

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 6 May 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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

Confidential

**Prosecution Response to the Registry's 30 April 2014 Second Addendum to its
Report on Seized Material**

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") responds to the Registry's 30 April 2014 second addendum to its report on seized material ("Second Addendum").¹ The Single Judge should direct the Registry to proceed with the extraction of data from mobile phone CAR-ICC-0001-0006 *via* options three and two, in that order. The Court possesses the phone, which was lawfully seized pursuant to the Pre-Trial Chamber's 20 November 2013 arrest warrant,² and has the sole authority to determine the data extraction method and to execute the requisite "waiver".

2. Proceeding with options four or five, or requesting that the suspect Arido³ sign the Netherlands Forensic Institute (NFI) waiver, is inadequate or unviable. A full extraction of all potentially relevant evidential material is required to fulfil the terms of the arrest warrant. This objective cannot reasonably be determined by whether a suspect, who is the object of the warrant and resultant proceedings, consents to or declines the examination of seized material that may incriminate him.

II. Confidentiality

3. This document is filed confidentially as a response to a filing so designated.⁴ However, the Prosecution notes that the information contained in this filing and the Second Addendum need not remain confidential⁵ and therefore does not oppose the reclassification of these submissions as "public".

¹ ICC-01/05-01/13-369-Conf.

² ICC-01/05-01/13-1-Red2-tENG.

³ The mobile phone was seized during the suspect Arido's arrest. See ICC-01/05-01/13-299-Conf-Anx1, p. 2.

⁴ See Regulation 23*bis*(2) of the Regulations of the Court.

⁵ The association between the NFI and the Court is well-documented in prior cases, e.g., in the *Mbarushimana* case. See ICC-01/04-01/10-140-Anx.

III. Submissions

A. CAR-ICC-0001-0006

4. The NFI reports that a preliminary extraction of data from mobile phone CAR-ICC-0001-0006 (Sony Xperia 1505) has been unsuccessful.⁶ Thus, the NFI proposes four potential additional forensic steps, described in paragraph six of the Second Addendum.⁷ For two of these steps, the NFI requires the execution of a “waiver”,⁸ presumably because of its responsibility for any damage to the device these extraction processes may cause.

5. The Single Judge has the authority to determine the data extraction method, and the Court (i.e., the Pre-Trial Chamber or Registry) is entitled to execute any waiver required by the NFI concerning the disposition of the phone. The Single Judge and/or Registrar lawfully possess and control the mobile phone as a result of its seizure by national authorities pursuant to the arrest warrant. Consequently, the Court retains possession and control of the device as against any claim of right by the suspect Arido.

- i. The Single Judge should direct the Registry to pursue options three and two, in that order*

6. Option three – a “non-destructive” extraction process requiring a waiver⁹ – is the *least intrusive* method to extract *all* the data from the suspect Arido’s mobile phone.

⁶ ICC-01/05-01/13-369-Conf, para. 5.

⁷ Only options two, three, four, and five relate to mobile phone CAR-ICC-0001-0006; see also ICC-01/05-01/13-369-Conf-Anx1, pp. 17-18.

⁸ ICC-01/05-01/13-369-Conf, para. 6; ICC-01/05-01/13-369-Conf-Anx1, pp. 17-18.

⁹ ICC-01/05-01/13-369-Conf, para. 6; ICC-01/05-01/13-369-Conf-Anx1, p. 18.

7. First, this option will permit the collection of the entire contents of the phone and thus best preserve any evidentiary material. The phone was seized because the Pre-Trial Chamber had reasonable grounds to believe that it was “relevant” to the crimes charged.¹⁰ That has not changed. A full data extraction may provide valuable information about communication between the suspects close to the date of their arrest, at a time when they were aware of the Prosecution’s investigation into their alleged activities.¹¹ The phone may contain other relevant information, including lists of contacts, SMSs, electronic files, and documents, whether incriminating, potentially exonerating, or otherwise material to the preparation of the defence.¹² This material may be lost if a full copy is not taken, which would defeat the purpose of its seizure and frustrate the Single Judge’s instruction to the Registry to return the seized material only after “their forensic acquisition *has been completed*”.¹³

8. Second, although option three requires a waiver,¹⁴ the non-destructive nature of the extraction process makes it likely that a functioning mobile phone will be returned to the suspect Arido. As discussed above, it is the Court or the Registrar that should execute the waiver. Were this deferred to Arido, he would in effect be handed the reins to the investigation of this case, and be allowed to dictate what evidence may be collected and used in the proceedings against him.

9. If option three fails, and a destructive extraction process is the only way to retrieve all the data, then option two must be taken. Option two is also “the fastest”.¹⁵ This method is appropriate because the Court is in lawful possession of the seized material and is exclusively empowered to pursue reasonable means to collect and

¹⁰ ICC-01/05-01/13-1-Red2-tENG, p. 16 (“requesting the States . . . to seize and transmit to the Court any relevant evidence”).

¹¹ See ICC-01/05-66-Conf-Anx-Corr, p. 48.

¹² The extent to which this information may be relevant to this case is still unknown. For example, the Single Judge and the parties are yet to receive the third Independent Counsel’s report.

¹³ ICC-01/05-01/13-103, p. 5 (emphasis added).

¹⁴ ICC-01/05-01/13-369-Conf, para. 6; ICC-01/05-01/13-369-Conf-Anx1, p. 18.

¹⁵ ICC-01/05-01/13-369-Conf-Anx1, p. 19.

preserve the contents of the seized phone. Arido's propriety interest in the phone cannot outweigh its potential evidentiary value to the Court, which the Single Judge confirmed when he ordered the phone's seizure.

ii. *Options four and five are neither adequate nor practical in the circumstances*

10. The Prosecution opposes options four and five because they may result in depriving the Chamber of important evidence in this case. To proceed with an incomprehensive data extraction or to forego proceeding altogether would nullify the objective of the seizure and frustrate the Single Judge's order regarding their forensic acquisition.¹⁶ The Single Judge should therefore authorise the Registry to proceed with options three and two, in that order, because they offer the best chance of extracting *all* the phone data.

11. Should the Single Judge decide to pursue option four, which requires the formulation of a "clear specific question" to the NFI in order for it to perform a focused extraction,¹⁷ the Prosecution reserves the right to make further submissions.

B. CAR-ICC-0001-0007

12. The Prosecution accepts the NFI's conclusion that "[i]t is . . . very likely that all the data has been extracted" from CAR-ICC-0001-0007 (Samsung GT-E1230),¹⁸ and proposes that no further investigative avenues need be pursued.

¹⁶ ICC-01/05-01/13-1-Red2-tENG, p. 16; ICC-01/05-01/13-103, p. 5.

¹⁷ ICC-01/05-01/13-369-Conf, para. 6.

¹⁸ ICC-01/05-01/13-369-Conf-Anx2, p. 13.

IV. Requested Relief

13. For the foregoing reasons, the Prosecution requests the Single Judge to (i) order the Registry to proceed with the extraction of data from mobile phone CAR-ICC-0001-0006 *via* options three and two, in that order, and execute such waivers as are required by the NFI to carry out these procedures; or (ii) in the alternative, if option four is taken, afford it an opportunity to formulate one or more questions for the NFI's focused extraction.



Fatou Bensouda, Prosecutor

Dated this 6th day of May 2014
At The Hague, The Netherlands