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**International
Criminal
Court**

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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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO

Public Document

**Prosecution's Response to the Mangenda Defence's Request for Variation of Time
Limit for Disclosure of Potential Expert Report**

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**

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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) defers to Trial Chamber VII’s (“Chamber”) discretion concerning the Mangenda Defence’s request for an extension of time to “disclose an anticipated expert report” (“Request”).¹ However, the Chamber should take into account the Request’s failure to show that the subject matter and scope of the expert report would be *prima facie* admissible – a potentially dispositive factor in determining the propriety of the relief sought.

2. Should the Chamber determine that an extension of time to disclose the expert report is appropriate, the Mangenda Defence should be directed to immediately reveal the expert’s identity and to provide a summary of his or her anticipated evidence by 21 January 2016.

II. Submissions

A. The *prima facie* admissibility of the anticipated expert report bears on the propriety of the relief sought

3. Regulation 35(2) of the Regulations of the Court (“RoC”) authorises the Chamber to extend time limits for good cause shown.² The Court’s jurisprudence is well settled.³ However, the propriety of an extension of time to disclose an expert report must take account of its prospective relevance and admissibility at trial. Extending the time for such disclosure where the nature and scope of the expert report is not *prima facie* admissible would be a futile exercise, undermining the

¹ ICC-01/05-01/13-1540 (“Request”).

² Regulation 35(2) of the RoC (providing, *inter alia*, “[t]he Chamber may extend or reduce a time limit if good cause is shown”).

³ See e.g. ICC-01/05-01/13-1068, para. 6; ICC-01/05-01/08-827, para. 6; ICC-01/05-01/08-1626-Red, paras. 21, 23; ICC-02/11-01/11-458-Red, para. 6; ICC-02/11-01/11-189, para. 4; ICC-01/09-01/11-1971, para. 7; ICC-02/05-01/09-249, para. 9.

substantial and countervailing interests of judicial economy and the expeditious conduct of proceedings before the Court.

4. The anticipated expert report appears to be *prima facie* inadmissible because it goes to legal issues, “usurp[ing] the functions of the Chamber.”⁴ The Request frames the scope of the anticipated expert report as “address[ing] the legality (under Austrian or other applicable law) of the procedure by which the Prosecution obtained financial records from Western Union”.⁵ Indeed, the Mangenda Defence’s 3 December 2015 “First Notice Pursuant to Trial Chamber’s ‘Directions on Defence Presentation of Evidence’ (ICC-01/05-01/13-1450)”,⁶ underscores its intention to introduce such expertise on “issues of *national law*.”⁷ Rather than demonstrate that the nature and scope of the anticipated expert report does not “[go] solely to factual and/or legal matters which usurp the functions of the Chamber”,⁸ the Request suggests the opposite. For that reason alone, it fails to show any reasonable likelihood that the expert report would be admissible.⁹

5. Moreover, the anticipated expert report appears to contravene article 69(8) of the Rome Statute (“Statute”), which provides that “[w]hen deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State’s national law.”¹⁰ The subject matter of the anticipated expert report appears to be on this very issue — namely, whether the procedure and circumstances under which the Prosecution obtained Western Union records requisitioned and transmitted by the government of Austria complied with Austrian law. To the extent that the expert report may bear on the Court’s statutory

⁴ ICC-01/05-01/13-1518, para. 15.

⁵ Request, para. 6.

⁶ ICC-01/05-01/13-1508 (*referenced at* Request, para. 6).

⁷ ICC-01/05-01/13-1508, para. 2 (emphasis added).

⁸ ICC-01/05-01/13-1518, para. 15; *see also* ICC-01/05-01/13-1212 (rejecting the Request of Mr Michael Karnavas for Leave to Submit Amicus Curiae Observations and noting, in particular, the Chamber’s capacity to answer legal questions concerning the attorney-client privilege “without such assistance”).

⁹ *Ibid.*

¹⁰ Article 69(8) of the Statute.

framework, the Chamber is obviously well disposed to resolve such questions of law without extraneous expertise.

6. Nothing advanced in the Request regarding the prospective scope of the expert's report suggests that the Chamber could reasonably conclude that, even absent contradiction by the Prosecution, such evidence would not "usurp the functions of the Chamber as the ultimate arbiter of fact and law",¹¹ or that it would otherwise be consistent with article 69(8) of the Statute. Granting the extension of time sought in these circumstances would seem to serve no useful purpose.¹²

B. The expert's identity should be disclosed without delay

7. Should the Chamber grant the Request, the Mangenda Defence should be directed to immediately identify its expert and to require a summary of anticipated evidence by 21 January 2016.¹³ That the Mangenda Defence's negotiations with the Registry regarding its expert's remuneration are on-going¹⁴ does not attenuate the Chamber's 3 November 2015 Directions on Defence Presentation of Evidence,¹⁵ as modified by the Chamber in its 9 December 2015 Further Directions on the Conduct of the Proceedings in 2016.¹⁶ That modification, made at the request of several Defence teams (Mangenda included),¹⁷ already extended the deadline for the Defence's disclosure of its final lists of witnesses and evidence by two weeks, to 21 January 2016.¹⁸

¹¹ See *e.g.* ICC-01/09-01/11-844, para. 12.

¹² See *e.g.* ICC-01/09-01/11-844, para. 11 (observing that an expert evidence should "by virtue of some specialised knowledge, skill or training [...] assist the Chamber to understand an issue of a technical nature that is in dispute, without undue difficulty" (internal citations omitted)).

¹³ Request, para. 5.

¹⁴ Request, para. 5.

¹⁵ ICC-01/05-01/13-1450, paras. 8-10.

¹⁶ ICC-01/05-01/13-1518 (extending the deadline for the Defence's provision of final lists of witnesses and evidence from 7 January 2016 to 21 January 2016).

¹⁷ ICC-01/05-01/13-1500-Red.

¹⁸ ICC-01/05-01/13-1518, para. 12.

8. For all intents and purposes, the Mangenda Defence has decided on a specific expert who it intends to call, and it should disclose his/her identity.¹⁹ Deciding otherwise would undermine the thrust of the Chamber's decisions on the conduct of proceedings — namely, to afford Parties the earliest possible notice of the witnesses to be called in the respective Defence cases. At this stage, there is no plausible justification for the Mangenda Defence to withhold the identity of its expert, nor does the Request establish one. Should the Mangenda Defence decide not to call the expert, or to appoint a different expert, it is still within its rights to do so by requesting a modification to its list of witnesses without prejudicing the Prosecution's right to be notified of potential witnesses as early as possible, as other Defence teams have done in complying with the Chamber's prior orders.

III. Relief Requested

9. For the foregoing reasons, the Prosecution defers to the discretion of the Chamber. Should the Chamber grant an extension of time concerning the disclosure of the anticipated expert report, the Prosecution requests that it concurrently direct the Mangenda Defence immediately to disclose the expert's identity.



Fatou Bensouda, Prosecutor

Dated this 13th Day of January 2016
At The Hague, The Netherlands

¹⁹ This is consistent with the Chamber's 9 December 2015 Further Directions on the Conduct of the Proceedings in 2016, where the Chamber instructed the parties that have already identified the witnesses they intend to call to provide their identities. See ICC-01/05-01/13-1518, para. 19.