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No: **ICC-01/05-01/13**
Date: **8 January 2016**

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

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

Request for Variation of Time Limit for Disclosure of Potential Expert Report

Source: Defence for Jean-Jacques Kabongo Mangenda

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

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**Unrepresented Applicants
(Participation/Reparation)**

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I. INTRODUCTION

1. Jean-Jacques Mangenda respectfully requests, pursuant to Regulation 35 of the Regulations of the Court, an extension of the 21 January 2016 deadline to disclose an anticipated expert report and to designate the author thereof as witness. The expert report will relate to issues that emerged only on 3 November 2015 based, in part, on late disclosure by the Prosecution of emails from Mr. Smetana. The Defence has undertaken diligent efforts since that time to identify a suitably qualified expert, and requested the appointment of an expert on 30 December 2015. The Registry, however, has indicated a maximum rate of remuneration substantially below the amount requested by the expert. The Defence now anticipates, even though the expert has estimated that he can complete his report within two to three weeks, that further discussions with the Registry and possibly recourse to the Chamber, may be required before the expert can begin his work. The Defence accordingly requests an extension of two weeks, to 3 February 2016, to be permitted to disclose the anticipated expert report, and to designate the expert as a witness. Given the sequence of witnesses to be heard during the Defence phase of proceedings, and the circumscribed subject-matter of the expertise, the Prosecution will suffer no prejudice.

II. PROCEDURAL HISTORY

2. Herbert Smetana, an official of Western Union, gave testimony on 2, 3, and 4 November 2015.¹ He provided information about his interaction with investigators of the Office of the Prosecutor; his disclosure of certain financial data to them; and the timing of judicial authorization for disclosure of financial information by an Austrian judge. Some information concerning this testimony was only discovered and disclosed by the Prosecution during the witness's testimony.²
3. On 3 November 2015, the Single Judge set deadlines for disclosure by the Defence in anticipation of the presentation of their evidence.³ In particular, the Defence was

¹ *Bemba et al.*, Transcript, ICC-01/05-01/13-T-33-ENG, 2 November 2015; *Bemba et al.*, Transcript, ICC-01/05-01/13-T-34-ENG, 3 November 2015; *Bemba et al.*, Transcript, ICC-01/05-01/13-T-35-ENG, 4 November 2015.

² *Bemba et al.*, Transcript, ICC-01/05-01/13-T-34-CONF-ENG, 3 November 2015, p.61, l. 22 – p.62, l. 3 (“MR VANDERPUYE: Yes, Mr President, I do. It's not good information, but I have it nevertheless. As I mentioned before we broke, there was the issue concerning certain disclosure in the form of email communications between the Office of the Prosecutor and Western Union. There were some emails that were communicated to me. They were sent in a form that they were still archived, so I could not open them to see what they were. I managed to do that over the break, and I forwarded those emails to the Defence.”)

³ *Bemba et al.*, Directions on Defence Presentation of Evidence, ICC-01/05-01/13-1450, 3 November 2015.

required by 3 December 2015 to: (i) disclose all material falling under its disclosure obligations as of that time; (ii) provide a provisional list of any witnesses; and (iii) estimate the duration of their testimony. By 7 January 2016, the Defence was required to: (i) disclose all outstanding materials it intends to use during its evidence presentation; (ii) provide a final list of witnesses and list of evidence; and (iii) provide summaries of anticipated testimony.

4. The latter deadline, at the Defence's request,⁴ was subsequently moved to 21 January 2016, at 16:00.⁵

III. SUBMISSIONS

5. The requested extension is supported by good cause and, given its limited duration and the scope of the subject-matter, will cause no prejudice to the Prosecution. The Defence was able to identify and make initial contact with a suitable candidate to provide expert testimony in early December. This was followed by preliminary discussions about the potential scope of the report and its relationship to the potential expert's expertise. On 21 December 2015, in response to the Defence's inquiry, the Registry advised that the maximum rate of remuneration for Defence experts is 40.40 Euros per hour, which is far below the amount requested by the potential expert. The Defence was unable to discuss this issue further with the Registry before the onset of the holidays, and proceeded to seek the appointment of the expert at a higher rate of remuneration on 30 December 2015. The Defence believes and hopes that the issue can be resolved through further discussions with the Registry, but now expects that this will take a number of days, and possibly even require recourse to the Trial Chamber. The potential expert, despite indicating that he can complete his task within two to three weeks, cannot commence work in advance of a formalized agreement for remuneration.
6. The Prosecution will suffer no prejudice by the modest delay in the disclosure of the expert report and the designation of the expert. The Defence has already indicated in

⁴ *Bemba et al.*, 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, 27 November 2015.

⁵ *Bemba et al.*, Further Directions on the Conduct of the Proceedings in 2016, ICC-01/05-01/13-1518, 9 December 2015.

general terms the scope of the expert report,⁶ which will address the legality (under Austrian or other applicable law) of the procedure by which the Prosecution obtained financial records from Western Union. The subject-matter is less factually complex than, for example, that of the Prosecution telecommunications expert, for which the Prosecution sought, and was granted, a three-week extension.⁷ Further, based on the estimates of the Kilolo and Bemba Defences of the time required for the presentation of their cases,⁸ the expert witness will not testify until many weeks after 3 February. This was also a consideration weighing in favour of granting the Prosecution's request in respect of the telecommunications expert.⁹

7. The Defence requests that any extension of the deadline for disclosure of the expert report also encompass the deadline for designating the expert as a witness. The Defence cannot reasonably be expected to commit to calling a witness without having first had the opportunity to review the content of any expert report.

IV. CONCLUSION AND RELIEF REQUESTED

8. The Defence accordingly requests a delay of two weeks, until 3 February 2016, to disclose an expert report concerning the legality of the disclosure of Western Union financial records to the Office of the Prosecutor of the ICC under Austrian or other applicable law, as well as to designate the author thereof as a Defence witness.



Christopher Gosnell
Counsel for Mr. Jean-Jacques Kabongo Mangenda

Respectfully submitted this 8 January 2016,

At The Hague, The Netherlands

⁶ *Bemba et al.*, First Notice Pursuant to Trial Chamber's "Directions on Defence Presentation of Evidence" (ICC-01/05-01/13-1450), ICC-01/05-01/13-1508, 3 December 2015, para. 2.

⁷ *Bemba et al.*, Decision on 'Prosecution's Request pursuant to Regulation 35 to vary the Time Limit for Disclosure of an Expert Report', ICC-01/05-01/13-1027, 24 June 2015, p. 6.

⁸ *Bemba et al.*, 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, ICC-01/05-01/13-1507-Conf, 3 December 2015; *Bemba et al.*, Response to Directions on Defense Presentation of Evidence, ICC-01/05-01/13-1509, 3 December 2015.

⁹ *Bemba et al.*, Decision on 'Prosecution's Request pursuant to Regulation 35 to vary the Time Limit for Disclosure of an Expert Report', ICC-01/05-01/13-1027, 24 June 2015, para. 11.