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Pénale
Internationale**



**International
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Court**

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Date: **6 October 2015**

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 1 to 7

**Public Redacted Version of
“Narcisse Arido’s Request to Interview Prosecution’s Investigators”
(ICC-01/05-01/13-1139-Conf)**

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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I. INTRODUCTION

1. As previously noted in the Arido Defence's submissions on the confirmation of charges,¹ irregularities surrounding the interviews of P-260² and (known as [REDACTED] in the main case) and P-245³ (known as [REDACTED] in the main case) by the Prosecution's investigators may render their evidence inadmissible. In preparation for trial, and their cross-examination, the Arido Defence aims to establish the circumstances of these interviews, as they impact upon the credibility of the said witnesses and the admissibility of their interviews with the Prosecution.

2. For these reasons, the Arido's Defence requests leave from the Trial Chamber VII ('Trial Chamber') to interview the investigators who have participated to the interviews of P-260 and P-245, namely, [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED], the latter being also known as Prosecution's witness P-433.

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 confidential as it refers to confidential evidence.

III. PROCEDURAL HISTORY

4. On 8 May 2015 the Arido Defence wrote to the Prosecution, requesting the contact information of four investigators.⁴ In an email dated 26 May 2015 the Prosecution responded stating that the Arido Defence had not provided an indication of the purpose for which interviews were sought, but that if it could provide a proper forensic basis for its request, the Prosecution would consider it.⁵

¹ ICC-01/05-01/13-598-Conf, para. 211 and f.

² CAR-OTP-0080-0007; CAR-OTP-0080-0021; CAR-OTP-0080-0043; CAR-OTP-0080-0069; CAR-OTP-0080-0100; CAR-OTP-0080-0135; CAR-OTP-0080-0159; CAR-OTP-0080-0494; CAR-OTP-0080-0412; CAR-OTP-0080-0442; CAR-OTP-0080-0472; CAR-OTP-0080-0487.

³ CAR-OTP-0077-1095; CAR-OTP-0078-0155; CAR-OTP-0078-0171; CAR-OTP-0078-0178; CAR-OTP-0078-0184; CAR-OTP-0078-0194; CAR-OTP-0078-0198; CAR-OTP-0078-0206; CAR-OTP-0078-218; CAR-OTP-0078-0236; CAR-OTP-0078-0248; CAR-OTP-0078-0264; CAR-OTP-0078-0283; CAR-OTP-0080-0165; CAR-OTP-0085-0857.

⁴ Letter sent on 8 May 2015 entitled "Request for interview with Prosecutor investigators", *see* Confidential Annex 1.

⁵ Email sent on 26 May 2015 entitled "Re: Request for interview with Prosecutor investigators -- letter on behalf of Chief Taku and Philippe Larochelle", *see* Confidential Annex 2.

5. On 13 July 2015, the Arido Defence re-stated its request,⁶ and also expanded it to cover any investigator working upon this case that was not yet identified. It also provided additional information regarding the purpose for which the interviews were sought.

6. In a letter of 22 July 2015, the Prosecutor rejected the request, arguing that the latter failed to provide an adequate basis to interview Prosecution investigators in connection with the case.⁷

7. On 30 July 2015 and 5 August 2015, the Arido Defence sent emails respectively inviting [REDACTED]⁸ and, [REDACTED], [REDACTED], and [REDACTED]⁹ to participate to an interview with the Defence.

8. On 7 August 2015, the Prosecution asked the Arido Defence to refrain from any further contact with its investigators.¹⁰ However, to date, no answer has been received from the investigators.

IV. APPLICABLE LAW

9. The present request is presented under Article 64 (6) (f) of the Statute which provides that the Trial Chamber may “rule on any other relevant matters”, as well as Rule 134 of the RPE which states that: “prior to the commencement of the trial, the trial Chamber on its own motion, or at the request of the Prosecutor or the defence, may rule on any issue concerning the conduct of the proceedings”.

V. SUBMISSIONS

A. The Chamber has the power to compel prospective witnesses to attend an interview

10. The Rome Statute or any other Rules applicable to the ICC proceedings do not provide for a similar rule as Rule 54 of the Rules of Procedure and Evidence of ICTY and ICTR. That rule provides that “At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial”. Based on this rule the ICTY and ICTR Appeals Chambers have confirmed that a subpoena could be issued in order to

⁶ Letter sent on 13 July 2015 entitled “Follow-up to Request for Interview with Prosecution Investigators Prosecutor v. Arido et al. ICC (ICC-01/05-01/13)”, *see* Confidential Annex 3.

⁷ Letter sent on 22 July 2015 Ref: OTP/PD/20150722/KV, *see* Confidential Annex 4.

⁸ Email sent on 30 July 2015, *see* Confidential Annex 5.

⁹ Email sent on 5 August 2015 to [REDACTED], [REDACTED], and [REDACTED], *see* Confidential Annex 6.

¹⁰ Email sent on 7 August 2015 entitled “RE: Interviews with investigators in ICC-01/05-01/13”, *see* Confidential Annex 7.

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.¹¹

11. As regards the ICC, such question has not been yet settled. However, in the case of *Prosecutor v. Ruto and Sang*¹² the Chamber held that the Court had the power to compel the testimony of witnesses and could, pursuant to article 93 (1)(d) and (l) of the Statute, and by way of requests for cooperation, obligate a State to serve summonses and to assist in compelling the attendance (before the Chamber) of the witnesses summonsed. Such decision was grounded on Article 64 (6) (b) of the Statute which authorises the Trial Chamber to “require the attendance and testimony of witnesses (...) by obtaining, if necessary, the assistance of States as provided in this statute”.

12. The Arido Defence is of the view that such power shall necessarily lead the Court to compel the appearance of individuals for questioning in the context of an investigation.

13. First, after having precisely considered the international case law regarding the competence, power, ability, and capability of international criminal Court, the Trial Chamber has pertinently ruled in the above mentioned Ruto and Sang’s decision, that the power to compel the appearance of witness is an implied power of an international criminal Court, and “standing alone, this principle of implied powers, as a general principle of international law, is ample to justify incidental competence in an ICC Trial Chamber to compel the appearance of witnesses. It makes it unnecessary to agonise over the import of any provision of the Rome Statute that does not expressly and clearly exclude the possibility to imply the power”.¹³

14. Secondly and more importantly, the Trial Chamber has clearly stated that Rule 54 common to ICTR and ICTY Rules is a general template that is repeatedly seen in identical or varying formulations in the procedural laws of all the other international criminal Courts.¹⁴ In this sense, “the result of these repeated procedural laws is inescapably the crystallisation of customary international criminal procedural law, which recognises that a trial chamber of an international

¹¹ ICTY, *Prosecutor v. Krstić*, IT-98-33-A, Decision on Application for Subpoena, 1 July 2003, paras 10, 17, available at: <http://www.icty.org/x/cases/krstic/acdec/en/030701.htm> (‘1 July 2003 *Krstić* Subpoena Decision’); ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Joseph Nzirorera’s Notice of Violation of Rule 68 and Motion for Remedial Measures, 12 July 2006, para. 9, available at: <http://41.220.139.198/Portals/0/Case%5CEnglish%5CNzirorera%5Cdecision%5C120706b.pdf> (‘12 July 2006 Rule 68 Karemera Decision’).

¹² ICC-01/09/01/11-1274.

¹³ *Ibid.*, para. 87.

¹⁴ *Ibid.*, para. 92.

criminal court may subpoena a witness to appear for testimony”.¹⁵ Such a statement is particularly interesting since, as explained before, this article is the very basis for the ICTR and ICTY to consider that the Chambers have the power to compel a potential witness to attend an interview. Thus, since the Trial Chamber in the *Ruto and Sang* case has considered that the customary nature of the capacity to subpoena witnesses to appear for testimony is merely based on the repeated application of the substance of Rule 54, then it cannot be denied that such reasoning also apply to the capacity to subpoena witnesses to appear for an interview. Such argument is strengthened by the fact that the RPEs of the ECCC and the STL also provide for the possibility to compel witnesses to be interviewed.¹⁶

15. Moreover, the said arguments developed by the Trial Chamber in the *Ruto and Sang* case are maybe more important in the case of subpoena related to interview. Indeed, as it has been previously held by the Appeal Chamber, that the recourse to other sources of law is relevant when a lacuna exists in the Statute or the RPE as regards the matter in question,¹⁷ which is clearly the case as regards the power to compel witnesses to be interviewed.

16. Under Article 67 (1) (e) of the Statute, the Accused should have the right to obtain the attendance and examination of his own witnesses in the same conditions as witnesses against him. The interviews of witnesses which are done before they formally take the stand is an inherent part of the conditions under which a witness may be called. The vast array of cooperation measures contained in the Rome Statute, including direct references to interview of witnesses at Article 99 (4), make a compelling case for the conclusion that the Trial Chamber of this Court have the power to issue subpoena to prospective witnesses of both the Defence and the Prosecution.

17. The Prosecution has a duty to research and assess the evidence they intend to bring before the Court and to look for the truth. If the prospective witnesses have nothing of interest to further the case of the Accused, they will be left alone. If they do have information, prior interviews will provide the necessary information to obtain the orders necessary for the attendance of these witnesses. Here, the potential witnesses are Court employees. Surely, of all individuals against whom issuing subpoena should be non-controversial, Prosecutor’s investigators must figure high.

¹⁵ *Ibid.*

¹⁶ For the ECCC see Rule 60 (3) and 35 (1) (b) of the ECCC IR, and for the STL see Art 11 (5) of the Statute and Rule 61 (i) of the RPE.

¹⁷ ICC-01/04-168 (OA3), para. 23.

18. Moreover, in the context of request to subpoena, it has to be noted that the above rules can be executed through the assistance of a State party, assistance that could be requested under article 93 (1) (l) of the Statute which provides that the Chamber can request a State party to provide “any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court”. In the Ruto and Sang subpoena decision mentioned above, the Chamber makes clear that article 93 (1) does not provide for an exhaustive list of the types of request that the ICC may make of State party, and that article 93 (1) (l) “makes that very clear”.¹⁸ Thus, the possibility for the Chamber to request a State to facilitate the appearance of witnesses to an interview cannot be denied.

B. In the alternative, the Trial Chamber has the power to order the Prosecution to instruct its investigators to attend an interview with the Defence

19. Article 64 (2) of the Statute provides that “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 due regard for the protection of victims and witnesses”. One of the main responsibilities of the Chamber is to preserve the rights of the Accused and notably to ensure that the principle of the equality of arms is respected during the course of the proceedings. As such, any disagreement that arise between the Prosecution and the Defence and which impact the right to a fair trial of the accused shall qualify as a relevant matter under Article 64 (6) (f) of the Statute. This permits the Chamber to take any relevant decision that could rebalance the unfairness of the trial, especially when such action does not imply any coercion.

20. Thus, if the Chamber does not consider that it has the power to compel a prospective witness to attend an interview, there is no doubt that the Chamber has the power to facilitate the attendance of a potential witness at an interview. Such idea had been pointed out by ICTY Judge Shahabuddeen in his dissenting opinion on the above mentioned *Kršić* decision:¹⁹ “The distinction is illustrated by what happened in Tadić. The case involved an application by Tadić to admit additional evidence in an appeal by him. He feared that officials in the State (or Entity) where the evidence had to be collected could be obstructive, and he accordingly moved an ex parte “Motion for Binding Order against” that State for certain reliefs. Pursuant to that motion, the Appeals Chamber granted him an order to the State requiring it to “inform Defence Counsel of the precise whereabouts of [certain] individuals” and to “use all the means in its power during

¹⁸ *Ibid.*, para. 115

¹⁹ 1 July 2003 *Kršić* Subpoena Decision.

[a certain] period ... to enable Defence Counsel without any restriction or interference to interview and take statements from the individuals ...". The necessary arrangements were then made by the authorities of the State, and the individuals were in due course interviewed by counsel and co-counsel for Tadić at a police station. But no subpoena was issued by the Appeals Chamber to the individuals themselves requiring them to attend the interview held by defence counsel".

21. In such context, the Arido Defence submits that the Trial Chamber has the power to invite the Prosecution and its investigator to attend an interview with the Defence.

C. The Prosecutor's investigators having interviewed P-260 and P-245 shall be compelled to be interviewed by the Arido's Defence

22. In order to determine the conditions that have to be fulfilled in the present request, the Defence considers that the ICTY and ICTR case law in relation to the subpoena of witness to be interviewed supports its demonstration. Indeed the Defence believes that, due to the similarity of request, the conditions provided by such case law are of particular relevance. The ICTY and ICTR Chambers considered that a subpoena requiring a prospective witness to attend an interview could be issued where such attendance is necessary for the preparation or conduct of trial, and where the Defendant can establish a reasonable basis for the 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.²⁰ Moreover, it is added that the test should be applied in a liberal way but fishing expeditions should be prevented.²¹

23. One should also keep in mind the tripartite principles followed by the Trial Chamber in the Ruto and Sang's subpoena decision, namely, relevance, specificity and necessity of the appearance.²²

24. Interviews with the investigators who have participated to interviews in relation to witnesses P-260 and P-245 are necessary for the preparation or conduct of the trial and the Arido Defence, as the investigators have material information in relation to clearly identified issues.

²⁰ 1 July 2003 *Kršić* Subpoena Decision, paras 10-11, 17; 12 July 2006 Rule 68 Karemera Decision, para 9.

²¹ 1 July 2003 *Kršić* Subpoena Decision, para. 11.

²² ICC-01/09/01/11-1274.

1. *Interview with the Prosecution's investigators is necessary for the preparation and conduct of the trial*

25. The right to a fair trial has to be effective. It is submitted that providing the means, adequate time, and facilities is not effective to the Accused when investigative avenues which may lead to exculpatory material are unilaterally closed by the Prosecution. The Defence must be able to undertake investigations that stem from the Prosecution's investigation. This is especially the case with facts that are central to the allegations against the Accused.

26. Witnesses P-260 and P-245 have been at the heart of the charges against Mr. Arido. In the first instance, P-260 and P-245 have been interviewed respectively in April and February 2014 by Prosecutions investigators. On this occasion, they both suddenly went back on their testimony, admitting that they lied before the Court while under oath. Both of them were heard again by Mr. Vanderpuye himself and other investigators in November 2014.²³ The first set of interviews form an important part of the Prosecution's case against Mr. Arido, and it is legitimate for the Arido Defence to try to get to the bottom of these circumstances.

27. Refusing to grant such a possibility to the Arido Defence would certainly undermine its ability to fairly consider and apprehend the credibility of the said Witnesses, and would of course render it impossible for the Defence to call into question the investigation led by the Prosecution. One could even see in such case a kind of one-sided investigation, which is irrefutably presumed as regular. That would clearly be a breach of Mr. Arido's right to a fair trial.

28. Moreover, enabling the Arido Defence team to interview the investigators is hitherto the sole opportunity for the Defence to fairly understand and investigate the conditions in which P-260 and P-245 have reversed their testimony. Indeed, neither P-260 nor P-245 nor any of the investigators have accepted the Defence's request for interviewing them.

2. *There are reasonable grounds to believe that the investigators have material information in relation to clearly identified issues*

29. Many aspects appear to befuddle the circumstances in which such interviews and statements were given, aspects that are all known by the investigators.

30. Firstly, according to the witnesses D-4 and D-6, who were interviewed by the Kilolo Defence in May 2014,²⁴ [REDACTED] might have exerted pressure on them with the view to

²³ For P-260/[REDACTED], see CAR-0084-0412; for P-245/[REDACTED], see CAR-OT-0085-0857

²⁴ For D-4, see CAR-D21-0004-0310, p. 19, l. 650, p. 13, l. 449. For D-6, see CAR-D-21-0004-0354, p. 14, l. 488-534.

make them accept being interviewed. Such alleged harassment by [REDACTED]²⁵ [REDACTED]. From the statements, such pressure could easily be regarded as intimidation, and yet, D-4 refers to the same kind of pressure being exercised on P-245.²⁶ It has to be recalled that [REDACTED]²⁷ in this respect, and although the claim in question has been rejected, the point should be raised that such decision was merely due to the absence of disclosure of 5 or 6 of the annexes grounding the claim.²⁸ Whether or not one agrees with this position insofar as it concerns the responsibility of the Prosecution, it is clear that such a situation raises at least some doubts as regards the course of events surrounding the interviews, and should, in this respect, enable the Arido's Defence to investigate such allegations in more depth. This would also assist the Trial Chamber in getting a full picture of the circumstances surrounding the evidence of P-260 and P-245.

31. Secondly, both P-260 and P-245 were [REDACTED] just before participating in their interviews with the Prosecution's investigators.²⁹ No records or transcripts have been provided to the Defence, and the reasons as to why both witnesses had to [REDACTED] before being heard by the investigators remain obscure. In addition, it appears that [REDACTED].³⁰ And yet, in view of D-4 and D-6's statements, which clearly have highlighted the fear, reasonable or not, that [REDACTED] evoked in them as well as to P-245,³¹ it is far from speculative to consider that [REDACTED] could have had an impact on the statements of the witnesses. In such circumstances, the Defence should be entitled to know precisely when, how and through what contact these two witnesses decided to recant the evidence they had provided in the Main Case.

32. Thirdly, the interviews themselves have also raised some questions, especially as regards the pressure that have been put on both witnesses. The Arido Defence is referring to the arguments developed in its submission on the Confirmation on Charges,³² demonstrating, with details and quotations how the interrogations led by [REDACTED] cannot be exempted from criticism.

²⁵ For D-4, *see* CAR-D21-0004-0310, p. 13, l. 424-429. For D-6, *see* CAR-D-21-0004-0354, p. 17, l. 568-573.

²⁶ CAR-D21-0004-0310, p. 18, l. 629-630.

²⁷ [REDACTED].

²⁸ [REDACTED]

²⁹ For P-260/[REDACTED], *see* CAR-OTP-0080-0007; for P-245/[REDACTED], *see* CAR-OTP-0078-0155.

³⁰ ICC-01/05-01/13-1015-Conf.

³¹ CAR-D21-004-310, p. A8 and 19, l. 629-644; *see* in particular line 629 « [REDACTED] Oui, oui, oui. [REDACTED] me l'a dit que le [REDACTED] est en train de le menacer. [REDACTED] me l'a dit aussi. Et oui effectivement » ; l. 633 « [REDACTED]: Les faibles vont céder, parce que les... la menace était, était tellement grande, preuve en est que moi-même j'ai fui » and line 641 « [REDACTED]: Oui, j'ai... j'ai eu l'idée de... de faire une plainte. C'est ce que je... je veux le faire. J'ai eu l'idée vraiment de faire une plainte, mais j'avais... j'avais peur d'aller déposer au commissariat. De peur qu'on m'arrête encore. J'avais juste peur. »

³² ICC-01/05-01/13-598-Conf

This is particularly the case when [REDACTED] asked leading questions,³³ when he said that he had “reasons to believe” that they committed offence of false testimony before the Court,³⁴ when he impliedly explained the risk to which the witnesses were exposed if they refused to cooperate,³⁵ or when he signed an agreement with both P-260 and P-245 wherein the Prosecution agrees not to use the evidence provided during the interviews against them.³⁶ And yet, beyond any considerations as regards the legality of the investigation led by the Prosecution, it cannot be denied that the manner in which interviews were directed raise questions which must be investigated.

3. *Conclusion*

33. For all these reasons, and in light of the test provided for in *Kršić* decision,³⁷ it is clear that such interviews are necessary for the preparation and the conduct of the trial, and that the Defence can reasonably believe that interviewing the persons who have been at the forefront of those events – who have been the proactive actors of those reversals – have information in relation to the specific issues raised above, and which can materially assist the Defence in the case.

34. Moreover, such request does not make the Prosecution bear an excessive burden that could obstruct the good administration of the justice. Arranging an interview between its investigator and the Defence is neither complicated nor costly, and has, in any case, to be balanced with the importance that such interview would constitute for Mr. Arido’s right to a fair trial.

35. Finally, it goes without saying that, should the Chamber grant the Arido Defence the right to interview the investigators, it would strictly implement and respect the Protocol on the Handling of Confidential Information during Investigations and Contact between a Party and

³³ See ICC-01/05-01/13-598-Conf, para. 229

³⁴ CAR-OTP-0078-0155-R01, p. 9 (0163): “selon le biais des informations dont dispose actuellement le bureau du Procureur de la CPI nous avons des motifs de penser que vous avez commis des crimes qui relevant de la compétence de la Cour en vertu de l’Article 70 (a) [...] notamment en produisant un témoignage qui n’est pas entièrement vrai”; CAR-OTP-0080-0007, p. 4 (0010): “Selon les informations dont dispose le Bureau du Procureur actuellement de la Cour pénale internationale, nous avons des motifs de croire que vous avez commis des crimes qui relèvent de la compétence de la Cour, notamment en vertu de l’article a, faux témoignage d’une personne qui a pris l’engagement de dire la vérité en application de l’article 69, paragraphe 1 ».

³⁵ CAR-OTP-0080-0165, p. 9 (0163): “En cas de condamnation, la Cour peut imposer une peine d’emprisonnement pouvant aller jusqu’à cinq ans ou une amende telle que prévue dans le Règlement de procédure et de preuve, ou les deux”; CAR-OTP-0080-0007, p. 4 (0010) : “En cas de condamnation, la Cour peut imposer une peine d’emprisonnement pouvant aller jusqu’à cinq ans ou une amende tel que prévu dans le Règlement de preuve et de procédure, ou les deux”.

³⁶ P-245/[REDACTED], see CAR-OTP-0077-1095; P-260/[REDACTED], see CAR-OTP-0078-0303.

³⁷ 1 July 2003 *Kršić* Subpoena Decision, paras 10, 11 and 17.

Witnesses of the Other Parties (“The Protocol”).³⁸ And although, the investigators would not by essence be witnesses at the time of the interview, the Defence would respect the procedure provided for by the Protocol allowing, notably, the Prosecution to arrange and attend the interviews.

VI. CONCLUSION

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

- a. ORDER the investigators that participated in the interviews of P-260 and P-245, to attend a place at a nominated time, determined at their convenience, in order to be interviewed by the Arido Defence;

Or, in the alternative, to

- b. INVITE those investigators who interviewed P-260 and P-245 to participate in an interview with the Arido Defence.



Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 6th day of October 2015

The Hague, The Netherlands

³⁸ ICC-01/05-01/13-1093-Anx.