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**International
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TRIAL CHAMBER VII

Before: Judge Bertram Schmitt
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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

**Confidential Document
with
Confidential Annexes A to D**

**Prosecution Response to the Arido Defence's Request to Interview
Prosecution Investigators**

Source: The Office of the Prosecutor

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

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I. Introduction

1. Arido's request for what amounts to an order of the Chamber requiring Prosecution investigators to submit to an interview by his Defence¹ ("Request") should be summarily dismissed. Moreover, Arido's last minute Addendum² brings nothing to bear on this outcome.

2. The Chamber has no authority under the Statute or the Rules of Procedure and Evidence to require one party's investigators to submit to interviews by another. Nor, is the Request otherwise supported by the Court's practice or the circumstances.

3. To be clear, the Prosecution has not unconditionally refused its investigators' possible interview by the Arido Defence, and has communicated as much in its correspondence. However, the Prosecution requires that the Defence articulate a proper forensic purpose for any such interview. Arido cannot dictate the conditions under which Prosecution investigators may be interviewed, and the unsubstantiated or purely speculative arguments his Defence has thus far advanced, are not enough.

II. Confidentiality

4. This document is classified as "Confidential" as it responds to a filing of the same designation. The Prosecution does not object to its reclassification as "Public", should the Chamber deem it appropriate.

¹ ICC-01/05-01/13-1139-Conf.

² ICC-01/05-01/13-1165-Conf.

III. Submissions

A. Arido is not entitled to interview Prosecution investigators

5. Arido's Request seeks impermissibly to expand the Prosecution's disclosure obligations beyond the statutory framework to encompass the *interview* of its investigative staff members. The Statute and the Rules clearly do not confer such authority on the Chamber, and there is no precedent for the requested relief. Arido's reference to articles 64(6) and 93 are inapposite and otherwise, unpersuasive.³

6. Rather than articulate a proper forensic basis for the requested interviews, as repeatedly invited by the Prosecution in previous *inter partes* correspondence, the Arido Defence now seeks inappropriately to engage the Chamber by repackaging the same specious and speculative arguments it provided to the Prosecution as grounds for its request. In this context, the Request is transparently unjustified.

7. The Prosecution communicated to the Arido Defence its willingness to consider the requested interviews upon a showing of a proper forensic purpose. Nevertheless, in the course of several exchanges of correspondence, the Arido Defence failed to do so. Instead, it provided one nebulous reason after another. For instance, Arido advanced, *inter alia*, the following ostensible justifications for the Request:

- "[They] are necessary to assess whether these investigators should be called as Defence witnesses";⁴
- "to know for [D-2 and D-3] what material the investigators relied upon for their preparation, what notes they took, what persons they talked to, what Cameroonian authorities they collaborated with, what material they received

³ Request, paras.11,12; *cf.* ICC-01/09-01/11-1598, para.113 (noting the Chamber's power to compel a witness to appear before it [*i.e.*, the Court]) — not before another party); *see also* ICC-01/09-01/11-1274-Corr2, para.193 (holding that the Chamber "has the power to compel the *testimony* of witnesses") (emphasis supplied).

⁴ 8 May 2015 Arido Defence letter to the Prosecution, Annex A.

from the Cameroonian authorities, and what steps they took to ascertain the veracity and possibly corroborate D2 and D3 allegations”;⁵

- “[to assess] whether the harassment against D4 and D6 took place, and also to hear their perspective on the matter. [To] assist us to gain a fuller forensic picture of the interviews of D2 and D3, and assist us in identifying the presence of any important factors that inform the content of the interviews taken”;⁶
- “in the interview of D2, he is confronted by the investigator by what may be interpreted as doubts in the mind of the investigator about the veracity of D2’s story. We want to ask questions about this as well. We also want to know from the investigators how the meetings were arranged, how cooperative were the witnesses in meeting them and providing the statements, how they obtained the contact information of D2 and D3 and through whom and how long in advance were the meetings arranged”;⁷
- “We would like to talk to the investigators about their interactions with D2”;⁸
- “we want to interview these investigators to gain a better appreciation of the dynamics and present configuration of the Article 70 case”;⁹ and
- “We would like to discuss with the investigator the factual aspects of their investigation that may have impacted upon this particular configuration of Accused. This may in turn assist us in assessing which witnesses to call and whether to call them.”¹⁰

8. Yet, as demonstrated below, none of these meets the criteria of the *ad hoc* tribunals’ case law on which Arido himself relies to substantiate the Request – *i.e.*, a

⁵ 13 July 2015 Arido Defence letter to the Prosecution, p.2, Annex B.

⁶ 13 July 2015 Arido Defence letter to the Prosecution, p.2, Annex B.

⁷ 13 July 2015 Arido Defence letter to the Prosecution, p.2, Annex B.

⁸ 13 July 2015 Arido Defence letter to the Prosecution, p.2, Annex B.

⁹ 13 July 2015 Arido Defence letter to the Prosecution, p.2, Annex B.

¹⁰ 13 July 2015 Arido Defence letter to the Prosecution, p.3, Annex B.

demonstrated legitimate forensic purpose.¹¹

9. On 7 August 2015, after having directly solicited Prosecution investigative staff through their emails, in flagrant disregard of the Prosecution's stated position regarding the conditions required for the submission of its staff for the requested interviews,¹² the Prosecution informed the Arido Defence in no uncertain terms as follows:

"If there are specific and articulable issues you wish to address with Prosecution investigators – rather than the non-specific "contextual details" or the "explor[ation] [of] concerns" that you advance – the Defence may do one of two things: (a) set out an appropriate forensic basis for an interview, as the Prosecution has previously invited; or (b) provide a reasonable list of questions, which we will then consider and determine whether and to what extent, if any, a response is warranted."¹³

10. The Arido Defence did neither, and thus cannot demonstrate that any legitimate information it may wish to obtain is unavailable except through the issuance of an order. This is plainly not the case.

11. The Request omits the above email communication, opting instead to selectively note the Prosecution's admonition regarding its direct contact with its investigators. However, even this is presented misleadingly in the Request.¹⁴ The Prosecution reacted to what it considered to be an impermissible attempt by the Defence to directly engage the investigators after being informed by counsel for the Prosecution that its request for interviews was found to be unsubstantiated. The Prosecution

¹¹ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's motion to Compel Interview: Griffiths Evans, 20 April 2011, para.6 ("Karadžić Decision") (<http://www.icty.org/x/cases/karadzic/tdec/en/110420a.pdf>).

¹² Request, paras.7-8; see ICC-01/05-01/13-1139-Conf-Anx5-6.

¹³ Prosecution email to Messrs Taku and Larochelle, 7 August 2015, Annex C.

¹⁴ Request, para.7.

stated the following: “[w]hile you may not agree with our position, this does not entitle the Defence to take advantage of available contact information of Prosecution staff to circumvent the Office’s stated position regarding the conditions necessary for their interview. Accordingly, please refrain from any such further contact, and direct any communications regarding this matter to [the Senior Trial Lawyer].”¹⁵

B. The jurisprudence of the *ad hoc* tribunals does not support the Request

12. The Arido Defence acknowledges, as it must, that the ICTY and ICTR jurisprudence on which it relies for the proposition that “a subpoena could be issued in order to require a prospective witness to attend at a nominated place and time in order to be interviewed where such attendance is necessary for the preparation or conduct of trial”, has no corollary under the Statute.¹⁶ Furthermore, the law on which Arido relies is not dispositive of the Court’s subpoena power in respect of a *party* being required to submit to another for purposes of an interview.¹⁷

13. Not only is the analogy that Arido draws between article 64 predicated on Rule 54 of the ICTY’s Rules of Procedure and Evidence (“ICTY Rules”) wrong, it also ignores the clearly restrictive application of the tribunal’s subpoena power in practice.

14. *First*, ICTY Rule 54 confers an express subpoena power on the Chamber, which may be exercised only when “necessary for the preparation or conduct of trial.”¹⁸ It is considered an instrument of last resort,¹⁹ given that it involves the use of coercive

¹⁵ Prosecution email to Messrs Taku and Larochelle, 7 August 2015, Annex C; *cf.* Request, para.7 and see ICC-01/05-01/13-1139-Conf-Anx7.

¹⁶ Request, paras.10-11.

¹⁷ See ICC-01/09-01/11-1598, para.113. ICC-01/09-01/11-1274-Corr2, para.193.

¹⁸ ICTY Rule 54.

¹⁹ Karadžić Decision, para.8.

powers and the possible imposition of criminal sanctions.²⁰ ICTY jurisprudence makes clear that a subpoena is considered “necessary” under ICTY Rule 54 where a legitimate *forensic purpose* for the information sought is demonstrated.²¹ As such, “an applicant for such [...] a subpoena before or during the trial would have to demonstrate a reasonable basis for his belief that there is a good chance that the prospective witness will be able to give information which will materially assist him in his case, in relation to *clearly identified issues relevant to the forthcoming trial*.”²² As can be seen above, the Prosecution’s responses to the Arido Defence’s inquiries have required nothing more. And, Arido’s explanations continue to fail.

15. *Second*, the ICTY Appeals Chamber has stated that a Chamber must “focus not only on the usefulness of the information to the applicant but on its overall necessity in ensuring that the trial is informed and fair.”²³ To this extent, ICTY jurisprudence holds that a Chamber may appropriately consider “whether the information the applicant seeks to elicit through the use of a subpoena is *necessary* for the preparation of his or her case and whether the information is obtainable through other means.”²⁴ Indeed, even if a Trial Chamber is satisfied that the applicant has met the legitimate forensic purpose requirement—which Arido has not—the issuance of a subpoena may be inappropriate if the information sought is obtainable through other means.²⁵

²⁰ Karadžić Decision, para.8; *see also* *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused’s Second Motion to Interview President Bill Clinton, 21 August 2012, para.16 (Second Karadžić Decision) (noting subpoena’s are to be used as a “method of last resort in the context of genuine investigatory efforts”).

²¹ Karadžić Decision, para.6.

²² Karadžić Decision, para.6, *citing* *Prosecutor v. Halilović*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoena, 21 June 2004 (“*Halilović* Decision”), para. 6; *Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 (“*Krstić* Decision”), para. 10 (citations omitted); *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder, 9 December 2005 (“*Milošević* Decision”), para.38.

²³ *Halilović* Decision, para.7; *Milošević* Decision, para.41, and *Prosecutor v. Brđjanin and Talić*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002, para.46; *see also* *Prosecutor v. Karemera, et al.*, Case No. ICTR 98-44-T, Decision on Nzirorera’s *Ex Parte* Motion for Order for Interview of Defence Witnesses NZ1, NZ2 and NZ3, 12 July 2006, para.9, (“*Karemera* Decision”) *citing* *Prosecutor v. Bagosora et al.*, Case No. 98-41-T, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana.(TC), 23 June 2004; *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Decision on the Defence Request for Subpoenas (TC), 4 May 2005; *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Decision on Confidential *Ex Parte* Motion for Subpoenas Directed to Defence Witnesses (TC), 20 January 2006.

²⁴ Karadžić Decision, paras.7,9.

²⁵ Second Karadžić Decision, para.9 *citations omitted* ; *see also* *Karemera* Decision, para.10.

16. Arido does not explain his reticence in providing properly motivated questions to the Prosecution in respect of the information he seeks from its investigative staff. Although he is entitled to pursue his defence as he deems appropriate, his strategic decisions do not excuse the legal deficiency of his Request. Thus, the Request fails to justify the necessity of a subpoena as the only means through which the information sought is obtainable, even if the Chamber had the power to compel one party's interview of another—which, as noted, is not provided for within the statutory framework.

17. *Third*, the Arido Defence persists in failing to articulate a proper forensic purpose for the requested interviews. Again, the purported justifications are speculative, generalised and misleading. One of the reasons Arido advances for the requested interviews of Prosecution investigators concerns alleged misconduct in respect of D-4 and D-6.

18. Specifically, Arido rehashes the same unsubstantiated and conjectural allegations concerning Prosecution investigators, set out in Kilolo's unfounded submissions before this Chamber in rearguing a decision denying Kilolo's request to obtain contact information for P-0260 and P-0245.²⁶ Although Arido concedes that Kilolo's complaint before the Presidency on this basis was dismissed,²⁷ his Request misleadingly suggests that in dismissing Kilolo's complaint as "manifestly unfounded"²⁸, the statements of D-4 and D-6 (on whom he now relies) were not before the Presidency.²⁹ In fact, they were.³⁰

²⁶ ICC-01/05-01/13-1053-Conf, para.14.

²⁷ Request, para.30.

²⁸ ICC-01/05-01/13-750-Conf, paras.21,22.

²⁹ Request, para.30.

³⁰ ICC-RPE26-01/14-2-Conf-Anx4 (D-4) (CAR-D21-0004-0310); and ICC-RPE26-01/14-2-Conf-Anx6 (D-6) (CAR-D21-0004-0354). Both statements were disclosed to the Parties by the Kilolo Defence in the course of the confirmation proceedings.

19. Further, the Presidency's recitation of the adopted findings of the panel assigned to assist its determination of Kilolo's complaint, noting that "the evidence put forward to support the allegations was unsworn or redacted and unsigned and thus insufficient to substantiate the grounds upon which the Complaint was made [and] that even if this evidence had been authenticated, *it would not have substantiated the allegations it purported to support.*"³¹

20. Arido's assertions concerning the conduct of the interviews of P-0245 and P-0260 in justification of the investigator interviews he seeks are also spurious. For example, he asserts that "the [witnesses'] interviews themselves have also raised some questions, especially as regards the pressure that have been put on both witnesses", yet omits any reference that these took place in the presence of Registry assigned counsel pursuant to article 55(2); and that, as the transcripts of their interviews reflect, both witnesses confirmed in counsel's presence that they had not been subject to such pressure.

21. Not surprisingly, the Request, as was the case in Arido's correspondence with the Prosecution, falls short of articulating a proper forensic purpose. Arido argues that such interviews are necessary because:

- as P-0260 and P-0245 admit lying before the Court, "it is legitimate for the Arido Defence to try to get to the bottom of these circumstances";³²
- it is "the sole opportunity for the Defence to fairly understand and investigate the conditions in which P-260 and P-245 have reversed their testimony";³³ and
- without the interviews, this would "undermine [the Arido Defence's] ability to fairly consider and apprehend the credibility of the said witnesses."³⁴

³¹ ICC-01/05-01/13-750-Conf, para.24 (emphasis added).

³² Request, para.26.

³³ Request, para.28.

³⁴ Request, para.27.

22. Although the above statements reflect rational areas of interest for the Defence, none demonstrates a proper forensic purpose *requiring* the interview of Prosecution investigators. Arido's recent Addendum³⁵ adds nothing to his cause on this issue, once again seeking to nonspecific information on purely speculative grounds.

23. Indeed, to date, Arido has advanced nothing to show that he is "likely to obtain information which would *materially assist his case*"³⁶ from the requested interviews. The Request thus fails to establish a legitimate forensic purpose — even assuming, *arguendo*, that the Chamber has the authority under the statutory framework to order the requested relief.

IV. Requested Relief

24. For the reasons above, the Request should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 24th Day of August 2015
At The Hague, The Netherlands

³⁵ ICC-01/05-01/13-1165-Conf, para. 19.

³⁶ Karadžić Decision, para.14.