

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

**Public Redacted Version of
“Narcisse Arido’s Request for a Variation of the ‘Decision on Victim and Witnesses
Unit Request to modify the witness familiarisation process’ (ICC-01/05-01/13-1299)
for Witnesses P-260 and P-245”
(ICC-01/05-01/13-1344-Conf), filed 6 October 2015**

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. PROCEDURAL HISTORY

1. On 15 September 2015, Trial Chamber VII (“Trial Chamber”) adopted its ‘Decision on Witness Preparation and Familiarisation’¹ (‘Protocol’) in which, for the purposes of the present trial, it rejected witness preparation, but adopted a familiarisation process whereby upon arriving at the seat of the Court witnesses would be provided with their statements and other materials to read before their actual testimony.

2. On 21 September 2015, the Prosecution wrote to the Trial Chamber requesting clarification regarding the period of time for which other parties could object to the provision of materials being provided to the witness as this was not provided for in the Protocol.² On 22 September 2015, the Trial Chamber responded stating *inter alia* “an minimum of three days should be accorded to the non-calling party”³ (sic).

3. On 24 September 2015, the Victims and Witnesses Unit (‘VWU’), the entity charged with arranging the familiarisation process requested a deviation⁴ from the Protocol whereby “the witness start[s] or complete[s] the statement reading in the field, prior to his or her arrival in the Netherlands or at the location of testimony”⁵. This request was granted by the Single Judge of Trial Chamber on 25 September 2015⁶ (‘25 September Decision’) and the Single Judge noted:

with a view to ensuring the timely appearance of witnesses, the Chamber considers it, exceptionally, appropriate and beneficial to render its decision without having received any responses. However, this is without any prejudice to the parties’ right to seize the Chamber with a motivated request at a later point in time should they require a derogation from the terms of the Protocol (as modified).⁷

4. On 25 September 2015, the Arido Defence wrote an email to the Trial Chamber expressing a series of concerns with the decision – namely the lack of an opportunity to respond to the VWU request and also that the decision may lead to witnesses P-260 and P-245 discussing their statements with each other to the detriment of the proceedings. In an email that day the Chamber

¹ Contained in Annex A to ICC-01/05-01/13-1252.

² Email of 21 September 2015, subject line ‘VWU Protocol’.

³ Email of 22 September 2015, subject line ‘RE: VWU Protocol’.

⁴ ICC-01/05-01/13-1297, para. 4.

⁵ *Ibid.*, para. 3.

⁶ ICC-01/05-01/13-1299.

⁷ *Ibid.*, para. 3.

noted that while the modified Protocol obliges⁸ the VWU to remind the witnesses not to discuss their evidence while travelling and sharing accommodation – and the date for that warning being advanced in light of the 25 September Decision, the Chamber further observed that “the Protocol does not include, in its original or modified form, a complete cessation of any contacts between witnesses”.⁹ The Chamber also indicated to the Defence that “the Arido Defence can seize the Chamber with specific submissions concerning particular witnesses”.¹⁰

II. 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 as confidential as its subject concerns information which relates to defence strategy. While the Defence will gladly file a public redacted version post-testimony. It requests that the present filing keep its present classification until after the cross-examination of witnesses P-260 and P-245.

III. SUBMISSIONS

6. The Arido Defence requests a derogation of the Protocol as modified by the 25 September Decision. The derogation is requested of the Trial Chamber as a measure to ensure the integrity of the proceedings with regards to the subsequent testimony of witnesses P-260 and P-245. The Defence considers that such a request finds its basis squarely within the protective obligations placed upon the Trial Chamber under Article 64 (2) of the Statute.

A. The threat to the proceedings

7. The Arido Defence is concerned that the provision of statements to these two witnesses at an earlier stage as resulting from the modification of the Protocol may lead to intentional or unintentional collaboration by these witnesses which may in turn lead to further obfuscation of the process. The Defence has identified a number of contradictions within and between the various statements of the witnesses which it will bring up in cross-examination.

⁸ As contained in para. 24 and para. 33 of the Protocol.

⁹ Email of 25 September 2015, subject line ‘RE: Decision on Victim and Witnesses Unit Request to modify the witness familiarisation process’.

¹⁰ *Ibid.*

8. These contradictions may lead the Chamber to find the witnesses not credible; however, the provision of statements in the field may lead to a tidying and sanitization of the subsequent testimony, whether intentionally or not. Such a sanitisation could lead to prejudice to Mr. Arido should any particular account – which would otherwise be considered not credible – be accepted; this would also impact upon the truth seeking process.

9. There is a risk that if these witnesses talk and discuss their evidence, they may identify contradictions and therefore agree on a ‘fact’ to ensure cohesiveness of their subsequent testimony. This would thereby distort the truth seeking process. However, while intentional collaboration is a risk, unintentional subconscious re-alignment of their accounts is a risk as well.

10. It appears that these witnesses may be close. According to P-245, these witnesses met during the Bemba main case¹¹, thus the main case would be a natural topic of conversation. P-245’s statements also show evidence of contact between the witnesses.¹² When two individuals who have experience the same general events find that there are differences between their experiences, it is a human tendency to rationalise away the differences or to lose one’s conviction that what was seen was indeed seen. In other words it is natural to say to one’s self “my memory must be mistaken I suppose it must have happened another way”. Over time, or in extreme cases, new memories of that event may even form. In a case against Mr. Arido, where the details are critical to the allegations, even completely lacking malice, discussion of prior events by witnesses – especially aided by the provision of prior statements – could lead to modified accounts.

11. While the Arido Defence considered that the VWU would prudently keep witnesses P-260 and P-245 separate during their time in the Hague, the 25 September Decision has increased the just mentioned risk for several reasons. Firstly, the witnesses are geographically proximate which facilitates the likelihood of their contact. This is exacerbated by the degree to which [REDACTED]. Secondly, from the evidence witness P-260 and P-245 may be on friendly terms or at least in contact with each other.¹³ Finally, when the familiarisation process is conducted at the seat of the Court, supervision by the VWU provides an additional check on the process. Beyond the seat of the Court, this additional safe-guard is diminished.

¹¹ CAR-OTP-0078-0218, pp. 11-15; CAR-OTP-0078-0218, p. 5.

¹² CAR-OTP-0078-0248, p. 4.

¹³ CAR-OTP-0078-0248, p. 4.

12. Though redacted, a report from investigator [REDACTED] regarding an alleged leak of confidential information indicates that P-260 has been willing in the past to discuss his testimony, his witness status, and the events alleged in the Article 70 case. [REDACTED] notes:

[REDACTED]

13. From the redactions, it is unclear precisely with whom P-260 spoke; however, the theme of status before the Court and accounts of events is clear.

14. Furthermore, while the chronology is far from clear, P-245's 5 November 2015 statement indicated that he clearly contacted witnesses from the main case at some point.¹⁴ P-245 has contacted witnesses – whether before or during his status as witness or potential witness, and it cannot be excluded that he may in the future.

B. The mitigating measures requested

15. With the above discussion in mind, the Arido Defence requests the Trial Chamber to take measures to reduce the likelihood of P-260, P-245, and any other witness related to them discussing their statements and upcoming testimony. Such measures would be consistent with the reasoning of the decision rejecting witness preparation, namely that it will assist in preserving the “spontaneity and reliability”¹⁵ of the accounts, will avoid anything approximating a “rehearsal”¹⁶, and preserve contradictions for discussion during the proceedings.¹⁷

16. Given that the calling party is to inform the other parties¹⁸ of the material to be provided, and the other parties are given three days to object to the material¹⁹, the Defence presumes that there is still time to put in place the requested safe-guard.

17. In the email response from the Trial Chamber, the Chamber appears to have understood the Defence to be consulting regarding an order for cessation of contacts. While such an order satisfies the Defence concerns, presuming that P-260 and P-245 will not be co-habiting or interacting at the Court, it can be added that the provision of the statements in the Hague, as planned in the original version of the Protocol, would largely allay the Defence concerns.

¹⁴ CAR-OTP-0085-0857, from p. 6 *et seq.*

¹⁵ ICC-01/05-01/13-1252, para. 22.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, para. 25.

¹⁸ ICC-01/05-01/13-1299, para. 5.

¹⁹ *Ibid.*, para. 6.

18. Though the Arido Defence considers that such a protection of the process would clearly flow from obligations contained in Article 64 (2)²⁰, the Defence notes that the Protocol also provides a basis to object to the provision of documents as part of the familiarisation process.²¹ Should the Chamber find that its Article 64 (2) obligations are not engaged by the present request, then on the basis of the Protocol, the Arido Defence requests that the provision of prior statements be merely be delayed until the witnesses are at the seat of the Court on this basis – presuming that the VWU will ensure the partition between witnesses.

IV. CONCLUSION

19. In light of the above, the Arido Defence respectfully requests Trial Chamber VII

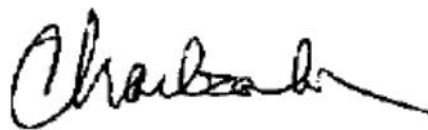
- a. ORDER witness P-260 and P-245 to not to communicate with each other after the provision of their statements

or

- b. ORDER that witnesses P-260 and P-245 be provided with their statements once they arrive at the seat of the Court on the condition that they are not co-housed.

Furthermore,

- c. ORDER the VWU to ensure that P-260 and P-245 do not travel together and are housed separately upon arriving at the seat of the Court.



Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 14th Day of July 2016

The Hague, The Netherlands

²⁰ The Chamber refers to its “broad discretion” under Article 64 (2) with regards to these matters at ICC-01/05-01/13-1252, para. 20.

²¹ ICC-01/05-01/13-1252-Anx, para. 74.