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**International
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Date: **10 March 2015**

TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Robert Fremr

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO,
AIMÉ KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE
BABALA WANDU AND NARCISSE ARIDO**

Confidential

**Narcisse Arido's Response to the 'Prosecution's Request for the Production of
Evidence' (ICC-01/05-01/13-820-Conf)**

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

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I. INTRODUCTION

1. On 17 February 2015, the Prosecution requested the Trial Chamber to order the Kilolo Defence team to produce all prior statements of Defence witnesses in the case of *Prosecutor v. Bemba* (ICC-01/05-01/08, hereinafter 'Main Case').¹ The Prosecution argues that the requested documents constitute evidence in the present case and are probative of matters placed at issue by the Kilolo Defence.²

2. Despite naming its request one for "production of evidence", the Prosecution is in fact asking the Trial Chamber to issue a disclosure order to the Kilolo Defence. The Arido Defence opposes the Prosecution's Request for the reasons set out below.

II. CLASSIFICATION

3. Pursuant to Regulation 23*bis* (2) of the Regulations of the Court ('RoC'), this response is submitted confidentially as it relates to a filing of the same classification.

III. PROCEDURAL HISTORY

4. On 11 November 2014, Pre-Trial Chamber II confirmed parts of the Article 70 charges against Mr. Bemba, Mr. Kilolo, Mr. Mangenda, Mr. Babala, and Mr. Arido, and committed the case for trial.³

5. On 6 January 2015, the Office of the Prosecution requested Pre-Trial Chamber II to order the current and former composition of the Bemba Defence in the Main Case to preserve the full record of interviews of Defence witnesses, and particularly the prior statements of the fourteen witnesses who the Prosecution submits are relevant to the confirmed charges.⁴ On 23 January 2015, Pre-Trial Chamber II dismissed the Prosecution's request, stating that it was not appropriate for it to exercise its powers in relation to the production of evidence at this stage. It further held that it was not satisfied that the Prosecution's request referred to a scenario whereby the requested items may not be available for trial.⁵

¹ ICC-01/05-01/13-820-Conf, hereinafter 'Prosecution's Request'.

² Prosecution's Request, paras 4-6.

³ ICC-01/05-01/13-749.

⁴ ICC-01/05-01/13-788-Conf.

⁵ ICC-01/05-01/13-799.

6. On 30 January 2015, the Presidency constituted Trial Chamber VII and assigned it to the present case.⁶ Judge Chile Eboe-Osuji was appointed presiding judge on 13 February 2015.⁷

IV. SUBMISSIONS

7. In its Request, the Prosecution asks the Trial Chamber to order Kilolo Defence team to disclose the full record of interviews with fourteen Defence witnesses in the Main Case,⁸ including audio recordings and transcriptions of the interviews, interview notes and, where available, their translations.⁹ The Prosecution argues that this material is not protected by any privilege, that it constitutes evidence in the Article 70 case, that it is necessary for the determination of matters placed at issue by Mr. Kilolo as well as for the discharge of the Prosecution's obligations under Article 54 (1) (a) of the Statute.¹⁰

8. The Arido Defence submits that the Prosecution's Request is inadmissible, as it should have been addressed to the Trial Chamber in charge of the Main Case. Further, it notes that the Prosecution's ability to investigate is limited at this stage. In any event, the Arido Defence submits that the items for which the Prosecution seeks disclosure do not form part of the materials which are subject to Defence disclosure, and that granting the Prosecution's Request would violate Mr. Kilolo's right to remain silent and his privilege against self-incrimination. Each point is addressed in parts A to D below.

A. The Prosecution Request should be addressed to Trial Chamber III

9. The Prosecution is seeking an order related to the disclosure of documents allegedly obtained in the context of the Main Case. The Arido Defence was not involved in this case, and is therefore unable to provide a position as to whether or not the requested documents do in fact exist. Notwithstanding this fact, the Arido Defence submits that the Prosecution's Request should be addressed to the Trial Chamber in charge of the Main Case, namely Trial Chamber III, and directed towards the Defence team of Mr. Bemba in this case. As a result, it is submitted that it is not within the powers of the Trial Chamber to issue an order on the disclosure of documents

⁶ ICC-01/05-01/13-805.

⁷ ICC-01/05-01/13-817.

⁸ Namely D-2, D-3, D-4, D-6, D-13, D-15, D-23, D-25, D-26, D-29, D-54, D-55, D-57 and D-64, *see* Prosecution's Request, fn. 1.

⁹ Prosecution's Request, para. 1.

¹⁰ *Ibid.*, para. 2.

allegedly obtained in the Main Case. On this basis alone, the Prosecution Motion should be dismissed.

10. Should the Trial Chamber find that it is properly seized of the matter, the Arido Defence opposes the Prosecution's Request for the reasons stated below.

B. The gathering of evidence post confirmation of charges phase by the Prosecution is subject to strict limitations

11. As a preliminary matter, the Arido Defence wishes to emphasise that the Prosecution's ability to continue investigation once the charges have been confirmed is not unlimited. The Prosecution has been investigating the present case since June 2012.¹¹ During its investigations, it shall "ensure that all necessary and reasonable enquiries are made [...] whether they point to the guilt or the innocence of the suspect".¹² The Prosecution has been in contact with a large number of individuals whom it alleges have testified falsely on behalf of Mr. Bemba in the Main Case and has had ample opportunities to gather evidence against the Accused in the present case.

12. While there is no legal prohibition as such for the Prosecution to continue investigations after the confirmation phase, Trial Chambers have consistently held that the Prosecution's investigation should largely be completed at the stage of the confirmation of charges hearing.¹³ The Prosecution is well aware of this duty, and stated in the Main Case that it was the Prosecution's "policy" to be "as close to trial ready as possible" at the time of confirmation.¹⁴

13. In particular, the Prosecution should not continue investigating post-confirmation for the purpose of collecting evidence which it could reasonably have been expected to have collected prior to confirmation.¹⁵ This is precisely the case here. The Prosecution should not be permitted to "complement" its case by seeking an order to Mr. Kilolo to provide documents which allegedly support the Prosecution's case.

14. The Arido Defence submits that any further investigation by the Prosecution following the confirmation of the charges should be subject to strict limitations and may be appropriate only

¹¹ ICC-01/05-01/13-597-Conf-AnxB, paras 22-27.

¹² Code of Conduct for the Office of the Prosecution, N. OTP2013/024322, Article 48 (c).

¹³ ICC-02/11-01/11-432, para 25; ICC-01/09-02/11-728, para. 119.

¹⁴ ICC-01/05-01/13-T-2-ENG, T. 10, l. 6-9.

¹⁵ ICC-01/09-02/11-728, para. 121.

when it relates to evidence which the Prosecution could not have discovered or obtained prior to confirmation with reasonable diligence.¹⁶

C. The requested materials do not fall within the categories of items subject to disclosure under Rule 78 or Rule 79 (1) of the RPE

15. The question of Defence disclosure obligations is regulated by Rules 78 and 79 of the RPE. In the *Lubanga* case, Trial Chamber I listed the various situations in which a Trial Chamber could order disclosure from the Defence. This included cases where the Defence presented the defence of alibi or a defence excluding criminal responsibility, the inspection of any documents or tangible materials which are intended for use by the Defence during the trial, the summary of the evidence the accused is to rely on, the number and identity of witnesses, the witness statements, the issues to be raised and the evidence to be used for trial.¹⁷

16. It is without controversy that the disclosure obligations for the Prosecution and the Defence differ significantly, in light of their different roles and obligations.¹⁸ The Prosecution bears the burden of proof to demonstrate the guilt of the Accused beyond any reasonable doubt.¹⁹ It must investigate both incriminating and exonerating circumstances.²⁰ As a result, the Prosecution's disclosure obligations under Rule 77 are more extensive than those provided for the Defence in Rule 78. The requirement for the Prosecution to provide the Defence the opportunity to inspect items that are material to the preparation of the Defence is not mirrored

¹⁶ ICC-01/09-02/11-728, para. 120.

¹⁷ ICC-01/04-01/06-1235, paras 29-31; *see also* "At least until after the Prosecution's case, the Defence is not under any obligation to provide the Prosecution with any information that could reveal its strategy, except for the defences set out in Rule 79(1), Rule 80 and the material that the Defence intends to use in cross-examination of Prosecution witnesses", in ICC-01/04-01/07-2388, para. 49.

¹⁸ "The defence has limited disclosure obligations in comparison with those of the prosecution", ICC-01/04-01/06-2433, para. 47; "[T]here are real limitations on the extent to which the Chamber can force the Defence to disclose the full detail of what witnesses are going to say in advance. [...] [T]he principle is that the Chamber must only order that which is properly within our powers and we have decided, certainly for the purposes of this trial, that there are limitations" in ICC-01/04-01/06-T-254-Red3-ENG, l. 3-16; "The overall positions of the prosecution and the defence are not the same - there are self-evident differences in their roles, in the length of their respective investigative involvement in the case and in the resources available to each of them. Although this divergence does not *ipso facto* lead to unequal or different disclosure obligations, it is an important factor that the Court must bear in mind, so as to ensure that the requirements which a Chamber imposes are fair and proportionate" in ICC-01/04-01/06-2192-Red, para. 54, *see also* para. 63; "[T]he Statute's framework does not provide for a reciprocal disclosure regime. The disclosure obligations of the Prosecution and the Defence differ significantly, because of the particular roles that these two parties have at trial. While the Prosecution bears the burden of proof and has to investigate both incriminating and exonerating circumstances pursuant to Article 54(l)(a) of the Statute, the role of the Defence is largely reactive to the Prosecution's presentation of evidence. The Statute and the Rules impose on the Prosecution specific obligations of disclosure of incriminating and exculpatory material to the Defence, in time to allow the accused to adequately prepare its defence. Different and more limited disclosure obligations are imposed on the Defence by Rules 78 and 79 of the Rules" in ICC-01/04-01/07-2388, para. 36.

¹⁹ Article 66 (2) and (3) of the Statute.

²⁰ Article 54 (1) (a) of the Statute.

in Rule 78,²¹ and the wording of Rule 78 is clear: only items which the Defence intends to use as evidence are the subject of disclosure.

17. In the present case, and unlike what the Prosecution purports to present, the requested materials do not constitute evidence in the present case.²² They have never been used in the present case, and there is no indication that the Kilolo Defence, or another Defence team, intends to use them - should they exist - as evidence in the present case. In particular, the Kilolo Defence team has not indicated whether it intends to present a Defence case, and should not be required to indicate its position on this matter until after the closing of the Prosecution's case. Absence an indication from the Kilolo Defence (or any other Defence team) that they intend to rely on the requested material at trial, Rule 78 does not apply to the present situation.

18. Furthermore, the Defence's disclosure obligations do not include the provision of witness statements, or, as the Prosecution requests in the present case, audio recording of witness interviews or interviewer notes. The various Trial Chambers of the Court have consistently held that a summary of key elements that each witness will address during his or her testimony was sufficient to assist the Prosecution to properly prepare for trial, assuming it contains a minimum of information related to the witness and his/her expected testimony.²³ The disclosure of interviewer notes or audio recording further form part of the items which are not subjected to disclosure, in accordance with Rule 81 (1) of the RPE, as they are internal documents.

D. The use of the Trial Chamber's powers to order disclosure would result in a violation of the fair trial rights of Mr. Kilolo

19. While, under Rule 79 (4) of the RPE, the Trial Chamber can "order the disclosure of any other evidence",²⁴ the Arido Defence submits that this provision is limited by the scope of the Rule, namely to items relates to these defences. Further, like Rule 78, it is limited to the disclosure

²¹ ICC-01/04-01/06-2192-Red, fn. 88; *see also* ICC-01/04-01/07-2388, para. 48.

²² Evidence is "the collective mass of things, especially testimony and exhibits, presented before a tribunal in a given dispute", *see* Black's Law Dictionary, Eighth Edition, p. 595.

²³ *See e.g. in Katanga and Ngudjolo*: "either with statements of the witnesses they intend to call to testify, or with a summary of the key elements that each witness will address during his or her testimony", ICC-01/04-01/07-2388, para. 60; *Bemba* "the statements of the witnesses whom it intends to call to testify, or a summary of the key elements that each witness will address during his or her testimony", ICC-01/05-01/08-2141, para. 36; *see also* Bemba: "While Trial Chamber I required that the defence disclose summaries of its witness statements, but denied the prosecution's request for disclosure of formal witness statements, Trial Chamber II required the defence to provide statements for the witnesses it intended to call, or a summary of the key elements of the witnesses' testimony, no later than two weeks before the opening of the defence case", ICC-01/05-01/08-2141, para. 26; *see further* ICC-01/04-01/06-2192-red, paras 58, 71.

²⁴ ICC-01/04-01/06-1235, para. 30.

of information only in the case the Accused decides to advance a positive case, thereby waiving his right to silence.²⁵ The same reasoning applies to the powers of the Chamber under Article 64 (3) (c) and (6) (d) of the Statute, Rule 84 of the RPE, and Regulation 54 (f) of the Regulations of the Court.

20. Should the Trial Chamber disagree with this interpretation, the Arido Defence submits that in deciding whether to grant the Prosecution's Request, the Trial Chamber must act in accordance with its duty to ensure that any discretionary order it makes regarding Defence disclosure does not derogate from the accused's right to a fair and impartial hearing in which his rights are fully safeguarded.²⁶ The powers of a Trial Chamber regarding Defence disclosure must also be interpreted consistently with internationally recognised human rights, in accordance with Article 21 (3) of the Statute.

21. Mr. Kilolo and all Accused before the Court are protected by a number of fundamental rights, including the presumption of innocence,²⁷ the right to remain silent and not to be compelled to testify or to confess guilt,²⁸ and the right not to have imposed on them any reversal of the burden of proof, or any onus of rebuttal.²⁹ These rights are "inviolable".³⁰

22. The right to remain silent and the right not to self-incriminate are the "starting-point" when considering the question of disclosure by the Defence, and must not be undermined by any obligations imposed on the Defence.³¹ The duty to uphold these protections falls with the Trial Chamber, in accordance with Article 64 (2) of the Statute.³² In the present Request, the Prosecution is asking the Trial Chamber to bypass those rights and to order Mr. Kilolo to produce materials which can be used against him, a situation which, the Arido Defence submits,

²⁵ ICC-01/04-01/06-1313, para. 13.

²⁶ ICC-01/04-01/06-2192-Red 2, para. 57, *citing to* ICC-01/04-01/06-1235-Corr-Anxl, para. 33; *see also* ICC-01/04-01/06-2192-Red, para. 68: "the fundamental protections for the accused include the presumption of innocence until his or her guilt is proved before the Court (Article 66(1) of the Statute) and the onus that rests on the Prosecutor throughout to establish the guilt of the accused (Article 66(2) of the Statute). Furthermore, he or she cannot "be compelled to testify or to confess guilt", and the accused has the right to remain silent, without the exercise of that right becoming a factor in the determination of his or her guilt or innocence (Article 67(l)(g) of the Statute). Critically, he also has the right not to incriminate himself"; *see further* ICC-01/04-01/07-2388, para. 40.

²⁷ Article 66 (1) of the Statute.

²⁸ Article 67 (1) (g) of the Statute.

²⁹ Article 67 (1) (i) of the Statute.

³⁰ ICC-01/04-01/06-1235, para. 27; *see also* ICC-01/04-01/06-2192-Red 2, para. 55.

³¹ ICC-01/04-01/06-1235-Con-Anx1, para. 27; *see also* Trial Chamber I in the *Lubanga* case: "The tension between the irreducible elements necessary for a fair trial (which include the right to silence) on the one hand, and the appropriate obligations of disclosure by the defence on the other, is not always easy to resolve" *in* ICC-01/04-01/06-2192-Red, para. 55.

³² ICC-01/04-01/06-1235-Con-Anx1, para. 27; *see also* ICC-01/04-01/06-2192-Red, para. 55.

would result in violating Mr. Kilolo's right to remain silent as well as his right not to self-incriminate.

1. The requested materials are sought to be obtained with a view to incriminate Mr. Kilolo

23. The Prosecution submits that the requested material is "actual and probative evidence of whether there has been improper interference with the testimony of witnesses in the Main case",³³ arguing that the substantive inconsistency between a witness' prior statements or interviews and their subsequent trial testimony may comprise strong evidence of witness tampering.³⁴ This clearly falls within the charges which have been confirmed against Mr. Kilolo and the other Accused by the Pre-Trial Chamber. As a result, the Prosecution's Request amounts to asking Mr. Kilolo to actively tend to the Prosecution material which will be used to incriminate him - an impermissible attempt against his right not to be compelled to provide evidence.

24. The Prosecution further states that the Kilolo Defence has "placed at issue the substance of the requested material" by arguing, in its submissions during the confirmation of charges proceedings, that the conduct underlying the charges in the present case simply amounted to reminding the witnesses of the contents of their prior statements.³⁵ The Prosecution concludes that the "viability" of the Kilolo Defence's argument can only be "fairly tested" by a comparison of the witness' prior statements/interviews with their subsequent trial testimony and the contents of intercepted telephone conversations between Defence witnesses and Mr. Kilolo.³⁶

25. While it attempts to present the question of its request as one that would "serves both parties' interest and is in the interest of justice",³⁷ the Prosecution in fact tries to collect additional evidence against the Accused in the present case. It seeks access to the requested material in order to demonstrate that there has been improper interference with the testimony of witnesses in the Main Case³⁸ and in order to test the "viability" of arguments allegedly presented by the Kilolo Defence during the confirmation of charge proceedings.³⁹ This clearly falls within the category of incriminating materials. The Prosecution's position is misguided: it is the Prosecution which bears the burden of proof and the Defence which "tests" the Prosecution's evidence at

³³ Prosecution's Request, para. 4.

³⁴ Prosecution's Request, para. 4.

³⁵ Prosecution's Request, para. 5, fn. 2.

³⁶ Prosecution's Request, para. 6.

³⁷ Prosecution's Request, para. 9.

³⁸ Prosecution's Request, para. 4.

³⁹ Prosecution's Request, para. 6.

this present stage of the trial. The Prosecution's Request is premised on a misconception of the roles and obligations of the Defence and of its own role, and, if granted, would amount to an inadmissible reversal of the burden of proof.

26. Finally, the Prosecution's statement that the Kilolo Defence presented such materials as exonerating and that therefore their disclosure is required in order to assist the Prosecution to fulfill its obligations under Article 54 (1) (a) of the Statute⁴⁰ is in direct contradiction with its statement that such materials would permit to "test" the arguments put forwards by the Kilolo Defence. Should this be the case, the information is already in possession of the Kilolo Defence and is therefore not required to be re-disclosed by the Prosecution. The Arido Defence also emphasises that Article 54 (1) of the Statute also includes the duty of the Prosecution to "fully respect the rights of persons arising under this Statute", including the right to remain silent and the protection against self-incrimination.⁴¹

2. Granting the Prosecution's Request would violate Mr. Kilolo's right not to incriminate himself

27. While the Prosecution's statement that the disclosure of evidence from the Defence is not *per se* inconsistent with an Accused's privilege against self-incrimination is correct,⁴² this is true in relation to items that the Defence intends to use as evidence for trial.⁴³ As stated above, the Kilolo Defence has not indicated its intention to use the requested materials at trial. In fact, it has not even indicated its intention to present a Defence case at all. Mr. Kilolo's right to remain silent can only be waived should he decide to present evidence, a choice which can only be made upon conclusion of the presentation of evidence by the Prosecution.⁴⁴ As a result, should the Kilolo Defence eventually decide to rely upon the requested materials for the presentation of its Defence during trial, such items will be subject to disclosure by the Prosecution under Rule 78 of the RPE.⁴⁵ The Prosecution's Request is therefore premature.

⁴⁰ Prosecution's Request, paras 2, 12.

⁴¹ Article 54 (1) (c) of the Statute.

⁴² Prosecution's Request, para. 11.

⁴³ See *supra*, fn. 17-18.

⁴⁴ See *e.g.* "the Chamber is also of the view that the filing of an outline by the defence will not contravene the right of the accused to remain silent pursuant to Article 67(I)(g) of the Statute, since the accused - at least in part - waives that right if he chooses to present evidence", ICC-01/05-01/08-2141, para. 32; see also TC III in the Bemba case, recognised "the defence's right not to be obliged to disclose its strategy before the conclusion of the prosecution's presentation of evidence and any potential evidence from the victims ICC-01/05-01/08-2141, para. 33.

⁴⁵ See *e.g.* "The Defence for their part have indicated that at this moment in time no firm decisions have been made in relation to advancing any positive case at all as opposed to testing your case. Our view, in those circumstances, is that if that is the position, that is the position; and if the Defence have not made up their minds in relation to a positive

28. As a result, the Prosecution's desired compulsion directed at Mr. Kilolo to hand over potentially incriminating material amounts to a violation of Mr. Kilolo's right not to self-incriminate. This position is supported by the case law of Trial Chamber I in the *Lubanga* case. The jurisprudence of the European Court of Human Rights ('ECtHR') and the International Criminal Tribunal for the Former Yugoslavia ('ICTY') also support the fact that compelling an Accused to provide materials which can be used against him/her in criminal proceedings violates both his/her right to remain silent and his/her privilege against self-incrimination.

29. In the *Lubanga* case, the Prosecution asked Trial Chamber I to order the Defence to disclose photographs of the witnesses it intended to call at trial, in order to show them to its own witnesses to obtain information as to whether they knew them and any other relevant information.⁴⁶ Trial Chamber I rejected the Prosecution's request, holding that "There is a clear and important dividing line between, on the one hand, the legitimate obligation that can be imposed by a Chamber on the accused to disclose in advance the summaries of the evidence of the witnesses he intends to call and to afford inspection of the other evidence he anticipates using during the trial, and, on the other, the accused's right to remain silent and not to incriminate himself."⁴⁷ It concluded by finding that unless the Defence intended to use these photos during the trial, there were no legal basis in the Rome Statute Framework which would justify an order for their disclosure to the Prosecution, adding that they formed part of the defence background preparatory materials which are ordinarily protected from inspection.⁴⁸

30. The European Court of Human Rights has consistently held that requiring an individual to provide certain information for the purposes of an investigation violated his/her right to remain silent and not to self-incriminate. In the case of *Funke v. France*,⁴⁹ an individual for whom evidence was found that he possessed foreign bank accounts was asked to provide details of these accounts for the purpose of an investigation. The ECtHR concluded that an infringement of the right to remain silent and not to contribute to incriminating himself had occurred on the basis that: "customs secured Mr Funke's conviction in order to obtain certain documents which they believed must exist, although they were not certain of the fact. Being unable or unwilling to procure them by some other means, they attempted to compel the applicant himself to provide

case, we cannot seek to go down the road of seeking to compel them to reveal something which they have not made a decision about" in ICC-01/04-01/06-T-105-ENG, p. 12, l. 9-15.

⁴⁶ ICC-01/04-01/06-2192-Red.

⁴⁷ ICC-01/04-01/06-2192-Red, para. 70.

⁴⁸ ICC-01/04-01/06-2192-Red, para. 72.

⁴⁹ ECtHR, Case of *Funke v. France*, Application No. 10828/84, Judgement, 25 February 1993, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57809> ('*Funke v. France*').

the evidence of offences he had allegedly committed.”⁵⁰ In the *JB v. Switzerland* case, the ECtHR held that the right against self-incrimination “presupposes that the authorities seek to prove their case without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the person charged”.⁵¹

31. A similar approach was taken at the ICTY. In the *Delalić et al.* case, the Trial Chamber decided that Mr. Mucić did not have to provide a sample of his handwriting to help prove the authenticity of a letter, attributed to him, that contained incriminating content.⁵² In doing this, the Trial Chamber dismissed the Prosecution’s argument that the scope of the ICTY provision guarding against self-incrimination was limited only to testimonial evidence and not other supplementary evidence.⁵³ The Chamber reasoned that it was not the role of the Accused to assist the Prosecutions investigations⁵⁴ and that the true purpose of the ICTY provision was “to protect the innocent by insulating him from the effects of coercion from law enforcement authorities.”⁵⁵

32. The Arido Defence submits that the present Prosecution’s Request falls within the category of situations at hand in the aforementioned cases. The distinctive criterion is that Mr. Kilolo would be forced to actively hand over potentially incriminating material to the Prosecution. The production of this material is dependent upon the will of Mr. Kilolo, and on that basis falls within the scope of application of the right not incriminate oneself. This right would not be applicable to, for example, the taking of DNA samples, or other incriminating materials that can be reproduced independent of the will of the suspect.

33. The Arido Defence takes the position that granting the Prosecution’s Request would amount to a violation of the right to a fair trial to which Mr. Kilolo is entitled and should be denied on that basis.

⁵⁰ *Ibid.*, para. 44.

⁵¹ ECtHR, Case of *JB v. Switzerland*, Application No. 31827/96, Judgement, 3 August 2001, para. 64, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59449> (*JB v. Switzerland*).

⁵² ICTY, Case of *Prosecutor v. Delalić et al.*, Case No. IT-96-21, Decision on the Prosecution’s Oral Requests for the Admission of Exhibit 155 Into Evidence and for an Order to Compel the Accused, Zdravko Mucić, to Provide a Handwriting Sample’, 9 January 1998, available at: <http://www.icty.org/x/cases/mucic/tdec/en/80119EV2.htm> (*Delalić et al.* 9 January 1998 Decision).

⁵³ *Ibid.*, para. 39.

⁵⁴ *Ibid.*, para. 49.

⁵⁵ *Ibid.*, para. 58.

V. CONCLUSION

34. In light of the above, the Arido Defence respectfully requests the Trial Chamber to reject the Prosecution's Request.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'G. Sluiter', with a long horizontal stroke extending to the right.

Göran Sluiter, Counsel for Mr. Arido

Dated this 10th Day of March 2015

At Amsterdam, The Netherlands