

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 13 August 2015

TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

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**

Confidential

Decision on Arido Request to Contact Witnesses

Decision 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

Mr Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

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

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VII (the 'Chamber') of the International Criminal Court (the '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 Article 64(2) of the Rome Statute (the 'Statute'), and Rules 16-18 of the Rules of Procedure and Evidence (the 'Rules'), issues the following 'Decision on Arido Request to Contact Witnesses' (the 'Decision').

I. Background and Submissions

1. On 28 April 2015, upon a request from the defence for Mr Babala (the 'Babala Defence'), the Chamber directed the Victims and Witnesses Unit (the 'VWU') to contact 14 defence witnesses in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* to enquire whether they consent to provide their contact information to the Babala Defence (the 'Decision of 28 April 2015').¹
2. On 26 June 2015, the defence for Mr Arido (the 'Arido Defence') filed a similar application, seeking the contact information of 57 witnesses (the 'Arido Request').²
3. On 29 June 2015, following a request from the defence for Mr Kilolo (the 'Kilolo Defence'), in which it sought the contact information of two witnesses, the Chamber rejected the said request on the basis that these same witnesses had informed the VWU that they did not wish to be contacted by the Babala Defence, and had similarly informed the Office of

¹ Decision on Babala Request to Obtain Contact Details of Witnesses, ICC-01/05-01/13-924.

² Narcisse Arido's Request to Direct the Victims and Witness Unit to Seek the Consent of Witnesses to Provide Their Contact Information to the Defence, ICC-01/05-01/13-1043-Conf.

the Prosecutor (the 'Prosecution') that they did not wish to be contacted by the Kilolo Defence (the 'Decision of 29 June 2015').³

4. On 3 July 2015, the VWU filed its observations on the Arido Request, noting that: (a) it is not aware whether the Arido Defence contacted one of the other parties to seek the witnesses' consent; (b) five of the 57 witnesses could not be reached by the VWU following the Decision of 28 April 2015; (c) 12 of the 57 witnesses have already been contacted in relation to the Decision of 28 April 2015 and renewing contact may expose them to security issues.⁴ The VWU therefore proposes to contact all 57 witnesses at once, inquiring their consent as regards all parties in the case. Thereafter, the VWU would proceed with a security assessment in the terms of the Decision of 28 April 2015.⁵ Alternatively, the VWU suggests it proposes to contact the calling party, when the VWU is aware that a party could provide the contact information of one of the 57 witnesses, in order to initiate *inter partes* discussion with the Arido Defence and also with the Babala Defence, in relation to the Decision of 28 April 2015.⁶ For witnesses for which the VWU has no information as to their link with a calling party, the VWU observes that it should not be in principle involved in investigations and therefore suggests that parties take their own investigations before making such a request to the VWU.⁷ Alternatively, the VWU requests to share the witnesses' contact information with the Arido Defence, with a prerequisite that the Arido Defence follows a good

³ 'Decision on the "Requête aux fin d'obtenir la communication des coordonnées des témoins D-2 et D-3"', ICC-01/05-01/13-1045-Conf.

⁴ Victims and Witnesses Unit's Observations on the "Narcisse Arido's Request to Direct the Victims and Witnesses Unit to Seek the Consent of Witnesses to Provide Their Contact Information to the Defence", ICC-01/05-01/13-1054-Conf, paras 2-7. The Chamber instructed the VWU to file observations by 3 July 2015. See e-mail from Trial Chamber VII Communications to VWU and counsel on 30 June 2015 at 15:16.

⁵ ICC-01/05-01/13-1054-Conf, paras 6-8.

⁶ ICC-01/05-01/13-1054-Conf, paras 10-13.

⁷ ICC-01/05-01/13-1054-Conf, para. 14.

practice training provided by the VWU and accept to comply with such practices.⁸

5. On 6 July, the defence for Mr Mangenda (the 'Mangenda Defence'), joined and supported the Arido Request, stating that such orders should apply *mutatis mutandis* to all accused.⁹

II. Analysis

6. The Chamber recalls that in its Decision of 28 April 2015, it indicated that 'it does not consider that conveying such a request from one of the parties [i.e. whether witnesses consent to provide their contact information to a defence team] conflicts with the VWU role as a neutral organ of the Court or its responsibilities under the statutory framework'.¹⁰ However, in that same decision the Chamber underlined that 'it is not the role of the VWU to carry out investigative activities for any of the parties'.¹¹
7. The Decision of 28 April 2015 served its own time and circumstances. But the circumstances have now changed. The Prosecution has disclosed its list of witnesses on 30 June 2015.¹² On 20 July 2015, the Chamber issued its decision on the protocol of contacting witness from one of the other parties, with an annex containing the protocol ('Contact Protocol').¹³ Accordingly, all contacts with witnesses of another party fall under the procedure

⁸ ICC-01/05-01/13-1054-Conf, paras 15-17.

⁹ Defence Response to ICC-01/05-01/13-1043-Conf, ICC-01/05-01/13-1063-Conf. The Chamber instructed the parties to file any observations by 6 July 2015. See e-mail from Trial Chamber VII Communications to VWU and counsel on 30 June 2015 at 15:16.

¹⁰ ICC-01/05-01/13-924, para. 6.

¹¹ ICC-01/05-01/13-924, para. 11.

¹² Prosecution's List of Witnesses and Evidence, ICC-01/05-01/13-1048, with confidential redacted annex A, ICC-01/05-01/13-AnxA-Red, containing the Prosecution's list of witnesses.

¹³ 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 public annex, ICC-01/05-01/13-1093-Anx.

established by the Contact Protocol, without any involvement from the VWU.

8. Further, the Chamber notes that, unlike the previous requests of the Babala Defence and the Kilolo Defence, the Arido Request concerns a significantly higher number of witnesses, a general enquiry that appears to go beyond the functions of the VWU. Involving the VWU in such a generic manner, pertaining also to potential witnesses who have not been referred to the VWU, would effectively mean to engage the VWU in the investigation of one of the parties. The Chamber does not endorse such an approach.
9. Likewise, as stated in its Decision of 29 June 2015, information as regards the witness's consent should be taken into consideration when deciding on the transmission of contact information to a party, regardless of whether this information comes from the VWU or a calling party.¹⁴
10. The Chamber appreciates the VWU's suggested approach to initiate *inter partes* discussions. The Chamber is of the view that since the Arido Defence Request, and all other comparable requests, have been notified to all parties in the proceedings, they are all duly informed of the interest of some defence teams in the contact information of some or all of these 57 witnesses for the preparation of their defence. Accordingly, there should already be awareness that *inter partes* disclosure of this information could be discharged pursuant to the statutory framework.
11. Nonetheless, the Chamber is mindful that the Prosecution and other parties in the case, may not have the contact information of all remaining witnesses of the 57 witnesses concerned by the Arido Defence Request (who are not on the Prosecution's list of witnesses). In this case, the

¹⁴ ICC-01/05-01/13-1045-Conf, para. 5.

suggested approach of the VWU, namely to request if the witnesses consent to being contacted by any of the parties and subsequent transmission of contact information of these witnesses, with a prerequisite training, seems reasonable.

12. Accordingly, the Chamber invites the VWU, in consultation with the parties, to organise such training for all defence teams within two weeks from the notification of this decision in order to facilitate a transmission of the relevant contact information to all parties in the case in a manner that is consistent with the rights of the accused and the protection of the witnesses concerned.

FOR THE FOREGOING REASONS THE CHAMBER HEREBY

INVITES the parties, should they wish to do so, to request the contact information of any witness another party intends to call in accordance with Contact Protocol;

INVITES the parties, should they wish to do so, to request the contact information of any of the remaining witnesses of the 57 witnesses, who are not on the Prosecution's list of witnesses, in accordance with the procedure laid out in paragraphs 9-11 of this Decision; and

ORDERS the VWU, in consultation with the parties, to organise the required training for all defence teams within two weeks from the notification of this decision and eventual transmission of the relevant contact information of any of the 57 persons identified in the Arido Request, subject to the procedure of paragraphs 9-12 above, to all parties in the case.

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



Judge Chile Eboe-Osuji
Presiding



Judge Olga Herrera Carbuccion



Judge Bertram Schmitt

Dated 13 August 2015

At The Hague, The Netherlands