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No.: **ICC-01/05-01/13**
Date: **17 November 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

Confidential Document

**Prosecution's Response to "Narcisse Arido's Request for Exclusion of Witness D4
or, in the Alternative, Clarification of Decision ICC-01/05-01/13-2025"**

Source: Office of the Prosecutor

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

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I. Introduction

1. Narcisse Arido's request to exclude Witness P-0256's¹ evidence – which establishes Arido's corrupt influence of this former Arido Defence witness² – should be denied. On 4 November 2016, the Office of the Prosecutor ("Prosecution") notified the Parties and Trial Chamber VII ("Chamber") of its intent to call P-0256 as a witness, explaining the direct relevance of his evidence to the Chamber's determination of Arido's sentence.³ Specifically, P-0256's evidence concerning Arido's conduct comprises an aggravating circumstance, a generally "relevant factor" for sentencing, or otherwise counters any submissions on mitigating circumstances. Considering these grounds, the Chamber permitted the Prosecution to call P-0256, noting that "[t]he anticipated summary raises serious allegations", such that procedural fairness required that "the Prosecution Witness [...] appear to be examined by the other parties."⁴ The Chamber, thus, implicitly recognised the particular relevance of P-0256's prospective testimony, which Arido's current arguments fail to address, much less undermine.

2. The Prosecution defers to the Chamber's discretion as to Arido's alternative request that the Chamber permit cross-examination on matters relating to the merits of this case. In general, the Prosecution considers that Arido can effectively examine the Witness's credibility within the parameters of the Chamber's order.⁵

3. Finally, Arido's request for a more detailed summary of the Witness's prospective evidence should be denied. None of Arido's arguments justify this relief. To the contrary, the Prosecution's disclosure of the audio recording and transcript of

¹ Also referred to as D-0004 in ICC-01/05-01/08.

² Designated as CAR-D24-0002-0003 in this case by the Arido Defence.

³ ICC-01/05-01/13-2009, paras. 1-4.

⁴ ICC-01/05-01/13-2025, para. 16.

⁵ ICC-01/05-01/13-2025, para. 18.

the Witness's statement, together with a detailed 25-page summary thereof⁶ to the Defence, undercuts his argument.

II. Confidentiality

4. This filing is classified as "*Confidential*" as it responds to a filing of the same designation. The Prosecution does not object to its reclassification as "*Public*".

III. Submissions

A. The Witness's Evidence is *Prima Facie* Relevant to Arido's Sentence

i. Arido's conduct in respect of P-0256 is an aggravating circumstance

5. Witness P-0256's prospective evidence is directly relevant to Arido's sentence. Contrary to Arido's submissions,⁷ Arido's corrupt influence of P-0256 in *this case* comprises an aggravating circumstance under rule 145(2)(b) of the Rules of Procedure and Evidence ("Rules"). While such conduct is not enumerated as an aggravating circumstance, rule 145(2)(b)(vi) permits the Chamber to consider unenumerated factors as aggravating when they are "by virtue of their nature [...] similar to those mentioned."

6. Arido's corrupt influence of P-0256 is similar "in nature" to another enumerated factor, namely rule 145(2)(b)(i) which permits the Chamber to consider "prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature". The two are similar since they both concern alleged criminal conduct. Moreover, an accused's prior criminal conviction of a similar crime goes to the likelihood of the convicted person repeating that crime in the same way that his alleged perpetration of that crime during the course of a trial would.

⁶ Those items were disclosed on 11 and 14 October 2016 and 1 November 2016. See generally ICC-01/05-01/13-1983-Conf-AnxA; ICC-01/05-01/13-1986-Conf-AnxA; ICC-01/05-01/13-1998-Conf-AnxA.

⁷ ICC-01/05-01/13-2029-Conf, para. 9.

7. The Court's jurisprudence and that of the ICTY Appeals Chamber support this conclusion. As noted by Trial Chamber III "[a] convicted person's obstruction of justice, or attempts to do so, may, in appropriate circumstances, be considered in sentencing or as a separate and independent offence against the administration of justice, but not as both".⁸ Similarly, as noted by the ICTY Appeals Chamber in the *Delalić* case, while an accused's interference with witnesses can be dealt with as a "separate and independent offence[] [...] [it is] equally pertinent to [the Trial Chamber's] assessment of Mucic's character and of his attitude towards the offences [and thus] was not inappropriate for the Trial Chamber to consider this behaviour as an aggravating factor and in its overall evaluation of the accused's character."⁹ The same conclusions should be drawn here.

8. Arido's argument that rule 145(2)(b)(i) is not "similar in nature" to Arido's alleged corrupt influence of P-0256 because rule 145(2)(b)(i) relates to "convictions" is unpersuasive for two reasons. *First*, both a conviction and an aggravating circumstance require proof to the same evidentiary threshold. Arido's alleged corrupt influence of Witness P-0256 in this case can only be considered an aggravating circumstance if established "beyond a reasonable doubt".

9. *Second*, rule 145(2)(b)(vi) requires only that the unenumerated aggravating factor be of a "similar nature" to an enumerated one. The use of the word "nature" is purposefully broad and intended to ensure that the fundamental qualities of the unenumerated and enumerated factors are the same. It does *not* require that the two be identical – in this sense that the aggravating conduct consist of a conviction. Rather, the essence of the alleged conduct here is criminal in nature, rendering it

⁸ ICC-01/05-01/08-3399, fn. 249.

⁹ *Prosecutor v. Zejnil Delalić et al.*, Judgement, Case No. IT-96-21-A, 20 February 2001, para. 790, <http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf> . See also *Prosecutor v. Vujadin Popović et al.*, Judgement, Case No. IT-05-88-A, 30 January 2015, para. 2046 ("the Appeals Chamber recalls that obstructing justice has been identified as one of the factors that may be considered as an aggravating circumstance.") http://www.icty.org/x/cases/popovic/acjug/en/150130_judgement.pdf .

sufficiently similar to conduct underlying a conviction. As such it is appropriate for consideration as an aggravating circumstance.

ii. *Arido's interference with Witness P-0256 is generally a "relevant factor" and relevant to counter any mitigating circumstance*

10. Irrespective of whether Arido's corrupt influence of P-0256 can be classified as an aggravating circumstance, it is relevant to his sentence for two further reasons – both of which were outlined in the Prosecution's notification but omitted in Arido's motion.¹⁰ *First*, the evidence is relevant to counter any mitigating circumstances Arido may raise. In particular, rule 145(2)(a)(ii) permits the Chamber to evaluate, as a mitigating circumstance, "[t]he convicted person's conduct after the act". Evidence that Arido corruptly influenced P-0256 in this case contradicts any submissions in mitigation or evidence of his good behaviour in the period following his commission of the article 70 crimes of which he has been convicted.

11. *Second*, Arido's corrupt influence of P-0256 in this case is a *prima facie* "relevant factor" the Chamber can consider under rule 145(1)(b). Rule 145(1)(b) provides the Chamber broad authority to "[b]alance all the relevant factors", without listing what factors are relevant – thereby leaving this to the Chamber's discretion. Rule 145(1)(b)'s stipulation that such "relevant factors [...] include[] any mitigating and aggravating factors" is broad and without limit, extending discretion to the Chamber to consider *any material* that it may deem relevant to the determination of sentence. In this instance, Arido's alleged corrupt influence of P-0256 in this case is a "relevant factor", irrespective of whether it is an aggravating or mitigating circumstance, as it goes to Arido's bad character and the continuation of the convicted offence.

¹⁰ Compare ICC-01/05-01/13-2009, paras. 1-2 with ICC-01/05-01/13-2029-Conf, para. 9.

B. The Prosecution Defers to the Chamber as to Whether P-0256's Cross-Examination Should Extend to Matters Relating to the Merits of this Case

12. The Prosecution defers to the Chamber's discretion under article 64(2) and rule 140 in defining the scope of any cross-examination of P-0256. The Chamber's decision is clear. P-0256's testimony is strictly intended to prove "that Mr Arido attempted to obstruct justice in this case" and not an "opportunity to litigate the merits of the present case", decided in the Chamber's article 74 decision.¹¹ The Prosecution also considers that Arido is well-disposed to examine this witness effectively within these parameters, particularly given Arido's longstanding familiarity with the Witness, and that he was a former Arido Defence witness in this case.

C. A More Detailed Summary of Witness P-0256's Anticipated Testimony is Unnecessary

13. Arido's request for a more detailed summary of P-0256's testimony¹² is unsubstantiated and unwarranted. To date, the Prosecution has disclosed to Arido a transcript of P-0256's interview with the Prosecution,¹³ the original audio recording thereof,¹⁴ a 25-page summary of that interview,¹⁵ and finally, now, a summary of what the Witness will testify about during the sentencing hearing.¹⁶

14. None of Arido's arguments suggest that he needs any further information about the scope and nature of the Witness's evidence to prepare for cross-examination. Instead, Arido's arguments simply contest what conclusions the Prosecution claims can be derived from the Witness's evidence, as opposed to arguing that he lacks information concerning its scope and nature. Those arguments are not only best reserved for his concluding remarks, but necessarily suggest that Arido has sufficient

¹¹ ICC-01/05-01/13-2025, para. 18.

¹² ICC-01/05-01/13-2029-Conf, para. 26.

¹³ See ICC-01/05-01/13-1998-Conf-AnxA.

¹⁴ See ICC-01/05-01/13-1986-Conf-AnxA.

¹⁵ See ICC-01/05-01/13-1983-Conf-AnxA.

¹⁶ See ICC-01/05-01/13-2009-Conf-AnxA.

information at his disposal to prepare the Witness's cross-examination and sentencing arguments without needing a more detailed summary of the evidence already in Arido's possession.

IV. Conclusion

15. For these reasons, Arido's motion should be denied.



Fatou Bensouda, Prosecutor

Dated 17th day of November 2016
At The Hague, The Netherlands