

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/05-01/13
Date: **9 December 2015**

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

***THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA
WANDU and NARCISSE ARIDO***

Public

Further Directions on the Conduct of the Proceedings in 2016

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

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Mr James Stewart

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Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Gosnell

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Others

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber VII ('Single Judge' and 'Chamber', respectively) of the International Criminal Court, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Article 67 of the Rome Statute ('Statute'), Rule 141 of the Rules of Procedure and Evidence ('Rules') and Regulations 23 *bis*, 29 and 54 of the Regulations of the Court, issues the following 'Further Directions on the Conduct of the Proceedings in 2016'.

I. Procedural history

1. On 3 November 2015, the Single Judge set certain deadlines ('Defence Directions Decision') on the presentation of evidence of the five defence teams ('Defence').¹ By 3 December 2015 ('3 December Deadline'), the Defence had to: (i) disclose all material in its possession which fell under its disclosure obligations; (ii) provide estimates on the number of witnesses they intend to call and the number of hours they intend to examine each of their witnesses; and (iii) provide a provisional list of witnesses, as well as the anticipated languages of testimony, whether video-link testimony is envisaged and if self-incrimination assurances are needed. By 7 January 2016 ('7 January Deadline'), the Defence must: (i) disclose all outstanding materials it intends to use during its evidence presentation; (ii) provide a final list of witnesses – in the order they will be called – and list of evidence; (iii) inform the Chamber of any intention to raise an alibi or grounds for excluding criminal responsibility and (iv) provide summaries of anticipated testimony.
2. On 27 November 2015, the defence teams for Mr Kilolo, Mr Mangenda, Mr Babala and Mr Arido ('Kilolo Defence', 'Mangenda Defence', 'Babala Defence' and 'Arido Defence', respectively) requested for the Chamber to: (i) convene a

¹ Directions on Defence Presentation of Evidence, ICC-01/05-01/13-1450.

status conference at the Chamber's earliest convenience to discuss certain difficulties the Defence have in meeting the deadlines set in the Defence Directions Decision and (ii) order a postponement of these deadlines ('Postponement Request').²

3. On 30 November 2015, the Single Judge rejected the requests to hold a status conference and postpone the 3 December Deadline, indicating that reasons for these rulings would follow.³
4. On 2 December 2015, the Office of the Prosecutor ('Prosecution') responded to the request to postpone the 7 January Deadline. The Prosecution submits that this part of the Postponement Request should be denied to the extent it is predicated on the Prosecution's alleged conduct – the Prosecution otherwise defers to the discretion of the Chamber.⁴
5. By 3 December 2015, the Defence provided information in accordance with the 3 December Deadline.⁵

II. Further directions

6. The present decision addresses the following three matters related to the further conduct of the proceedings: (i) the Postponement Request; (ii) the number of

² Requête conjointe de la Défense de MM. KILOLO, MANGENDA, BABALA et ARIDO demandant le report des échéances fixées par la décision ICC-01/05-01/13-1450, ICC-01/05-01/13-1500-Conf (with three confidential annexes; filing notified 30 November 2015).

³ Email from a Legal Officer of the Chamber to the parties, 30 November 2015 at 15:32.

⁴ Prosecution's Response to « Requête conjointe de la Défense de MM. KILOLO, MANGENDA, BABALA et ARIDO demandant le report des échéances fixées par la décision ICC-01/05-01/13-1450 », ICC-01/05-01/13-1506 (reclassified as public on 7 December 2015).

⁵ Soumission de l'équipe de Défense de M. Fidèle BABALA WANDU en vue de présenter la liste provisoire des témoins qu'elle envisage appeler à témoigner dans la présentation de son cas, conformément à la « Directions on Defence Presentation of Evidence » (ICC-01/05-01/13-1450), 1 December 2015, ICC-01/05-01/13-1504-Conf (with confidential annex); Requête de la défense de monsieur Aime Kilolo concernant la liste provisoire des témoins potentiels qu'elle compte appeler dans le cadre de la préparation de son cas, 3 December 2015, ICC-01/05-01/13-1507-Conf (with confidential annex); First Notice Pursuant to Trial Chamber's "Directions on Defence Presentation of Evidence" (ICC-01/05-01/13-1450), 3 December 2015, ICC-01/05-01/13-1508; Response to Directions on Defence Presentation of Evidence, 3 December 2015, ICC-01/05-01/13-1509 (with four confidential annexes); Narcisse Arido's Notification of Disclosure and Provisional List of Witnesses pursuant to Trial Chamber VII Directions as Contained in ICC-01/05-01/13-1450, 3 December 2015, ICC-01/05-01/13-1510 (notified 4 December 2015). The Arido Defence's submission was filed four hours after the 16:00 filing deadline on 3 December, but it has nevertheless been accepted.

hours the defence teams will have to make their presentation of evidence and (iii) closing submissions following the presentation of evidence.

A. Postponement Request

7. The Kilolo, Mangenda, Babala and Arido Defence identify five issues which, in their submission, justify postponing the 3 December and 7 January Deadlines: (i) defence disclosure; (ii) missions; (iii) inadequate time to investigate; (iv) the Court's move and (v) the judicial recess.⁶
8. The Single Judge considers that the arguments in the Postponement Request are sufficiently clear that no status conference is necessary to discuss the alleged difficulties further. Accordingly, this request is rejected.
9. As to issues (i)-(iii), the Defence have been given more than ample notice as to the parameters of the charges and the Prosecution's witnesses and materials which they could investigate.⁷ The Single Judge does not consider that the Chamber's approach to the admissibility of evidence in this case places the Defence at a disadvantage⁸ and, in any event, fails to see how additional time would give the Defence any more certainty on admissibility when preparing its evidence presentation. The Prosecution has also given a clear indication that it has closed its presentation of evidence.⁹ The Single Judge notes the difficulties raised with conducting missions in the Central African Republic ('CAR') and waiting for further materials from the Independent Counsel.¹⁰ However, just as

⁶ Postponement Request, ICC-01/05-01/13-1500-Conf, paras 15-29.

⁷ Decision on the Submission of Auxiliary Documents, 10 June 2015, ICC-01/05-01/13-992. The Prosecution's list of witnesses and evidence was filed on 30 June 2015 and have not changed significantly since being filed.

⁸ As argued in Postponement Request, ICC-01/05-01/13-1500-Conf, para. 22. See Transcript of Hearing, 13 November 2015, ICC-01/05-01/13-T-37-CONF-ENG, page 58 lines 12-13 ('The Chamber sees no good reason to revisit these rulings, which apply equally to both the Prosecution and the Defence'), *referencing* Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf), 24 September 2015, ICC-01/05-01/13-1285 (setting out a general rule that considerations of admissibility would be deferred to the trial judgment).

⁹ Prosecution's Notice of the Close of its Case-in-Chief, 27 November 2015, ICC-01/05-01/13-1499.

¹⁰ Postponement Request, ICC-01/05-01/13-1500-Conf, paras 17-18.

the Chamber indicated in reference to the Prosecution, despite any lack of fault from the Defence as to why it may be waiting for certain materials, ‘waiting for them would entail a delay of an indefinite duration. [Yet] [t]he trial may not thus be delayed on the speculative hope that further evidence may be uncovered from materials not now in [...] possession’.¹¹ The Single Judge also recalls that the Defence has been in a position to investigate through means other than travelling to the CAR.

10. As to issues (iv)-(v), the Court’s move and judicial recess are also foreseeable events which the Defence could have taken into account in organising its work. As regards the 3 December Deadline in particular, this deadline pre-dates both the defence teams’ move to the permanent premises¹² and the judicial recess.¹³
11. It is for these reasons that the Single Judge rejected the Postponement Request as regards the 3 December Deadline, especially given that this deadline only required provisional information from the Defence about its evidence presentation. As for the 7 January Deadline, despite the fact that no compelling reasons were presented, the Single Judge notes the Prosecution’s qualified non-opposition to the relief sought and the accuseds’ right under Article 67(1)(b) of the Statute to have adequate time and facilities to prepare their defence.
12. In order to ensure that there is no doubt that the Defence will have an adequate amount of time to prepare, two measures will be taken. First, the Defence will be given a limited extension of time – all information which was scheduled to be provided by the 7 January Deadline must now be filed by **16:00 on 21 January 2016**. Second, the Defence’s opening statements and presentation of evidence will be scheduled to commence on **29 February 2016**, almost two months after

¹¹ Decision on Modalities of Disclosure, 22 September 2015, ICC-01/05-01/13-959, para. 50.

¹² Postponement Request, ICC-01/05-01/13-1500-Conf, para. 25 (moving dates are 9-11 December 2015).

¹³ The judicial recess commences at 17:30 on 11 December 2015.

the conclusion of the judicial recess and more than three months after the Prosecution closed its presentation of evidence.

13. To this extent, the Postponement Request is partially granted.

B. Hours for Defence presentation of evidence

14. The Defence have provided provisional estimates for the length of their evidence presentation as follows: (i) 16 hours for the defence team for Mr Bemba ('Bemba Defence') (four witnesses); (ii) 40 hours for the Kilolo Defence (ten witnesses); (iii) three hours for the Mangenda Defence (one witness); (iv) 12 hours for the Babala Defence (four witnesses) and (v) 31 hours for the Arido Defence (eight witnesses). This comes to a total of 26 witnesses and approximately 100 hours of examination.¹⁴
15. The Single Judge considers that the provisional estimates provided by each defence team appear to be reasonable, though this is without prejudice to the Chamber concluding at a later point that estimates for certain witnesses need to be revised. This could be the case if, for example, a witness's anticipated testimony is irrelevant or goes solely to factual and/or legal matters which usurp the functions of the Chamber. The Single Judge recalls that, when calculating an overall case estimate for the Prosecution, it was assumed that the defence teams would need, collectively, double the length of time as the Prosecution to examine the Prosecution's witnesses.¹⁵ Given the amount of time actually used in examining Prosecution witnesses¹⁶ and the likelihood that non-calling defence teams will not question Defence witnesses to the same degree as Prosecution witnesses, it is more accurate to estimate that non-calling parties

¹⁴ 27 witnesses were provisionally named by the defence teams, but the Kilolo and Babala Defence have one witness in common on their respective lists.

¹⁵ Directions on the conduct of the proceedings, 2 September 2015, ICC-01/05-01/13-1209, paras 12-15.

¹⁶ From examination times kept by the Registry, the Defence collectively questioned Prosecution witnesses in about the same number of hours used by the Prosecution.

will collectively question defence witnesses for only as long as the calling defence team itself.

16. Calculating with this modification in mind and applying each defence team's respective estimates, the Single Judge expects the Defence presentation of evidence to not exceed a 200 hour maximum (the same estimate given to the Prosecution). This estimate applies irrespective of whether the Defence put additional witnesses on its final lists, but it will be enforced subject to the overall course of the proceedings and will not be enforced against any defence team due to the fault of any other defence team.¹⁷
17. The parties are reminded that: (i) no party will be entitled to conduct an inefficient examination of a witness, even if such an examination would fall within the estimated times per witness indicated above and (ii) they must always be prepared to continue with the case, even if less time than estimated is required for a particular witness.¹⁸ The Defence are to endeavour to avoid gaps in the hearing whenever possible, up to and including having a defence team call its available witnesses during the presentation of evidence of another defence team.
18. The Defence are required to make all necessary logistical arrangements with the Registry sufficiently in advance of calling any witnesses, particularly as regards interpretation (Court Interpretation and Translation Section), self-incrimination assurances (Counsel Support Section) and matters falling within the mandate of the Victims and Witnesses Unit. As regards witnesses requiring self-incrimination assurances, the Chamber also expects to receive additional

¹⁷ See Rule 136(2) of the Rules.

¹⁸ ICC-01/05-01/13-1209, para. 15.

information sufficiently in advance of their testimony explaining why they require these assurances.¹⁹

19. As a final matter, the Single Judge notes that, although all five teams gave an estimated number of witnesses to be called with anticipated examination times, only two of the five defence teams actually gave the identities of the witnesses they intend to call. The Mangenda Defence and Bemba Defence indicate that this information could not be provided because they had not decided on witnesses to be called.²⁰ The Single Judge has no reason to doubt that these responses are made in good faith and considers them to be acceptable for purposes of a provisional witness list. However, the Arido Defence's list of witnesses provides pseudonyms for the potential witnesses, but not their identities.²¹ The Single Judge considers that this is not a satisfactory response to the Defence Directions Decision, and the Arido Defence is directed to provide a new provisional witness list with the identities of the persons it intends to call forthwith.

C. Closing submissions and statements

20. The Single Judge will also give some guidance for the parties on what to expect as regards closing submissions and statements.
21. Any closing submissions will be due three weeks after the submission of the evidence closes, if the parties so wish.²² The purpose of this submission is for the parties to crystallise their final positions on the charges and the evidence presented in a succinct manner. There is no need to recapitulate the argumentation advanced in trial, as the parties' discussions are on record. The

¹⁹ *In this regard, see* Prosecution's Notification pursuant to Rule 74 of the Rules of Procedure and Evidence, 16 June 2015, ICC-01/05-01/13-1010 (reclassified on 5 October 2015).

²⁰ ICC-01/05-01/13-1508, para. 2; ICC-01/05-01/13-1509, para. 7.

²¹ ICC-01/05-01/13-1510-Conf-AnxB.

²² See Rule 141(1) of the Rules ('The Presiding Judge shall declare when the submission of evidence is closed').

parties are instead expected to stress the main points which constitute their core arguments in the case. Finally, only issues which arose and were discussed during the trial should be included.²³ The page limit for these closing submissions is extended to 100 pages,²⁴ which the Single Judge considers to be sufficient in this case.

22. The closing submissions will not be staggered so that the Defence can respond to the Prosecution's submission. The Defence has the right to present closing statements last, and may orally respond to the Prosecution's arguments then.²⁵ However, in order to ensure that there is enough time for the accused to understand the Prosecution's closing submissions, the Single Judge considers it necessary to meet the requirements of fairness for the Prosecution to file English and French versions of its closing submission simultaneously.²⁶
23. Any closing statements will be given four weeks after the submission of the evidence closes. The length of these statements will be determined in due course, in consultation with the parties.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

PARTIALLY GRANTS the Postponement Request, postponing the 7 January Deadline to 21 January 2016 at 16:00 and resuming the hearing on 29 February 2016;

REJECTS the remainder of the Postponement Request;

ORDERS the Arido Defence to re-file its provisional witness list with the identities of the witnesses it intends to call; and

²³ *In this regard, see* Rule 64(1) of the Rules (in general, an issue relating to relevance or admissibility 'must be raised at the time when the evidence is submitted to a Chamber').

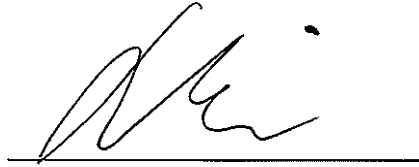
²⁴ Regulation 37(1) of the Regulations.

²⁵ Rule 141(2) of the Rules.

²⁶ *See* Article 67(1)(f) of the Statute. If the Prosecution's English language closing submission is within the prescribed 100 page limit, it is acceptable if the French translation exceeds this limit.

ADOPTS the aforementioned directions for the Defence presentation of evidence, closing submissions and closing statements.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to be 'BS', is written over a horizontal line.

Judge Bertram Schmitt, Single Judge

Dated 9 December 2015

At The Hague, The Netherlands