

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13

Date: 14 March 2014

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, 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

Decision on the "Prosecution's request for variation of time limits pursuant to regulation 35 of the Regulations of the Court concerning the confirmation of charges" dated 3 March 2014

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

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Nicholas Kaufman

Counsel for Aimé Kilolo Musamba

Ghislain Mabanga

Catherine Mabilie

Counsel for Jean-Jacques Mangenda Kabongo

Jean Flamme

Counsel for Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Legal Representatives of Victims

Legal Representatives of Applicants

**The Office of Public Counsel for
Victims**

The Office of Public Counsel for the Defence

States Representatives

REGISTRY

Registrar

Herman von Hebel

Detention Section

I, Judge Cuno Tarfusser, having been designated as Single Judge of Pre-Trial Chamber II of the International Criminal Court;

NOTING the “Prosecution’s request for variation of time limits pursuant to regulation 35 of the Regulations of the Court concerning the confirmation of charges” dated 3 March 2014, whereby the Prosecutor submits that “[s]everal factors beyond the Prosecution’s control have rendered the schedule set in early December 2013 untenable” and, accordingly, requests a four-month extension of the deadlines set by the Pre-Trial Chamber concerning the scheduling of proceedings regarding the confirmation of charges (“Request for Postponement”);

NOTING the “Réponse de la Défense de M. Fidèle Babala à ‘Prosecution’s request for variation of time limits pursuant to regulation 35 of the Regulations of the Court concerning the confirmation of charges’ (ICC-01/05-01/13-234)”² and the “Réponse de la Défense de Monsieur Jean-Jacques KABONGO MANGENDA à la requête du Procureur du 3 mars 2014 en prolongation des délais”³, both dated 10 March 2014 and both opposing the Request for Postponement;

NOTING the “Registry observations pursuant Regulation 24bis of the Regulations of the Court related to document ICC-01/05-01/13-234-Conf and ICC-01/05-01/13-238-Conf-Corr” dated 10 March 2014⁴;

NOTING the “Defence response to the Prosecution’s request for a delay of the confirmation proceedings by four months (ICC-01/05-01/13-234)” dated 11 March 2014⁵, whereby the Defence for Jean-Pierre Bemba Gombo files “his most strenuous objection” to the Request for Postponement;

¹ ICC-01/05-01/13-234-Red.

² ICC-01/05-01/13-241-Conf.

³ ICC-01/05-01/13-242-Conf.

⁴ ICC-01/05-01/13-243-Conf.

⁵ ICC-01/05-01/13-245.

NOTING the “Réponse de la Défense à la ‘Prosecution’s Request for Variation of Time Limits Pursuant to Regulation 35 of the Regulations of the Court Concerning the Confirmation of Charges’ (ICC-01/05-01/13-234-Conf)” dated 11 March 2014⁶, whereby the Defence for Aimé Kilolo Musamba requests to reject the Request for Postponement and, “à titre subsidiaire”, to order the release of the suspect;

NOTING articles 57(3)(a), 60, 61, 67, 70(2) of the Statute; rule 167 of the Rules of Procedure and Evidence and regulation 35(2) of the Regulations of the Court;

NOTING that the factors listed by the Prosecutor in support of her request for Postponement include (i) her lack of access to material seized by the Dutch and Belgian authorities upon the arrest of the suspects and since then held in their custody and control; (ii) the fact that “several seized electronic devices, provided to the Registry on or about 24 November 2013, have only been recently forensically copied and partially made available to the Prosecution”; (iii) the “imminent” joinder of Narcisse Arido to the proceedings; (iv) the fact that the final report by Independent Counsel, based on the intercepts carried out by the Dutch authorities upon the Chamber’s request, has yet to be transmitted to the Court and made available to her; (v) the fact that several requests for assistance to State authorities are still pending and that additional time to properly analyse all the material which might be yielded by those requests is required;

NOTING further that the Prosecutor’s submits inter alia that inaccessibility of, or “late and limited” access to, the seized material will result in her not being “trial-ready” at the commencement of the confirmation proceedings as scheduled;

CONSIDERING, as stated by more than one Defence team, that most of the factors purportedly warranting the requested extension amount to submissions

⁶ ICC-01/05-01/13-248-Conf.

of a hypothetical and speculative nature (in particular, the assumption that seized materials as yet unknown by the Prosecutor might yield “relevant evidence”), acceding to which would result in exposing these proceedings to an excessive amount of uncertainty;

CONSIDERING, as regards the purported delay by the Registrar in making the relevant materials available to the Prosecutor, that the Registrar promptly proceeded to the handling and processing of the seized electronic materials in accordance with the Single Judge’s instructions, including by handing over the relevant copies of most materials to the Prosecutor as early as on 29 January 2014;

CONSIDERING that, since only few items were excluded by the handing over completed on 29 January 2014 (namely, two mobile phones and an ipad), and that a copy of the ipad was handed over to the Prosecutor on 11 February 2014, the Prosecutor has had ample opportunity to review the majority of the materials made available to her and to promptly raise any issue she might have with it, including of a technical nature or in relation to her lack of access to documents concerning the forensic acquisition process, as pointed out by the Defence for Mr Bemba;

CONSIDERING, as regards Narcisse Arido, that the Single Judge will consider the impact of the timing of his surrender to the Court only once it actually happens and that the option of severing the proceedings continues to be available;

CONSIDERING further that the Prosecutor’s wish to be “trial-ready” at the commencement of the confirmation proceedings cannot result in making it impossible for the confirmation phase to proceed until and unless all the evidence which might conceivably be gathered by the Prosecutor is actually in the possession of the latter, irrespective of the circumstances, and that to hold

otherwise would be tantamount to making the pre-trial phase into a “mini-trial”, or “a trial before the trial”, as such deprived of any meaningful purpose;

CONSIDERING, by the same token, that there is merit in the Prosecutor’s submission to the effect that “[t]he Independent Counsel’s reports have yielded evidence critical to the case” and that, accordingly, the availability of the final report to the parties and to the Court appears of essence to the determinations to be made by the Chamber under article 61 of the Statute, also with a view to properly assessing the contents and probative value of the First and of the Second Reports, irrespective of whether this final report will actually “produce similarly cogent evidence”;

CONSIDERING that the possible impact of the unavailability of the final report on the timing of the confirmation hearing seems also to be acknowledged by the Defence for Mr Bemba, by stating that this particular matter “is subject to the unique discretion of the Pre-Trial Chamber”, particularly if the latter was expecting a final report;

CONSIDERING that, pursuant to article 70(2) of the Statute, “the conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State”;

CONSIDERING that the relevant Dutch authorities recently submitted to the Single Judge information to the effect that, although Independent Counsel’s work has been completed for several weeks now, the third and final report is still currently under judicial consideration and, although no definite estimate of the precise timing can be made at this stage, it appears that it shall not be transmitted to the Court earlier than during the first week of May 2014;

CONSIDERING that the timing of the transmission of this last report to the Court, based as it is on applicable Dutch domestic law, is entirely the responsibility of the Dutch authorities, as such beyond the control of either the

Prosecutor or the Court, and that, accordingly, the ensuing delay in the confirmation proceedings cannot be considered as “due to inexcusable delay by the Prosecutor” within the meaning and for the purposes of article 60(4) of the Statute;

CONSIDERING further that the Dutch authorities had transmitted to the Court the First and the Second Report by Independent Counsel within days of their completion, and that, accordingly, at the time of the initial determination of the calendar for the confirmation of the charges, the Single Judge had assumed that a similar timing would also apply to the transmission of the final report;

CONSIDERING that the only “good cause” shown by the Prosecutor in support of her request for postponement consists therefore of the persisting unavailability of the final report by Independent Counsel and that, accordingly, postponement should be strictly and precisely correlated with the need to ensure its availability to the Court and to the parties, in particular with a view to allowing the latter to peruse and include it, as appropriate, in the document containing the charges and in the other submissions to be prepared for the purposes of the confirmation of the charges in writing in lieu of hearing;

CONSIDERING that, accordingly, it is appropriate that the calendar for the confirmation of the charges in writing be amended;

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

PARTIALLY GRANTS the Request for Postponement;

DECIDES to amend the calendar for the confirmation of the charges in writing as follows:

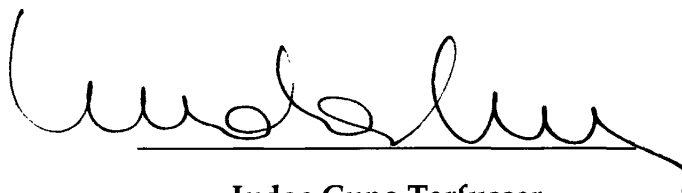
- the Prosecutor shall have until **30 May 2014** for the filing of her document containing the charges and list of evidence;

- both the Prosecutor and the Defence teams shall have until **30 June 2014** for the filing of their written submissions in lieu of hearing;
- the Prosecutor shall have until **7 July 2014** for the filing of her reply to the written submissions of the Defence teams;
- the Defence teams shall have until **14 July 2014** for the filing of their reply to the Prosecutor's written submissions;

REJECTS the request by the Defence for Jean-Pierre Bemba to find that the delay is inexcusable and attributable to the Prosecutor for the purposes of article 60(4) of the Statute;

REJECTS the requests to release Fidèle Babala and Aimé Kilolo pursuant to article 60(4) of the Statute.

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



Judge Cuno Tarfusser
Single Judge

Dated this Friday, 14 March 2014
The Hague, The Netherlands