

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 28 August 2015

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Single Judge

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***

**Public Redacted Document
with
Confidential Annex A**

**Public redacted version of "Prosecution's response to 'Narcisse Arido's Request for Disclosure or Securing of the Prior Statements Given by Prosecution's Witnesses to Domestic Judicial Authorities and International Organisations'",
24 August 2015, ICC-01/05-01/13-1175-Conf**

Source: The Office of the Prosecutor

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

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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) opposes the Arido Defence’s Request for Disclosure or Securing of the Prior Statements Given by Prosecution’s Witnesses to Domestic Judicial Authorities and International Organisations (“Request”).¹ The Request should be rejected.

2. The Prosecution does not possess or control the items Arido seeks to obtain.² Further, the Request incorrectly reads into rule 76 of the Rules of Procedure and Evidence (“Rules”) and article 54(1) of the Rome Statute (“Statute”) a non-existent Prosecution obligation to obtain undefined material of unascertained relevance, on nothing more than pure speculation about its possible existence.³ The statutory framework does not oblige the Prosecution to engage in wasteful, or futile, investigative activities at the whim of the Defence. Rather, the manner of investigation—which is within the Prosecution’s sole discretion—is governed by what is reasonable, responsible and efficient in the circumstances.

II. Confidentiality

3. This filing is classified as “Confidential”, as it responds to a filing of the same designation. The Prosecution will file a public redacted version.

III. Submissions

4. *First*, the Prosecution has fully complied with the express requirements of rule 76. No disclosure obligation arises under the statutory framework in respect of

¹ ICC-01/05-01/13-1137-Conf.

² ICC-01/05-01/13-1137-Conf, paras.3(c) and (f).

³ ICC-01/05-01/13-1137-Conf, para.22: “Rule 76 (1) disclosure is mandatory in nature, but for Rule 77, despite the practice of pre-emptive disclosure, the Prosecution’s disclosure obligations are strictly legally-speaking dependent upon a request by the Defence”.

material that the Prosecution does not control or possess.⁴ Arido's assertion to the contrary relies entirely on *dicta* from a Single Judge's decision in the *Lubanga* case,⁵ which no Chamber has subsequently endorsed.

5. *Second*, the Prosecution is not obliged to conduct fishing expeditions at the behest of the Defence. Article 54(1) of the Statute does not, nor can it, require the Prosecution to seek out material unknown to exist on the speculative basis that it may or may not contain information which may or may not be relevant to the proceedings. For example, in the *Ruto and Sang* case, the Chamber held that material sought under article 54(1) must at a minimum exist, among other things.⁶ The Request fails to affirmatively *allege*, let alone *demonstrate*, that this basic threshold is met here.⁷ Even if it were, the Request's speculation on whether such material contains any information relating to matters at issue in, or relevant to, this case remains fatal.⁸

6. Further, Arido's disagreement with the scope of the investigation, does not transform his gripe into a Prosecution's statutory obligation. As noted, the Prosecution is not obliged to engage in wasteful, or futile, investigative activities. Here, this is underscored by Arido's personal knowledge and prior statement which belie the claimed materiality of the information concerning P-0260's and P-0245's

⁴ See article 67(2) of the Rome Statute; rule 77 of the Rules. See also *Niyitegeka v. Prosecutor*, ICTR-96-14-A, Judgment, 9 July 2004, para.35; *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Joseph Nzirorera's Motion on Notice of Violation of Rule 66(A)(ii) For Witnesses ALZ And AMC, and for Remedial and Punitive Measures - Rules 66 (A)(ii) and 73 of the Rules of Procedure and Evidence, 11 July 2007, para.6; *Prosecutor v. Karemera et al.*, ICTR-98-44-PT, Decision on Disclosure of Witness Reconfirmation Statements – Rule 66(A)(ii) of the Rules of Procedure and Evidence, 23 February 2005, para.7.

⁵ ICC-01/05-01/13-1137-Conf, paras.19, 37 citing to ICC-01/04-01/06-718, p.4.

⁶ ICC-01/09-01/11-1655-Red, para.33.

⁷ ICC-01/05-01/13-1137-Conf, para.14: "The Arido Defence has particular reasons to believe that material falling within these classifications exists for witnesses P-0245 and P-2060; however, the present request aims at securing any past statements made by all the witnesses the Prosecution intends to call in this trial"; para.28: "A brief consideration of geography, recent regional history of [REDACTED], and the disclosed personal details of witnesses P-0245 and P-0260 indicates a strong likelihood of further material existing"; para.33: "from disclosed evidence and easily verifiable facts about the circumstances of life [REDACTED], it is clear that either statements exist or a strong likelihood exists that several statements may be held by different institutions"; para.41: "The Arido Defence finds itself in a situation where past statements of Prosecution witnesses likely exist".

⁸ See e.g. ICC-01/05-01/13-1137-Conf, para.31.

military backgrounds to the preparation of his defence. Concretely, during his interview with the French authorities, Arido admitted that witnesses with whom he and Kilolo met in Cameroon in February 2012, including specifically D-2, D-3, D-4, D-6, were not former members of the military, and that he knew this fact at the time of the events:

“[REDACTED]”.⁹

“[REDACTED]”.¹⁰

“[REDACTED]”.¹¹

Furthermore, Arido conceded [REDACTED], obviously putting him in a position to know the witnesses’ background.¹² To the extent Arido considers further investigation into the backgrounds of these witnesses material to the preparation of his defence, he is free to do so. But, this requires no mandatory action by the Prosecution. In this sense, the Prosecution stresses that article 54(1)(a) was created to ensure a fair, objective and impartial investigation by the Prosecution; it was *not* created to relieve the Defence from its autonomous duties of inquiry and case preparation.

7. *Finally*, Arido’s claim that he has exhausted the options available to him to obtain the material sought other than through the Prosecution is untenable. Article 57(3)(b) of the Statute and rule 116(1) of the Rules¹³ ensure that the Defence may seek the Chamber’s assistance in the collection of evidence material to its preparation. Notably, in the *Lubanga* decision, referred to throughout the Request, the Single

⁹ CAR-OTP-0074-1065 at 1066, Section 1 (emphasis added).

¹⁰ CAR-OTP-0074-1065 at 1066, Section 4.

¹¹ CAR-OTP-0074-1065 at 1066, Section 6.

¹² See e.g. ICC-01/05-01/13-598-Conf, para.251.

¹³ ICC-01/05-01/13-1137-Conf-Anx6, p.3.

Judge did not order the Prosecution to obtain notes of interviews of its witnesses with MONUC officials, but instead directed the Registry to issue an appropriate cooperation request.¹⁴ Similarly, the ICTR decisions that Arido cites in support of the relevance of witnesses' judicial records pertain to their production by State authorities upon a Chamber's order.¹⁵

8. The timing of Arido's efforts to obtain the material sought tempers his claim of their reasonableness.¹⁶ The Request is silent as to any such efforts being undertaken until recently, although Arido was placed on notice of the substantive charges against him with the filing of the Document Containing the Charges well-over a year ago on 30 June 2014.¹⁷

9. The Request fails to establish any legally cognisable basis for the relief sought.

IV. Relief Requested

10. For the foregoing reasons, the Prosecution requests the Chamber to reject the Request.



Fatou Bensouda, Prosecutor

Dated this 28th Day of August 2015
At The Hague, The Netherlands

¹⁴ ICC-01/04-01/06-718, p.7.

¹⁵ ICC-01/05-01/13-1137-Conf, para.24 citing *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders, 13 February 2006, para.7; *Prosecutor v. Zigiraniyerazo*, ICTR-2001-73-T, Decision on the Defence Motion for the Cooperation of the Government of Rwanda in Relation With Prosecution Witnesses AVY and SGO, 17 January 2006.

¹⁶ ICC-01/05-01/13-1137-Conf, Section D.

¹⁷ See ICC-01/05-01/13-526-Conf-AnxB1.