

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: **14 July 2016**

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 Annex A

**Public Redacted Version of
“Narcisse Arido’s Notification of its Revised List of Witnesses
and Supplementary Submissions” (ICC-01/05-01/13-1705-Conf), filed 7 March 2016**

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. The Arido Defence hereby formally notifies the Chamber that it withdraws its intention to call witnesses D24-0002, D24-0003, D24-0010, and D24-0012 due to concerns regarding the conduct of the Prosecution. The Defence still intends to call witnesses D24-0001 and D24-0013 and a revised list of witnesses reflecting the various changes is annexed to the present notification.

II. BACKGROUND

2. On 21 January 2016, the Arido Defence communicated its final list of witnesses that it intended to call.¹ Following this, on 1 March 2016, the Arido Defence indicated through email its intention to withdraw calling D24-0011 and D24-0009.²

3. Following testimony on 3 March 2016, the Prosecution provided disks containing the audio interviews of witnesses D24-0002 and D24-0003. The next day, on 4 March 2016, the Prosecution disclosed the fruits of its recent investigations of defence witnesses.³

4. During the following weekend, on 5 March 2015, the Arido Defence indicated to the Chamber and VWU that it was considering revising its witness list in light of new information. Later that day the Defence communicated changes. Trial Chamber VII ('Trial Chamber') has requested that this communication is formally reflected in the case-record.

III. CONFIDENTIALITY

5. 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 the contents of evidence which is confidential.

IV. SUBMISSIONS

6. Upon review of the recent disclosure, communicated on 4 March 2016, which included the audio recordings, the Arido Defence is very concerned with respect to fundamental issues of fair trial and process, especially in respect to the manner in which the investigations have been conducted. The Arido Defence decision to change its list is based on four primary reasons.

¹ ICC-01/05-01/13-1557.

² Email of 1 March 2016, subject line 'RE: Regarding scheduling of witnesses in ICC-01/05-01/13'.

³ ICC-01/05-01/13-1700.

1. The Arido defence cannot approach these witnesses to prepare for the Arido defence while the investigation lasts

7. While the Prosecution sought an order from the Trial Chamber to approach witnesses D24-0002 and D24-0003 despite their suspect status,⁴ the material disclosed, and reports from the VWU,⁵ indicates that [REDACTED]. Only one of the individuals who is being investigated provided consent to meet the Prosecution.⁶ At no point was it brought to the attention of the Defence that these individuals were [REDACTED].

8. In fact, the Prosecution initiated a request to [REDACTED] prior to these three persons being withdrawn from the Arido Defence witness list. Witnesses CAR-D24-0011 and CAR-D24-0009 were withdrawn by the Arido Defence in an e-mail dated 1 March 2015 to the Trial Chamber and other parties. [REDACTED]'s reply to the Prosecution is dated 26 February 2016, four days prior to the withdrawal of these witnesses. Thus, at the time of [REDACTED] correspondence to the Prosecution, the witnesses were still on the list.

9. Under such circumstances, it is not possible to prepare a defence involving these witnesses. In particular, given the existing evidence [REDACTED], it cannot be assumed that communication of confidential information can be kept as such. This further risks compromising Mr. Arido's right to privileged communication.

2. The Prosecution has impermissibly expanded the scope of this case, by its request for information [REDACTED]

10. The Defence recalls that the material returned by Independent Counsel – which included [REDACTED] emails – was presumably considered to be “obviously irrelevant” pursuant to the Pre-Trial Single Judge's order.⁷ This investigation, has been, and continues to be conducted based on private e-mails recovered from [REDACTED], which are in fact the subject of a pending application before this Trial Chamber. Thus, the ICC Prosecution has approached [REDACTED] and conducted investigations based on this matter which is not yet decided before the ICC.

⁴ ICC-01/05-01/13-1638.

⁵ See email of 23 February 2016, subject line 'RE: Implementation by the VWU RE: Prosecution Request ICC-01/05-01/13-1619-Conf' which confirmed that D24-0009 and D24-0011 were being contacted under the Article 55(2) procedural regime.

⁶ Only witness D24-0002 consented to an interview, compare with CAR-OTP-0093-0152.

⁷ ICC-01/05-01/13-366-Conf, p. 10.

11. The Arido defence re-iterates the remedy in its prior motion that the Prosecution not be permitted to use these, or other illegally obtained e-mails. In addition, we are adding the request that these e-mails be expunged from all places where the Prosecution stores this material.

12. The investigation interview,⁸ dated 27 February 2016, which was obtained one day after [REDACTED]'s letter to the Prosecution, refers to these e-mails in paragraph 9. These e-mails are part of some of the material which was posted into [REDACTED] when the security of exclusive-access to [REDACTED] e-mail was compromised.

13. As indicated by the Declarant in the interview, the Prosecution investigation and interview with this person was based on [REDACTED],⁹ and the Defence points out that the Declarant, [REDACTED], threatened to initiate legal proceedings. Certainly, the basing of an investigation on [REDACTED] casts substantial doubt on the reliability of the material, and its use in any phase of the proceedings at the ICC and could seriously damage the integrity of the proceedings.

3. The Prosecution's manner of investigation has placed undue pressure on these witnesses

14. The Prosecution's interviews continue the pattern established in the pre-trial phase of combining questions with reminders that false answers can lead to prosecution. In one episode, Prosecution investigators start laughing at a witness's invocation of his right to silence.¹⁰ In view of a non-standard redaction concerning the report of interactions with this witness,¹¹ it is also worrying that an hour of recordings appears to be missing from the disclosure.¹²

15. Further, many Arido Defence witnesses were also protected witnesses in the Bemba Main case. While the Arido Defence cannot establish that the Prosecution violated the Protocol on the Handling of Confidential Information During Investigations,¹³ what is clear is that information about these witnesses is being raised with [REDACTED]. Such attention by the ICC, places focus upon these names amongst people from a milieu who can exert influence and pressure upon Defence witnesses. Under these circumstances, it is both unfair to the witnesses and difficult for the Arido Defence to continue to call them.

⁸ CAR-OTP-0093-0084, p. 5 (0089).

⁹ CAR-OTP-0093-0087, para. 10.

¹⁰ CAR-OTP-0093-0150-Track03 at time 10:40 of the recording.

¹¹ CAR-OTP-0093-0157, p. 2 (0158).

¹² CAR-OTP-0093-0150-Track02 at time 1:10 of the recording.

¹³ ICC-01/05-01/13-1093-Anx.

4. *The Prosecution's disclosure unveils new information which would require further investigation by the Arido Defence.*

16. The [REDACTED] in his report of an "[REDACTED]"¹⁴ mentions an "[REDACTED]" which the Prosecutor sent to him. This has neither been disclosed nor does the report he provides cite any procedures conducted to support the opinion he has provided. The Arido Defence is presently seeking this information *inter partes*.

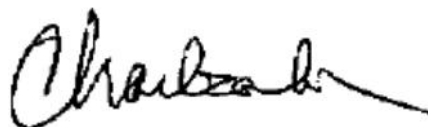
17. The Prosecution also spoke to a purported [REDACTED] who previously worked with [REDACTED]. This individual raises questions about the military background of defence witnesses; however, given the individual's [REDACTED] and given the absence of corroborating information, further investigations of this information, the claims that he makes, and the circumstances of the interview would be required. This is particularly the case since the information that he gives contradicts that which is found within another Prosecution report.¹⁵

18. In order to investigate these legal and factual issues, Defence investigation would be required and the Defence has neither the time nor the resources available to undertake this investigation at this point. In the interests of conserving judicial resources and time, and limiting the fair trial violations and ensuing prejudice to Mr. Arido, the Arido Defence, is prepared to proceed with his defence as scheduled by the Trial Chamber.

19. The security and safety of Mr. Arido, his family and witnesses continues to be endangered and compromised by the Prosecution's conduct.

V. CONCLUSION

20. In light of the above, the Arido Defence respectfully notifies Trial Chamber VII of its intention to revise its witness list as reflected in Confidential Annex A to this filing.



Chief Charles Achaleke Taku, Counsel for Mr. Arido

¹⁴ CAR-OTP-0093-0152.

¹⁵ CAR-OTP-0072-0476.

Dated this 14^h Day of July 2016

The Hague, The Netherlands