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**International
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Court**

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

Date: **22 May 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, with Public Annex A

**Public Redacted Version of “Narcisse Arido’s Observations on Annexes A, A1 and A2
of the Independent Counsel’s Report of 13 March 2015 (ICC-01/05-01/13-845-Conf) in
Accordance with Trial Chamber’s Decision No. ICC-01/05-01/13-893-Red”
(ICC-01/05-01/13-918-Conf-Exp) filed on 20 April 2015**

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 13 March 2015, the Independent Counsel submitted his “Rapport du Conseil indépendant sur la levée des scellés et l’analyse de pièces saisies par les autorités françaises et les autorités belges (Décisions ICC-01/05-01/13-41 et ICC-01/05-01/13-366 et 446)” to the Trial Chamber (hereinafter ‘the Report’).¹

2. On 9 April 2015, the Trial Chamber held that the Report should be reclassified as confidential, and that Annexes A, A1 and A2 thereof should be made available to the Arido Defence.² It further stated that the Arido Defence should be given the opportunity to make observations, if they wish so, within five days of being notified of the report and the said annexes.³

3. The Arido Defence hereby presents its observations. In particular, the Arido Defence submits that its ability to provide observations is hindered by the lack of information regarding the procedure followed by the Independent Counsel. Further, it informs the Trial Chamber that all materials selected by the Independent Counsel are already in possession of the Prosecution and have been disclosed to all the Defence team, and was discussed at length in the Arido Defence’s submissions on the confirmation of charges. As a result, it submits that the reclassification of Annexes A and A2 is not justified. The Arido Defence also observes that the Independent Counsel appears to have taken an incomplete approach to the case, omitting to consider as “relevant” information which are potentially exculpatory, and made a number of prejudicial comments. Finally, the Arido Defence requests that the Trial Chamber order that the DVD containing Mr. Arido’s emails be returned to Mr. Arido.

II. CLASSIFICATION

4. Pursuant to Regulation 23*bis* of the Regulations of the Court (‘RoC’), this request and its Annex A are submitted as confidential *ex-parte*, only available to the Trial Chamber and the Registry as they refer to a filing of the same level of classification. [REDACTED].

¹ ICC-01/05-01/13-845-Conf.

² ICC-01/05-01/13-893-Red, p. 14.

³ Ibid.

5. In light of the number of concerns the present filing raises regarding the general working method of the Independent Counsel, it submits that the other Defence teams should be given access to paragraphs 7 to 21 of the present filing.

III. SUBMISSIONS

6. Annex A contains the Independent Counsel analysis of 35 emails from the email account of Mr. Arido for the period of 1 November 2011 till 22 November 2013, out of a total of 2764 emails.⁴ The Independent Counsel states that all the other emails are either privileged or “manifestly irrelevant” to the present case.⁵ Annex A2 contains a copy of the actual documents, and Annex A1 contains proposed redacted versions of the documents. The Arido Defence hereby presents its observations on Annex A, A1 and A2.

A. The Independent Counsel’s report is incomplete as it fails to provide information regarding the method used for the review of the materials

7. The Arido Defence notes that the Report of the Independent Counsel is clearly incomplete. The Arido Defence recalls that the Independent Counsel was tasked with reviewing the contents of the email accounts of Mr. Arido “with a view to preserving the integrity of proceedings in this case and in the Main Case”.⁶ In particular, he was tasked with reviewing the DVDs “with a view to identifying any item which is privileged or otherwise obviously irrelevant for the purposes of these proceedings”.⁷

8. The cryptic report that was communicated and the selection of e-mails that were retained in those seized from Mr. Arido’s account do not provide sufficient information to allow meaningful submissions on the work of the Independent Counsel.⁸ In particular, there is absolutely no information as to the process used in order to arrive at this selection. The Arido Defence notes that the Independent counsel provides no reference to the DCC or the confirmation of charges decision. In the complete absence of information on the motivation of the Independent’s counsel decisions, it is difficult for the Arido Defence to provide more comprehensive observations.

⁴ ICC-01/05-01/13-845-Conf, para. 36.

⁵ *Ibid.*, para. 38.

⁶ ICC-01/05-01/13-366-Conf, p. 7.

⁷ *Ibid.*, pp. 7-8

⁸ See e.g. ICC-01/05-01/13-845-Conf, paras 35-39.

9. More specifically, the Arido Defence does not have any information regarding:
- i. Whether the Independent Counsel “filtered out what was obviously irrelevant” or “selected what was relevant”;
 - ii. The manner in which the Independent Counsel established what he considered as relevant or irrelevant, in particular whether he used keywords, key names or key dates or which instructions, if any, he used;
 - iii. Whether the Independent Counsel also included exculpatory information in his selection;
 - iv. The list of documents on which the Independent Counsel relied in order to make a determination regarding the relevance of the email from Mr. Arido, in particular, which filings relevant to the contents of the charges he relied on;
 - v. Whether the Independent Counsel reviewed the Defence teams’ submissions on the confirmation of the charges, and whether it reviewed the emails keeping in mind the Defence’s case;
 - vi. How the Independent Counsel defined what was privileged, and whether there are any “exceptions” to the privileged character of an email;
 - vii. Which categories of emails from Mr. Arido the Independent Counsel classified as privileged;
 - viii. Whether a document which contains potentially exculpatory material but which is also covered by privilege would be included in its report or be left out;
 - ix. Whether the Prosecution, the other Defence teams and the Registry gave guidance to the Independent Counsel regarding the review of the materials, and if so, what the contents of these instructions was, at what frequency, and the name of such individuals;
 - x. Which method was used: word search, reading through everything, what softwares were used, what technical difficulties were met, ect...;
 - xi. The role, if any, of the Independent counsel’s assistant, and which instructions were given to him/her;
 - xii. Whether the Independent Counsel had any contacts or sought instructions from the Prosecution, the Registry and/or the other Defence teams;⁹
 - xiii. Whether, when he selected one email as relevant, the Independent Counsel also

⁹ The Arido Defence notes that it has never been asked to submit any instructions regarding the work of the Independent Counsel.

included the other emails in the chain of emails.

10. As a result, the ability of the Arido Defence to make meaningful submissions is limited, and the possibility of seeking some review of the Independent's counsel work reduced to nothing by the absence of motivated decisions. In addition, as detailed further below in paragraphs 13 to 26, the assessment which has been undertaken by the Independent Counsel regarding the email account of Mr. Arido, and particularly the apparent lack of consideration given to the submissions of the Defence and the decision of the Pre-Trial Chamber regarding the confirmation of charges, further raises serious concerns as to the completeness of the review undertaken by the Independent Counsel regarding the email accounts of the co-suspects.

11. It therefore requests the Trial Chamber to order the Independent Counsel and, if necessary, the Registry and the Prosecution, to provide a report to the Trial Chamber and the parties indicating clearly the methodology used to review not only the email account of Mr. Arido but all the information which he was tasked to review, and responding to the questions raised in paragraph 9 above.

12. The Arido Defence reserves the right to provide further observations upon obtaining this type of information.

B. Annex A shows that the Independent Counsel's review was incomplete and potentially prejudiced

1. All the documents already form part of the Prosecution's disclosures at the confirmation stage

13. The Arido Defence hereby informs the Trial Chamber that all documents selected by the Independent Counsel are already in the possession of the Prosecution and have been made available to the parties through disclosures. Confidential Annex A contains a table indicating the Doc ID corresponding to the documents contained in Annex A2 of the Independent Counsel's report. In addition, amongst the 35 emails selected by the Independent Counsel, 33 were included in the Prosecution's or the Arido Defence's list of evidence for the confirmation stage.¹⁰

14. As a result, three points need to be made. First of all, there is no justification for the other

¹⁰ See Confidential *Ex Parte* Annex A.

parties to be given access to Annexes A, A1 and A2 of the Independent Counsel's report, since they are already in possession of the said material. This is particularly true in light of the fact that, as discussed below, Annex A to the report contains a number of prejudicial comments from the Independent Counsel, [REDACTED]. This is not the role of the Independent Counsel, whose function is solely to filter out privileged materials.

15. Secondly, the fact that the Independent Counsel does not make any reference to the substance of the Arido Defence's submissions on the confirmation of charges, where a number of emails are extensively discussed,¹¹ raises concern with the method used by the Independent Counsel. Particularly, it appears that the Independent Counsel ignored the position of the Defence altogether, and therefore may have filtered out emails which are relevant to charges because they support the Defence's case or discuss issues raised in the Defence case. This is discussed in further details in paragraphs 18 to 20 below. The Arido Defence particularly notes that certain emails which were contained in the Prosecution's disclosures and included in the Arido Defence's list of evidence are not contained in the selection made by the Independent Counsel. This is particularly the case of [REDACTED]. Clearly, this relates to D-2's credibility and is therefore of direct relevance to the charges.¹² Similarly, all communications between Mr. Arido, Mr. Kilolo and the VWU related to Mr. Arido's fears of testifying have not been considered as relevant by the Independent Counsel, even though they form a substantial part of the Arido Defence's submissions.¹³

16. Last but not least, the fact that the Prosecution already had access to items which the Pre-Trial Chamber considered could contain privileged information raises the question of the method by which the Prosecution obtained these emails. As a result, the Arido Defence requests the Trial Chamber to order the Prosecution to provide information to the Chamber and the Arido Defence as to how it obtained the items listed in Annex A of the present filing.

2. The Independent Counsel's comments in Annex A show a clear misunderstanding of the charges

17. The Arido Defence notes that the Independent Counsels makes a number of references to the charge of false documents, which has not been confirmed by the Trial Chamber.¹⁴ This is the

¹¹ See e.g. ICC-01/05-01/13-598-Conf, paras 121-129, 174-181, 250-253 and 312-313.

¹² ICC-01/05-01/13-598-Conf, paras 250-253, 312-313.

¹³ *Ibid.*, paras 124, fn. 94, 174-181.

¹⁴ ICC-01/05-01/13-749, paras 38-50, p. 55.

case for entries #117898301, #164213949, #47558152, #50804010, #50806124 and #79640155. It therefore appears that the Independent Counsel has been working with the DCC and not the current charging document, namely the decision on the confirmation of charges. This further supports the Arido Defence's position that the review undertaken by the Independent Counsel was inaccurate and incomplete.

18. In addition, it is clear that the Independent Counsel failed to take into consideration the position of the Arido Defence on a number of essential aspects of the Charges. In particular, it is obvious that the Independent Counsel is not aware, or ignored, the Arido Defence's position that the contacts between Mr. Kilolo and Mr. Arido related to the provision of an expert report by Mr. Arido to the Bemba Defence, and that any and all payment he received was the payment for the work he had done on the report.¹⁵ [REDACTED]. This, it is submitted, shows that the Independent Counsel did not take into consideration the position of the Defence when undertaking his review of the materials, and therefore that his review was incomplete.

19. Additionally, [REDACTED], on which the Arido Defence relied extensively in order to challenge D-2's credibility in its submissions on the confirmation of the charges,¹⁶ were not considered as "relevant" by the Independent Counsel. Additionally, all communications between Mr. Arido, Mr. Kilolo and the VWU related to Mr. Arido's fears of testifying have not been considered as relevant by the Independent Counsel, even though they form a substantial part of the Arido Defence's submissions.¹⁷

20. The Independent Counsel appears to be similarly unaware of the fact that Mr. Arido had concerns for his security as a result of being associated with the Bemba Defence, which led to his fleeing to France and which also led to his expression of disappointment regarding the conduct of Mr. Kilolo in handling this matter.¹⁸ Again, this shows that the Independent Counsel's review was incomplete.

21. As a result, the Arido Defence submits that this mitigates against the disclosure of Annex A to the Prosecution and the other Defence teams, since it presents an incomplete and, perhaps, biased view of the case.

¹⁵ ICC-01/05-01/13-598-Conf, paras 121-129.

¹⁶ *Ibid.*, paras 250-253, 312-313.

¹⁷ *Ibid.*, paras 124, fn. 94, 174-181.

¹⁸ ICC-01/05-01/13-598-Conf, paras 178-181.

3. Annex A shows that the Independent Counsel failed to undertake a neutral review and instead included his own interpretation of the charges

22. A number of comments contained in Annex A show, in the view of the Defence, that the Independent Counsel failed to undertake the review he was tasked with in a neutral and objective manner. The Independent Counsel included references to the name of certain individuals who were never mentioned in Mr. Arido's emails, links the contents of the email with the contents of the charges in a very liberal interpretative manner, and draws conclusion as to the meaning of the email, which runs contrary to his duty to approach the material in a neutral manner.

23. The following comments contain, it is submitted, the Independent Counsel's own interpretation of the emails, his speculations as to its meaning and his attempts to link them to the Prosecution's case:

- i. [REDACTED];
- ii. [REDACTED];
- iii. [REDACTED];
- iv. [REDACTED];
- v. [REDACTED];
- vi. [REDACTED].

24. The Arido Defence recalls that the role of the Independent Counsel should have been to simply to filter out items which are obviously irrelevant, or which contain privileged information. Clearly, by providing his own interpretation as to the meaning of the emails and by linking certain emails - which are subject to interpretation - to the charges, the Independent Counsel went beyond his mandate, and instead appears to have understood his assignment as collecting information which would support the Prosecution's case. This is impermissible.

25. [REDACTED].

26. The Arido Defence also respectfully requests the Trial Chamber to disregard the report of

the Independent Counsel as contained in Annex A to his report N. 845 for the purpose of assessing the charges against Mr. Arido.

C. Observations regarding the Independent Counsel's Proposed Redactions (Annex A1)

27. The Independent Counsel fails to provide explanations as to the method used when suggesting certain redactions to the contents of Mr. Arido's emails, as contained in Annex A2 of his report.

28. In addition, the Independent Counsel has made redactions in a more expanded manner than the Prosecution. All mention of Mr. Arido's interactions with the Court have been redacted.¹⁹ Similarly, when Mr. Arido describes his security concerns and [REDACTED], these too have been redacted by the Independent Counsel, but not the Prosecution in its disclosure.²⁰

29. In two instances, the Independent Counsel has redacted information which arguably indirectly relates to privileged communication or strategy yet contains no substance²¹, however the Prosecution opted to retain the content in its disclosure.

30. Finally, the Independent Counsel's redactions of email addresses are not obviously consistent. While the names and email addresses of the accused are left intact, with other email senders or recipients in some cases he redacts both the name and email address²², and in other circumstances he leaves both components unredacted²³. This is both less and more redacted than the Prosecution's disclosure. The Independent Counsel has left name and email visible where the Prosecution has redacted the email address²⁴, and he has also redacted both name and email where the Prosecution has redacted the name, but not the email address.²⁵

D. The DVD should be returned to Mr. Arido

¹⁹ See e.g. Entry #149211181, Entry #149200899, p. 7, and Entry #86390310, p. 46, of ICC-01/05-01/13-845-Conf-Exp-AnxA1.

²⁰ Compare ICC-01/05-01/13-845-Conf-Exp-AnxA1, Entry #127557831, p. 6, and CAR-OTP-0075-0567-R01.

²¹ Compare ICC-01/05-01/13-845-Conf-Exp-AnxA1, Entry #149200899, p. 7, and CAR-OTP-0075-0587, and Entry #79640155 and CAR-OTP-0075-0421-R01.

²² See e.g. ICC-01/05-01/13-845-Conf-Exp-AnxA1, Entry #79640155, p. 43.

²³ See e.g. ICC-01/05-01/13-845-Conf-Exp-AnxA1, Entry #163477545, p. 47.

²⁴ Compare ICC-01/05-01/13-845-Conf-Exp-AnxA1, Entry #163477545, p. 47, with CAR-OTP-0075-0634-R01 and Entry #200909359, p. 14, with CAR-OTP-0075-0751-R01.

²⁵ Compare ICC-01/05-01/13-845-Conf-Exp-AnxA1, Entry #86390310, p. 46, with CAR-OTP-0075-0478-R01.

31. The Arido Defence requests that the DVD containing the copy of Mr. Arido's email account be given back to Mr. Arido at the earliest opportunity, as he is the rightful owner of such material. This right was recognised by the Trial Chamber in its most recent decision on the Independent Counsel,²⁶ and the Arido Defence submits that such request is further supported by the fact that the Independent Counsel has failed to take into account the Arido Defence's submissions on the confirmation of the charges and has, as a result, omitted to include exculpatory material in his review. It is therefore essential that the Arido Defence be provided with the DVD used by the Independent Counsel for its own investigations.

IV. CONCLUSION

32. In light of the above, the Arido Defence respectfully requests the Trial Chamber to order that:

- i. The Independent Counsel and, if necessary, the Prosecution and the Registry report to the Trial Chamber and the Arido Defence regarding the questions related to the method used by the Independent Counsel, as contained in paragraph 9 above;
- ii. Annexes A, A1 and A2 shall not be given to the Prosecution or the other Accused;
- iii. The Prosecution informs the Trial Chamber and the Arido Defence as to how the emails from Mr. Arido came in its possession at the confirmation stage;
- iv. The Independent Counsel uses the confirmation of charges decision as a basis for his review, and includes information which support the Defence's position as contained in their respective submissions on the confirmation of charges;
- v. The Independent Counsel refrains from making comments or conclusions when reviewing material;
- vi. The DVD containing Mr. Arido's email account be given back to Mr. Arido.



Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 22nd Day of April 2015

²⁶ ICC-01/05-01/13-893-Red, para. 13.

In The Hague, The Netherlands.