

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13
Date: 9 September 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, AIMÉ KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA
WANDU and NARCISSE ARIDO***

Public

**Decision on Request for Disclosure or Securing of Prior Statements Given by
Prosecution Witnesses to Domestic Judicial Authorities and International
Organisations**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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Counsel for Jean-Jacques Mangenda Kabongo

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Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Legal Representatives of Victims

Legal Representatives of Applicants

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Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims **The Office of Public Counsel for the Defence**

States Representatives

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REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber VII ('Single Judge' and 'Chamber', respectively) of the International Criminal Court, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* ('Bemba et al. case'), having regard to Article 54(1)(a) of the Rome Statute ('Statute') and Rules 76 and 77 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Request for Disclosure or Securing of Prior Statements Given by Prosecution Witnesses to Domestic Judicial Authorities and International Organisations'.

I. Procedural History

1. On 10 August 2015, the defence for Mr Arido ('Arido Defence') requested that the Chamber order the Office of the Prosecutor ('Prosecution') to take various steps related to disclosure or securing of prior statements given by Prosecution witnesses to domestic judicial authorities and international organisations ('Request').¹
2. On 24 August 2015,² the Prosecution responded to the Request, submitting that the Chamber reject it ('Response').³

II. Analysis

3. The relief sought by the Arido Defence has been separated and analysed in the sub-sections below.

¹ Narcisse Arido's Request for Disclosure or Securing of the Prior Statements Given by Prosecution's Witnesses to Domestic Judicial Authorities and International Organisations, 10 August 2015, ICC-01/05-01/13-1137-Conf (with nine annexes).

² The Chamber ordered that any response to the Request be filed by this date. See Email communication from a Trial Chamber Legal Officer to the parties on 12 August 2015 at 18:51.

³ 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-Red (with annex; public redacted version notified 28 August 2015).

A. Requests to disclose statements under Rule 76 of the Rules and to obtain such statements

4. The Arido Defence requests that the Chamber order the Prosecution to: (i) disclose, under Rule 76(1) of the Rules, any further statements of its witnesses that it intends to call which it may have in its possession, including but not limited to P-245 and P-260, and (ii) obtain prior statements given by its witnesses, and to confirm that it is in the process of doing so.⁴
5. The Arido Defence provides information suggesting a 'strong likelihood' that P-245 and P-260 may have given statements to an identified international organisation and indicates that it has unsuccessfully tried to obtain these statements directly from that organisation.⁵ The Prosecution has not disclosed any such statements and has provided no indication that it has attempted to obtain them.⁶ The Arido Defence submits that these statements may provide information on P-245 and P-260's military backgrounds, and that both the Pre-Trial Chamber and Prosecution have made this background relevant to its defence.⁷
6. The Prosecution responds that the requested statements are not within its possession or control. The Prosecution submits that it has fully complied with its Rule 76 disclosure obligations and that 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'.⁸

⁴ Request, ICC-01/05-01/13-1137-Conf, paras 18-24, 44(a), (c).

⁵ Request, ICC-01/05-01/13-1137-Conf, paras 28-33. *See also* ICC-01/05-01/13-1137-Conf-Anx3, ICC-01/05-01/13-1137-Conf-Anx4.

⁶ Request, ICC-01/05-01/13-1137-Conf, paras 3, 35.

⁷ Request, ICC-01/05-01/13-1137-Conf, paras 26-27.

⁸ Response, ICC-01/05-01/13-1175-Red, paras 2, 4-5.

7. The Prosecution has made it clear that it does not possess any further statements of the kind identified by the Arido Defence. The inquiry at hand is limited to whether the Prosecution has an obligation to try to obtain these kinds of statements.
8. Rule 76(1), first sentence, of the Rules provides that '[t]he Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses'. Article 54(1)(a) of the Statute provides that the Prosecution shall '[i]n order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally'.
9. Consistent with the way other International Tribunals have defined statements for provisions analogous to Rule 76 of the Rules,⁹ the Single Judge considers that 'prior statements' within the meaning of Rule 76 are made only when witnesses are questioned about their knowledge of the case in the course of its investigation. On this definition, statements provided by witnesses to entities other than the Prosecution (for example, domestic judicial authorities and certain international organisations) may still qualify as Rule 76 statements,¹⁰ provided such statements involve questioning witnesses 'about their knowledge of the

⁹ See ICTY, Appeals Chamber, *The Prosecutor v. Tihomir Blaškić*, Decision on the Appellant's Motions for the Production of Material, Suspension of Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, IT-95-14-A, para. 15 (emphasis added: 'the usual meaning of a witness statement in trial proceedings is an account of a person's knowledge of a crime, **which is recorded through due procedure in the course of an investigation into the crime**'); ICTR, Trial Chamber, *Prosecutor v. Karemera et al.*, Decision on Joseph Nzirorera's Sixth, Seventh and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive and Other Measures, 29 November 2007, ICTR-98-44-T, para. 20; SCSL, Trial Chamber, *Prosecutor v. Brima et al.*, Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68, 4 May 2005, SCSL-04-16-T, para. 16. See also ICTR, Appeals Chamber, *Niyitegeka v. Prosecutor*, Judgment, 9 July 2004, ICTR-96-14-A, paras. 31-36.

¹⁰ In this regard, see Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Defence Requests for Disclosure of Materials, 17 November 2006, ICC-01/04-01/06-718, page 4.

case in the course of its investigation'.¹¹ The Single Judge recalls that the Prosecution has an investigative obligation to make sufficient efforts to obtain Rule 76 statements.¹²

10. The Arido Defence provides no information suggesting that any questioning by the international organisation identified was done in a context which would lead to statements falling under Rule 76 of the Rules. Particularly given the nature of the organisation at issue, the Arido Defence does not substantiate that any statements taken by this organisation involved questioning P-245 or P-260 about their knowledge of this case in the course of its investigation. There is therefore no justification to order the Prosecution to obtain any such statements for Rule 76 disclosure purposes.
11. For these reasons, this relief sought by the Arido Defence is rejected.

B. Request to disclose statements of certain non-witnesses

12. The Arido Defence requests for the Chamber to order the Prosecution to disclose all statements in its possession that have been given by named persons 'central to its case' who are not intended to be called as Prosecution witnesses.¹³
13. The Prosecution has indicated that, for individuals not being called as witnesses, it has already provided or would provide all relevant material in its possession or control, in accordance with its disclosure obligations.¹⁴
14. The Single Judge recalls that the disclosure deadline in this case has already passed.¹⁵ The Arido Defence provides no information which would tend to show

¹¹ This has the effect of removing remarks from the ambit of Rule 76 where witnesses are solely discussing matters outside the context of the relevant case investigation.

¹² See Decision on Joint Request to Strike Prosecution Witnesses P-198 and P-201 from the Witness List, 31 August 2015, ICC-01/05-01/13-1202.

¹³ Request, ICC-01/05-01/13-1137-Conf, paras 17, 44(b).

¹⁴ Annex 2 of the Request, ICC-01/05-01/13-1137-Conf-Anx2, page 4.

¹⁵ Decision on Modalities of Disclosure, 22 May 2015, ICC-01/05-01/13-959, para. 51 (30 June 2015).

that the Prosecution failed to comply with this deadline in respect of any of the individuals named by the Arido Defence. This request for disclosure of statements of certain non-witnesses is rejected for lack of substantiation.

C. Request to order the Prosecution to seek a list of prior statements and consent from its witnesses

15. As an alternative to the other relief sought, the Arido Defence requests that the Chamber order the Prosecution to provide its witnesses with an annexed 'model consent form' so as to seek a list of prior statements and the consent of these witnesses to access certain materials.¹⁶
16. The Single Judge notes the information provided by the Arido Defence that witnesses P-245 and P-260 have already confirmed that they do not wish to speak with any of the defence teams.¹⁷ The Single Judge considers that there is little utility in ordering the Prosecution to give the proposed form to witnesses who have affirmatively indicated they do not want to meet with the defence teams so as to facilitate their investigation.
17. As for Prosecution witnesses who have not made such refusals, the Arido Defence is free to contact these witnesses in accordance with the Chamber's protocol for contacting opposing party witnesses.¹⁸ During such meetings, the Arido Defence may provide its proposed form to these persons if it wishes to do so.
18. For these reasons, the only time the proposed form would serve any purpose would be those situations when the Arido Defence could present it directly to the Prosecution's witnesses. No order for the Prosecution to provide this form is

¹⁶ Request, ICC-01/05-01/13-1137-Conf, paras 14 n. 26, 43, 44(d). *See also* ICC-01/05-01/13-1137-Conf-Anx9.

¹⁷ Annexes 7 and 8 of the Request, ICC-01/05-01/13-1137-Conf-Anx7, ICC-01/05-01/13-1137-Conf-Anx8.

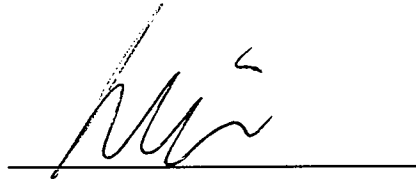
¹⁸ Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party and Witnesses of the Other Parties, 20 July 2015, ICC-01/05-01/13-1093-Anx, paras 35-37.

necessary. Accordingly, the Single Judge rejects the Arido Defence's alternative request.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

REJECTS the relief sought in the Request.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to be 'BS', is written over a horizontal line.

Judge Bertram Schmitt, Single Judge

Dated 9 September 2015

At The Hague, The Netherlands