

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **7 July 2016**

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

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

Public

**Public Redacted Version of
‘Narcisse Arido’s Request for Leave to Reply to
“Prosecution’s Response to Arido’s Request for the Admission of Evidence from the
Bar Table Motion (ICC-01/05-01/13-1789)”
(ICC-01/05-01/13-1836-Conf)’ (ICC-01/05-01/13-1851-Conf), filed 28 April 2016**

Source: Counsel for Narcisse Arido

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

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Melinda Taylor

Counsel for Aimé Kilolo Musamba

Paul Djunga Mudimbi

Steven Powles

Counsel for Jean-Jacques Mangenda Kabongo

Christopher Gosnell

Arthur Vercken De Vreuschmen

Counsel for Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Roland Azama Shalie Rodoma

Counsel for Narcisse Arido

Charles Achaleke Taku

Beth Lyons

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

**The Office of Public Counsel for
Victims**

The Office of Public Counsel for the Defence

Xavier-Jean Keïta

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and

Other

Reparations Section

I. INTRODUCTION

1. The Arido Defence exceptionally seeks leave to appeal the Prosecution's "Prosecution's Response to Arido's Request for the Admission of Evidence from the Bar Table Motion"¹ ('Prosecution Response') on three issues.

II. CONFIDENTIALITY

2. 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 as confidential as it refers to a filing of the same classification which is confidential.

III. SUBMISSIONS

3. Regulation 24(5) of the Regulations of the Court ('RoC') provides that "Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations". Leave has been granted *inter alia* where a response raises "new issues";² presents arguments not reasonably foreseeable at the time of the request;³ or "misinterprets the applicable law and misrepresents the facts in an unanticipated way".⁴

4. Though Trial Chamber VII has strictly rejected granting leave during this case, permission is warranted in the present circumstances given that the Prosecution Response raises new issues that could not have been foreseen by the Arido Defence when it put forward its requests. Accordingly the Arido Defence seeks leave to reply and put forward arguments concerning the following issues:

- a. Whether the consideration of other evidence is relevant to assessment of the admission of the investigator's reports of P7 interviews or whether the two-step process of (1) admission and then (2) weighting in the judgement is the correct approach;
- b. Whether, if the first French interview is found relevant to the admission of the P7 report, the contents of the second French interview must be considered as well for the fairness of the trial to be preserved; and

¹ ICC-01/05-01/13-1836-Conf.

² ICC-01/05-01/08-3049, para. 5.

³ ICC-02/05-03/09-261, para. 5.

⁴ *Ibid.*

- c. Whether a report of an interview with P7 and a signed document constitutes a statement under Rule 68 of the Rules of Procedure and Evidence ('RPE').

5. The respective reasons for seeking leave to reply to each of these issues is set out successively.

6. Firstly, the Prosecution argues that the admission of two investigator's reports would be prejudicial to a fair trial⁵ because *inter alia* Mr. Arido provided a statement that contradicts the information contained in the reports.⁶ Other Trial Chambers have approached the admission and assessment of evidence as preceding its weighting against other items of evidence in the judgement. For example, in the *Katanga and Ngudjolo* case, Trial Chamber II stated:

[E]ach item of evidence *must be individually assessed* for its relevance and probative value at the time it is tendered and before being admitted into evidence. If at the time of tendering an item of evidence, the party is unable to demonstrate its relevance and probative value, including its authenticity, it cannot be admitted. It does not suffice to argue that its content may be corroborated by other evidence or that the Chamber may subsequently determine its proper evidentiary weight. *The Chamber wishes to remind the parties that probative value and evidentiary weight are two similar but distinct concepts.* [...] Probative value is determined on the basis of a number of considerations pertaining to the inherent characteristics of the evidence. Evidentiary weight, however, *is the relative importance that is attached to an item of evidence in deciding whether a certain issue has been proven or not.* It depends on the intrinsic quality and characteristics of the item of evidence, but also on the amount and quality of other available evidence on the same issue. Thus, unlike probative value, *evidentiary weight is assessed at the end of a trial*, when the Chamber has heard all other evidence admitted in the case. (emphasis added)⁷

7. In other words, the item is assessed on its own merits and admissibility and evidentiary weighting occur separately at different stages of the proceedings. The Prosecution argues that other evidence is relevant to the admissibility of a report. The Prosecution's argument is that admissibility is affected by other evidence and this is a new issue which merits a reply.

8. Moreover, the Arido Defence has previously,⁸ and simultaneous to the submission of its bar-table request,⁹ challenged the legality of Mr. Arido's first interview to the French police. The position of the Prosecution, that other evidence is relevant to balancing the prejudice of admission against the evidence's probative value, also merits a fully developed reply as regards

⁵ Prosecution Response, para. 9.

⁶ *Ibid.*, para. 10.

⁷ ICC-01/04-01/07-2635, para. 13.

⁸ ICC-01/05-01/13-1795-Conf, paras 10-23.

⁹ ICC-01/05-01/13-1241-Conf, paras 14-18.

whether evidence which is collected in a manner prejudicial to the Accused can be used to block the admission of exculpatory evidence.

9. As regards the second issue, the Arido Defence notes that there are in fact two interviews¹⁰ that Mr. Arido gave in France. In the latter interview, with the assistance of a fully trained lawyer, Mr. Arido provided a different account of the military background of D4 to that advanced by the Prosecution,¹¹ as well as a challenge to the legality of the former interview.¹² The Prosecution has an obligation to pursue the truth under Article 54(1)(a) of the Statute. If the Prosecution's position that the first French interview is relevant to the admission of the investigator reports is legally correct, then the Arido Defence should be permitted to provide a reply referring to the substance of the second French interview as it could not be anticipated that the Prosecution would take a legally unorthodox approach to the admission of evidence.

10. Finally, as regards the third issue, the Prosecution argues that the P7 investigator reports and a document signed by [REDACTED] constitute statements for which a request under Rule 68 of the RPE must be made.¹³ The Trial Chamber has taken a liberal interpretation of the understanding of what constitutes a statement during the present trial;¹⁴ however, the Prosecution's argument that these materials should be admitted through Rule 68 go way beyond the Trial Chamber's approach and the Arido Defence could not have anticipated making arguments as it does not agree that Rule 68 is applicable in any way to these items.

11. A report of a meeting with an individual, prior to the issuance of an arrest warrant, and prior to the specific allegations concerning D4 – which came to light as a result of the interviews with witnesses D2 and D3 the following year – could not constitute a statement for the purposes of Rule 68 of the RPE. The same is true for a document signed attesting to the status of D4 in 2013. For this reason, the Arido Defence should be afforded an opportunity to reply to set out the basis for rejecting this proposed legal classification.

¹⁰ CAR-OTP-0074-1065 from the 23 November 2013 and CAR-OTP-0078-0117 from 17 January 2014.

¹¹ CAR-OTP-0078-0117, p. 8 (0121), (“[REDACTED]”).

¹² *Ibid.*, p. 8 (0124).

¹³ Prosecution Response, paras 11, 21, and 23.

¹⁴ ICC-01/05-01/13-1227, para. 9

IV. CONCLUSION

12. In light of the above, the Arido Defence respectfully requests Trial Chamber VII's leave to reply to the Prosecution's response on the three issues described above.

A handwritten signature in black ink, appearing to read 'Charles', with a long, sweeping horizontal line extending to the right.

Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 7th Day of July 2016

The Hague, The Netherlands