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

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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**

Public

**With Confidential *Ex Parte* Annexes A and B
only available to the Prosecution and Arido Defence**

**Public Redacted Version “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), filed 15 February 2016**

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

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I. INTRODUCTION

1. The Prosecution seeks Trial Chamber VII ('Trial Chamber') to order the Victims and Witness Unit ('VWU') to provide the contact information for Defence witnesses D24-0002 and D24-0003 ('First Group') and D24-0009, D24-0011, and D24-0012 ('Second Group'). With regards to the First Group, the Trial Chamber should reject the request due to the manner in which the request has arose and its incompatibility with the applicable rules. With regards to the Second Group of witnesses, it is submitted that the Trial Chamber should order the Prosecution to indicate whether it considers these witnesses to be suspects and only consider granting the request upon receipt of an unequivocal no.

II. CONFIDENTIALITY

2. 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 confidential as it refers to a filing of the same classification.

III. PROCEDURAL HISTORY

3. On 20 July 2015, the Trial Chamber adopted its 'Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party and Witnesses of the Other Parties' ('Witness Approach Protocol').¹ The protocol regulates and enables contact between parties and the consenting witnesses of other parties.

4. Much of the chronology of events is outlined in Annex A.2 to the Prosecution's Request. In summary form, the Prosecution requested the Defence to communicate a request for interviews on 31 December 2015.² Having registered concern regarding the broad nature of the request, the Arido Defence responded to the Prosecution's request on 8 January 2016.³ Subsequently, on 22 January 2016, the Arido Defence raised the prospect of the VWU coordinating a video-link *in lieu* of the procedural obstacle presented by the Prosecution's request to interview the witnesses after the standard cut-off date for contact.⁴

¹ ICC-01/05-01/13-1093-Anx.

² ICC-01/05-01/13-1619-Conf ('Prosecution Request'), Annex A.2, p. 14.

³ *Ibid.*, p. 12.

⁴ *Ibid.*, pp. 10-11.

5. On 3 February 2016, the Arido Defence contacted the Counsel Support Section to bring to their attention the possibility of a last-minute mission. The formal mission request was submitted on 5 February 2016 at 9:50am.⁵

6. On 4 February 2016, the Arido Defence confirmed that the witnesses were able to travel and confirmed the availability of the Defence and the witnesses around the proposed time period.⁶

7. On 5 February 2016, the Prosecution then requested copies of the passports of the Fierst Group of witnesses at 3:17pm.⁷ The same day, the Arido Defence indicated that a neutral body – the Registry – should facilitate the purchase of plane tickets and handling of information. The Defence also inquired as to the oblique reference to arranging “legal representation” for the witnesses; to which, the Prosecution responded on 5 February 2016, that it considered the witnesses suspects.⁸ To this, the Arido Defence noted that same day that under the changed circumstances it must re-seek the consent of the concerned individuals.⁹

8. On 6 February 2016, the Prosecution indicated that in addition to prior filings, evidence elicited at trial has led the Prosecution to consider that the First Group of witnesses committed offences under the Rome Statute. Without seeking clarification of whether the Arido Defence had sought the further consent of these witnesses, the Prosecution then requested the Defence to provide their contact information so that the Prosecution “can inform them of the applicable modalities of their respective interviews”.¹⁰

9. On 9 February 2016, the Prosecution then re-iterated its request for the contact information of the First Group of witnesses.¹¹

10. As the final *inter partes* exchange, on 10 February 2016, Counsel for Mr. Arido wrote to the Prosecution noting the various efforts the Arido Defence had made to facilitate the interviews and indicating some of the reasons for which he found the Prosecution’s request improper.¹²

⁵ See Annex A to this filing.

⁶ Prosecution Request, Annex A.2, p. 5.

⁷ *Ibid.*, p. 6.

⁸ *Ibid.*, p. 6.

⁹ *Ibid.*, p. 5.

¹⁰ *Ibid.*, p. 3.

¹¹ *Ibid.*, p. 2.

¹² See Annex B to this response, p. 2.

11. On 11 February 2016, the Prosecution requested the Trial Chamber to order the VWU to provide it with the contact information of the First Group of witnesses¹³ to “directly inform the Witnesses of the modalities of their prospective interviews” and regarding the second group of witnesses “requests the Chamber to direct the VWU to contact D24-P-0009, D24-P-0011, and D24-P-0012 to seek their consent to meet the Prosecution” pursuant to paragraph 37 of the Witness Approach Protocol.

IV. SUBMISSIONS

12. The Prosecution’s request is an outright attack on the principles of a fair trial and should be rejected by the Trial Chamber. Essentially, the Prosecution’s request is an attempt to transform a neutral section of the court into an investigatory arm in violation of its mandate and enlist the support of the Defence – through the back door – to do its investigative work.

13. Moreover, the Prosecution’s request undermines Defence preparation. As is made out from the pattern of other requests,¹⁴ the Prosecution seems intent on removing witnesses from testifying rather than simply challenging the relevance of their testimony at trial and cross-examining them in the ordinary course of a Defence case. The Prosecution request – even if not calculated to do so – certainly runs the risk of dissuading witnesses from testifying on behalf of Mr. Arido.

14. As a final introductory remark, the Prosecution investigated its case for over a year before bringing charges. It then had a year of pre-trial time to further investigate. If these individuals were always suspects, it is now surprising to say the least that the Prosecution does not have the contact information or know the location of these individuals.

A. The Prosecution’s request regarding the First Group is procedurally improper

15. The claim that these individuals are suspects has only surfaced late on the eve of the Defence case. In 11 correspondences over a 37-day period, the Defence and the Prosecution worked to coordinate a rather logistically complicated meeting.¹⁵ The Prosecution never once mentioned the fact that these individuals were suspects. It is unclear from what period the

¹³ Prosecution Request, para. 17.

¹⁴ ICC-01/05-01/13-1594, ICC-01/05-01/13-1605, and ICC-01/05-01/13-1628.

¹⁵ The first communication regarding meeting witnesses was on 31 December 2015, subject line ‘TRIM: Witness Contact’, the email where Prosecution first made clear that the First Group were suspects was on 5 February 2016, subject line ‘RE: 160127 - Prosecution second request on Witness Contact’, see Annex A.2 to Prosecution Request, pages 14 and 5 respectively.

Prosecution has considered these individuals suspects, but to proceed in such a manner with the Defence is highly misleading and perhaps legally dishonest. For posterity, it must be added that the Arido Defence set about to organise the missions to facilitate these interviews as evidenced by the correspondence in Annex A.

16. The Prosecution's submissions improperly conflate consenting to an interview as a witness and consenting to an interview as a suspect. Consent to the former cannot lead inexorably to the conclusion that witness consents to the latter – to represent otherwise is wishful thinking or disingenuous. Consent is at the heart of the Witness Approach Protocol and consent must be *informed* and *voluntary*. Until the witnesses know they are suspects, they cannot give an informed decision to be interviewed.

17. Just as the Prosecution conflates the witnesses' consent, it conflates the various legal obligations. Article 55(2) applies to "suspects" whereas the Protocol applies to "witnesses". The Defence's obligations stem from the Witness Approach Protocol and the Protocol is silent on the issue of suspects. The obligations contained in the protocol are to facilitate an interview so that another party may speak to the individual about matters that would be relevant to preparations **for the purpose of the ongoing trial**, it is not up to the Defence to facilitate an investigation into another case being brought forward. The Prosecution placing the Defence in this position is highly disruptive as it places the Defence in the position of either undermining its own case by deciding to not call witnesses or alternatively possibly facilitating the violation of the rights of a suspect.

18. For witness D24-0003, it must be borne in mind that this witness has complained of attempts of improper influence from Prosecution investigators. That witness has alleged what appear to be possible improper promises of money.¹⁶ After this episode, the witness appears to have gone into partial hiding.¹⁷ From their statement, it appears fair to conclude that D24-0003 might not be particularly eager to meet members of the Prosecution. It is likely for this reason that the witness conditioned consent upon a member of the Defence being present.¹⁸

19. It now appears that the Prosecution's intention has always been to interview these individuals as suspects. While the Prosecution should have clearly stated that the witnesses were

¹⁶ CAR-D21-0004-0310, p. 15.

¹⁷ *Ibid.*, p. 16.

¹⁸ As indicated by the Defence in email of 8 January 2016 subject line 'RE: 160107 - Prosecution second request on Witness Contact', see Annex A.2 to Prosecution Request, p. 12.

suspects at the outset, the Prosecution should have at least asked the Arido Defence to confirm the witnesses consent to an interview as a suspect subsequently.

20. The Prosecution refers to the indication in the Arido Defence list of witnesses¹⁹ that the witnesses may need Rule 74 Duty-Counsel. To indicate this was a precautionary decision and should not be interpreted as an admission on the witnesses or the Arido Defence's part that these witnesses may have committed a crime within the jurisdiction of the court. Given the Prosecution's mention of these individuals in the various documents it cites, it would be irresponsible both out of consideration for the witnesses, but also for the logistic preparations to avoid delay at trial to not indicate this.

21. It also must be noted that the Prosecution's hands may not be entirely clean when it complains about the application of the Approach Protocol. Witness P-0214 indicated that consent had been given to interviews with the Defence²⁰ – however, the Prosecution failed to communicate this in a timely manner. While an innocent administrative error may explain the failure to communicate this, certainly no explanation has been given.²¹

B. The request disregards the division of responsibilities and structure of the court

22. The Prosecution's request is unprecedented and in addition to requesting the Defence to undermine its work runs roughshod over the structure and balance of responsibilities within the court.

23. Firstly, the VWU should not be used as a vehicle for investigations. This has been emphasised on virtually every interaction of the Arido Defence with its staff and often in submissions. The VWU's impartiality is enshrined in Rule 18(b) RPE which states

While recognizing the specific interests of the Office of the Prosecutor, the defence and the witnesses, respect the interests of the witness, including, where necessary, *by maintaining an appropriate separation of the services* provided to the prosecution and defence witnesses, and *act impartially* when cooperating with all parties and in accordance with the rulings and decisions of the Chambers (emphasis added)

¹⁹ Prosecution Request, para. 4.

²⁰ CAR-OTP-0089-1322, (1356), p. 25, entry 11 August 2015: "P-0214 that [REDACTED] changed [REDACTED] mind and he agrees to be contacted by ANY defence teams, moreover by KIOLO's defence lawyer".

²¹ ICC-01/05-01/13-T-35-ENG RT, p. 6 ln. 25 to p. 7 ln. 3: "I do agree with you and I'm not contesting the fact that we did not communicate this information to the Defence, and I'm saying to you as a matter of record, I'm not sure what the explanation for that is yet, and I will undertake to find out what it is".

24. The unit's thinking appears to be that the VWU's ability to create trust with witnesses depends upon it being – largely speaking – perceived as neutral. While made prior to the adoption of the Approach Protocol, the unit has previously stated:

6. The Unit considers however that it is not part of its mandate to contact any witnesses in order to convey the intention of one party to communicate with them except when this is specifically ordered by a Chamber. The VWU is of the view that this process is part of the investigative activities of the parties and that any intervention of the Unit would fall outside its mandate.

7. The Unit would also like to underline that it is crucial that the appearance of neutrality of the Unit is maintained towards the witnesses for the Unit's future interaction with them in case they will be further called to testify. Therefore, the Unit would rather not to be put in a situation to act on behalf of the parties by either providing the witnesses' contact details to the Defence or by contacting them to inform them of the Defence's request.²²

25. In brief, the VWU considers that investigative activities are outside of its mandate, moreover assisting in investigative activities compromises the unit's neutrality.

26. Secondly, the request should be rejected as it improperly seeks to use Trial Chamber VII in a Pre-Trial investigative manner. Clearly, in light of the closure of the Prosecution's case on 27 November 2015,²³ the time for amendment of the charges has long passed. It is submitted that the authorisation of the Prosecution's request to obtain the contact information for the First Group of witnesses would usurp one of the primary functions of the Pre-Trial Chamber: the power to authorise investigations.

27. Though the Trial Chamber may “rule on any other relevant matters” pursuant to Article 64 (6)(f) and “may, as necessary, exercise any functions of the Pre-Trial Chamber referred to in article 61 (11)”, these functions are limited by Articles 61 (9) and 64 (4). These provisions provide that the Trial Chamber “shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is *relevant* and *capable of application* in those proceedings” (emphasis added). Thus Article 61 (11) contains two limitations.

28. While the First Group of witnesses are relevant in the proceedings to establish the narrative and facts related to Mr. Arido, the search for potential incriminatory information against them is not relevant to the case at hand. This is the trial of Mr. Bemba, Mr. Kilolo, Mr. Mangenda, and Mr. Arido. It should remain as such. The Prosecution seems to be trying to resuscitate a dormant

²² ICC-01/05-01/13-882-Conf, paras 6-7; see also ICC-01/05-01/13-953, paras 5-6.

²³ ICC-01/05-01/13-1499, paras 1-2.

avenue, but whatever the merit of the case the Prosecution is pursuing, it cannot be contended that authorising *de facto* investigatory actions in pursuit of arrest warrants is a relevant function for the Trial Chamber – this is not the Chamber’s ‘constitutional’ role so to speak. With respect, it is submitted that the Trial Chamber’s role is to conduct a trial for an Accused for whom there are confirmed charges.

29. It is submitted that the Trial Chamber is not capable of applying the Prosecution’s request in the current proceedings. The scope of its powers relate to the trial before it. The interview of a suspect is objectively one of an investigative nature, which is an inherently preliminary issue. Moreover, consideration of the implications of authorising an investigation show the power is not capable of application in the present proceedings. Upon authorising this investigative action, the Chamber could find itself seized of the matter. While this could deplete its resources and time to address the defence case, more profoundly it would lead to a procedural Frankenstein: the Article 70 case – itself an adjunct to the Main Case – having a quasi-parasitic Pre-Trial proceeding attached.

30. If it is the Prosecution’s intent to bring a new case forward, then the Trial Chamber is the improper venue to do so. It is submitted that it should not be indirectly and improperly used as a Pre-Trial Chamber.

C. The Prosecutor misrepresents the circumstances surrounding the Second Group of witnesses

31. The Arido Defence firstly wishes to correct a misrepresentation by the Prosecution in its filing. First made in its procedural history,²⁴ and referring to the Second Group of witnesses, the Prosecution claims that “[i]n more than five weeks, the Defence has ostensibly been unable to contact these Witnesses to seek their consent to meet with the Prosecution”.²⁵ This is incorrect. The Arido Defence had sought the consent of witnesses D24-0009. This witness was undecided as was indicated on 8 January 2016²⁶ and has since become un-contactable. Only D24-0011 and D24-0012 has been continuously beyond contact since the initial Prosecution request under the Approach Protocol.

²⁴ Prosecution Request, para 7.

²⁵ Prosecution Request, para. 18.

²⁶ Email subject line ‘RE: 160107 - Prosecution second request on Witness Contact’, see ICC-01/05-01/13-1619-Conf-AnxA.2, p. 12.

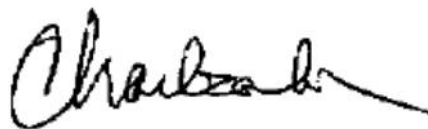
32. With regards to D24-0011, it can be noted that [REDACTED].²⁷ As the Trial Chamber is no doubt aware, [REDACTED].²⁸ The Arido Defence has attempted to contact witness D24-0011 periodically, but under the prevailing circumstances it is not wholly surprising that communications have been impeded.

33. The Approach Protocol covers witnesses not suspects. It was created pursuant to the Trial Chamber's power to conduct proceedings. It is a well-established principle of law that a body cannot delegate a power that it does not hold itself. Thus for the reasons in paragraph 29, it is submitted, the Trial Chamber cannot have placed an authorisation to investigate new cases within the Witness Approach Protocol. The Arido Defence thus requests the Trial Chamber to order the Prosecution to clarify whether these witnesses are suspects before authorising any action pursuant to the Witness Approach Protocol.

V. CONCLUSION

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

- a. REJECT the Prosecution's request regarding the First Group of witnesses in its entirety;
- and
- b. ORDER the Prosecution to indicate whether it intends to interview any of the Second Group of witnesses as suspects and only in the case of a negative answer to consider the Prosecution's request under the Witness Approach Protocol.



Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 6th Day of July 2016
The Hague, The Netherlands

²⁷ [REDACTED].

²⁸ [REDACTED].