

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-01/05-01/13  
Date: 7 September 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, AIME KILOLO  
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU  
AND NARCISSE ARIDO***

**Public**

**Prosecution's Consolidated Response to Defence Applications for Leave to Appeal  
Decision on Defence Requests for Disclosure (ICC-01/05-01/13-1188)**

**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 Chamber should deny Arido's and Mangenda's applications seeking leave to appeal<sup>1</sup> the decision on disclosure of confidential filings in the Main Case,<sup>2</sup> as well as Bemba's submission in support of those applications (collectively "Applications").<sup>3</sup> The issue raised by Mangenda (First Issue), the three issues raised by Arido (Second, Third and Fourth Issues), and the issue raised by Bemba (Fifth Issue) (collectively "Issues") do not arise from the Decision. In addition, none of the Issues meet the criteria for leave to appeal under article 82(1)(d).

## **II. Submissions**

### **A. The Issues do not arise from the Decision**

2. None of the Issues address the finding at the heart of the Decision: that "Trial Chamber III, not this Chamber, has primary authority to decide whether to provide access to material in the Main Case record."<sup>4</sup> The First, Second, Third and Fourth Issues concern matters that are tangential or unrelated to this finding. The Fifth Issue, while claiming to challenge this finding,<sup>5</sup> is actually about a separate matter: whether the Chamber abdicated its authority to resolve disclosure disputes.<sup>6</sup> The Fifth Issue confuses the distinction understood by the Single Judge between the authority to grant access to confidential materials in the Main Case (vested with Trial Chamber III) and the authority to remedy disclosure disputes in the article 70 case (retained by

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<sup>1</sup> ICC-01/05-01/13-1204 ("Mangenda Application"); ICC-01/05-01/13-1207 ("Arido Application").

<sup>2</sup> ICC-01/05-01/13-1188 ("Decision").

<sup>3</sup> ICC-01/05-01/13-1213-Red ("Bemba Application"). Despite filed in "response" to the Mangenda Application, Bemba's filing raises an issue that is different and distinct from those raised by Mangenda and Arido. In doing so, Bemba, once again, engages in precisely the type of gamesmanship the Prosecution has noted in its previous filings. See *e.g.* ICC-01/05-01/13-1202, para.4; ICC-01/05-01/13-1210-Conf, para.5.

<sup>4</sup> Decision, para.13.

<sup>5</sup> Bemba Application, para.4.

<sup>6</sup> See Bemba Application, paras.5-6, 10.

Trial Chamber VII).<sup>7</sup> As such, the Fifth Issue does not arise from the underlying rationale forming the Decision.

3. The First, Second, Third and Fifth Issues also fail to correctly represent the Decision. The Single Judge never “implied that the Prosecution has no independent disclosure obligations once an access request has been filed”.<sup>8</sup> The Single Judge also did not “enter a decision on a disclosure violation”.<sup>9</sup> The Single Judge explicitly concluded that those issues were “premature”.<sup>10</sup> The Defence also fail to explain how the Decision means that the “Prosecution’s disclosure obligations are not subject to any judicial supervision”<sup>11</sup> or removes the Chamber of its authority to resolve disclosure matters in this case.<sup>12</sup> Nothing in the Decision supports those propositions.

4. To the contrary, by claiming that allegations that the Prosecution’s violated its disclosure obligations are “premature”,<sup>13</sup> the Single Judge clearly anticipates that such matters are within the Chamber’s competency to adjudicate. At minimum, it shows that the matter was not resolved by the Decision. The fact that there is no discussion as to the standard of review applicable to a disclosure violation is not because the Decision “is so tersely reasoned.”<sup>14</sup> Instead, it is further support that the Single Judge never issued a decision as to whether such violation occurred to begin with.

5. Finally, none of the Issues amount to “a subject the resolution of which is essential for the determination of matters arising in the judicial cause under

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<sup>7</sup> Decision, para.13.

<sup>8</sup> Mangenda Application, para.1. *See also* para.7.

<sup>9</sup> Arido Application, para.10. *See also* paras.12, 23.

<sup>10</sup> Decision, para.13.

<sup>11</sup> Mangenda Application, para.8.

<sup>12</sup> *See* Bemba Application, paras.4-5.

<sup>13</sup> Decision, para.13.

<sup>14</sup> Arido Application, para.23.

examination.”<sup>15</sup> This is so because Trial Chamber III, the Prosecution’s position notwithstanding, may grant broad access to the Main Case, within its discretion, thus remedying any purported error raised under the Issues.

## **B. The Issues do not meet the criteria for leave to appeal**

6. None of the Issues significantly affects the fair conduct of the proceedings.<sup>16</sup> The Defence continues to be at liberty to obtain the relevant materials directly from Trial Chamber III through an access motion, which they have already done. Until Trial Chamber III issues a decision on that request, all potential concerns as to the ramifications of Trial Chamber III’s denial of access are premature and non-justiciable.

7. None of the Issues significantly affect the expeditious conduct of the proceedings or would materially advance them.<sup>17</sup> Irrespective of whether any of the Issues are granted, Trial Chamber III would still need to determine whether or not to grant access to the materials at issue since only Trial Chamber III has “primary authority to decide whether to provide access to material in the Main Case record.”<sup>18</sup> For instance, even if the Appeals Chamber were to determine that the Prosecution retains a duty to disclose the requested material, authorisation from Trial Chamber III would still need to be obtained. The Prosecution is not – as it has expressed before – the custodian of Court records nor is the record of a case in the Prosecution’s “possession or control” within the terms of rule 77.<sup>19</sup> The Prosecution also does not have the authority to vary protective orders issued by a Chamber seised of a case.<sup>20</sup>

<sup>15</sup> ICC-01/04-168, para.9. *See also* ICC-02/04-01/05-367, para.22; ICC-01/04-01/06-2463, para.8; ICC-01/09-02/11-27, para.7.

<sup>16</sup> *Contra* Mangenda Application, paras.8-13; Bemba Application, para.9; Arido Application, paras.17-19, 30-33, 41-42.

<sup>17</sup> *Contra* Mangenda Application, paras.14-15; Bemba Application, paras.9-17; Arido Application, paras.20-21, 34-35, 43-44.

<sup>18</sup> Decision, para.13.

<sup>19</sup> ICC-01/05-01/13-1162 (“Prosecution Response to Disclosure Request”), para.8.

<sup>20</sup> Prosecution Response to Disclosure Request, para.8

Thus, irrespective of whether the First and Fifth Issue are granted, there is no indication, and the Defence point to none, that instilling the Prosecution with a separate disclosure obligation would expedite the proceedings given that the Prosecution would be required to do what the Defence is asking to do now – request access from Trial Chamber III.

8. The remaining Issues fail for similar reasons. Whether confidential materials in the Main Case can be disclosed is a matter within the province of Trial Chamber III. Even if, *arguendo*, the Decision was improperly issued by the Single Judge, there is no argument presented by the Defence that the requested materials would come into its possession any sooner.<sup>21</sup> It is also unclear and unexplained how the proceedings in *this* case would be “potentially significantly” delayed if the Arido Defence were “obliged to make [additional disclosure] requests to Trial Chamber III”.<sup>22</sup> The Bemba Defence also fails to explain why spending some “time and resources to develop arguments as to why it should be given access to materials”<sup>23</sup> has any bearing on the expediency of these proceedings, particularly when the Bemba Defence already has access to those materials by virtue of being a party to the Main Case.

9. Finally, and for similar reasons as those discussed above, the Issues do not affect the outcome of the trial. The concerns raised by the Defence<sup>24</sup> are speculative and depend on Trial Chamber III denying the Defence access to relevant materials in the Main Case. Even if all of the Issues were resolved in a manner favourable to the Defence, the Prosecution and/or the Single Judge would still need to apply to Trial Chamber III for access. The Defence fails to argue or demonstrate that the Prosecution or the Chamber could disclose materials from the Main Case without

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<sup>21</sup> *Contra* Arido Application, paras.18-21, 30-35, 41-44.

<sup>22</sup> Arido Application, para.18.

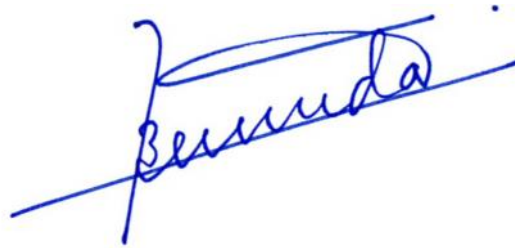
<sup>23</sup> Bemba Application, para.15.

<sup>24</sup> Mangenda Application, paras.8-9; Arido Application, paras.16, 19-20; Bemba Application, paras.12-13.

Trial Chamber III's consent, such that the Issues could potentially affect the outcome of trial if Trial Chamber III denies the joint access request.

### III. Relief Requested

10. The Applications should be denied.



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Fatou Bensouda, Prosecutor

Dated this 7<sup>th</sup> Day of September 2015  
At The Hague, The Netherlands