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

Date: **30 November 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, With Confidential Annexes A through E**

**Public Redacted Version of  
“Narcisse Arido’s Request for Exclusion of Witness D4 or, in the Alternative,  
Clarification of Decision ICC-01/05-01/13-2025”  
(ICC-01/05-01/13-2029-Conf), filed 15 November 2016**

**Source:** Counsel for Narcisse Arido

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

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**Other**

**Reparations Section**

## **I. INTRODUCTION**

1. Consequent to Trial Chamber VII's ('Trial Chamber') decision to permit the testimony of witness D4, the Arido Defence moves to the exclude his testimonial evidence in order to preserve trial fairness for reasons both legal and factual.

2. The Defence opposes any Prosecution intention<sup>1</sup> to call witness D4. Though the Trial Chamber has suggested that the interview transcripts cannot be tendered,<sup>2</sup> the Arido Defence requests that this evidence be completely and explicitly excluded.

3. Should the Trial Chamber reject this request, the Arido Defence requests clarification, in the interests of justice, or further guidance as regards the Chamber's order that D4 "may only be examined on the matters allegedly proving that Mr Arido attempted to obstruct justice in this case."<sup>3</sup> Cross-examination on this issue necessarily involves the credibility of witness D4. Such questions of credibility inevitably touch upon matters decided upon in the Judgment. Therefore in the interests of fairness, the Arido Defence seeks directions and guidance from the Trial Chamber.

## **II. CONFIDENTIALITY**

4. 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 confidential as it refers to the contents of evidence which is confidential.

## **III. PROCEDURAL HISTORY**

5. On 4 November 2016, the Prosecution, in compliance with the Trial Chamber's order,<sup>4</sup> gave notice that it intended to call one witness – D4.<sup>5</sup>

6. On 11 November 2016, the Trial Chamber provided its 'Decision on Sentencing Witnesses and Setting an Article 76(2) Hearing' ('Witness Sentencing Decision').<sup>6</sup> Regarding witness D4, the Trial Chamber ruled that, "procedural fairness demands" that the Prosecution must either call

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<sup>1</sup> ICC-01/05-01/13-2009.

<sup>2</sup> ICC-01/05-01/13-2025, para. 16.

<sup>3</sup> *Ibid.*

<sup>4</sup> ICC-01/05-01/13-1990.

<sup>5</sup> ICC-01/05-01/13-2009.

<sup>6</sup> ICC-01/05-01/13-2025.

him for live testimony or withdraw him, and it will be bared from relying upon his interview transcripts for the purposes of sentencing.<sup>7</sup>

#### IV. APPLICABLE LAW

7. Pursuant to Article 64(2) of the Statute, the Trial Chamber “shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused” and pursuant to Article 64(6)(e) may as necessary “[p]rovide for the protection of the accused”.

#### V. SUBMISSIONS

8. The Arido Defence respectfully requests the Trial Chamber to reject the calling of witness D4. At the moment where the Trial Chamber issued its Witness Sentencing Decision, still within the time-period for responses, the Arido Defence was preparing a response to the Prosecution’s notice.<sup>8</sup> The Witness Sentencing Decision clarifies some of the issues which were to be the subject of a response; however, it raises new ones which are the basis of the present request. In this respect, the Witness Sentencing Decision is a new legal fact motivating this request.

9. Though Mr. Arido has been convicted, he still continues to benefit from international human rights fair-trial protections including the presumption of innocence.<sup>9</sup> In relation to this,

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<sup>7</sup> *Ibid.*, para. 16.

<sup>8</sup> ICC-01/05-01/13-2009.

<sup>9</sup> Article 6 § 2 governs criminal proceedings in their entirety, irrespective of the outcome of the prosecution, and not solely the examination of the merits of the charge’ (see, among many authorities, *Poncelet v. Belgium*, Application no. 44418/07, Judgment, 30 March 2010, para. 50, available at: <http://hudoc.echr.coe.int/eng?i=001-97989>; *Minelli v. Switzerland*, Application no. 8660/79, Judgment, 25 March 1983, para. 30, available at: <http://hudoc.echr.coe.int/eng?i=001-57540>; *Garycki v. Poland*, Application no. 14348/02, Judgement, 6 February 2007, para. 68, available at: <http://hudoc.echr.coe.int/eng?i=001-79352>); The presumption of innocence does not cease to apply solely because the first-instance proceedings resulted in the defendant’s conviction when the proceedings are continuing on appeal. (*Konstas v. Greece*, Application no. 53466/07, Judgment, 24 May 2011, para. 36, available at: <http://hudoc.echr.coe.int/eng?i=001-104858>);

Once an accused has properly been proved guilty, Article 6 § 2 can have no application in relation to allegations made about the accused’s character and conduct as part of the sentencing process, unless such accusations are of such a nature and degree as to amount to the bringing of a new “charge” within the autonomous Convention meaning (*Böhmer v. Germany*, Application no. 37568/97, Judgment, 3 October 2002, para. 55, available at: <http://hudoc.echr.coe.int/eng?i=001-60668>; *Geerings v. the Netherlands*, Judgment, Application no. 30810/03 , 1 March 2007, para. 43, available at: <http://hudoc.echr.coe.int/eng?i=001-79657>; *Phillips v. the United Kingdom*, Application no. 41087/98, Judgment, 5 July 2001, para. 35, available at: <http://hudoc.echr.coe.int/eng?i=001-59558>);

A person’s right to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her forms part of the general notion of a fair hearing under Article 6 § 1 of the Convention which applies to a sentencing procedure (*Phillips v. the United Kingdom*, Application no. 41087/98, Judgment, 5 July 2001, paras 39-40, available at: <http://hudoc.echr.coe.int/eng?i=001-59558>; *Grayson and Barnham v. the United Kingdom*, Applications nos. 19955/05 and 15085/06, Judgment, 23 September 2008 , paras 37 and 39, available at: <http://hudoc.echr.coe.int/eng?i=001-88541>).

D4's testimony (and transcripts) should be excluded from the Sentencing Hearing because it/they fail to comply with the Rule 145 (2)(b) of the Rules of Procedure and Evidence ('RPE'). The Prosecution seeks – through this witness - to allege an uncharged bad act against Mr. Arido and members of his Defence team as an aggravating circumstance.<sup>10</sup> The allegations do not fall into the category of “relevant prior criminal convictions” nor are the allegations of a “similar nature” to “prior criminal convictions.” Allegations are simply not convictions and there is no similarity between the two categories. Thus, as a matter of law, the Prosecution should not be permitted to introduce the testimony of D4 or any evidentiary materials related to D4 into the sentencing process.

10. Bringing this particular witness raises critical fair-trial issues that go outside of the scope of sentencing. There are at least two central points to this request. Firstly, the manner by which the Prosecution has previously framed D4's anticipated testimony necessarily obliges the Arido Defence to prepare lines of cross-examination that may stray into issues prohibited by the Trial Chamber Witness Sentencing Decision. Secondly, without an updated summary from the Prosecution, the Witness Sentencing Decision potentially invites the Prosecution to seek to establish issues for which investigations are necessary.

11. Given the multitude of issues raised in the present filing, should the present requests be rejected, the Arido Defence will submit a request for a full 4 hours to cross-examine the witness. The Arido Defence will also request a longer timeline to submit the documents it will rely on to conduct the cross-examination of this witness as such time will be needed to cover all foreseeable eventualities.

**A. A fair sentencing hearing necessitates cross-examining D4 on issues that impact upon his credibility**

12. The Prosecution's account of witness D4's anticipated testimony is that:

[REDACTED].<sup>11</sup>

This is characterised as “Arido's attempt to obstruct justice in this case”<sup>12</sup> and the perpetration of “acts aimed at subverting the course of justice”.<sup>13</sup>

<sup>10</sup> ICC-01/05-01/13-2009, paras 2 and 3.

<sup>11</sup> ICC-01/05-01/13-2009-Conf-AnxA, p. 2.

<sup>12</sup> ICC-01/05-01/13-2009, para. 2.

<sup>13</sup> *Ibid.*, para. 3.

13. In determining Mr. Arido's sentence, any evidence or information that is relied upon to establish aggravating factors must be collected through a fair process. As recognised by the Trial Chamber in its Witness Sentencing Decision, an aspect of that fairness is giving the Defence an opportunity to challenge the testimony elicited. In that decision, the Trial Chamber states:

If and when the Prosecution Witness appears, the Chamber emphasises that 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.<sup>14</sup>

14. The Prosecution has produced one email related to its allegations, but otherwise, in the absence any further purported corroborating evidence, the Arido Defence concludes that the Prosecution seeks to demonstrate the aggravating factors strictly through D4's oral testimony.

15. For this reason, the issue of D4's credibility is front and centre. If elements of his narrative of the allegations are clearly inconsistent with or contradicted by other available information, then it raises doubts as to whether the most serious allegations he makes are credible.<sup>15</sup> The same is true if it can be shown that he is lying. It must be borne in mind that the Arido Defence dropped this witness and he did not testify.<sup>16</sup>

16. [REDACTED]<sup>17</sup> [REDACTED]<sup>18</sup> [REDACTED].<sup>19</sup> [REDACTED].

17. [REDACTED].

18. [REDACTED].

19. While the above issue is the most crystal clear, there are at least several other elements of D4's credibility that the Defence has identified thus far that could similarly cross the threshold into issues which the Trial Chamber might consider re-litigation or introduce new elements that may significantly destabilise the evidence on record.

20. [REDACTED]<sup>20</sup> [REDACTED].<sup>21</sup>

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<sup>14</sup> ICC-01/05-01/13-2025, para. 16.

<sup>15</sup> See CAR-D24-0003-0054, Annexes A and B, CAR-D24-0004-0092 at 0093.

<sup>16</sup> ICC-01/05-01/13-1705-Conf.

<sup>17</sup> [REDACTED].

<sup>18</sup> [REDACTED].

<sup>19</sup> CAR-OTP-0094-1702, at page 1743 line 1149 to page 1744 line 1478.

<sup>20</sup> [REDACTED].

<sup>21</sup> [REDACTED].

21. The issue that presents itself, it is submitted, is that by the order the Trial Chamber, without further directions, the Arido Defence may be unfairly barred on 12 to 14 December 2016 from effectively challenging D4's credibility. Given the principled unwillingness to hear issues related to those that have been decided in the Judgment, the Arido Defence submits that the only fair outcome is to exclude D4 from testifying.

**B. In the alternative, the Arido Defence requests clarification or directions from the Trial Chamber as regards the scope of cross-examination**

22. In light of the prior submissions on exclusion, and in the alternative to the exclusion of D4 as a Prosecution witness, the Arido Defence requests the Trial Chamber to clarify paragraph 16 of its Witness Sentencing Decision at least insofar as it concerns questions related to the credibility of witness D4.

23. In addition to those issues of credibility that touch the merits of the Judgment, there are also lines of cross-examination which could be relevant to D4's credibility. With regards to witness D4, the Arido Defence has kept the competent organs of the court informed and updated about matters relating to this witness and where problems arose,<sup>22</sup> these were communicated promptly. The Trial Chamber might prohibit raising these issues for being outside of the scope of "matters allegedly proving that Mr Arido attempted to obstruct justice in this case"<sup>23</sup> yet they could impact upon his credibility<sup>24</sup> and thus be relevant to whether other allegations are credible.

24. Similarly relevant to his credibility are the manner the Prosecution approached him and his resulting interview including the matters explored in the interview during the 21-22 February 2016.<sup>25</sup> This witness did not testify. Nevertheless, it is desirable that the right of Mr. Arido to have individuals interviewed with a view to defending himself should be protected and safeguarded under the Statute.

25. For the reasons stated above, the Arido Defence requests the Trial Chamber to provide directions and guidance on the scope of further testimony. It is the Arido Defence position that fairness demands that certain issues concerning D4's credibility are explored; yet, the Defence is also mindful of the Trial Chamber's instruction. Such a tension is impossible for the Arido

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<sup>22</sup> See Annexes C, D, and E.

<sup>23</sup> ICC-01/05-01/13-2025, para. 18

<sup>24</sup> See CAR-D24-0003-0054, Annexes A and B, CAR-D24-0004-0092 at 0093.

<sup>25</sup> See CAR-OTP-0093-0586, CAR-OTP-0093-0597, CAR-OTP-0093-0608, CAR-OTP-0093-0621, and CAR-OTP-0093-0628.

Defence to resolve itself so it turns to the Trial Chamber in advance of hearings for further directions as to the permissible scope of examination-in-chief and cross-examination.

**C. At a minimum the Prosecution should be required to file a more detailed summary of anticipated testimony**

26. The Prosecution summary of the proposed testimony requires clarification of its scope in light of the Trial Chamber's Witness Sentencing Decision.

27. Firstly, in regards to Prosecution point (a),<sup>26</sup> the transcripts disclosed [REDACTED]. On its face, it is unclear how pursuing this matter can establish an aggravating factor. Moreover, the Arido Defence exists to defend Mr. Arido. It is unfair to seek to draw these issues out where team members of the Defence lack a proper procedural mechanism to respond to the allegations. For these reasons, the Prosecution should be barred from pursuing this issue.

28. The transcripts also do not make clear that the suspect was approached by [REDACTED].<sup>27</sup> [REDACTED].<sup>28</sup>

29. Given that the Witness Sentencing Decision connection seems to clearly dispense with point (a) and also that the connection between the summary and transcripts is not made out, the Arido Defence submits that Trial Chamber should order this point dropped and/or that the Prosecution should re-submit its summary of anticipated testimony.

30. Secondly, the substance of allegations anticipated by the Prosecution in points (c) through (d) purportedly took place in [REDACTED] and are potentially far ranging based upon the summaries. Depending upon the scope of direct examination anticipated by the Prosecution, the Arido Defence cannot realistically challenge many claims without the time or resources to investigate them which is unfair.

31. Thus, if the Trial Chamber continues to deem it possible to call witness D4 for sentencing purposes, the Arido Defence requests the Trial Chamber to – at a minimum – 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.

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<sup>26</sup> ICC-01/05-01/13-2009-Conf-AnxA, p. 2.

<sup>27</sup> CAR-OTP-0094-1702, at page 1743, line 1531.

<sup>28</sup> CAR-OTP-0094-1702, at page 1746, line 1458.



32. Given the fair-trial issue involved, the underlying purpose of this request being raised now is to anticipate whether witness D4 can be called in manner that is fair for Mr. Arido, and if not, provide time for the Arido Defence to seek the appropriate relief – be it variation of time-limits, a request to withdraw the witness, further investigative resources, or otherwise.

## **VI. CONCLUSION**

33. In light of the above, the Arido Defence respectfully requests Trial Chamber VII to:

- a. EXCLUDE the testimony of witness D4 and any evidentiary materials related to D4 for sentencing purposes; the Witness Sentencing Decision paragraphs 16 and 18 and exclude the testimony of witness D4 for sentencing purposes;

Or in the alternative,

- b. CLARIFY its decision in paragraph 16 and 18 of its Witness Sentencing Decision and PROVIDE directions and guidance, so as to permit the Arido Defence to challenge the credibility of witness D4; and
- c. ORDER the Prosecution to re-file a more detailed summary of anticipated testimony in light of the Witness Sentencing Decision and issues raised in paragraphs 27 to 30.



Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 30<sup>th</sup> Day of November 2016

The Hague, The Netherlands