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

Date: **22 April 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

**Narcisse Arido's Request to Amend the 14 March 2014 Scheduling Order
(ICC-01/05-01/13-255) and for Permission to File its Written Submissions in Lieu of
Oral Hearing after those of the Prosecution**

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

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I. INTRODUCTION

1. On 14 March 2014, the Single Judge of Pre-Trial Chamber II (hereinafter ‘Single Judge’) ordered that the Prosecution and the Defence teams file their written submissions in lieu of an oral hearing for the confirmation of charges (‘written submissions’) by 30 June 2014.¹ He further ordered that the Prosecution file its reply to the Defence’s written submissions by 7 July 2014, and gave the Defence until 14 July 2014 to file its reply to the Prosecution’s submissions.²

2. The Defence for Narcisse Arido (‘Arido Defence’) respectfully requests the Single Judge to amend its 14 March 2014 order and to permit the Defence to file its written submissions 3 weeks after the filing of those of Prosecution.

II. PROCEDURAL HISTORY

3. On 5 December 2013, the Single Judge decided that the confirmation of charges would take place on the basis of written submissions, without an oral hearing.³ The Prosecution was ordered to file its Document Containing the Charges (‘DCC’) and its list of evidence by 18 March 2014.⁴ The date of 18 April 2014 was set for the Prosecution and the Defence teams to file their written submissions in lieu of the oral hearing.⁵ The Prosecution was given until 25 April 2014 to file a reply, and the Defence teams until 2 May 2014.⁶

4. On 3 March 2014, the Prosecution requested a four-month extension of the deadlines set by the Single Judge.⁷ All Defence teams on the case at that time opposed the request.⁸ The Registry submitted observations on 10 March 2014.⁹ On 14 March 2014, the Single Judge partly granted the Prosecution’s request and amended the calendar for the confirmation of the charges in writing.¹⁰

¹ ICC-01/05-01/13-255, pp. 7-8 (‘scheduling order’).

² *Ibid.*, p. 8.

³ ICC-01/05-01/13-T-3-conf-ENG, p. 6.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ ICC-01/05-01/13-234-conf.

⁸ ICC-01/05-01/13-241-conf; ICC-01/05-01/13-242-conf; ICC-01/05-01/13-245; ICC-01/05-01/13-248-conf.

⁹ ICC-01/05-01/13-243-conf.

¹⁰ ICC-01/05-01/13-255, pp. 7-8.

5. The Single Judge set the following schedule:

- 30 May 2014: filing by the Prosecution of its Document Containing the Charges and its List of Evidence;
- 30 June 2014: filing of written submissions by the Prosecution and the Defence teams in lieu of oral hearing;
- 7 July 2014: filing of the Prosecution's reply to the written submissions of the Defence teams;
- 14 July 2014: filing of the Defence teams' reply to the written submissions of the Prosecution.¹¹

6. On 18 March 2014, Mr. Arido was transferred to the ICC Detention Centre. His initial appearance took place on 20 March 2014.¹²

7. On 15 April 2014, the Kilolo Defence filed a request to be permitted to call *viva voce* witnesses during the confirmation of charges, and asked the Single Judge to amend the scheduling order accordingly.¹³ Should the Kilolo Defence's request to call witnesses be granted and the confirmation of charges hearing take place orally, the present request would apply *mutatis mutandis* to final written submissions to be filed after the confirmation of charges hearing.

III. APPLICABLE LAW

8. Article 70 of the Statute governs proceedings in cases of alleged offences against the administration of justice and its second paragraph states that "the principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence". Rule 163 of the Rules of Procedure and Evidence ("Rules") further provides that - subject to the exceptions listed in the Rules and the Statute¹⁴ - the Statute and the Rules apply *mutatis mutandis* to the investigation, prosecution and punishment of offences defined in Article 70.

¹¹ *Ibid.*

¹² ICC-01/05-01/13-T-4-Conf.

¹³ ICC-01/05-01/13-339.

¹⁴ Part 2 of the Statute (other than Article 21); Article 53; Article 59 and Part 10 of the Statute (other than Articles 103, 107, 109 and 111).

9. Article 61 of the Statute regulates the confirmation of the charges before trial. It holds that during the hearing, the Prosecutor must support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged.¹⁵ The suspect may object to the charges, challenge the evidence presented by the Prosecutor and present evidence.¹⁶ On the basis of the hearing, the Pre-Trial Chamber must determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.¹⁷

10. Rule 122 (1) of the Rules states that the Presiding Judge of the Pre-Trial Chamber shall determine how the confirmation hearing is to be conducted, including the order and the conditions under which s/he intends the evidence to be presented. During the hearing on the merits, the Prosecutor and the suspect shall present their arguments in accordance with paragraphs 5 and 6 of Article 61.¹⁸ Paragraph 8 of Rule 122 unequivocally provides for the right of the suspect to make its final observations after those of the Prosecutor.

11. Rule 165 (3) of the Rules, which relates to the investigation, prosecution and trial of Article 70 offences, allows the Pre-Trial Chamber to decide on the confirmation of charges on the basis of written submissions without a hearing, unless the interests of justice require otherwise.

IV. SUBMISSIONS

12. The Arido Defence respectfully submits that permitting it to file its written submissions after those of the Prosecution is consistent with the object and purpose of the confirmation of charges proceedings, with established practice in other cases and with the fair trial rights of Mr. Arido.

A. The object and purpose of the confirmation of charges procedure favours the Defence filing its submissions after those of the Prosecution

13. The confirmation of charges exists to “separate those cases and charges which should go to trial from those which should not”.¹⁹ At the end of this process, the Pre-Trial Chamber must

¹⁵ Article 61 (5) of the Statute.

¹⁶ *Ibid*, Article 61 (6).

¹⁷ *Ibid*, Article 61 (7).

¹⁸ Rule 122 (7) of the Rules. Regarding Article 61 (5) and (6), *see above*, para. 9.

¹⁹ ICC-01/04-01/10-514 OA4, para. 39; *see also ibid*, fn. 79.

determine whether the evidence presented by the Prosecution is sufficient to establish “substantial grounds to believe” that the person committed the crimes charged²⁰ – that is, whether the Prosecution submitted “concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations”.²¹ As the Appeals Chamber noted, the confirmation of charges hearing is, by its nature, an “evidentiary hearing”.²²

14. During the hearing, the Prosecution is expected to support each of the charges with “sufficient evidence”, so as to meet the substantial grounds standard.²³ In other words, the Prosecution is expected to turn its DCC and its list of evidence into a comprehensible narrative, and thus to show how the evidence supports the charges. In the present case, this is to be demonstrated by the Prosecution in its written submissions.

15. The participation of the Defence during the confirmation of charges is threefold: to object to the charges, to challenge the Prosecution’s evidence and to present evidence.²⁴ In accordance with the presumption of innocence,²⁵ the Defence only needs to demonstrate that the evidence presented by the Prosecution does not meet the threshold required to confirm the charges. This is also in line with Article 67 (1) (i) of the Statute, according to which each accused has the right not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal. Therefore, the role of the Defence may be confined to mere opposition to the position and arguments of the Prosecution – which can only be done effectively if the Prosecution’s arguments are known to the Defence.

B. A review of the Court’s practice during the confirmation of charge shows that the Defence arguments are always presented after those of the Prosecution

16. The aforementioned “reactive” role of the Defence - and the corresponding unequivocal and full burden of proof on the Prosecution - is further confirmed by the order in which the parties and participants are to present their arguments during the confirmation of charges hearing. Rule 122 (8) of the Rules unequivocally gives the suspect the right to make its final observations after the Prosecutor.

²⁰ ICC-01/04-01/10-514 OA4, para. 39; *see also* Articles 61 (5) and (7) of the Statute.

²¹ ICC-01/04-01/06-803-tEN, para. 39; ICC-01/04-01/07-717, para. 65.

²² ICC-01/04-01/10-514 OA4, para. 39.

²³ Article 61 (5) of the Statute.

²⁴ *Ibid*, Article 61 (6).

²⁵ *Ibid*, Article 66.

17. In all cases, the Defence responds to the Prosecution's arguments and presents its evidence, if any, after the Prosecution does.²⁶ Further, the Defence is always the last party to present its closing arguments.²⁷ Similarly, the Defence was permitted to file its submissions after those of the Prosecution²⁸ by virtue of the guiding principle that grants the Defence the right to have the last word.²⁹

18. As a result, the Arido Defence submits that granting its request to be permitted to file its written submissions after those of the Prosecution is coherent with the purpose of the confirmation of charges, and is in accordance with the practice of the Court.

19. The Arido Defence notes that it has been the practice of the Court not to permit the Prosecution to respond/reply to the Defence's arguments. During oral hearings, the Prosecution is not permitted to present arguments in reply to the Defence's arguments. It is only permitted to present closing arguments, and the Defence has the last word by presenting its closing argument last.³⁰ In the same way, when written submissions are filed following the confirmation of charges hearing, the Prosecution is not permitted to respond/reply to the Defence's submissions.³¹ While the Arido Defence does not have a position regarding the current schedule providing for a Prosecution's reply to the Defence's submissions, it respectfully requests the Single Judge to permit it to file a reply to any Prosecution's argument contained therein, in accordance with its right to have the last word.

C. The suggested order of filing protects the rights of the Suspect

20. At the date it is supposed to file its submissions on the confirmation of charges, the Arido Defence will only be in possession of the Prosecution's DCC ("a detailed description of the

²⁶ See e.g. *Lubanga* case: ICC-01/04-01/06-678; *Katanga & Chui* case: ICC-01/04-01/07-587-AnxI; *Mbarushimana* case: ICC-01/04-01/10-413-Anx1; *Muthaura, Kenyatta & Ali* case: ICC-01/09-02/11-321-Anx; *Bemba* case: ICC-01/05-01/08-336-Anx; *Abu Garda* case: ICC-02/05-02/09-182-Anx1; *Ntaganda* case: ICC-01/04-02/06-245-Anx; *L. Gbagbo* case, ICC-02/11-01/11-397-Anx; *Ruto, Kosgey & Sang* case: ICC-01/09-01/11-294-Anx.

²⁷ *Ibid.*

²⁸ See e.g. *Lubanga* case: ICC-01/04-01/06-T-47-EN, p. 150; *Katanga & Chui* case: ICC-01/04-01/07-T-50-ENG, p. 8; *Mbarushimana* case: ICC-01/04-01/10-T-9-ENG, p. 29; *Muthaura, Kenyatta & Ali*: ICC-01/09-02/11-T-15-Red-ENG, p. 88; *Abu Garda* case: ICC-02/05-02/09-T-21-Red-ENG, pp. 82-83; *Banda & Jerbo* case: ICC-02/05-03/09-T-9-Red-ENG, p. 51 (although in the end the parties declined filing written submissions); *Ntaganda* case: ICC-01/04-02/06-T-11-ENG, p. 11; *Ruto, Kosgey & Sang* case: ICC-01/09-01/11-T-12-ENG, pp. 76-77; *L. Gbagbo* case, ICC-02/11-01/11-T-21-ENG, pp. 50-51 and ICC-02/11-01/11-619, p. 24.

²⁹ It is widely accepted that the Defence should always have "the last word", and that this principle extended to written submission; see Rule 140 (2) (d) and Rule 141 (2) of the Rules; see also ICC-01/04-01/06-2722, para. 2; ICC-01/04-01/06-T-29-EN, pp. 26-27; ICC-01/05-01/08-T-13-ENG, pp. 7-8.

³⁰ See above, footnote 26.

³¹ See above, footnote 28.

charges”)³² and of its list of evidence (a list of the documents which the Prosecutor intends to “bring in support of those charges *at the hearing*”).³³ These two documents do not constitute the Prosecution’s submissions and are to be discussed and expanded upon during the confirmation hearing by the Prosecution. They cannot be said to provide a sufficient basis for the Defence to defend itself during the confirmation of charges; should they be sufficient, there would not be a need for the Prosecution to present additional submissions during the confirmation hearing. As things stand, the Arido Defence has to challenge the Prosecution’s evidence and how it allegedly supports the charges without having knowledge of the Prosecution’s arguments, or its ‘narrative’, explaining how the evidence relates to and supports the charges.

21. By virtue of the presumption of innocence, it is for the Prosecutor to prove the guilt of the Accused,³⁴ a principle applicable to all the stages of the proceedings.³⁵ It is clear from the wording of article 61 (5) of the Statute that it is upon the Prosecution to establish the substantial grounds that the suspect committed the crimes charged. Requesting the Defence to submit its written submissions prior to knowing the Prosecution’s arguments amounts to asking the Defence to actively demonstrate that the evidence contained in the Prosecution’s list of evidence do not support the charges in the DCC, in other words, it puts the onus of rebuttal on the Defence. This is inconsistent with the aforementioned and unconditional right to the presumption of Innocence set out in Article 67 (1) (i) of the Statute.

22. Under Article 64 (2) of the Statute, the Trial Chamber must ensure that a trial is fair and expeditious, with full respect for the rights of the accused and due regard for the protection of victims and witnesses. It is widely accepted that such obligation extends to the Pre-Trial Chamber.³⁶ On this basis, the Arido Defence respectfully requests the Single Judge to amend the scheduling order and permit the Defence to file its written submissions after those of the Prosecution.

23. While in its previous filing the Arido Defence had requested the Single Judge to strictly adhere to the timeline,³⁷ this was related to the Prosecution’s obligation to file its DCC, list of evidence and written submissions in lieu of oral hearing. It does not prevent the Defence to

³² Article 61 (3) (a) of the Statute; Rule 121 (3) of the Rules.

³³ Article 61 (3) (b) of the statute (*emphasis added*); Rule 121 (3) of the Rules.

³⁴ Article 66 (2) of the Statute.

³⁵ ICC-01/05-01/08-424, para. 31; ICC-01/09-01/11-373, para. 41.

³⁶ See e.g. ICC-02/11-01/11-33, para. 5; ICC-01/09-02/11-30, para. 6; ICC-01/05-01/08-528, para. 10.

³⁷ ICC-01/05-01/13-334.

request for a variation of the timeline when it is required to protect the fundamental rights of Mr. Arido. The Arido Defence further submits that the requested amendment of the scheduling order does not substantially protract the proceedings. To the contrary, permitting the Arido Defence to file its submissions after those of the Prosecution will lead to more specific and focused pleadings (as the Defence will not have to speculate on the Prosecution's narrative) which will assist the Pre-Trial Chamber in making its decision on the confirmation of the charges.

V. CONCLUSION

24. In light of the above, the Arido Defence respectfully request the Single Judge to amend his 14 March 2014 scheduling order to permit the Defence to file its written submissions in lieu of oral hearing 3 weeks after those of the Prosecution, and to consequently adopt the following schedule:

- **30 June 2014:** filing of written submissions by the Prosecution;
- **21 July 2014:** filing of the Arido Defence's written submissions;
- **28 July 2014:** filing of the Prosecution's response to the written submissions of the Defence;
- **4 August 2014:** filing of the Arido Defence team's reply to the response of the Prosecution.



Göran Sluiter, Counsel for Mr. Arido

Dated this 22nd Day of April 2014

At Amsterdam, The Netherlands