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

Date: **10 July 2016**

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 Annex A

**Public Redacted Version of
“Narcisse Arido’s Request for a Disclosure Order for Material Related to the Witnesses
Indicated in ICC-01/05-01/13-1521-Conf-AnxA, pursuant to Article 67(2) and Rule 77”
(ICC-01/05-01/13-1640-Conf), filed 19 February 2016**

Source: Counsel for Narcisse Arido

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

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Melinda Taylor

Counsel for Aimé Kilolo Musamba

Paul Djunga Mudimbi

Steven Powles

Counsel for Jean-Jacques Mangenda Kabongo

Christopher Gosnell

Arthur Vercken De Vreuschmen

Counsel for Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Roland Azama Shalie Rodoma

Counsel for Narcisse Arido

Charles Achaleke Taku

Beth Lyons

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

**The Office of Public Counsel for
Victims**

The Office of Public Counsel for the Defence

Xavier-Jean Keïta

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and

Other

Reparations Section

I. INTRODUCTION

1. The Arido Defence respectfully requests Trial Chamber VII ('Trial Chamber') to order the Prosecution to disclose all material related to the witnesses indicated in ICC-01/05-01/13-1557-Conf-AnxA,¹ and all material under Article 67(2) of the Rome Statute ('Statute'). In light of the fact that the Arido Defence intends to call these witnesses, all material related to them is material for Defence preparation under Rule 77 of the Rule of Procedure and Evidence ('RPE').

2. This request is made again now because the Prosecution has refused, to date, to confirm the materiality of the documents and material sought. The Defence wants to avoid unfairness to the Accused at trial and must be able to fully assess calling each of these individuals. Therefore, the Arido Defence respectfully requests the Trial Chamber to confirm the scope of the Prosecution's disclosure obligations and order disclosure of the material.

3. It is the contention of the Arido Defence that, based upon the charges against Mr. Arido, the fact that a number of witnesses have testified in the Main Case, and that the Prosecution is now claiming that several witnesses are suspects, there is far more material to be disclosed. This is the reason for the present request.

II. CONFIDENTIALITY

4. 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 refers to confidential information about defences witnesses.

III. PROCEDURAL HISTORY

5. On 5 May 2015, the Arido Defence made a comprehensive *inter partes* requested for disclosure to the Prosecution.² This request concerned material from the Bemba Main Case and Article 70 investigations, it included requests relating to the witnesses that the Arido Defence now intends to call. The Prosecution rejected much of the 5 May request outright.³ Items that

¹ See email in Annex A, subject line 'Request for disclosure of materials relating to witnesses in ICC-01/05-01/13-1521-Conf-Anx', dated 7 January 2016.

² ICC-01/05-01/13-1141-Conf-AnxA.

³ ICC-01/05-01/13-1141-Conf-AnxB.

have been subsequently disclosed that could fall within the 5 May request have often been done so after an order from the Trial Chamber.⁴

6. On 7 January 2016, citing Rule 77 of the RPE, the Arido Defence requested, by email,⁵ the disclosure of materials relating to witnesses in ICC-01/05-01/13-1521-Conf-Anx from the Prosecution. This request covered, but was not limited to: statements from the witnesses or by other individuals about the witnesses or their actions; records, notes, or documents created, seized, or obtained generally by the Prosecution that pertained to these witnesses; and any evidence that directly or indirectly pertains to the background, the truth of statements given, or the actions of the various witnesses indicated on the provisional list.

7. The Prosecution replied on 8 January 2016⁶ stating that it was aware of its disclosure obligations under the prevailing Statute and Rules. The Prosecution disclosed no information at this time. In response, on 14 January 2016, the Arido Defence sought clarification. With the 21 January and the 29 February 2016 deadlines in mind, the Arido Defence enquired whether a specific review was undertaken following the Defence's particular request, and whether a predicted time-line for the completion of the review was anticipated.⁷ Also, addressed in the same letter was an inquiry as to the Prosecution's understanding of the scope of its obligation.

8. On 22 January 2016, the Prosecution disclosed some material under Rule 77 that relates to Arido Defence witnesses.⁸ This was followed by a general statement which was provided on 26 January 2016 whereby the Prosecution asserted that it has disclosure obligations and that it is reviewing material in conformity with them.⁹

9. Finally, on 4 February 2016,¹⁰ the Prosecution disclosed a witness summary from the Main Case, records describing unfruitful [REDACTION] investigative requests concerning several of the Arido Defence witnesses, and a series of emails from Mr. Arido.

⁴ As for example ICC-01/05-01/13-1234-Conf.

⁵ See email in Annex A, subject line 'Request for disclosure of materials relating to witnesses in ICC-01/05-01/13-1521-Conf-Anx', dated 7 January 2016.

⁶ See email in Annex A, subject line '160108 - PD's Response to Arido Defence Request for disclosure of materials relating to witnesses in ICC-01/05-01/13-1521-Conf-Anx', dated 8 January 2016.

⁷ See email in Annex A, subject line 'RE: 160108 - PD's Response to Arido Defence Request for disclosure of materials relating to witnesses in ICC-01/05-01/13-1521-Conf-Anx', dated 14 January 2016.

⁸ ICC-01/05-01/13-1569-Conf-AnxB.

⁹ See email in Annex A, subject line '160126 - PD's Response to Arido Defence Request for disclosure of materials relating to witnesses in ICC-01/05-01/13-1521-Conf-Anx', dated 26 January 2016.

¹⁰ ICC-01/05-01/13- 1599.

IV. APPLICABLE LAW

10. Rule 77 of the RPE states that the Prosecution must permit the Defence to “inspect any books, documents, photographs or other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the Defence or are intended for use by the Prosecution as evidence for the purposes of the confirmation hearing or at trial”. It is common practice at the ICC that material falling within the scope of Rule 77 of the RPE is automatically disclosed to the Defence along with other disclosures.¹¹

11. The ICC Appeals Chamber has held that the expression “material to the preparation of the defence” has to be interpreted broadly¹² and that Rule 77 encompasses “all objects that are relevant for the preparation of the defence”.¹³ In particular, it noted that certain objects, while not directly linked to exonerating or incriminating evidence, may otherwise be material to the preparation of the defence.¹⁴ This included material not directly related to the case but tending to explain the overall circumstances of a conflict¹⁵ – which is to say the context of the charges.

12. The Appeals Chamber has noted that Rule 77 shares textual similarities to Rule 66(B) of the *ad-hoc* tribunals. It therefore considered that it is “useful to consider the relevant jurisprudence of the ICTY and the ICTR”¹⁶. However, unlike the rules of the ICTY and ICTR, the Prosecution has an obligation to disclose items material to the preparation of the defence independently of any request of the defence.¹⁷

13. Under Rule 81 (1) of the RPE “reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure”.

14. However, Article 64 (3) (c) of the Statute grants the Trial Chamber the power to 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. This Statutory provision is complemented by Rule 84 of the RPE which further elaborates upon this power by specifying that the Trial Chamber may attach “strict time limits” for disclosures that are “necessary” in

¹¹ See e.g. ICC-01/05-01/13-291; ICC-01/05-01/13/333.

¹² ICC-01/04-01/06-1433 OA, para. 78; see also ICC-01/05-01/08-1594-red, para. 19.

¹³ ICC-01/04-01/06-1433 OA, para. 77.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, paras 76-82.

¹⁶ ICC-01/04-01/13-1433, para. 78.

¹⁷ ICC-02/05-03/09-501 (OA4), para. 34.

advance of trial. This is in order to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of proceedings.

V. SUBMISSIONS

15. To date, the Prosecution has only provided general assertions. In its emails of 8 and 26 January 2016, the Prosecution stated that it is aware of its disclosure obligations and refers to the Prosecution conducting ongoing reviews of its evidence for the discharge of this obligation.

16. While the Prosecution's statement of its *ongoing* disclosure obligation¹⁸ is correct, these responses fail both to inform the Defence as regards the status of its request and also fail to provide sufficient information to evaluate whether the Prosecution considers the Arido Defence requests to be beyond its disclosure obligations.

17. Given the fast approaching trial deadlines, the Defence is left with no other choice, but to address the Chamber to seek clarification with regards to disclosure of the material related to its witnesses. So as to avoid repetitions of unnecessary delays or late disclosures, the Arido Defence now asks that Trial Chamber to order the Prosecution to provide the Arido Defence with all material related to the witnesses in ICC-01/05-01/13-1521-Conf-Anx, certainly as soon as possible, but at least one week prior to the start of the examination-in-chief of the first Arido Defence witness.

18. The material concerned primarily includes:

- a. Statements by the witness or by other individuals about our witnesses or their actions.
- b. Records, notes, or documents created, seized, or obtained generally by the Prosecution that pertain to these witnesses; and
- c. Any evidence that directly or indirectly pertains to the background, the truth of the statements given, or the actions of the various witnesses in our provisional list.

19. The material disclosed to this point following the Arido Defence request is limited. Most items concern emails sent by Mr. Arido while a few items disclosed concern investigative

¹⁸ ICC-01/05-01/08-2292, paras 10-13.

requests, many of which simply seek to establish the address of the witnesses in question. Given that 5 individuals on the Arido Defence witness list either have testified in the Bemba Main Case, have been placed on the Bemba Defence list of witnesses, or have at least been mentioned in the Prosecution Document Containing the Charges,¹⁹ it can be safely assumed that the Prosecution holds further materials related to individuals on the Arido Defence list of witnesses either from disclosures in the Main Case or investigations from either the Main case or the present Article 70 case.

20. Given that witnesses D24-0003 and D24-0009 form part of the charges against Mr. Arido, it would be outright improper to for the Prosecution to have brought forward charges if it was not in possession of a substantial body of material that corroborated its arguments about the background of these individuals. Moreover, the Prosecution has recently indicated that it considers D24-0002 and D24-0003 to be suspects.²⁰ All this strengthens the argument that there is significant material outstanding. Put simply, the Arido Defence submits that there is doubt as to whether the Prosecution has followed its disclosure obligations and thus the Trial Chambers intervention is necessary.²¹

A. The material sought is highly relevant and must be disclosed

21. Independent of the Prosecution's obligations under Article 67(2), Rule 77 creates a wide obligation to disclose and a presumption of full disclosure of any materials which are relevant to defence preparation. The Appeals Chamber has also repeatedly stated that exceptions to this presumption are themselves very exceptional.²²

22. Thus, in order to establish this obligation to disclose, the Defence needs to establish firstly, that the information requested is *relevant* to a particular aspect of defence preparation at that stage of the proceedings, and secondly, that there are *no provisions* in the Statute or Rules which restrict the requested disclosure.

23. The material related to the witnesses in ICC-01/05-01/13-1521-Conf-Anx is not only relevant, but also imperative for defence preparation at the stage where the defence readying its case for presentation. Disclosure of the material requested is essential for at least two reasons: (1)

¹⁹ See for example witnesses CAR-D24-P-002 at p. 10, CAR-D24-P-003 at p. 29, CAR-D24-P-009 at p. 35, and CAR-D24-P-0012 at p. 15 of ICC-01/05-01/13-526-AnxB1.

²⁰ Email, subject line 'RE: 160127 - Prosecution second request on Witness Contact', dated 5 February 2016, ICC-01/05-01/13-1619-Conf-AnxA.1-Red, p. 6.

²¹ ICC-01/05-01/08-750-Red, para. 30.

²² ICC-01/04-01/06-3031, para. 10; ICC-01/04-01/07-475, para. 70.

the material may be critical in assessing the credibility and suitability of calling the various witnesses and (2) the information will inform the drafting and selection of witness questions. With regards to reason (1), ICC jurisprudence confirms that information sought in the present request may be critical in assessing the credibility and suitability of calling the various witnesses.²³

24. The Prosecution has asserted that it is conducting its assessment on the basis of a *prima facie* standard of relevance.²⁴ However, the absence of clarification from the Prosecution to Defence's questions²⁵ and the relatively small trickle of documents leaves a great detail of uncertainty as to how this standard is being applied. The Arido Defence recalls that the Prosecution, in public session, stated "you don't get things just by sitting around and hoping this they fall out of the sky as a Defence attorney. You make specific requests targeted requests, intelligent requests as they relate to various positions that the Defence may take."²⁶ This submission clearly suggests the lens through which the Prosecution sees its disclosure obligations.

25. The wide breadth of relevance established by the Appeals Chamber in *Lubanga*²⁷ was given more precision by the Appeals Chamber in the *Banda & Jerbo* case which stated that "[i]t may be that information that is material to the preparation of the defence is ultimately not used as evidence at the trial or may not turn out to be relevant to it. Yet, the defence is still entitled to this information on the basis of a *prima facie* assessment".²⁸ The legal question of what is *prima facie* relevant depends upon context and the perspective of the evaluator. It is for this reason that Appeals Chamber made clear that it is the defence²⁹ who can make out the standard and this involves "a low burden"³⁰.

26. Since it would be unfair to require the Defence to disclose its whole case-theory so as to effect full disclosure of material that may or may not support it, it is submitted that a *prima facie* standard must be understood to mean that *any* material that relates to a witness to be called *is relevant* simply by merit of it relating to a witness to be called.

²³ ICC-01/04-01/06-1433, para 79; see also ICC-01/04-01/07-T-245-Red-ENG WT 08-04-2011.

²⁴ See email in Annex A, email subject line '160108 - PD's Response to Arido Defence Request for disclosure of materials relating to witnesses in ICC-01/05-01/13-1521-Conf-Anx', dated 8 January 2016.

²⁵ See email in Annex A, email subject line 'RE: 160108 - PD's Response to Arido Defence Request for disclosure of materials relating to witnesses in ICC-01/05-01/13-1521-Conf-Anx', dated 14 January 2016.

²⁶ ICC-01/05-01/13-T-22-CONF-ENG, p. 10.

²⁷ ICC-01/04-01/06-1433, paras 78-79.

²⁸ ICC-02/05-03/09-501 (OA4), para. 42.

²⁹ *Ibid.*, para. 82.

³⁰ *Ibid.*

27. ICC Chambers have considered *ad-hoc* case law and found that any statements or other materials made by Defence witnesses “are material to the preparation of the Defence. Accordingly, the material is subject to disclosure under Rule 77 of the Rules”³¹ and according to the ICTY jurisprudence, information contained in these documents need *only to be likely* to assist the Defence with this decision.³² The ICTR jurisprudence also concurs.³³ Furthermore, ICTR jurisprudence indicates that information – as being sought in the present request – which may be critical in assessing the credibility and suitability of calling a witness should be disclosed.³⁴

28. Furthermore, it is submitted that the reference to categories of documents from specifically identified prospective witnesses is sufficiently precise pursuant to Rule 77 of the RPE. Jurisprudence from the ICTY confirms that the Defence is not required to specifically identify these documents.³⁵ Indeed, given the disparity of investigative resources, the defence will virtually never have an equal knowledge of the range of materials that exist. It is therefore unfair and legally incorrect for the Prosecution to place a burden of absolute specificity in its requests upon the Defence.

B. Exceptions to disclosure under Rules 81 and 82 do not apply to this request

29. The RPE has provisions that permit exceptions to disclosure; the Prosecution has never invoked them in the present case. However, the Arido Defence takes this opportunity to submit that none of the restrictions on disclosure provided for in Rules 81 and 82 of the RPE would in fact prevent the Prosecution from providing the Arido Defence with the requested material related to witnesses in ICC-01/05-01/13-1521-Conf-Anx.

30. The restrictions on disclosure set out in Rule 81 of the RPE are linked to the need to preserve the security of Prosecution investigations, or the need to protect the safety of victims and witnesses. Rule 81(1) does not exempt the Prosecution from disclosure of “information and

³¹ ICC-01/09-01/11-840-Red, para. 11.

³² ICTY: Popović et al., IT-05-88-T, 19 July 2007, p. 5, available at: <http://www.icty.org/x/cases/popovic/tdec/en/070719.pdf>; Djordjević, IT-05-87/1PT, 6 Feb 2008, para. 7, available at: <http://www.icty.org/x/cases/djordjevic/tdec/en/080206a.pdf>.

³³ *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73.11, Decision on the Prosecution’s Interlocutory Appeal Concerning Disclosure Obligations, 23 January 2008, para. 14, available at: <http://41.220.139.198/Portals/0/Case%5CEnglish%5CKaremera%5Cdecisions%5C080123.pdf>.

³⁴ *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73.11, ‘Decision on Joseph Nzirorera’s Motion for Inspection: Michel Bagaragaza’, 10 July 2008, paras 8 and 9, available at: <http://41.220.139.198/Portals/0/Case%5CEnglish%5CKaremera%5Cdecisions%5C080710.pdf>.

³⁵ *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Motion to Compel Inspection of Items Material to the Sarajevo Defence Case, 8 February 2012, paras 14-17, available at: <http://www.icty.org/x/cases/karadzic/tdec/en/120208a.pdf>. See also *Prosecutor v. Karadžić*, IT-95-5/18-T, ‘Decision on Accused’s Motion to Compel Inspection of Items Material to the Municipalities Defence Case’, 7 May 2012, paras 9-12, available at: <http://www.icty.org/x/cases/karadzic/tdec/en/120507.pdf>.

material” in internal investigator reports that is either exculpatory or material to the preparation of the defence, it only covers the investigators “evaluations or assessments”.³⁶ If the material is relevant to Defence preparation under Rule 77, then even if it comes from documents such as Prosecution pre-screening notes, it should be disclosed.³⁷

31. In this case, the burden falls on the Prosecution to establish the existence of concrete risks, and to demonstrate that such restrictions are both necessary and proportionate.³⁸ Therefore, the mere fact that the Arido Defence requests concerns material related to witnesses in ICC-01/05-01/13-1521-Conf-Anx issued by the Prosecution does not itself meet the criteria necessary to justify the non-disclosure of information under Rule 81 of the RPE.

32. With regards to the application of Rule 82 of the RPE, the Pre-Trial Chamber held that the Prosecution must raise such restrictions with the Chamber as soon as possible so that appropriate measures to safeguard the rights of the Defence are taken.³⁹ Given that the Prosecution has not brought any such matters to the attention of the Chambers, it must be presumed that the restrictions under Rule 82 of the RPE are not engaged with regards to all the requested material related to witnesses in ICC-01/05-01/13-1521-Conf-Anx.

33. Finally, the Appeals Chamber has suggested, that if there is any doubt regarding the propriety of disclosure, the Prosecution should produce a list to the Trial Chamber for it to assess whether or not they meet the standard of relevance for disclosure.⁴⁰

C. Fairness to the accused requires that a specific search by the Prosecution be undertaken

34. In light of the judicial understanding of the relevance and/or materiality described above and the explanations provided in the disclosure emails between the two parties, the Arido Defence is concerned that the Prosecution has failed to provide clear indications as to what it has or has not done. The Arido Defence recalls that the defence case begins in nearly a week, as such it is emphasized that the Prosecution cannot validly stand behind its ongoing disclosure obligations at such an important juncture in the trial.

³⁶ ICC-01/04-01/06-2656-Red, para. 12.

³⁷ ICC-01/05-01/08-750-Red.

³⁸ ICC-01/04-01/07-475.

³⁹ ICC-01/04-01/07-646.

⁴⁰ ICC-02/05-03/09-501 (OA4), para. 39

35. By not responding clearly and unequivocally to the requests of the Arido Defence, the Prosecution undermines the overriding principle of full disclosure⁴¹, and therefore fairness and opportunity to a full answer and defence to the Accused. Whereas an ongoing review may be appropriate to discharge its obligations under some circumstances, in the present ones, the Arido Defence requires that the certainty of a comprehensive and specific inquiry has been made.

36. More holistically speaking, disclosure of this material is necessary to avoid the unfairness of trial by ambush. Out of concern that litigation might break out anew, the Arido Defence requires the immediate intervention of the Chamber.

VI. CONCLUSION

37. In light of the above, the Arido Defence respectfully requests the Trial Chamber to:

- a. ORDER the Prosecution to disclose all the material related to witnesses in ICC-01/05-01/13-1521-Conf-Anx as described above in paragraph 18 to the Arido Defence no later than one week before the start of the examination-in-chief of the first Arido Defence witness; and
- b. GRANT the Arido Defence prospective permission to add any material disclosed by the Prosecution to its list of evidence.



Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 10th Day of July 2016

⁴¹ ICC-01/04-01/06-3031, p. 10.