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Date: **31 August 2015**

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

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**

Public with Confidential Annexes A, B, C, D and E

**Public Redacted Version of
‘Corrigendum to Narcisse Arido’s Request for an Order on Disclosure Violation
(Article 67 (2) of the Statute)’ (ICC-01/05-01/13-1141-Conf-Corr)**

Source: Counsel for Narcisse Arido

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

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I. INTRODUCTION

1. The Arido Defence has identified a number of information/material from the case of Prosecutor v. Bemba (hereinafter ‘Main Case’) that falls under the scope of Article 67 (2) of the Statute (‘potentially exculpatory materials’) and which the Prosecution failed to disclose. As a result, the Arido Defence requests the Trial Chamber to order a temporary stay of the proceedings, to order the Prosecution to immediately disclose the said material, and to order the Prosecution to review the totality of the Main Case file with a view to identify other information or material falling under the scope of Article 67 (2).

2. The Arido Defence supports the request to have access to the main case which will be filed in both the main and the contempt case on 10 August 2015. The present filing is seeking remedies specifics to Arido in view of the Prosecutor’s violations of his disclosure duties.

II. CONFIDENTIALITY

3. Pursuant to Regulation 23*bis* of the Regulations of the Court (‘RoC’) and Regulation 24 of the Regulations of the Registry (‘RoR’), this request is submitted confidential as it contains references [REDACTED] and confidential information, as well as references to *inter partes* communications.

III. PROCEDURAL HISTORY

4. On 13 April 2015, the five Co-Accused (‘Joint Defence’) filed observations on the modalities of Prosecution disclosure in advance of the first Statue Conference (‘Joint Defence Observations’) following an order from the Trial Chamber. In these observations, the Defence requested, *inter alia*, “that the Prosecution certify as of a date certain that its disclosure obligations under Article 67 (2) have been diligently completed, which includes diligently and actively searching its own databases”¹ and this be done at least three months before trial.²

5. The Defence also noted that the “Defence also understands that if any exculpatory matter relating to his case is revealed in the Main case, the responsibility belongs to the Prosecution to keep the Defence appraised of any such matters in a timely fashion.”³

¹ ICC-01/05-01/13-894, para. 29.

² *Ibid.*

³ *Ibid.*, para. 27.

6. At the 24 April 2015 Status conference, the Trial Chamber requested the parties to – where reasonable – pursue issues *inter partes* before seizing the Chamber.⁴

7. On 5 May 2015, the Arido Defence wrote to the Prosecution and requested *inter alia*:

- [REDACTED];⁵
- Any and all information relating to any mention of Mr. Arido's name in the transcripts or testimony or exhibits tendered in the Bemba main case;⁶
- Documents relating to main case testimonies and proceedings, including:
- [REDACTED];
- [REDACTED];
- [REDACTED].⁷

8. On 22 May 2015, the Chamber issued its 'Decision on Modalities of Disclosure', in which it directed the Prosecution, to disclose all incriminating materials by 30 June 2015.⁸ In response to the Joint Defence Observations request for certification the Trial Chamber stated:

“The Chamber will not engage in any discussion as to the Prosecution's disclosure methodology until the Defence can first demonstrate that it has unsuccessfully sought specific kinds of materials from the Prosecution. The Chamber notes that verification orders have been made in some past cases, but they have been remedial steps taken in the face of established disclosure violations.”⁹

9. It further added:

“the Chamber recalls the duty of the Prosecution to disclose, pursuant to Article 67(2) of the Statute, any evidence in its possession which is exculpatory in nature ‘as soon as practicable’. This obligation is ongoing and requires the Prosecution to disclose such materials possibly much earlier than 30 June 2015.”¹⁰

⁴ ICC-01/05-01/13-T-8-CONF-ENG, p. 4, lines 16-20.

⁵ See Annex A, letter entitled: “Request for disclosure #1”, sent 5 May 2015, p. 1, A.1.

⁶ *Ibid.*, p. 2, A.4.

⁷ See Annex A, letter entitled: “Request for disclosure #1”, sent 5 May 2015, p. 5, D.16.

⁸ ICC-01/05-01/13-959, p. 19.

⁹ ICC-01/05-01/13-959, para. 46.

¹⁰ ICC-01/05-01/13-959, para. 52.

10. On 3 June 2015, the Prosecution responded to the Arido Defence's first disclosure request and rejected it.¹¹

11. On 25 June 2015, noting its unequal footing with the other parties – save the Babala Defence – regarding an incident arising in the Main Case, the Arido Defence requested access to unredacted filings, transcripts, and other material related to [REDACTED] pursuant to Rule 77 of the RPE.¹²

12. On 23 July 2015, the Arido Defence wrote to the Prosecution to “request that the [Prosecution] certif[ies] that there is no further material in the record of the main case that should be disclosed under any rule.”¹³

13. On 27 July 2015, the Prosecution responded, advising the Arido Defence that “it has discharged its disclosure obligations under the Statute and the Rules”.¹⁴ The Prosecution noted that it was not privy to Defence theories and thus could not anticipate every possible piece of information that would be relevant thereto. Finally, it noted that the Arido Defence could seek the assistance of Trial Chamber III in the main case.

14. Pursuant to a 27 July 2015 Joint Defence request for a 30 day extension of the 31 July 2015 deadline,¹⁵ on 30 July 2015, the Trial Chamber granted a partial extension of time until 10 August 2015 to file all motions requiring resolution prior to the start of the trial.¹⁶

IV. APPLICABLE LAW

15. Pursuant to Article 64 (2), the Trial Chamber “shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”

16. Under sub-provision (3) (c) of Article 64 “[u]pon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall [...]

¹¹ See Annex B, letter entitled “Re: Letter of 5 May 2015 requesting disclosure of material”, Ref: OTP/PD/150603/KV.

¹² ICC-01/05-01/13-1032-Conf, para. 5.

¹³ See Annex C, letter of 23 July 2015, entitled ‘Re: Query regarding material from ICC-01/05-01/08’.

¹⁴ See Annex D, letter of 27 July 2015, Ref: OTP/PD/20150727/KV.

¹⁵ ICC-01/05-01/13-1105-Conf.

¹⁶ “As to the requested extension of the 31 July deadline for all motions that in the view of the parties require resolution prior to the commencement of trial, the Chamber considers that, in the circumstances, only a partial extension is warranted. It hereby varies the pre-trial motion deadline for all parties to Monday, 10 August 2015”, email of 30 July 2015, subject line: ‘Ruling on ICC-01/05-01/13-1105-Conf’.

[s]ubject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.”

17. Pursuant to Article 64 (1) (a) in the determination of any charge the Accused shall have “adequate time and facilities for the preparation of the defence”.

18. Article 67 (2) places an obligation upon the Prosecution to disclose evidence in its possession that “tends to show the innocence of the accused, or mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.”

19. Rule 136 (2) of the Rules of Procedure and Evidence (‘RPE’) provides that “[i]n joint trials, each accused shall be accorded the same rights as if such accused were being tried separately.”

V. SUBMISSIONS

A. Article 67 (2) of the Statute compels the Prosecution to disclose exculpatory materials from the Main case

20. The Prosecution must also diligently, and on an ongoing basis, review the information in its possession to ensure full disclosure, which includes evaluating potential and known defences to ensure full disclosure under Article 67(2)¹⁷ and reviewing all newly-received information to ensure full disclosure.¹⁸

21. The disclosure of exculpatory evidence in the possession of the prosecution is a fundamental aspect of an accused’s right to a fair trial. Where exculpatory evidence has been withheld, this fundamental right is in jeopardy.

22. The Arido Defence notes that the Prosecution’s obligation under Article 67 (2) is free-standing. This duty persists whether the Defence indicates that which it considers exculpatory or not. With regards to this observation, it can be noted in passing that in numerous *inter*

¹⁷ ICC-01/04-02/06-T-13-ENG, p. 28, l. 18-24.

¹⁸ ICC-01/04-02/06-T-13-ENG, p. 28, l. 17-24; See e.g. Ntaganda: OTP stated that it was reviewing its search terms “to take into account new defence positions for which [they] were apprised during the confirmation hearing [...] review of [their] past searches, also in line with the Defence strategy that [they] became aware of during the confirmation hearing [...] a very thorough review of documents that [they] call unsearchable, which [...] means that [...] their content or metadata are not captured by [their] specific search term searches”, ICC-01/04-01/06-1019, para. 28.

partes communications 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).¹⁹ In any case, the Arido Defence submits that one important aspect of this free-standing obligation is to cut through a paradox which would significantly reduce the value of the right to the Defence to exculpatory materials.

23. The fact that the present case arises entirely from the lengthy proceedings of the *Bemba* case puts a very clear onus on the Prosecutor, himself a party to *Bemba*, to secure all relevant information, whether exculpatory or in any other manner material to the Defence. Put otherwise, the investigation of this case should have taken place not in the jungle of Congo, but rather under the thick canopy of the main case proceedings. Unfortunately, as demonstrated below, there are many indication that the Prosecutor has failed to ascertain what information from the *Bemba* case should have been made available to the parties in the present case, and the Defence for Arido is therefore seeking appropriate remedies for that state of affair.

B. The Prosecution violated its Article 67 (2) obligations

24. The Arido Defence notes that material from the Main Case case-file indicates the existence of information that would be clearly exculpatory, but which has not been disclosed by the Prosecution. This includes, but is not limited to:

- a. Filings related to the protective measures of [REDACTED]D2,²⁰ [REDACTED]D-64,²¹ [REDACTED]D-15,²² [REDACTED]D-57,²³ [REDACTED]D-55,²⁴ [REDACTED]D-54;²⁵
- b. Filings related to the questions of victims' representative for [REDACTED]D-2,²⁶ [REDACTED]D-64,²⁷ [REDACTED]D-3,²⁸ [REDACTED]D-15,²⁹ [REDACTED]D-57,³⁰ [REDACTED]D-55,³¹ [REDACTED]D-54;³²

¹⁹ That is to say (a) either tends to show the innocence of the accused, or (b) mitigates the guilt of the accused, or (c) which may affect the credibility of prosecution evidence.

²⁰ ICC-01/05-01/08-T-321-CONF-ENG, p. 1, l. 24 to p. 2, l. 7.

²¹ ICC-01/05-01/08-T-259-CONF-ENG, p. 1, l. 24 to p. 4, l. 15.

²² ICC-01/05-01/08-T-343-CONF-FRA, p. 2, l. 5-15.

²³ ICC-01/05-01/08-T-256-CONF-FRA, p. 2, l. 11 to p. 5, l. 13.

²⁴ ICC-01/05-01/08-T-264-CONF-FRA, p. 1, l. 27 to p. 5, l. 22.

²⁵ ICC-01/05-01/08-T-347-CONF, p. 2, l. 5-21.

²⁶ ICC-01/05-01/08-T-321-CONF-ENG, p. 2, l. 8-16;

- c. Filings related to the possible self-incrimination [REDACTED]D-2,³³
[REDACTED]D-64,³⁴ [REDACTED]D-3,³⁵ [REDACTED]D-15,³⁶
[REDACTED]D-57,³⁷ [REDACTED]D-54;³⁸
- d. Information related to the assignment of duty counsel to [REDACTED]D-2,³⁹
[REDACTED]D-3;⁴⁰
- e. Transcripts of witnesses whose evidence was put to [REDACTED]D-2,⁴¹
[REDACTED]D-64,⁴² [REDACTED]D-3,⁴³ [REDACTED]D-57,⁴⁴
[REDACTED]D-54,⁴⁵ during their testimony in the Main Case;
- f. Exhibits/documents discussed in court with [REDACTED]D-2,⁴⁶ [REDACTED]D-
3,⁴⁷ [REDACTED]D-64,⁴⁸ [REDACTED]D-15,⁴⁹ [REDACTED]D-57,⁵⁰
[REDACTED]D-55,⁵¹ [REDACTED]D-54;⁵²

²⁷ ICC-01/05-01/08-T-259-CONF-ENG, p. 63, l. 16 to p. 64, l. 4.

²⁸ ICC-01/05-01/08-T-325-CONF-ENG, p. 2, l. 10-24; ICC-01/05-01/08-T-326-CONF-ENG, p. 23, l. 23 to p. 24, l. 8.

²⁹ ICC-01/05-01/08-T-343-CONF-FRA, p. 2, l. 15-28.

³⁰ ICC-01/05-01/08-T-257-CONF-FRA, p. 1, l. 24 to p. 2, l. 9.

³¹ ICC-01/05-01/08-T-264-CONF-FRA, p. 1, l. 27 to p. 5, l. 22.

³² ICC-01/05-01/08-T-347-CONF-ENG, p. 2, l. 5-21.

³³ ICC-01/05-01/08-T-321-CONF-ENG, p. 6, l. 1-3.

³⁴ ICC-01/05-01/08-T-259-CONF-ENG, p. 6, l. 23 to p. 7, l. 25; ICC-01/05-01/08-T-260-CONF-ENG, p. 1, l. 19 to p. 2, l. 9;

³⁵ ICC-01/05-01/08-T-325-CONF-ENG, p. 6, l. 13-22.

³⁶ ICC-01/05-01/08-T-343-CONF-FRA, p. 8, l. 17 to p. 9, l. 23.

³⁷ ICC-01/05-01/08-T-256-CONF-FRA, p. 17, l. 10 to p. 11, l. 20.

³⁸ ICC-01/05-01/08-T-347-CONF-ENG, p. 8, l. 16-20.

³⁹ ICC-01/05-01/08-T-321-CONF-ENG, p. 6, l. 4-15.

⁴⁰ ICC-01/05-01/08-T-325-CONF-ENG, p. 1, l. 25 to p. 2, l. 9; p. 2, l. 25 to p. 3, l. 1.

⁴¹ ICC-01/05-01/08-T-321-CONF-ENG, p. 52, l. 17 to p. 53, l. 20; p. 54, l. 12 to p. 55, l. 6, p. 57, l. 25 to p. 58, l. 7; ICC-01/05-01/08-T-322-CONF-ENG, p. 27, l. 20-25, p. 28, l. 14-19, p. 32, l. 25 to p. 33, l. 1, p. 45, l. 8-13, p. 46, l. 14 to p. 47, l. 3.

⁴² ICC-01/05-01/08-T-259-CONF-ENG, p. 46, l. 5-15; p. 47, l. 1, 6-8; p. 58, l. 23 to p. 59, l. 5; ICC-01/05-01/08-T-260-CONF-ENG, p. 9, l. 2-6; p. 22, l. 10-21; p. 24, l. 4-8; p. 25, l. 18 to p. 26, l. 2; p. 27, l. 23-25; p. 40, l. 18-22; p. 42, l. 13-15.

⁴³ ICC-01/05-01/08-T-325-CONF-ENG, p. 29, l. 9 to p. 30, l. 2; p. 40, l. 5-9; ICC-01/05-01/08-T-330-CONF-ENG, p. 2, l. 22 to p. 3, l. 1, p. 11, l. 15-20; p. 17, l. 8-12.

⁴⁴ ICC-01/05-01/08-T-257-CONF-FRA, p. 55, l. 12-14; ICC-01/05-01/08-T-258-CONF-FRA, p. 12, l. 12-14, p. 18, l. 24-26, p. 35, l. 4-8, p. 42, l. 23 to p. 43, l. 7.

⁴⁵ ICC-01/05-01/08-T-348-CONF-ENG, p. 36, l. 15-23, p. 48, l. 17-23; ICC-01/05-01/08-T-349-CONF-ENG, p. 27, l. 25 to p. 28, l. 4, p. 71, l. 6-9.

⁴⁶ ICC-01/05-01/08-T-321-CONF-ENG, p. 57, l. 25 to 58, l. 7 (CAR-OTP-0042-0237).

⁴⁷ ICC-01/05-01/08-T-325-CONF-ENG, p. 32, l. 24 to p. 35, l. 1; p. 35, l. 12-13; p. 47, l. 15-17; ICC-01/05-01/08-T-326-CONF-ENG, p. 2, l. 22 to p. 3, l. 1; ICC-01/05-01/08-T-330-CONF-ENG, p. 4, l. 9-20; p. 5, l. 15-24.

⁴⁸ ICC-01/05-01/08-T-259-CONF-ENG, p. 37, l. 8-10, p. 42, l. 2-4.

g. Information related to [REDACTED]D-64's security assessment;⁵³

h. Documents prepared by [REDACTED]D-15.⁵⁴

25. Exculpatory evidence must be disclosed as soon as possible.⁵⁵ Much of the documentary information in the Main Case case-file has been in existence prior to the Prosecution's request for a warrant of arrest on 20 November 2013. Thus, for some information at least, a disclosure obligation may have persisted for arguably as much as nearly two years.

26. As late as 3 August 2015, in a response to a Defence Request for disclosure of information concerning the Fourteen Witnesses, the Prosecution stated: "[t]he Defence has already received all information that might have an impact on the credibility of the Prosecution witnesses in this case."⁵⁶

C. Remedies sought

27. The Arido Defence has already joined a request seeking access to the entirety of the main case in the main case, as well as a request in this case seeking disclosure from the Prosecutor of the entirety of the non-accessible material from that case. It is submitted however that these motions do not sufficiently address the prejudice suffered by Arido as a result of the Prosecutor's failure to disclose material which should have been disclosed a long time ago. To alleviate the fact that Arido, contrary to the Prosecutor and some of the co-accused, has had no access and no familiarity at all with the main case, and the way it is archived, classified and organized, the following remedies are sought. Firstly, a thorough

⁴⁹ ICC-01/05-01/08-T-343-CONF-FRA, p. 29, l. 23-25, p. 30, l. 25-27, p. 34, l. 17-19, p. 35, l. 16-18, p. 47, l. 10-14, p. 59, l. 14-19, p. 69, l. 7-10, p. 71, l. 23-26, p. 81, l. 23-25; ICC-01/05-01/08-T-344-CONF-FRA, p. 5, l. 10-12, p. 28, l. 25-27, p. 33, l. 20-24, p. 55, l. 3-5, p. 56, l. 26-28, p. 65, l. 19-21, p. 68, l. 18-19, p. 80, l. 3-5; ICC-01/05-01/08-T-345-CONF-FRA, p. 16, l. 8-23, p. 30, l. 8-11, p. 33, l. 13-15, p. 34, l. 9-11, 42, p. 38, l. 6-9, p. 41, l. 1-5, p. 42, l. 23-24, p. 45, l. 9-11, p. 47, l. 21-23, p. 65, l. 14-19.

⁵⁰ ICC-01/05-01/08-T-257-CONF-FRA, p. 14, l. 18-20, p. 41, l. 14-19.

⁵¹ ICC-01/05-01/08-T-264-CONF-FRA, p. 22, l. 15-17; ICC-01/05-01/08-T-265-CONF-FRA, p. 32, l. 3-5.

⁵² ICC-01/05-01/08-T-347-CONF-ENG, p. 18, l. 22-23, p. 24, l. 8-11, p. 35, l. 19-22, p. 48, l. 20-22, p. 58, l. 22-24, p. 63, l. 3-5, p. 79, l. 18-20; ICC-01/05-01/08-T-348-CONF-ENG, p. 8, l. 9-10, p. 13, l. 19-20, p. 24, l. 21-22, p. 34, l. 11-13, p. 39, l. 25 to p. 40, l. 5, p. 45, l. 7-9, p. 52, l. 14-18, p. 58, l. 1-5, p. 77, l. 14-17, p. 81, l. 2-3; ICC-01/05-01/08-T-349-CONF-ENG, p. 3, l. 19-20, p. 10, l. 16-17, p. 16, l. 20-22, p. 18, l. 1-4, p. 25, l. 3-4, p. 31, l. 12-13, p. 68, l. 8-10, p. 72, l. 11-14.

⁵³ ICC-01/05-01/08-T-260-CONF-ENG, p. 36, l. 15 to p. 37, l. 11; p. 38, l. 11-17.

⁵⁴ ICC-01/05-01/08-T-343-CONF-FRA, p. 28, l. 10-12.

⁵⁵ Article 67 (4); *see also* ICC-01/04-01/06-102, para. 125.

⁵⁶ ICC-01/05-01/13-1118, para. 2.

review of the main case should be performed by the Prosecutor, and a certification that there remains nothing to be disclosed to the Arido Defence from that case should be offered. Secondly, the proceedings in this case should be suspended for such time as is necessary to obtain such certification, and for the Defence, generally, and the Trial Chamber to be satisfied that the main case has been thoroughly reviewed and contains no further information, whether exculpatory or material to the Defence.

28. The Prosecutor cannot ignore that Mr. Arido's role as an Accused in the present case is marginalised and adjunct. The problems this remoteness from the main case cause to Arido are recently illustrated in a recent exchange between Bemba and the Prosecutor, where the latter stated "[t]he Court's jurisprudence is clear. Information about witness payments or assistance is disclosable only if they are extraordinary".⁵⁷ Footnote number 19 of that filing, which indicate the legal basis for that assertion, refers to two confidential decisions from the Main Case for which the Arido Defence does not have access. Furthermore, the threshold for the obligation of disclosure of witness payments to which that statement refers – namely payments 'beyond subsistence' – has been referred to in an *inter partes* rejection of a similar request by the Arido Defence.⁵⁸ Regardless of the legal accuracy of the Prosecutions legal claim, it was absolutely impossible for the Arido Defence to be aware of jurisprudential origin of the Prosecution's claim and thus evaluate the accuracy of it. While the impact of that Prosecutorial rejection is not the subject of the present request, the Arido Defence submits that it illustrates well the unfair and vaguely Kafka-esque situation facing the Mr. Arido's Defence in relation to most of the other parties.

1) Order to review the case file

29. The Arido Defence further requests the Trial Chamber to order the Prosecution to review the totality of the case file in the Main Case, and to disclose the following information/material to the Defence in accordance with its Article 67 (2)'s obligations, for all witnesses the Prosecutor intends to call in the contempt case:

⁵⁷ ICC-01/05-01/13-1118, para. 11.

⁵⁸ See Letter from the Prosecution to the Arido Defence dated 31 July 2015, OTP/PD/20150731/OST, see confidential Annex E.

- Steps taken by the Prosecution when preparing for the cross-examinations of such witnesses, including the list (and statements) of any individuals approached, documents gathered and RFAs filed, as well as the corresponding records;
- Any material used during the examination in chief and cross-examination of such witnesses;
- Transcripts of testimony of Prosecution and/or Defence witnesses referring to such witnesses, or to Mr. Arido;
- Filings and decisions related to any witnesses and to the question of payments to Prosecution or Defence witnesses;
- With regards to both the Main case and Article 70 case, [that the Prosecution] generally disclose any material generated by or with generated by any witness on the Prosecution's list of evidence or who is mentioned in the charges which is in which is in [the Prosecution's] possession and may impact on their credibility or which may be in any other manner material to the preparation of the Defence;⁵⁹
- Any and all information relating to any mention of Mr. Arido's name in the transcripts or testimony or exhibits tendered in the Bemba main case;⁶⁰
- Any use made of the material generated in the contempt case in the main case.

30. Further, some filings from other parties in the contempt case clearly hint at the existence of exculpatory material in the main case yet to be disclosed to the defendant in the main case. Such filings are good illustrations of the disadvantageous position the Defence for Arido finds itself as far as being aware of the existence of exculpatory or material evidence in the main case goes. For example, in a recent publicly redacted version of a Prosecution's filing in the Main Case, the Prosecution stated that:

“The Prosecution disclosed significant information placing the Defence on notice of the credibility challenges to Defence witnesses. Specifically, between July 2012

⁵⁹ See Annex A, letter entitled: “Request for disclosure #1”, sent 5 May 2015, p. 1, A.1.

⁶⁰ *Ibid.*, p. 2, A.4.

and mid-November 2013, during the Defence case, the Prosecution disclosed over 2,000 pages of rule 77 materials. The Defence cannot seriously contend that the Prosecution deprived it of an opportunity to consider significant information.”⁶¹

31. Upon inquiring with the Bemba Defence, the Arido Defence estimates that only 18 documents out of 197 documents were disclosed in the Article 70 proceedings. The Arido Defence cannot actually know, but the material described in the above mentioned Prosecution’s filing appears to sit squarely within the *inter partes* request made by the Arido Defence on 5 May 2015.⁶²

32. In view of the trial date imminence, Arido’s inability to have access in a comprehensible manner to the main case, and the proven existence of material that should have been disclosed much earlier, the Defence for Arido requires this Trial Chamber to order the Prosecution to certify that there is no more exculpatory evidence that remains to be disclosed from the main case to the contempt case. The Defence therefore requests that the Prosecution certify as of a date certain that its disclosure obligations have been diligently completed, which includes diligently and actively searching its own databases.⁶³ This is

⁶¹ ICC-01/05-01/08-3265-Red, para. 9.

⁶² See Annex A, letter entitled: “Request for disclosure #1”, sent 5 May 2015, p. 1, A.1.

⁶³ In *Kordić & Čerkez*, the Appeals Chamber noted that, while the defence is entitled to have a clear assurance from the prosecution of their obligation under Rule 68, such an assurances are regularly sought, and given without difficulty, during Status Conferences held pursuant to Rule 65bis. “Such an assurance need not be in the form of a certificate as sought by [Counsel for] Čerkez, but it should be in writing.” As such, the Appeals Chamber ordered the Prosecution submit a written assurance that it has been and is still searching through the material which it has received, and that, so far, no material which may reasonably be considered to fall within the scope of Rule 68 has been identified. See ICTY, *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-A, Decision on Motions to Extend Time for Filing Appellant’s Briefs, 11 May 2001, paras 15, 23, available at: http://www.icty.org/x/cases/kordic_cerkez/acdec/en/10511EX315605.htm; In *Blaškić*, the Appellant sought a signed certificate that the Prosecution has complied with the First and Second Requests and is furthermore aware of its *continuing* obligations under Rules 66 and 68. “[The Appellant] suggests that certification is required so that the Appellant and the Appeals Chamber can be assured that the Prosecution has discharged its obligations before the appeal process may proceed. He also asks that the Prosecution be required to review the material, produce it to the Appellant, and provide certification within 14 days of the issuance of an order by the Appeals Chamber on the Motions.” The request was denied, and the Chamber noted that this type of order would be rarely made as the Prosecution is expected to act in good faith. See ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14, Decision on the Appellant’s Motions for the Production of Material, Suspension of Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, paras 43, 45, available at: <http://www.icty.org/x/cases/blaskic/acdec/en/00926PN313780.htm#31>; The *Krnojelac* decision was cited in the *Blaškić* Decision, where Judge David Hunt ordered compliance with Rule 68 in that particular case by requiring the Prosecution to file an affidavit to that effect. The affidavit was to acknowledge both that a full search has been conducted throughout the materials in the possession of the prosecution or otherwise within its knowledge for the existence of such evidence, and that he or she is aware of the continuing nature of the obligation pursuant to Rule 68. See ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on Motion by Prosecution to Modify Order for Compliance with Rule 68, 1 November 1999, para. 11, available at: <http://www.icty.org/x/cases/krnojelac/tdec/en/91101DE212633.htm>; As a remedy for a Rule 68 violation, in the Orić case the Chamber ordered the Prosecution to provide the Trial Chamber with a declaration stating what searches had been made, where the searches had been made, and the results of such searches. See ICTY, *Prosecutor v. Orić*, Case No. IT-03-68-T, Decision on Urgent Defence Motion Regarding Prosecutorial Non-

without prejudice to the Prosecution's obligation to disclosure PEXO materials on an on-going basis.

2) *Order for a temporary stay of the proceedings*

33. The Arido Defence submits that in view of the gravity of the Prosecutor's disclosure violation, a temporary stay of proceedings should be entered. The ICC Appeals Chamber has stated that "[w]here the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed."⁶⁴ The Arido Defence submits that it has been deprived of information which is crucial to assess and put into perspective the evidence of the Prosecutor in this case. Time is required to permit the Arido Defence to familiarise with the documents. Further, a temporary stay of the proceedings is necessary should the Trial Chamber order the Prosecution to review the Main Case materials in order to ensure that all Article 67 (2) materials have been disclosed to the Defence, in order to give adequate time for the Prosecution to do so - including by consulting with the Defence regarding possible search terms, ect... - and for the Arido Defence to review and analyse the documents.

34. In addition to the material that will be accessible to the Prosecution in the main case, the Defence will need to review it itself to locate further material, such as:

- Emails and correspondence between Mr. Arido and the Bemba Defence team contradicting the alleged role given by the Prosecutor to Arido with respect to Cameroonian witnesses;
- Correspondence between Bemba's defence team and the registry on the issue of Arido's expertise, explaining some of the payments and correspondence between

Compliance with Rule 68, 27 October 2005, p. 5, available at: <http://www.icty.org/x/cases/oric/tdec/en/051027.pdf>; Finally, in *Haradinaj*, the Chamber made a similar finding, requiring that the Prosecution to file a report with the Tribunal "confirming that it has comprehensively searched for Rule 68 material in its possession, in relation to all its witnesses in this trial, specifying what searches have been made, where they have been made, and the results of such searches." In this case, the Prosecution had seven days after the decision to file the report. See ICTY, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Decision on Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions Pursuant to Rule 68bis, 12 October 2011, para. 66, available at: <http://www.icty.org/x/cases/haradinaj/tdec/en/111012.pdf>.

⁶⁴ ICC-01/04-01/06-772 (OA4), para. 36.

Arido and Bemba's Defence team, beyond the e-mails already available on the topic;

- Correspondence between Bemba's team and [REDACTED], an individual abundantly mentioned in the Prosecutor's accusatory instruments;
- Correspondence between Bemba's team and the registry concerning the issue of the use of false documents in the main case;

35. As outlined above, the denial of access to exculpatory material sits squarely within the range of rights the significant breach of which renders a fair trial impossible. Though the Arido Defence submits that the Prosecution has had adequate warning and time to provide this material, it is worth noting that the *Lubanga* Trial Chamber stated that it is "not a necessary precondition [...] for the exercise of [the] jurisdiction [to stay proceedings] that the prosecution is found to have acted *mala fides*."⁶⁵

36. The Arido Defence notes that it is not alleging that the proceedings should be discontinued permanently, but submits that should the Trial Chamber find that the Prosecution violated its Article 67 (2) obligations, the proceedings should be delayed until the materials listed in paragraphs 24 and 29 above have been made available to the Defence, giving sufficient time to the Defence to review the requested materials.

⁶⁵ ICC-01/04-01/06-1401, para. 90.

VI. CONCLUSION

37. In conclusion the Arido Defence respectfully requests Trial Chamber VII to:

- Find that the Prosecution has violated its disclosure obligations under Article 67 (2) of the Statute by failing to disclose to the Defence the material listed in paragraph 24 above;
- Order the Prosecution to immediately disclose the material listed in paragraph 24 above;
- Order the Prosecution to review the whole case file of the Main Case with a view to identifying information falling under Article 67 (2) of the Statute, and to disclose the relevant information to the Defence;
- Order the Prosecution to certify that it has disclosed all exculpatory evidence;
- Order a temporary stay of the proceedings until the Prosecution discloses the material listed in paragraphs 24 above and until after the Prosecution completes its review of the Main Case file and discloses the relevant information to the Defence. The Arido Defence further requests the Trial Chamber to order that such stay of proceeding should remain in place until the Defence is given a meaningful opportunity to review the requested material.



Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 31st Day of August 2015

The Hague, The Netherlands.