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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 Arido Defence Requests for Disclosure and to Delay the Testimony of
Witnesses P-245 and P-260**

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

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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 54(1)(a) and 67(2) of the Rome Statute ('Statute'), Rule 77 of the Rules of Procedure and Evidence ('Rules') and Regulation 23 *bis* of the Regulations of the Court ('Regulations'), issues the following 'Decision on Defence Requests for Disclosure and to Delay the Testimony of Witnesses P-245 and P-260'.

I. Background and Submissions

1. On 21 August 2015, the defence for Mr Arido ('Arido Defence') requested that the Chamber order the Office of the Prosecutor ('Prosecution') to lift redactions to ICC-01/05-01/13-665-Conf-Anx-Red, submitting that the information falls under Article 67(2) of the Statute and Rule 77 of the Rules ('Redaction Request').¹
2. On 17 September 2015, the Arido Defence requested ('Request') that the Chamber (i) order the disclosure of certain information ('Disclosure Requests') relating to witnesses P-245 and P-260 ('Witnesses'), and (ii) delay the Witnesses' testimonies or cross-examination until it receives the information subject of the Disclosure Requests, delay their testimonies to the end of the Prosecution case, or permit the Witnesses' recall ('Consequential Requests').² In the Disclosure Requests, concerning information allegedly crucial to an appreciation of the Witnesses' credibility,³ the Arido Defence requests that the Chamber grant the following relief:

¹ Narcisse Arido's Addendum to its Request for Reclassification of Information (ICC01/05-01/13-1111-Conf), its Request for an Order on Disclosure Violation (ICC-01/05-01/13-1141-Conf) and its Request to Interview Prosecution's Investigators (ICC-01/0501/13-1139-Conf), ICC-01/05-01/13-1165-Conf, paras 20-21. A corrected version was filed on 18 September 2015 (ICC-01/05-01/13-1165-Conf-Corr).

² 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.

³ Request, ICC-01/05-01/13-1261-Conf, paras 1, 3 and 15.

- i) as the information is necessary to assess P-260's account of a recent incident, rule on the Redaction Request and order lesser redacted versions of CAR-OTP-0082-1418 and ICC-01/05-01/13-1144-Conf-Anx-Red, removing the redactions to the names of individuals with whom P-260 spoke ('First Disclosure Request');⁴
 - ii) order the Prosecution to obtain the call data records attached to CAR-OTP-0084-0157 because, although it appears that the Prosecution never obtained these call data records, it should have taken further measures in light of its obligations under Article 54(1)(a) of the Statute and the Arido Defence has already made diligent efforts to obtain the call data records through the Prosecution, Registry and relevant States ('Second Disclosure Request');⁵
 - iii) order the Prosecution to disclose information on contacts with the Witnesses, including relevant cooperation agreements and requests for assistance, leading up to their interviews ('Third Disclosure Request');⁶ and
 - iv) order the Prosecution to disclose information concerning benefits paid or promised to P-245 and P-260, as well as any relevant agreements or information concerning a scheme ('Fourth Disclosure Request').⁷
3. On 21 September 2015,⁸ the defence for Mr Babala ('Babala Defence') responded, joining the Request ('Babala Defence Response').⁹
4. On 22 September 2015, the Prosecution responded, submitting that it has complied with its disclosure obligations, the Arido Defence had access to the full transcripts

⁴ Request, ICC-01/05-01/13-1261-Conf, paras 29-35.

⁵ Request, ICC-01/05-01/13-1261-Conf, paras 36-41.

⁶ Request, ICC-01/05-01/13-1261-Conf, paras 16-23.

⁷ Request, ICC-01/05-01/13-1261-Conf, paras 24-28.

⁸ The Chamber shortened the deadline for any responses to 22 September 2015. *See* Email communication from Legal Officer of Trial Chamber to the parties on 17 September 2015 at 19:04.

⁹ Adjonction de la Défense de M. Fidèle Babala Wandu à « 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) déposée le 17 septembre 2015, ICC-01/05-01/13-1273-Conf.

of the Witnesses' statements since June 2014 and the Arido Defence has not established any inability to prepare a meaningful cross-examination ('Response').¹⁰

5. In addition, concerning the First Disclosure Request, the Prosecution submits that (i) the redactions are limited, (ii) the Arido Defence has not demonstrated that it has insufficient information to investigate the matter, (iii) CAR-OTP-0082-1418 does not contain redactions to names, as claimed, and (iv) the Arido Defence could have made its request in a timelier manner.¹¹ According to the Prosecution, the Second Disclosure Request is also without merit as (i) the call-data records are not in its possession; (ii) the Arido Defence has not indicated a legal basis for the Chamber to order the Prosecution to obtain the material and has not exhausted other reasonable measures to obtain the material; and (iii) the Arido Defence has not substantiated its assertion that it cannot undertake a meaningful cross-examination of the Witnesses without the information.¹² In relation to the Third Disclosure Request, the Prosecution submits that there is no further material to disclose relating to its contacts with the Witnesses.¹³ Finally, it submits that the Fourth Disclosure Request concerns limited payment information that has been or will soon be disclosed and the Arido Defence fails to demonstrate that this information is necessary for the effective cross-examination of the witnesses.¹⁴

II. Analysis

6. At the outset, the Single Judge notes that the Arido Defence filed the Request on a confidential basis as its contents relate to confidential evidence, decisions and defence strategy, submitting that a redacted version would not be filed until after

¹⁰ Prosecution Response to Narcisse Arido's Omnibus Motion for a Delay of the Testimony of Witnesses P-0260 and P-0245 until Material Crucial to their Credibility is Disclosed and/or Obtained, ICC-01/05-01/13-1281-Conf.

¹¹ Response, ICC-01/05-01/13-1281-Conf, paras 8-9.

¹² Response, ICC-01/05-01/13-1281-Conf, paras 10-13.

¹³ Response, ICC-01/05-01/13-1281-Conf, para. 5.

¹⁴ Response, ICC-01/05-01/13-1281-Conf, paras 6-7.

the Witnesses' testimonies.¹⁵ As they reference the Request, the Single Judge considers that the Prosecution Response and Babala Defence Response should, until the conclusion of the Witnesses' testimonies, also remain confidential.

7. As a further preliminary matter, the Single Judge emphasises that the 'parties have a general obligation to make the disclosure process practical and manageable',¹⁶ in particular, in light of the trial schedule. In this regard, the Single Judge notes with concern the timing of the Request. He recalls (i) that the Prosecution indicated its intention to call the Witnesses on 30 June 2015¹⁷ and (ii) the 10 August 2015 deadline for motions that, in the parties' view, required resolution prior to the commencement of trial.¹⁸ The Arido Defence does not justify – especially in light of the imminent start of the trial and the limited number of Prosecution witnesses – its failure to raise the Disclosure Requests in a timelier manner. The Single Judge takes this lack of diligence into account, as relevant, in this decision and cautions the parties that untimely requests may be summarily dismissed in future.

A. First Disclosure Request and Redaction Request

8. The First Disclosure Request, incorporating the Redaction Request, seeks information redacted in ICC-01/05-01/13-665-Conf-Anx-Red, ICC-01/05-01/13-1144-Conf-Anx-Red and CAR-OTP-0082-1418. On 9 September 2015, the Single Judge instructed the Registry to implement the redactions thereafter applied to ICC-01/05-01/13-1144-Conf-Exp-Anx1 (ICC-01/05-01/13-1144-Conf-Anx-Red)

¹⁵ Request, ICC-01/05-01/13-1261-Conf, para. 4.

¹⁶ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Appeals Chamber, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor", 28 August 2013, ICC-02/05-03/09-501, para. 34.

¹⁷ Prosecution's List of Witnesses and Evidence, ICC-01/05-01/13-1048, with one confidential *ex parte* and one confidential annex.

¹⁸ Email communication from Legal Officer of the Trial Chamber to the parties on 30 July 2015 at 13:37. The deadline was extended from the original deadline of 31 July 2015. *See* Order setting the commencement date for trial, 22 May 2015, ICC-01/05-01/13-960, para. 14.

(‘Redaction Decision’).¹⁹ The redactions to ICC-01/05-01/13-665-Conf-Exp-Anx (ICC-01/05-01/13-665-Conf-Anx-Red)²⁰ are consistent with those applied, according to the Single Judge’s instruction, to ICC-01/05-01/13-1144-Conf-Exp-Anx1 (ICC-01/05-01/13-1144-Conf-Anx-Red). In relation to these documents, the Arido Defence is effectively seeking reconsideration of the Redaction Decision. The Single Judge recalls the applicable law relating to reconsideration as set out in previous decisions.²¹ Noting that the Arido Defence indicates no new facts or arguments and effectively repeats submissions already considered in the Redaction Decision, the Single Judge finds that reconsideration is not justified and rejects the related requests.

9. Concerning CAR-OTP-0082-1418, the Single Judge notes that the Prosecution applied redactions according to Category A.1 of the Protocol Establishing a Redaction Regime. Such information, relating to the locations of witness interviews and accommodation, ‘is in principle not relevant to the other party’ and redactions may therefore be maintained until ‘the location is no longer used in ongoing or future investigations’.²² The Arido Defence indicates that redactions in CAR-OTP-0082-1418 were applied to the identity of certain persons, which are relevant to an assessment of P-260’s credibility.²³ The Prosecution responds that the document does not contain any redactions to the names of individuals.²⁴ Indeed, this submission accords with the category of redactions applied, namely locations of witness interviews and accommodation. Accordingly, the Single Judge rejects the request to lift the redactions in CAR-OTP-0082-1418.

¹⁹ Decision on the Arido Request for Disclosure Related to an Incident Concerning a Prosecution Witness, ICC-01/05-01/13-1225-Conf, para. 15 and ICC-01/05-01/13-1225-Conf-Exp-Anx.

²⁰ See Redaction Decision, ICC-01/05-01/13-1225-Conf, paras 10 and 12 (after the Prosecution filed the redacted version of this document, the Chamber found that the related requests of the Arido Defence were moot).

²¹ Decision on Defence Request for Reconsideration of or Leave to Appeal ‘Decision on “Defence Request for Disclosure and Judicial Assistance”’, 22 September 2015, ICC-01/05-01/13-1282, para. 8; Decision on Kilolo Defence Request for Reconsideration, 15 July 2015, ICC-01/05-01/13-1085-Conf, para. 4.

²² ICC-01/05-01/13-959-Anx, paras 15-16.

²³ Request, ICC-01/05-01/13-1261-Conf, paras 30-35.

²⁴ Response, ICC-01/05-01/13-1281-Conf, para. 8.

B. Second, Third and Fourth Disclosure Requests

10. In relation to the remaining Disclosure Requests, the Request fails to substantiate any reason to doubt the Prosecution's assertion that it has disclosed or is in the process of disclosing all information relevant to the Witnesses, which falls under Article 67(2) of the Statute and Rule 77 of the Rules.
11. Further, insofar as the Second Disclosure Request seeks the Chamber's assistance in obtaining information which is not in the Prosecution's possession, the Single Judge considers that the Arido Defence has not yet exhausted other reasonable measures to obtain the information sought;²⁵ for example, its request to the Registry, which was made about a month ago, is pending.²⁶
12. The Arido Defence also does not substantiate its suggestion that the Prosecution violated its obligations under Article 54(1)(a) of the Statute in failing to obtain the information sought in the Second Disclosure Request. The Chamber has previously found that information relating to, *inter alia*, the fact and frequency of witness contacts does not *per se* impact on witness credibility.²⁷ In turn, it is insufficient to argue, as the Arido Defence does, that the requested information is essential to assessing credibility because it relates to the Witnesses' contacts.²⁸ The Arido Defence does not further substantiate its assertion that the requested information is relevant to the Witnesses' credibility or that the Prosecution failed to investigate incriminating and exonerating circumstances equally.

²⁵ The Chamber has generally required the parties to, in good faith, exhaust *inter partes* and other reasonable measures before requesting the Chamber's assistance in matters relating to the conduct of investigations. *See, inter alia*, Decision on Arido Defence Request to Interview Prosecution Investigators, 22 September 2015, ICC-01/05-01/13-1279, para. 5 *citing* Decision on 'Defence Request for Disclosure and Judicial Assistance', 21 August 2015, ICC-01/05-01/13-1166-Conf, para. 21; Decision on Kilolo Defence Request to Obtain Contact Information of P-201 and P-264, 17 August 2015, ICC-01/05-01/13-1155-Conf, para. 11; Transcript of Hearing, 24 April 2015, ICC-01/05-01/13-T-8-Red-ENG, page 4, lines 16-21.

²⁶ Response, ICC-01/05-01/13-1281-Conf, para. 12.

²⁷ Decision on 'Defence Request for Disclosure and Judicial Assistance', 21 August 2015, ICC-01/05-01/13-1166-Conf, para. 20.

²⁸ Request, ICC-01/05-01/13-1261-Conf, paras 38-41.

C. Consequential Requests

13. Finally, the Single Judge considers that the submissions in support of the Consequential Requests are general and conclusory, preventing any assessment of the specific remedies requested *vis-à-vis* defence preparations for the Witnesses' testimonies. The Single Judge notes Prosecution submissions concerning the limited information relating to witness payments yet to be disclosed. Until this payment or other information currently being processed²⁹ is disclosed, or the information sought in the Second Disclosure Request obtained, it is premature to consider what, if any, remedies are necessary. In this regard, the Single Judge further notes that the Prosecution has notified the Chamber of its intention to, for practical reasons, change the witness order, resulting in some delay to the Witnesses' testimonies.³⁰

14. The Single Judge emphasises that the Arido Defence has had the transcripts of the Witnesses' statements since June 2014.³¹ It also had ample opportunity to take reasonable measures to obtain other information it deemed relevant, including that sought in the Disclosure Requests.³² The Single Judge also recalls, as set out above, that the Arido Defence could have made the Disclosure Requests in a timelier manner. As submitted by the Prosecution, 'the Arido Defence cannot divorce itself from the consequences of its own strategic decisions'.³³ Accordingly, the Single Judge does not consider that the Arido Defence has identified an issue that justifies a delay in hearing the Witnesses' testimony. This is without

²⁹ After the filing of the Request and related submissions, the Chamber was notified that the Prosecution is in the process of lifting redactions to the identities of two persons who were present at interviews of the Witnesses. *See* Email communication from Legal Officer of Trial Chamber to Parties on 24 September 2015 at 15:09. These redactions should have been lifted earlier, namely 'when the identity of the last witness interviewed or contacted' by these persons was disclosed. *See* Decision on Prosecution's Application for Non-Standard Redactions, 17 June 2015, ICC-01/05-01/13-1015-Conf, para. 10.

³⁰ Prosecution's Revised Order of Witnesses, 25 September 2015, ICC-01/05-01/13-1304-Conf, with two confidential annexes.

³¹ Response, ICC-01/05-01/13-1281-Conf, paras 2 and 4.

³² *See also* Decision on Arido Defence Request to Interview Prosecution Investigators, 22 September 2015, ICC-01/05-01/13-1279, para. 6.

³³ Response, ICC-01/05-01/13-1281-Conf, para. 9.

prejudice to the Arido Defence, as appropriate and justified, seeking to call the Witnesses to testify again or other measures, such as the submission of documentary evidence.

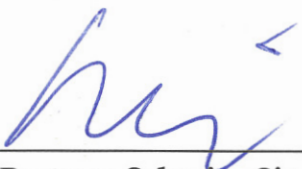
FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Redaction Request;

REJECTS the Request; and

ORDERS the Arido Defence, Babala Defence and Prosecution to, within 10 days of the conclusion of the Witnesses' testimonies, file public redacted versions of the Request, Babala Defence Response and Prosecution Response, respectively, or indicate to the Chamber that they may be reclassified as 'public' without redactions.

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



Judge Bertram Schmitt, Single Judge

Dated 28 September 2015

At The Hague, The Netherlands