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Date: **9 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 Response to the “Prosecution’s Sixth Request for the Admission of
Evidence from the Bar Table” (ICC-01/05-01/13-1784-Conf)’
(ICC-01/05-01/13-1818-Conf), filed 18 April 2016**

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I. INTRODUCTION

1. On 8 April 2016, the Prosecution filed its sixth motion for admission of evidence through the bar table (hereinafter ‘Prosecution’s Request’).¹ The request includes Annexes to Independent Counsel reports (Category I), witnesses’ statements and related documents (Category II), and other documents (Category III).

2. The Arido Defence hereby submits its response.

II. CONFIDENTIALITY

3. 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 because it refers to a filing of the same classification.

III. SUBMISSIONS

4. The Arido Defence incorporates by reference the relevant sections of its request for an order on the Prosecution to re-file its first bar table motion² and of its responses to the Prosecution’s first and second bar table motions.³ The Arido stresses again that the use of a bar table motion does not entail a lower standard of relevance or admissibility and that Article 69 (4) of the Statute applies.

A. Independent Counsel reports

5. As regards item CAR-OTP-0093-0634, the Arido Defence tendered this item in its own bar-table motion for a different purpose.⁴ It takes no position as regards the Prosecution’s interpretation of the evidence, but the Defence has offered its own interpretation previously and reserves its rights to provide further interpretation as it deems suitable.

6. For item CAR-OTP-0094-0392, the Arido Defence maintains the position it took on the more redacted version of this item: the Defence opposes the admission into evidence of the report in this form, although it would not oppose the admission into evidence of some of the actual emails. Further, parts of the emails relate to the charges of false documents, which do not form part of the charges (e.g. #117898301), and the Defence opposes admission of these

¹ ICC-01/05-01/13-1784-Conf.

² ICC-01/05-01/13-1038-Conf, paras 8-10.

³ ICC-01/05-01/13-1077-Conf, paras 5, 8-9, 25-26, 30; ICC-01/05-01/13-1197-Conf, paras 4-6, 10, and 17.

⁴ ICC-01/05-01/13-1789-Conf-AnxA, p. 9, row 59.

sections of the e-mails as irrelevant and immaterial. The Arido Defence also recalls the objections contained in its 20 April 2015 observations on the IC report.⁵

7. With regards to CAR-OTP-0094-0444, a similarly lesser redacted version of an item previously tendered, the Arido Defence maintains its position that it does not have any objections⁶ to the material nor does it take a position.

B. Witnesses' statements and related documents

8. With regards to the materials submitted for witness D21-0006⁷ and D21-0005⁸ the Arido Defence takes no position. The Arido Defence objects to the submission of the material related to witness P-805⁹ and P-785¹⁰ ('P-805 and P-785 materials').

1. The P-805 and P-785 material lacks relevance

9. In its motion, the Prosecution stakes the relevance of this material essentially upon arguments advanced in the Arido Defence opening statement;¹¹ however, the Prosecution itself has argued that:

Specifically, the scope of opening statements is limited to the summarisation of, or commentary on, the evidence that the given Party intends to adduce during its case-in-chief and what it will prove. *It is not evidence in itself*, nor is it for the purpose of argument ('emphasis added')¹²

10. The Prosecution cannot have it both ways. From a legal perspective, the purported relevance the Prosecution advances ceased to exist when the Arido Defence withdrew witnesses D4, D6, and D8 from its list of witnesses after making its opening statement. Therefore, the material is irrelevant because the witnesses did not testify.

11. As regards CAR-OTP-0093-0071, this decree merely appointed some members of the Presidential Security to posts of responsibility. As such, those who were not appointed had no reason to be included in the text. The position that the Arido Defence witnesses claimed to have

⁵ ICC-01/05-01/13-918-Conf-Exp.

⁶ ICC-01/05-01/13-1515-Conf-AnxA, p. 78, row 77.

⁷ CAR-OTP-0093-0447, CAR-OTP-0093-0448, CAR-OTP-0093-0449, and CAR-OTP-0093-0460.

⁸ CAR-OTP-0093-0468, CAR-OTP-0093-0469, CAR-OTP-0094-0002, and CAR-OTP-0094-0003.

⁹ CAR-OTP-0093-0064 and CAR-OTP-0093-0071.

¹⁰ CAR-OTP-0093-0092, CAR-OTP-0093-0101, CAR-OTP-0093-0104, CAR-OTP-0093-0106.

¹¹ ICC-01/05-01/13-1784-Conf, para. 17.

¹² ICC-01/05-01/13-1654, para. 1.

been appointed or held positions of responsibility was never advanced, therefore, this decree is totally irrelevant.

12. The photo CAR-OTP-0093-0104 is simply immaterial to the case. The Defence cannot ascertain if the persons mentioned are really the ones appearing in the picture. Moreover, the source of the picture is unknown.

13. Finally, the Arido Defence opposes the admission of item CAR-OTP-0093-0106 on the following grounds: (1) this document is irrelevant to the case, as it is dated 11 May 1996; and (2) [REDACTED] and [REDACTED] are not parties to the proceedings, nor witnesses in this case. Therefore, to admit a decree which shows their affiliation to [REDACTED] is immaterial and irrelevant.

2. The P-805 and P-785 documentary materials lack reliability and have no probative value

14. The sources of CAR-OTP-0093-0064 and CAR-OTP-0093-0092 were P-805 and P-785 respectively. The Prosecution is relying on them to identify former military and non-military persons. However, the Prosecution has not corroborated their reliability or otherwise verified their information. Absent such an undertaking, it has not been shown that these individuals can reliably identify former military and non-military people. Moreover, Prosecution investigations from an early period in the case paint a different picture of the status of D4 and D6. A report from the Prosecution itself indicates that D4 was in the military¹³ and a report from [REDACTED] indicates that D6 was in the military.¹⁴

15. As regards, CAR-OTP-0093-0071, this document is not sufficient by itself to show that D4, D6, and D8 were not soldiers working under [REDACTED]'s command. This Decree, signed and stamped on 1 August 2001, does not establish a time frame for its application. It does not show if, before 1 August 2001 or after this date, and in particular after the attempted coup of Andre Kolingmba in 2001, whether these individuals were under the command of [REDACTED]. Its reliability, and its probative value, are extremely limited.

16. As regards CAR-OTP-0093-0104, the source of the picture – who took it in what circumstances, when, and where – is missing. Therefore, the photo cannot be admitted as it bears no indicia of reliability.

¹³ CAR-0072-0476, p. 4 (0479).

¹⁴ CAR-0088-0287.

3. *The prejudice of the admission of the P-805 and P-785 material outweighs the probative value*

17. The Prosecution's request is extremely un-timely, and prejudices the fair trial rights of the Defence. The Prosecution closed its case on 27 November 2015.¹⁵ It now seeks to introduce this evidence over four months later.

18. The disclosure on 4 March 2016, just after the beginning of Defence case, left no chance for the Defence to investigate the material. This handicaps the Defence, and makes it substantially harder to investigate and contest the material or raise it with Prosecution witnesses. Moreover, had the Defence been given timely notice of this material, it would have been in a position to potentially identify witnesses to refute the claims the Prosecution is now making.

19. The Prosecutor had ample opportunity to conduct appropriate investigation prior to bringing the case for confirmation and trial and it must be recalled that as far back as 2008, the Prosecution was conducting investigations regarding the military status of some of the individuals mentioned in the charges. The Prosecution should know its case and should not be provided an opportunity to mould the case as the trial progresses.

20. The material the Prosecution is submitting now relates to submissions it made on the confirmation of charges¹⁶ in 2014 – which were confirmed by Pre-Trial Chamber II.¹⁷ The Prosecution has an obligation to seek the truth under Article 54(1)(a). In light of that duty, justification for the delay in investigating is simply not credible.

21. The Prosecution argues that it is justified in submitting the materials now because it had limited access to military records due to an ongoing-armed conflict.¹⁸ However, the Prosecution readily admits¹⁹ that it was only the Arido Defence's inclusion of witnesses D4 and D6 that prompted the follow-up investigation and *not* the improvement of the security situation. The Central African Republic ('CAR') had a transitional government prior to the June 2015 cut-off date for the Prosecution to add items to its list of evidence and at that time the conflict was abating. There is no reason that it could not sought out this information before this point.

¹⁵ ICC-01/05-01/13-1499.

¹⁶ Regarding D4: "D-4 has never been a soldier in the CAR armed forces", see ICC-01/05-01/13-597-Conf-AnxB, para. 172. See also "ARIDO and [REDACTED] illicitly coached D-4 at the meeting, including instructing him to present himself as a soldier when he met with KILOLO", *Ibid.*, para. 174. Regarding D6: "D-6 was never a soldier in the CAR armed forces", para. 223 of ICC-01/05-01/13-597-Conf-AnxB and "D-6 was also promised money and the chance to live in Europe in exchange for falsely testifying that he was a member of the CAR armed forces", *Ibid.*, para. 225.

¹⁷ ICC-01/05-01/13-749, para. 90.

¹⁸ ICC-01/05-01/13-1784-Conf, para. 23.

¹⁹ *Ibid.*, para. 23.

22. After, the interim Government was appointed, the Prosecution continued to carry out investigations in the CAR. This would have been a golden opportunity to pursue a request through the Ministry of Defence in order to have the information concerning these individuals. Especially given that later the Prosecution sought information from purported members of the military, to seek information from the [REDACTED] and [REDACTED] is completely misleading and inappropriate.

23. The simple fact is that there can be an almost endless supply of information that *could* be advanced as relevant in cases concerning allegations that cover several states and a year or more of alleged activities. The late submission of this material, as well as the Prosecution's reservation that it be permitted to submit further outstanding material from the Independent Counsel,²⁰ gives the impression that the Prosecution intends to investigate almost indefinitely. This is prejudicial to a fair trial and should not be permitted.

4. The P-805 and P-785 material should not be admitted under Rule 68

24. The Prosecution requests the Chamber to accept the Rule 68(2)(b) should the Chamber deem it necessary; however, the Prosecution provides no arguments²¹ as to how the requirements of Rule 68(2)(b) are met, especially given the extremely prejudicial late submission of these interviews.

25. The Trial Chamber has stated that "The entire purpose of Rule 68(2)(b) of the Rules is to identify certain situations where it is not necessary to examine witnesses while preserving the fair and expeditious conduct of the proceedings."²² The Trial Chamber has also affirmed that where a point is materially in dispute, this militates against the application of Rule 68(2)(b).²³

26. The Prosecution wants to use the materials to prove facts related to the acts and conduct of the Accused. The Prosecution makes clear that the statements "are relevant to the confirmed charges"²⁴ as they are provided to support the testimony of P-245 and P-260 against Mr. Arido.²⁵

²⁰ ICC-01/05-01/13-1784-Conf, para. 13.

²¹ *Ibid.*, para. 20.

²² ICC-01/05-01/13-1478-Conf, para. 106.

²³ "The Chamber considers that when assessing the requirements in Rule 68(2)(b)(i) of the Rules, they do not militate in favour of receiving D23-1's testimony without examination by all parties. The contents of the Report do relate to issues which are materially in dispute", ICC-01/05-01/13-1753, para. 5, citing the Trial Chamber's prior decision ICC-01/05-01/13-1641, para. 7.

²⁴ ICC-01/05-01/13-1784-Conf, para. 19.

²⁵ *Ibid.*, para. 17.

The Prosecution also advances these documents as providing an interpretation of Mr. Arido's statement to the French police.²⁶

27. In addition to failing on the threshold criteria of "acts and conduct", the Prosecution's arguments fail in respect of the other factors to be considered under Rule 68(2)(b). Firstly, the question of the witnesses' military background is clearly disputed. This is a factor that the Trial Chamber has stressed on several occasions.

28. Secondly, the information is not cumulative, but is rather the sole information that the Prosecution has uncovered regarding the prior history of the prior Arido Defence witnesses. It is also contradicted by other evidence previously adduced by the Prosecution.²⁷

29. Thirdly, with the exception of the statements, no information has been adduced as regards these individuals.

30. Fourthly, the interests of justice are not served by the introduction of this material. The extensive prejudice that would be created by the admission of these documents has been described above.²⁸ Additionally, there is clearly no nexus between these documents and Mr. Arido's statement to the French Police. The circumstances under which the statements were recorded are completely different.

31. Fifthly, and strongly related to the interests of justice, the Arido Defence has not had an opportunity to investigate or cross-examine these individuals as regards their credibility. Furthermore, the statements also relate to individuals the Prosecutor characterises as suspects.²⁹ The prejudicial effect of submitting statements related to suspects who have themselves not been afforded an opportunity to test the credibility of the statements and additionally submitting them against Mr. Arido who has similarly not been afforded an opportunity to test the credibility of the statements violates the fundamental principles of fair trial.

32. Finally, as discussed above, the material lacks reliability.³⁰ For these reasons, the Trial Chamber should reject the admission of these statements under Rule 68(2)(b).

²⁶ *Ibid.*, para. 19.

²⁷ See paragraph 14 above.

²⁸ See paragraphs 17-23.

²⁹ ICC-01/05-01/13-1638, para. 1.

³⁰ See paragraphs 14-16 above.

5. *Materials from the Public Authorities of CAR*³¹

33. As discussed above³² the material is not relevant now; however, it can be added that item CAR-OTP-0093-0197 does not even specify the time period over which the individual searched. Absent some indication of this, his conclusion that the Arido Defence witnesses were not in the military is not relevant since this claim could, for example, only indicate that they are not *current* members of the military. Additionally, the individual's records may only span a short time-period.

34. Similarly, the report signed on 26 February 2016 by [REDACTED] is vague and confusing. There is no *indicia* regarding the time frame at which the research was directed. Absent an indication of this, the research into the status of an individual, many years after the events, is rendered of little assistance.

35. The Prosecution claims that the background checked “confirm”³³ that the former Arido Defence witnesses were not in the CAR military; however, upon closer inspection the reliability of the documents does not stand up to this claim.

36. Firstly, it is far from clear how the archives of the CAR authorities can be regarded as totally reliable. The country has existed on the brink of ‘failed state’ status for much of the last decade. It has undergone multiple conflicts which would disrupt and/or call into question the reliability of public records. Since 2001, there has been a coup attempt – which is of course related to the Bemba main case, a successful coup d’état, and at least two armed rebellions or internal armed conflicts with the most recent leading to the opening of a further situation at the ICC. Under such conditions, doubt should arise as regards whether a record of service was either destroyed or – due to the informal nature of recruitment in these conflicts – ever created in the first place.

37. Secondly, a [REDACTED], as compared to military records, is also not the correct source from which to find reliable information as regards inscription in the army. As just alluded to, the conflict in CAR has been waged with militias, but more importantly, given the security situation, the administrative efficacy and integration of information that is expected in a stable state cannot be presumed.

³¹ CAR-OTP-0093-0152 and CAR-OTP-0093-0197.

³² See paragraphs 9-10.

³³ ICC-01/05-10/13-1784-Conf, para. 16.

38. Thirdly, the Prosecution failed to ‘calibrate’ this source of information. Without checking that the request would return positive results for individuals whom were known to be in the military at the specified time, the absence of an indication of military status in these reports does not demonstrate anything. Said most succinctly, the absence of proof is the not the same thing as proof of that absence.

39. To conclude, it is submitted that the prejudicial impact of admitting this evidence when set against its probative value should lead the Trial Chamber to reject this documentary material. Material that is not reliable is not probative. As discussed above, the late disclosure – and investigation – of this material is itself highly prejudicial to a fair trial. It is submitted that there is thus little balancing to do, the material should be rejected.

C. Other documents

40. As regards items CAR-OTP-0094-0473, CAR-OTP-0094-0474, and CAR-D20-0006-0478, the Arido Defence takes no position.

41. For item CAR-D21-0013-0154, that a Lead Counsel would ask for views regarding a witness does not, as contended by the Prosecution, demonstrate a strategic decision making role. The item is thus not relevant to this question; however, it is relevant to the status of Mr. Arido, as it demonstrates that as late as 24 April 2012, the question of Mr. Arido’s witness capacity was under discussion by the Bemba Defence.

42. With respects to the English translations³⁴ of prior transcripts, the Arido Defence maintains its prior position namely that: (a) the Prosecution does not provide information regarding relevance – the document is unrelated to Mr. Arido; (b) the place of recording is unknown; (c) the date and identity of the “Jacques” is not referred to in the audio file – it is unclear how this information is known to the Prosecution. In any event, it does not form part of the evidence and therefore the cover page should be removed. Finally (d) the Prosecution does not provide information or evidence regarding the provenance of the document.

³⁴ CAR-OTP-0092-5469 and CAR-OTP-0092-5477.

IV. CONCLUSION

43. The Arido Defence respectfully submits the above arguments and observations, and requests the Trial Chamber VII to find CAR-OTP-0094-0392, CAR-OTP-0093-0064, CAR-OTP-0093-0071, CAR-OTP-0093-0092, CAR-OTP-0093-0101, CAR-OTP-0093-0104, CAR-OTP-0093-0106, CAR-OTP-0093-0152, CAR-OTP-0093-0197, CAR-OTP-0092-5469, and CAR-OTP-0092-5477 inadmissible.



Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 9th Day of July 2016

The Hague, The Netherlands