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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 Redacted Document

**Public redacted version of “Prosecution’s Response to Narcisse Arido’s
Request that Trial Chamber VII Admit CAR-OTP-0094-1580-R01 into Evidence
(ICC-01/05-01/13-1968-Conf)”, 19 August 2016, ICC-01/05-01/13-1975-Conf**

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I. Introduction

1. Trial Chamber VII (“Chamber”) should reject the Arido Defence’s Request to admit CAR-OTP-0094-1580-R01¹ into evidence (“Request”). The Request fails to satisfy the stringent conditions for the submission of evidence at this stage of the proceedings, as set out in the Chamber’s 29 April 2016 *Decision Closing the Submission of Evidence and Further Directions*² and re-emphasised in the Chamber’s 20 June 2016 *Decision on Arido Defence Request to Formally Submit CAR-D24-0002-0003*.³ The Request further fails in that the Asylum Interview is, in any event, inadmissible under rule 68 of the Rules of Procedure and Evidence (“Rules”) and/or under article 69 of the Rome Statute (“Statute”).

II. Confidentiality

2. This filing is classified as “*Confidential*” as it responds to a filing of the same designation. A “*Public Redacted*” version will be filed following the Arido Defence’s filing of the same.

III. Submissions

A. The Request fails to establish any exceptional basis for the submission of the Asylum Interview

3. The Request fails to establish a “truly exceptional basis”⁴ for the submission of evidence at this stage of the proceedings. *First*, the relevant information contained in the document sought to be admitted has been known to the Arido Defence since

¹ D-0006’s asylum application interview with [REDACTED] authorities (“Asylum Interview”): CAR-D24-0005-0056 (English translation provided by the Arido Defence).

² ICC-01/05-01/13-1859, para. 5.

³ ICC-01/05-01/13-1935, para. 6.

⁴ ICC-01/05-01/13-1859, para. 5. *See also* ICC-01/05-01/13-1935, para. 6 (“The evidence presentation in this case is closed, and any future requests of this kind will be considered with great circumspection – including materials submitted late through no fault of the parties.”).

before the start of the trial. The Arido Defence was already aware of the fact that D-0006 had made an asylum request [REDACTED], and that he had made statements to the [REDACTED] authorities concerning the attendant circumstances, including regarding his purported military background.⁵ Indeed, during their opening statements, the Arido Defence stated:

“The Defence will present evidence and demonstrate that in D6’s asylum application in [REDACTED], he stated that he was a soldier. He was in the army of the Central African Republic.”⁶

4. The above submission establishes the Arido Defence’s possession of the information that D-0006 had provided in relation to his [REDACTED] asylum claim that he had been a soldier of the Central African Republic (“CAR”), or at least that the Defence had insight into any statement D-0006 had made relevant to the charges against Arido prior to his selection – and certainly in respect of their decision to withdraw him – as a witness.⁷

5. *Second*, even if the Asylum Interview contained additional relevant information that was not already in the Arido Defence’s possession, the information provided by D-0006 in this interview was available to the Arido Defence prior to the close of evidence had it exercised reasonable due diligence. Conspicuously, the Request omits any reference to the Arido Defence’s efforts to obtain any such statements by D-0006 to the [REDACTED] authorities from either them or the Witness, notwithstanding their representations in the record of the evidence they intended to present.⁸ The Arido Defence was concretely aware that the Witness had made statements to the [REDACTED] authorities concerning his military background at least six months before identifying him as a Defence Witness. As the Chamber

⁵ ICC-01/05-01/13-T-39-CONF-ENG ET, p. 33, lns. 14-18.

⁶ ICC-01/05-01/13-T-39-CONF-ENG ET, p. 33, lns. 14-18 (Arido Defence opening statement).

⁷ See ICC-01/05-01/13-T-39-CONF-ENG, p. 40, lns. 3-11. See also ICC-01/05-01/13-1705-Conf; ICC-01/05-01/13-1790.

⁸ Had the Defence have encountered any difficulty in obtaining this evidence from the [REDACTED] authorities, they were at liberty to seek the Chamber’s assistance under article 57(3)(b), read with article 61(11).

knows, the Prosecution disclosed a 4 May 2015 communication [REDACTED] concerning information provided to them by D-0006 regarding his asylum application.⁹ The Prosecution received the communication on 11 May 2015 in response to a request made in January 2015, and disclosed it to the Accused as PEXO on 19 May 2015,¹⁰ given D-0006's claim to the [REDACTED] authorities that he "[REDACTED]" and "[REDACTED]".¹¹

6. Despite being put on notice of the Witness's statement to the [REDACTED] authorities, and despite the alleged importance of the contents to its defence, the Arido Defence has failed to reveal in its Request any action taken to obtain those statements. Although the Asylum Interview was not received by the Prosecution [REDACTED] until 31 May 2016 – well after the close of evidence in this case – the administrative error which resulted in its July 2016 disclosure in no way provides any basis for Arido's tender of information of which it was aware or which was readily ascertainable had the Arido Defence exercised reasonable due diligence.

7. The Prosecution's July 2016 disclosure of the Asylum Interview in no way mitigates the Arido Defence's apparent inertia in respect of the information concerning D-0006's statements to the [REDACTED] authorities, which it has had since May 2015. Certainly, no good cause has been shown. D-0006 was on Arido's list of witnesses, accessible to the Arido Defence and personally aware of the information now sought to be admitted. Had the Asylum Interview genuinely been relevant to the Arido Defence's case, nothing precluded them from requesting information about the interview or the interview itself from D-0006 or the [REDACTED] authorities. The Request provides no explanation for the delay in seeking the introduction of the information sought to be submitted. On this basis alone, the Request should be rejected.

⁹ CAR-OTP-0088-0285; CAR-OTP-0088-0287.

¹⁰ CAR-OTP-0088-0285; CAR-OTP-0088-0287; ICC-01/05-01/13-954-Conf-AnxC.

¹¹ CAR-OTP-0088-0287, at 0288.

B. Neither the Statute nor the Rules permit the admission of the Asylum Interview

i. Admission of the Asylum Interview would violate article 69(2), read with rule 68

8. Should the Chamber further consider the Request, article 69(2) precludes the admission of the Asylum Interview in any event. Article 69(2) enshrines the principle of orality, except to the extent otherwise permitted under article 68 or the Rules. The Asylum Interview is a statement by the Witness given that it was provided in the context and in anticipation of legal proceedings, namely the processing of the Witness's asylum application.¹² Thus, its admission into evidence is governed by the provisions of rule 68.¹³

9. The Arido Defence does not even attempt to make out a case for the admission of the Asylum Interview under rule 68. Even if they had, the Asylum Interview does not fall within any of the categories of evidence that may be admitted under this rule. Insofar as Arido offers the Asylum Interview for the truth of its contents – to show “that *Mr. Bemba's lawyer* contacted [D-0006]”¹⁴ rather than Arido – it directly concerns the acts and conduct of Kilolo in contravention of rule 68(2)(b). Further, the Asylum Interview manifestly fails to meet the further criteria set out in rule 68(2)(b)(iii). Nor, has Arido demonstrated the Asylum Interview is otherwise admissible under rule 68, for instance due to D-0006's absence or unavailability.¹⁵ In

¹² See e.g. ICC-01/05-01/13-1478-Conf, paras. 31-32; ICC-01/05-01/13-1858, para. 30. See also Study Group on Governance: Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties, 31 October 2013, ICC-ASP/12/37/Add.I, page 22, para. 13 (“[P]rior recorded testimony’ in this context is understood to include video or audio recorded records, transcripts and written witness statements”).

¹³ ICC-01/09-01/11-1353, para. 25; ICC-01/04-02/06-1325, para. 11; ICC-01/09-01/11-1938-Red, para. 149.

¹⁴ ICC-01/05-01/13-1968-Conf, para. 16 (emphasis added).

¹⁵ For instance, the Request fails to establish D-0006's unavailability under rule 68(2)(c), or that his absence was the product of interference under 68(2)(d). Moreover, as noted, the Arido Defence voluntarily dropped D-0006 as a Defence Witness. See ICC-01/05-01/13-1705-Conf; ICC-01/05-01/13-1790.

short, Arido fails to establish any of the criteria justifying the admissibility of D-0006's Asylum Interview under rule 68.

ii. *The Asylum Interview is not admissible under article 69(4)*

10. Even if the Chamber were to consider that rule 68 does not operate *lex specialis* regarding the admissibility of the Asylum Interview — which it does, particularly since the Arido Defence seek to introduce the contents for its truth — it remains inadmissible under article 69(4) given the patent unreliability of its content.

11. *First*, the trial evidence, as outlined in the Prosecution's Closing Brief,¹⁶ establishes beyond doubt that Arido knew that D-0006 was not a soldier and coached him to lie as such. Indeed, Arido stated to French authorities that D-0006, *inter alia*, was not a member of the CAR military and he knew as much when meeting in Doula.¹⁷ Whether or not D-0006 lied to the [REDACTED] authorities about being a CAR soldier in no way mitigates Arido's knowledge and conduct at the relevant time. That evidence should also be considered in evaluating the reliability of D-0006's claims to the [REDACTED] authorities.

12. *Second*, to the extent the Arido Defence seeks to rely on the Asylum Interview in arguing that D-0006 was in fact a member of the CAR military, the assertion – in addition to being self-serving – is contradicted by official documentation provided by the CAR authorities.¹⁸ For instance, D-0006's claim to have been [REDACTED]¹⁹ is undermined by a 2001 decree of the CAR Ministry of Defence, designating the names and matriculation numbers of the drivers assigned to the command of the *Unité de*

¹⁶ See ICC-01/05-01/13-1905-Conf, paras. 134-146, 344-348.

¹⁷ See CAR-OTP-0074-1065-R02, at 1066 (Arido's 23 November 2013 Statement to French authorities: "*Ils m'ont été présenté par maître KILOLO comme étant des collègues militaires de CENTRAAFRIQUE mais étant moi même un ancien militaire, je savais qu'aucun de ces témoins n'avait été militaire.*").

¹⁸ See CAR-OTP-0093-0152, at 0155. See also CAR-OTP-0093-0197.

¹⁹ CAR-D24-0005-0056, at 0077; CAR-OTP-0088-0287, at 0288.

sécurité présidentielle (“USP”), which does not mention D-0006 in any capacity.²⁰ D-0006’s claims concerning his prior military status are further independently refuted by P-0805’s Witness Statement (although not in evidence) attesting that D-0006 never served in any such capacity.²¹ The Witness Statement of P-0785, [REDACTED], attests to the same fact.²²

13. The documentation provided by the CAR authorities, the decree of the Ministry of Defence, and the Witness Statements of P-0805 and P-0785 all corroborate the independent sworn testimony at trial, which also establishes that D-0006 was not a member of the CAR military. That evidence includes testimony that D-0006 admitted stating that he was not in the military, as well as evidence that he threatened witness D-0003 over D-0003’s cooperation with the Prosecution in the context of the article 70 investigation.²³ P-0264’s Statement that D-0006 implored her not to cooperate with the Prosecution regarding the investigation into his actions²⁴ is a further indication of the untruthfulness of the claims D-0006 made in his Asylum Interview with [REDACTED] authorities. Indeed, D-0006’s claim that he did not know whether Kilolo contacted other former military to give evidence in the Main Case²⁵ underscores its falseness.²⁶ Not only is this claim contradicted by evidence

²⁰ See CAR-OTP-0093-0071, at 0072.

²¹ CAR-OTP-0093-0064-R01, at 0068, para. 19.

²² CAR-OTP-0093-0092-R01, at 0097-0098, paras. 22, 24.

²³ ICC-01/05-01/13-T-19-CONF-ENG ET, p. 4, lns. 11-24; ICC-01/05-01/13-T-26-CONF-ENG ET, p. 37, lns. 15-17 and pp. 39-40, lns. 14-20.

²⁴ See ICC-01/05-01/13-1378-Conf-AnxA, p. 2 (confirming that, «[a] CAR-OTP-0085-0531, lignes 260 à 265 je voudrais préciser que [REDACTED] et moi étions toujours en contact et ce même avant ma déposition ; il m'avait conseillé de ne pas rencontrer le Bureau du Procureur au cours d'un échange que nous avons eu via Facebook juste avant ma déclaration au Bureau du Procureur.»).

²⁵ CAR-D24-0005-0056, at 0082 (“Q: Do you know if Bemba’s lawyer also contacted other former members of the military to provide evidence? A: I don’t know that”); *but see* CAR-OTP-0074-1065-R02, at 1066 (23 November 2013 Statement to French authorities referencing «6 témoins», of which D-0006 was among, at 1069). See also the sworn testimony of D-0002 and D-0003 referencing the 2012 Douala meeting and 2013 Yaoundé meetings, noting D-0006’s presence. See ICC-01/05-01/13-T-19-CONF-ENG ET, pp. 8-9, lns. 24-25; ICC-01/05-01/13-T-23-CONF-ENG ET, p. 9, lns. 14-16, p. 11, lns. 13-18; ICC-01/05-01/13-T-27-CONF-ENG ET, p. 84, lns. 5-15.

²⁶ Cf. ICC-01/05-01/13-1378-Conf-AnxA, p. 2 (confirming that, «[a] CAR-OTP-0085-0538 lignes 571 à 573 je précise qu’il [D-0006] s’agit de [REDACTED] [D-4] et [REDACTED] [D-9] qui étaient aussi des témoins dans la même affaire»; and that «[a] CAR-OTP-0085-0544 ligne 115 je voudrais préciser que j’entendais souvent [REDACTED] parler de Kilolo ensemble ou au téléphone mais c’était en Sango. Mais je ne connais pas Kilolo»).

establishing his ongoing association with such other witnesses,²⁷ the submissions of the Accused contradict it.²⁸

14. The Asylum Interview thus fails to satisfy the *de minimus* threshold for the *reliability* of admissible evidence required under the Statute and the Rules.

IV. Conclusion

15. For the foregoing reasons, the Chamber should reject Arido's Request to admit the Asylum Interview from the bar table.



Fatou Bensouda, Prosecutor

Dated 6th Day of September 2016
At The Hague, The Netherlands

²⁷ See e.g. Facebook photos and list of friend's depicting D-0006's close relationship with D-0007, D-0009: CAR-OTP-0088-0139; CAR-OTP-0088-0140; CAR-OTP-0088-0142; CAR-OTP-0088-0143; CAR-OTP-0088-0145; CAR-OTP-0088-0148.

²⁸ CAR-OTP-0074-1065-R02, at 1066 (Arido's statement to the French authorities during which he concedes "Ils m'ont été présenté par maître Kilolo comme étant des collègues militaires de Centrafrique mais étant moi même un ancien militaire, je savais qu'aucun de ces témoins n'avait été militaire."); ICC-01/05-01/13-T-39-CONF-ENG ET, p. 25, lns. 13-17 (Arido Defence's opening statement conceding Arido's briefing of the Witness, but suggesting that "Mr Arido briefed them to provide information to Mr Kilolo, not to the Bemba Trial Chamber, not to influence the conduct of the Trial Chamber, but to Mr Kilolo, nothing more, nothing less"). See also ICC-01/05-01/13-1905-Conf, paras. 134-146, 344-347.