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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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

Public Redacted Document

Public redacted version of Prosecution Consolidated Response to the Bemba and Arido Defences' Challenges to Legality of 'Prosecution Evidence pursuant to Article 69 (ICC-01/05-01-13-1199-Conf and ICC-01/05-01/13-1241-Conf), 9 October 2015, ICC-01/05-01/13-1359-Conf

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I. Introduction

1. The Bemba¹ and Arido² Defences' requests to exclude Detention Centre ("DC") recordings and logs (together, "Materials") and Arido's Statements to the French authorities under article 69(4), (5) and (7) of the Rome Statute ("Statute"), should be rejected. The Materials and Statements were collected in full respect of Bemba's and Arido's rights under the Statute and in accordance with international human rights law. Even if the Court were to find that their collection violated these standards, this would neither affect their reliability, nor the integrity of the proceedings. The Materials and the Statements should thus be admitted into evidence.

2. Bemba's Request is based on erroneous and confused interpretations of the applicable jurisprudence. It also impermissibly attempts to appeal valid judicial decisions of Pre-Trial Chamber II ("PTC II"). The DC recordings were lawfully produced in accordance with the Regulations of the Registry ("RoR").³ They were transmitted to the Prosecution pursuant to a valid decision of the Single Judge of PTC II ("Single Judge") issued during the investigation stage of the case. Bemba's procedural rights were fully protected. He held no legitimate expectation of privacy in calls made on the non-privileged DC phone line. Finally, no step taken in collecting the Materials affects their reliability or has the capacity to damage the integrity of the proceedings.

3. Arido's Statements were taken in conformity with French law and the Statute. Arido was fully and properly apprised of his statutory rights and the charges against him. There is no evidence that Arido received ineffective legal assistance. Finally, his statements were not audio recorded because French law does not foresee this measure regarding article 70 offences. The reliability of the statements is attested to

¹ ICC-01/05-01/13-1199-Conf ("Bemba Request").

² ICC-01/05-01/13-1241-Conf ("Arido Request").

³ See ICC-01/05-01/08-2987, *in particular* paras. 1-10.

by the totality of the circumstances under which they were taken. As no violation of the Statute or international human rights occurred, the integrity of the proceedings remains intact.

II. Confidentiality

4. This request is designated as “Confidential” because it responds to Defence Requests of the same designation. A public redacted version will be filed.

III. Submissions

A. The DC recordings were lawfully collected and transmitted to the Prosecution

i. The DC recordings were lawfully recorded

5. Bemba’s conversations from the DC were recorded in accordance with the provisions regulating the detention regime at the Court. The RoR set out clear and foreseeable standards for detainees regarding their telephone communications. Regulation 174(1) of the RoR provides for passive monitoring of “all telephone conversations of detained persons (...) other than those with counsel, assistants to counsel entitled to legal privilege” and several other categories of persons of special status. Regulation 174(2) of the RoR makes clear that passive monitoring entails “the recording of telephone calls but without simultaneous listening”. This clear framework leaves no doubt about the propriety and legality of the recordings of Bemba’s DC non-privileged conversations.

ii. *The Materials were lawfully transmitted to the Prosecution*

6. The Materials were transmitted to the Prosecution on the basis of a valid judicial order. The Bemba Request fails, confusing the separate conditions applicable to the detention regime on the one side, and the issuance of judicial orders on the other, especially, when issued in the investigation of a detainee suspected of wrongdoing.

7. The “Decision on the Prosecutor’s request for judicial assistance to obtain evidence for investigation under Article 70”⁴ was properly issued in accordance with article 57(3)(a).⁵ There was no requirement for the Single Judge, when ordering the transmission of the Materials to the Prosecution, to additionally apply “the specific Regulations of the Court or the Regulations of the Registry”.⁶ Neither regulation 101 of the Regulations of the Court (“RoC”), nor regulation 175 of the RoR, contrary to the Defence assertion, are *lex specialis* regulating this matter.⁷ Neither provision imposes any duties or restrictions on judges with respect to collection of evidence.⁸ Rather, article 57 continues to be the overarching provision regulating the functions of pre-trial Judges, including during the investigations phase. Thus, in reaching his Decision, the Single Judge did not act *ultra vires*, but within his bounds as a pre-trial judge in the investigations stage.

⁴ ICC-01/05-46 (“Decision”).

⁵ See Bemba Request, para. 48.

⁶ Bemba Request, para. 48.

⁷ See Bemba Request, para. 48; *see also*, para. 60.

⁸ Regulation 101 of the RoC regulates the powers of the Chambers in relation to imposing or changing the conditions of the detention regime; regulation 175 of the RoR regulates the duties and powers of the DC officials to impose active listening of the detainee’s calls when a detainee is suspected of offences against the administration of justice. Neither provision restricts the powers of Chambers to order the production of any evidence they deem necessary.

8. Bemba had no right to be informed prior to the issuance of the Decision.⁹ *First*, Bemba's rights as a suspect under article 55 – applicable at the investigation stage of the proceedings – were not infringed by virtue of the Decision. *Second*, Bemba's right as a detainee to be heard "prior to the making of a decision affecting detention rights"¹⁰ is also not applicable in this situation: whereas a similar requirement may apply to decisions taken by the Registry in relation to the detention regime, and in particular where the Registry is conducting active monitoring of the detainee's calls,¹¹ it does not, and could not, impose any similar requirements on a Single Judge's regulatory powers during an investigation. At any rate, the Decision did not impact on Bemba's detention rights:¹² his conversations and visits were not restricted, nor was active monitoring implemented as a result, under regulation 175 of the RoR.

9. The language of regulation 189 of the RoR, even though non-exhaustive, makes it obvious that the recorded conversations are not part of the detention record either, as the record's purpose is to provide the basic information about the status of the detainee and the specifics of conditions of his detention regime.¹³ The Single Judge observed that:

The detention record is aimed at preserving all information pertaining to the period in which the accused remained in the custody of the Court; as can easily be evinced *inter alia* by reading regulation 189 of the Regulations of the Registry, such information consist notably of personal information of a

⁹ See Bemba Request, paras. 49-50.

¹⁰ Bemba Request, para. 50.

¹¹ See regulation 175(10) of the RoR (the counsel for the detainee has to be informed prior to the transcripts of the conversations actively monitored by the Registrar being handed over "as evidence of contempt of court").

¹² Bemba Request, paras. 48-50, 93.

¹³ Regulation 189 of the RoR provides that the detention record contains, *inter alia*, information concerning the detainee's identity, a copy of the warrant of arrest and document containing the charges, an order restricting access and contact of the detainee, the date and time of admission, the name of the counsel, listing of absences from DC, and number of days spent in custody. The Registry has acknowledged that the transcripts of monitored conversations under regulation 175 of the RoR do not form part of the detention record, and that the Prosecution can have access to them should the Chamber deem it appropriate: see ICC-01/05-01/08-315, paras. 1-11, 15; see also ICC-01/04-01/07-2187-tEng-Red, para. 18.

confidential nature, as well as of information on salient events occurring during such stay. Recordings of telephone conversations are made and maintained for purposes which are other than those of establishing a complete documentation of all relevant facts pertaining to the custody of the accused, and which can easily be appreciated precisely under the circumstances evoked by the Prosecutor's Request.¹⁴

10. The test set out in the Presidency Decision¹⁵ the Bemba Defence argues the Single Judge should have applied but illustrates the confusion that the Defence appears to have in relation to this issue. *First*, that decision did not address detention monitoring in general, but only the monitoring of non-privileged visits.¹⁶ *Second*, having found that such monitoring constitutes – as such – an interference with the right to a private and family life of a detainee,¹⁷ the Presidency then found that no violation of the article 8 of the European Convention for Human Rights occurred, given that the monitoring took place lawfully and in accordance with the applicable provisions of the RoR, which are provided to all detainees upon entering the DC, and formulated with sufficient clarity.¹⁸ *Third*, the Presidency stated that non-privileged visits are not private visits, because they are always subject to surveillance in accordance with the RoR.¹⁹ The Presidency thus confirmed that monitoring of visits in the DC is by definition, lawful, as well as proportionate to the aims pursued.²⁰ By analogy, monitoring of non-privileged conversations of a detainee is also lawful, and because these conversations are not “private”, no legitimate expectation of privacy attaches.²¹

¹⁴ Decision, para. 9.

¹⁵ See Bemba Request, para. 47, *citing* ICC-01/05-01/08-310, para. 38.

¹⁶ See ICC-01/05-01/08-310, *in particular* paras. 25-43.

¹⁷ See ICC-01/05-01/08-310, para. 37.

¹⁸ See ICC-01/05-01/08-310, paras. 38-40.

¹⁹ See ICC-01/05-01/08-310, para. 42.

²⁰ See ICC-01/05-01/08-310, para. 42.

²¹ See *below* paras. 12-16.

11. In any case, as the Single Judge has found,²² the purpose of the monitoring measures cannot be confined strictly to the protection of the security of the detention facility,²³ given the range of scenarios under which the Registry can undertake to actively monitor detainees, which may include instances of interference against the administration of justice.²⁴ And, as the Appeals Chamber has determined, only because monitoring is not ordered by a judicial authority, and for a different purpose, this does not render its result inadmissible at trial, particularly if the information is “related to the case at hand or of great significance to the parties”.²⁵ For this reason, the Single Judge acted appropriately when granting the access to the DC recordings to the Prosecution.

iii. The conversations were not privileged, and Bemba’s privacy rights were not affected

12. When granting the Prosecution’s request for the Materials, the Single Judge ruled that there was no need for an independent counsel to be appointed to review any conversations not directed to the Counsel for the Accused (including those with Mangenda), and considered all such calls to be non-privileged.²⁶ Irrespective of the fact that the Registry made available to the Prosecution all calls made on the “non-privileged line”, the Single Judge simply affirmed the same position when he later found, that “it is beyond controversy that the Mangenda calls were placed on a line which was considered non-privileged by the Registry [...] the features of the line were adequately known to all the participants”, and consequently, the parties to the Mangenda calls were not entitled to any legitimate expectation of privacy or confidentiality.²⁷

²² See Decision, para. 9.

²³ See Bemba request, para. 72.

²⁴ See regulation 175(2) of the RoR.

²⁵ ICC-01/04-01/07-1718, para. 49.

²⁶ See Decision, para. 4.

²⁷ ICC-01/05-01/13-48, para. 3. The Defence leave to appeal this decision was rejected. See ICC-01/05-01/13-109. The Bemba Defence also sought leave to appeal the Decision on judicial assistance after it was reclassified. The Defence sought leave to appeal the following issues purportedly arising from the decision: (i) whether the Single Judge erred by finding that he had power per article 57(3)(a) of the Statute to permit the Prosecutor access

13. There is no basis for asserting that the Court's legal framework and human rights law do not permit "privacy protections" to be lifted in this manner.²⁸ Conversations on Bemba's non-privileged line carried with them no expectation of privacy either generally,²⁹ or in Bemba's specific circumstances, and no violations of either the Statute or the human rights law occurred. No "secret surveillance"³⁰ took place here, but legitimate monitoring of which Bemba was apprised.

14. The Defence wrongly asserts that the Single Judge did not consider issues of privacy and privilege before ordering the transmission of the Materials to the Prosecution,³¹ and that he "appear[ed] to have acted upon the assumption" that Mangenda's communications would be treated the same as Kilolo's.³² The Single Judge considered these factors, but did not find them applicable to the matter at hand, finding that "[t]here is no reason that recordings of the telephone conversations made or received by an accused at the detention centre be governed by the same confidentiality and disclosure regime governing the detention record, in light of the specific purpose each of them respectively serves."³³ And, as referred to above, he explicitly found that Mangenda calls were not entitled to confidentiality protections.

15. It is also clear that the Single Judge considered that the communications themselves – distinct from the logs of such communications – may be subject to

to a log and to the intercepted recordings of the suspect's non-privileged telephone conversations in the Detention facility; (ii) assuming that he had such power, whether the Judge erred by permitting the Prosecutor access to the aforementioned items in the absence of reasonable grounds/basis to believe that the suspect had committed an offence against the administration of justice; and (iii) whether he erred by finding that "as long as they are not directed to counsel and as such, privileged, the conversations entertained by the Accused at the Detention Centre can be legitimately directly accessed by the Prosecutor for purposes of her investigations". See ICC-01/05-01/13-170-Corr. This application was also rejected on the basis that the Defence did not have the *locus standi*. See ICC-01/05-01/13-187.

²⁸ Bemba Request, para. 59.

²⁹ See above, para. 10.

³⁰ Bemba Request, para. 68. See also paras. 69-70.

³¹ See Bemba Request, paras. 81-82.

³² Bemba Request, para. 84, fn 47.

³³ Decision, para. 9. See also above, para. 12.

privilege, in granting the Prosecution access to them in the same Decision. The Defence's reference to the Chamber's decision regarding the contacts with witnesses is inapposite, as the Prosecution never sought all contacts with the Defence witnesses from the Single Judge – but only those Bemba may have had from the DC.³⁴ Even if the Prosecution had received all such contacts, there would have been no violation of Bemba's rights at the time – and especially none warranting the exclusion of evidence under article 69(7).

16. The Defence cannot claim the work product rights under rule 81(1) or privilege applying to professional communications under rule 73(2).³⁵ Whereas rule 81(1) cannot be invoked as an exception to disclosure regarding materials containing potentially relevant information in relation to offences under the Statute, it is clear that the conditions for the application of rule 73(2) are not fulfilled.³⁶

17. Finally, Bemba's conversations make clear his awareness of their monitoring. He expressed this to his interlocutors, including Babala, on many occasions. For example, in a conversation on 5 March 2012, Bemba told Babala in relation to the difficulties they were having in establishing a connection: "[REDACTED]".³⁷ On 18 January 2013, while discussing issues related to the Main Case, Bemba reminded Babala of the importance of using codes when on the telephone: "[REDACTED]".³⁸ It is in this knowledge that Bemba, together with Babala and others, devised and consistently used a system of codes to evade the Registry monitoring regime. Having

³⁴ See Bemba Request, para. 84.

³⁵ Bemba Request, para. 90.

³⁶ Rule 73(2) states that conversations made in the context of class professional conversations shall be regarded as privileged if the Chamber decides that (a) they were made in the context of a confidential relationship producing reasonable expectations of privacy and non-disclosure; (b) confidentiality is essential to the nature and type of relationship; and (c) recognition of the privilege would further the objectives of the Statute. See rule 73(2). There has been no such determination in this case or in the *Bemba* Main Case. Additionally, rule 73(3) does not list the relationship with the case manager as one of the relationships that the Court should give "particular regard" to when deciding on their potential privileged nature. See rule 73(3).

³⁷ CAR-OTP-0074-0456 (Audio); CAR-OTP-0080-0947 at 0949, lns. 22-24 (Translation).

³⁸ CAR-OTP-0074-0100 (Audio); CAR-OTP-0077-1035 at 1038, lns. 68-70 (Translation).

attempted to evade this monitoring, Bemba cannot rightfully invoke any privacy protections in this regard.

iv. No balancing with the rights of the Accused was required, as no Defence rights in this case were affected

18. No balancing of the “rights of the accused” under article 67 and the Prosecution’s duties under article 54(1), as required by the Appeals Chamber in the *Ngudjolo* appeal,³⁹ was necessary in deciding whether to grant access to the Materials. Bemba’s situation is distinguishable from that of Mathieu Ngudjolo, whose right to mount a defence was being protected at the time the Materials were being requested - during his trial. At the time that the Prosecution requested judicial assistance in question, no formal suspects had been named, and Bemba was not an Accused in this case, which was still an investigation.

19. The Defence’s arguments regarding alleged violations of the Defence rights are unsubstantiated, and they confuse Bemba’s rights in the Main Case at the time of the evidence collection, with the rights attendant to his status as an Accused in this case. Further, the Prosecution has only received the Materials until November 2013,⁴⁰ and does not intend to seek such materials beyond that date. Therefore, no other action is necessary to prevent future transmission of DC recordings or logs after that date.⁴¹

20. The Defence speculates in alleging that the Single Judge would not have found any evidence of wrongdoing, given the Materials’ “marginal relevance”, had he conducted the balancing exercise as the Defence proposes.⁴² The confirmation of the charges in this case belies the Defence’s claims because it is based, in part, on the very

³⁹ ICC-01/04-01/07-1718, para. 52.

⁴⁰ See ICC-01/05-01/08-2987, para. 10.

⁴¹ See Bemba Request, para. 95.

⁴² See Bemba Request, paras. 77, 79.

Materials the Defence now contests.⁴³ And, as set out in detail in the Prosecution's Pre-Trial Brief, the relevance of these conversations is readily apparent, not only from those conversations demonstrating the bribery and coaching scheme in the Main Case, but also from all of the conversations – including those affecting family and political matters – that demonstrate the on-going close relationship between Bemba and the other Accused, most of all Babala; Bemba's issuing instructions to the other participants in the scheme; and, most of all, his and his interlocutors' daily use of codes to conceal the true meaning of their conversations.⁴⁴

v. The transmission of the Materials was granted on the basis of evidence implicating Bemba

21. The Bemba Defence's assertion that the transmission of the Materials was unsupported by evidence, and that the Prosecution's allegations were "purely speculative",⁴⁵ is wrong.⁴⁶ The Decision was a "reasoned judicial determination", "grounded in evidence"⁴⁷ implicating Bemba and others in alleged wrongdoing in relation to corruption of witnesses in the Main Case. It was not substantiated merely by information received from two unidentified sources,⁴⁸ nor did it contain a "vague benediction"⁴⁹ for the Prosecution's entitlement to receive Bemba's non-privileged communications. There was no "lowering the evidential threshold" for transmission of a detainee's communications either, as no such threshold is established by the regulations governing the detention regime in the first place.⁵⁰

⁴³ See ICC-01/05-01/13-749, paras. 79-80, 98-102.

⁴⁴ See ICC-01/05-01/13-1110-Conf, paras. 27-30, 45-46, 53.

⁴⁵ Bemba Request, para. 56.

⁴⁶ See Bemba Request, paras. 52-59, 72-73.

⁴⁷ Bemba Request, para. 73.

⁴⁸ Bemba Request, para. 53.

⁴⁹ Bemba Request, para. 73.

⁵⁰ Bemba Request, para. 61.

22. Instead, the decision was based on numerous and varied other sources, including interviews with Prosecution resource persons and witnesses, Western Union transfers between the Accused in this case and Defence witnesses in the Main Case, payments made by the Victims and Witnesses Unit to witnesses, information in relation to Defence witnesses in the Main Case already known to the Prosecution, and information known about the telephone numbers in communication with Bemba in the DC.⁵¹ All of this information, taken together, satisfied the Single Judge that access to the Materials was justified and would assist further investigation into the allegations that Bemba and his associates interfered with witnesses in the Main Case.

23. In accordance with the nature of the Prosecution's request, the Single Judge was not required to make any factual findings on the actual existence of a bribery scheme. He was only required to determine whether a sufficient evidentiary basis gave rise to granting the Prosecution access to additional evidence to help establish such existence, since that was precisely the reason for which the Materials were being sought. Without actual knowledge of the content of the recorded calls, the Single Judge would have been amiss in denying the Prosecution access to them, as he could not determine in a vacuum whether the recordings were indeed necessary. Had the Single Judge done so, he would have impeded his own, and by extension Trial Chamber VII's, power to gather evidence it considers necessary for the determination of the truth, in accordance with article 69(3).⁵²

24. To support its assertions, the Bemba Defence relies on case law that is either irrelevant to the issues at stake,⁵³ or that confirms that access to detention recordings

⁵¹ See ICC-01/05-44-Red, paras. 9-28.

⁵² See ICC-01/04-01/07-1718, para. 48.

⁵³ See Bemba Request, paras. 64-65. The Šešelj 23 November 2006 Decision concerned a decision by the ICTY Registry restricting Šešelj's visitation rights; see ICTY, *Prosecutor v. Šešelj*, Case No. IT-03-67, Decision On Appeal Against The Registrar's Decision Of 19 October 2006; in the "Čelebići" Decision, the President of the ICTY took into account the rights of the accused in reaching his decision regarding notes exchanged between two accused, and confiscated by the Registry. The President ordered the notes disclosed. See ICTY, *Prosecutor v. Mucić et al.*, Case No. IT-96-21, Decision of the President on the Prosecutor's Motion for the Production of Notes Exchanged between Zejnil Delalić and Zdravko Mucić, 11 November 1996.

can be properly granted to the Prosecution where there is sufficient evidence to believe that detention communications have been abused.⁵⁴ However, the cited case-law also upholds the principle that conversations resulting from detention monitoring fall primarily within the remit of administrative decision-making. As this Court has rejected that interpretation of the appropriate regulations,⁵⁵ the cited jurisprudence has no application in this matter.

vi. Even if violations have been committed, they have not affected either the reliability of the evidence or integrity of the proceedings

25. Article 69(7) states that evidence obtained by means of a violation of this Statute or internationally recognised human rights shall not be admissible if the violation casts substantial doubt on the reliability of the evidence; or the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings. The Defence does not demonstrate either.

26. The method of collection of the Materials did not affect the reliability of the evidence.⁵⁶ The Registry, a neutral organ of the Court, recorded the evidence.⁵⁷ It is not contested that Bemba and Babala can be heard on these recordings,⁵⁸ and Bemba's other interlocutors, as well as the place from which the calls were made – the DC – are well-established.⁵⁹ Additionally, other evidence independently corroborates the accuracy and reliability of these conversations.⁶⁰

⁵⁴ See Bemba Request, para. 66. In the *Taylor* case, the Trial Chamber declined to grant the Prosecution access to the detention communications in the absence of any evidence that interference with the proceedings took place. See SCSL, Prosecutor v. Taylor, Case No. SCSL-03-1-T, Decision on Urgent Prosecution Request for an Order to Direct the Registry to Disclose Non-Privileged Information, 22 January 2010.

⁵⁵ See ICC-01/04-01/07-1718. Furthermore, the Appeals Chamber determined that such information can be used at trial, ICC-01/04-01/07-1718, paras. 44-50. See also Decision, para. 9.

⁵⁶ See Bemba Request, para. 96.

⁵⁷ See ICC-01/05-01/13-1113-Red, paras. 3, 10.

⁵⁸ See ICC-01/05-01/13-1113-Red, para. 19.

⁵⁹ See ICC-01/05-01/13-1113-Red, para. 20.

⁶⁰ See ICC-01/05-01/13-1113-Red, para. 21.

27. The fact that some recordings are slightly affected by lack of synchronisation does not go to the admissibility of this evidence, but rather the weight the Chamber may attach to them, and has to be assessed on a case-by-case basis. Synchronisation does not affect each recording equally, nor does it render its contents unintelligible. The information in relation to the methodology employed to record the calls, contrary to the Defence assertion, has been provided to the Defence.⁶¹

28. Neither were the Conversations “extracted” under coercive circumstances.⁶² The comparison that the Defence draws with information obtained from questioning in custody is inappropriate. Bemba made the calls of his free will, with full knowledge the conversations were being recorded, and, not having the status of an accused at the time, did not have to provide a waiver of his right to silence or counsel.

29. As argued above, Bemba’s “privacy and defence rights”⁶³ were not unduly affected by the recording and transmission of the Materials. These measures were lawful and provided adequate safeguards for the rights that Bemba was entitled to. However, even if any residual privacy rights had been affected, this did not damage the integrity of the proceedings. As the Materials were recorded and transmitted in accordance with the governing legal provisions – as the Defence finally admits at the end of the Request⁶⁴ – the integrity of the proceedings is preserved.

B. Arido’s Statements are admissible

i. Arido’s Statements were taken in full conformity with the national procedures and the ICC framework

⁶¹ See CAR-OTP-0079-0205. See Bemba Request, para. 104.

⁶² Bemba Request, para. 97.

⁶³ Bemba Request, para. 98.

⁶⁴ See Bemba Request, para. 101.

30. There have been no violations of either the Statute or French law in the manner in which Arido's Statements were captured. The interviews with Arido were not recorded because French law does not provide for recording of interviews of suspects for offences against the administration of justice, in accordance with article 64(1) of the French Code of Criminal Procedure.⁶⁵ This is also the reason this impediment to audio recordings was not articulated in either of Arido's Statements. This procedure applied irrespective of the presence of the ICC investigators at the Statement's taking, given that it was executed by the French authorities and on French soil. As the lack of recording conforms with French law, and the adequate justifications have been provided, this purported violation does not have the capacity to damage the integrity of the proceedings within the meaning of article 69(7).⁶⁶

31. Equally, the absence of audio recordings does not make it impossible for the Defence to evaluate the reliability of Arido's Statements.⁶⁷ Their reliability can also be assessed on the basis of other factors: Arido was represented by a lawyer both times; his rights were read out to him; he was informed of the charges against him; he was given the opportunity to remain silent; and he provided the Statements of his free will.⁶⁸ He signed both Statements.⁶⁹ Furthermore, the second statement was taken at Arido's express request.⁷⁰ There is no doubt that the reliability of Arido's Statements can be properly assessed on the basis of the available information, and that the Statements are sufficiently reliable for admission into evidence.

⁶⁵ The French authorities did not consider these offences to be *crimes*: See CAR-OTP-0089-0007 15 March 2015 letter from the French prosecutorial authorities, forwarded to the Prosecution, which provides : « *Il n'a pu être procédé à l'enregistrement sonore sollicité au point 12 c) de cette demande formée sur le fondement de l'article 70 du statut de la Cour Pénale Internationale, la législation ne prévoyant cette mesure qu'en matière criminelle, conformément aux dispositions de l'article 64-1 du Code de Procédure Pénale.* » According to French law, crimes are those infractions of the French Criminal Code punishable by a prison sentence of 10 or more years. See article 131-1 of the French Criminal Code.

⁶⁶ Arido Request, para. 34.

⁶⁷ Arido Request, para. 38.

⁶⁸ CAR-OTP-0074-1045; CAR-OTP-0074-1058; CAR-OTP-0074-1060; CAR-OTP-0074-1061 at 1061-1064; CAR-OTP-0074-1065 at 1065-1066; CAR-OTP-0077-0164; CAR-OTP-0077-0165; CAR-OTP-0077-0169 at 0169, 0170.

⁶⁹ CAR-OTP-0074-1065 at 1065-1070; CAR-OTP-0077-0169 at 0169-0176.

⁷⁰ CAR-OTP-0077-0169 at 0170.

ii. Arido had effective legal assistance

32. The Defence arguments regarding Arido's purported lack of effective legal assistance are speculative.⁷¹

33. *First*, there is no requirement that a counsel appointed to a suspect before the Court must be Registry-appointed.⁷² The plain language of article 55(2) makes that clear, all the more so since suspects have the right to assistance of a "counsel of the person's choosing". Additionally, Arido never objected to the counsel assigned to him.

34. *Second*, there is no evidence that Arido was provided ineffective assistance when represented by his counsel [REDACTED]. The factors that Arido Defence lists as showing that Arido's representation was ineffective, focusing primarily on the [REDACTED],⁷³ do not support that contention. There is also no reason to doubt the legality of the counsel's appointment in accordance with French national procedures. Finally, Arido was – unlike Germain Katanga in the cited decision in the Arido Request⁷⁴ – properly apprised of the reasons for his arrest and detention.

iii. Arido was fully informed of his rights

35. It is inaccurate to state that Arido was unaware of the reasons for his detention. Arido was specifically informed of the reasons for the detention, and of the charges against him.⁷⁵ There was no "misleading emphasis"⁷⁶ on the 14 false documents,

⁷¹ See Arido Request, paras. 40-49.

⁷² See Arido Request, paras. 40-43.

⁷³ Arido Request, paras. 45-46.

⁷⁴ See Arido Request, para. 47.

⁷⁵ See, for example, CAR-OTP-0074-1061 at 1061; CAR-OTP-0074-1065 at 1065-1066; CAR-OTP-0074-1060; CAR-OTP-0074-1045.

given that these 14 documents constituted at the time part and parcel of the basis for the arrest warrant. Instead, the documents that the Prosecution at the time alleged were false were raised with Arido as the investigators were interested in hearing what Arido had to say about them, among other things.⁷⁷

36. Likewise, Arido rights were explained to him, including the right to remain silent and against self-incrimination, under article 55(2).⁷⁸ During his first interview, at the time of his arrest, Arido was placed under the *garde à vue* regime, his rights under that regime were duly notified to him, and he was able to exercise them.⁷⁹

37. There is simply no evidence that Arido's rights were not respected, and consequently, that his statement should be found inadmissible on the basis of a violation of article 69(4) or (7).

IV. Relief Requested

38. Based on the foregoing reasons, the Prosecution requests the Chamber to reject the Defence Requests.



Fatou Bensouda, Prosecutor

Dated this 4th Day of November 2015
At The Hague, The Netherlands

⁷⁶ Arido Request, para. 48.

⁷⁷ CAR-OTP-0074-1065 at 1065-1070.

⁷⁸ CAR-OTP-0074-1058; CAR-OTP-0074-1060; CAR-OTP-0074-1061 at 1061-1064; CAR-OTP-0074-1065 at 1065-1066; CAR-OTP-0077-0164 at 0165; CAR-OTP-0077-0169 at 0169-0170.

⁷⁹ See CAR-OTP-0074-1058, CAR-OTP-0074-1060.