



Original: English

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

Date: 24 July 2014

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, 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 “Narcisse Arido’s request for interim release”

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Nicholas Kaufman

Counsel for Aimé Kilolo Musamba

Ghislain Mabanga

Counsel for Jean-Jacques Mangenda Kabongo

Jean Flamme

Counsel for Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Göran Sluiter

Legal Representatives of the Victims

Legal Representatives of the 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

Competent authorities of the Kingdom of the Netherlands

Competent authorities of French Republic

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel, Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

Patrick Craig

Victims Participation and Reparations Section Other

I, Judge Cuno Tarfusser, having been designated as Single Judge of Pre-Trial Chamber II of the International Criminal Court;

NOTING the “Prosecution’s application for warrant of arrest” dated 19 November 2013 (“Prosecutor’s Application”)¹;

NOTING the “Warrant of arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido” issued on 20 November 2013 (“Warrant of Arrest”)²;

NOTING the “Public redacted version of Narcisse Arido’s request for interim release filed on 10 June 2014 (ICC-01/05-01/13-477-Conf)” dated 17 June 2014 (“Mr Arido’s Request for Interim Release”)³;

NOTING the “Decision requesting observations on the ‘Narcisse Arido’s request for interim release’” dated 12 June 2014⁴;

NOTING the “Prosecution Response to Arido’s Request for Interim Release” dated 30 June 2014⁵ (“Prosecutor’s Response”), requesting the Single Judge to deny Mr Arido’s Request for Interim Release and to order Arido’s continued detention;

NOTING “Narcisse Arido’s Request for Leave to Reply to the ‘Prosecution’s Response to Arido’s Request for Interim Release’ (ICC-01/05-01/13-525-Conf)” dated 4 July 2014⁶;

NOTING the “Transmission of the observations from France and The Kingdom of The Netherlands on ‘Narcisse Arido’s request for interim release’” dated 4 July 2014⁷;

NOTING the “Decision on ‘Narcisse Arido’s request for leave to reply to the ‘Prosecution’s Response to Arido’s request for Interim Release’” dated 7 July 2014⁸;

¹ ICC-01/05-67-Conf.

² ICC-01/05-01/13-1-Red2-tENG.

³ ICC-01/05-01/13-477-Red.

⁴ ICC-01/05-01/13-488-Corr.

⁵ ICC-01/05-01/13-525-Conf.

⁶ ICC-01/05-01/13-535-Red.

⁷ ICC-01/05-01/13-537 with Confidential Annexes I and II.

⁸ ICC-01/05-01/13-543.

NOTING “Narcisse Arido’s Reply to the ‘Prosecution’s Response to Arido’s Request for Interim Release’ (ICC-01/05-01/13-525-Conf)” dated 16 July 2014⁹;

NOTING articles 21, 58(1), 60(1) and (2) and 67(1) of the Statute, rules 118(1), (2) and (3), 119(1) of the Rules of Procedure and Evidence and regulation 51 of the Regulations of the Court;

HEREBY RENDERS THIS DECISION.

Determinations by the Single Judge

A. General principles

1. The Single Judge will decide Mr Arido’s Request for Interim Release in light of those principles which are now consolidated in the case-law of the Appeals Chamber of the Court and have constantly been upheld by this Chamber.

2. Pursuant to article 60(2) of the Statute, upon an application for interim release, the Chamber has to determine whether “the conditions set forth in article 58, paragraph 1, are met”. In the affirmative, “the person shall continue to be detained; in the negative, the person shall be released, “with or without conditions”. This assessment requires the Chamber to “inquire anew into the existence of facts justifying detention”¹⁰, but can be based on the same materials as those looked at for the purposes of the warrant and on the same factors underpinning it¹¹.

3. As stated by the Defence for Mr Arido, the right to liberty is a fundamental human right and pre-trial detention is an exception thereto¹². It is however an exception which is necessary, and shall therefore unfailingly apply, when the relevant statutory requirements are satisfied. As stated by the Appeals Chamber, “the decision on continued detention or release pursuant to article 60(2) read with article 58(1) of the Statute, is not of a discretionary nature. Depending upon whether or not the conditions of article 58(1) of the Statute continue to be met, the detained person shall be continued to be detained or shall be released”¹³.

⁹ ICC-01/05-01/13-576-Red.

¹⁰ ICC-02/11-01/11-278-Red, para. 23.

¹¹ ICC-02/11-01/11-278-Red, para. 27.

¹² ICC-01/05-01/13-477-Red, para. 13.

¹³ ICC-01/04-01/06-824, para. 134.

4. The Single Judge is mindful of the recent “recommendation” issued by the Appeals Chamber, by way of criticism to a Pre-Trial Chamber’s decision under article 60(2) of the Statute, to the effect that such decisions must contain a “full reasoning”¹⁴. Whilst believing that more than one doubt could be raised as to the actual existence of such a need, he will nevertheless specifically refer to some of the materials relied upon in issuing the warrant (as well as to their contents), all of which have been reconsidered and assessed *ex novo* for the purposes of this decision.

5. By referring to “article 58, paragraph 1”, article 60(2) of the Statute seems to require the Pre-Trial Chamber to proceed anew to an assessment of both the existence of reasonable grounds to believe that the crimes alleged by the Prosecutor have been committed by the arrested person (article 58(1)(a)), and of the existence of one or more of the risks listed under article 58(1)(b). It is debatable, however, to what extent a Pre-Trial Chamber (namely, the same Pre-Trial Chamber who has issued the warrant of arrest) can be meaningfully called upon reassessing the existence of reasonable grounds to believe that a crime has been committed in the context of an application for interim release. It is also worth noting that the practice developed so far by the Chambers of the Court in their decisions on requests for interim release seems, most appropriately, to have rather focussed on the determination as to whether one or more of the risks listed under letter b of article 58, paragraph 1 still exist. Be it as it may, the Single Judge will also briefly proceed to assess the persisting existence of reasonable grounds to believe that the crimes alleged by the Prosecutor in her application under article 58 have been committed. In so doing, he will also be guided by the recent Appeals Chamber’s statement to the effect that a Pre-Trial Chamber called to decide on an application under article 60(2) of the Statute is “at liberty to rely on the materials underpinning” the warrant as assessed *ex novo*, which “reliance, in and of itself, does not imply an uncritical acceptance, on the part of the Pre-Trial Chamber, of such materials to support its finding under article 58 (1)(a) of the Statute”¹⁵.

¹⁴ICC-02/11-01/11-278-Red, para. 49. See also ICC-01/04-01/06-824, para. 124.

¹⁵ ICC-01/05-01/13-559, para. 46. See also ICC-01/05-01/13-558, para. 60.

B. First limb of the assessment: article 58(1)(a) (whether there are reasonable grounds to believe that the person committed the crimes alleged by the Prosecutor)

6. On the basis of material attached to the Prosecutor's Application, the Single Judge found that there were reasonable grounds to believe that Narcisse Arido "provided false or forged evidence, which was disclosed to the Prosecutor and which the Defence attempted to tender into the record of the Case, and that he transferred sums of money to Defence witnesses". In particular, there were reasonable grounds to believe that he "i) received sums of money from Bemba's close associates, including Aimé Kilolo and Fidèle Babala, around the date of delivery of the documents to Aimé Kilolo; ii) he acted as intermediary in respect of other money transfers to other witnesses ...; and iii) he transferred money to Defence witnesses"¹⁶.

7. The material on which the Chamber based its findings in relation to Narcisse Arido – which, together with the Prosecutor's Application, was reclassified as confidential and therefore made available to all the suspects as of 27 November 2013 - included the following: a) tables containing amounts of money transferred by Fidèle Babala to a number of persons, including Narcisse Arido¹⁷; b) translated excerpts of phone calls intercepts between Fidèle Babala and Jean-Pierre Bemba, concerning Mr Arido's withdrawal of a Western Union payment¹⁸; c) material related to the case *The Prosecutor v. Jean-Pierre Bemba Gombo* ("Main Case") showing that Mr Arido submitted documents¹⁹ requested by the Defence to be admitted as evidence, the authenticity of which was challenged during the Main Case²⁰; d) Western Union

¹⁶ ICC-01/05-01/13-1-Red2-tENG, para. 19.

¹⁷ ICC-01/05-67-Conf-Anx C.2.; ICC-01/05-67-Conf-Anx B.2.

¹⁸ ICC-01/05-67-Conf-Anx I.1., page 3, 25 May 2012, 2013/000031430.

¹⁹ ICC-01/05-67-Conf-Anx D.1.; ICC-01/05-67-Conf-Anx D.2.; ICC-01/05-67-Conf-Anx D.3.; ICC-01/05-67-Conf-Anx D.4.; ICC-01/05-67-Conf-Anx D.5.; ICC-01/05-67-Conf-Anx D.6.; ICC-01/05-67-Conf-Anx D.8., ICC-01/05-67-Conf-Anx D.9.; ICC-01/05-67-Conf-Anx D.10.; ICC-01/05-67-Conf-Anx D.11.; ICC-01/05-67-Conf-Anx D.12.; ICC-01/05-67-Conf-Anx D.13.; ICC-01/05-67-Conf-Anx D.14.

²⁰ ICC-01/05-67-Conf-Anx F.1.

and Express Union payments tables showing the role of Narcisse Arido as intermediary in payments to a number of Defence witnesses in the Main Case²¹.

8. The Single Judge notes that, since the issuance of the Warrant, the Prosecutor disclosed to the Defence evidence suitable to strengthen her allegations relating to Narcisse Arido, which evidence has been reviewed by the Single Judge for the purposes of assessing the Prosecutor's application for redactions²². This evidence appears to provide additional support to the allegation to the effect that Mr Arido played a significant role in the context of the implementation of the criminal scheme alleged by the Prosecutor as aimed at perverting the course of justice: in particular, he appears to also have briefed witnesses on the answers to give during their depositions²³, and to have solicited them to give false testimony in the Main Case with the promise of money and asylum in Europe²⁴.

9. None of the arguments submitted by the Defence for Narcisse Arido in its Request for Interim Release pertains to the merits of the case, and hence the first limb. The Defence for Mr Arido simply argues that it will give "a logical explanation for every single operation [ie, Western Union and Express Union money transfers] that is totally unrelated to the commission of crimes under Article 70 of the Statute" in the context of its submissions for the purposes of the confirmation of charges. The Single Judge believes that this broad assertion is not *per se* suitable to weaken his conclusion that there are reasonable grounds to believe that Mr Arido committed the alleged crimes for the purposes of this decision.

10. Under these circumstances, the Single Judge is still fully persuaded that the information and materials made available to the Chamber by the Prosecutor at the time of her Application under article 58 of the Statute, all of which have been assessed *ex novo* in light of Mr Arido's Request for Interim Release, as well as those disclosed to the Defence during these proceedings, still justify the finding that there are reasonable grounds to believe that Narcisse Arido committed the crimes alleged

²¹ ICC-01/05-67-Conf-Anx J.1., ICC-01/05-67-Conf-Anx J.2.

²² ICC-01/05-01/13-467 and confidential *ex parte* Annexes thereto; ICC-01/05-01/13-503.

²³ CAR-OTP-0080-0100 at 0109, line 324 and at 0114, line 499; CAR-OTP-0080-0494 at 0499, line 172; CAR-OTP-0078-0264 at 0281, line 583.

²⁴ CAR-OTP-0080-0021 at 0030, line 314 and at 0031, line 320.

by the Prosecutor and that, therefore, the requirements of article 58(1)(a) of the Statute continue to be satisfied.

C. Second limb of the assessment: article 58(1)(b) (whether the arrest appears necessary for one or more of the reasons listed therein)

11. As regards the requirements set forth under article 58(1)(b), the Single Judge notes that – as clarified by the Appeals Chamber²⁵ and also recently reiterated by this Chamber²⁶ – the three conditions listed in the provision are “in the alternative”, thereby making “the fulfilment of one of them sufficient to negate the need to address the remaining conditions”. Nevertheless, the Single Judge deems it appropriate to consider all of them. By the same token, he will also strictly follow the guidance provided by the Appeals Chamber to the effect that, when it comes to determine the existence of one or more of the risks set forth in article 58(1)(b), the “question revolves around the possibility, not the inevitability, of a future occurrence”²⁷, provided only that such risk is established on the basis of specific and concrete elements.

C.1 Appearance at trial

12. The Defence for Mr Arido submits that, by the time of his arrest, “Mr Arido’s behaviour demonstrated that he did not attempt to abscond from the Court’s jurisdiction and is willing to cooperate with the Court”. Moreover, although he failed to testify before the Court in the Main Case and used the visa obtained by the Court to flight to France, he should not be considered a “flight risk” person, since absconding from the jurisdiction of the Court would negatively impact to his asylum application in France or elsewhere. Furthermore, Narcisse Arido was found indigent for the purpose of the legal aid; since he has never been part of Jean-Pierre Bemba’s network, it is submitted that he does not have access to funds that would permit him to abscond.

13. The Single Judge takes the view that these submissions are not suitable to weaken the persuasiveness of the factors supporting the existence of a flight risk.

²⁵ ICC-01/04-01/06-824, para. 139.

²⁶ ICC-01/04-02/06-147, para. 39.

²⁷ ICC-01/04-01/07-572, para. 21.

First, the fact that Mr Arido has never had any direct contact with Mr Bemba does not *per se* exclude him from the latter's network. As the recently disclosed evidence demonstrates, he was actively involved with the other suspects in the implementation of the criminal plan alleged by the Prosecutor: such involvement leads the Single Judge to consider him as also being part of the Bemba's network, as such potentially able to claim and obtain economic support, if and when required.

14. Both the Appeals Chamber²⁸ and Pre-Trial Chambers of the Court have previously found the existence of a network of supporters behind a suspect to be a relevant factor in the determination of the existence of a risk of flight²⁹, because it might indeed facilitate absconding; the availability of financial means, "whether directly or indirectly" through a network, has been likewise been found relevant by this Chamber in the case of *The Prosecutor v. Bosco Ntaganda*³⁰.

15. Similarly, factors such as the existence of an asylum application in France, the claimed absence of risk of Mr Arido's return to Cameroon and the submission that leaving his residence in France or absconding from the jurisdiction of the Court would negatively impact to, or even jeopardise, his ability to obtain the refugee status are not suitable to outweigh the elements considered by the Single Judge as determining the existence of a concrete flight risk.

16. The Defence for Narcisse Arido highlights the difference between the crimes alleged in these proceedings and the "core crimes" under article 5 of the Statute, in particular in light of the maximum sentence set forth by article 70(3) of the Statute, and submits that under these circumstances the duration of his pre-trial detention has already become unreasonable within the meaning article 60(4) of the Statute.

17. The Single Judge is aware of the statutory limitation to five years of detention in case of conviction for offences against the administration of justice. However, contrary to what stated by the Defence for Mr Arido, this does not *per se* make the duration of Mr Arido's pre-trial detention inconsistent with the Statute. Article 60(4) does require the Pre-Trial Chamber to "ensure that a person is not detained for an

²⁸ ICC-02/11-01/11-278-Red, para. 32.

²⁹ ICC-02/11-01/11-278-Red, para. 26.

³⁰ ICC-01/04-02/06-147, para. 55 .

unreasonable period prior to trial due to inexcusable delay by the Prosecutor". It seems hardly necessary to recall, however, that the duration of these proceedings (more specifically, their protraction beyond the time limits originally envisaged in the context of the initial appearance of the suspects back in November 2013) is certainly not ascribable to the Prosecutor: if a "delay" there was, this originated exclusively from the need that the Dutch judicial authorities comply with their own domestic procedures prior to the transmission to the Court of Independent Counsel's third and final report, and from the timing required by such procedures following the arrest of the suspects, as clearly explained in both the "Decision on the Prosecution's request for variation of time limits pursuant to regulation 35 of the Regulations of the Court concerning the confirmation of charges" dated 14 March 2014³¹ and the "Decision amending the calendar for the confirmation of the charges" dated 28 May 2014³².

C.2 *Obstructing or endangering the investigation or the Court proceedings*

18. The Single Judge confirms what he already stated as regards the necessity to have specific and concrete elements supporting the finding that the risk referred to in article 58(1)(b) exists³³. Both the materials attached to the Prosecutor's Application and those disclosed during this pre-trial phase and referred to in the Prosecutor's Response provide such specific and concrete elements, in particular by showing the willingness and the ability of the Suspect to interfere with witnesses. Furthermore, as recently as during the week of 17 July 2014, information to the effect that confidential information relating to witnesses in these proceedings was unduly disseminated by persons closely related to Narcisse Arido was submitted to the Single Judge³⁴ and required the urgent adoption³⁵ of appropriate provisional measures aimed at preventing further disruption of the confidential measures in place.

19. All of these elements (also when seen in light of the most recent incident) strengthen the Single Judge's conviction that the risk that Narcisse Arido may

³¹ ICC-01/05-01/13-255.

³² ICC-01/05-01/13-443.

³³ ICC-01/05-01/13-261, para. 23.

³⁴ ICC-01/05-01/13-575-Conf-Exp and Annex thereto.

³⁵ ICC-01/05-01/13-579-Conf.

further engage in unlawful acts of the same or a similar nature with a view to obstructing or endangering the investigation or the Court's proceedings is far from being an abstract, distant or theoretical one.

20. The Single Judge is satisfied that these elements are specific and objective enough for them to suitably ground his assessment of the persisting existence of a risk that obstruction or endangerment of the proceedings does exist, both in respect of this case and of the Main Case. Furthermore, article 58(1)(b)(ii) explicitly states that detention might be necessary with a view to ensuring that the person does not obstruct or endanger not only the investigation, but also the "court proceedings".

21. The Single Judge is persuaded that the very nature of the crimes at stake makes it obvious that the detention is the only context allowing the effective management of these risks. The more so, when one considers that the crimes alleged in the Prosecutor's Application, which the Chamber found reasonable grounds to believe were indeed committed, appear to have been at least partly committed in spite of the fact that one of the suspects was already in the custody of the detention unit of the Court, and by means of an abuse of the communication system set up within it.

C.3 The risk relating to future crimes

22. Again, the Single Judge will be guided by the Appeals Chamber in making his assessment under this heading. The risk relating to the possible commission of related crimes, by its very nature, is such as to make it impossible to specify in detail what the nature of such crimes might be, or the context in which they might be committed³⁶. Furthermore, the nature of the crimes at stake in these proceedings (i.e., offences against the administration of justice) is such as to create a great degree of overlapping between the risk that the investigation be obstructed or endangered and the risk that the commission of the crimes be continued or that related crimes be committed. Accordingly, the observations contained in paragraph C.2 above, to the effect that the risks that the relevant investigation, or these proceedings, be obstructed or endangered are ground in the very conducts carried out by Narcisse

³⁶ICC-02/11-01/11-278-Red, para. 70.

Arido both prior to his arrest and very recently, are also of relevance for the purposes of assessing the third element listed under article 58(1)(b) of the Statute.

23. As an additional remark, the Single Judge notes that it is incorrect to state, as Mr Arido's Defence does, that "references to the fact that the [Main] case may be 're-opened' and to 'future and related crimes[...] [that] might also be committed by the suspect in respect of these proceedings' constitute ... a mere speculation". First, by its very nature, the reopening of a case at a late stage is something which cannot be predicted before it happens; by the same token, the possibility that it may happen makes it of essence to adopt all measures which might be necessary and appropriate to prevent that the integrity of the case be compromised, the more so in presence of substantiated allegations that acts aimed at disrupting the course of justice have already been committed. Moreover, in light of powers recognised to the Appeals Chamber in article 83(1) and (2) of the Statute vesting in the Appeals Chamber "all the powers of the Trial Chamber", including, most critically, the power to itself to "call evidence". Second, future and related crimes, the risk of which the Single Judge is called to assess, might also be committed by the Suspect in respect of these proceedings. If many pieces of evidence might by this stage indeed be in the hands of the relevant authorities and as such beyond the suspects' reach³⁷, it cannot yet be excluded that action be taken in respect of other evidentiary items which might be still outstanding.

24. In light of the above, the Single Judge is satisfied that a concrete risk that Narcisse Arido might commit crimes related to, or of the same nature of, those underlying the Prosecutor's Application and the warrant continues to exist unabated.

D. As to the issue of conditional release as an alternative to detention

25. Mr Arido's Defence submits that Narcisse Arido is prepared to accept and comply with any conditions the Single Judge should find necessary to impose to the interim release.

³⁷ ICC-01/05-01/13-38-Corr, paras 53-54.

26. The Single Judge is persuaded that, because of the nature of the alleged criminal conduct and the specific role played by Mr Arido in its implementation, as well as in light of the fact that most of the conducts related to the alleged crimes have occurred by way of communications with the other suspects or witnesses, it is difficult to conceive of measures which might effectively counteract the risks identified in this decision, including those associated with the suspect's communications with the external world and that, accordingly, the detention centre is the only environment providing adequate guarantees for the effective management of those risks.

27. Moreover, the Single Judge notes that no availability to accept Narcisse Arido on their territory in the event of his release, with or without conditions, has been shown by either the Netherlands or France, that is the State to which Narcisse Arido requested to be released.

FOR THESE REASONS, THE SINGLE JUDGE
REJECTS Narcisse Arido's Request for Interim Release.

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



Judge Cuno Tarfusser
Single Judge

Dated this Thursday, 24 July 2014

At The Hague, The Netherlands