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Date: **21 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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

**Public
With Public Annex A**

**Prosecution's Motion for Reconsideration of the Further Directions on the Conduct
of the Proceedings in 2016 (ICC-01/05-01/13-1518)**

Source: The Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Mr Steven Sacha Powles

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Michael Gosnell

Mr Arthur Vercken De Vreuschmen

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Mr Azama Shalie Rodoma

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Others Section

I. Introduction

1. The Office of the Prosecutor (“Prosecution”) requests the Single Judge of Trial Chamber VII (“Chamber”) to reconsider the page and time limits regarding the Parties’ closing submissions set out in the Further Directions on the Conduct of the Proceedings in 2016.¹

2. A page limit of 100 pages is insufficient and impairs the Prosecution’s ability to make meaningful closing arguments, irrespective of the scope of the Defence’s case. The deadline of three weeks following the close of evidence to file the Prosecution’s closing submission also impedes its professional obligations as a party to these proceedings.

3. The Prosecution assures the Chamber that it recognises that the thrust of the Decision is to ensure the efficient and expeditious conduct of the proceedings. And, with this understanding it has already begun drafting its closing submission to ensure the timely and efficient presentation of its arguments on the trial evidence as early as possible following the close of evidence. However, the Decision overlooks several critical factors affecting the Prosecution’s ability fairly to do so, which warrant the Chamber’s reconsideration.

4. As explained below, the Chamber should vacate the time and page limits regarding the Parties’ closing submissions, in the interests of justice, pending further clarity on the full scope of the trial evidence in this case.

¹ ICC-01/05-01/13-1518 (“Decision”).

II. Submissions

A. The 100-page limit on the Prosecution's closing submission is insufficient for it to address the evidence at trial irrespective of the Defence case

5. The Decision's 100-page limit for closing submission should be reconsidered² to prevent an injustice and for failing to reasonably take into consideration the following significant factors:

- (i) The Prosecution is entitled to a meaningful opportunity to explain how the evidence adduced at trial meets its burden to prove the Accused's guilt beyond a reasonable doubt³ and to present its most compelling arguments in discharging its obligation to establish the truth.⁴ Although comprehensive, the Prosecution's pre-trial submissions were geared toward the given stage of the proceedings and the relevant evidentiary standards.⁵ However, they were not designed to establish the facts of the case to the requisite legal threshold for a conviction, and thus cannot supplant the necessity of the Prosecution to fully address the *trial evidence*.
- (ii) Each of the five Accused has been charged with multiple counts of offences against the administration of justice – 42 counts against Bemba,

² Although Chambers have limited discretion to reconsider their own decisions on the application of a Party or *proprio motu*, the exercise of such discretion is appropriate where it would, *inter alia*, prevent an injustice or avert manifestly unsound consequences. See ICC-01/05-01/13-1085-Conf, para. 4 (summarising when reconsideration is warranted).

³ See Art. 66(3), Statute.

⁴ See Art. 54(1), Statute.

⁵ See below paras. 7-9.

Kilolo, Mangenda and Babala and 12 counts against Arido.⁶ These crimes have also been charged under five different modes of liability.⁷

- (iii) The scope of the respective Defence cases is unknown. The page limit allocated by the Decision can only have been premised on the Defence's provisional lists of documents and witnesses. Presently, nothing precludes the Defence from changing or expanding the scope of their respective cases,⁸ which would correspondingly warrant the Prosecution addressing such evidence in its closing submission.
- (iv) No determination on the admissibility of evidence or the elements of the crimes will be made until an Article 74 judgement is issued.⁹ The resultant uncertainty as to the scope of the evidentiary record and the legal elements militates against the ability to confidently differentiate among the material on which to focus and to rely in their closing submissions. Indeed, it requires the Parties' in their closing submissions to account for all potentialities regarding the final evidentiary record in this case and the legal elements.
- (v) Because this is a multi-accused case, the common page limit on the Parties' respective submissions does not achieve procedural parity. Unlike the Accused, each of whom has 100 pages to address the specific issues concerning their personal culpability, the Prosecution must demonstrate the individual criminal responsibility of each of the *five* Accused within this same page limit, despite bearing the burden of

⁶ See ICC-01/05-01/13-749.

⁷ See ICC-01/05-01/13-749. See also ICC-01/05-01/13-992-Anx-Corr, paras. 110-130 (regarding the complexity of this case).

⁸ ICC-01/05-01/13-1518, p. 10; ICC-01/05-01/13-T-37-CONF-ENG, p. 58, lns. 6-11.

⁹ See ICC-01/05-01/13-1285, para. 9 (setting out a general rule that considerations of admissibility would be deferred to the trial judgment).

proof. Concretely, per the Decision, the Prosecution has 20 pages to argue its evidence regarding each Accused, whereas each Accused may devote 100 pages to address infirmities in the Prosecution's case. For this and similar reasons, the *ad hoc* Tribunals have traditionally afforded the Prosecution a greater page limit than each individual accused in multi-accused cases. For instance: (a) in the *Popović* case (seven accused), the Prosecution was afforded three times the page length as each Defence team;¹⁰ (b) in the *Prlić*¹¹ and *Butare*¹² cases (both six accused) the Prosecution was afforded twice the page length as each Defence team; and (c) in the *Stanišić and Župljanin* case (two accused), the Prosecution was afforded almost twice the word limit as each Defence team.¹³

6. Reconsideration is also warranted because the scope of the trial record on which the page limit is apparently premised is unclear. Specifically, what is meant by "[t]here is no need to recapitulate the argumentation advanced in trial"¹⁴ is not clear. The record at trial does not expound the Parties' *arguments* on evidence. Further, the Prosecution cannot reasonably be held to rely on its Pre-Trial Brief, or other pre-trial submissions, either in place of, or supplemental to, its closing submissions in arguing the trial evidence.

¹⁰ *Prosecutor v. Vujadin Popović et al.*, Order on Final Trial Briefs and Closing Arguments, Case No. IT-05-88-T, 27 March 2009, p. 1 ("The final trial briefs shall not exceed 900 pages in length for the Prosecution, and 300 pages in length for each Defence team.").

¹¹ *Prosecutor v. Jadranko Prlić et al.*, Amended Scheduling Order (Final Trial Briefs, Closing Arguments for the Prosecution and the Defence), Case No. IT-04-74-T, 30 November 2010, p. 12 ("The Prosecution's final trial brief shall not exceed 400 pages and that of each Defence team shall not exceed 200 pages.").

¹² *Prosecutor v. Pauline Nyiramasuhuko et al.*, Scheduling Order - Rules 54 and 86 of the Rules of Procedure and Evidence, Joint Case No. ICTR-98-42-T, 2 July 2008, p. 2 ("the respective final trial briefs of the Defence shall not exceed 200 pages and 60,000 words and that the Prosecution final trial brief shall not exceed 400 pages and 120,000 words"). *But see Prosecutor v. Miroslav Kvočka et al.*, Decision on Motion for Variance of Length of Prosecution's Final Brief, Case No. IT-98-30/1-T, 29 March 2001 (same page limit for five accused case).

¹³ *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Order on Final Trial Briefs and Closing Arguments, Case No. IT-08-91-T, 30 March 2012, p. 1 ("the Prosecution's final trial brief shall not exceed 120,000 words, the Stanišić Defence's final trial brief 80,000 words, and the Župljanin Defence's final trial brief 60,000 words"). *But see Prosecutor v. Jovica Stanišić and Franko Simatović*, Decision on the Parties' Requests for Leave to Exceed Word Limit for Final Trial Briefs, Case No. IT-03-69-T, 24 August 2012, p. 2 (granting 100,000 words for all parties).

¹⁴ Decision, para. 21.

7. *First*, the Pre-Trial Brief sets out the Prosecution's theory of the case. It does not form part of the argumentative trial record, *per se*, and therefore obviate further exposition of the salient trial evidence.

8. *Second*, although the Prosecution's Pre-Trial Brief foreshadowed the evidence introduced during its case-in-chief, its purpose was wholly distinct from that of a closing submission.¹⁵ While the former set out the Prosecution's prospective case and theory as an instrument of notice, the latter will argue and explain the evidence actually submitted before the Chamber, the reasonable inferences arising therefrom, and demonstrate how they establish the Accused's individual criminal responsibility beyond a reasonable doubt.

9. *Third*, the Pre-Trial Brief does not account for arguments and evidence to be adduced by the Defence in their respective cases-in-chief. Because the extent and materiality of that evidence is yet to be seen, it is not possible to know the depth of the response required in the Prosecution's closing submission for it to demonstrate how it has met its high evidentiary burden.

10. As noted, the stage of the proceedings does not allow the Prosecution to provide the Chamber with a definitive estimate of the length required for it to produce a comprehensive and concise exposition of the charged offences and modes of liability for each Accused. An application pursuant to regulation 35 of the Regulations of the Court ("RoC") would thus be premature. Nevertheless, it is clear at this point that the Decision's 100-page limit is insufficient.

11. Based on the Prosecution's assessment of the evidence and testimony elicited to date, the Prosecution believes it will require up to 200 pages to address the *trial*

¹⁵ See ICC-01/05-01/13-992, para. 21; ICC-01/05-01/13-1068.

evidence irrespective of the size and scope of the Defence case. The length of the Prosecution's Pre-Trial Brief — which required 186 pages (inclusive of its substantive annex)¹⁶ and for which the Prosecution was granted 200 pages¹⁷ — is a reliable gauge in this respect. Indeed, the Prosecution is unaware of any case at this Court or before the *ad hoc* tribunals where the final trial brief or closing brief was shorter than the pre-trial brief.¹⁸ While these other cases were comparatively more complex in terms of the alleged crimes and the scope of the evidentiary record, the same logic for permitting more pages for the Prosecution's closing submissions *vis-à-vis* its pre-trial brief — namely to address the trial record and in light of the Prosecution's increased burden of proof at trial — is equally applicable here as reflected above.

B. The deadline for the filing of closing submissions is untenable

12. The Prosecution further considers that where the Defence case has yet to start, setting a deadline for the filing of closing submissions is premature.¹⁹ The Decision's restrictive three-week deadline following the close of evidence in this five-Accused case is all the more so.²⁰ Several of the arguments advanced above for why the 100-page limit on the Prosecution's closing submission warrants reconsideration also apply to the deadline for its closing brief. These include for example, that the

¹⁶ See ICC-01/05-01/13-1110-Conf (126 pages) and ICC-01/05-01/13-1110-Conf-AnxA (60 pages).

¹⁷ See ICC-01/05-01/13-1068, p. 4. During the confirmation proceedings, the Prosecution similarly required 145 pages for its submissions and 73 pages for its response to the submissions of the Defence. See ICC-01/05-01/13-597-Conf-AnxB; ICC-01/05-01/13-646-Conf.

¹⁸ Compare e.g. *Prosecutor v. Milan Lukić and Sredoje Lukić*, Prosecution Final Trial Brief, Case No. IT-98-32/1-T, 12 May 2009 (213 pages with substantive annexes) with *Prosecutor v. Milan Lukić and Sredoje Lukić*, Prosecution's Pre-Trial Brief, Case No. IT-98-32/1-PT, 14 March 2008 (43 pages with substantive annexes); *Prosecutor v. Zdravko Tolimir*, Public Redacted Final Trial Brief, Case No. IT-05-88/2-T, 29 November 2012 (320 pages with substantive annexes) with *Prosecutor v. Zdravko Tolimir*, Public Version of Pre-Trial Brief, Case No. IT-05-88/2-PT, 30 September 2009 (128 pages with substantive annexes); *Prosecutor v. Jovica Stanišić and Franko Simatović*, Prosecution's Public Redacted Version of Prosecution's Final Trial Brief, Case No. IT-03-69-T, 1 March 2013 (439 pages with substantive annexes) with *Prosecutor v. Jovica Stanišić and Franko Simatović*, Prosecution's Pre-Trial Brief, Case No. IT-03-69-PT, 19 July 2004 (91 pages).

¹⁹ See e.g. *Prosecutor v. Zdravko Tolimir*, Decision on Prosecution's Motion for Variation of the World Limit for its Final Trial Brief, Case No. IT-05-88/2-T, 12 January 2012, p. 3 ("CONSIDERING, however, that it is premature at this stage of the proceedings, where the Defence case is yet to start, to set a deadline for the filing of the parties' Final Briefs, and that an order setting the deadline for Closing Arguments, if any, pursuant to Rule 86 of the Rules of Procedure and Evidence ("Rules) and the deadline for the filing of the Final Briefs is more appropriately to be issued towards the end of the Defence case").

²⁰ Decision, para. 21.

individual Defence cases, their scope and/or complexity are unknown. But, the deadline for the filing of closing submissions also warrants reconsideration for other reasons.

13. *First*, the deadline, which for the Prosecution includes the simultaneous provision of English and French versions of its closing submissions,²¹ does not account for the time required for translation. Based on its experience during the confirmation of charges proceedings – wherein the Pre-Trial Chamber imposed a similar requirement regarding the Prosecution’s Document Containing the Charges and submissions – and the Prosecution’s consultations with the Language Services Unit, a fully quality controlled translation of a 100-page Court filing will require at least 15 working days to complete. Presumably, the Court Interpretation and Translation Section of the Registry (STIC) would require no less time. In either case, the Decision effectively reduces the allotted time for the Prosecution to finalise its closing submissions to only one working week after the close of evidence.

14. *Second*, the deadline does not account for the Registry’s delay in producing edited transcripts of the record – which the Parties’ will necessarily rely upon for their closing submissions. As indicated by the Chamber in its 13 October 2015 oral ruling,²² the Registry is only able to produce edited transcripts in English on a delayed schedule that can last several weeks. To the extent such delay persists during the Defence case, which is likely given that multiple trials will be conducted simultaneously during that period, the Parties will be without the benefit of numerous edited transcripts when preparing their final submissions.

²¹ Decision, para. 22.

²² See ICC-01/05-01/13-T-19-Red-ENG, pp. 62-63, lns. 14-5 (noting, in part, “third, edited transcripts in English will only be available on a delay and this can last several weeks”).

15. In any event, the Prosecution does not anticipate requiring any more than a modest extension of time, if that, once the full scope of the Defence case is reasonably discernible.

III. Relief Requested

16. For the foregoing reasons, the motion should be granted. The Chamber should reconsider its Decision and vacate the time and page limits, pending further clarity on the full scope of the trial evidence.



Fatou Bensouda, Prosecutor

Dated this 21st Day of December 2015
At The Hague, The Netherlands