

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/05-01/13
Date: 19 February 2016

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Single Judge

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

**Decision on Prosecution Request to Obtain Contact Information of Defence
Witnesses**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

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Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Gosnell

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Others

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber VII ('Single Judge' and 'Chamber', respectively) of the International Criminal Court, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Articles 64(6)(f) of the Rome Statute ('Statute') and Rules 16-18 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Prosecution's Request to Obtain Contact Information of Defence Witnesses'.

I. Procedural History

1. On 20 July 2015, the Chamber issued a decision setting out a protocol on handling confidential information and contact between a party and witnesses from other parties ('Protocol').¹
2. On 10 February 2016, the Office of the Prosecutor ('Prosecution') filed an application seeking to obtain the contact information of five defence witnesses ('Request').²
3. On 15 February, the defence teams for Mr Arido ('Arido Defence')³ and Mr Kilolo ('Kilolo Defence')⁴ filed their responses ('Arido Response' and 'Kilolo Response', respectively).
4. On 16 February, due to the urgency of the Request, the Single Judge transmitted the operative part of this decision to the parties and the Registry via email.⁵

¹ Decision adopting a Protocol on the Handling of Confidential Information during Investigations and Contact Between a Party and Witnesses of the Other Parties, ICC-01/05-01/13-1093, with an annex, ICC-01/05-01/13-1093-Anx, containing the Protocol.

² Prosecution's Motion to Obtain the Contact Information of Witnesses D24-P-0002, D24-P-0003, D24-P-0009, D24-P-0011, and D24-P-0012, ICC-01/05-01/13-1619-Conf with three annexes, one confidential *ex parte*, Prosecution, defence for Mr Arido and VWU only and two confidential ones.

³ Narcisse Arido's Response to the 'Prosecution's Motion to Obtain the Contact Information of Witnesses D24-P-0002, D24-P-0003, D24-P-0009, D24-P-0011, and D24-P-0012' (ICC-01/05-01/13-1619-Conf), ICC-01/05-01/13-1630-Conf, with two confidential *ex parte* annexes, available only to the Prosecution and the Arido Defence.

⁴ Réponse à la "Prosecution's Motion to Obtain the Contact Information of Witnesses D24-P-0002, D24-P-0003, D24-P-0009, D24-P-0011, and D24-P-0012, (ICC-01/05-01/13-1619-Conf)", ICC-01/05-01/13-1629-Conf.

II. Submissions

5. The Prosecution submits that two of the witnesses the Arido Defence intends to call, witness D24-2 and D24-3 ('First Group'), already provided their consent to be contacted by the Prosecution and requests that the Prosecution be provided with their contact details.⁶ In respect of three other witnesses the Arido Defence intends to call, D24-9, D24-11 and D24-12 ('Second Group'), the Prosecution submits that it requested the Arido Defence several weeks ago to enquire if they were willing to be contacted by the Prosecution. Since the Arido Defence is unable to contact them, it requests that the Victims and Witnesses Unit ('VWU') be instructed to ask the Second Group if they are willing to being contacted by the Prosecution.⁷
6. In respect of the First Group, both defence teams submit that the Request should be rejected. They argue that the Prosecution's intent to interview the First Group under Article 55(2) of the Statute, and therefore treat these persons 'as suspects' instead of 'witnesses', signifies that the Protocol does not apply in the current situation.⁸ The Kilolo Defence also argues that any consent provided by the witnesses was without the knowledge that the Prosecution intended to interview them pursuant to Article 55(2) of the Statute and is therefore invalid.⁹

⁵ Email from Trial Chamber VII to the parties on 16 February 2016, at 15:24, in which the Singe Judge:

- Ordered the Defence for Mr Arido to provide the contact details of D24-P-0002, D24-P-0003 to the Prosecution forthwith;
- Ordered the Prosecution, when contacting D24-P-0002, D24-P-0003, to disclose that it plans on interviewing them under Article 55(2) of the Rome Statute and request if they still agree to be interviewed;
- Ordered the Prosecution to tell the VWU if it plans on conducting the interviews with D24-P-0009, D24-P-0011, and D24-P-0012 under Article 55(2) of the Statute;
- Orders the VWU to contact D24-P-0009, D24-P-0011, and D24-P-0012, if possible, in order to enquire if they agree being interviewed by the Prosecution, telling them should the Prosecution intend to interview them under Article 55(2); and
- Ordered the VWU to provide to the Prosecution the contact details of the witnesses who agree to be contacted by the Prosecution.

⁶ Request, ICC-01/-05-01/13-1619-Conf, para. 16.

⁷ Request, ICC-01/-05-01/13-1619-Conf, para. 18.

⁸ Arido Response, ICC-01/05-01/13-1630-Conf, paras 15 and 17 and Kilolo Response, ICC-01/05-01/13-1629-Conf, para. 9.

⁹ Kilolo Response, ICC-01/05-01/13-1629-Conf, paras 12-14.

7. With regard to the Second Group, the Arido Defence submits that, should the Prosecution also intend to interview these witnesses under Article 55(2) of the Statute, the Protocol does not apply, since this would not be a case of contacting witnesses of other parties but suspects.¹⁰ Accordingly, it submits that the Prosecution should first indicate if it intends to interview these witnesses pursuant to Article 55(2) of the Statute. Only if this is not the case should the Request with regard to this group be granted.¹¹

III. Analysis

8. The issue at hand seems to be caused by different understandings of the purpose of Article 55(2) of the Statute. Article 55(2) sets out the minimum procedural guarantees for persons who are questioned by the Prosecution or by national authorities upon a co-operation request. These guarantees include the right to remain silent, the right to legal assistance and the right to have counsel present while being questioned. Rule 112 of the Rules sets out specific conditions for the recording of such interviews and Rule 113(1) of the Rules pays further heed to the fact that a person benefits from the safeguards of Article 55(2) of the Statute by providing the possibility of a medical, psychological or psychiatric examination of this person.
9. In order for a person to enjoy these safeguards, Article 55(2) of the Statute stipulates that there must be ‘grounds to believe that [he or she] has committed a crime with the jurisdiction of the Court’. This is an objective criterion, irrespective of whether or not this person is the active target of a Prosecution investigation. The prosecutorial intent to interview that person ‘as a witness’ or ‘as a suspect’ is no factor in the determination if Article 55(2) of the Statute applies. Accordingly, the Prosecution would violate its obligations if it questioned a person for whom it

¹⁰ Arido Response, ICC-01/05-01/13-1630-Conf, paras 33.

¹¹ Arido Response, ICC-01/05-01/13-1630-Conf, paras 1, 33 and 34.

had grounds to believe committed a crime within the jurisdiction of the Court without applying the safeguards in Article 55(2). The Single Judge further notes that Article 55(2) of the Statute has been repeatedly applied in interviews of people being questioned by the Prosecution as witnesses,¹² including in this case.¹³

10. Considering the above, the Single Judge finds that the Protocol does apply in the present case. However, the fact that the Prosecution is in possession of information which give grounds to believe that a person has committed a crime within the jurisdiction of the Court might influence that person's decision as to whether he or she wishes to be contacted by the Prosecution or not. Accordingly, the Prosecution is to disclose this information when contacting the First Group.
11. In respect of the Second Group, and considering the above, the Single Judge finds that paragraph 37 of the Protocol applies and accordingly instructs the VWU to request these witnesses whether they agree to be contacted by the Prosecution. As with the First Group, the Prosecution is to disclose if it is in possession of information which gives grounds to believe that this person has committed a crime within the jurisdiction of the Court, meaning that the interview will be conducted pursuant to Article 55(2) of the Statute.

¹² See for instance, Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Hearing on 13 August 2008, ICC-01/04-01/06-T-79-ENG ET, p. 4, lines 12-16; Trial Chamber VI, *Prosecutor v. Bosco Ntaganda*, 16 September 2015, Public redacted version of Decision on request for in-court protective measures relating to P-0901, ICC-01/04-02/06-828-Red, para. 4; Trial Chamber I, *Prosecutor v. Laurent Gbagbo*, Decision on Prosecution's request for an extension of time to disclose certain material, 9 March 2015, ICC-02/11-01/11-804-Red, para. 7.

¹³ See only, Decision on Defence Request for Disclosure of Information concerning the Fourteen Witnesses ICC-01/05-01/13-1172, 24 August 2015, para. 14, footnote 21.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

ORDERS the Defence for Mr Arido to provide the contact details of D24-P-2, D24-P-3 to the Prosecution forthwith;

ORDERS the Prosecution, when contacting D24-P-2, D24-P-3, to disclose that it plans on interviewing them under Article 55(2) of the Statute and request if they still agree to be interviewed;

ORDERS the Prosecution to inform the VWU if it plans on conducting the interviews with D24-P-9, D24-P-11, and D24-P-12 under Article 55(2) of the Statute;

ORDERS the VWU to contact D24-P-9, D24-P-11, and D24-P-12, if possible, in order to enquire if they agree being interviewed by the Prosecution, informing them whether the Prosecution intends to interview them under Article 55(2) of the Statute; and

ORDERS the VWU to provide to the Prosecution the contact details of the witnesses who agree to be contacted by the Prosecution.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Single Judge

Dated 19 February 2016

At The Hague, The Netherlands