

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **24 August 2015**

TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

***THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

Confidential Document

Prosecution's Response to the Arido Defence Request for Disclosure Orders

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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I. Introduction

1. The Defence fails to substantiate its request for a disclosure order, a review of the Main Case record, a Prosecution disclosure certification, and a temporary stay of proceedings ("Request").¹ The Request should be dismissed. *First*, the Request does not justify how the information sought is potentially exculpatory or material to the Defence's preparation. *Second*, the Prosecution has discharged and continues to discharge its disclosure obligations under the Statute and the Rules, and thus no certification or stay of proceedings is required. *Third*, the Defence should apply for this information directly to Trial Chamber III, which controls the case file.

II. Confidentiality

2. This document is designated as "confidential" because it responds to a filing of the same classification. A public redacted version will be filed.

III. Submissions

A. The Request fails to justify how the material sought is potentially exculpatory or material to the Defence's preparation

3. The Request does not devote a single paragraph to justifying how the material sought is disclosable. Instead, the Request merely claims that to be the case. For example, "the Prosecution has simply denied Defence assertions of the exculpatory nature of particular information that would clearly fall within the tripartite scheme of Article 67 (2)";² and, "material from the Main Case case-file indicates the existence of

¹ ICC-01/05-01/13-1141-Conf, para.37.

² Request, para.22.

information that would be clearly exculpatory".³

4. This is not enough. The *Lubanga* Trial Chamber held – in the context of deciding on the disclosure of information in witness statements – that the Prosecution is only required to disclose potentially exculpatory information “which may have a real, as opposed to minimal, impact on the trial in favour of the accused”,⁴ and “[i]f the real possibility exists that this evidence may contribute to a resolution of material factual issues in the case in favour of the accused”.⁵ Both this Chamber⁶ and the Appeals Chamber⁷ have required a party requesting material to demonstrate sufficiently the basis for its request.

5. The information sought in paragraph 24 of the Request does not meet this threshold. The Accused Arido is charged with recruiting false witnesses in Cameroon, introducing them to Mr Kilolo, and instructing, persuading or otherwise influencing them to testify falsely before Trial Chamber III through *inter alia* money transfers and the possibility of relocating to Europe.⁸ Without specific justification, it is not a reasonable submission that *all* filings related to D-2's and/or D-3's protective measures, victims' representatives questions, self-incrimination, and duty counsel, and all transcripts of other witnesses in the Main Case and exhibits used during their testimony are material to the Defence's preparation, let alone potentially exculpatory.⁹ This same and other information related to witnesses in the Main Case other than those with which Arido is charged – including D-15, D-57, D-54, D-64, D-55¹⁰ – are also *prima facie* not relevant, absent specific justification.

³ Request, para.24.

⁴ ICC-01/04-01/06-1311-Anx2, para.94.

⁵ ICC-01/04-01/06-1311-Anx2, para.94.

⁶ ICC-01/05-01/13-1154, para.13.

⁷ ICC-01/04-01/06-1433, para.82; ICC-02/05-03/09-501, para.39.

⁸ ICC-01/05-01/13-749, pp.53-54.

⁹ Request, para.24.

¹⁰ Request, para.24.

B. The Prosecution has discharged and continues to discharge its disclosure obligations under the Statute and the Rules, and thus no certification or stay of proceedings is required

6. The Prosecution has carried out in good faith its disclosure obligations under the Statute and the Rules. Specifically, the Prosecution has reviewed, and continues to review, the Main Case record for disclosable material. When information is found that is incriminating, material to the Defence's preparation, or potentially exculpatory, the Prosecution has applied to Trial Chamber III for its release. In addition, as explained below in paragraphs 9-11, there is nothing to preclude the Defence from seeking access to this material before the relevant Trial Chamber, upon an appropriately substantiated request.

7. In this context, the Request fails to establish any violation of the Prosecution's disclosure obligations. On 22 May 2015, this Chamber held that "verification orders have been made in some past cases, but they have been remedial steps taken in the face of established disclosure violations".¹¹ Because no disclosure violation has been established in this case, there is no reason to grant the requested certification.

8. For the same reason, the Defence fails to substantiate its request for a stay of proceedings. Such a drastic remedy should be imposed only in the most exceptional circumstances: when it would be repugnant to the administration of justice to allow the proceedings to continue, or if it is impossible for the trial to be fair.¹² Not only does the Request fail to establish any violation of the Prosecution's disclosure obligations; it also fails to demonstrate that the information is potentially exculpatory,¹³ that the Defence has not been unable to obtain the material by other

¹¹ ICC-01/05-01/13-959, para.46.

¹² See, e.g., ICC-01/04-01/06-2690-Red2, paras.160-166; ICC-01/04-01/06-772 OA4, paras.30-33, 39; ICC-01/04-01/06-2582 OA18, para.55; ICC-01/09-02/11-868-Red, paras.14-15.

¹³ ICC-02/05-03/09-410, para.95.

reasonably available means,¹⁴ or that the absence of the information has created such serious prejudice as to make a fair trial impossible. Thus, the Request fails to meet the high threshold required to stay the proceedings.

C. The Defence should apply directly to Trial Chamber III for this information

9. Trial Chamber III has confirmed that it – and not the Prosecution – controls access to the confidential case file of the Main Case, and that access will be granted only pursuant to a specific, founded, request. For example, on 13 February 2014, the *Bemba* Defence in this case requested Trial Chamber III to grant it access to the entire confidential case record in the Main Case. Trial Chamber III rejected the request, ordering the Defence to re-submit a more specific and substantiated request.¹⁵

10. Similarly, the Prosecution in this case requested Trial Chamber III to reclassify the trial transcripts of all defence witnesses who testified in the Main Case between 14 August 2012 and 14 November 2013.¹⁶ Trial Chamber III did not grant the request, but did grant the Prosecution's second, more focused and substantiated, request.¹⁷ A third¹⁸ and fourth¹⁹ similar request was granted. The Prosecution ensured that each of its requests before Trial Chamber III was notified to the Accused in the article 70 case, so that they would be fully aware of the nature and scope of the material sought, and thus promptly seek access should they deem it appropriate. They did not.

11. The best course of action is for the Arido Defence to submit a focused and substantiated access request to Trial Chamber III for the material it seeks. The Defence obtains no benefit by applying to the Prosecution for this material.

¹⁴ ICC-02/05-03/09-410, para.95; *E.g.*, see below, paras.9-11.

¹⁵ ICC-01/05-01/08-2972, para.11.

¹⁶ ICC-01/05-01/08-3014, para.2.

¹⁷ ICC-01/05-01/08-3074.

¹⁸ ICC-01/05-01/08-3098-Red.

¹⁹ ICC-01/05-01/08-3238.

IV. Relief Requested

12. For the reasons above, the Prosecution requests the Chamber to reject the Request.



Fatou Bensouda, Prosecutor

Dated this 24th Day of August 2015
At The Hague, The Netherlands