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Date: **22 September 2015**

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

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 Document

**Prosecution Response to Narcisse Arido's Omnibus Motion for a Delay of the
Testimony of Witnesses P-0260 and P-0245 until Material Crucial to their
Credibility is Disclosed and/or Obtained**

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") opposes the Arido Defence's request for a delay in the testimony of witnesses P-0260 and P-0245 until certain material sought by the Arido Defence is disclosed and/or obtained ("Request").¹ The Request is unfounded, predicated on speculative assumptions and unsubstantiated assertions about the purportedly critical nature of the limited number of items sought.

2. The Prosecution has complied with its disclosure obligations and acted in accordance with the orders and decisions of Trial Chamber VII ("Chamber"). The Arido Defence has had access to the full transcripts of P-0260's and P-0245's statements since June 2014, well over a year ago. The Arido Defence has not established, nor can it reasonably suggest, any inability to prepare a meaningful cross-examination of P-0260 and P-0245 in these circumstances. The Request should be rejected.

II. Confidentiality

3. This filing is designated as "Confidential" because it responds to a Defence filing of the same designation. The Prosecution does not object to its reclassification as "Public".

¹ ICC-01/05-01/13-1261-Conf ("Request").

III. Submissions

4. The Arido Defence has not established that a postponement of P-0260's and P-0245's testimony is warranted. The Arido Defence's central claim—that “missing material yet to be obtained”² renders it unable to assess P-0260's and P-0245's credibility and prepare a meaningful cross-examination³—is, at best, unsubstantiated. The Arido Defence has had access to the principal material reflecting on P-0260's and P-0245's credibility—the transcripts of those witness's interviews with the Prosecution—for more than a year.⁴ The additional material sought by the Arido Defence would not significantly affect its ability to prepare a meaningful cross-examination of P-0260 and P-0245, if at all. Indeed, as detailed below, the material sought either does not exist, has already been disclosed, or is obviously marginal in view of what is already available.

A. The Prosecution has met its disclosure obligations with regard to its contacts with P-0245 and P-0260

5. The Prosecution has no further material to disclose in relation to its witness contacts with P-0245 and P-0260. As recently as 24 August 2015, the Trial Chamber found that “[t]here is no information suggesting that the Prosecution has under-disclosed the details of its relevant witness contacts.”⁵ The Arido Defence's speculative submissions⁶ do not establish otherwise.

² Request, para.42.

³ Request, para.43.

⁴ P-0245's and P-0260's statements were disclosed on 20 June 2014 in Pre-Confirmation INCRIM Package 15.

⁵ ICC-01/05-01/13-1172, para.20.

⁶ Request, paras.16-23.

B. The Prosecution has disclosed information about payments made to P-0245 and P-0260 in accordance with the Chamber's 24 August 2015 Order

6. Contrary to the Arido Defence's characterisation of the matter, there is no "lack of information"⁷ regarding payments made to P-0245 and P-0260 by the Prosecution. As the Arido Defence itself concedes,⁸ the Prosecution disclosed information regarding such payments on 9 September 2015,⁹ in accordance with the Trial Chamber's decision of 24 August 2015.¹⁰ Specifically, the Prosecution disclosed 60 witness related expenses.¹¹

7. The Arido Defence has not established that it lacks sufficient time to assess this limited material, only some items of which pertain to P-0245 and P-0260, in advance of their respective testimonies. Further, it has not established that any related material that may be disclosed in the future¹² is indeed so "crucial"¹³ or "indispensable"¹⁴ to its preparation of an effective cross-examination that it justifies an order postponing P-0245's and P-0260's testimony.

C. The limited redactions to the reports on P-0260's security situation do not justify a postponement of P-0260's testimony

8. The redactions to the Prosecution and VWU reports on P-0260's security are limited in nature and do not prevent the Arido Defence from investigating the matter, particularly given that the Accused's wife was one of the principal protagonists in the incident. Further, the document CAR-OTP-0082-1418 does not

⁷ Request, p.8.

⁸ Request, para.24.

⁹ ICC-01/05-01/13-1229.

¹⁰ ICC-01/05-01/13-1172.

¹¹ ICC-01/05-01/13-1229, para.3.

¹² The Prosecution plans to disclose a limited set of emails pertaining to witness expenses this week; the Prosecution is currently finalising redactions on this disclosure package.

¹³ Request, para.28.

¹⁴ Request, para.27.

contain any redactions to names of individuals. The Arido Defence's request for a lesser redacted version of this report including the "names of interest"¹⁵ is therefore moot.

9. Even if the Chamber orders less redacted versions of these documents, the Arido Defence would not be entitled to a postponement of the testimony of P-0260 on this basis, particularly given its unexplained delay in pursuing the matter. For example, one of the three documents for which the Arido Defence seeks a lesser redacted version (ICC-01/05-01/13-665-Conf-Anx)¹⁶ has been in the Arido Defence's possession since 12 August 2014, over a year ago.¹⁷ It is only now, with trial imminent, that the Arido Defence demands a lesser redacted version of this document, on the purported basis that such information is "indispensable in conducting investigations to assess the veracity of P-0260's allegations, and, therefore, his credibility".¹⁸ Presumably, if this information was indeed "indispensable", Arido would have sought it in a more timely fashion. The Arido Defence cannot divorce itself from the consequences of its own strategic decisions. And, its own failure to act cannot serve as a justification to postpone P-0260's testimony.

D. The Arido Defence is not entitled to a postponement of P-0260's and P-0245's testimony because of lack of access to certain call data records

10. The Arido Defence's present inability to examine the nine Cameroonian call data records ("CDRs") it references¹⁹ does not justify a postponement of P-0260's and P-0245's testimony.

¹⁵ Request, para.34; *see also* paras.35,45(b).

¹⁶ Request, paras.35, 45(a).

¹⁷ *See* ICC-01/05-01/13-665-Conf-Anx-Red, filed on 12 August 2015.

¹⁸ Request, para.35.

¹⁹ Request, paras.41,45(d).

11. *First*, the referenced CDRs are not in the Prosecution's possession. There has been no disclosure violation.

12. *Second*, the Arido Defence cites no legal precedent for the exceptional measure it requests, namely that the Chamber order the Prosecution to obtain material of interest to the Defence.²⁰ Such a request is particularly unreasonable where the Defence has failed to exhaust its own independent avenues to obtain the material; indeed, the Defence's request for the referenced CDRs, transmitted to the Registry less than one month ago,²¹ is pending.²² Nothing prevented the Defence from transmitting that request a year or more ago.

13. *Third*, the Arido Defence has not substantiated that it "cannot undertake a meaningful cross-examination of P-0260 and P-0245"²³ without the CDRs of P-0260 and P-0245. Instead, the Arido Defence offers only vague and hyperbolic conjecture, such as "there are no words strong enough to describe the importance of the CDRs of P-0260 and P-0245"²⁴, or the conclusory assertion that such CDRs would "reveal" contacts between the two witnesses, other Main Case witnesses, the OTP, and the Cameroonian Police.²⁵ Even if such contacts occurred and were discernible from the CDRs, it is unclear—and the Arido Defence does not explain—why this would be of "critical assistance in challenging the credibility of P-0260 and P-0245."²⁶

²⁰ Request, paras.41,45(d). The Prosecution's article 54(1)(a) obligations—referenced at paragraph 41 of the Request—do not supplant the role of the Defence to investigate and prepare a defence.

²¹ See Request, para.41; ICC-01/05-01/13-1261-Conf-AnxB (containing the Arido Defence's cooperation request concerning, *inter alia*, call data records, dated 26 August 2015).

²² Further, the Arido Defence does not explain why the exceptional relief sought is necessary, in view of the fact that it can itself approach the Chamber for an order to obtain the material pursuant to article 64(6)(b) of the Statute.

²³ Request, para.40.

²⁴ Request, para.40.

²⁵ Request, para.40.

²⁶ Request, para.40.

IV. Relief Requested

14. Based on the foregoing reasons, the Chamber should reject the Request.



Fatou Bensouda, Prosecutor

Dated this 22nd Day of September 2015
At The Hague, The Netherlands