

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/05-01/08**

Date: **2 October 2014**

TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
V. JEAN-PIERRE BEMBA GOMBO**

Public Redacted document

Public Redacted version of: "Prosecution Response to 'Narcisse Arido's Request for Access to Confidential Filings and Decisions Related to Evidence Presented by the Bemba Defence Team'", 22 August 2014, ICC-01/05-01/08-3120-Conf

Source: The Office of the Prosecutor

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

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The Defence for Mr Narcisse Arido

I. Introduction

1. The Arido Defence in case ICC-01/05-01/13 (“Article 70 Case”) seeks access to two confidential filings and a decision in this case, and to any past or future filings or decisions related to material presented by the *Bemba* Defence concerning two defence witnesses and one Trial Chamber (“Chamber”) witness (“Three Witnesses”), [REDACTED] (“Request”).¹

2. The Prosecution does not oppose Arido’s access to the three confidential items sought, and to any decisions the Chamber may determine satisfy the Request. However, the Chamber should bear in mind that certain information (a) does not relate to the 14 documents listed in the Request (“Contested Documents”), (b) does not relate to any of the Three Witnesses and, (c) is not already public, which may affect the security of witnesses.

3. The Chamber should reject the request of Arido Defence for any past or future confidential filings related to any of the Contested Documents or to the credibility or reliability of the Three Witnesses. This request contravenes the Chamber’s previous rulings, as insufficiently specific. Further, as framed in the Request, the material sought may encompass unsubstantiated or even factually incorrect averments of counsel and thus be without probative value or materiality. The Prosecution defers to the Chamber however, with respect to the request for past and future decisions of the Chamber.

II. Confidentiality

4. This response is filed as “confidential” pursuant to Regulation 23*bis* of the Regulations of the Court, as it refers to a document filed with this classification.

¹ See ICC-01/05-01/13; see ICC-01/05-01/08-3116-Conf and Conf-Anx.

III. Submissions

5. The Request, partially predicated upon submissions by the Defence of Arido's co-suspects in the Article 70 Case and on information in the public redacted versions of filings,² seeks access to confidential versions of ICC-01/05-01/08-2301 ("Prosecution's Request"); ICC-01/05-01/08-2326 ("Defence's Response") and confidential ICC-01/05-01/08-3019-Conf ("Admissibility Decision"). The Prosecution does not oppose the request.

6. However, the Admissibility Decision deals with several evidentiary items other than the Contested Documents or material related to the Three Witnesses—including expert reports, media articles, maps and witness statements. The Arido Defence should only be granted access to those parts of the Admissibility Decision related to the parties' submissions and the Chamber's reasoning regarding the Contested Documents or to any of the Three Witnesses. With regard to the Prosecution's Request and the Defence's Response, access should be similarly limited.³ This will ensure that any protective measures in place affecting the security of witness, other than the Three Witnesses, is not inadvertently compromised.

7. The Request is insufficiently defined as concerns access to any past or future confidential filings of the parties related to the Contested Documents or to the credibility or reliability of the Three Witnesses. The request is neither limited in scope, nor narrowly tailored to a specific identified purpose demonstrating the required necessity. Further, as framed, the Request is overbroad and encompasses information that may be unsubstantiated, unfounded and/or incorrect, and without

² ICC-01/05-01/08-3116-Conf and Conf-Annex, para. 4.

³ Although the Arido Defence refers to its knowledge of the identity of the two [REDACTED] witnesses referred to in these filings (see ICC-01/05-01/08-3116-Conf and Conf-Annex, para. 9), this might not be the case for the witnesses mentioned for example in paragraph 5 or 43 of the Defence Response.

any evidential value or informational reliability. In this respect the Request should be rejected.

A. The Admissibility Decision, the Prosecution's Request and the Defence's Response do not constitute Article 67(2) material

8. Contrary to the Request,⁴ there has been no violation of Article 67(2) of the Statute. First, the article specifically refers to 'evidence' in the Prosecution's possession or control. It cannot be read, as the Arido Defence suggests, to include parties' submissions or comments made on evidence.

9. Second, the Request omits salient facts and circumstances of which the Arido Defence is fully aware and which bear directly on its incorrect characterisation of the Chamber's Admissibility Decision and the parties' respective submissions as falling under Article 67(2). The filings and decision requested did not take into account, inter alia, [REDACTED] statements, forensic data extracted from [REDACTED], or audio recordings of Article 70 case suspects [REDACTED], which render them well outside the substantive scope of Article 67(2).

10. Further, the Admissibility Decision is not a final determination of the authenticity of the Contested Documents. It is a preliminary determination of admissibility according to a three-part test. The Chamber made clear that it had not taken a final decision regarding the authenticity of the Contested Documents.⁵

11. Third, although the Article 70 Case arises from this case, the Chamber's preliminary assessment in no way binds Pre-Trial Chamber II ("PTC II"), which is free to make its own assessment of the Contested Documents in the context of the

⁴ ICC-01/05-01/08-3116-Conf and Conf-Annex, para. 13.

⁵ ICC-01/05-01/08-3019-Conf, para. 50.

Article 70 Case. Similarly, PTC II is not bound by any current or future findings of this Chamber in this regard.

12. The Request thus fails to make out any basis for its contention that the filings sought fall within Article 67(2).

B. The Request for past and future filings is insufficiently specific

13. The requested access to numerous unidentified filings of the parties that may contain “any information regarding” the Three Witnesses or related to the Contested Documents is overbroad and unjustified. The request also contravenes this Chamber’s previous rulings on the matter, holding that “any request for access to a document classified as ‘confidential’, ‘ex parte’, or ‘under seal’ *must be specific* and would need to be assessed in light of the nature and content of the document. Moreover, a legal and factual justification for such a request must be provided.”⁶

14. The Request manifestly fails to meet this threshold, and should be rejected accordingly.

C. Deferral to the Trial Chamber’s discretion

15. As the Prosecution considers that the decisions of a Chamber may be accorded greater potential evidentiary consideration than the submissions of the parties, the Prosecution does not object to the Chamber providing the Arido Defence with access to past and future decisions in its discretion, notwithstanding the insufficiency of the Request.

⁶ ICC-01/05-01/08-2972, para. 9 (emphasis added).

IV. Relief Sought

16. The Prosecution does not oppose the Arido Defence's access to the Prosecution's Request, the Defence's Response and the Admissibility Decision bearing in mind that certain information may have security implications for witnesses, namely information that (a) does not relate to the Contested Documents, (b) does not relate to any of the Three Witnesses and (c) is not in the public domain.

17. The Arido Defence's request for access to any past or future confidential filings of the parties related to the Contested Documents or to the credibility or reliability of the Three Witnesses, should be rejected as insufficiently specific and overbroad.



Fatou Bensouda, Prosecutor

Dated this 2nd Day of October 2014

At The Hague, The Netherlands