

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
6 ICC-01/05-01/13
7 Presiding Judge Bertram Schmitt, Judge Marc Perrin de Brichambaut and
8 Judge Raul Pangalangan
9 Sentencing Hearing
10 Wednesday, 14 December 2016
11 (The sentencing hearing starts in open session at 9.31 a.m.)
12 THE COURT USHER: [9:31:09] All rise.
13 The International Criminal Court is now in session.
14 PRESIDING JUDGE SCHMITT: [9:31:25] I want to welcome everyone in the
15 courtroom today and ask the court officer please to call the case.
16 THE COURT OFFICER: [9:31:36] Situation in the Central African Republic in the
17 case of The Prosecutor versus Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba,
18 Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, case
19 number ICC-01/05-01/13.
20 PRESIDING JUDGE SCHMITT: Thank you very much.
21 I would ask again, like always, counsel, to introduce the teams.
22 MR VANDERPUYE: Thank you, Mr President. Good morning to you, your
23 Honours, everyone. Today the Prosecution is represented by to my far left Nema
24 Milaninia, to my immediate left Olivia Struyven, Sylvie Vidinha on the left second
25 row, Ester Kosova in the middle, Sylvie Wakchom to her right, to Miss Wakchom's

1 right Meritxell Regue and in the back is Adepeju Adewoye. Thank you, Mr
2 President. Kweku Vanderpuye.

3 PRESIDING JUDGE SCHMITT: Thank you. And now for the Defence,
4 Mr Karnavas, please.

5 MR KARNAVAS: [9:32:35] Good morning, Mr President. Good morning, your
6 Honours. Good morning to everyone in or around the courtroom. Mr Kilolo is
7 represented by the same Defence team as he was yesterday and the day before.

8 PRESIDING JUDGE SCHMITT: Thank you.
9 Mr Taku.

10 MR TAKU: Good morning, your Honours. I appear for Mr Arido, who is present.
11 With me is Michael Rowse.

12 PRESIDING JUDGE SCHMITT: Mr Gosnell.

13 MR GOSNELL: Good morning, Mr President. Appearances for Mr Mangenda are
14 the same as yesterday. Thank you.

15 PRESIDING JUDGE SCHMITT: Mr Kilenda.

16 MR KILENDA: (Microphone not activated)

17 THE INTERPRETER: [9:33:14] Microphone please, counsel.

18 PRESIDING JUDGE SCHMITT: It's good enough. I understand you nevertheless.

19 THE INTERPRETER: [9:33:22] Maître Kilenda's microphone is not on.

20 PRESIDING JUDGE SCHMITT: I think it will also be on the record. That's no
21 problem.

22 Mrs Taylor, please.

23 MS TAYLOR: Good morning, Mr President, your Honours. The Defence for
24 Mr Bemba is the same as yesterday. Thank you.

25 PRESIDING JUDGE SCHMITT: So and then I give Mr Taku the floor.

1 MR TAKU: May it please your Honours, on behalf of Mr Arido I extend greetings to
2 everyone here, and I extend greetings for the Christmas season that is coming, the
3 new year. Enjoy.

4 May it please Mr President, your Honours, on 19 October 2016, you delivered the
5 judgment in this case. In delivering the judgment, you underscored the severity of
6 the Article 70 offence for which Mr Arido and others were convicted. The reasons
7 you provided underscoring the severity of the offence were loud and clear. We took
8 notes, your Honours.

9 What is remarkable in your exercise of your wisdom in this case is that despite your
10 finding relating to the severity of the offence, you still found a place in your hearts to
11 make a well-reasoned decision allowing the convicts to remain on temporary release
12 pending sentencing. You exercised your decision on the side of mercy based on
13 strong legal, factual and human factors articulated in your decision. You took this
14 decision, the second you have done so, over strong objections by the Prosecutor,
15 based very much on the same argument he has presented in aggravation of sentences
16 in this case.

17 In taking the decision you took and will take again, you are not alone. The Pre-Trial
18 Judge who ordered Mr Arido detained in the first place ordered him released due to
19 the excessive nature of the pre-trial detention. On 24 October 2014, during the
20 pendency of this case and approximately one year before the start of the trial,
21 Pre-Trial Chamber II granted Mr Arido interim release.

22 On 29 May 2015, the Appeals Chamber declined to order Mr Arido to be detained
23 based on interests of justice following its finding that he had been released in error.
24 He stated, quote,

25 "However, given the specific situation of the suspects in this case, that is they were

1 ordered to be released on 21 October 2014, to which suspensive effect was not granted
2 by the Appeals Chamber and the length of time that passed since their release, the
3 Appeals Chamber finds that it would be in the interests of justice for the suspects to
4 be -- it will not be in the interests of justice for the suspects to be re-arrested because
5 of the reversal of the Impugned Decision."

6 Accordingly, despite reversing the Impugned Decision, the Appeals Chamber
7 decided in view of the exceptional circumstances to maintain the relief ordered
8 therein, in other words, their release of the suspects pending the Chamber
9 determination on the matter.

10 On 17 August 2015, following the delivery of a diplomatic note indicating that
11 Mr Arido had not caused any problems in his country, in the country he resides, the
12 Trial Chamber maintained the accused's liberty stating, "In relation to the 'good
13 conduct' argument made by the four accused, the Chamber considers that the length
14 of time that the four accused have been released, nearly 10 months, without incident
15 demonstrates that the expectation connected with the interim release previously
16 ordered has been fulfilled. The Prosecution presents no evidence, beyond mere
17 speculation, that any of the four accused have done anything while released to
18 suggest that they may constitute a flight risk, obstruct investigations or continue to
19 commit further crimes. The Chamber has only been presented with supporting
20 materials to the contrary, and specifically notes that three of the four accused wished
21 to attend the -- wished to attend the first trial status conference despite not being
22 required to attend, with two ultimately attending."

23 Finally, on 19 October 2016, the Trial Chamber seriously considered arguments made
24 by the Prosecution for -- by the Prosecution for Mr Arido to be returned to the
25 detention centre to await sentencing and your Honours rejected the invitation to do

1 so.

2 The Prosecutor has not presented compelling aggravating circumstances in support of
3 his submission seeking a sentence of 5 years against Mr Arido. The factors
4 submitted for consideration are premised on a misreading or misrepresentation of the
5 trial judgment.

6 Among the factors submitted by the Prosecutor for consideration in aggravation is the
7 need to send a clear warning to potential perpetrators against the administration of
8 justice.

9 The Arido Defence submits that this submission should be disregarded. Your
10 Honours were mindful in your judgment to state that this case was not about politics.
11 It was about four individuals who were tried and convicted for offences against the
12 administration of justice.

13 THE INTERPRETER: [9:39:22] Request from the interpreter. Could counsel please
14 slow down. Thank you.

15 MR TAKU: I might venture to add that this trial should not --

16 PRESIDING JUDGE SCHMITT: Mr Taku, I just come with information from the
17 interpreters. If you could speak a little bit slower.

18 MR TAKU: Thank you, your Honours, thank you. I'm so sorry, please.

19 The Arido Defence submits that this submission should be disregarded. Your
20 Honours were mindful in your judgment to state that this case was not about politics.
21 It was about four individuals who were tried and convicted for offences against the
22 administration of justice. I may venture to add that this trial should not be
23 transformed into an opportunity to stereotype and intimidate the Defence teams that
24 are making a great contribution towards the realisation of the objectives of the Rome
25 Treaty. It is not about satisfying the ideological needs of judicial activists and special

1 interests who hold respectable but distinct mandates in the service of international
2 criminal justice.

3 Your Honours again underscored your determination to protect the core values of
4 international justice by demonstrating your determination to protect the right of the
5 Defence even in a trial where, if reasonable brakes are not applied to the potential
6 exercise of prosecutorial power, one trial may potentially be transformed into an
7 unrestrained assault on the Defence and the ability of accused persons coming before
8 the Court to be effectively defended. This was demonstrated by your decision that
9 the Chamber would not allow the examination of P-256 to be transformed into an
10 occasion to explore other Article 70 cases and ruling from the Bench that the issue in
11 relation to the testimony of the witness was not about the actions of the Defence or
12 Defence counsel as such, only if this could be related to Mr Arido.

13 Your Honours, Mr Arido was convicted of a single offence under Article 70(1)(c) of
14 the Statute in conjunction with Article 25(3)(a) of the Statute of having corruptly
15 influenced witnesses D-2, D-3, D-4 and D-6.

16 The Arido Defence filed a sentencing brief in which it submitted many mitigating
17 factors and made and here again makes an impassioned plea for your Honours to
18 temper justice with mercy and sentence him to time served.

19 Mr Arido recognizes the severity of the offence for which he was convicted. He
20 accepts the general importance of deterrence as a consideration in sentencing in
21 international crimes, but agrees with the Appeals Chamber of the ICTY in Tadić that
22 this factor must not be accorded undue prominence in the overall assessment of the
23 sentences to be imposed on persons convicted by international tribunals. Tadić
24 sentencing appeal, paragraph 4.

25 Mr Arido knows that the time he has spent in this courtroom has permitted your

1 Honours to critically observe him. He prays very strongly that the humanity in him
2 should find a soft spot in your minds when deliberating over his fate and indirectly
3 that of his wife, his children, in particular (Redacted)
4 (Redacted) while he was far from home facing the ordeal of this trial and its enduring
5 consequences.

6 No ocean is big enough to accommodate the tears of his wife, the trauma suffered by
7 his daughter and the helplessness he finds himself in not being able to exercise
8 parental care that his family deserves.

9 As Mr Arido faces his ordeal, an ordeal that has taken him through solitary
10 confinement of about four months in France on the warrant of the ICC and about
11 seven months at the ICC detention centre and earned him the label and stigma of a
12 génocidaire, he often feels the painful voice, he often feels the painful voice of
13 (Redacted) who is a victim of parental misadventure with international justice. This
14 is bleeding -- this is a bleeding dagger on his conscience, on that of (Redacted)
15 (Redacted) forced by circumstances to struggle and struggle and struggle on the hope
16 that -- with hope and hope alone being her daily companion.

17 In this situation in which Mr Arido finds himself and all the convicts here, the
18 troubled continent of Africa needs them now than ever. I am hopeful, your Honours,
19 that an act of leniency in sentencing them will deliver a powerful message that,
20 although the ICC can be tough in deterring offences against the administration of
21 justice, it is not a vengeful institution baying for the blood of transgressors. For
22 persons like me, who have strongly supported the founding objectives of the Rome
23 Treaty but have been very critical of the exercise of prosecutorial discretion in the
24 selection of cases, which like this case has targeted Mr Arido but left untouched five
25 offenders without reasonable cause, among them Mr Kokate, who will point, who

1 will forever point to your wisdom and lenient exercise of your wide discretion as a
2 powerful exercise of your professionalism, your independence that are the bedrock of
3 integrity and justice that the founding spirit of the Rome Treaty is anchored on. For
4 vengeance and exceedingly harsh sentences are not attributes of criminal justice.
5 Lest we forget, when Jesus challenged the vengeful Pharisees that any of them who
6 had not sin should throw the first stone, all of them left, abandoning a lady who was
7 in an almost a hopeless situation and the Lord told the lady, "Go and sin no more."
8 And her soul was saved. And that left an enduring lesson to humanity to date and
9 potentially for posterity.

10 Your Honour, the personal circumstances of Mr Arido merits consideration as a
11 mitigating factor. He has no criminal record. We have made legal and factual
12 arguments in our sentencing brief supporting the different mitigating factors
13 available to him. Mr Arido has demonstrated good behaviour in detention and full
14 compliance with his temporary release conditions. He has continued to support his
15 family despite extremely difficult circumstances.

16 Following the threats to his security in relation to his participation with the Bemba
17 Main Case, with material aid from Cameroonian authorities, he fled to France.
18 There he sought asylum. He's grateful to the government and people of France for
19 being there for him in time of extreme need.

20 Mr Arido throughout his exile in Cameroon, then France and during his incarceration
21 has also tried to struggle financially and emotionally supporting his family. He's
22 married and has five children. Your Honours, your Honours had the opportunity to
23 see and hear the testimony of his lone witness and the ordeal of that witness.

24 Without going into details, I respectfully ask your Lordship to take the testimony of
25 that lone witness into consideration in mitigation.

1 Mr Arido has suffered the hardship of incarceration. The Defence invites the
2 Chamber to consider the time Mr Arido was detained in France as well as his very
3 constraining conditions of detention in France that included solitary confinement,
4 restricted communications with his family and his lawyer in mitigation of his
5 sentence.
6 Additional incarceration, particularly in a foreign country and/or a fine would
7 adversely impact upon his family life. Mr Arido has already served 11 months
8 incarceration. This has already caused an excessive hardship to him personally and
9 also to his family members. To impose additional incarceration, your Honours,
10 and/or a fine would increase this hardship and remove him from his place as a
11 contributing member to his family and to his new community in France. As the
12 Court is well aware, the family continues to struggle with the consequences of his
13 prior incarceration, exile and trial, (Redacted)
14 (Redacted) and the
15 stereotyping of his wife as the wife of a génocidaire and a convict at the ICC.
16 If additional incarceration were imposed by the Court, it is likely the custodial
17 sentence would be served in a country away from Mr Arido's family. By itself, this
18 will create an additional hardship as communication will become even more difficult.
19 Custodial visits will be impossible.
20 Secondly, due to Mr Arido's financial situation and legal situation as an asylum
21 seeker, a custodial sentence would place an additional hardship on the family still
22 struggling to heal itself, especially after again the (Redacted)
23 International courts have recognized previous good character and community service
24 as mitigating factors. In Fofana and others the Special Court for Sierra Leone Trial
25 Chamber commended Fofana's subsequent conduct in fostering peace process and

1 recognized it as a factor of mitigation for his sentence.

2 Here Mr Arido has demonstrated a long record of service in furtherance of peace,
3 democracy and the individual and collective good of his country.

4 Mr Arido's generosity to help other countrymen in need including D-2 and others
5 demonstrates his integral connection to his community. Mr Arido's commitment to
6 participate in the ICC proceedings resulted in violations to himself and his family.

7 We have provided a detailed discussion of these violations in our sentencing brief.

8 We will not belabour your Honours with that again.

9 The Prosecutor requests consecutive sentences. He has sought to do this since the
10 pre-trial phase. It is not supported by the ICC legal framework and leads to an
11 act -- leads to an absurdity where an individual convicted of Article 70 crimes could
12 face a longer sentence than those convicted of Article 5 crimes.

13 Through its judgment for a joint -- through his arguments for a joint conviction he
14 seeks to convert one, one conviction into four. He seeks to treat individual events as
15 separate offences to be sentenced individually. He seeks through this sentence to
16 attain the objectives of its multiple charges that were rejected by the confirmation
17 judge in paragraph 106 of the confirmation decision. While the Prosecution set out a
18 table of contents in its DCC, your Honours held in decision ICC-01/05-01/13-992 that
19 the confirmation decision takes precedence. That decision clearly combined the
20 counts into a single count and the conviction was on a single count.

21 Furthermore, he repeatedly uses the term "crime," not "offence." As for example at
22 paragraph 136, he therefore tries through a sleight of hand to equate the Article 70
23 convictions with Article 5 crimes.

24 The Prosecution, while not appealing any part of the judgment, is seeking through the
25 sentencing hearing to bring in new issues and arguments which go beyond the

1 charges in this case and what was decided in the judgment, and this is beyond
2 permissible limits.

3 Your Honours, to avoid duplication, what has already been stated in our brief, I will
4 confine myself to making a few observations on the Prosecution's sentencing brief
5 and points that arose since the witness testified, P-256 testified on 12 December 2016.
6 Through the Prosecution Witness P-256, the Prosecution sought to virtually hide new
7 charges, filed new charges. Elementary ICC procedure precludes new charges at
8 this stage.

9 On 12 December 2016, the Chamber reminded the Prosecutor that the permitted
10 Prosecution evidence in aggravation of sentence was to be adduced by Witness P-256
11 on the following points: The draft transcripts, page 37, lines 17 to 23, one, the
12 alleged forged document; two, alleged receipt of regular payments from Arido
13 through his wife; and allegedly giving a story about Arido's security situation. The
14 Defence submits that none of these factors was proof beyond a reasonable doubt.
15 The evidence adduced by the Prosecution and under cross-examination through this
16 witness significantly -- also, my Lord, let me repeat that, the evidence adduced by the
17 Prosecution and under cross-examination through this witness significantly eroded
18 the credibility and reliability of the Prosecution aggravating factors and significantly,
19 unfortunately significantly contradicted the trial findings contrary to the consistent
20 findings of the trial and the warnings of the Chamber.

21 The Defence additionally submits that the three points are uncharged offences, and
22 even if proved cannot be considered as aggravating factors.

23 In Krnojelac, the ICTY Trial Chamber, case number IT-97-25-T, judgment, 15 March
24 2002, paragraph 850, the ICTY Trial Chamber held that acts not charged in the
25 indictment will not be taken into account as aggravating factors, even if they were

1 proved beyond a reasonable doubt while holding, "An offender can only be sentenced
2 for conduct for which he has been convicted."

3 The purpose of calling Witness P-256 by the Prosecutor was to support or bolster the
4 unfounded allegations and misrepresentations submitted in paragraph 85, 86 and 87
5 of the Prosecution's sentencing brief for want of credible aggravating factors.

6 The tentative nature of the Prosecution sentencing submissions at the time it was filed
7 relating to Mr Arido in anticipation of prospective witness testimony of P-256 could
8 be excused. Although it was wholly unjustified to seek a stiff and unsubstantiated
9 sentence of 5 years against Mr Arido based on tentative, speculative evidence and a
10 misrepresentation of the evidence on the trial record as well as a misrepresentation of
11 the law, but that the Prosecutor repeated the allegations in his -- this allegation in his
12 sentencing brief at paragraph 84, lines 4 to 15 of the draft is wholly unjustified.

13 In its original October 11 October 2016 filing on P-256, the Prosecution claims that
14 during his interview P-256 confirmed, one, that he lied in the Main Case as to his
15 military status under instructions after being given money by Arido. This evidence,
16 your Honours, rule out completely that's not adduced because it relate to re-litigation
17 of the findings. That D-2, that D-2, otherwise known as P-260, D-3, also known as
18 P-245, were not part of the military. This again was not part of what your Honours
19 permitted that evidence was adduced about. But that he was approached by
20 members of the Arido Defence in the present case and asked to doctor a document to
21 support Arido's claims, a document which has since been formally submitted into
22 evidence by the Arido Defence, CAR-D24-0002-0003, and that he had received regular
23 payments from Arido through an intermediary. Of course the test factor was not
24 here about Arido's wife and the security situation which we've talked about.

25 At paragraph 85 of the Prosecution's sentencing submissions, he discusses evidence,

1 he discusses evidence of regular payments through an intermediary.

2 P-256 testified that he received money from a certain Nadège, who asked him to

3 support Mr Arido. Page 39 of the draft transcript.

4 Asked by the Prosecutor the question: "As far as you're concerned, where did that

5 money come from?" Page 40 line 1 to 2.

6 Answer: "She never told me where the money came from."

7 When the Prosecutor suggested that he had in his interview with the Prosecutor said

8 the money came from Mr Arido, Witness P-256 said, quote, "If I said so, it was

9 precipitous. She never told me the money came from Arido."

10 Arido Defence submits, submitted -- Arido Defence submitted an investigative report

11 from the director of legal services in the Ministry of Justice of the Republic of Central

12 Africa, discussed at page 41 of the draft transcript and also submitted into the record

13 negating this allegation.

14 The Prosecutor led no evidence concerning allegations that the Prosecutor laid against

15 Mr Arido on any security matter relating to Mr Arido. So we will not belabour the

16 Court on that.

17 The Prosecutor at paragraph 73 of his sentencing brief imputes acts which constitute

18 an Article 70 offence to Mr Arido. These include forged documents and seeking to

19 corruptly influence a witness.

20 In particular, the Prosecutor alleged that Mr Arido's Defence formally submitted into

21 evidence in this case the document I've talked about, a document P-256 would testify

22 he forged. The existing document which was obtained from P-256 -- the original

23 document the Prosecutor submitted which was obtained from P-256 is different from

24 the version disclosed by the Arido Defence as it does not include P-256 and 260's

25 names.

1 Similarly, the Arido Defence disclosed a statement allegedly sourced and signed by
2 Kokate attesting that P-256 was his bodyguard.

3 We respectfully urge the Court to dismiss all the purported aggravating factors as
4 speculative, unproven beyond reasonable doubt and unwarranted.

5 Furthermore, the Arido Defence urges the Trial Chamber to discountenance the
6 misrepresentation of the trial judgment in paragraphs 85, 86 and 87 of the Prosecution
7 brief and page 79 of the draft transcript.

8 The Arido Defence in response to the Prosecution's sentencing brief will refer to
9 answers provided by this witness that contradict or discredit the spurious allegations
10 made against Mr Arido and his Defence team on the basis of which the Prosecution's
11 submissions on aggravating factors are founded.

12 On the alleged instructions, the first point that we would bring the citation on is on
13 alleged instruction by Arido Defence to P-256 to forge, fabricate or alter a document.

14 The Arido Defence recorded a statement from Witness 256 on 24 August 2015. In the
15 statement the witness disclosed that he was a member of an organisation known as
16 collective des officiers libres.

17 In his testimony before the Chamber the witness testified and explained that it was
18 during the interview he granted the Arido Defence in which he recorded a statement
19 which he identified during trial and accepted that he signed that it was his statement
20 that he talked about producing a document to prove when asked to prove that he
21 belonged to the organisation, he said he had a document, he will produce a document
22 and requested for time to collect, look for the document in his country of residence at
23 the time.

24 When he went to collect the document the witness testified that he was arrested by
25 the security forces of that country where he resides and accused of very grievous

1 crimes, extremely grievous crimes. Interrogated for five hours. He promptly
2 reported to me and I called the director general of national security to protect him and
3 protect the material he had because he revealed to me that he had the document he
4 had promised to hand over to Maître Djunga, another counsel who was in the
5 sub-region to meet him, in other words, had he not been arrested, he will hand over
6 the document to Maître Djunga to bring.

7 And I promptly out of prudence, and also because there was a possibility, I feared for
8 the life of somebody welcomed under the protection of the Court and also on the
9 integrity of the documents he had that were going to be used for judicial proceedings,
10 I in an ex parte filing email informed your Lordships, in the letter informing your
11 Lordships I spoke about this document. At that time we had not seen a copy of the
12 document. But for your lordship to understand that the document, even before saw
13 it, even before he handed over the documents to us, we were aware of the documents,
14 we informed your Honours, and we informed the witness protection unit and
15 informed the members of the other Defence team. Our email, ex parte email in
16 which we mention this document and which we promptly sent to your Honours is in
17 evidence in this case.

18 Now, your Honours, the witness has testified that he subsequently lifted a signature
19 from another document and placed it on the document in order to prove to a member
20 of the Defence team that indeed he was a member of the organisation. That is
21 evidence here.

22 And when asked whether that member of the Defence was present at the time he
23 lifted the signature or added the names, each of them, because you have these two
24 versions, lifting the signature and also adding a name, either of these two versions, he
25 said he was never, he was never present, never. And the Prosecutor asked again,

1 "According to you, if you had shown the document to Mr Arido, would he have
2 known that it was a false document?" He says, "I don't know," page 33, lines 6 to 14.
3 Here the Prosecution's own witness is casting doubt about the serious allegations the
4 Prosecutor had made.

5 The Arido Defence submits that the regularity of the Arido investigation and the
6 professionalism which they handled this investigation is established by this
7 contemporaneous email we sent to your Honours, by the measures I took with the
8 director of national security in Cameroon and by talking to the police on the spot and
9 doing everything I could to save an individual that comes under the Court's
10 jurisdiction. But as he himself testified, your Honours, there is no need to repeat the
11 actions he took, which are in his statement, which are before you, because if I want to
12 describe these actions it could reveal his identity. And also I do not want to say or
13 do anything here that could further aggravate the Ongwen investigations and create
14 problems between two friendly countries. But that was the situation.

15 What else could a diligent defence team have done to protect the integrity of the
16 Court, the integrity of people who come before the Court to assist the Court to do
17 international justice and to protect the evidence that they themselves volunteer to
18 give to the Defence and to the Prosecutor and to the Court to enable the Court justice.
19 The evidence provided by this witness about the leaders of the two rebel movements,
20 Joachim Kokate and Abdoulaye Hissene, represented in that exhibit, who are
21 signatories, and the contents of the purpose of that assembly, the common political
22 objective shared by these two individuals and the testimony of the nature of the
23 relations between the witness and Joachim Kokate, again, which I will not describe,
24 but I will come back to it when I'm addressing you on the extraordinary influence
25 Kokate had on the witnesses in this case by the nature of their relationship that this

1 witness described between them, including when he visited Cameroon.

2 Your Honours, these actions that we took, this, the contents, the name, the role of

3 Kokate, which he ascribed to Kokate, and one of the most vicious rebel leaders in the

4 region Abdoulaye Hissene was destabilising and was to be of interest in any serious

5 international investigation. Kokate by this new evidence, he's a rebel leader now,

6 that should be of interest to any serious international investigation.

7 And this exhibit about this rebel group and this witness, I think this is a bit, bringing

8 forth the exhibit should be celebrated by any Prosecution intent on doing any serious

9 investigation. But who knows? Kokate is still out there. He's not here, and he

10 will never come into these proceedings, even though his shadow we find the ghost of

11 even in this courtroom now.

12 Now, your Honours, attempting to undermine the Arido Defence investigation, the

13 Prosecutor at page 28 of the draft transcript asked the witness, Prosecutor: "Were you

14 asked to bring any information with regard to the status of those two individuals?"

15 Your Honour, that's the next point, to see whether the evidence that he was to give

16 was coached, whether he was coached. That was the purpose of that question.

17 And his answer: "Well, there was an issue for me to prove that they were soldiers.

18 So I went and copy and pasted the genuine signature of P-260 on the liste des officiers

19 libres."

20 Now, this creates a problem for us because it gets into the heart of the decision that

21 we should not re-litigate issues which the Court has, because that Witness 260 merely

22 denied the signature, it's not his signature. But we have an individual here saying

23 that it was his real signature, but which he merely copy and pasted. So you have to

24 take that into consideration in disregarding this witness.

25 It is significant to point out, your Honours, your Honours, the Arido Defence submits

1 that the investigative procedure where questions are asked and request for proof are
2 made as standard investigation procedures that enabled investigators to obtain
3 evidence on the basis of which credible evaluations, assessments of credibility and
4 reliability of witnesses may be made.

5 In this case, the Prosecution investigator, whom I think is one of the most experienced
6 in this Court, reading through his investigative, very tough investigative questions he
7 asked in CAR-OTP-0094-1747, at page 1755, line 261, tab 16, asked the witness the
8 same question that our investigator asked, and it is in French, your Honours.

9 (Interpretation) "Do you have the original of this document?" (Speaks English) He
10 asked, he didn't just believe what he said, he asked proof. Any investigator which
11 does not ask, that makes serious allegations, serious claims, should approve, could be
12 sanctioned for negligence or being incompetent. He had to ask the right question.

13 Based on this request for an original of the document, the witness talked about doing
14 his interview, the witness submitted to the Prosecutor a number of documents which
15 were tendered during the hearing, the testimony of this witness. Under
16 cross-examination, your Honour, under cross-examination the witness, to the surprise
17 of everyone and probably also to the Prosecutor, because sometimes we have no
18 control over his witnesses, he admitted forging or tampering even with the supposed
19 original that the Prosecutor in his brief was using to compare with the one we had
20 and trying to discredit the document which the witness handed over to us in the
21 course of an official investigation approved by the Court.

22 And he relied on that to sentence 5 years for Mr Arido, and he did that allegedly by
23 comparing the alleged original documents provided by this witness and the
24 documents submitted by the Defence.

25 Your Honour, under cross-examination on page 59:

1 "Question: Now, Witness, look at the 0 in front of number 5 in the original
2 document. Don't you think somebody has pressed that 0 from all the other 0s in
3 front of number 5 on the original document, don't you think -- with the 0? Look at it
4 again carefully. The 0 in front of number 5 on the original document. Do you think
5 it has been tampered with?"

6 Line 21 the witness says, your Honours: "Yes, counsel, that is correct, counsel, yes,
7 yes. In this list it was redone, yes, that's correct."

8 Probably the Prosecutor was knowing about this for the first time. But for a witness
9 who was under suspicion and being investigated, he was on our witness list, and the
10 reason, one of the reasons apart from the investigation in Cameroon that we declined
11 to call him was because he was being investigated by the Prosecutor and we did not
12 see any reason how or we didn't see how we could contact him again without
13 permission from the Prosecutor without being -- falling under Article 70.

14 You heard the questions they were asking: Since February has any member of
15 Defence contacted you?

16 So where to meet him, to call -- we're to calling him. Those questions were
17 reasonable.

18 You'll say yes, and they say, Oh, let's, let's open an investigation. Let's seek an order
19 from -- send a judge to start listening to their communications. Let's start another
20 case.

21 Luckily, wisely, I call to my 37 years of practice as a lawyer, I knew that once the
22 Prosecutor, they have the wide, wide power investigating, once they said he was a
23 suspect, I took -- and I think I have demonstrated that professionalism throughout in
24 this case with, of course, the allowance that the witnesses that we meet every day,
25 they're common men and women, some of them may not be soldiers, some of them

1 might be combatants, some of them might be involved in different activities, but we
2 never can tell. Between the time that they testify in the first case and the time now,
3 they're in the world, nobody knows. So we take that into great consideration.
4 But I declined that we meet him again, and the client advised me no. But also, also
5 so because we got credible information that he had the intention of fleeing once he set
6 his foot in The Hague, and that we thought that we would do a disservice to the client
7 and to the Court if we got that information and still brought him here. Of course
8 there were drawn also inferences that would be even more serious on our part.
9 Your Honours, page 55, line 1 to 5, I asked him the question, "Where is the original?"
10 He said, "I no longer have it."
11 And you saw that purported original, he brought back one page. In other words, he
12 was not even forthcoming to the Prosecution. He told the investigators, "I'm going
13 to bring the original." He brought one page. That one page cannot be said to be the
14 original on the basis of which you can make a reasonable comparison with a 3-page
15 document, because on that 3-page document we have -- without the full document,
16 without the document from which he lifted the signatures, your Honour cannot make
17 a reasonable determination about the credibility and reliability of this witness. There
18 is just a lot missing. And what is his answer? "I destroy it. I cannot ever find it."
19 He doesn't give any comprehensive information from which your Honours can
20 reasonably see.
21 I understand that he incriminated himself. I should during the time I contact him be
22 defending him professionally. And I restrain, as I say, a lot of restraint as a
23 professional lawyer that I cannot have contacted somebody as a witness and be forced
24 in circumstances to use the evidence against him in the proceeding. And that's why
25 I apply to your Honours that nothing that I say in these proceedings should be used

1 against him, and they were asking whether he had an immunity either way, and that
2 nothing with regard to this witness, because he is different from other witnesses that
3 have come, that he was a witness for Arido in this case. He came under the
4 protection of Arido. His name had been communicated to the parties. The witness
5 protection unit has commenced obtaining a visa for him to come when upon getting
6 the additional information about the investigation in Cameroon, about the intention
7 to escape and about the fact that he was not a suspect in two serious investigations by
8 the Court and by national authority, I decided to drop him and to ask the Court to
9 discontinue.

10 Now, your Honour, I will not, and I hesitate, I'm not in any way suggesting that the
11 way this witness replied that there should be any imputation against the Prosecutor.
12 Professional men don't do that. He's a lawyer. He happens just to be there. I'm
13 here. We are colleagues. And after here we will return. And I hate casting
14 aspersions on -- so nobody should understand what I'm saying to interpret to say that
15 I'm casting aspersions on the Prosecutor, whom I respect very much. I'm talking
16 about the witness and the answers he gave before this Court.

17 Your Honours, the Arido Defence has submitted that most answers provided by this
18 witness undermine the findings of the Court. So this witness should be kept
19 completely away from these proceedings because most of the answers he gave, and I
20 will demonstrate how he undermines your findings.

21 He contradicts the findings in paragraph 334 of the judgment. On the matter of
22 ranks, attribution of ranks, he stated at page 32, lines 18 to 25:

23 "Question: Where did you get the ranks from?" That was a question from the
24 Prosecutor.

25 He said, "We just assigned the ranks haphazardly, just like that."

1 What do you mean by that?

2 Well, I gave him that rank to be brief."

3 He gave -- he said that he gave P-260 the rank. That contradicts materially the
4 finding of this Court. I wish he testified when he was supposed to, and it was not
5 for want of effort because from 2014, 26 February 2014, the Prosecutor communicated
6 a report in which he made many attempts to contact this individual. But every time
7 either he said he was sick or he gave some other reason, so but the fact is that he
8 didn't testify in this Court.

9 I wish, I wish he did and gave these answers. Maybe he was persuaded. I bet the
10 reality is that the standing decision by your Honours that the evidence adduced
11 should not in any way challenge the trial finding and we stand by that. I'm just
12 drawing your attention that these answers, most of the answers he gave indeed
13 challenge clarifying this.

14 Now, "And where did you get your own rank?

15 Since I had already mentioned that I was a warrant officer, I kept that rank.

16 When you say 'kept that rank,' what do you mean?

17 I have already told him" -- he already told 260 -- "I was a warrant officer, so I
18 maintained that position."

19 Page 27, lines 25 to 21:

20 "Question: Mr Witness, who asked you to say these things in this case, in this case
21 that you were supposed to come and testify here?"

22 Line 24: "Well, as you know, I knew P-260" -- that subsequently called the name, but
23 I use the protective name -- "and P-245 not long ago. In fact, they introduced
24 themselves to me and said -- and said they told me and had said, well, we came
25 across each other, we came across each other, because we were supposed to take part

1 in the trial, and they told me that -- and they told me that they were soldiers. But I
2 didn't have any proof as to whether they were soldiers or not. I had no knowledge
3 of this story.

4 And according to you, did Arido know that P-260 and -- did he know them?
5 Of course.

6 Question: Did you know how they had come to know each other?

7 Answer: Well, these people" -- they live in one capital city in a friendly
8 country -- "and thought, and I thought to myself that maybe they got to know each
9 other in that city."

10 Now, your Honour, from the extensive findings that you made in this case and these
11 answers that we are learning, we're learning from this witness, and I respect the
12 decision of the Court, that's why I'm pointing, I'm drawing this to your attention and
13 the attention of my colleagues.

14 Now, on the document of Kokate, the witness says that he did it when he went to
15 apply for asylum.

16 "Why did you provide that document to the Defence, that attestation to testify?

17 Answer: I gave it to the Defence to support the position whereby I had told" -- a
18 member of the Defence team -- "that I was part of the coalition des officiers libres."

19 He had told him, and we wanted to prove that he was, so he gave that attestation.

20 But, your Honours, this is an attestation that came before the Court previously. You
21 have the copy that was here. And the copy they brought here, the date had been
22 altered. I pointed that out, that the altering of the date must have been done after
23 that document was tendered here. And your Honours said that that document was
24 prepared for the Main Case. It was the finding of the Court. It was final.

25 So you assess the credibility of this witness from this, from this evidence. So you can

1 see, your Honours, I gave it to the Defence to support the position whereby I had told
2 them before that it was part, in other words, because of the presentation he had made
3 about himself, he was producing this document to support it because he really
4 wanted.

5 Now, your Honours, the appearance of the witness has one merit nevertheless, and
6 that merit is because he has brought back the focus at this crucial moment on one man,
7 Kokate. You will remember, your Honours, that on 31 May 2016, your Honour,
8 Honourable Judge Perrin de Brichambaut, I don't know if I pronounce the name well,
9 asked the Prosecutor to address the Chamber on Kokate. There is someone
10 mentioned here, Mr Kokate, the role of Kokate in the recruitment of witnesses in the
11 Main Case, the question of his influence regarding these witnesses and contents of
12 their testimony as mentioned in several occasions in the closing brief by the
13 Prosecutor and the Defence.

14 Your Honour, the Prosecutor did not directly address this, but Mr Kilolo spoke for
15 everyone here that the overwhelming influence of Kokate on the population in
16 Central African Republic, at the time the evidence we now know that the Prosecutor
17 had been investigating Central Africa for ten years now or more, we now know that
18 he now leads a rebellion.

19 And I'm a victim because, coming from Cameroon, what happens in Central Africa
20 ultimately, of course, we now have a war in all parts of Cameroon coming from the
21 north, from south, from east Africa, coming from -- and this individual, the activities
22 the evidence was led here was constituting this group in Cameroon, Yokadouma.

23 And finally we heard a witness who was very current about this individual.

24 And the question I asked in the face of this individual, Arido was a go-between, you
25 describe him as go-between, he was in the hierarchy of the military, he was a more

1 junior officer, but with this powerful individual, so powerful that the Prosecutor has
2 not even deemed it even to investigate to bring him here in this case, yet, at every
3 turn his name is mentioned, and it is the opportunity on your Honours to say that
4 with this new information from this witness, we cannot put the submission of the
5 Prosecutor for -- that a message should be sent through this trial, we can put in
6 perspective that for that message to be comprehensively held by the international
7 community, and of course that your message, you are the guarantors of international
8 justice. And of course, the Judges of this Court have performed so well, and those of
9 us who criticise the Court, we do not do that because of the judgments or before the
10 Judges. We do that on policy grounds, on the selectivity which I've written about,
11 which I talk about, which we see here. Out of five individuals, there is only one here.
12 And when he left, he wrote to 260 and told him, "I'm leaving." He didn't leave
13 quietly.
14 Please use your wisdom in this situation. He tried to help, to get him out. But
15 when you heard 245 -- no, 256 testifying, he calls him a chief. Oh, my goodness, in
16 Africa to call one a chief, for one to appropriate the title of a chief, the person, it is
17 unprecedented, it's unprecedented. But he called him a chief to the deference. That
18 situation, he will reduce a family man to a role that he plays, a family head. And he
19 came, he was present when -- the brief period Arido participated. He was a
20 go-between, but he was present himself.
21 Your Honours, it is but reasonable to conclude that the reason why the other did not
22 leave, abandoned, when Arido left was because Kokate was there. And if Kokate
23 can manipulate, he was their resource person, deceive counsel, deceive members of
24 Bemba's team including Bemba himself. And the reason he's not here, I tried to
25 bring him here, and I told him, "If you don't come, I will subpoena you." But when

1 the Prosecutor announced he was meeting him as a suspect, the Prosecutor has
2 primacy in these investigations than the Defence. He couldn't come.
3 But I wanted to put him here, as I said, that you are a politician, you are a senior
4 commander in the army, take responsibility for your action. Don't sacrifice. Don't
5 turn Arido into a matter, because people in Central Africa, people in Africa, people
6 around the world will look, yes, the Prosecutor is asking for 5 years. But what about
7 Kokate? What about the other accused? They are not victims.
8 The Prosecutor misconstrued one concept in law. I was at the ICTR, I was in
9 Semanza. I was in military, too, I was in Sierra Leone, the contempt proceedings in
10 Sierra Leone, Bomb Blast, Papa Hassan Bangura, I was in the case. My friend came
11 to Sierra Leone. We met there. I have been in all these cases. And in every case
12 they say the number of victims. They are not saying that. If you were to say five,
13 because there were five witnesses, in a pogrom in a genocide, will you now say
14 because 1 million, 1 million people, 1 million counts? No, your Honours. We say
15 you've made a determination that you keep to the confirmation decision. He was
16 convicted of one count. You take this into consideration, your Honours.
17 And for Arido to have been convicted, your trial findings at every turn talk about
18 Kokate, Kokate. He could well have been a witness if the Prosecution decided.
19 And therefore, your Honours, if Arido alone is put there, sent back to prison, yes,
20 your Honour have wide discretion, you've done justice, but the question will remain:
21 What message will the world get that Kokate, whom even the Prosecutor
22 acknowledges in filing before you was a mastermind is out there, probably now
23 running a rebellion in the very country where the Prosecutor on behalf of the
24 international community is fighting mass criminality, how will he not be encouraged?
25 How will not bringing him here not encourage impunity? How will punishing

1 Arido not send a message that, oh, the Court goes for soft targets but not strong men?
2 So your Honours, your Honours, just one minute, your Honours.
3 Now, your Honours, the Prosecutor invokes the report of the Open Society Initiative.
4 Your Honours, I will urge the Court, the Open Society may be right, they are
5 professionals and I respect them, but as I said, your Honours, that I've read most of
6 the decisions and your Honours do not want to be contributing to some form of
7 judicial activism. Maybe you may take decisions that accord with this, but to cite
8 Open Society, to rely on Open Society to make findings, your Honours, they've taken
9 very, very controversial positions particularly in the Kenya case. As you know, I
10 was one of the counsel in the Kenyan case, an aspect of the Kenya case. Open
11 Society took a very, very controversial position, I will stop at that, your Honours, and
12 they continue to play that role.
13 One of the problem of politicising, the politicising of international justice is not -- has
14 not to do -- it's not the ICC itself doing that. It's not the doing of the Office of the
15 Prosecutor, it's not the Court. It is these non-State actors who have their own
16 ideological perspective to international justice and who are in the field. They cannot
17 make a decision between politics and the rule of law. That brings problems.
18 And with all due respect, I respect Open Society, I know professionals work there, my
19 former legal assistant in Sierra Leone works there, and I have the utmost respect, but
20 from the opening statement that you made when you delivered the judgment, I pray
21 your Honours not even to look at this report.
22 Now, your Honours, the other point my colleagues had addressed, and I thank them
23 so much, I thank Chris, I thank Melinda Taylor, I thank Steve, I thank of course Mr.
24 Kilenda, I thank Mike. They addressed the law correctly. I adopt everything they
25 said, their understanding of the law in this. And I only want to say that your

1 Honours, with the preparatory material that's been sent, the diplomatic materials,
2 your Honours cannot be bound by that. You cannot be influenced by that. It was
3 before the Rome Statute, they were not adopted, they cannot even inspire that.
4 Unlike other travaux préparatoires that I see on the cases, it is disjointed, and most of
5 the countries that contributed did not finally join the Court. In fact, they oppose the
6 Court and unduly influenced -- tried to influence the Court in many ways. These are
7 the head -- this is the weak law that is afflicting the International Criminal Court.
8 Some of these countries that negotiated jumped out and made so many proposals.
9 Why they're out, they cannot be bound by what they did. It can't.
10 Your Honours, it is a jurisprudence that you -- jurisprudence that you will lay here
11 and that will guide us and future generations, not the work of politicians who were
12 negotiating the Rome Statute. Of course it has its own imperfections because it was
13 negotiated by Prosecutors -- I mean by politicians, but we'll have to deal with that.
14 Finally, your Honours, I see the Prosecutor using the word "obstructive conduct" of
15 course as an aggravating circumstance, obstructive conduct, but this is a crime itself,
16 these are elements of the crime itself, why it can be.
17 And also I have pointed out in our written submissions the Prosecutor double
18 counting, that in France he didn't cooperate, yet you made findings that immediately
19 he was arrested, he admitted that D-2, D-3, D-4 were not soldiers, even though he
20 defended himself, but that was your finding.
21 And also about the question of the money, that he didn't admit that Kilolo gave him
22 money. But your Honours have ruled on that in your decision that you will not
23 consider that, that factor. And the possibility of double counting, your Honours,
24 elements that or the evidence that you considered in making the determination
25 cannot be cited by the Prosecutor to aggravate, for aggravation of the sentence, your

1 Honours.

2 And so your Honours, with due respect, I think I should end here. I cannot say
3 everything within the timeline that I have. But I wish to thank your Honours, thank
4 the co-accused in this case, I thank the Office of the Prosecutor, that we'll have heated
5 discussions sometimes, but the bottom line is that we are lawyers and that our duty,
6 this case notwithstanding, we should try to strengthen the foundation of legal
7 practice. We should try to protect people who come here.

8 In making determinations in this case, your Honours will through this case try to
9 draw the line. And I think there should be some guidelines, policy statement by the
10 Office of the Prosecutor on matters like this. The objective of the Rome Statute
11 would be better served, your Honours, if the Prosecutor through international
12 cooperation and complementarity reaches an outreach so that people can better know
13 exactly what is wrong and what is right, because these trials, these investigations and
14 these convictions, your Honours, it is sad, it's not always easy. It's not always -- we
15 don't rejoice when we see someone going to jail. We don't rejoice when we see the
16 Democratic Republic of Congo on fire, when someone who should be the most
17 competent president is here, we don't rejoice when one of our best lawyers in the
18 sub-region, we find him here.

19 We don't rejoice when Mr Arido, whom the Cameroonian government, although a
20 refugee, appointed a member of the National Commission for Elections and the peace
21 efforts that he had been making for his country through convincing these warlords to
22 lay down arms, we don't rejoice to see him sitting here.

23 So your Honours, thank you so much. Thank you for this opportunity. And I will
24 end, your Honours, to say that your deliberations, your Honours, look at the
25 humanity in Mr Arido, look at the people under him and, your Honours, don't return

1 him to jail. You demonstrated many times that you could go in that direction and
2 perhaps give him time served.

3 Thanks so much, your Honours.

4 PRESIDING JUDGE SCHMITT: Thank you very much.

5 As Mr Taku has pointed out, there has been from time to time a heated debate in the
6 courtroom. But this is not only understandable, this is absolutely normal in a
7 courtroom to have it like that. But what I think I can say for the Chamber is that the
8 behaviour of counsel towards each other and towards the Chamber was always
9 respectful and courteous and I want to thank everybody here in the courtroom for
10 that.

11 This concludes the sentencing hearing. The Chamber would also like to thank all
12 those who have provided support, both in and outside the courtroom, including court
13 officer, translators of course, we thank them for their indulgence, the transcribers and
14 everyone else.

15 This concludes the hearing. The Chamber will retire to deliberate and announce in
16 due course a date for a further hearing when the final sentencing decision will be
17 rendered. Thank you.

18 THE COURT USHER: [10:51:14] All rise.

19 (The hearing ends in open session at 10.51 a.m.)