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No.: ICC-01/05-01/13
Date: **21 November 2016**

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul C. 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

**Decision on Arido Defence Request for Exclusion of Prosecution Witness or, in the
Alternative, Clarification of Sentencing Witnesses Decision**

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

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Trial Chamber VII ('Chamber') of the International Criminal Court ('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 64(2), 67(1)(e) and 70(1)(c) of the Rome Statute ('Statute') and Rule 145 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Arido Defence Request for Exclusion of Prosecution Witness or, in the Alternative, Clarification of Sentencing Witnesses Decision'.

I. Procedural history

1. On 4 November 2016, the Office of the Prosecutor ('Prosecution') proposed to call one witness to provide evidence going to Mr Arido's alleged attempt to obstruct justice in this case ('P-256').¹ The Prosecution indicated that the witness's statement could be introduced in writing instead of or in addition to him testifying before the Chamber.²
2. On 11 November 2016, the Chamber issued a decision on, *inter alia*, the witnesses proposed by the parties for the sentencing phase ('Sentencing Witnesses Decision'),³ determining that: (i) in view of the seriousness of the allegations raised by P-256, he had to appear and be examined by the other parties and (ii) if and when P-256 appears, he 'may only be examined on the matters allegedly proving that Mr Arido attempted to obstruct justice in this case. This is not a further opportunity to litigate the merits of the present case, as the Chamber has already decided upon the merits of this case in its judgment'.⁴
3. On 15 November 2016, the defence for Mr Arido ('Arido Defence') filed a request ('Request')⁵ seeking that the Chamber: (i) exclude the testimony of P-256

¹ Prosecution's Notification of Witness Summaries for Sentencing Proceeding, ICC-01/05-01/13-2009 (with confidential annex), paras 2-4.

² See ICC-01/05-01/13-2009-Conf-AnxA, page 2.

³ Decision on Sentencing Witnesses and Setting an Article 76(2) Hearing, ICC-01/05-01/13-2025.

⁴ Sentencing Witnesses Decision, ICC-01/05-01/13-2025, paras 16, 18.

⁵ ICC-01/05-01/13-2029-Conf (with five confidential annexes).

and any evidentiary materials related to him for sentencing purposes or, in the alternative, (ii) clarify the Sentencing Witnesses Decision and provide directions and guidance, so as to permit the Arido Defence to challenge P-256's credibility and (iii) order the Prosecution to re-file a more detailed summary of P-256's anticipated testimony.

4. On 17 November 2016,⁶ the Prosecution deferred to the Chamber's discretion on the request for clarification while opposing the remainder of the relief sought ('Response').⁷

II. Submissions, analysis and conclusions

5. The Chamber will examine each relief sought by the Arido Defence in turn.⁸

A. Request to exclude P-256 and associated materials

6. The Arido Defence argues that P-256's testimony should be excluded to preserve trial fairness for both legal and factual reasons.⁹
7. Legally, the Arido Defence submits that allegations of obstructing justice cannot qualify under Rule 145(2)(b)(i) and (vi) of the Rules¹⁰ as an aggravating circumstance. The Arido Defence emphasises that 'uncharged bad acts' are not specified as aggravating circumstances in this rule, only 'prior criminal

⁶ The response deadline was shortened to this date. Email from Trial Chamber VII Communications to the parties, 15 November 2016 at 14:56.

⁷ ICC-01/05-01/13-2035-Conf.

⁸ As a preliminary note, the Arido Defence request indicates that it was preparing a response to the Prosecution's 4 November 2016 notification at the time the Sentencing Witnesses Decision was rendered. Request, ICC-01/05-01/13-2029-Conf, para. 8. The Prosecution's notification was filed in accordance with a briefing schedule set by the Single Judge of the Chamber. Sentencing Calendar, 20 October 2016, ICC-01/05-01/13-1990, para. 2(i). The indicated briefing schedule did not permit any responses to these 4 November notifications, and Regulations 24(1) and 34(a) of the Regulations of the Court permit Chamber orders to constitute exceptions to the general statutory procedure for responding to party filings. As such, the general rules were inapplicable and any such response would not have been considered. *See also* Trial Chamber V, *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on the content of the updated document containing the charges, 28 December 2012, ICC-01/09-02/11-584, para. 9.

⁹ Request, ICC-01/05-01/13-2029-Conf, para. 1.

¹⁰ Rule 145(2)(b)(i) and (vi) provide as follows: 'In addition to the factors mentioned above, the Court shall take into account, as appropriate: [...] (b) As aggravating circumstances: (i) Any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature; [...] (vi) Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned'.

convictions'. The Arido Defence argues that '[a]llegations are simply not convictions' and consequently that P-256's allegations are not similar in nature to 'prior criminal convictions' within the meaning of Rule 145(2)(b)(i) and (vi).¹¹

8. Factually, the Arido Defence indicates that, if the Chamber's limitations on the scope of examination preclude the Arido Defence from effectively challenging P-256's credibility, then 'the only fair outcome' is to exclude him from testifying.¹²
9. The Prosecution responds that Mr Arido's alleged corrupt influence of P-256: (i) can constitute an aggravating circumstance on grounds that it is sufficiently 'similar' within the meaning of Rule 145(2)(b)(i) and (vi) of the Rules; (ii) can be relevant to counter any mitigating circumstances Mr Arido may raise and (iii) can also be considered more generally as a 'relevant factor' under Rule 145(1)(b) of the Rules.¹³ The Prosecution also argues that the Arido Defence is well-disposed to examine P-256 within the parameters set in the Sentencing Witnesses Decision.¹⁴
10. The Chamber does not consider the Arido Defence's arguments to be persuasive on either legal or factual grounds.
11. Legally, the Chamber considers that conduct constituting offences against the administration of justice under Article 70 of the Statute can qualify as an aggravating circumstance under Rule 145(2)(b)(vi) of the Rules. Such conduct is sufficiently similar in nature to the aggravating circumstance of '[a]ny relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a

¹¹ Request, ICC-01/05-01/13-2029-Conf, paras 8-11.

¹² Request, ICC-01/05-01/13-2029-Conf, paras 12-21.

¹³ Response, ICC-01/05-01/13-2035-Conf, paras 5-11. Rule 145(1)(b) provides: 'In its determination of the sentence pursuant to article 78, paragraph 1, the Court shall: [...] Balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime'.

¹⁴ Response, ICC-01/05-01/13-2035-Conf, para. 12.

similar nature’, noting that Article 70(1)(c) of the Statute expressly provides the Court with jurisdiction over corruptly influencing a witness.

12. The Arido Defence is correct that ‘allegations’ are not the same as ‘convictions’, but the Chamber considers that this kind of alleged conduct is sufficiently ‘similar’ in nature to fall under Rule 145(2)(b)(vi), particularly given that aggravating circumstances must ultimately be proven to the same standard as a criminal conviction (i.e. beyond reasonable doubt).¹⁵ Even if such conduct did not qualify as an aggravating circumstance, the same evidence could still be relevant at sentencing to disprove the existence of any mitigating circumstances.¹⁶

13. Factually, the Arido Defence’s fairness concerns stem from a misrepresentation of the Sentencing Witnesses Decision. The Arido Defence has not been precluded from effectively challenging P-256’s credibility. The Sentencing Witnesses Decision set out two general principles governing the examination of P-256: (i) the witness may only be examined on matters allegedly proving that Mr Arido attempted to obstruct justice in this case and (ii) this is not a further opportunity to relitigate the merits of the present case.¹⁷ The Chamber deliberately did not permit or prohibit any specific questioning topics, including questioning on P-256’s credibility. Whether a given line of questioning goes to a matter relevant for sentencing or to improper relitigation of the trial will not be determined in the abstract. Consistent with its general approach throughout the trial,¹⁸ the Chamber will not regulate modalities of questioning upfront and will instead address them on a case-by-case basis in the course of P-256’s testimony.

¹⁵ Article 66(3) of the Statute; Trial Chamber VIII, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, 27 September 2016, ICC-01/12-01/15-171, para. 73 (further citations therein).

¹⁶ *In this regard, see* Rule 145(2)(a) of the Rules: ‘In addition to the factors mentioned above, the Court shall take into account, as appropriate: [...] (a) As mitigating circumstances [...] (ii) The convicted person’s conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court’.

¹⁷ Sentencing Witnesses Decision, ICC-01/05-01/13-2025, para. 18.

¹⁸ Transcript of Hearing, 29 September 2015, ICC-01/05-01/13-T-10-Red-ENG, page 7 lines 8-14.

14. For these reasons, the Chamber rejects the Arido Defence request to exclude P-256 from testifying and any evidentiary materials related to him.
15. As a final matter, the Arido Defence indicates that if these requests are rejected it will request ‘a full 4 hours to cross-examine the witness’ and ‘a longer timeline to submit the documents it will rely on to conduct the cross-examination of this witness’ as some time will be needed to cover all foreseeable eventualities.¹⁹ The Sentencing Witnesses Decision already permits the defence teams four hours to examine P-256,²⁰ and the Chamber will summarily dismiss any extension requests which do not demonstrate that the Arido Defence attempted to work out an arrangement with the other defence teams within the currently allocated time. As for the late submission of any documents,²¹ the Chamber notes that it was entirely foreseeable that P-256 could be called for sentencing - even before the trial judgment was rendered²² - and emphasises that the Arido Defence would need to demonstrate good cause for any such extensions.

B. Alternative requests

16. First, the Arido Defence requests that the Chamber provide directions and guidance as to the permissible scope of P-256’s testimony.²³ For the reasons stated above,²⁴ the Chamber will give no such clarification in the abstract.
17. Second, the Arido Defence requests that the Chamber order the Prosecution to re-file a summary of anticipated testimony ‘with more detail to clarify the scope of testimony that it intends to elicit’.²⁵ With reference to the three discrete points

¹⁹ Request, ICC-01/05-01/13-2029-Conf, para. 11.

²⁰ Sentencing Witnesses Decision, ICC-01/05-01/13-2025, para. 20(i).

²¹ By the terms of the sentencing calendar, any additional evidence to be considered for sentencing must be disclosed and formally submitted by 23 November 2016. ICC-01/05-01/13-1990, para. 2(ii).

²² Prosecution’s Notification of Disclosure Under Rule 77 of the Rules of Procedure and Evidence, 11 October 2016, ICC-01/05-01/13-1983-Red2 (with two annexes; public redacted version notified 18 October 2016), para. 6 (disclosing P-256’s statement to the Chamber and parties ‘as it may be deemed necessary to the establishment of the truth, the fair evaluation of the evidence, and any potential sentence to be imposed’).

²³ Request, ICC-01/05-01/13-2029-Conf, paras 3, 22-25.

²⁴ See paragraph 13 above.

²⁵ Request, ICC-01/05-01/13-2029-Conf, paras 26-32.

referenced by the Prosecution in its anticipated testimony summary for P-256,²⁶ the Arido Defence argues that the Sentencing Witnesses Decision 'clearly dispenses' with the first point and argues that the latter two points are 'potentially far ranging' and cannot be realistically challenged without the time or resources to investigate them.²⁷

18. On this second alternative request, the Prosecution responds that '[n]one of Arido's arguments suggest that he needs any further information about the scope and nature of the Witness's evidence' and that the Arido Defence's arguments are rather designed to 'simply contest what conclusions the Prosecution claims can be derived from the Witness's evidence'.²⁸

19. The Chamber considers that, from its entire argumentation, the Arido Defence does not seek additional detail or clarity from the anticipated testimony summary so much as orders limiting the scope of P-256's direct examination. Again, no limits on particular lines of questioning will be set in the abstract.²⁹

20. The Chamber further considers that the Arido Defence overstates its investigative difficulties caused by the 'far ranging nature' of P-256's allegations. The Arido Defence is reasonably expected to already be highly familiar with P-256, given: (i) his role in the factual allegations made and proven by the Prosecution at trial; (ii) his one-time status as a prospective Arido Defence witness and (iii) the fact that his statement³⁰ makes extensive reference to the acts and conduct of the Arido Defence itself. Accordingly, rejecting this request causes no undue prejudice.

21. For these reasons, both alternative requests are rejected.

²⁶ ICC-01/05-01/13-2009-Conf-AnxA, page 2.

²⁷ Request, ICC-01/05-01/13-2029-Conf, paras 29-30.

²⁸ Response, ICC-01/05-01/13-2035-Conf, paras 13-14.

²⁹ See paragraph 13 above.

³⁰ P-256 Statement Summary, CAR-OTP-0094-1628.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

ORDERS the Arido Defence and Prosecution, after consulting with each other, to either file public redacted versions of the Request and Response (respectively) or request their reclassification within 10 days of notification of the present decision.

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



Judge Bertram Schmitt, Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Raul C. Pangalangan

Dated 21 November 2016

At The Hague, The Netherlands