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

Date: **8 January 2015**

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Cuno Tarfusser
Judge Christine Van den Wyngaert

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 Response to the 'Corrected Version of "Prosecution's Request to Obtain Records from the Victims and Witnesses Unit"' (ICC-01/05-01/13-784-Corr)

Source: Counsel for Narcisse Arido

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

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I. INTRODUCTION

1. On 22 December 2014, the Prosecution filed a motion requesting the Pre-Trial Chamber to order the Victims and Witnesses Unit (hereinafter ‘VWU’) to provide the parties with the records and dates of payments made to 21 Defence witnesses from the case of *Prosecutor v. Bemba* (‘Main Case’).¹

2. The Arido Defence opposes the Prosecution Request and hereby submits its response.

II. PROCEDURAL HISTORY

3. On 18 December 2014, the Prosecution filed a request to obtain records from the Victims and Witnesses Unit, based on Articles 54 (1) (a) and 57 (3) (a) of the ICC Statute.² The Prosecution asked the Pre-Trial Chamber to order the VWU to provide records of payments related to 21 Defence witnesses in the case of *Prosecutor v. Bemba* (ICC-01/05-01/08) (‘Main Case’), namely D-2, D-3, D-4, D-6, D-7, D-9, D-11, D-13, D-15, D-23, D-25, D-26, D-29, D-36, D-52, D-53, D-54, D-55, D-57, D-59 and D-64.³

4. In particular, the Prosecution seeks to be provided with the following material, regarding each witness:

- i. Records and dates of money provided, either directly or indirectly, by the Registry to the Bemba Defence in relation to the testimonies of 21 Defence witnesses; and,
- ii. Receipts, invoices and documents submitted by the Bemba Defence to VWU relating to the use of the said money.⁴

5. The Prosecution argues that access to the requested information is “highly relevant” to the charges as confirmed, will assist the Court in establishing the truth, and is material to the proceedings.⁵ In particular, the Prosecution states that the requested information will permit the Prosecution and the Trial Chamber to be constituted to “identify whether payments to Defence witnesses [...] were legitimate”.⁶

¹ ICC-01/05-01/13-784-Corr (‘Prosecution Request’).

² ICC-01/05-01/13-784.

³ Prosecution Request, para. 4, fn. 1.

⁴ *Ibid.*, para. 4.

⁵ Prosecution Request, paras 6-13.

⁶ *Ibid.*, para. 8.

6. Regarding D-7, D-9, D-36, D-52, D-53 and D-59, the Prosecution argues that, even though it has not alleged any violations of Article 70 with regards to these witnesses, they are “relevant to providing additional information on the Bemba Defence’s recording of witness payments in support of their requests for advance funds from the Registry”.⁷ It also submits that access to this information is necessary in light of the fact that the Kilolo and Arido Defence made submissions regarding payments to certain of these witnesses to legitimate the Bemba Defence’s system of reimbursements to witnesses.⁸ The Prosecution argues that records of payments related to Mr. Arido are also necessary for the same reasons.⁹ On 22 December 2014, the Prosecution filed a corrigendum.¹⁰

III. SUBMISSIONS

A. **The requested information stems from the confidential relationship between the VWU and the Bemba Defence team in the Main Case and is not subject to disclosure**

7. The Prosecution is requesting the Pre-Trial Chamber to order the VWU to disclose internal information on the assistance it provided to the Bemba Defence team in the Main Case and related to the payment of witness expenses. In other words, the Prosecution is seeking access to information related to the internal workings of the Bemba Defence team and of the VWU, information which is normally not subject to disclosure in accordance with Rule 81 of the RPE.

8. Further, and as stated by Trial Chamber II in the *Katanga and Ngudjolo Chui* case, “information exchanged between a party or participant and the [VWU] unit [...] has to be *ex parte* in order to preserve the trust that underlies the cooperation which is indispensable for the effectiveness of the protection of victims and witnesses.”¹¹ Permitting the Prosecution to access such information on the speculative basis that it may highlight illicit payments made by members of the Bemba Defence teams to Defence witnesses would unnecessarily endanger this trust and should not be permitted.

9. Further, the Registry had previously clearly indicated that “the management of expenditure that the Registry undertook under Rules 81 to 86 of the Regulations of the Registry come[s]

⁷ *Ibid.*, para. 5.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ ICC-01/05-01/13-784-Corr.

¹¹ ICC-01/04-01/07-T-255-Red-ENG, pp. 4-5; *see also* ICC-01/04-01/07-T-253-ENG, p. 49; ICC-01/04-01/07-T-215-Red-ENG, p. 8.

under its internal procedures and are not shared with participants to the proceedings.”¹² It also made clear that it does not consult, cooperate with or report to any party with regard to witness expenses,¹³ and that its financial decisions were made independently.¹⁴ Any request related to such information should therefore be approached with the utmost caution, and access should be granted in the most exceptional circumstances. This high threshold is not met by the Prosecution Request in the present case.

B. The Prosecution fails to show that the requested information are material to the case

10. The Prosecution argues that the information sought are material to the proceedings as it relates to Defence witnesses who are either listed in the confirmed charges, or to the submissions of the co-suspects.¹⁵

11. The Arido Defence notes that the Prosecution has already been provided with information by the VWU concerning the record of the payments effected by the Registry to Defence witnesses who had testified in the Main Case, either directly or through any intermediary person or persons, and with information as to the amount of professional fees that the three defence expert witnesses were granted and paid.¹⁶ The Registry had also indicated to the Prosecution that money was paid through the Defence Counsel to the witnesses on three occasions, to facilitate their application for travel documents,¹⁷ and through two Legal Assistants in order to facilitate their application for travel documents and to cover the expenses of their accommodation in the field.¹⁸

12. In light of the fact that the Prosecution is already informed of the Registry’s disbursement of money made directly to the members of the Bemba Defence team in the Main Case, and of the Prosecution’s failure to specifically justify the materiality of the new information sought, it is submitted that the Prosecution Request must be rejected.

¹² ICC-01/04-01/07-T-215-Red-ENG, p. 7.

¹³ ICC-01/05-01/08-2441, para. 2.

¹⁴ *Ibid.*

¹⁵ Prosecution Request, paras 11-13.

¹⁶ ICC-01/05-01/08-2461, para. 4.

¹⁷ ICC-01/05-01/08-2441, para. 5.

¹⁸ *Ibid.*

C. The Prosecution Request highlights the fact that the Prosecution appears to have failed in its duty to investigate incriminating and exonerating circumstances equally

13. The Prosecution bases its request on Article 54 (1) (a) of the Statute, which enshrines the Prosecution's duty to establish the truth and as a result, its corresponding obligation to "extend the investigation to cover all facts and evidence [...] and, in doing so, investigate incriminating and exonerating circumstances equally."¹⁹ It is the position of the Arido Defence that the lateness of the Prosecution Request, and the resulting conclusion that the Prosecution appears to have never investigated whether the alleged payments to Defence witnesses were made pursuant to a legitimate aim, raises serious concerns as to the Prosecution's investigations method and the quality of its pre-confirmation investigations.

14. According to the Code of Conduct for the Office of the Prosecutor, the Prosecution shall conduct investigations "with the goal of establishing the truth" and must "consider all relevant circumstances when assessing evidence, irrespective of whether they are to the advantage or the disadvantage of the Prosecution". In addition, it shall ensure that "all necessary and reasonable enquiries are made".²⁰ At all times, the Prosecution should be guided by "fair, impartial, effective and expeditious investigation"²¹ In addition, the Prosecution must also take all appropriate measures to ensure the effective investigation pursuant to Article 54 (1) (b) of the Statute.

15. The Prosecution's case is based, *inter alia*, on the payment of Defence witnesses in order to induce them to provide false evidence in the Main Case. Any matter related to payment of Defence witnesses should have therefore been investigated by the Prosecution at the earliest opportunity, and certainly prior to the confirmation of the charges. This is particularly surprising since the Prosecution had previously approached the Pre-Trial Chamber in order to obtain certain documents related to Defence witnesses in the Main Case from the VWU.²²

16. The Arido Defence takes the position that the Prosecution has not lived up to its duty to investigate the case fully and impartially, and has thus also not met its obligation to investigate exonerating circumstances as imposed by the Statute, even though the Prosecution's investigation should largely be completed at the stage of the confirmation of charges hearing.²³

¹⁹ Prosecution Request, para. 1.

²⁰ Code of Conduct for the Office of the Prosecutor, para. 49.

²¹ *Ibid.*, para. 8.

²² ICC-01/05-01/13-172-Conf, para. 4.

²³ ICC-02/11-01/11-432, para 25; ICC-01/09-02/11-728, para 119.

17. The Arido Defence therefore wishes to request the Pre-Trial Chamber to remind the Prosecution of its fundamental obligation to *also* investigate exonerating evidence. This is particularly important since the manner in which the Prosecution questioned some of its witnesses also shows that the Prosecution failed to dig into issues related to possible exonerating circumstances.²⁴

D. The Prosecution's attempt to reverse the burden of proof should not be permitted

18. The Arido Defence also notes that the Prosecution appears to take the approach that, should the requested information not support the Defence team's arguments, it would support the argument that that members of the Bemba Defence team in the Main Case corruptly influenced witnesses.²⁵ The Arido Defence simply wishes to recall that the burden of proof is on the Prosecution, which must demonstrate beyond any reasonable doubt that the Accused have committed the charged offences.²⁶ It also recalls that the Defence does not benefit, unlike the Prosecution, from an internal system independent from the VWU to permit the reimbursement of expenses for witnesses.²⁷

19. The Arido Defence suggests that, should the Prosecution Request be granted, the Pre-Trial Chamber follows the approach of the Single Judge in his decision on the Prosecution's request to obtain evidence from the VWU in February 2014,²⁸ wherein he stated that the information previously sought by the Prosecution through the VWU and related to Defence witnesses was "*per se* neutral vis-à-vis the charges" and that "it is only by way of their use in the context and for the purposes of the line of arguing [...] that it may, or may not, be found of probative value".²⁹

²⁴ ICC-01/05-01/13-598-Conf, paras 229-238. A public redacted version of this document is available as ICC-01/05-01/13-598-Red.

²⁵ Prosecution Request para. 8.

²⁶ Article 66 (2) of the ICC Statute; *see also ibid.*, Article 67 (1) (i).

²⁷ Regulation 43 (2) of the Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, states that the Prosecution, irrespective of the reimbursement of expenses payable by the Registrar pursuant to the Regulations of the Registry, shall establish mechanisms to ensure that persons are compensated for expenses incurred and earnings lost as a result of their cooperation, for the duration of such questioning or provision of a statement.

²⁸ ICC-01/05-01/13-182.

²⁹ *Ibid.*, p. 3.

IV. CONCLUSION

20. The Arido Defence respectfully requests the Pre-Trial Chamber to reject the Prosecution Request, and to remind the Prosecution of its duty to investigate exonerating evidence in the same way as incriminating evidence.

A handwritten signature in black ink, appearing to read 'G. Sluiter', with a large, loopy initial 'G' and a horizontal line extending to the right.

Göran Sluiter, Counsel for Mr. Arido

Dated this 8th Day of January 2015

At Amsterdam, The Netherlands.