

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 10 June 2015

TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

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 Submission of Auxiliary Documents

Decision 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

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Gosnell

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

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

Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber VII ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Articles 21(1)(a) and (2), 64(2) and 67(1)(a) of the Rome Statute (the 'Statute') and Rule 121(3) of the Rules of Procedure and Evidence ('the Rules'), renders by Majority, Judge Eboe-Osuji partly dissenting, this 'Decision on the Submission of Auxiliary Documents'.

I. Procedural Background

1. On 3 March 2015, the defence of Aimé Kilolo Musamba (the 'Kilolo Defence') submitted the 'Requête de la Défense de Monsieur Aimé Kilolo Musamba aux fins d'ordonner au Procureur de présenter une version amendée du document de notification des charges et de communiquer l'ensemble des preuves' (the 'Request')¹ seeking the Chamber's order to the Office of the Prosecutor (the 'Prosecution') to, *inter alia*, submit an updated document containing the charges (the 'UDCC'), while taking into account the 'Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute' (the 'Confirmation Decision')² delivered by Pre-Trial Chamber II on 11 November 2014.
2. On 11 March 2015, the Prosecution responded that it did not object to the submission of an UDCC and informed the Chamber that it was in the process of preparing an UDCC 'which it intends to present in due course in accordance with instructions from' the Chamber.³
3. On 8 April 2015, the defence of Mr Fidèle Babala Wandu (the 'Babala Defence') submitted further observations on issues to be discussed at the first status

¹ ICC-01/05-01/13-830.

² Pre-Trial Chamber II, ICC-01/05-01/13-749.

³ Prosecution's Response to the Kilolo Defence's Request « *d'ordonner au Procureur de présenter une version amendée du document de notification des charges et de communiquer l'ensemble des preuves* » ICC-01/05-01/13-839, para. 1.

conference, requesting, *inter alia*, that the Prosecution provide the defence with an UDCC and an element-based chart.⁴

4. On 13 April 2015, the defence of the five accused (together the 'Defence'), submitted, prior to the first status conference, the 'Joint Defence Observations on Modalities of Disclosure in Accordance with the Trial Chamber's Order Regarding the Agenda of the First Status Conference (ICC-01/05-01/13-824)', requesting, *inter alia*, that the Prosecution, when disclosing incriminating evidence, also submits an element-based chart relating each piece of evidence with each constitutive element of each offence and the modes of liability.⁵ On the same day, the Kilolo Defence, the defence of Mr Jean-Jacques Kabongo Mangenda (the 'Mangenda Defence') and Mr Narcisse Arido (the 'Arido Defence') reiterated, in discrete filings, their request to be provided with an UDCC.⁶ The Arido Defence also requested that the Prosecution be ordered to submit a pre-trial brief.⁷
5. On 24 April 2015, the Chamber held a status conference⁸ during which further submissions on the necessity of auxiliary documents, such as the UDCC,⁹ an element-based chart¹⁰ and a pre-trial brief¹¹ were received by the Prosecution and the Defence. While the Prosecution objected to the necessity of providing an element-based chart, it did not object to the production and submission of

⁴ Observations de la Défense de M. Fidèle Babala Wandu en vue de la première conférence de mise en état, 8 April 2015, ICC-01/05-01/13-890, p. 8, para. 16.

⁵ ICC-01/05-01/13-894, paras 9-12 and 37(e).

⁶ Observations de la Défense de Monsieur Aimé Kilolo en vue de la première conférence de mise en état, ICC-01/05-01/13-904-Conf, para. 40 (a public redacted version of the filing is also available, ICC-01/05-01/13-904-Red); Observations of the Mangenda Defence in advance of the first Status Conference, ICC-01/05-01/13-900, para. 7(a); Arido Defence's Submissions in Advance of First Status Conference Pursuant to Trial Chamber's Order of 1 April 2015 (ICC-01/05-01/13-824), ICC-01/05-01/13-901, paras 53-54.

⁷ ICC-01/05-01/13-901, paras 55-56.

⁸ Transcript of Hearing, ICC-01/05-01/13-T-8-Conf-ENG, 24 April 2015 (a public redacted version is also available, ICC-01/05-01/13-T-8-Red-ENG). See also Order setting the agenda for the status conference on 24 April 2015, 17 April 2015, ICC-01/05-01/13-912, para. 6.

⁹ Transcript of Hearing, ICC-01/05-01/13-T-8-Red-ENG, p. 57, lines 16-19; p. 62, line 5 to p. 63, line 1; p. 64, line 20 to p. 65, line 8; p. 66, line 4 to p. 67, line 25, p. 69, lines 5-6 and 13-19.

¹⁰ Transcript of Hearing, ICC-01/05-01/13-T-8-Red-ENG, p. 58, line 4 to p. 62, line 1; p. 63, line 12 to p. 64, line 1; p. 68, lines 1-19; p. 69, lines 6-9.

¹¹ Transcript of Hearing, ICC-01/05-01/13-T-8-Red-ENG, p. 64, line 3-15.

an UDCC and a pre-trial brief. The Defence reiterated its request to be provided with an UDCC, element-based chart and a pre-trial brief.

6. On 1 May 2015, the Defence submitted the ‘Observations conjointes des équipes de défense suite à la Première conférence de mise en état et requête afin de fixer certains délais (ICC-01/05-01/13-T-8-Conf-FRA)’,¹² reiterating its request to be provided with an UDCC and element-based chart.¹³
7. On 1 June 2015, the Prosecution submitted the « Prosecution’s Response to « Observations conjointes des équipes de défense suite à la Première conférence de mise en état et requête afin de fixer certains délais (ICC-01/05-01/13-T-8-Conf-FRA) » [ICC-01/05-01/13-940-Conf]’.¹⁴

II. Applicable Law and Analysis

The Submission of an UDCC

8. The Chamber by Majority (Judge Eboe-Osuji dissenting) finds that the submission of an UDCC in this case is neither appropriate nor compatible with the procedural regime set out in the Statute. Its finding is based on the following considerations.
9. Under the Statute, the charges are presented by the Prosecution in the document containing the charges (the ‘DCC’), as provided for in Article 61(3) of the Statute.¹⁵ Rule 121(3) of the Rules further instructs the Prosecution to provide the person with a detailed description of the charges.¹⁶ Regulation 52

¹² ICC-01/05-01/13-940-Conf, with confidential annex A (ICC-01/05-01/13-940-AnxA-Corr).

¹³ ICC-01/05-01/13-940-Conf, pp. 6-10.

¹⁴ ICC-01/05-01/13-976-Conf.

¹⁵ Appeals Chamber, *The Prosecutor v Thomas Lubanga Dyilo*, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence’, 13 October 2006, ICC-01/04-01/06-568 (OA3), para. 51.

¹⁶ As to the notion of ‘charge’, *see*, for example, Pre-Trial Chamber I, *The Prosecutor v Laurent Gbagbo*, Decision on the date of the confirmation of charges hearing and proceedings leading thereto, 14 December 2012, ICC-02/11-01/11-325, para. 25; Pre-Trial Chamber II, *The Prosecutor v William Samoei Ruto et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373, para. 44; Trial Chamber II, *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Filing of a Summary of the Charges by the Prosecutor, 21 October 2009, ICC-01/04-01/07-1547-tENG, para.

of the Regulations of the Court provides for the content of the document containing the charges and directs the Prosecution to include, beside the full name of the person, a 'statement of facts, including the time and place of the alleged crimes' and a 'legal characterization of the facts to accord with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28' of the Statute.

10. The Chamber's Majority further recalls that the Statute entrusts the Pre-Trial Chamber with the responsibility to confirm or decline to confirm the charges, as presented by the Prosecution in the DCC. It does so, on the basis of a hearing in the presence of both parties, and against a relatively high evidentiary threshold.¹⁷ Notably, Article 61(7)(a) of the Statute provides that the Pre-Trial Chamber 'confirm those charges in relation to which it has determined that there is sufficient evidence, and *commit the person* to a Trial Chamber for trial *on the charges as confirmed*' (emphasis added). In the view of the Chamber's Majority, this means that in case the Pre-Trial Chamber confirms the charges, its determination not only extends to *whether* the person is committed to a Trial Chamber but also *for what* the person is put on trial. Therefore, the confirmation of a 'charge' implies a judicial decision both in relation to the facts set out in the DCC and their legal characterization.
11. Moreover, Article 61(7)(a) of the Statute stipulates that the accused is committed to a Trial Chamber 'on the charges *as confirmed*' (emphasis added). This entails that the Pre-Trial Chamber's decision under Article 61(7)(a) of the Statute constitutes the authoritative document informing the accused of the charges 'as confirmed'. The Statute does not foresee the submission of a new charging document by the Prosecution post-confirmation. To the contrary, a

19; Trial Chamber I, *The Prosecutor v Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, 28 March 2012, ICC-01/04-01/06-2842, para. 2.

¹⁷ As to the incomparability of the confirmation procedure under Article 61 of the Statute with the procedure governing the confirmation of the indictment at the ICTY and ICTR (Rule 47(B) of the ICTY and ICTR Rules of Procedure and Evidence, see Appeals Chamber, *The Prosecutor v Callixte Mbarushimana*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges", 30 May 2012, ICC-01/04-01/10-514 (OA4), para. 43.

DCC is explicitly only foreseen at the confirmation stage, but not at trial. This conclusion is further supported by the fact that the Court's legal instruments lack any provision related to the submission, timing and content of a charging document at the trial stage, equivalent to those applicable at the confirmation stage.

12. It follows from the above that the Statute foresees a shift of authority to define the factual scope of the case: while at the stage of submitting the DCC this authority rests squarely with the Prosecution, at the confirmation stage, such authority passes over to the Pre-Trial Chamber. In other words, at the confirmation stage the Pre-Trial Chamber has the sole authority to define the parameters of the case for the purpose of ensuing trial proceedings; the confirmation of charges decision rendered under Article 61(7)(a) of the Statute sets out the charges, which, as such, also binds the Trial Chamber.¹⁸
13. The Majority's position is further supported by a systematic interpretation of other statutory provisions. Article 61(4) of the Statute reflects the prerogative of the Prosecution to 'amend or withdraw any charges' *prior* to the confirmation hearing.¹⁹ Conversely, Article 61(9) of the Statute establishes that, in case the Prosecution intends to amend the charges '*after the charges are confirmed* and before the trial has begun' (emphasis added), it must seek prior permission of the Pre-Trial Chamber.²⁰ A combined reading of those provisions, against the backdrop of Article 61(7) of the Statute, shows that the Pre-Trial Chamber remains competent to decide on the definition of the charges for which the person is prosecuted at trial.

¹⁸ Trial Chamber I, *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06-1084, para. 43.

¹⁹ Appeals Chamber, *The Prosecutor v Thomas Lubanga Dyilo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence', 13 October 2006, ICC-01/04-01/06-568 (OA3), para. 53.

²⁰ Appeals Chamber, *The Prosecutor v William Samoei Ruto et al.*, Decision on the Prosecutor's appeal against the 'Decision on the Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute', 13 December 2013, ICC-01/09-01/11-1123, para. 29.

14. A further argument can be drawn from Article 64(6)(a) in conjunction with Article 61(11) of the Statute which foresees that '[o]nce the charges have been confirmed', the Trial Chamber may, for the purpose of subsequent proceedings, exercise any function of the Pre-Trial Chamber, but 'subject to [article 61] paragraph 9 and article 64 paragraph 4' of the Statute. These provisions further illustrate the limitations of the Trial Chamber's powers by those vested exclusively in the Pre-Trial Chamber, even after the case has been committed to a Trial Chamber.
15. Moreover, several provisions use as a reference point the charges as confirmed by the Pre-Trial Chamber, such as Articles 61(7)(a), 64(8)(a) and 74(2) of the Statute and regulation 55 of the Regulations of the Court (the 'Regulations'). Article 61(7)(a) of the Statute provides that the person be committed 'to a Trial Chamber for trial *on the charges as confirmed*' (emphasis added); Article 64(8)(a) of the Statute stipulates that at the commencement of the trial, the Trial Chamber 'shall have read to the accused the *charges previously confirmed by the Pre-Trial Chamber* (emphasis added)'; Article 74(2) of the Statute dictates that the final decision of the Trial Chamber 'shall not exceed the *facts and circumstances described in the charges* and any amendments to the charges' (emphasis added); and finally, regulation 55 of the Regulations allows the Trial Chamber to modify the legal characterisation of facts but 'without exceeding the *facts and circumstances described in the charges* and any amendments to the charges' (emphasis added). A combined reading of the aforementioned norms cannot but lead to the conclusion that the Trial Chamber is bound by the factual description of the charges, as determined by the Pre-Trial Chamber in the confirmation decision.²¹
16. In addition, and as a more general point, the judicial nature of the confirmation decision dictates that its content cannot be placed at the disposal of the parties.

²¹ Similarly, Trial Chamber I, *The Prosecutor v Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 7.

As any other judicial decision, its content and tenor is authoritative and cannot be 'updated' by any of the parties. Indeed, there is a kind of structural incongruity in using an UDCC as a vehicle to provide further details about the charges as confirmed by the Pre-Trial Chamber. A UDCC is an updated version of a document given a specific purpose in the statutory scheme – and this purpose has been served when the confirmation decision is rendered.

17. There are also other, more practical considerations which militate against the submission of an UDCC. Accepting an UDCC next to the confirmation decision with the purpose to 'clarify' the factual scope of the case, in fact, bears the risk to achieve the opposite, namely to engage the parties and the Chamber into prolonged discussions as to the congruence of the UDCC with the confirmation decision, *i.e.* whether particular facts are part of the charges confirmed or not, thus prolonging unnecessarily the proceedings.²²
18. Lastly, one of the arguments used in the past for ordering an UDCC was that the confirmation decisions were fragmented, lacking a 'readily accessible statement of the facts underlying each charge'.²³ In addition, an UDCC was seen as a necessary measure to ensure that the defence is informed 'promptly and in detail of the nature, cause and content of the charge'.²⁴
19. In the present case, however, and contrary to the submissions of the Defence, that claim is untenable. In the view of the Chamber's Majority, the Confirmation Decision sets out clearly the 'facts and circumstances' of the case for the accused, presenting a description of the factual allegations and their legal characterization, thus satisfying the minimum requirements of Article

²² See, for example, Trial Chamber III, *The Prosecutor v Jean-Pierre Bemba Gombo*, Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges, 20 July 2010, ICC-01/05-01/08-836; Trial Chamber V, *The Prosecutor v Francis Kirimi Muthaura et al.*, Order for the prosecution to file an updated document containing the charges, 5 July 2012, ICC-01/09-02/11-450; Trial Chamber V, *The Prosecutor v Francis Kirimi Muthaura et al.*, Decision on the content of the updated document containing the charges, 28 December 2012, ICC-01/09-02/11-584; Trial Chamber V, *The Prosecutor v William Samoei Ruto et al.*, Decision on the content of the updated document containing the charges, 28 December 2012, ICC-01/09-01/11-522.

²³ See, for example, Trial Chamber V, *The Prosecutor v William Samoei Ruto et al.*, Order for the Prosecution to file an updated document containing the charges, ICC-01/09-01/11-439, para. 6 (with further references).

²⁴ *Ibid.*

67(1)(a) of the Statute. In light of this, the UDCC would simply repeat the allegations set out in the Confirmation Decision. Hence, from a practical point of view, the UDCC is simply not necessary.

The Submission of an Element-Based Chart

20. The Chamber unanimously holds that an element-based chart is not necessary in this particular case. The scope of the case is, compared to other proceedings involving Article 5 crimes, rather small. As was confirmed by the Prosecution in the status conference, the vast majority of evidence has been already disclosed to the Defence,²⁵ which, in turn, had the opportunity to acquaint itself with the evidentiary material of this case. Moreover, the Defence is responsible for reviewing and analysing the evidence itself, making its own assessment of the evidence in light of the line of its defence strategy it intends to follow at trial. For the reasons reflected above, the Chamber unanimously does not deem it necessary to exercise its discretion under Article 64(2) of the Statute and to order the Prosecution to submit an element-based chart.²⁶

The Submission of a Pre-Trial Brief

21. The Chamber notes the Prosecution's submission that it has no objections to file a pre-trial brief, as requested by the Defence. Notwithstanding the Majority's principled approach as regards other auxiliary documents, the Chamber unanimously is of the view that such a pre-trial brief could be beneficial to the Defence in the preparation for trial. That said, the Chamber highlights that the submission of such document is left at the discretion of the parties and that it is not binding on the Chamber. Accordingly, it invites the Prosecution, after having consulted with the Defence, to prepare a pre-trial

²⁵ Transcript of Hearing, ICC-01/05-01/13-T-8-Red-ENG, p. 9, lines 9-11 ('In terms of the material that we actually have, we have disclosed the vast majority of it. If I were to put an approximation on it I would say we're somewhere in the area of 90 per cent, 95 per cent of the material that forms the core of the – of the case collection').

²⁶ See also Decision on Modalities of Disclosure, 22 May 2015, ICC-01/05-01/13-959, paras 30-33.

brief, explaining the Prosecution's case theory with reference to the evidence it intends to rely on, and to submit it no later than 16 July 2015.

FOR THE FOREGOING REASONS THE CHAMBER HEREBY

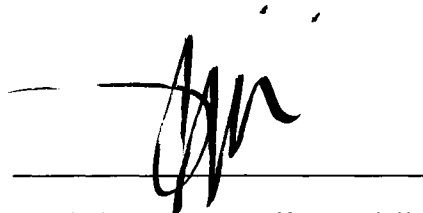
REJECTS, by Majority, the Defence request for an UDCC;

REJECTS unanimously the request for an element-based chart; and

INVITES the Prosecution, to submit no later than 16 July 2015 a pre-trial brief.

Judge Eboe-Osuji will append his partly dissenting opinion in due course.

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



Judge Chile Eboe-Osuji, Presiding



Judge Olga Herrera Carbuccion



Judge Bertram Schmitt

Dated 10 June 2015

At The Hague, The Netherlands