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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, AIMÉ KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA
WANDU AND NARCISSE ARIDO**

Public

**Public Redacted Version of
“Narcisse Arido’s Response to ‘Prosecution’s Observations on the Accused’s
detention’ (ICC-01/05-01/13-1044-Conf)”
(ICC-01/05-01/13-1064-Conf), filed 6 July 2015**

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I. INTRODUCTION

1. The Arido Defence respectfully submits that the Prosecution response of 29 June 2015 regarding the interim release of Mr. Arido and the other Co-Accused misrepresents the evidence and substitutes speculation for proper proof of the risks posed by interim release. Furthermore, the Prosecution ignores the most basic internationally recognised legal principles that regulate release and detention.

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 confidential as it refers to confidential information and a filing of the same designation.

III. PROCEDURAL HISTORY

3. On 21 October 2014, the Single Judge rendered a decision *proprio motu*,¹ in which he ordered the release of Mr. Arido and his co-suspects other than Mr. Bemba, in order to avoid an unreasonable period of pre-trial detention² ('Decision Ordering Release').

4. On 29 May 2015, the Appeals Chamber rendered its judgement³ on the Prosecution's appeal against the Single Judge's Decision Ordering Release. It held that the Single Judge was permitted to take into account the unreasonable period of pre-trial detention even in the absence of an inexcusable delay on the part of the Prosecutor. However, it held that the Single Judge should have done so in the context of Article 60 (3) of the Statute, and should have considered whether, all factors considered against the risks contained in Article 58 (1) (b), the detention of the suspects stopped being reasonable. As a result, the Appeals Chamber reserved the Single Judge's decision rejecting interim release⁴ and remanded the question to the Trial Chamber. The Appeals Chamber highlighted the importance of a proper assessment of the (un)reasonableness of any period of detention prior to the trial on the basis of individual circumstances of each suspect in the present case⁵ and held that it would not be in the interests of justice to re-arrest the suspects.

¹ ICC-01/05-01/13-703.

² *Ibid.*, p. 6.

³ ICC-01/05-01/13-969.

⁴ ICC-01/05-01/13-588.

⁵ *Ibid.*, paras 45 and 49.

5. Pursuant to Trial Chamber's 1 June 2015 Order,⁶ the Arido Defence filed its observations on review of release under Article 60 (3) of the Statute.⁷ Following this, on 29 June 2015, the Prosecution provided its observations on the interim release of Mr. Arido⁸ ('Prosecution Observations').

IV. SUBMISSIONS

6. While the Prosecution concedes that re-arrest would be "logistically impracticable"⁹, it is clear from the tenor of the submissions that the Prosecution is still seeking re-arrest, it merely cannot bring itself to take this overt position. Re-arrest is obviously possible; it would just be disproportionate and unreasonable given the changed circumstances.

7. The Prosecution's position is untenable. On one hand, it argues, through mischaracterized evidence, that the risks of Article 58 (1) (b) are still present while on the other it does not *itself* ask for the re-arrest of Mr. Arido. If the risks in Article 58 (1) (b) are present, then it is the duty of the Prosecution to ask for re-arrest, instead the Prosecution invites the Trial Chamber to order it. Furthermore, the Prosecution requests unreasonable conditions while neither outlining why these conditions will reduce the risks of Article 58(1) (b) nor why they are the least intrusive that is required by the circumstances.

A. The Prosecutor misrepresents, exaggerates, and invents evidence to overemphasise the risks of granting Mr. Arido release under Article 60 (3)

8. The observations of the Prosecution fail to provide a substantive rebuttal to the Arido Defence arguments that Mr. Arido should remain at liberty. Distressingly, it appears that rather than present limited arguments, the Prosecution has attempted to persuade on the basis of misrepresentation and exaggeration.

1. Misrepresentation of evidence and the Pre-Trial Confirmation decision

9. When, in its submissions, the Prosecution claims that Mr. Arido is a lawyer¹⁰, either the Prosecution is confused about the information that it has or is trying to mislead the Trial Chamber. To date the Prosecution has not adduced any evidence that suggests that Mr. Arido was a professional lawyer. The Arido Defence has not disputed that Mr. Arido

⁶ ICC-01/05-01/13-980.

⁷ ICC-01/05-01/13-1022-Conf

⁸ ICC-01/05-01/13-1022-Conf

⁹ ICC-01/05-01/13-1044-Conf, para. 9.

¹⁰ ICC-01/05-01/13-1044, paras. 33 and 40.

received a law degree¹¹; however, for the Prosecution to conflate a law degree with the professional position – with its extended traineeships, professional rules, and annual professional development – is bordering upon blatant disregard for the evidence before it and should give pause-for-thought when examining other assertions made within the Prosecution submissions.

10. The Prosecution also tries to revive the argument that Mr. Arido was part of the Bemba network.¹² As argued previously¹³, it simply bares stating that it is clear from the Confirmation of Charges Decision that the Pre-Trial Chamber considered Mr. Arido more peripheral. The Prosecution has failed to substantiate its claim that Mr. Arido was a connected member of a network, and to adjust its representations on that issue with the Pre-Trial Chamber decision.

2. *Misrepresentation of an alleged incident*

11. The Prosecution also attempts to create a perception of an atmosphere of witness intimidation by exaggerating unfounded claims stemming from a single alleged incident and making assertions for which it provides no evidence.

12. The Prosecution states: “Arido’s submissions on the risk of his endangering the investigation or Court proceedings minimise his responsibility in the interference with *witnesses* that has occurred during the pendency of this case” (emphasis added)¹⁴ and “As noted, Prosecution *witnesses* in this case have been interfered with during its pendency.” (emphasis added)¹⁵. Given its similar formulation, the latter statement appears to refer to the former claim, yet neither assertion provides any reference, and yet both statements allude to the interference with multiple *witnesses*. The Arido Defence is aware of a single allegation of witness interference. It thus appears that the Prosecution is bending the truth to a point close to or past the breaking point.

13. Furthermore, with regards to the single allegation, the Prosecution states “The Arido Defence acknowledges as it must, that [REDACTED]”¹⁶. *This is absolutely incorrect*, and it is telling that the Prosecution has refused to engage with a single one of the arguments

¹¹ [REDACTED].

¹² ICC-01/05-01/13-1044, para. 39.

¹³ ICC-01/05-01/13-951, para. 10.

¹⁴ ICC-01/05-01/13-1044, para. 42.

¹⁵ *Ibid.*, para. 45.

¹⁶ *Ibid.*, para. 42.

previously made regarding this point.¹⁷ In particular, the Prosecution neither established the link between the alleged event and [REDACTED], and it did not provide any information – necessary for fairness – that would permit the Arido Defence to respond. The Prosecutor is therefore basing itself on an unresolved incident to invite the Trial Chamber to speculate further on the possible realisation of the risks mentioned at 58(1) (b). The Prosecutor’s submissions are simply devoid of any elaboration on how this alleged incident supports the argument that the Trial Chamber’s intervention is necessary – today – to order detention or to impose conditions so as to prevent the realisation of the risks mentioned in Article 58(1) (b).

3. *Misrepresentation of the flight risk*

14. Finally, the Prosecution is also reviving claims made a year ago – and thought abandoned – that the Arido Defence submissions on interim release ignores the “misuse of the visa obtained for [Mr. Arido] by the Court to facilitate his testimony in the Main Case in order to abscond to France”.¹⁸ At several instances¹⁹ the Arido Defence has responded to this claim in detail and the Prosecution has never provided any response that can satisfactorily account for the material referred to by the Arido Defence. Though it is repetitive to do so, given the importance of the issue of Mr. Arido’s liberty, the Arido Defence will – yet again – summarise two main points of these prior submissions.

15. Firstly, as is clear from the emails sent by Mr. Arido to the Bemba defence team and the VWU in 2012,²⁰ Mr. Arido did not come to testify as a result of fears for his security, as he believed that his identity and his quality as a Defence witness were known [REDACTED].

16. The reason for this relates to [REDACTED]. In July 2012, Mr. Arido was approached by a person [REDACTED].²¹ He was told that this person was there to assist him with regards to his future testimony in the Bemba case, and that he had to hand over his travel documents to that person so that he could organise the trip.

¹⁷ ICC-01/05-01/13-606-Conf, paras. 30-32.

¹⁸ ICC-01/05-01/13-1044, para.40.

¹⁹ See ICC-01/05-01/13-413-Conf-Exp, paras 24-29; ICC-01/05-01/13-420-Conf-Exp, paras 15-21; ICC-01/05-01/13-477-Red, para. 30; and ICC-01/05-01/13-749, paras. 176-184.

²⁰ See e.g. CAR-OTP-0075-0484; CAR-OTP-0075-0486; CAR-OTP-0075-0491; CAR-OTP-0075-0589; CAR-OTP-0075-0593; CAR-OTP-0075-1251; CAR-OTP-0075-1255; see also ICC-01/05-01/08-2261-Conf-Red.

²¹ For further details see ICC-01/05-01/13-413-Conf-Exp.

17. Upon his failure to present any valid official Court document or a mission order, and upon being informed that [REDACTED]. Mr. Arido feared that his identity as a Defence witness for Mr. Bemba had been discovered [REDACTED]. He informed the [REDACTED] who in turn informed [REDACTED], and fled the country to seek refuge in France as a result, [REDACTED].

18. It must also be pointed out that there is ample evidence that that former CAR military living in [REDACTED] were under constant security threats.²² Furthermore, the Bemba Trial Chamber and the VWU recognised this since protective measures have been granted to Bemba Defence witnesses.

19. Secondly, Mr. Arido was not trying to “hide” from the ICC’s jurisdiction. On 26 July 2012 Mr. Arido wrote a letter to the VWU explaining the incident which led to him leaving [REDACTED] and not testifying.²³ Mr. Arido contacted the ICC several times to raise his security concerns, but no measures were taken.²⁴ He also informed Mr. Kilolo, at the time lead counsel for Mr. Bemba in the main case, of the various letters he sent to the VWU and the ICC and of his security concerns.²⁵

20. As soon as he arrived in France [REDACTED], he approached the French authorities, asking for temporary stay as an asylum seeker.²⁶ [REDACTED], Mr. Arido was fully transparent regarding his arrival in France, including by explaining that he used a visa that was given to him to testify before the ICC, and that he did not testify because of his

²² See e.g. CAR-D24-0001-0018; CAR-D24-0001-0009; CAR-D24-0001-0016; CAR-D24-0001-0028; see also, more generally [REDACTED], CAR-D24-0001-0023.

²³ CAR-OTP-0075-1251 ; see also CAR-OTP-0075-0594, acknowledging receipt of Mr. Arido’s email and confirming transmission of the email to the VWU.

²⁴ CAR-OTP-0075-1254-R01 (26 July 2012, email from ARIDO to the VWU, attaching CAR-OTP-0075-1255, CAR-OTP-0075-1256 and CAR-OTP-0075-1257, which is also under CAR-OTP-0075-1455-R01); CAR-OTP-0075-1454-R01 (automatic reply from the email address to which ARIDO sent an email at the VWU (AR-OTP-0075-1254-R01) which shows that the email was sent); CAR-OTP-0075-1455-R01 (30 July 2012, Email from ARIDO to the VWU going through the ICC visit email address, attaching CAR-OTP-0075-1456-R01 & CAR-OTP-0075-1457-R01).

²⁵ See CAR-D21-0002-0062; CAR-D21-0002-0059; CAR-OTP-0075-0605-R01 (31 October 2012); CAR-OTP-0075-0490 (24 July 2012, ARIDO transmitting the letter for the ICC Judge – under CAR-OTP-0075-0491 - to KILOLO); CAR-OTP-0075-0490 (24 July 2012, ARIDO sending a letter presenting his security concerns and reasons thereto to KILOLO for him to transmit to the relevant authorities. The letter is under CAR-OTP-0075-0491-R01); CAR-OTP-0075-0589-R01 (23 October 2012, ARIDO informs KILOLO that he cannot testify because of his security concerns); CAR-OTP-0075-0594-R01 (23 October 2012, ARIDO forwards the email from ICC visits to KILOLO, which states that they forwarded his email to the VWU); CAR-OTP-0075-0594-R01 (23 October 2012, ARIDO forwards the letter he sent to the VWU - CAR-OTP-0075-0599, 600 & 60 - to KILOLO); CAR-OTP-0075-1459-R01 (30 July 2012, email from the ICC visit informing ARIDO that his email was forwarded to the VWU); CAR-OTP-0075-0598-R01 (23 October 2012, email from ARIDO sending KILOLO a “lettre d’information pour insécurité à la Cour”, attaching CAR-OTP-0075-0599, 600 & 601); CAR-OTP-0075-0602 (23 October 2012, [REDACTED] (CAR-D24-0001-0020-R01) to KILOLO).

²⁶ CAR-OTP-0073-0551: [REDACTED].

security fears.²⁷ Email communications from Mr. Arido also show that he was still willing to testify, even after the July 2012 incident [REDACTED] and after August 2012. He was in touch with the VWU and sent them his travel document in September 2012.²⁸

21. A review of Mr. Arido's email exchanges with his friends and relatives show that he perceived a serious threat against him, which is why he decided not to testify before the ICC.²⁹ Even having taken the decision not to testify, Mr. Arido was never trying to "hide" from the ICC. In February 2013, Mr. Arido wrote an article for the newsletter of "*Europe Ecologie les Verts*" on the CAR conflict, which was made publicly available online, and which included his name, phone number and email address.³⁰ Clearly, someone trying to "hide" from the ICC would not do this.

22. As a final note, it can be added that the above-mentioned evidence concerning Mr. Arido's flight to France and related complaints to the Defence team and the VWU about his security were disclosed in April 2014 as exculpatory evidence.³¹ This is in contradiction to the way in which the Prosecution now wants to refer to this sequence of events as after-the-fact evidence that reflects badly on Mr. Arido's character.

B. The Prosecution submissions ignore international and ICC jurisprudence on detention and detention related matters

23. It is distressing that the Prosecution Observations appear to have jettisoned at least three well established international principles that concern issues surrounding individual liberty and detention.

1. The burden of proof

24. It must be pointed out that the burden of establishing the continuing existence of the conditions set forth in Article 58 (1) of the Statute during the time a person is under pre-trial detention lies with the Prosecution³² and that this reflects internationally recognised human

²⁷ CAR-OTP-0073-0551, p. 2 (0552), last paragraph.

²⁸ CAR-OTP-0075-1476-R01 (12 September 2012, ARIDO sends his travel document to the VWU representative, attaching CAR-OTP-0075-1477); CAR-OTP-0075-1481-R01 (12 September 2012, Email from VWU representative acknowledging receipt of the travel document).

²⁹ See e.g. CAR-OTP-0075-0603-R01, wherein [REDACTED]; CAR-OTP-0075-1140-R01 (16 September 2013 "[REDACTED]").

³⁰ CAR-D24-0001-0040, p. 8 (0047).

³¹ For an overview see ICC-01/05-01/13-333-Conf-AnxC.

³² ICC-01/04-01/07-330, p. 6.

rights³³. Connected to such a principle is the presumption of innocence which is provided in Article 66 (1) of the Statute.³⁴

25. While the Prosecution need not repeatedly re-establish the same underlying facts if these facts continue to apply, they must show that there is no change in circumstances.³⁵ For each review, the Prosecution “must bring to the attention of the Chamber any other relevant information of which he is aware that relates to the question of detention or release”.³⁶ As things currently stands, Arido has been released. The Prosecutor, therefore, has the burden to demonstrate that that state of affairs should change.

26. With respects to these duties just described, the Prosecution Observations are misleading and largely devoid of new content and, aside from repeating year old allegations disregarding any possible changed circumstances, fail to show why there is no changed circumstance. As discussed above, the observations misrepresent evidence, but in addition, they do not provide reference to new information. In fact, the only evidence cited for the proposition that Mr. Arido is a flight risk is information disclosed in March 2014 and which was generated in 2013.³⁷

2. *Disregard for the presumption of innocence*

27. Beyond trying to reverse the presumption of innocence through rhetoric³⁸, the observations attempt to twist facts in disregard of the presumption of innocence. The Prosecution states that Mr. Arido “did not [initially] appear in the proceedings in this case voluntarily”.³⁹ However, what the Prosecution neglects to mention is that the possibility was never given, as it was decided that he would be arrested in light of the Arrest Warrant issued by the Single Judge. It can be added that Mr. Arido did not resist arrest in France⁴⁰, and cooperated with the French and ICC authorities who interrogated him in November 2013⁴¹ and January 2014, on a voluntary basis.⁴² In fact, the Prosecutor does not stop short of

³³ *Ibid.*, p. 7.

³⁴ ICC-01/05-01/08-1019 (OA4), para. 49.

³⁵ *Ibid.*, para. 51.

³⁶ *Ibid.*

³⁷ This is item CAR-OTP-0073-0551 see ICC-01/05-01/13-1044, para. 40.

³⁸ ICC-01/05-01/13-1044, para. 30.

³⁹ ICC-01/05-01/13-1044, para. 41.

⁴⁰ The French authorities said that the arrest was made without any difficulties and without the use of force, see CAR-OTP-0074-1058.

⁴¹ CAR-OTP-0074-1065.

⁴² CAR-OTP-0078-0117.

reproaching Mr. Arido for his challenges before the French courts on the legality of his detention and transfer.⁴³

28. In a similar vein, the observations refer to Mr. Arido's presence at the 24 April 2015 Status Conference as "strategic".⁴⁴ While such a comment should be simply disregarded because it fails to undermine the premise that Mr. Arido's presence at the Status Conference shows that he will be present at trial. It bares saying that such an approach by the Prosecutor offers no fair way out for Mr. Arido. Had he solicited the Trial Chamber not to have been present, this would have also have been seemingly held against him instead.

3. *Misrepresentation of the duration of detention*

29. It is submitted that the Prosecution misrepresent the manner in which the duration of pre-trial detention is considered when assessing an unreasonable duration of detention. The Prosecution seems to suggest that time spent in detention in the custody of national systems should not be considered.⁴⁵

30. The European Court of Human Rights ('ECtHR') has found that "in determining the length of detention pending trial [...] the period to be taken into consideration begins on the day the accused is taken into custody and ends on the day when the charge is determined".⁴⁶ The ECtHR thus considers any pre-trial detention as relevant.⁴⁷ Though the ECtHR faces cases where the detainee has been detained within the same national legal framework, the Appeals Chamber of the ICTR has applied the same approach where the detention of the Accused was first in a national system at the request of an international Prosecution.⁴⁸

31. Thus, it is submitted that the Prosecution's oblique claim, that the time Mr. Arido spent in French detention should not be considered with regards to the determination of the reasonableness of his detention, is in conflict with accepted fundamental human rights. It can be added that excluding this time would defeat the purpose of the norm prohibiting unreasonable detention since the effectiveness of the norm would be defeated by a legal formality – that is to say the formal legal basis of his detention and not the reason for it.

⁴³ ICC-01/05-01/13-1044, para. 41.

⁴⁴ *Ibid.*, para. 41.

⁴⁵ *Ibid.*, para. 41.

⁴⁶ *Kalashnikov v. Russia*, Judgement, Application no. 47095/99, 15 July 2002, §110, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60606>.

⁴⁷ See further *Stögmüller v. Austria*, Judgement, Application no 1602/62, 10 November 1969, §4, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57582>.

⁴⁸ ICTR, *The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-AR72, 3 November 1999, para. 52.

32. It can be added that the Statute shows some acknowledgment that the Court has some responsibility for pre-trial detention in a national system where it is at the request of the Court. Article 59 (5) creates a right of notification for the Pre-Trial Chamber in the event of the Suspect requesting interim release and the Pre-Trial Chamber is enabled it to provide recommendations thereon.

33. Finally, though not strictly reflecting one legal rule, the Prosecution Observations would, if adopted, lead to a situation where interim release was effectively not possible post confirmation of charges. The Prosecution seems to argue that the confirmation decision is proof of the risks in Article 58 (1) (b) *per se*.⁴⁹ Such an absolute approach, which would effectively eliminate judicial discretion to grant interim release post-confirmation-decision, cuts against the general trend in international human rights law to look at the particulars of the individual to assess the necessity and proportionality of interference with their rights.

C. The conditions proposed by the Prosecution are unnecessary and unreasonable

34. Though the Arido Defence submits that conditions are not necessary, it has in the past indicated⁵⁰ that Mr. Arido would be willing to abide by reasonable conditions if they are necessary to secure his liberty.

35. As an introductory matter, the Arido Defence stresses that Article 88 of the Rome Statute places obligations upon its signatories to “ensure that there are procedures available under their national law for all of the forms of cooperation [specified in Part 9 of the Statute]”. The kinds of procedures required must respond to both the general obligations of cooperation with prosecution under Article 86, but also the more specific kinds of assistance enumerated under Article 93.

36. With regards to State obligations the Arido Defence recalls its prior submissions that – briefly put – observe that protections of internationally recognised human rights should not be contingent on the realisation or failure of states to live up to their obligations under the Rome Statute.⁵¹

⁴⁹ ICC-01/05-01/13-1044, para. 11 (“The Chamber should not lose sight of the fact that the Confirmation Decision found substantial grounds to believe that all of the Accused committed offences under Article 70”).

⁵⁰ ICC-01/05-01/13-477-Conf, see particularly paras. 58-60.

⁵¹ ICC-01/05-01/13-695-Conf, see particularly para. 30.

1. *General Principles*

37. Given that there is little practice of the imposition of conditions at the ICC or within international criminal tribunals more generally, the Arido Defence submits that two principles should guide the evaluation.

38. Firstly, clearly any conditions must be tailored to the individual, the nature and seriousness of the charges, and the individual's circumstances.

39. Secondly, the formulation and application of conditions must be in compliance with internationally recognised human rights following Article 21 (3). In this regard, the Prosecutions suggestion that the “immediate revocation of interim release”⁵² should follow any breach of conditions acknowledges neither that detention must not be arbitrary – which would be the case for detention following a *de minimis* breach, nor that the RPE provides for modification of condition under Rule 119 (2) which could in many cases be used to remedy many breaches prior to any re-detention.

2. *Communications surveillance*

40. With regards to condition that Mr. Arido be “monitored by the relevant State authorities”⁵³, little detail is given as to the requested scope and manner. In other words whether it should be passive or active and which communication media should be covered.

41. The Arido Defence notes that Rule 119 (3) provides for a procedural right to respond before the actual imposition of conditions. The Arido Defence is unable to fully respond to the reasonableness or proportionality of the measures requested by the Prosecution because of their lack of specificity. Thus, the Arido Defence wishes the Trial Chamber to note its intention to respond should this condition be imposed with greater specificity. This said, some general observations can be made.

42. It must be primarily borne in mind that any recording of information by a public authority – and should the condition be imposed it will necessarily be under the auspices of a state – is under the ECHR considered an interference with the right to respect for private life.⁵⁴ Following from that, any interference in the Accused private life must be carefully

⁵² ICC-01/05-01/13-1044, para. 47.

⁵³ ICC-01/05-01/13-1044, para. 47 (e).

⁵⁴ *Leander v. Sweden, Judgment*, Application no. 9248/81, 26 March 1987, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57519>; *Kopp v. Switzerland, Judgment*, 13/1997/797/1000, 25 March 1998, available at:

proscribed by law. That is to say, that should the Trial Chamber implement this condition, it is submitted that it should *extremely* carefully formulate it.

43. The Arido Defence also submits that any monitoring or surveillance should be used to prevent the realisation of risks, not be used to continue investigations. Furthermore, in the event that the material is used to re-justify detention, it must be disclosed to the Defence. Following the general principles of data retention, after any surveillance is complete or the proceedings end, Mr. Arido should be able to inspect what has been collected and the material – its use exhausted – should be destroyed. Finally, it must be stated again that given the changed circumstances⁵⁵ the Prosecution has not demonstrated any risks that this measure is aimed to alleviate.

3. *Posting bond or providing real or personal security or surety*

44. With regards to the Prosecution request for a possible condition to “post bond or provide real or personal security or surety” under Rule 119 (g), in the awareness of the Arido Defence, there is no international criminal law practice on the manner of evaluation of this condition. Similarly, national practice is highly varied.⁵⁶ Thus, it is submitted that the principles mentioned above⁵⁷ should guide the evaluation of this Prosecution request.

45. Though State practice on bail is varied, the Arido Defence submits that both Canada and France legal systems demonstrate an approach that it is consistent with the general principles just mentioned. Canadian decisions from Newfoundland and Labrador Supreme Court have applied what is described as a “means” principle to bail. Such an approach stems from the Canadian Charter of Rights and Freedoms which under Section 11(e) requires that a person charged with an offence “not to be denied reasonable bail without just cause”.⁵⁸ In considering this principle, the Newfoundland and Labrador Supreme Court has for example

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58144>; *Amann v. Switzerland*, Judgment, Application no. 27798/95, 16 February 2000, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58497>.

⁵⁵ ICC-01/05-01/13-1022-Conf, paras. 20-59.

⁵⁶ *International Criminal Procedure: Principles and Rules* (eds. Sluiter et al. 2013), p. 346, see Annex A.

⁵⁷ See paras 38 to 39 above.

⁵⁸ The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html#sec11_smooth.

stated: “Because [the accused] is not privileged enough to have personal resources or family and friends with same, he should not, in my view, be denied bail”.⁵⁹

46. In a completely different legal system, the French Criminal Procedural Code similarly provides in article 138, 11° that the resources of the individual should be taken into account when assessing bond conditions.⁶⁰ The French Court de Cassation when has examined the application of this provision and noted the importance of examining the particular circumstances of the individual and has noted the importance of this examination in the context of an individual who was living on social assistance.⁶¹

47. Following from these principles, the Arido Defence submits that any bond or personal security or surety must be proportionate to circumstance of Mr. Arido. Anything less would be condition liberty upon economic means. It is submitted that this implies that the Trial Chamber should assess both (i) the *capacity* to provide a bond and (ii) the *impact* of providing that upon other human rights.

48. In this regards, the Trial Chamber should consider both that Mr. Arido has been found to be indigent by the Court and that any burden should not negatively impact upon his well-being or that of his family.

4. *Reporting contact with Witnesses*

49. Finally, with regards to the condition that “The Accused must report to the Registrar any contact with such witnesses in this case, or those in Case ICC-01/05-01/08”⁶², the Arido Defence does not dispute the utility of such a condition under certain circumstances, but submits that its formulation could be made more clear by the inclusion of the text ‘must report to the Registrar any contact *by the Accused*’ as the scope of condition could be imprecisely interpreted to refer to any contact to that comes to their notice, as for example, by their Defence team.

⁵⁹ *Oliver v. The Queen*, 2008NLTD5, <https://www.canlii.org/en/nl/nlsctd/doc/2008/2008nlt5/2008nlt5.html?autocompleteStr=Oliver%20v%20The%20Queen&autocompletePos=2>.

⁶⁰ Code of Criminal Procedure, English translation available at: p. 35, http://www.legifrance.gouv.fr/content/download/1958/13719/.../Code_34.pdf.

⁶¹ Cour de cassation, Chambre criminelle, 4 Novembre 2008, Cassation – renvoi Lyon, N° 08-85.724, available at: <http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000019780594>; Cour de cassation Chambre criminelle, 17 Septembre 2014, Cassation - renvoi Aix-en-Provence, N° 14-84.282, 5001, available at: https://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/5001_17_30150.html.

⁶² ICC-01/05-01/13-1044, para. 47 (i).

V. CONCLUSION

50. In light of the above, the Arido Defence respectfully requests Trial Chamber VII to not accept the Prosecution arguments and rather follow the Arido Defence prior submissions.⁶³

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

Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 14th Day of July 2016

The Hague, The Netherlands

⁶³ ICC-01/05-01/13-1022-Conf, para. 60.