

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 27 February 2015

TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Robert Fremr

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF
*THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO*

Public Redacted Document

Public redacted version of "Prosecution's Response to the Arido Request to Withdraw the Charges", 26 February 2015, ICC-01/05-01/13-827-Conf

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

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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) opposes the Accused, Narcisse Arido’s “Request for an Order on the Prosecution to Withdraw the Charges” (“Request”).¹ *First*, there is no legal basis for the relief sought in the Request. The Rome Statute (“Statute”) does not authorise a Chamber to (i) order the withdrawal of charges by the Prosecution; or, (ii) order the Prosecution to assess its case against an Accused and report back to it. Equally, the Statute contains no provision limiting the Prosecution’s discretion regarding who may be charged for article 70 offences. Consequently, there is no legal basis for the relief sought in the Request.

2. *Second*, the facts do not justify the withdrawal of the charges, and the decision to proceed against Arido is unquestionably an appropriate exercise of prosecutorial discretion. The confirmed case against Arido is that he, together with Accused, Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, and Fidèle Babala Wandu, participated in an “overall strategy”² lasting from the end of 2011 to 14 November 2013, to defend Bemba against the charges in case ICC-01/05-01/08 (“Main Case”) by means including the commission of Article 70 offences. Those charges comprise five counts of war crimes and three counts of crimes against humanity,³ carrying a potential life sentence.⁴

3. The Prosecution alleges, and the Pre-Trial Chamber II (“Pre-Trial Chamber”) has found substantial grounds to believe,⁵ that 14 witnesses — almost half the fact witnesses called by the *Bemba* Defence⁶ — were corruptly influenced and lied under oath in the Main Case, pursuant to an overall strategy that spanned at least nine

¹ ICC-01/05-01/13-812.

² ICC-01/05-01/13-749, paras.52, 94, 95 (“Confirmation Decision”).

³ ICC-01/05-01/08-1-tENG-Corr; ICC-01/05-01/08-395-Anx3, pp.34-38.

⁴ Article 77(1)(b) of the Statute.

⁵ Confirmation Decision, pp.47-55

⁶ Thirty-four witnesses testified for the Defence in the Main Case. Three of these were expert witnesses.

countries: including, The Netherlands, Belgium, France, Portugal, Sweden, Cameroon, Central African Republic, Republic of the Congo, and Democratic Republic of the Congo.

4. The Confirmation Decision details Arido's important role in executing the overall strategy. The Pre-Trial Chamber found, *inter alia*, that there were substantial grounds to believe that in Cameroon, Arido procured at least four false witnesses for the *Bemba* Defence⁷ – D-2, D-3, D-4, and D-6. For these witnesses, which comprise nearly a third of the incidents charged and confirmed, Arido encouraged their participation in the scheme with money payments and the possibility of relocation in Europe.⁸ He coached the witnesses to testify falsely, including by instructing them to provide false information or withhold true information during their testimony in Court.⁹ Arido thus faces twelve separate counts of article 70 offences.¹⁰

5. As a lawyer,¹¹ Arido would have been cognisant of the egregious nature of his alleged conduct and of its potentially lasting impact on the Court's integrity and reputation. He would have been fully aware that, if successful, his alleged acts and those of his co-Accused would have left thousands of victims of the serious crimes alleged in the Main Case without justice.

6. Given the lack of any legal basis for the Request, and the seriousness of Arido's alleged conduct, the Trial Chamber VII ("Chamber") should reject the Request.

⁷ Confirmation Decision, paras.88-92, 95.

⁸ Confirmation Decision, paras.88, 91, 95.

⁹ Confirmation Decision, paras.88-90, 95.

¹⁰ Confirmation Decision, para.96.

¹¹ ICC-01/05-01/13-T-4-Red2-ENG, p.4, ln.16 ("My profession is – is that of lawyer"); see also CAR-OTP-0078-0117 at 0118 [REDACTED].

II. Confidentiality

7. This Response is classified as “Confidential”, as it refers to material that is not available to the public. The Prosecution will file a public redacted version as soon as possible.

III. Submissions

A. The relief sought has no legal basis

8. *First*, the Chamber cannot “order the Prosecution to withdraw the charges”¹² against Arido because the Statute provides for no such relief. Article 61(9) of the Statute confers on the Prosecution the sole authority to withdraw charges against an accused. Although this power is subject to the Chamber’s oversight “[a]fter commencement of the trial”¹³ and possibly before,¹⁴ the Chamber has no positive role – i.e., to “order” withdrawal. The Request fails to deal with this provision, which is dispositive.¹⁵

9. Similarly, and contrary to the Request,¹⁶ articles 64(6)(f) and 64(2) of the Statute are general, ‘catch-all’ provisions, which give a Chamber residual power to rule on matters not otherwise explicitly regulated in the Statute or Rules of Procedure and Evidence (“Rules”). They are not ‘trump all’ provisions that enable a Chamber to discard the controlling statutory provision – article 61(9) of the Statute.

¹² Request, para.38.

¹³ Article 61(9) of the Statute.

¹⁴ See ICC-01/09-02/11-696; *contra* ICC-01/09-02/11-698.

¹⁵ Although the Request does cite to the provision at para.12.

¹⁶ Request, paras.15-17, 36.

10. *Second*, the Prosecution has no obligation under the Statute to “only prosecute the most serious Article 70 offences”¹⁷ or “the worst [article 70] scenario imaginable”.¹⁸ As the Request itself acknowledges,¹⁹ rule 163(2) of the Rules explicitly excludes the provisions of Part 2 of the Statute from any article 70 proceeding. Thus, arguments founded on the gravity of the case against Arido are inapposite because the Statute does not limit the Prosecution’s discretion to bring charges against any individual for article 70 offences.

11. The other provisions cited in the Request to support a ‘gravity test’ are equally inapposite. Regulation 29 of the Regulations of the Office of the Prosecutor relates exclusively to the preliminary examination stage. It does not apply to article 70 investigations. In any case, the provision provides no oversight mechanism to the Chamber. Article 53 of the Statute is, as the Request acknowledges, “not directly applicable to the present case”²⁰ and thus provides no legal basis for the relief sought.

12. *Third*, the Request’s submissions on sentencing²¹ can be discarded because they require the Chamber to pre-judge an issue that will be dealt with only in the event of Arido’s conviction, pursuant to article 76 of the Statute. In any case, the Statute does not preclude the imposition of consecutive sentences for multiple counts of article 70 offences. Arido’s conduct comprises multiple distinct violations of article 70, each of which carries a penalty of up to five years, pursuant to article 70(3). Article 78(3) of the Statute also provides for the imposition of a joint sentence upon conviction of more than one offence, in order to reflect the extent of an accused’s culpability. Thus, Arido faces a possible sentence of substantially more than five years, as may properly reflect his culpability.

¹⁷ Request, para.18.

¹⁸ Request, para.20.

¹⁹ Request, para.22.

²⁰ Request, para.23.

²¹ Request, paras.2, 24-31, 35, 38.

B. The alternative relief sought has no legal basis and is, in any event, moot

13. The Request's alternative relief – for “the Chamber to issue an order to the Prosecution, requesting it to assess the case against Mr Arido with a view to determine whether a withdrawal of the charges is appropriate, and to report to the Chamber and the parties accordingly”²² – fails in law for the reasons outlined above. Further, the Statute permits the substantive review of the Prosecution's charges only at the arrest warrant,²³ the confirmation,²⁴ the trial judgment,²⁵ and the final appeal²⁶ stages. This case is not currently in one of these procedural postures.

14. In any event, the alternative relief sought in the Request is moot. The Prosecution, in undertaking its investigation and prosecution of the case against Arido, pursuant to its duty under article 54(1)(a) of the Statute, has already assessed “whether there is criminal responsibility under [the] Statute”. No order is required because, as the Request itself highlights,²⁷ the Prosecution is bound by regulation 60 of the Regulations of the Office of the Prosecutor, which requires the Prosecution to act when its charges are unsupported by the evidence available.²⁸

C. The seriousness of Arido's conduct warrants his prosecution

15. Article 70 of the Statute protects the integrity of the Court's judicial proceedings

²² Request, para.40; see also paras.1, 17.

²³ Article 58 of the Statute.

²⁴ Article 61 of the Statute.

²⁵ Article 74 of the Statute.

²⁶ Article 81 of the Statute.

²⁷ Request, para.13.

²⁸ ICC-BD/05-01-09 (“If at any stage in the proceedings, the Office considers that the evidence available, including both incriminating and exonerating evidence, does not support an element of the charges pleaded or supports a different charge, or that any charge pleaded otherwise cannot be pursued, in particular due to the individual circumstances of the accused, then the Office shall promptly seek to either: (a) amend or withdraw the charges pursuant to article 61, paragraphs 4 and 9; or (b) submit the matter for consideration to the Trial Chamber in the light of its powers under regulation 55 of the Regulations of the Court.”)

and ensures the effective, fair, administration of justice.²⁹ As Arido concedes, its violation is “detrimental to the functioning of the Court and must certainly be investigated and prosecuted”.³⁰

16. Arido is no exception. And, the decision to proceed against him is squarely and exclusively within the Prosecution’s discretion, and fully justified by the evidence. It is the Prosecution’s case, and the Pre-Trial Chamber unanimously found substantial grounds to believe, that Arido:

- corruptly influenced individuals to testify falsely as witnesses in the Main Case. For example, Arido said to D-3, “[t]u sais, mon frère, en ce moment, nous souffrons trop. Nous avons une occasion pour nous faire un peu d’argent”.³¹ Arido also told a group of prospective witnesses, “une fois que nous ayons témoigné, nous aurons la possibilité de rester là-bas, parce que même si nous mentons dans notre déposition, nous serons assistés d’un avocat qui va nous défendre”.³² Arido told D-2 that, “si tu vas à La Haye pour témoigner, j’ai une possibilité pour toi que tu puisses trouver l’asile”,³³ and that, “[s]i vous le faites bien, les émoluments peuvent aller jusqu’à 10 millions [CFA]”,³⁴
- illicitly coached witnesses to testify falsely in the Main Case. For example, D-3 told the Prosecution that “[REDACTED]”.³⁵ Although Arido knew that D-2 was not a soldier,³⁶ he instructed D-2 in detail on what to say about his role in the Central African Republic (“CAR”) conflict, including that “tu es un des éléments [...] faisant partie de la jeunesse du parti, le MLPC” and that “[tu] avais fini avec le grade de sous-lieutenant”;³⁷ and

²⁹ See, e.g., Göran Sluiter, “The ICTY and Offences against the Administration of Justice”, *Journal of International Criminal Justice* 2 (2004), p.631.

³⁰ Request, para.18.

³¹ CAR-OTP-0078-0184 at 0189, lns.159-160.

³² CAR-OTP-0078-0218 at 0234, lns.551-553.

³³ CAR-OTP-0080-0021 at 0030, lns.314-315.

³⁴ CAR-OTP-0080-0043 at 0050, lns.250-251.

³⁵ CAR-OTP-0078-0218 at 0225, lns.241-244.

³⁶ CAR-OTP-0080-0021 at 0031, lns.343-345.

³⁷ CAR-OTP-0080-0043 at 0051-0052, lns.270-303.

- arranged and participated in a meeting with Kilolo, D-2, D-3, D-4, D-6, [REDACTED] in Douala, Cameroon, in or around February 2012.³⁸ Arido facilitated this contact knowing that they would be further illicitly coached on what to say when testifying in court, and paid in exchange for their false testimony.³⁹

17. The Pre-Trial Chamber also found that Arido's personal involvement in "recruiting and corruptly influencing witnesses [...] all of whom subsequently falsely testified [in the Main Case]"⁴⁰ demonstrated his material ability to direct the manner in which the crimes were allegedly committed. Accordingly, it found that Arido, *inter alia*, "bears criminal responsibility as a perpetrator under article 25(3)(a) of the Statute for intentionally corruptly influencing D-2, D-3, D-4 and D-6 in accordance with article 70(1)(c) of the Statute".⁴¹

18. That the Pre-Trial Chamber found Arido's contribution to the overall strategy to be "more limited"⁴² than other accused does not make his intentions, or the nature of his involvement, any less reprehensible or culpable. Even as limited by the Confirmation Decision, Arido's alleged corrupt influencing of almost a third of the witnesses comprising the charged incidents in this case demonstrates his clear intention to pervert the course of justice in a trial adjudicating crimes of the utmost gravity. As a lawyer, the criminality of his conduct and its impact cannot have escaped him.

³⁸ Confirmation Decision, para.90; *see also* ICC-01/05-01/13-526-Conf-AnxB1, paras.68, 75.

³⁹ Confirmation Decision, para.90 ("The day before the meeting, Mr Arido reiterated to the prospective witnesses the promises he had made before; according to D-2's statement, he also said that they could ask up to 10 million CFA in exchange for their testimony").

⁴⁰ Confirmation Decision, para.95.

⁴¹ Confirmation Decision, para.96.

⁴² *See* Request, para.19, citing Confirmation Decision, para.52.

19. Further, contrary to the Request, the “limited judicial resources of the Court”⁴³ and the Prosecution’s “larger duty [...] to the Assembly of States-Parties, not to waste the Court’s scarce resources”⁴⁴ are precisely the reasons why Arido’s conduct, as confirmed by the Pre-Trial Chamber, warrants prosecution.

20. The false witnesses that Arido allegedly corruptly influenced in the Main Case – D-2, D-3, D-4, and D-6 – testified over the course of eight days *via* video link.⁴⁵ A Chamber had to be convened; a courtroom had to be staffed and facilities managed; ironically, the *Bemba* Defence was paid to present the witnesses’ false evidence and compensated for missions to procure it; the Registry had to implement protective measures and undertake missions to prepare and administer the video links; the Prosecution and the Legal Representatives of Victims had to prepare for and cross-examine these witnesses; and the *Bemba* Trial Chamber is now saddled with the task of evaluating allegedly false evidence introduced into the trial record.

21. In sum, Arido’s alleged conduct and that of his co-accused has threatened to undermine a six-year investigation and a three-year trial, costing millions. It has put at risk the justice to which the thousands of victims in the Main Case are entitled, and jeopardised the Court’s credibility and integrity, which in turn threatens its ability to adjudicate cases well beyond the Main Case and the CAR situation.

⁴³ Request, paras.2, 34.

⁴⁴ Request, para.35.

⁴⁵ D-2 on 12 and 13 June 2013 (ICC-01/05-01/08-T-321-CONF-ENG ET, 12 June 2013; ICC-01/05-01/08-T-321-CONF-FRA ET, 12 June 2013; ICC-01/05-01/08-T-321bis-CONF-ENG, 12 June 2013; ICC-01/05-01/08-T-322-ENG ET, 13 June 2013; ICC-01/05-01/08-T-322-FRA ET, 13 June 2013); D-3 on 18, 19, and 25 June 2013 (ICC-01/05-01/08-T-325-CONF-ENG ET, 18 June 2013; ICC-01/05-01/08-T-325-CONF-FRA ET, 18 June 2013; ICC-01/05-01/08-T-326-CONF-ENG ET, 19 June 2013; ICC-01/05-01/08-T-326-CONF-FRA ET, 19 June 2013; ICC-01/05-01/08-T-330-CONF-ENG ET, 25 June 2013; ICC-01/05-01/08-T-330-CONF-FRA ET, 25 June 2013); D-4 on 18, 19, and 20 June 2013 (ICC-01/05-01/08-T-325bis-CONF-ENG ET, 18 June 2013; ICC-01/05-01/08-T-325-CONF-FRA ET, 18 June 2013; ICC-01/05-01/08-T-326bis-CONF-ENG ET, 19 June 2013; ICC-01/05-01/08-T-326-CONF-FRA ET, 19 June 2013; ICC-01/05-01/08-T-327-CONF-ENG ET, 20 June 2013; ICC-01/05-01/08-T-327bis-CONF-ENG ET, 20 June 2013; ICC-01/05-01/08-T-327-CONF-FRA ET, 20 June 2013; ICC-01/05-01/08-T-327bis-CONF-FRA ET, 20 June 2013); D-6 on 21 and 24 June 2013 (ICC-01/05-01/08-T-328-CONF-ENG ET, 21 June 2013; ICC-01/05-01/08-T-328-CONF-FRA ET, 21 June 2013; ICC-01/05-01/08-T-328bis-CONF-ENG ET, 21 June 2013; ICC-01/05-01/08-T-328-CONF-FRA ET, 21 June 2013; ICC-01/05-01/08-T-329-CONF-ENG ET, 24 June 2013; ICC-01/05-01/08-T-329-CONF-FRA ET, 24 June 2013; ICC-01/05-01/08-T-329bis-CONF-ENG ET, 24 June 2013).

IV. Relief Requested

22. The Prosecution requests the Chamber to reject the Request.



Fatou Bensouda, Prosecutor

Dated this 27th Day of February 2015
At The Hague, The Netherlands