

**Cour
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**International
Criminal
Court**

Original: **English**

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

Date: **6 September 2017**

THE APPEALS CHAMBER

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Geoffrey A. Henderson
Judge Piotr Hofmański

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 Request to Admit Prior Recorded Testimonies and to Designate a
Person Authorised to Witness a Declaration under Rule 68(2)(b)”
(ICC-01/05-01/13-2205-Conf)’, filed 18 August 2017**

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

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I. INTRODUCTION

1. On 25 August 2017, as rebuttal evidence, the Prosecution requested¹ the admission of one decree² of the government of the Central African Republic ('CAR') and two statements³ ('Statements') of CAR individuals pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence ('RPE'). The Appellant requests that the Appeals Chamber reject this request.
2. The Request should be rejected because the criteria for Rule 68(2)(b) are not met and the material submitted is not relevant or probative in relation to its purported purpose. Moreover, the Request should be rejected because the admission of the statements and decree prejudice a fair legal process.

II. CONFIDENTIALITY

3. Pursuant to Regulation 23 *bis* (2) of the Regulations of the Court ('RoC') and Regulation 24 of the Regulations of the Registry ('RoR'), this response is submitted confidential as it refers to information about a protected witness which if made public could lead to the identification of that protected witness.

III. SUBMISSIONS

A. **The Rule 68(2)(b) statements should not be admitted**

4. The Rule 68(2)(b) statements should not be admitted because: (1) they go to the acts and conduct of the Accused, (2) relate to issues that are materially in dispute, (3) are not cumulative and are not of a background nature, (4) are not reliable, and (5) the interests of justice are not best served by their introduction.

1. *The Statements go to the acts and conduct of the Appellant*

5. The Statements go to the acts and conduct for which the Appellant was convicted. The Prosecution Request contends that the statements show *inter alia* "that D-6 was not in the military".⁴ However, this is only the latest event in the dispute which has existed throughout the trial process. The dispute is whether Mr Arido instructed the witnesses to present themselves as soldiers, even though he believed that they had no military background. The

¹ ICC-01/05-01/13-2205-Conf ('Request').

² CAR-OTP-0093-0071 ('Decree').

³ P-805: CAR-OTP-0093-0064-R01; and P-785: CAR-OTP-0093-0092-R01.

⁴ Request, para. 14.

Military status, or not, underlies the Trial Chamber's conviction, and the Statements, which the Prosecution considers determinative of the matter, goes to proof of "the acts and conduct of the accused" and thus the Request does not fulfil the requirements of Rule 68(2)(b).

6. This dispute between the Prosecution and Defence has been unresolved since before the trial. The Confirmation of Charges decision noted in a section titled "Factual findings with regard to Mr Arido":

On the same day, D2, D3, D4 and D6 were also instructed on what to say to Mr Kilolo, in particular as regards their military status and some events that took place in Bangui⁵

7. Later, the confirmation decision noted the false testimony of D-2,⁶ D-3,⁷ and D-4.⁸ The confirmation decision ultimately confirmed several charges against Mr Arido. In the confirmation decision, the charge for which Mr Arido was convicted states that he:

committed the offence of corruptly influencing witnesses D-2, D-3, D-4 and D-6, *by way of instructing them to either provide false information or withhold true information during their testimony in Court*⁹

8. The Trial Chamber claimed that the Confirmation Decision "[set] out clearly the 'facts and circumstances' of the case for the accused".¹⁰ If any or all of those witnesses have a military background, then the basis of the conviction of Mr Arido is not proven beyond a reasonable doubt.
9. The Prosecution Pre-Trial Brief also addresses the military status of the witnesses. In alleging that Mr Arido was guilty of an Article 70(1)(c) offence as a direct perpetrator, the Prosecution miss-cites Mr Arido's statement to the French¹¹ and summarised its allegations as in part shown by his:

⁵ ICC-01/05-01/13-749, para. 90.

⁶ "D-2 testified that he had been a member of the youth movement within the MLC with the role of intelligence officer and that he was a sub-lieutenant, assigned to the support battalion unit", ICC-01/05-01/13-749, para. 94.

⁷ "During his video-link testimony in the Main Case, D-3 testified that he joined the CAR armed forces in 2002", ICC-01/05-01/13-749, para. 94.

⁸ "D-4 testified that in October 2002 he was "in the USP forces" as "a chief sergeant", ICC-01/05-01/13-749, para. 94.

⁹ ICC-01/05-01/13-749, p. 53 (v) [emphasis added].

¹⁰ ICC-01/05-01/13-992, para. 19.

¹¹ See ICC-01/05-01/13-2145-Conf-Corr, paras 367-372 and 383 to 392 ('Appellants Document in Support of Appeal Against Conviction').

awareness that witnesses who he had introduced to the Defence and who testified to having been members of the CAR armed forces did not have the military background claimed, as admitted in his statement.¹²

10. If, as the Prosecution claims, “whether D-6 had a military background is immaterial to Arido’s conviction for corruptly influencing D-6”,¹³ then it raises the question of why it has bothered submitting the rebuttal evidence at all and, in fact, why the Prosecution conducted fresh investigations – expending time and resources – to obtain the items.

The military status of these witnesses was material to the conviction

11. The Judgment indicates that the military status of D-2, D-3, D-4, and D-6 was front and centre in the mind of the Trial Chamber. Firstly, in its summary of facts the Trial Chamber states:

Mr Arido admitted that he instructed D-2, D-3, D-4 and D-6 to present themselves to Mr Kilolo and to the Court as FACA soldiers, even though he *believed that they had no military background*.¹⁴

12. Secondly, the Judgment concludes that Mr Arido was told by D-3 that he had no military background¹⁵ as part of its analysis of the case.
13. Thirdly, the Trial Chamber noted that: “P-245 (D-3) testified that D-4 and D-6 told the other witnesses in the group that they had no military background”¹⁶
14. Fourthly and similarly, the Trial Chamber noted that “Mr Arido stated his belief that D-2, D-3, D-4 and D-6 had not been military persons”.¹⁷
15. Finally, in its formal disposition of the conviction, the Trial Chamber concluded:

Mr Arido also intentionally instructed and briefed the four witnesses (or facilitated their briefing by others) to present themselves as military men to Mr Kilolo and the Court even while believing that they did not have such a background.¹⁸

16. In conclusion, the Trial Chamber repeatedly emphasised the military background in its reasoning through its conviction of Mr Arido.

¹² ICC-01/05-01/13-1110-Conf, para. 257.

¹³ Request, para. 1.

¹⁴ ICC-01/05-01/13-1989-Conf, para. 128 (emphasis added).

¹⁵ *Ibid.*, para. 127 and 328.

¹⁶ *Ibid.*, para. 338.

¹⁷ *Ibid.*, para. 671.

¹⁸ *Ibid.*, para. 944.

2. *The Statements relate to issues that are materially in dispute*

17. Whether the prior recorded testimony ‘relates to issues that are not materially in dispute’ depends upon whether issues are “soundly and conceivably disputed between the parties, and are crucial, or of at least sufficient significance for the Chamber’s eventual determination of the charges against the accused in its judgment.”¹⁹ The issues should not be of a “peripheral nature”.²⁰
18. The Prosecution concedes, “D-6’s military status is in dispute”.²¹ As mentioned above,²² and despite attempts by the Trial Chamber to minimize the question, the litigation throughout the *Bemba et al.* case has addressed the question of the military status. This has most recently been raised in the Defence closing brief²³ and Appeal against conviction.²⁴
19. Though the Prosecution claims that “the issue [of D-6’s military status] is not determinative of Arido’s conviction”²⁵ this question is ultimately for the Appeals Chamber not the Prosecution. The reasons presented by the Prosecution to the Trial Chamber at the time of the first submission of these statements undermine the argument that the military status of these witnesses does not matter.²⁶
20. The military status issue is not peripheral. The issue permeates the case against Mr Arido in many ways and militates against introduction of the statements. The military status of D-6 impacts upon the conviction in relation to D-6, but D-6’s military status also impacts upon Trial Chamber conclusions about D-2 and D-3’s testimony²⁷ and thus the convictions in relation to them and D-4.

3. *The Statements are not of a cumulative or corroborative nature*

21. The Statements are not cumulative as claimed by the Prosecution. Firstly, the Statements are not cumulative to D-3’s testimony that he heard D-6 stating that he had no military

¹⁹ ICC-02/04-01/15-596-Red, para. 15.

²⁰ ICC-02/11-01/15-950-Red, para. 29.

²¹ Request, para. 16.

²² See paras 6 to 15 above.

²³ ICC-01/05-01/13-1904-Conf-Corr, paras 166, 319, and 372.

²⁴ Appellants Document in Support of Appeal Against Conviction, paras 249, 252-253, 306, 393-397, 413-421, and 326-327.

²⁵ Request, para. 16.

²⁶ ICC-01/05-01/13-1784-Conf, paras 15, 21, and 23.

²⁷ See, for example, ICC-01/05-01/13-1989-Conf, para. 338.

background as the credibility of D-3's testimony has been extensively challenged in the appeal against conviction.²⁸

22. Secondly, Mr Arido's Article 55(2) statement in which he stated that he knew that D-6 had not been a military person is also the subject of the Defence Appeal.²⁹
23. Finally, the official documentation provided by the CAR authorities noted by the Prosecution is not cumulative. Document CAR-OTP-0093-0197, dated 4 March 2016, is not of assistance as it has not been demonstrated that the Ministry of Finance is in a position to confirm or deny whether an individual was part of the armed forces 13 years prior during a period of turbulence and violence. As regards CAR-OTP-0093-0152, dated 26 February 2016, the same argument holds for [REDACTED] court document about events in 2002 and 2003.

4. The interests of justice are not best served by the introduction of the statements

Cross-examination

24. The Statements purport to rebut a central theme of the Arido Defence case, which was that Mr Arido did not coach persons who were soldiers in CAR to present themselves to Mr Kilolo. To potentially resolve such a fundamental issue, without cross-examination, is contrary to the interests of justice – the right to cross-examine witnesses is a right protected under Article 67(1)(e) of the Statute.

The Prosecution should have called witness D-6

25. D-6 was a missing witness. By not calling him the Prosecution denied Mr Arido a fair trial.³⁰ The statements cannot be removed from their context – they are submitted to determine something which could have been achieved through the testimony of D-6. D-6's presence at trial to personally provide evidence about the alleged tampering is material to the fairness of the proceedings and the fact that D-6 has not testified was and is prejudicial to the case against Mr Arido.
26. Prior to bringing charges against Mr Arido, the Prosecution should have interrogated D-4 and D-6 and confronted them with the allegations as he did with D-2 and D-3. It failed to do so. The Prosecution is acting under an illusion that it is not obliged to call all the relevant

²⁸ Appellants Document in Support of Appeal Against Conviction, paras 273-310.

²⁹ *Ibid.*, paras 367-392.

³⁰ *Ibid.*, paras 311-325.

witnesses to testify in a case because the evidence of one witness is enough. This is particularly grave where those missing witnesses are potential accomplices and the Appellant was convicted for conduct relating to all 4 persons.

27. There was no reason why the Prosecution did not bring D-6 and D-4 to appear and testify. The Prosecution could have applied for summons as they did with other witnesses in the case.³¹ In the *Ruto & Sang Case*, where allegations of witness tampering were made, the Chamber issued orders compelling the witnesses to testify.³²
28. D-4 and D-6 were the subjects of Mr Arido's conviction and thus should have been summoned. To submit statements in place of their testimony is not in the interests of justice.

Lack of Prosecution due-diligence

29. The Prosecution failed to produce the evidence that would allegedly prove its case (e.g. D-6) and is now seeking to admit material that was already rejected as untimely at trial. The Prosecution should not be permitted two bites at the apple – this is not in the interests of justice.
30. The Prosecution has still not explained why the investigation was conducted so late and how the introduction of the material is not highly prejudicial. The Prosecution tendered this material in its 8 April 2016 Request³³ and it was rejected by the Trial Chamber on 29 April 2016.³⁴ In deciding the Prosecution request, the Trial Chamber ultimately stated that:

[A]lthough the Prosecution only obtained the documents in question in early 2016, it apparently wanted these documents much earlier and makes no effort to explain what efforts it made between late 2012 and the close of the presentation of its evidence to get these materials. The event which prompted the renewed investigation appears to be the Arido Defence's choice to call D-4, D-6 and D-8 during its defence case, but **the Prosecution was clearly well aware of the importance of these witnesses at a much earlier time.** It is also noted that the Arido Defence subsequently withdrew all three witnesses, which further militates against the notion that these documents [(*inter alia* the decree and Statements)] must be recognised in the interests of justice. **The Chamber is not satisfied that the Prosecution presents sufficient justification that they could not obtain the Military Status Documents for reasons outside its control,**

³¹ ICC-01/05-01/13-1237-Conf-Red and ICC-01/05-01/13-1259-Conf-Red.

³² ICC-01/09-01/11-1274, para. 47

³³ ICC-01/05-01/13-1784-Conf, paras 14-23.

³⁴ ICC-01/05-01/13-1858, paras 40-42.

nor does it consider that recognising their submission would further the fair and expeditious conduct of the proceedings.³⁵

31. These arguments still hold. Having been rejected by the Trial Chamber, the Prosecution is trying again with the Appeals Chamber, and without acknowledging the past procedural history of its request. Moreover, the Prosecution did not seek leave to appeal that decision.
32. The evidence the Prosecution proposes to rebut is evidence which the Prosecution noted could be exculpatory.³⁶ The Prosecution should not be opposing the tendering of exculpatory evidence. In any case, there was an independent statutory obligation to disclose that evidence as soon as practicable pursuant to Rule 77, yet that was not done.³⁷ The Prosecution was in possession of the evidence when the evidential phase of the case was ongoing and disclosed it as exculpatory evidence only when that phase of the case had ended. This, in turn, prejudiced the Defence's ability to present that evidence, and the issue is only now being addressed on appeal.

5. The Statements are not reliable

33. The two witnesses who provided statements were very low-level soldiers and may not be competent to provide evidence of significant value about deployments of a unit of the army as significant as [REDACTED] soldiers. These soldiers were deployed to [REDACTED] and their participation in various aspects of the war decisions made by the commander is unspecified.
34. They also could not have comprehensive information about all units of [REDACTED]. This information is only available to the Commander of [REDACTED].

B. The Statements are not relevant or probative

35. The evidence sought to be tendered in rebuttal is irrelevant to the material issue that arises for determination in this case, namely the military status of D-6 and whether he participated in the war in CAR while working [REDACTED].

³⁵ ICC-01/05-01/13-1858, para. 42 (emphasis added).

³⁶ Prosecution e-mail, dated 25 July 2016, which was included with the Rule 77 package including CAR-OTP0094-1580.

³⁷ The chain of custody in eCourt indicates that the document came into the possession of the Prosecution on 31 May 2016 but was disclosed on 25 July 2016.

1. The statement of P-805

36. The statement provided by P-805 states that P-805 was an appointed [REDACTED]. The decree did not deploy him as [REDACTED] under whom D-6 claimed to serve [REDACTED] and obviously P-805 was not deployed as [REDACTED] by that decree.
37. His place of deployment was [REDACTED] and not the General Commander of the unit. His statement is speculative and irrelevant. He cannot by any stretch of imagination purport that prior to his appointment, and that of [REDACTED], in [REDACTED] 2001, that there were no [REDACTED] within [REDACTED]. The statement is thus not relevant, and does not refute that D-6 was [REDACTED].

2. The statement of P-785

38. The witness statement of P-785 is completely irrelevant to this case. He was not [REDACTED]. He was not named as appointed in the submitted decree to work in any capacity in [REDACTED], nor was he deployed as [REDACTED].

C. The decree is not relevant or probative

39. The decree does not refute that D-6 was [REDACTED]. The Prosecution's claim that the decree "further confirms the cumulative nature of P-785's and P-805's evidence that D-6 was not [REDACTED]"³⁸ is inapposite. The decree dates from 2001, whereas the relevant time period when D-6 claimed to be [REDACTED] and participating in the CAR war is 2002 to 2003. Moreover, the decree is not, and does not purport to be, an exhaustive list of all those employed during the 2001 period. The decree is not determinative of the number of [REDACTED] deployed to the unit [REDACTED] at the material time in 2002 and 2003 and it does not state that [REDACTED] were the only ones in the unit.
40. It is notable that the Prosecution did not produce a roster of the unit from which D-6 claimed to have originated although it appears to have been able to acquire documents for a period earlier than 2002 to 2003.
41. The decree does not establish that the P-805 is competent to determine, verify, or disconfirm that D-6 was or was not [REDACTED] as claimed by the Prosecution. The decree establishes

³⁸ Request, para. 15.

that P-805 held a position at a particular point in time. It does not establish that P-805 was in a position to know D-6's role in 2002 to 2003.

42. In conclusion, the decree is irrelevant to any of the issues that are central to the conviction of Mr Arido. It does not rebut the evidence in D-6's [REDACTED] and participated in the war in CAR in 2002 and 2003.

IV. CONCLUSION

43. In light of the above, the Arido Defence respectfully requests the Appeals Chamber to reject the Prosecution's Request for the admission of two Statements³⁹ and the decree.⁴⁰



Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 6th Day of September 2017

Washington D.C., The United States of America

³⁹ CAR-OTP-0093-0064-R01 and CAR-OTP-0093-0092-R01.

⁴⁰ CAR-OTP-0093-0071.