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Court**



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

Date: **4 November 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, AIMÉ KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA
WANDU AND NARCISSE ARIDO**

Confidential with Confidential Annexes A and B

**Public Redacted Version of ‘Narcisse Arido’s Omnibus Motion for a Delay of the
Testimony of Witnesses P-260 and P-245 until Material Crucial to Their Credibility is
Disclosed and/or Obtained’ (ICC-01/05-01/13-1261-Conf)**

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. Less than two weeks before trial, the Prosecution is still withholding or has otherwise failed to secure key material pertaining to witnesses P-260 and P-245. The Arido Defence is seeking the appropriate remedies to obtain that material, and in the meantime is left with no other choice but to request that the testimony of P-260 and P-245 be delayed until such materials are in its possession.

2. As can be seen below, the Arido Defence has pursued resolution of these issues to the extent possible through the Registry, disclosure requests to the Prosecution, and filings, and now facing an imminent opening to trial, respectfully invites the Trial Chamber VII (herein after ‘Trial Chamber’) to reflect upon the impact that the varied facts and circumstances outlined in this filing will have upon the fairness of the trial and thereby the determination of guilt or innocence of Mr. Arido.

3. The central argument put forward here is that requesting the Arido Defence to cross-examine P-245 and P-260 under the prevailing circumstances would violate Mr. Arido’s right to test the evidence against him, as effective cross-examination would be impossible in the absence of the information listed below.

II. CLASSIFICATION

4. Pursuant to Regulation 23*bis* of the Regulations of the Court (‘RoC’) and Regulation 24 of the Regulations of the Registry (‘RoR’), this request is submitted as confidential, as it refers to confidential evidence and decisions. As the contents of this filing relates to issues that may be put to witnesses, and this could enable a witnesses to prepare for challenges, a public redacted version will not be filed until after their testimony.

III. PROCEDURAL HISTORY

5. At the 24 April 2015 Status conference, the Trial Chamber requested the parties to – where reasonable – pursue issues *inter partes* before seizing the Chamber.¹

6. On 22 May 2015, the Trial Chamber set the date of the trial to Tuesday 29 September 2015.²

¹ ICC-01/05-01/13-T-8-CONF-ENG, p. 4, lines 16-20.

7. On 9 September 2015, the Prosecution indicated that it intends to call witnesses P-245 and P-260 secondly and thirdly.³

8. On 10 August 2015, responding to a Trial Chamber order, the Arido Defence filed a series of motions which, in its view, required “resolution prior to the commencement of trial and which are not already before the Chamber”.⁴ Then, on 21 August 2015, in light of the provision of crucial information contained within a redacted version of a report being made available after the 10 August 2015 cut-off date, the Arido Defence filed an Addendum to supplement its motions and requested *inter alia* “to order the Prosecution to unredact the names of individuals with whom P-0260 talked about [REDACTED] and about his evidence in the present case”⁵.

IV. APPLICABLE LAW

9. Article 64 (2) of the Statute obliges the Trial Chamber to “ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused”. Two of the rights that are protected by this provision are located in Article 67 (1) (b) and (e). Article 67 (1) (b) guarantees any Accused the right to have adequate time and facilities for the preparation of the defence, and Article 67 (1) (e) the right to examine, or have examined, the witnesses against him or her.

10. Article 54 (1) (a) of the Statute obliges the Prosecution to “establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally”.

11. According to its code of conduct, the Prosecution has the duty to act with professional ethics and integrity⁶ and must conduct investigations with the goal of establishing the truth,⁷ considering all relevant circumstances when assessing evidence, “irrespective of whether they are to the advantage or the disadvantage of the Prosecution”.⁸ It shall also “ensure that all necessary

² ICC-01/05-01/13-960.

³ ICC-01/05-01/13-1219-Conf-AnxA.

⁴ ICC-01/05-01/13-960, para. 14.

⁵ ICC-01/05-01/13-1165-Conf, para. 24.

⁶ Code of Conduct for the OTP, Article 8 (b).

⁷ *Ibid.*, Article 49 (a).

⁸ *Ibid.*, Article 49 (b).

and reasonable enquiries are made [...] whether they point to the guilt or the innocence of the suspect”.⁹

12. Pursuant to Article 67 (2) of the Statute, the Prosecution shall, as soon as practicable, disclose to the defence evidence in its possession or control which may affect the credibility of Prosecution evidence. In accordance with Rule 77 of the RPE, the Prosecution must permit the Defence to have access to items in the possession or control of the Prosecution which are material to the preparation of the Defence.

V. SUBMISSIONS

A. Background

13. P-260 testified in the main case on [REDACTED] 2013, and then gave an interview to the Office of the Prosecutor (“OTP”) on 2, 3, and 29 April 2014, and 5 November 2014. P-245 testified in the main case on [REDACTED] 2013 and then gave statements to the OTP on 28 February, 1 March, 29 April, and 5 November 2014.

14. P-260 and P-245 are now due to testify in the first weeks of this trial. While a concrete date has not been fixed, according to the Prosecution’s estimate of one day per witness, P-245 will start testifying around 5 October 2015, and P-260 on 8 October 2015, at the earliest.

15. In their interviews to the Prosecution, [REDACTED] after their testimony in the main case, P-260 and P-245 claim that they lied when giving evidence in the main case in exchange for money and promises of relocation. Despite the Defence’s attempts to know more about the circumstances leading to P-260 and P-245 alleged recantation, the Prosecution maintains a sealed lid on the period leading to that recantation. The Arido Defence submits that the circumstances leading to the recantation of P-260 and P-245, and their interaction with the Prosecution and/or the VWU in the process is crucial to appreciate the credibility of these witnesses, and constitute material which must be secured before these witnesses are heard. Considered with the witnesses statements, email communications and other material so far disclosed, the material sought, if disclosed, will significantly impact on the credibility P-260, P-245, and the integrity of the Prosecution case. It is submitted that this will assist the Trial Chamber in having a complete view of the facts which will ultimately assist it in its determination of the truth.

⁹ *Ibid.*, Article 49 (c).

B. Failure to disclose material generated in meetings and/or conversations with P-260 and P-245

16. Despite several requests for disclosure to the Prosecution,¹⁰ the Defence has yet to receive any information on the contacts between the Prosecution and P-260 and P-245 that led to them giving an interview with the Prosecution’s representatives in February, March, and April 2014. The Prosecution implicitly suggests that these two witnesses simply decided – overnight – to recant the testimony that they had made in [REDACTED] 2013 in the main case.

17. Although there are very little traces of the contacts between P-260, P-245, and [REDACTED], the OTP investigator who had been in touch with them, there is nevertheless dim evidence of the contacts leading to these statements. For example, the interview of P-260 by [REDACTED] and [REDACTED], [REDACTED] (identified as interviewer 1) starts a question with these words:

“[REDACTED]”¹¹

18. According to [REDACTED], the goal of that meeting was to “[REDACTED]”¹². Following that meeting, [REDACTED] and P-260 went on to say:

“[REDACTED]”¹³

19. And [REDACTED] then reminds P-260 of the purpose of the meeting, which is: [REDACTED].¹⁴

20. Although the circumstances surrounding P-245’s first interview to the Prosecution were not confirmed by him in such details, in transcript CAR-OTP-0085-0869, he confirms that he was first contacted by [REDACTED] before meeting [REDACTED].¹⁵

¹⁰ See Confidential Annex A which contains *inter partes* disclosure requests to the Prosecution and some responses thereto. Included are Letter of 5 May 2015, ‘Request for Disclosure #1’, *inter alia* section D; Letter of 8 May 2015, ‘Request for Interview with Prosecutor investigators’; Letter of 8 June 2015, ‘Follow up on clarification of 19 May 2015 Disclosure’; Letter of 13 July 2015, ‘Follow-up to Request to OTP to Interview Investigators’; Letter of 15 July 2015, ‘Request for Disclosure of Material derived from [REDACTED]’; Letter of 16 July 2015, ‘Request for disclosure of OTP-VWU records’; and Letter of 21 August 2015, ‘Arido Defence follow up OTP RFA [REDACTED]’.

¹¹ CAR-OTP-0080-0007, lines 334-340.

¹² *Ibid.*, lines 342-347.

¹³ *Ibid.*, lines 369-374.

¹⁴ *Ibid.*, lines 377-379

¹⁵ CAR-OTP-0085-0869, lines 408-425.

21. What appears to be the case from what is available so far is that the Prosecution used an intermediary – [REDACTED] – to make contact with P-260 and P-245 immediately prior to giving their interviews to the OTP. Only a careless Prosecution would fail to keep records of such meetings with witnesses, and failing to do so when meeting witnesses claiming that they can lie for money would be quite a lapse in judgement. The Defence submits that it is entitled to receive disclosure of any material generated during the meetings with P-260 and P-245 that preceded their first interviews.

22. The Defence is also entitled to know precisely under which “accords de cooperation” (or RFAs) the OTP and the [REDACTED] authorities were operating, to assess the manner in which the initial contacts were made with P-260 and P-245, if they were indeed the initial contacts, and whether such contacts could have had an impact on the reliability of P-260 and P-245’s evidence. This is a case of alleged improper interference with witnesses, and both P-245 and P-260 have stated having been “manipulated” in order to lie before the Court. Assessing whether any other sort of interference could have taken place following their testimony in the main case and their interviews with the Prosecution is material to the preparation of the Defence. Should there be evidence that the manner in which P-245 and P-260 were approached was improper – for instance, if they were threatened by [REDACTED] – certainly can have an impact on their credibility and the reliability of their evidence.

23. On this aspect, the Arido Defence recalls that at the Confirmation stage, D-4 reported that [REDACTED] also tried to contact him, saying that “[REDACTED]”¹⁶ and asking him to meet with the Prosecution.¹⁷ D-4 was very scared and fled to the border.¹⁸ He also gave evidence that P-245 called him, saying that he was really threatened by [REDACTED] on behalf of the Prosecution and fled to go to his wife’s village. One day, on the phone P-245 told D-4 that he sent [REDACTED] to meet the Prosecution first.¹⁹ After that he never called back.²⁰

¹⁶ CAR-D21-0004-0310, p. 15 (0324).

¹⁷ *Ibid.*, p. 17 (0326).

¹⁸ *Ibid.*

¹⁹ CAR-D21-0004-0310, p. 17 (0326).

²⁰ *Ibid.*

C. The lack of information regarding payments made to P-245 and P-260 by the Prosecution

24. On 9 September 2015, the Defence received disclosure of documents detailing some payments that were made between June 2014 and December 2014 to P-260 and P-245,²¹ including some rent, “allocation familiale” for P-260, a monthly allowance for P-245, electricity, moving costs, windows, etc. The Arido Defence submits that such information – in the present context – clearly fell under Article 67 (2) or, at the very least Rule 77. As a result, the ability of the Arido Defence to investigate the said matter in a timely manner has been prejudiced by the Prosecution’s late disclosure. The Arido Defence submits that it is also entitled to know if further similar benefits have been paid and/or promised to the witnesses, and under what agreements or what scheme such amounts have or are being paid. Until such information is at the disposal of the Arido Defence, its ability to properly investigate – and therefore its ability to effectively cross-examine P-245 and P-260 – is significantly impaired.

25. Indeed, knowing the extent to which a given testimony may be the result of benefits or expectations of benefits is crucial, particularly for witnesses such as those that will be heard in this case. The Prosecution has the utmost duty to satisfy the Court that P-260 and P-245 are not lying now simply to receive benefits from the Court. To that end, the Defence is entitled to obtain all the material concerning the benefits that were given and promised to these witnesses, as well as any agreement between the witnesses and the OTP (and/or the VWU).

26. The disclosure of 9 September 2015 also reveals that [REDACTED] went to [REDACTED] at the end of May 2014 to give some money to P-260 and P-245.²² According to the documentation that was provided, [REDACTED] then paid the witnesses directly for their allowances, rents and other moving costs. Apart from receipts and “attestations de reconnaissance” the Defence has received no records whatsoever of these meetings between [REDACTED] and P-260 and P-245. Particularly where the Prosecution has brought charges on alleged improper payments alleging similar demands, the Arido Defence submits that such payments should be made by the VWU or the Prosecution’s VWU, but not by its [REDACTED]. Here, the [REDACTED] rather than VWU has apparently become the handler of P-260 and P-245. The Defence is entitled to fully investigate the relations between [REDACTED] and the witnesses that recanted their testimonies.

²¹ ICC-01/05-01/13-1229.

²² Summaries can be found in CAR-OTP-0090-2121 (P-260) and CAR-OTP-00902120 (P-245).

27. Despite repeated requests to that effect, the Prosecution is failing to provide the Defence with the above-mentioned material, which is indispensable for the preparation of, and the cross-examination proper of these two witnesses since, as stated above, they have the potential of discrediting them.

28. The Arido Defence submits that it is entitled to obtain the postponement of the testimony of P-260 and P-245 until such time where that material is received. Delaying the testimony of P-245 and P-260 would preserve Mr. Arido's right to cross-examine witnesses against him – something that cannot effectively be done at the present time in the absence of crucial information – and, it is submitted, would not prejudice the other Defence teams nor the Prosecution as it would not cause any delay in the trial.

D. The redactions on the Prosecution and VWU's reports regarding P-260 prevents the Arido Defence from properly investigating the matter

29. The Defence recently received three documents that were produced after P-260 called the Prosecution to complain about his security.

30. CAR-OTP-0082-1418, prepared on 16 July 2014 by [REDACTED], and ICC-01/05-01/13-1144-Conf-Anx-Red – the VWU assessment of the same event – concern an alleged incident that occurred on 15 July 2014 as P-260 was [REDACTED]. According to these reports, [REDACTED], following which, P-260 talked to and met a number of individuals who appear to be linked to the case.

31. Apart from a few disconcerting hints, the documents are so heavily redacted that it is next to impossible to understand precisely what P-260 did following this encounter. In view of his background, it is conceivable that this could be one of P-260's schemes to extract more money from the ICC system. To properly assess this, the Defence should be entitled to have access to unredacted versions of these reports, to eventually inquire with the individuals, whose names have been so far edited, and to see whether there is any truth in P-260's story. It further notes that, regarding the VWU report, the Registry only requested that the information concerning the VWU's internal operational procedures be redacted.²³ It is unclear to the Arido Defence why additional information – including the name of individuals to whom P-260 appear to have talked

²³ ICC-01/05-01/13-1144-Conf-Red, para. 5.

– were redacted. It submits that the right of Mr. Arido to defend himself requires that such redactions be lifted. This has a direct bearing on P-260's credibility in general, and in particular regarding any possible underlying motive he may have to testify against Mr. Arido.

32. The Defence is very sensitive to the security of individuals and witnesses in these procedures, and fully adheres to the existing protocols in place to insure compliance with the various protective measures in effect in this case. Thus, the mere provision of the names of critical individuals will not put these individuals or the Prosecution's witnesses at risk. Presumably, the redacted persons are other main case witnesses who the Defence is entitled to meet. To withhold the names of the individuals who are in a position to contradict P-260 on these issues is causing prejudice to the Defence, and prohibiting it from having access to key exculpatory material.

33. Apparently, [REDACTED] called P-260 back on 27 August 2014. Incidentally, P-260 had some issues he wanted to share with the ICC. This time, P-260 had heard from a friend that [REDACTED]. He also complained about [REDACTED].

34. P-260 revisited the incident of 15 July 2014, but again all the names of interest have been redacted, which makes the events undecipherable. P-260 talked about the evidence he gave to the Prosecution in the present case to other individuals in [REDACTED], and also talked about Mr. Arido and his motives for giving evidence against him. While their identity is redacted, it is clear that these individuals are [REDACTED] and know Mr. Arido and [REDACTED]. The Prosecution's investigator himself noted that discussing his evidence with these individuals could affect the credibility of P-0260 evidence, and informed him as such.²⁴ Finally, the Registry's account of this episode concludes by stating "the admission by CAR-0260 that he had voluntarily divulged information concerning his activities with Arido to individuals who are [REDACTED] illustrates CAR-0260's poor judgement".²⁵

35. The Arido Defence respectfully submits that the names of the individuals referred to in the Prosecution's and VWU reports, to whom P-260 talked about [REDACTED] and about his evidence in the present case, are material to the preparation of the Defence, as they are indispensable in conducting investigations to assess the veracity of P-260's allegations, and therefore, his credibility. As a result, the Defence therefore requests versions of CAR-OTP-0082-1418, ICC-01/05-01/13-665-Conf-Anx, and ICC-01/05-01/13-1144-Conf-Anx-Red without

²⁴ ICC-01/05-01/13-665-Conf-Anx-Red, p. 4: [REDACTED]

²⁵ ICC-01/05-01/13-1144-Conf-Anx-Red.

redactions being put on the names of the individuals to whom P-260 talked, before the cross-examination of P-260 and P-245.

E. The Cameroon Call Data Records ('CDRs')

36. In addition to having them contacting P-260 and P-245 on their behalf, the Prosecution obtained other forms of cooperation from [REDACTED].

37. Although the Defence would prefer to obtain all the RFAs that were sent to the [REDACTED] authorities, at the moment two of these stand out. These are the RFAs that lead to the correspondence of 3 June 2013²⁶ and 11 April 2014²⁷ from the [REDACTED]. The Defence notes with surprise that there is no correspondence accompanying the documents that were sent from [REDACTED] to the OTP. Such correspondence could have allowed a better tracking of what was sent to and received from [REDACTED], and permit the Defence to assess the legality of the documents provided.

38. Apart from its missing underlying RFA and accompanying correspondence, the letter of 3 June 2013 reveals the swiftness with which [REDACTED] authorities can execute RFAs received from the OTP. Indeed, CAR-OTP-0073-0020 reveals that the representative from [REDACTED], after receiving the Director of Judicial Police request of 28 May for the CDRs of Mr. Arido and [REDACTED], was able to send the required CDRs on 30 May 2014. Three days later on 3 June 2013, the Director sent to the Prosecution a rough analysis of these CDRs. Clearly, it is possible to rapidly obtain CDRs in [REDACTED] – and even have them analysed.

39. At some unknown date before 11 April 2014, the Prosecution requested the CDRs, from at least June 2012, of P-260, P-245, D-4 and D-6, amongst other individuals. Unfortunately, it seems that this time around, the Prosecution not only received the correspondence without accompanying correspondence, but also without accompanying documents at all. When required to do so by the Defence, the Prosecution refused to acknowledge whether it had made any efforts to obtain these CDRs, simply claiming that “the Prosecution has disclosed all material to which the Defence is entitled under the statutory framework”.²⁸

²⁶ CAR-OTP-0073-0003.

²⁷ CAR-OTP-0084-0157.

²⁸ See letter of 27 July 2015, 'OTP/PD/20150727/OST', in confidential Annex A to this filing.

40. There are no words strong enough to describe the importance of the CDRs of P-260 and P-245, since at least June 2012, and possibly until as late as April 2014. These CDRs would cover the period of their testimony, up until the period where they gave statements to the OTP. Any contacts between themselves, but also with other main case witnesses would be revealed. Contacts with the OTP and [REDACTED] would also be revealed. This material can be of critical assistance in challenging the credibility of P-260 and P-245. Absent such crucial information, the Arido Defence submits that it cannot undertake a meaningful cross-examination of P-260 and P-245, and that the Trial Chamber will not be presented with the full picture, which will be detrimental to its truth-seeking mission.

41. Following its obligation to pursue the truth as found in Article 54 (1) (a), the Defence considers that in view of the importance of that material, the Prosecution has a heightened obligation to obtain this material during his investigations. Further, in light of [REDACTED]'s acknowledgement that there are [REDACTED], since it appears that CDRs can be obtained very swiftly, and considering also that the Defence has made diligent efforts through the Prosecution,²⁹ the Registry³⁰ and the [REDACTED] authorities themselves³¹ to obtain these documents, without success, it is submitted by the Defence that in those very specific circumstances, and taking into account the high burden that rests on the Prosecution's shoulders in investigating objectively and thoroughly, that the Prosecution should seek, obtain and disclose the 9 CDRs that are mentioned as accompanying the letter of 11 April 2014.

F. Postponing the testimony of P-260 and P-245

42. In view of the missing material yet to be obtained concerning P-260 and P-245, and considering that the responsibility for depriving the Defence of that material rests solely on the Prosecution's shoulders, it is submitted that the testimony of P-260 and P-245 should be postponed until a date where the areas of disclosure mentioned above are properly resolved and until the Arido Defence can complete its investigations on the above mentioned matters.

43. The Defence submits that it cannot proceed to effectively cross-examine P-260 and P-245 without the documents and information mentioned in the present motion. As a result, it requests

²⁹ See footnote above, and more generally items in the letter of 5 May 2015, 'Request for Disclosure #1', in confidential Annex A to filing.

³⁰ The *Note Verbale* entitled 'Demande de coopération aux fins de communication de documents et d'enregistrement de données d'appel' and confirmation of receipt in confidential Annex B.

³¹ [REDACTED]

that P-245 and P-260's testimony be delayed until the end of the Prosecution's case. In the alternative, it suggests that P-245 and P-260's cross-examination only be postponed until the end of the Prosecution's case. Finally, in the further alternative, the Arido Defence requests the advance authorisation to seek the recall of P-245 and P-260 in order to discuss the additional documents.

VI. CONCLUSION

44. In light of the above, the Arido Defence respectfully requests Trial Chamber VII to:

- a. ORDER the testimony of P-260 and P-245 be delayed until the documents described in paragraphs 16, 22, 24, 31, 34 and 39 are obtained, or at least ORDER that their cross-examination by the Arido Defence be delayed until the Arido Defence obtains the requested documents; or, in the alternative,
- b. ORDER that the Prosecution's witness order be changed such that P-260 and P-245 testify last in the OTP case; or, in the further alternative,
- c. PERMIT the recall of P-260 and P-245 once the Arido Defence obtains the documents listed in paragraphs 16, 22, 24, 31, 34 and 39 above.

45. In addition, the Arido Defence respectfully requests the Trial Chamber to:

- a. RULE on the Arido Defence's request for an a less redacted version of the Report of Prosecution's investigator [REDACTED] regarding [REDACTED]³² as requested in filing ICC-01/05-01/13-1165-Conf;
- b. ORDER the Prosecution to file a less redacted version of CAR-OTP-0082-1418, removing the redactions on the names of individuals to whom P-260 talked;
- c. ORDER that the redactions applied to the VWU security report on P-260 (ICC-01/05-01/13-1144-Conf-Anx-Red) related to the individuals to whom P-260 talked about [REDACTED];

³² ICC-01/05-01/13-665-Conf-Anx-Red.

- d. ORDER the Prosecution to obtain from [REDACTED] the CDRs attached to CAR-OTP-0084-0157;
- e. ORDER the disclosure of material listed in paragraphs 16, 22 and 24 above.

A handwritten signature in black ink, appearing to read 'Charles', with a long, sweeping horizontal stroke extending to the right.

Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 4th Day of November 2015

The Hague, The Netherlands