

1 International Criminal Court
2 Trial Chamber VII - Courtroom 1
3 Situation: Central African Republic
4 In the case of The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba,
5 Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido - ICC-01/05-01/13
6 Presiding Judge Bertram Schmitt, Judge Marc Perrin de Brichambaut and
7 Judge Raul Pangalangan
8 Trial Hearing
9 Tuesday, 1 March 2016
10 (The hearing starts in open session at 9.32 a.m.)
11 THE COURT USHER: All rise.
12 The International Criminal Court is now in session.
13 PRESIDING JUDGE SCHMITT: I think we wait a second until everybody has taken his seat.
14 Court officer, would you please call the case.
15 THE COURT OFFICER: Good morning. Yes, Mr President.
16 Situation in the Central African Republic in the case of The Prosecutor versus
17 Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo,
18 Fidèle Babala Wandu and Narcisse Arido, in the case reference ICC-01/05-01/13.
19 And for the record, we are in open session.
20 PRESIDING JUDGE SCHMITT: Thank you very much. And as always, for the
21 appearances we start with the Prosecution.
22 MR VANDERPUYE: Thank you, Mr President. Good morning to you, your Honours, good
23 morning everyone. Today the Office of the Prosecutor is represented by the same
24 individuals that were seated yesterday morning, the morning session. Thank you,
25 Mr President.

1 PRESIDING JUDGE SCHMITT: Thank you.

2 And for the Defence, perhaps the sequence that we are accustomed to now.

3 MR POWLES: Good morning, Mr President, your Honours. I appear on behalf of
4 Mr Kilolo this morning with my learned colleagues, Ms Rosalie Mbengue and Tara
5 Nasrollahi.

6 PRESIDING JUDGE SCHMITT: Thank you.

7 MR TAKU: May it please your Honours, I appear for Mr Arido. With me today is my
8 learned colleague and good friend Beth Lyons. I have here Mr Arido, who is present here in
9 his own defence. We have Mr Michael Rowse, Mr Tibor, and Mr Kiel.

10 PRESIDING JUDGE SCHMITT: Thank you.

11 Perhaps Mr Gosnell. I just -- it depends on you, of course.

12 MR GOSNELL: Good morning, Mr President. Thank you. Same appearances as
13 yesterday for Mr Mangenda.

14 MR KILENDA: (Interpretation) Good morning, your Honour. Good morning, your
15 Honours. Our team is the same as yesterday.

16 PRESIDING JUDGE SCHMITT: I express again that, you know, I'm not very good in French,
17 but I like this expression very much, "intact."

18 MS TAYLOR: Good morning, Mr President, your Honours. The Defence for Mr Bemba is
19 the same, except Ms Yuqing Liu is not here today.

20 PRESIDING JUDGE SCHMITT: Thank you very much. We await now the opening
21 statement of the Defence of Mr Arido. And I give Mr Taku the floor.

22 MR TAKU: Mr President, your Honours and learned friends. I'm Chief Charles Achaleke
23 Taku, the lead counsel representing the fifth accused in this case, Mr Narcisse Arido. Your
24 Honours, Mr Arido is charged in the confirmation of charges decision with four factual
25 allegations:

1 One, recruiting D2, also known as P-260; D3, also known as P-245; D4 and D6.

2 Two, instructing, persuading or otherwise influencing four witnesses: D2, D3, D4
3 and D6 to either provide false information or to withhold true information during
4 their testimony in court.

5 Three, encouraging their testimony through money transfers and possibility of
6 relocation in Europe; and

7 Four, introducing D2, D3, D4 and D6 to Mr Kilolo.

8 The Trial Chamber, at the commencement of this trial on the 29 of September 2015,
9 succinctly defined the very limited scope of this case.

10 The case against Arido within this scope is extremely limited and should wisely have
11 been dropped to avoid the waste of the Court's resources and extent of the egregious
12 violations to which Mr Arido and his family have been subjected. To this date, it is
13 still unclear why the Prosecutor -- why this Prosecution did not pursue perjury
14 charges against the witnesses he alleges gave false testimony and why this case was
15 not returned to the Bemba court where it properly belongs to deal with matters of its
16 recanting witnesses.

17 The Trial Chamber noted the peculiarity of this case and cautioned that it would not
18 allow a re-litigation of the Bemba case.

19 The Trial Chamber rightly noted that this case could have been joined to the Bemba
20 main case under Rule 165(4) of the Rules of Procedure and Evidence to resolve case
21 overlap issues, but, quote, "No such joinder had been made or even contemplated."
22 End of quote.

23 Significantly, the Trial Chamber underscored the fact that the burden of proof lies
24 upon the Prosecution, which has the obligation to prove the charges beyond a
25 reasonable doubt.

1 The Trial Chamber also emphasised that it would uphold the principle of orality.

2 The Arido Defence understands this to mean that this case would not be determined
3 on the basis of documentary evidence submitted into the record through bar table
4 motions by the Prosecution in the place of oral evidence of witnesses who, although
5 available and compellable, were not called by the Prosecution to testify before this
6 Trial Chamber.

7 Although, your Honours, Mr Arido bears no burden of proof and is not bound to
8 even respond to what he considers a very incoherent and unsupported case, he will
9 nevertheless call witnesses and take the stand in his own defence. He will do so to
10 assist the Trial Chamber in its search for truth.

11 For this purpose, your Honours, the Arido Defence will confine its defence within the
12 scope defined by this Honourable Trial Chamber. The Arido Defence will address
13 factual and legal issues arising from the charges retained against Arido. The Arido
14 Defence will not turn this process into a circus or an occasion for the rendition of
15 platitudes in the abstract. The Arido Defence will point to the relevant evidence and
16 law for the issues it intends to address in his defence.

17 The Arido Defence will elicit evidence to challenge the charges and the Prosecution
18 theory of the case. This evidence, your Honours, would include testimonial and
19 documentary evidence and evidence already in the trial record. It is the Defence
20 position that the Prosecution has not proved each and every element of the offence
21 and modes of liability charged.

22 In fact, the Prosecution evidence itself raises reasonable doubts.

23 Moreover, starting from the initial investigation in this case, the Prosecution has
24 violated Mr Arido's fair trial rights and other rights guaranteed under international
25 law.

1 Mr Arido has no choice, your Honours, absolutely no choice but to testify for the sake
2 of his own security and that of his family. And this is the primary reason why, your
3 Honours, he has elected to testify. His decision to testify and call witnesses should
4 not be mistaken or misconstrued for recognition that a prima facie case had been
5 made against him to warrant a response. Far from that. He's testifying, your
6 Honours, because he strongly welcomes this opportunity to assert his innocence and
7 especially clear his name against false allegations and the blackmail of being an
8 alleged génocidaire. The Trial Chamber will recall the ICC Prosecution never
9 submitted any evidence that it took curative action by communicating to the Austrian
10 Prosecutor that Mr Arido was, in fact, suspected of offenses against the
11 administration of justice and was not a génocidaire.

12 This is an opportunity for Mr Arido, your Honours, to speak to his fellow
13 countrymen and women of the Central Africa Republic and the world at large to say
14 that he is not a génocidaire, and he did not commit genocide against his dear country
15 people in the Republic of Central Africa, and he is not standing trial for any such
16 crime. Indeed, your Honours, taking the stand will provide a level of security for
17 Mr Arido and his family and relief from the pain, humiliation and the stigma of false
18 allegations.

19 In this case, your Honours, the process which resulted in these proceedings is as
20 important as the specific allegations against Mr Arido. In fact, the two -- in fact, the
21 two are interrelated. For this reason, your Honours, this opening statement -- in this
22 opening statement, the Arido Defence will focus on, one, fundamental fair trial
23 violations including two, prosecutorial misconduct; three, on the elements of the
24 offences and modes of liability charged; and lastly, four, the evidence Mr Arido's
25 Defence will present.

1 Mr Arido, your Honours, is being tried on a confirmation of charges decision by the
2 Pre-Trial Chamber. Although I have requested it, there is no updated indictment
3 from the Prosecution which reflects the Pre-Trial Chamber's decision.

4 In the absence of a charging indictment, the defendant is left to guess about the
5 charges. This certainly eviscerates the right of the accused to notice under the
6 Statute and international instruments.

7 Moreover, your Honours, the harm is exacerbated by the fact that the Prosecution, in
8 disregard of the Pre-Trial Chamber's decision, continues to make changes in its theory
9 of the case. For example, previously the Pre-Trial Chamber established that there
10 was a lack of evidence to support the charge of false documents, but the Prosecution
11 continues to falsely include the documents supporting that charge in its list of
12 evidence and tried to get the concerned documents admitted through its five bar
13 tables.

14 In another example, your Honours, we've also seen that in the document containing
15 the charges, the Prosecution changed its storyline twice concerning the charges of
16 providing payment for improper purpose. The first time the Prosecutor changed the
17 charge from paying witnesses generally to paying D3, D4, and D7. The second time,
18 your Honours, the Prosecution changed to simply paying witnesses P-245 and P-260.
19 Then at trial the Prosecution abandoned these charges and led its witnesses, P-245
20 and P-260, to testify only that Mr Arido refunded them the cost of transportation and
21 food.

22 Before the trial, your Honours, the Prosecution charged Mr Arido with offenses in
23 relation to 14 witnesses who have not given any evidence related to Mr Arido. At
24 the trial, the Prosecution presented only two incredible and unreliable witnesses,
25 P-245 and P-260, from among the four that the Article 61(7) confirmation of charges

1 decision retained. The Prosecution presented no evidence D4 or D6. And as a
2 matter of law, the Defence will move for dismissal of the allegations in respect to
3 them.

4 In respect to modes of liability, the Pre-Trial Chamber held that Mr Arido was not a
5 co-perpetrator and there was no common purpose liability for the accused. See
6 paragraph 54(b)(iii) of that decision.

7 The Prosecution nevertheless continues to insist in this case, including its opening
8 statement at paragraph 49 that, quote, "Mr Arido is part of the criminal plan led by
9 Mr Bemba," end of quote, in an attempt to legally place Arido in modes of liability
10 which the Pre-Trial Chamber has rejected. This Trial Chamber has wisely and
11 consistently reminded the Prosecutor of that decision, and we're thankful for your
12 Honours' vigilance.

13 This trial is rife with other fair trial violations. Article 67(2) of the Statute imposes an
14 obligation upon the Prosecution to disclose evidence in its possession that tends to
15 show the innocence of the accused or mitigate the guilt of the accused or which may
16 affect the credibility of the Prosecution's case.

17 Pursuant to Rule 77 of the Rules of Procedure and Evidence, the Prosecution must
18 permit the Defence to inspect evidence which is material to the preparation of the
19 Defence.

20 On 20 June 2014, the time closest to the disclosure deadline imposed by the Pre-Trial
21 Chamber, the Prosecution disclosed evidence relating to P-245 and P-260 interviews
22 which were conducted in February 2014 and early April 2014 respectively.

23 Then the Prosecution interviewed both witnesses again on 5 November 2014 and
24 disclosed evidence seven months later. This violates Article 67(2) of the Statute,
25 which requires the Prosecution, your Honours, to disclose materials which may affect

1 the credibility of the Prosecution's case as soon as practicable.

2 On 3 August 2015, in response to a Defence submission restating disclosure violations,
3 the Prosecution said, and I quote, "The Defence has already received all information
4 that might have an impact on the credibility of the Prosecution witnesses in the case."
5 End of quote.

6 A few days later, your Honours, the Prosecution disclosed a report of September 2014
7 in relation to P-245's interaction with other individuals concerning this case, and the
8 report in particular included the investigator's warning to P-245 that such contacts
9 would affect his credibility. This material report was made available to the Defence
10 one year after it was obtained. This hardly satisfies the "as soon as practicable"
11 requirement.

12 Mr Arido, your Honours, will testify about a significant prejudice he suffered and the
13 fair trial violations he suffered as a result of the non-disclosure of the transcripts of
14 these interviews containing potentially exculpatory evidence prior to the delivery of
15 the confirmation of charges decision and their late disclosure seven months after.

16 In addition, your Honours, the Prosecution's failure to disclose the November
17 interviews in a timely manner resulted in the withholding of material information
18 from the Pre-Trial Chamber. On 11 November 2014, five full days after interview of
19 these witnesses, the Pre-Trial Chamber delivered its decision confirming charges
20 against Mr Arido based on an incomplete body of information. Information arising
21 out of the 5 November 2014 interviews should have been made available, as it was
22 relevant to the Pre-Trial Chamber deliberations.

23 In early September 2015, your Honours, upon repeated requests by the Defence and
24 an intervention of this Honourable Trial Chamber, the Prosecution disclosed details of
25 some thousands of dollars of payments given by itself and the VWU to P-245 and

1 P-260.

2 The Arido's lack of access to the Bemba main case file.

3 Your Honours, the Arido Defence would like to emphasise the fact that Mr Arido was
4 never involved in the main case, and so he never had access to the totality of the case
5 file in the main case.

6 Mr Arido will therefore elicit evidence to establish that he has therefore been
7 impaired in accessing the complete material required to substantiate the charges
8 against him concerning the alleged instructions to lie in the testimony before the Trial
9 Chamber; in particular, the alleged false testimony of P-245 and P-260 in the Bemba
10 main case.

11 Motions filed by Mr Arido to obtain materials related to the alleged false testimony he
12 is charged for suborning were opposed by the Prosecution, which ought to have
13 disclosed the material to him in the first place. And this was upheld by the Bemba
14 Trial Chamber on the basis that the Arido Defence failed to identify specific
15 information that they needed.

16 Your Honours, this case, from its very beginning at the investigative stage through
17 the trial, has been replete with prosecutorial errors, which violated Mr Arido's fair
18 trial rights. In view -- in our view, they rise both individually and in aggregate to
19 the level of prosecutorial misconduct.

20 The Arido Defence would demonstrate that the Prosecution conducted investigations
21 on Mr Arido in Vienna, Austria, and accessed his and his family's financial records in
22 Western Union on the false representation that he was a génocidaire.

23 The subject matter of the Austrian request, which was known to the Prosecutor, states,
24 and I quote, "Against Arido, Subject Matter - Genocide." CAR-D24-0002-1349.

25 Mr Arido will demonstrate, your Honours, that the Prosecution irreparably harmed

1 Mr Arido's reputation in violation of the Universal Declaration of Human Rights,
2 Article 12 and Article 17 of the International Covenant on Civil and Political Rights
3 and the broadness of its fishing expedition for records violated his privacy -- his right
4 of privacy and reputation of his family.

5 Mr Arido, your Honours, will demonstrate that the Prosecution firstly, presented him
6 as the son of the director general of the Central Africa Republic Garde présidentielle
7 during the conflict period of October 2002 to March 2003 and then falsely represented
8 him as a member of the Central Africa Republic Unité spéciale présidentielle during
9 the conflict period. Mr Arido will vehemently contest these allegations and will
10 demonstrate that he fled Central Africa Republic in 2001 and was not in Central
11 Africa Republic during the conflict period.

12 Failure of the Prosecution to fulfil its duty pursuant to Article 54(1)(a) of the Statute.

13 The Defence will establish that the Prosecution persistently violated its disclosure
14 obligations and failed to comply with Article 54(1)(a) of the Statute, which, in relevant
15 part, provides that the Prosecutor shall, in order to establish the truth, investigate
16 incriminating and exonerating circumstances equally.

17 But in this case, your Honours, the Prosecutor conducted a one-sided investigation of
18 Mr Arido and his family, who were not parties to this case. He failed to ask
19 appropriate neutral questions arising from the key factual allegations of P-245 and
20 P-260. Instead of searching for the truth, its investigations were compromised by the
21 tactic of asking leading questions to elicit the answers the Prosecution wanted.

22 For example, when the Prosecution interviewed P-245 and 260 for the first time, the
23 interview report was filled with leading questions such as -- and permit me to quote
24 in French, in the original French: (Interpretation) "I imagine that Mr Arido knows
25 that you are not in the army." (Speaks English) End of quote.

1 Or, quote, (Interpretation) "Because I imagine that he does not ask you to be second
2 lieutenant just like that and necessarily you accept; nevertheless, you do have
3 reticences in that regard."

4 (Speaks English) CAR-OTP-0080-0043 at CAR-OTP-0080-0051. The Defence will
5 demonstrate that this biased questioning of P-245 and 260 was not based on relevant
6 considerations but seemingly directed to determine the outcome of particular
7 predetermined positions.

8 The Defence will establish, your Honours, that the Prosecution failed to seek potential
9 exculpatory evidence arising from the following:

10 A, there is no investigation relationship between P-260, who claimed that he was a
11 mere (Redacted) with no military background, and D24-02, who was a high-level
12 military officer and politician in Central Africa Republic. The core of this case lies on
13 P-260's claims of a non-military background.

14 B, no diligent investigation of the information contained in some intercepted emails
15 which would have established the military status of some Prosecution witnesses.

16 C, no diligent investigation of the celebratory email sent by P-260 to Mr Arido, dated
17 24 March 2016, CAR-OTP-0075-0786. That's almost three months before his
18 testimony in the Bemba case in which he said -- and permit me again the French,
19 original French (Interpretation) "Notre Seleka has won the battle." (Speaks English)
20 End of quote.

21 The evidence will establish that Seleka, your Honours, is an armed rebel movement
22 that took power in Central Africa Republic through a bloody war in which Central
23 Africa refugees in neighbouring countries participated.

24 The evidence will demonstrate that the Prosecution had the ability to (Redacted)
25 (Redacted) that, if available, would have

1 established their participation in the armed conflict in Central Africa Republic in 2002
2 to 2003 but failed to do so.

3 The Defence will demonstrate that notwithstanding this lack of due diligence, the
4 Defence of Mr Arido during trial and in search for the truth and nothing but the truth
5 sought the consent of both witnesses to access their (Redacted) to obtain this
6 crucial information. Both granted their consent on oath. P-245 consented in the
7 transcript of 22 October 2015. That's the English transcripts, page 60, lines 17 to 23,
8 and I quote, "I do not fear anything. I freely give the authority, authorisation to
9 consult my file." End of quote.

10 And P-260 consented in the transcript of 14 October 2015, English transcript, page 47,
11 lines 21 to 25, page 50, lines 1 to 17, but both later declined and withdrew their
12 consent without explanation.

13 P-260 withdrew his consent of oath before this Trial Chamber while the Arido
14 Defence was informed of P-245's withdrawal of consent on 17 February 2016 by the
15 Counsel Support Section, which also informed the Arido Defence that the Chamber
16 had been advised of this decision.

17 The Defence will demonstrate that the Prosecution, due to the paucity of any evidence,
18 failed to prove payments allegedly made by Mr Arido to P-245 and P-260 supported
19 by receipts as the confirmation decision states.

20 The Defence, Arido Defence considers it a waste of precious judicial time to
21 elaborately respond to an unproven allegation. However, Mr Arido will vigorously
22 deny this allegation on oath before this Honourable Trial Chamber.

23 The Prosecution failed to present evidence relating to the telephone and email
24 communications, hotel records, highway transportation records and financial records
25 of P-245 and P-260, which are required to render the allegations against Arido valid.

1 The Prosecution provided no reasons for its deliberate default in bringing this key
2 evidence before the Trial Chamber.

3 The Prosecution call data records for the relevant periods and relevant actors,
4 particularly relating to the critical period of January and February 2012 were either
5 not obtained; or if obtained, not disclosed to the Defence and to this Honourable Trial
6 Chamber. Your Honours will look at the Prosecution witness communication
7 analyst P-0433 report that supports this Arido's position.

8 The Prosecution failed in its duty to approach D24-02 to verify the accuracy of the
9 allegation made by P-245 and 260 against Mr Arido relating to the recruitment,
10 coaching, promise of financial incentives even though both witnesses testified about
11 D24-02's presence when the alleged acts were allegedly committed.

12 The Prosecution failed to investigate and bring before this Honourable Trial Chamber
13 all the individuals Mr Arido allegedly procured, coached and suborned on 21
14 February 2012 to allegedly provide false testimony in the Bemba trial.

15 The Prosecution failed to investigate credible evidence that critically discredited its
16 witnesses P-245 and P-260. For example, your Honours, evidence of motives to lie
17 against Mr Arido such as those that were pecuniary in nature, jealousy, and the
18 vengeful attempts to settle past personal scores through this case.

19 The Prosecution does not appear to have considered or investigated the withdrawal
20 of Mr Arido contained in the following email to P-260 in particular as it raises
21 reasonable doubt about the Prosecution's theory of the case alleging Mr Arido's
22 alleged participation in elaborating and implementing an overall strategy to defend
23 Mr Bemba.

24 That email is CAR-OTP-0075-0567.

25 With your permission again, in the original French, I'll read that out (Interpretation)

1 "Because of my safety, I withdrew from the Kilolo case because several times I was
2 interviewed by an agency -- " (Speaks English) I will leave out the name of the
3 agency --

4 THE INTERPRETER: I will leave out the name of the agency.

5 MR TAKU: -- for obvious reasons, which you'll understand later (Interpretation) "-- in
6 Yaoundé, and no reaction to protect me. Once I am free, I plan to sue the ICC for breach of
7 confidentiality. At your level, assess in light of your own interests, they are not serious and a
8 great deal of wisdom. I am leaving Brazza at the end of the month." End of quote.

9 (Speaks English) The Prosecutor failed to investigate the reasons provided by P-260
10 for seeking relocation and financial support from the Court in the following email to
11 Mr Kilolo dated 21 June 2012. That is the email is CAR-OTP-0088-0504 at
12 CAR-OTP-0088-0509. And I quote again with your permission in the original French:
13 (Interpretation) "I hereby bring to your attention the things that are going on
14 between Arido and myself, and these things could lead to death. However, he is
15 trying to do me harm everywhere. He wanted D4 to lead the team so that I would
16 not be giving testimony. I find myself obliged to reveal this to you and inform you
17 so that practical arrangements can be made so that my family and myself will not be
18 unprotected. Thus, and in light of the proceeding, I would like to ask you to bring
19 these matters before the Court and ensure that we are relocated without any
20 prerequisites or conditions. I know Arido's designs, his tricks, and what he is
21 capable of because he has always written to betray. If the Court and you do nothing,
22 don't be sorry tomorrow and have no regret because since I am writing to you, I
23 believe I am entrusting you, showing you my trust. This bunch of scoundrels does
24 not know the advantages."

25 (Speaks English) Mr Arido will rely on this email and other evidence which will be

1 produced or adduced at trial to establish that the elements of trust and confidence to
2 induce P-260 to testify falsely in the Bemba case on a promise of financial gain and
3 relocation to Europe, as alleged in the charge, have not been proven beyond a
4 reasonable doubt.

5 The Defence will demonstrate that the Prosecution accomplice/perpetrators witnesses'
6 evidence against Mr Arido is false. The Defence will elicit evidence to establish that
7 the Prosecution failed in its duty to investigate the testimony of
8 accomplice/perpetrator witnesses with due diligence. The Defence will establish that
9 the Prosecution did not subject the nature of the suspicious relationship between
10 P-245 and P-260 to reasonable scrutiny. These two witnesses -- these two individuals,
11 who claimed to be unknown to each other prior to their involvement in the Bemba
12 case, were frequently and regularly in touch. Why? Why did P-245 call P-260 after
13 a telephone conversation with D6 and D9 immediately after being contacted by the
14 Prosecution?

15 Why did 245 call P-260 after meeting with the Prosecution in February 2014? What
16 did they discuss? Why did P-245 call the Prosecution on 3 March 2014 to alter his
17 statement to exactly match what P-260 later told the Prosecution?

18 This consistent pattern of contacts all proved the existence of a sufficient proximate
19 relationship and a level of coordination or reasonable attempt at coordinating the
20 information provided to the investigators.

21 The Defence, your Honours, will elicit evidence to establish that upon being informed
22 by 260 that he discussed the case with other -- that he discussed the case with other
23 Central Africa Republic individuals within the Central Africa Republic refugee
24 community in Cameroon and Central African Republic, thereby putting the security
25 of Mr Arido's wife and his family at risk. The VWU -- the VWU rebuked the witness

1 that such action could compromise his credibility, and the Prosecution failed to
2 investigate the matter. The Prosecution again failed to investigate this security
3 threat to Mr Arido's wife and family and the credibility of 260.

4 The Prosecution obtained information about Mr Arido and his wife (Redacted)
5 through unlawful means. They didn't seek their consent to obtain that information.

6 Your Honours, a discretionary investigative power can exist at a level necessary to
7 obtain key information. That we'll concede. But the Arido Defence will
8 demonstrate that the Prosecution (Redacted)

9 (Redacted)

10 (Redacted) who is not a party to this case; without their consent and without
11 assistance of a national police force.

12 During the investigation, the Prosecutor obtained an order from a Single Judge of the
13 Pre-Trial Chamber to intercept the telephone or email correspondence of Mr Arido
14 and others as well as information relating to Mr Arido's financial transactions. The
15 order, your Honours, regretfully, did not -- it contained no expressed procedural
16 protection or any specific guidelines which Mr Arido can rely on to legitimately
17 expect that the Prosecution would comply with section 49(1) of the OTP Code of
18 Conduct. The order, your Honours, permitted a potentially very invasive procedure
19 without a mechanism to audit and check potential abuses, and there are many. It
20 did not stipulate the threshold of departure that would give rise to a duty of the
21 Prosecution to justify its actions.

22 In these circumstances, your Honours, we have seen a subsequent departure from
23 section 49(1) where the Prosecution unlawfully extended its authority to use national
24 and international law enforcement agencies to secure the cooperation and
25 interrogation of protected ICC Defence witnesses, inter alia, concerning the identity

1 and personal information of some witnesses that were already known by the
2 Prosecution and they were readily available by the Prosecutor -- by the Prosecution
3 from the Bemba case.

4 Evidence relating to P-245 and 260 further shows that witnesses were called to attend
5 a police office without giving prior reasons to meet with the Prosecution
6 investigators.

7 Similarly, D4 and D6 alleged in statements submitted before the Pre-Trial Chamber
8 that they resisted attempts by Prosecution investigators to secure their cooperation
9 through undue influence and assistance of the national police. CAR-D21-0004-0310
10 at page 17, lines 372 to 387.

11 One of the first actions of the Prosecution investigators on meeting with witnesses
12 P-245 and P-260 at the national police office where they were summoned was to
13 inform them about the fate of the incarcerated Mr Arido. They were informed that
14 Mr Arido, who was on the Bemba witness list like them, was held in custody in
15 relation to Article 70 offences that were subject to their investigation.

16 The possibility of these witnesses finding themselves in the same predicament of
17 Mr Arido must have weighed on their minds when they proceeded to cooperate in
18 incriminating Mr Arido. From then, the Prosecutor used its superior investigative
19 power in an illegitimate way that purposefully coerced P-245 and P-260 to believe
20 that it was in their best interest to submit to the Prosecution demands and that if they
21 agreed to provide information in a predetermined direction, they would and indeed
22 were granted immunity from prosecution.

23 Your Honours, your Honours, pressure exerted on P-245 and P-26 -- no, by 245 and
24 P-260 by the Prosecutor amounted to a compulsion of their wills. The witnesses had
25 no realistic practical alternative but to submit to the pressure of immunity. Pursuant

1 to regulation 59(1), the Prosecution must strive to provide a safe and an agreeable
2 environment to conduct questioning. A national police office was certainly not that
3 agreeable environment for questioning of (Redacted) witnesses, one who, due to
4 (Redacted) status, lived in the shadows of society for the fear of the same
5 police. The Prosecution certainly did not deprive the witnesses of choice, but merely
6 presented them with a choice between two evils.

7 The Defence evidence will establish that the Prosecution exerted a continuing form of
8 dominion -- domination during its interview of Mr Arido in November 2013 and
9 thereafter misrepresented the answers provided by Mr Arido during the interview to
10 the Pre-Trial Chamber and continues to do so before this Trial Chamber.

11 During the interview, a French investigator appointed an unqualified counsel, who is
12 neither an ICC listed counsel nor possessed any knowledge of the Central Africa
13 Republic situation, the Bemba case, and the ICC rules and procedures to represent
14 Mr Arido during the interview. The Prosecution investigators, who were present
15 during the interview, did nothing to redress this egregious travesty of the ICC statute.

16 The Prosecutor must assume the responsibility, your Honours, for this violation
17 because they stood to benefit from the investigation, which was at their request. The
18 Prosecution abused its position of confidence in a special relationship between an
19 accused and an executor of the Statute of the Court by, ironically, depriving the
20 accused of Article 54(1) fair trial rights.

21 Your Honour, I just want -- I simply want to address a few of these fundamental
22 elements.

23 The actus reus element requires proof that Mr Arido engaged in a course of conduct
24 which amounts to corruptly influencing the witness to testify falsely before the Trial
25 Chamber or, at the very least, some conduct must be alleged and proved beyond a

1 reasonable doubt from which an intention to testify falsely before the Trial Chamber
2 can reasonably be inferred.

3 The Arido Defence will demonstrate that the Prosecution did not prove the elements
4 of the offences or modes of liability charged beyond a reasonable doubt. And
5 Mr Arido will testify that he had no knowledge of and never knew, never
6 communicated with Mr Bemba, Mr Mangenda and Mr Babala during the period of
7 the offences charged. Not until he was brought into the ICC custody in March 2014
8 did he even meet these three persons. In respect of Mr Kilolo, Arido will testify that
9 he did not meet and know him prior to February 2012.

10 The Arido Defence recalls that the offence under Article 70 is an intentional offence.

11 The Arido Defence will demonstrate that there was no prove beyond a reasonable
12 doubt that Mr Arido intended to commit the offences charged. We note that the
13 Prosecution provided no evidence to prove that he even had sympathy or even
14 expressed support for Mr Bemba. Mr Arido will testify that the only tangible
15 evidence of his relationship with Mr Bemba or the Bemba Defence was the provision
16 of expert report based on military strategy. This was a job, that's all.

17 As to modes of liability charged, the Arido Defence position is that the Prosecution
18 failed to prove direct perpetration and aiding and abetting beyond a reasonable
19 doubt.

20 The Arido Defence. Mr Arido has chosen to present witnesses on his behalf,
21 although he recognizes that he has no burden of proof in a criminal trial and is
22 presumed innocent under the Statute and other international instruments.

23 Mr Arido will adduce evidence of his family, professional and educational
24 background. And the evidence will demonstrate that Mr Arido is a former soldier
25 and lieutenant in the Central African Army. He left Central African Republic in 2011

1 and went to seek asylum in Cameroon with his family. 2001, sorry, 2001. He was,
2 therefore, not in the Central African Republic during the war in 2002 to 2013, as the
3 Prosecution alleges.

4 Your Honours, we'll move for a very brief private session to deal with two critical
5 issues, with your kind permission.

6 PRESIDING JUDGE SCHMITT: Then we go into private session, please.

7 (Private session at 10.23 a.m.)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

Trial Hearing

(Private Session)

ICC-01/05-01/13

1

2

3

4

5

6

7

8

9

10

11

12

13 Page redacted – Private session

14

15

16

17

18

19

20

21

22

23

24

25

1 (Redacted)
2 (Redacted)
3 (Redacted)
4 (Redacted)
5 (Redacted)
6 (Redacted)
7 (Redacted)
8 (Redacted)
9 (Redacted)
10 (Redacted)
11 (Redacted)
12 (Redacted)
13 (Redacted)
14 (Redacted)
15 (Redacted)
16 (Open session at 10.29 a.m.)
17 THE COURT OFFICER: We are in open session, Mr President.
18 PRESIDING JUDGE SCHMITT: Perhaps one short remark for everybody. We don't have
19 these lights, different lights anymore, which indicate to us that we are in open or closed
20 sessions, but what we have is the right corner of the screen we see that there is written -- it's
21 not so markedly than before, but for everybody that we control our -- if we are in open session
22 or private session, and that is important to get accustomed to this one. Private session is
23 written in there on the right corner. Thank you very much.
24 MR TAKU: Thank you, your Honour.
25 Now, your Honours, having regard to what I just said, before your Honours, you

1 have two individuals who desired war and impunity to continue in Central African
2 Republic from the host country and Mr Arido who worked against the furtherance of
3 this enterprise.

4 The Prosecutor, who has intervened in the Central African Republic situation,
5 purportedly to combat impunity, had an option to support the forces of peace and
6 security in Central Africa and the forces of destabilisation. This the Prosecution of
7 Mr Arido -- this Prosecution of Mr Arido is a litmus test of the effectiveness of the
8 efficiency of that prosecutorial mandate. Mr Arido's only offence, among other
9 things, is that he worked with a state agency for the furthering of peace in the
10 subregion and his own country, and he does not regret for doing that.

11 The Defence would adduce evidence to demonstrate, as the confirmation of charges
12 decision acknowledges, that Mr Arido submitted a report upon request of Mr Kilolo,
13 submitted a report of his expertise on military matters relating to the conflict in
14 Central African Republic. This report was submitted 11 June 2012 and, in return, he
15 received 6,028 US dollars.

16 The evidence will establish that Mr Arido was scheduled to testify in September 2012.
17 However, he discovered that a person purporting to be an ICC official interfered with his
18 security. Mr Arido will testify that he had no doubt that the disclosure of his personal
19 information to an identified person prior to and during his testimony was leading to
20 abduction. The conduct of this person caused Mr Arido with reasonable firmness to fear for
21 his family and his own personal safety.

22 Immediately, an international organisation in Yaoundé and a state agency intervened.
23 That state agency offered Mr Arido a one-way ticket to France where he currently
24 resides. That ticket can be accessed, CAR-D24-004-0016.

25 Mr Arido will demonstrate that he appropriately, promptly informed the Court and

1 Mr Kilolo of the new situation, but received no response from the Court. In this
2 situation, Mr Arido declined to testify as a witness for Mr Bemba.

3 Mr Arido will testify that in this situation, where his life was threatened, he acted as
4 any reasonable person would, he alerted the competent authorities within the host
5 country, and he also informed the appropriate organs of the Court, including the Trial
6 Chamber, and he took the only reasonable steps that every person within this
7 institution including the United Nations would take pursuant to the safety measures
8 on basic security, security awareness recommendation of the UN, he took to preserve
9 his own security by, with the assistance of a host agency travelling to France.

10 Mr Arido has been accused by the Prosecutor for refusing to testify and trying to
11 impeach motives and to draw on reasonable inferences by Mr Arido, who seeks in the
12 circumstances that he deserves a fair adjudication of his acts, the performance of his
13 proposed witness role because there was good reason to believe that abduction was
14 likely to occur. The Defence will demonstrate that there is an elaborate regime for in
15 the ICC, for the protection of witnesses at risk, as Mr Arido was; that the system and
16 international criminal justice system failed Mr Arido, who felt and still feels betrayed
17 by the system.

18 The evidence will show that not even the investigation he sought was conducted, not
19 then, not even now. Mr Arido will pray that it is left to you, your Honours, to decide
20 in the circumstances of this case what a person in his shoes would do. (Indiscernible)
21 in search of abducted to die or to preserve his own security can take reasonable
22 measures, as he did.

23 Mr Arido will further demonstrate that he has never hidden his identity. He
24 published articles from his location in France advocating the peace situation in
25 Central African Republic. His identity was known. He did not seek to escape.

1 Mr Arido will call individuals whom the charge alleged were corruptly influenced by
2 him to testify and present before this Court.

3 Mr Arido will demonstrate that he is an accidental accused in this case. Mr Arido's
4 relation to the Bemba Defence is that he was requested to provide an expert report.

5 As the Pre-Trial Chamber remarked, Confirmation of Charges decision, paragraph 52,
6 the role of Mr Arido is very limited. Mr Arido was not a member of the Defence
7 team of Mr Bemba, and Mr Arido will vigorously contest the allegation, the false
8 allegations made against him.

9 Mr Arido will demonstrate that whether the charges relate to a period of late 2011 to
10 mid-2013, the evidence against Arido covered a period of a maximum of just about
11 two weeks in February 2012. Mr Arido will demonstrate after the alleged Douala
12 meeting on 21 February 2011, there is absolutely no allegation of any further
13 interference or any other, any other further briefing by these witnesses; and that in the
14 case the witnesses' testimony is that Mr Arido briefed them to provide information to
15 Mr Kilolo, not to the Bemba Trial Chamber, not to influence the conduct of the Trial
16 Chamber, but to Mr Kilolo, nothing more, nothing less, and that is inconsistent with
17 the charge.

18 The Arido defence will adduce evidence backed by email correspondence between
19 Mr Kilolo and Arido to establish that the limited Western Union payments submitted
20 by the Prosecution were made for the purpose of Arido's work. Others were private
21 family transactions.

22 The Arido Defence will demonstrate that the Prosecution presented no evidence that
23 Mr Arido paid any witnesses. There is an unsubstantiated, unsubstantiated
24 allegation that he refunded a negligible amount of 10,000 each, less than 15 euro, to
25 P-245 and 25 -- primarily for transportation and food, not to buy their testimony, not

1 to influence their testimony alleged.

2 But this allegation is purely speculative and nonsensical, because both witnesses also
3 testified that Mr Kilolo gave them 50 euro each to pay, refund for their transportation,
4 their cost. And if Arido had given the money on behalf of Bemba to defray the cost,
5 Mr Kilolo, who was counsel for Bemba, would not have given 50 ostensibly for the
6 same purpose. So that allegation against Mr Arido either raises reasonable doubt,
7 speculative, is at best nonsensical.

8 The Arido Defence will demonstrate that the evidence adduced comprehensively
9 established that this allegation is based on multiple misunderstandings and ignorance
10 of established relevant facts. The Prosecutor is to act neutrally, the Prosecutor is an
11 administer of justice, to help the Court to do justice. But as we'll demonstrate several
12 more complex motivational considerations operating -- that were operating on the
13 Prosecution to press charges on Mr Arido at all costs.

14 Your Honours, first, before we note, your Honours, that there was an incomplete
15 recantation by the witnesses, the Prosecutor did not produce the specific transcripts in
16 the Bemba trial. And with these witnesses alleged Mr Arido influenced them to lie,
17 to point out the specific areas in which Mr Arido lied, for them to recant on oath
18 before this Court and permit Mr Arido the opportunity to challenge his accuser.
19 That never happened, your Honours. So there was an incomplete recantation by
20 these witnesses.

21 However, your Honour, Mr Arido will adduce evidence to challenge the credibility of
22 these two accomplice witnesses. Mr Arido will recall, your Honours, that the
23 Prosecution cautioned the Court, the Prosecutor asked your Lordship to consider this
24 witness with caution in the opening statement of the Prosecutor. This is what the
25 Prosecutor said, transcript of 29 September 2005, the English transcript, the

1 Prosecutor said, "I just want to indicate a word of caution. When these witnesses are
2 testifying in this case, they may try to minimise their own responsibility, their own
3 conduct or have done so in providing statements to avoiding incriminating
4 themselves or protecting others. In regard to their evidence, you will see that the
5 witnesses minimise their, you will see where the witnesses minimise their -- you see
6 where the witnesses minimise their involvement."

7 That was the Prosecution itself, your Honours.

8 Your Honours have had an opportunity to watch their demeanour and to listen to
9 them. And your Honours have listened to multiple witnesses and multiple
10 motivations for them providing that testimony.

11 Your Honours, the Defence will elicit testimonial evidence and the evidence points
12 even on record to show that there is reasonable doubt the Prosecutor has not
13 discharged its evidentiary burden.

14 And, your Honours, Mr Arido, on the allegation Arido induced P-260 to testify
15 falsely in the Bemba case, that he was a sub -- that he had a certain military rank, and
16 he was a soldier and had a certain military rank, and P-245 the same.

17 Before this Trial Chamber, your Honours, the testimony of both witnesses contradicts
18 the charge in the following regard: P-260 told the investigator that he knew
19 that -- testified about his involvement in (Redacted) and, importantly,
20 your Honours, he testified that, quote, "On my application for asylum in Cameroon, I
21 stated that I was fleeing from the war and reprisals from the then head of state
22 because at that time I was" -- he was a representative of a particular individual
23 involved in the conflict, former president in a particular location in Central African
24 Republic.

25 Now, your Honours, I'll refer you to page 65, lines 4 to 5 of the transcript of

1 14/10/2015 for this testimony. The Defence will adduce evidence to support the
2 evidence on record, your Honour, that this witness in the main case testified about his
3 involvement as a member of the Karako, Karako militia movement, not the allegation
4 that he was a lieutenant or sub-lieutenant in the Forces Armées Central African. His
5 involvement was Karako. And this before your Lordship, he led similar evidence.
6 With regard to P-245, your Honours, in the Bemba main case, he admitted he never
7 testified as the charge alleges that he was a member of the Central African forces as
8 such, that evidence he testified he was a member of the Miskine. And, your
9 Honours, he dismissed the charges (indiscernible) dismissed the charges at page 63 of
10 the transcript of 22/10/15, page 245, and I will reproduce that, question, lines 15 to 18:

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 PRESIDING JUDGE SCHMITT: Mr Vanderpuye, shortly please.

20 MR VANDERPUYE: Mr President, I'm on my feet. Could we go into private session,
21 please?

22 PRESIDING JUDGE SCHMITT: Yes. I think that's correct. I think we should go into
23 private session.

24 (Private session at 10.45)

25 (Redacted)

Trial Hearing

(Private Session)

ICC-01/05-01/13

1

2

3

4

5

6

7

8

9

10

11

12

13 Page redacted – Private session

14

15

16

17

18

19

20

21

22

23

24

25

Trial Hearing

(Private Session)

ICC-01/05-01/13

1

2

3

4

5

6

7

8

9

10

11

12

13 Page redacted – Private session

14

15

16

17

18

19

20

21

22

23

24

25

1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Open session at 10.50 a.m.)

14 THE COURT OFFICER: (Interpretation) Thank you very much, your Honour. We're in
15 open session.

16 MR TAKU: Your Honours, the Arido Defence will demonstrate that the fact this witness
17 willingly and without prior conditions and without the fulfilment of the alleged financial
18 incentives and a relocation to Europe accepted to testify and did testify by video link from a
19 location in Africa establishes that their motivation for incriminating Arido based on financial
20 motivation were unfounded and that the motivation were indeed pecuniary and a vengeful
21 effort to satisfy their jealousy, their jealous proclivity against Arido.

22 Mr Arido will lead evidence to prove that by the very nature of the relation between
23 Mr Arido and P-245 and 260. Even by their own admission and documentary
24 evidence, Mr Arido was not in a position of trust and influence in order to secure
25 their trust to self-incriminate and to lie in Mr -- in the testimony in the Bemba trial.

1 The Defence will demonstrate that the Prosecution failed to produce any or all of the
2 alleged participants said by your Honours that were present and allegedly took notes
3 at the so-called Grand Moulin in Douala on 21 February 2012.

4 The Arido Defence will demonstrate that although the Prosecution recognized the
5 importance of securing key documentary evidence such as hotel bills, air ticket
6 receipts, boarding passes, intercepted email communications related to the mission
7 effected by Mr Kilolo, Miss Gibson and D24-02 to Douala from 19 to 24 February 2012;
8 it failed to conduct a thorough, a similar thorough investigation aimed at securing
9 entries in the hotel records, receipts, hotel reservations at the Motel Grand Moulin
10 where alleged acts charged against Mr Arido were perpetrated.

11 The Prosecution failed to obtain telephone or email intercepts of P-245 and P-260.

12 The Defence will demonstrate that the failure to conduct the investigation aimed at
13 establishing the truth in this regard departed from balanced investigative practices
14 and legitimate expectation of any legal practitioner in this courtroom.

15 The Defence will demonstrate P-245 particularly had no immigration problem and his
16 application for relocation to a western country where he now resides was way on
17 course even before these events, and therefore it now could not have been a critical
18 the motivation for him to lie.

19 The Arido Defence will therefore demonstrate, your Honours, because the Prosecutor
20 did not provide call data records for the relevant period, January-February 2012, there
21 is no proof beyond a reasonable doubt that Arido made calls with this witness who
22 met Kilolo within this period. The report of P-0433 presented by the Prosecution has
23 no information in regard to the period January to February 2012.

24 However, Mr Arido will give evidence to vigorously challenge and deny the
25 allegation that he recruited P-260 at Carrefour MEEC in Yaoundé and P-245 at

1 Carrefour Olizua in Yaoundé sometime in January or February 2012 and that in that
2 occasion Mr Arido used his own phone to place a phone call to Mr Kilolo in which at
3 the urging of Mr Arido P-260 introduced himself as a sub-lieutenant in Central
4 African forces and P-245 introduced himself as chief corporal during the period of the
5 conflict.

6 The Arido Defence will rely on the transcripts of the testimony of P-0433 to challenge
7 the legality of the collection of the call data of Mr Arido's phone calls and
8 demonstrate a consistent pattern of egregious violations of Mr Arido's right to privacy
9 and the sanctity of his correspondence, the sanctity of his family calls, privacy.

10 Regarding 245, OTP communication analyst identified six contacts between him and
11 Mr Arido between 4 May 2012 and 6 May 2012. None incriminates Mr Arido, none
12 relates to this case, and none of them relate to any other offence relating to any
13 offence before this Court.

14 The Defence did not present any direct evidence regarding D4 and D6 and merely
15 relied on interviews given by these two, by the impugned two witnesses. The
16 Defence will present evidence and demonstrate that in D6's asylum application
17 (Redacted), he stated that he was a soldier. He was in the army of the Central
18 African Republic.

19 D4 will testify that he never travelled to Douala under the circumstances described by
20 D2 and D6, and that Mr Arido did not recruit him, and that he was -- he did not
21 participation in any portion, section and that indeed he testified truthfully with
22 regard to his participation as a soldier in the conflict in 2003 in the Bemba trial.

23 Conclusion: Your Honours, I was saying in the beginning of this statement this case
24 is as much about the process of international justice as it is about the allegations.

25 Firstly, your Honours, the fundamental rights of Mr Arido are at stake, the intrusion

1 caused by the Prosecution was so extensive such that the evidence will demonstrate
2 the wife of Mr Arido, the wife of Mr Arido was subjected to persistent threats and
3 humiliations after P-260 discussed this case with the Central African community,
4 refugee community and the community back home, which are recorded by both the
5 Prosecution investigations and the VWU.

6 After he publicly discussed the wife and the family knew no peace, in one instance
7 Mr Arido's fifteen-years daughter was raped and the allegations of rape thereafter are
8 documented, and that we will produce the evidence, in order to humiliate him in
9 public based on the lies and based on the blackmail that Mr Arido and his family have
10 suffered as a result of this case.

11 The business that Mr Arido developed in 2008 had a worth of 23 million francs CFA,
12 about 35,000 euros per year. It collapsed. His children have dropped out of school.
13 The prejudice, the humiliation, the threat he has suffered, his name is all -- most law
14 enforcement and security agencies worldwide and Western Union monitoring
15 transactions worldwide in the manner we've described.

16 Your Honours, the Defence position from the very beginning, the Prosecutor engaged
17 in conduct which rises to prosecutorial misconduct.

18 The Defence position at the end of the day, your Honours, that the Prosecution did
19 not meet its statutory burden to prove each and every element of the offence and
20 mode of liability. Mr Arido, your Honours, still does not know why he was charged
21 before this Court. As he begins his Defence, he's conscious of the fact that his trial
22 will provide an opportunity for this Trial Chamber to set the limits on devastating,
23 invasive and intrusive prosecutorial abuse of power. The outcome of the Arido trial
24 should reassure millions of people worldwide that they can come forth and
25 participate in trials at the ICC as victims, Prosecution or Defence witnesses, without a

1 fear of being subjected to dehumanising processes or institutional threats to dignity,
2 threat to family life, privacy, a life to which Mr Arido and his family have been
3 subjected.

4 Mr Arido in this courtroom, is in this courtroom, your Honours, to respond to the
5 false charges brought against him and to provide an accurate account of his acts
6 before your Lordships, distinguished, professional judges. On the one hand, your
7 Honours, we must also seek legitimacy of the Prosecution's acts, that the exercise of
8 power irrespective of the Prosecution must conform to the notion of respect for
9 Mr Arido's fair trial rights; in fact, the right of all participants in trials and
10 proceedings before this Court, that the power conferred on the various divisions of
11 the Prosecution, whether investigation or prosecution, be exercised truthfully and in
12 good faith; that the Prosecution in legitimising its prosecution strategy, interacting
13 with the Chamber and the Defence, is accountable to the Assembly of States Parties
14 on which trust, power -- on whose trust power is held.

15 Your Honours, thank you for your kind attention.

16 PRESIDING JUDGE SCHMITT: Thank you very much, Mr Taku.

17 In the remaining time until 11.30, when we will have the lunch-break, we will draw
18 our attention to scheduling matters. I think we can be optimistic to finish this issue
19 until the break at 11.30.

20 It is normal that organising appearances of witnesses from places far away from the
21 Court or establishing video-links testimony for witnesses far away from the Court
22 involves logistical problems that cannot always be solved smoothly.

23 But sometimes the problems arise when you would least expect them, and I suspect
24 that Mr Gosnell knows that I'm now addressing the testimony of Witness D23-1.

25 It is of course unfortunate that D23-1 refuses to come to The Hague and testify here in

1 the courtroom. It is also, may I, allow me to say that it's also a little bit hard to
2 understand. Nevertheless, the situation is like it is and we have to find a satisfactory
3 solution in the interests of justice.

4 The Chamber is mindful of the arguments brought forward by the Mangenda Defence
5 in their request for reconsideration. And because of this, the Chamber gives the
6 following order:

7 The Chamber takes note of the courtesy copy of the Mangenda Defence's new filing, I
8 quote, "Jean-Jacques Mangenda request for reconsideration of decision concerning
9 video conference testimony."

10 The Chamber also recalls paragraph 12 of decision 1641 whereby it did not consider it
11 justified to, I quote "Spend the time and resources to send a team from the Court to
12 set up a video link solely to accommodate D23-1." Quote end.

13 The Mangenda Defence's new filing raises the possibility of an economical video link
14 solution being found, and the Chamber considers it in the interest of justice to explore
15 this opportunity further.

16 Noting that D23-1 is scheduled to commence testifying this Friday, the Mangenda
17 Defence is directed to immediately liaise with the Registry as to what can be done to
18 facilitate a video link hookup this Friday.

19 The Mangenda Defence should also explore the possibility for D23-1 to testify via
20 video link on 7 and 8 of March, which would, in light of the possible length of
21 testimony of Witness D21-3 be a possibility because the testimony of this witness
22 could perhaps last longer and could -- we could need the Friday for this witness too.

23 The Mangenda Defence is to report back to the Chamber at the end of the hearing
24 tomorrow with an update. Any responses to this new Mangenda Defence request
25 will be received orally at the same time, and this concludes this order. Thank you

1 very much for the moment to -- for this witness.

2 And then we will hear any responses to the Registry report last Friday on the status of
3 essential arrangements for Defence witnesses. The Chamber will hear submissions
4 by the parties, and we will start with the Prosecution first, if you want to make
5 submissions.

6 MR VANDERPUYE: You know I can't refuse that offer, Mr President. Good morning to
7 you.

8 First, with respect to the current scheduling of witnesses, we are always flexible.

9 Having gone through it ourselves in putting our case together and presenting it
10 before the Chamber, we are, of course, understanding of the situation that the
11 Defence are in, and we are doing our best to be flexible to accommodate any shifts in
12 the schedule, including the one that was proposed by Mr Gosnell, I think it was
13 yesterday.

14 We do have, however, a certain position with respect to the calling of witnesses before
15 the Chamber, particularly witnesses that are, from our vantage point, complicit in the
16 crimes that are charged, suspects within the meaning of Article 55(2) of the Statute
17 relative to the charges in this case, and it's our position that those witnesses especially
18 are witnesses that should appear before the Court live to render their testimony so
19 that you are in the best position to evaluate any demeanour evidence and the manner
20 in which they testify in your search for the truth.

21 With respect to witnesses that are more peripheral, let's say, we are perfectly disposed
22 to accommodate fluctuations in the schedule, differences in the manner of appearance,
23 but we do note that Article 69(2) does require, essentially, that witnesses testify in
24 person. We understand that the jurisprudence of the Court is such that video link
25 testimony is equated to in-person testimony, but it's not quite the same as actually

1 appearing before the Court, in all of its auspices before a Chamber, to fairly evaluate
2 evidence.

3 So to the extent -- to the extent that the VWU is in the process of trying to schedule
4 witnesses, we applaud that. However, we think that the considerations that we have
5 for witnesses to appear live, first and foremost, is something that should be
6 countenanced by the Chamber, something that should be encouraged by the Chamber,
7 and something that the VWU should try to accommodate.

8 If there are alternatives available, such as calling witnesses that are readily available
9 to appear before the Chamber, I think those are matters that should be pursued first,
10 in terms of scheduling witnesses.

11 I note, per Mr Taku's representations, that Mr Arido is prepared to testify. He's here,
12 and we're perfectly -- perfectly disposed to accommodate his testimony, if that is
13 necessary to facilitate the expeditious conduct of the proceedings and to avoid gaps in
14 the presentation of evidence as well as any other witnesses who may be nearby that
15 can testify before the Court before we employ, as a first resort or even a second resort,
16 video link testimony for witnesses who we say are complicit in the crimes charged
17 and as found by the Pre-Trial Chamber in the confirmation decision.

18 PRESIDING JUDGE SCHMITT: Thank you very much, Mr Vanderpuye, for your remarks.
19 You correctly indicate that video link testimony is viva voce testimony, if you're looking at
20 Rule 67. And, of course, the problem can be that we have factual problems to accommodate
21 an appearance in the courtroom, what we will see.

22 And we have this Registry report, which mainly addresses the witnesses brought
23 forward by the Defence of Mr Arido. So I would like to hear from the Defence teams,
24 but perhaps firstly from Mr Taku, if you want to make any remarks on that.

25 MR TAKU: Your Honours, first, as you remember, the Prosecutor requested and contacted

1 some of the Defence witnesses. We haven't received the transcripts of the report. We want
2 the Prosecutor to disclose that as soon as possible. When we have all the information, we
3 will make a determination of the witnesses to call when -- we are still evaluating that, and as
4 the trial proceeds, we'll make a constant evaluation, of course with instructions to Mr Arido,
5 about the witnesses that tentatively we'll call. But for now we can state that the order of
6 presentation that we submitted to the Chamber remains unchanged. Mr Arido makes that
7 conscious decision in consideration of his Defence strategy, and I would not want to offer that
8 he will testify last.

9 With regard to one of the witnesses that they propose an option of video conference,
10 your Honours, we would love that witness to come here and testify viva voce with
11 regard to the issue raised in our opening statements that the witness comes here if it is
12 possible.

13 If, however, your Honours at the end of the day it's practically impossible, the VWU
14 will advise the Chamber, and your Honours will make a decision, which of course we
15 cannot challenge. All we want is that the truth should be done and a witness that
16 has so far that extensive invasion and violation of rights would actually properly
17 come here. Firstly, it will be cheaper, in terms of cost, than sending the whole
18 Court -- and to the complexity organising the video link, as your Honours said is
19 extremely tenuous. So we really want the witness to come.

20 But with other witness issues, your Honours, I will seek your permission for my case
21 manager, Mr Michael Rowse, who is coordinating with our colleague in the field to
22 provide the information. I'm not -- he is the one that is responding directly to the
23 victims and witness situation. If you give your permission, he will provide you
24 more information about this, your Honours.

25 PRESIDING JUDGE SCHMITT: I would like, Mr Taku, please, to further explore especially

1 concerning D24-9 and D24-12. You brought forward security concerns, but be mindful that
2 we are in open session.

3 MR TAKU: I'm sorry, your Honour. I'm so sorry about that, extremely sorry.

4 Also, we are reviewing our list of witnesses. I think one of the colleagues, the

5 Mangenda team, they, too, also requested and met some witnesses. We take into

6 consideration -- we take seriously observations made by our colleagues, and we will

7 review and maybe we're thinking seriously, your Honours, of advising the Chamber

8 about probably reducing the list of witnesses based on some other considerations; not

9 because of the content of the statement but some other considerations; and also

10 because of the difficulties some of them are facing in the countries where they reside,

11 which makes it difficult for them to travel here to testify already.

12 PRESIDING JUDGE SCHMITT: Let me express an impression that I have from the Registry

13 report that to put it a little bit basic, it could be worse, I think. So there are really some

14 witnesses who are able to appear here and others that we could establish video link, so we

15 will see what we will do with that.

16 Other Defence teams, do you want to make any remarks on that please?

17 MR POWLES: Your Honour, Mr President, if I may very briefly. As your Honours know,

18 D21-003 is due to testify by video link tomorrow and for the remainder of this week. May

19 we simply put on record that we join the concerns of the Prosecution. Our strong preference

20 would have been for D21-03 to give evidence live here in The Hague rather than by video

21 evidence, but we understand the positions and concerns of the VWU. However, our strong

22 preference would have been for him to give evidence before your Honours live.

23 PRESIDING JUDGE SCHMITT: Other Defence teams? Ms -- excuse me. This -- yes.

24 MR KILENDA: (Interpretation) Thank you. The Babala Defence team has no particular

25 observations and remains available for any discussions required regarding our single witness.

1 Thank you.

2 PRESIDING JUDGE SCHMITT: Thank you very much.

3 This concludes the hearing for today. A decision on this --

4 I received just an email that indicates that you wanted to raise an issue, Mrs Taylor.

5 So perhaps, Mr Powles, you'll give the floor -- you allow me to give the floor to

6 Mrs Taylor for the moment.

7 MS TAYLOR: Thank you, Mr President, your Honours.

8 I wanted to address the Chamber briefly regarding an issue concerning the holding

9 cell behind the courtroom.

10 Yesterday when I met with Mr Bemba, I was informed that it was necessary to keep

11 the door open, which means that the guards surveying the area can hear the

12 conversation.

13 Now, my conversations with Mr Bemba aren't particularly interesting, but they

14 should be privileged. And when I have the door open and guards can listen to it,

15 they're not. And regulation 97 of the regulations of the Registry states that visits

16 between counsel and the detainee can be visually surveyed but should not be listened

17 to either directly or indirectly.

18 Now, I understand that this is a security issue because there is no window in the door

19 and that that's something the Registry is looking into, but this trial looks to be short,

20 and I would hope that it would be solved before then and that we're not deprived of

21 the opportunity of having privileged visits in the meantime. So what I would

22 respectfully ask the Chamber is if the Registry can be directed to look into alternative

23 solutions. For example, if it is a security issue, I'm happy to be surveyed by a

24 medical detector or not to take any papers into the room, but I hope we can find a

25 solution which doesn't mean that we can't have privileged communication with our

1 client in the interim. Thank you.

2 PRESIDING JUDGE SCHMITT: Does the Prosecution want to answer to that?

3 MR VANDERPUYE: No, Mr President. I have no issue with it. But I notice that two of
4 my colleagues were standing up on the other side to address the Court, and I also have to
5 address the Court with respect to one particular issue.

6 PRESIDING JUDGE SCHMITT: So but first I would shortly address what Mrs Taylor has
7 said. We will explore possibilities with the Registry, and I'm -- let me put it this way: I
8 think I'm relatively confident that we will find a solution.

9 Mr Gosnell, please.

10 MR GOSNELL: Mr President, I rose hastily as this is a related matter. We have been
11 informed by the Registry that at the moment there is no private location for any consultation
12 between counsel and any of the other accused. And this has to do to some extent also with
13 authorisations as to where the accused may go in the building.

14 Hearing of evidence starts tomorrow morning.

15 It's important, for example, at the break that all of us have the opportunity to speak
16 with our clients confidentially, and so I would ask your Honours' assistance in
17 perhaps facilitating an answer, which I'm sure is being worked on diligently by the
18 Registry. But to bring this matter to your Honours' attention is something that is a
19 matter of importance. Thank you, your Honour.

20 PRESIDING JUDGE SCHMITT: Also, this is understandable, and we are mindful of it. I
21 cannot guarantee, of course, that we will solve this immediately, but we have taken note of it.
22 Mr Powles now.

23 MR POWLES: Yes. Many thanks, Mr President, your Honours. Of course, we join the
24 concerns of Mr Gosnell on behalf of Mr Kilolo.

25 On a separate matter, your Honours will, of course, have noted that Mr Kilolo and I

1 think some of the other accused arrived after your Honours this morning into court.

2 As your Honours may be aware, he must, as the others, be accompanied by guards

3 into court in the morning. He wanted me to assure you that no discourtesy was

4 meant by his arrival after your Honours. He was here and I think, like others, 30

5 minutes before the start of this morning's session. Thank you, your Honours.

6 PRESIDING JUDGE SCHMITT: Mr Kilenda.

7 MR KILENDA: (Interpretation) Thank you, your Honour. Similarly, I have much the

8 same concerns. We do not have our professional domicile here in The Hague. Other

9 counsel are based in London or wherever. We are primarily based in Brussels and, you see,
10 generally speaking, we receive clients in our offices.

11 Now, since we have clients here, perhaps our offices could be deemed to be our

12 professional domiciles; and if we could receive our witness -- correction, our clients in
13 our offices here, that would be very useful.

14 As for the various clients and the building, this building should be deemed to be the

15 Court of Justice of -- the very courthouse of the ICC, and an accused person who has

16 been released from detention should have the ability to move about within the

17 courthouse. Mr Arido was ordered out of one particular location yesterday as if he
18 were a simple petty thief or something like that.

19 Please keep this problem in mind, and I am sure you will find a much more humane

20 solution because my point of view is that our clients are considered to be convicted

21 persons already and, you know, they are entitled to dignity. And this is a serious

22 matter. I believe you will consider it seriously as well.

23 PRESIDING JUDGE SCHMITT: Thank you very much, Mr Kilenda, and now I give the floor
24 to Mrs Lyons.

25 MS LYONS: Thank you, your Honours. First of all, I would like to thank you for your

1 consideration of this matter, and I would like to support my previous colleague's remarks.

2 Unfortunately, I will say I have worked in situations where there is no space to have a
3 confidential discussion with one's client. This is not -- should not be the standard,
4 and I'm sure your Honours understand this.

5 We need to consult, especially during the proceedings themselves. And the two
6 conference rooms which VWU -- sorry, the Registry has allotted would be fine if there
7 were two out defendants. We have four people who are out.

8 And lastly, I just want to second the remarks of Maître Kilenda in respect to my client,
9 and this may be true for others as well. Any treatment of the defendants here, which
10 is disrespectful, presumes guilt, is objectively in violation of the Statute, and I know
11 it's not the kind of treatment which this Court supports, but sometimes the principles
12 are put in secondary place and the security concerns or logistical issues take first
13 place. It should be the other way around, and I'm sure that everyone in this
14 courtroom understands that position. Thank you.

15 PRESIDING JUDGE SCHMITT: Thank you, Mrs Lyons.

16 Mr Vanderpuye.

17 MR VANDERPUYE: Thank you, Mr President. The one issue that I wanted to raise
18 concerns a contact with a Defence witness, a Bemba Defence witness, who is an expert. We
19 had a conversation with this witness in the presence of Ms Taylor. You may recall our little
20 disagreement concerning that particular interaction.

21 Nevertheless, during the course of that conversation, the witness consented to
22 provide us with certain notes and other materials that he used to prepare his expert
23 report. His only caveat was whether the Bemba Defence was asserting any privilege
24 or some other issue with respect to that material.

25 It does not appear that that's the case. I don't know, Ms Taylor can address the

1 Court, but assuming that that's not the case, which I believe it to be -- which I believe
2 is so, what we propose to do is to contact the witness to have him provide the
3 material. He's already consented to it, so it's not a problem for me to provide it as
4 long as Ms Taylor doesn't have an issue with respect to the presentation of that
5 material pursuant to some privilege or other matter. So I was hoping we could just
6 resolve it really quickly today so that we can get on with it and be prepared for the
7 witness.

8 PRESIDING JUDGE SCHMITT: So can we solve this immediately, Mrs Taylor?

9 MS TAYLOR: Thank you, Mr President, your Honours.

10 As the Prosecutor has stated, during the interview, the witness stated that although
11 he himself had no objection, he would need to seek guidance from the Defence as he
12 himself was unfamiliar with the procedures at the ICC concerning disclosure of such
13 matters.

14 Now, the materials that have been requested are extraordinarily broad. The
15 Prosecution has requested all the emails, all records, all contacts between the witness
16 and the Defence. They have requested all invoices, including the breakdown of
17 hours worked on the case.

18 These are materials which are ordinarily confidential. For example, invoices of
19 expert witnesses, we're quite happy to disclose his rates and the amount given to him,
20 but these are provided to CSS. CSS invoices are protected by specific regulation in
21 the regulations of the Registry, which specifies that only CSS is entitled to these
22 documents.

23 Similarly, correspondence with a witness, we've already made our position clear in
24 this case last year is covered by a form of privilege to the extent it may concern or
25 involve Defence strategy or instructions.

1 We requested the Prosecution to articulate the legal basis for their request, and they
2 failed to do so.

3 We also indicated that the collection of a significant amount of the materials would
4 imply a significant workload for the witness, and we ask the Prosecution to specify
5 whether they would remunerate the witness. For example, they've asked him to
6 collect all the drafts, all notes, all kind of work product related to the report.

7 Now, this isn't work that the Defence should have to pay for, and we've made that
8 clear. But the Prosecution also needs to address the fact that the witness shouldn't be
9 expected to work for free for the Prosecution. Thank you, Mr President.

10 PRESIDING JUDGE SCHMITT: Mr Vanderpuye, please short, because we have really to
11 finish in five minutes.

12 MR VANDERPUYE: Mr President, first, the request is not directed to the Bemba Defence
13 but to the Bemba Defence's witness. We all understand that there is no property in a witness.
14 And to the extent that the witness himself has consented to the provision of that material, we
15 don't see that there is any legal basis for the request that is necessary because the witness has
16 simply said, "Sure, I'll give it, no problem." And it is of obvious relevance to the preparation
17 of the witness's evidence. Clearly the amount of time he spent on the report, the nature and
18 extent of the research that he did, the amount that he's being paid even with respect to the
19 production of the report on behalf of the Bemba Defence are all relevant to the credibility of
20 his evidence, the reliability of his evidence, the thoroughness with which it was carried out
21 and so on and so forth.

22 So that's I think relatively clear. In terms of whether the witness seeks to be
23 remunerated for preparing this material, A, that never arose during the course of the
24 conversation that we had during -- it did? Okay. Well, we can sort that out with
25 him separately if that's an issue. It hasn't been an issue so far. We are simply

1 asking -- we are simply asking the Court's permission to contact the witness to have
2 him produce the material. If the issue of remuneration arises there and it is an
3 obstacle, that is something that we will deal with, with the witness. Either he'll do it
4 for what we can pay him or what the Defence will pay him or he won't. But all we're
5 dealing with at this moment now is to transmit the request to the witness so that
6 we're not in violation of the Court's protocol. That's all.

7 PRESIDING JUDGE SCHMITT: Ms Taylor.

8 MS TAYLOR: Just very briefly. I would like to emphasise that the witness did put it within
9 the purview of the Defence. It wasn't that the witness said, "I will give it over." He said, "I
10 don't have a problem myself, but I defer to the Defence, I ask for their guidance."
11 And a lot of the emails concern issues of scheduling, issues concerning the witness's
12 own personal details and issues concerning Defence scheduling. It's very broad.
13 It's not limited to the issues directed by the Prosecution. Thank you.

14 PRESIDING JUDGE SCHMITT: So I think it is fair when I summarise this dialogue between
15 Mr Vanderpuye and Mrs Taylor that we cannot solve this problem immediately, so perhaps
16 we will have -- we have to think about it. Perhaps you have to make a request even. I don't
17 know how we can go further because it seems to be that this cannot be solved inter partes, to
18 put it this way, so we will have to look into that perhaps, too, in the near future.

19 A decision on all the other matters will be rendered in the near future too, meaning a
20 decision on the question of sequence of testimony and especially the question of video
21 link or appearance in the courtroom viva voce.

22 So this concludes the hearing for today. We will reconvene tomorrow at 9.30 and
23 start with the first witness.

24 THE COURT USHER: All rise.

25 (The hearing ends in open session at 11.27 a.m.)