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**International
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Court**



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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, AIMÉKILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA
WANDU AND NARCISSE ARIDO**

Public with Confidential Annexes 1 to 9

**Public Redacted Version of
“Narcisse Arido’s Request for Disclosure or Securing of the Prior Statements Given
by Prosecution’s Witnesses to Domestic Judicial Authorities
and International Organisations”
(ICC-01/05-01/13-1137-Conf), filed 10 August 2015**

Source: Counsel for Narcisse Arido

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I. INTRODUCTION

1. The Arido Defence hereby respectfully requests Trial Chamber VII (hereinafter ‘Trial Chamber’) to order the Prosecution to disclose or secure any prior statements of the witnesses listed on its witness list¹ that have been given to judicial institutions, [REDACTED], or any other public or quasi-public institution. In the alternative, the Arido Defence requests the Trial Chamber to order the Prosecution to obtain a list of prior statements or the consent of the relevant individuals in order to permit the Defence to obtain these statements.

II. CLASSIFICATION

2. 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 protected witnesses and to personal information of individuals who have not been granted protective measures.

III. PROCEDURAL HISTORY

3. At the 24 April 2015 Status conference, the Trial Chamber requested the parties to – where reasonable – pursue issues *inter partes* before seizing the Chamber.² Following these instructions, the Arido Defence and Prosecution exchanged a series of letters:

- a. On 5 May 2015, the Arido Defence wrote to the Prosecution and requested generally:

“With regards to both the Main case and Article 70 case, we ask you generally to disclose any material generated by or with these witnesses which is in your possession and may impact on their credibility or which may be in any other manner material to the Defence.”³

- b. More specifically the Defence requested *inter alia* information about the “steps taken [by the Prosecution] to ascertain the [lack of] military background of D-

¹ ICC-01/05-01/13-1048-Conf-AnxA-Red.

² ICC-01/05-01/13-T-8-CONF-ENG, p. 4, lines 16-20.

³ See Annex 1, Letter from the Arido Defence to the Prosecution, dated 5 May 2015 and entitled ‘Request for Disclosure #1’, p.1, A.1.

2, D-3, D-4, D-6”⁴; “[a]ny documents in the possession of the Prosecution or that the Prosecution is aware of produced by [REDACTED], concerning D-2, D-3, D-4, or D-6 and/or attempts at obtaining such documents”⁵; “[a]ny domestic judicial decisions, or orders, or records of incarceration, concerning D-2, D-3, D-4, or D-6 that were obtained by the Prosecutor”⁶; and finally “[d]ocuments or information that the Prosecution has or is aware being taken during meetings or interviews that D-2, D-3, D-4, or D-6 may have had with domestic police or security officials [REDACTED]”.⁷

- c. The Prosecution responded on 3 June 2015 by stating that it did not either “possess or control”⁸ the information. Notably, the Prosecution did not deny their existence.
- d. In June 2015, members of the Arido Defence undertook a mission to [REDACTED]. During this period, they approached [REDACTED] in [REDACTED] seeking files related to the present request. At the office, the Defence was denied access in person. The Arido Defence team then initiated a cooperation procedure on 16 June 2015. A follow-up request was directed through international cooperation section to the [REDACTED] headquarters in [REDACTED] 25 June 2015. The team was subsequently denied access by a letter dated 13 July 2015 with the accompanying explanation that “subject to other relevant considerations” the consent of [REDACTED] would be required.⁹ Finally, on 16 July 2015, the Arido Defence team responded to [REDACTED]’s Letter, clarifying its application regarding [REDACTED] [REDACTED] files and requesting for re-consideration of [REDACTED]’s position regarding the other concerned individuals.¹⁰

⁴ *Ibid.*, p. 4, C.9.2.

⁵ *Ibid.*, p. 4, D.8.

⁶ *Ibid.*, p. 5, D.8.

⁷ *Ibid.*, p. 5, D.12.

⁸ See Annex 2 to this request, Prosecution’s Response to the Arido Defence’s ‘Request for Disclosure #1’ dated 3 June 2015 and entitled ‘Re: Letter of 5 May 2015 requesting disclosure of material’, p. 2.

⁹ See Annex 3 to this request, [REDACTED] Response to the Arido Defence Request, dated 13 July 2015.

¹⁰ See Annex 4 to this request, Response from the Arido Defence to [REDACTED] ‘Response to the Arido Defence’, dated 16 July 2015.

- e. The Arido Defence responded to the Prosecution on 15 July 2015.¹¹ In this response, the Arido Defence requested disclosure of several items pertaining to P-0245 and P-0260 referred to in previously disclosed material – including [REDACTED]. The Arido Defence also requested the Prosecution to confirm that the Prosecution had no records of attempts to seek this material. The Defence also provided a lengthy explanation of the importance of this information to its investigations and preparation. Finally, the Defence also notified the Prosecution of its inability to access files from [REDACTED] concerning [REDACTED] and [REDACTED].
- f. The Prosecution responded on 28 July 2015 that it did not possess or control the material.¹² It further added that it did not see how the military background of P-0245 and P-0260 was relevant and that the Defence had not presented any information to suggest that these witnesses had misrepresented themselves. It concluded that the Defence was pursuing a fishing expedition and declined to seek the permission of its witnesses. The Prosecution did not indicate whether it had actually sought out the permission of the witnesses. It also did not confirm that it had not sought out the information for which the Arido Defence had enquired.
- g. Shortly after, still on the 28 July 2015, the Arido Defence requested an interview with P-0245 and P-0260 pursuant to the ‘Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party and Witnesses of the Other Parties’ (‘Witness Contact Protocol’)¹³ on the narrow basis of discussing access to any prior statements.¹⁴ The Prosecution

¹¹ See Annex 5 to this request, Letter from the Arido Defence to the Prosecution, dated 15 July 2015 and entitled ‘Request for disclosure of material derived from [REDACTED] and also material relevant to the background of D-2 and D-3’.

¹² See Annex 6 to this request, Prosecution’s Response to the Arido Defence’s ‘Request for disclosure of material derived from [REDACTED] and also relevant to the background of D-2 and D-3, dated 28 July 2015, Reference Number: ‘OTP/PD/20150728/OST’.

¹³ ICC-01/05-01/13-1093.

¹⁴ See Annex 7 to this request, Email from the Arido Defence to the Prosecution, dated 28 July 2015 and entitled ‘Request to Interview Witnesses D-2 (P-260) and D-3 (P-245).

responded the following day that P-0245 and P-0260 refused to be interviewed.¹⁵

4. On 22 May 2015, the Trial Chamber ordered that the “filing of all motions that, in the view of the parties, require resolution prior to the commencement of trial and which are not already before the Chamber” should be filed by 31 July 2015.¹⁶

5. On 26 June 2015, the Arido Defence requested the Trial Chamber to order the VWU to seek the consent of a number of Prosecution’s witnesses to have their contact information conveyed to the Arido Defence, for the purposes of interviewing them.¹⁷ The Prosecution responded to this request on 6 July 2015¹⁸ and the Registry responded on 3 July 2015¹⁹. Without explicitly deciding upon this request, on 20 July 2015, the Trial Chamber issued its decision setting in place the Witness Contact Protocol.²⁰

6. Pursuant to a 27 July 2015 Joint Defence request for a 30 day extension of the 31 July 2015 deadline²¹, on the 30 July 2015, the Trial Chamber ordered partial extension of time until 10 August 2015.²²

IV. APPLICABLE LAW

7. Article 64 (3) (c) of the Statute empowers the Trial Chamber 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”. As part of the same mechanism, but where the evidence is not under the control of the party, Article 64 (6) (b) enables the Trial Chamber to require the “production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute”.

¹⁵ See Annex 8 to this request, Prosecution’s Response to the Arido Defence’s ‘Request to Interview Witnesses D-2 (P-260) and D-3 (P-245)’, dated 28 July 2015 and entitled ‘PD’s Response to the Arido Request on 28 July 2015’.

¹⁶ ICC-01/05-01/13-960, para. 14.

¹⁷ ICC-01/05-01/13-1043-Conf.

¹⁸ ICC-01/05-01/13-1059-Conf.

¹⁹ ICC-01/05-01/13-1054-Conf.

²⁰ ICC-01/05-01/13-1093.

²¹ ICC-01/05-01/13-1105-Conf.

²² “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’.

8. 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.”

9. Article 54 (1) (a) places an obligation upon the Prosecution to extend its investigation to “to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility”. This obliges the Prosecution to examine exonerating circumstances.

10. This obligation in Article 54 (1) (a) to pursue a prosecution in a rigorously objective manner is re-iterated and underscored in the Code of Conduct of the Office of the Prosecutor (‘Code of Conduct’). In particular the Code of Conduct states that the Prosecution shall conduct investigations “with the goal of establishing the truth”²³ and must “consider all relevant circumstances when assessing evidence, irrespective of whether they are to the advantage or the disadvantage of the Prosecution”²⁴. In addition, it shall ensure that “all necessary and reasonable enquiries are made [...] whether they point to the guilt or the innocence of the suspect”²⁵.

11. Under Rule 76 of the RPE, the Prosecution is obliged to disclose copies of “any prior statements” made by witnesses that the Prosecution intends to call during trial.

12. Under Rule 77 of the RPE, subject to strictly delimited exceptions, the Prosecution must “permit the defence to inspect any books, documents, photographs and 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 Prosecutor as evidence for the purposes of the confirmation hearing or at trial”.

²³ Code of Conduct for the Office of the Prosecutor, OTP2013/024322, para. 49 (a).

²⁴ *Ibid.*, para. 49 (b).

²⁵ *Ibid.*, para. 49 (b).

V. SUBMISSIONS

13. At its broadest, the present request is directed to recovering formal statements and documents of a similar nature made by – primarily – Prosecution witnesses and – secondarily – other individuals mentioned in the core Prosecution case against Mr. Arido.

14. Primarily, the present requests concerns disclosure of the prior statements to police, prior judicial records, information given to [REDACTED], and any other documents of a similar nature. 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.²⁶

15. The Defence acknowledges that some of these statements are currently not in the Prosecution's possession. Nevertheless, it is suggested that a proper reading of Rule 76 RPE in conjunction with Article 54 (1) (a) and paragraph 49 of the Code of Conduct imposes a positive obligation on the Prosecution to obtain and disclose any past statements made by a witness the Prosecution intends to bring before the Court.

16. Alternatively, if the position is that it is incumbent upon the Defence to secure the Prosecution's witnesses past statement, then the Defence seeks the necessary orders from this Trial Chamber to be allowed to obtain such statements itself.

17. The secondary aspect of the present request aims at securing the disclosure of statements or statement-like material under Rule 77 of the RPE for individuals who are not Prosecution witnesses; however, whom are central to the Prosecution's allegations. This includes the following individuals: [REDACTED], [REDACTED], [REDACTED], [REDACTED] (D-4), [REDACTED] (D-6), [REDACTED] (D-13), [REDACTED] (D-25), [REDACTED] (D-26), [REDACTED] (D-29), and [REDACTED] (D-52).

²⁶ Prosecution's Witnesses included on the List of Witnesses: [REDACTED] (P-0020); [REDACTED] (P-0198); [REDACTED] (P-0201); [REDACTED] (P-0214); [REDACTED] (P-0243); [REDACTED] (P-0245); [REDACTED] (P-0260); [REDACTED] (P-0261); [REDACTED] (P-0263); [REDACTED] (P-0264); [REDACTED] (P-0267); [REDACTED] (P-0270); [REDACTED] (P-0272); [REDACTED] (P-0361); [REDACTED] (P-0433), *see* ICC-01/05-01/13-1048-Conf-AnxA-Red.

A. The importance of prior statements in ascertaining the credibility of witnesses

18. The Arido Defence submits that a witness statement is “any statement or declaration made by a witness in relation to an event he or she witness, and recorded in any form by an official in the course of an investigation”²⁷. Therefore, “witness statements” can be contained in *inter alia* immigration records, past testimonies in criminal, civil or administrative Court, past statements in other cases, records of interviews with international organisations, and so on.

19. Although at the pre-trial stage, Single Judge Claude Jorda has stated: ‘the notion of “prior statements” in rule 76 of the Rules includes statements taken by entities *other than the Prosecution*’ (emphasis added).²⁸ By exclusion of certain documents, Judge Jorda seems to indicate that the concept of statements include those that were “re-read by the witnesses *or signed by them*” (emphasis added).²⁹

20. It is submitted that maintaining this approach in the present trial-stage context is correct for at least two reasons. Firstly, it is the most coherent plain reading of the rule. The text of the Rule 76 states that the Prosecution is obliged to provide the Defence ‘any’ prior statements. This phrasing neither includes a qualifying phrase – that is to say: ‘any prior statements *taken by the Prosecution*’, and the use of the word ‘any’ also suggests an expansive intention. Such an approach, which downplays the form of a statement in favour of the practical importance has been adopted in the ICTR.³⁰ There, the distinction between statements taken by the Prosecution and other entities has been rejected

21. Secondly, this interpretation is more keeping with the purpose of the provision and the structure of the rules. The Statute places an emphasis upon oral testimony.³¹ It is submitted

²⁷ *Niyitegeka v. Prosecutor*, No. ICTR-96-14-A, Judgement (9 July 2004), para. 35, available at: <http://www.refworld.org/docid/41591f1b4.html>; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, Decision on Joseph Nzirorera’s Sixth, Seventh, and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive, and Other Measures (29 November 2007), para. 20, available at: <http://41.220.139.198/Portals/0/Case%5CEnglish%5CKaremera%5Cdecisions%5C071129.pdf>.

²⁸ ICC-01/04-01/06-718, p. 4.

²⁹ *Ibid.*

³⁰ *Prosecutor v Karemera et al*, No. ICTR-98-44-T, Decision on Joseph Nzirorera’s Sixth, Seventh, and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive, and Other Measures (29 November 2007), paras 19-20, available at: <http://41.220.139.198/Portals/0/Case%5CEnglish%5CKaremera%5Cdecisions%5C071129.pdf>.

³¹ See for example Article 69 (2): “The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence.”

that given the importance that a witness's testimony may have upon the determination of a given charge, the rules of the ICC aim to provide for a range of measures that ensure that the Defence is able to prepare to examine and challenge a Prosecution witness's evidence. Knowing a witnesses *prior account* of events or their background is essential to preparing for cross-examination. In particular, the opportunity to compare prior and present accounts of an event or narrative is extremely important.

22. Rule 76 (1) follows from this purpose by providing a mechanism aimed at ensuring that the Defence is not placed in a prejudicial and unprepared situation with regards to challenging Prosecution-witness oral testimony. The critical importance of this rule to the Defence is illustrated by comparison to Rule 77 of the RPE. Rule 76 (1) disclosure is mandatory in nature³², 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.³³

23. It is submitted that given the importance of Rule 76 (1) to a fair trial, it would be artificial to require the provision of all statements made directly to the Prosecutor in the interests of fairness, yet exempt from the mandatory regime statements which are – substantively speaking – identical in importance for the Defence.

24. The importance of past statements as a tool to ascertain witness credibility is widely acknowledged. ICTR Trial Chambers have stated that “Judicial records of witnesses are also required to assist the Chamber in its assessment of witness credibility”³⁴ and that “It is settled jurisprudence that the judicial records of a witness are material for his/her cross examination and are therefore necessary for the opposing party”.³⁵ It is submitted that any prior witnesses' statements may impact upon ascertaining with greater precision the credibility or reliability of the evidence or witness testimony put to the Chamber and thereby

³² Pursuant to Rule 76 (1) RPE, “The Prosecutor *shall provide ...*” (emphasis added).

³³ Pursuant to Rule 77 RPE, “The Prosecutor shall [...] *permit*” (emphasis added).

³⁴ *Prosecutor v Karemera et al*, No. 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) at para. 7 available at: http://www.worldcourts.com/ictt/eng/decisions/2006.02.13_Prosecutor_v_Karemera_2.pdf.

³⁵ *Prosecutor v Zigiranyirazo*, No. 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) available at: <http://ictt-archive09.library.cornell.edu/ENGLISH/cases/Zigiranyirazo/decisions/170106b.html>; *Prosecutor v Karemera et al*, No. 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) at para. 7 available at: http://www.worldcourts.com/ictt/eng/decisions/2006.02.13_Prosecutor_v_Karemera_2.pdf.

the resolution of Prosecution allegations. This is even more relevant in the present proceedings, wherein most of the charges are based on the evidence of former Defence witnesses who are implicitly alleged to have perjured themselves. In short, the credibility of the former Defence witnesses in the Main Case who are now listed on the Prosecution's list of witnesses is at the core of the case.

25. Under Article 67 (2) of the Statute, the Prosecution is under the duty to disclose evidence which may affect the credibility of prosecution evidence. Prior statements have the potential to illuminate the background and history of witnesses. Official statements made by witnesses may either provide evidence that supports the claims that witnesses have made regarding the culpability of the Accused, or alternatively, prior statements may impact upon the credibility of these statements by illustrating *inter alia* that they have given varied and inconsistent accounts of either themselves or events at different points in their lives.

26. In this particular case, several major material facts relate directly to the background of the witnesses. The Pre-Trial Chamber found that Mr. Arido recruited P-0245 and P-0260 while aware of their lack of military background during testimony.³⁶ Similarly, the Prosecution emphasises the lack of a military background in its Pre-Trial Brief.³⁷ The question of whether Mr. Arido improperly influenced their testimony – that is to say induced either P-0245 and P-0260 to make a statement that they knew to be false – may depend upon whether the testimony they provided in the main case was in fact false.

27. The former military status of P-0245 and P-0260 is therefore an essential dimension of the Prosecution's case and a major issue for trial. Information that impacts upon this issue is both relevant to Prosecution's obligation to establish the truth, and material to the preparation of the Defence. Any information provided on this issue in past statements goes to the core of this case, and should actually have already been obtained by the Prosecutor at this stage.

³⁶ ICC-01/05-01/13-749, para. 88-89.

³⁷ For P-0260 see ICC-01/05-01/13-Conf, para. 132, and for P-0245 ICC-01/05-01/13-Conf, para. 144.

B. The existence of Prior statements and records

28. Evidence disclosed indicates the existence of prior statements. A brief consideration of [REDACTED], [REDACTED], and [REDACTED] indicates a strong likelihood of further material existing. Three points support this claim.

29. Firstly, the disclosures indicate that [REDACTED].³⁸

30. [REDACTED].³⁹ [REDACTED].⁴⁰

31. [REDACTED].⁴¹ [REDACTED].⁴² [REDACTED].⁴³ [REDACTED]⁴⁴ [REDACTED]⁴⁵ [REDACTED]⁴⁶ Thus, [REDACTED].

32. Thirdly, [REDACTED]. In this regard, [REDACTED] emails suggest that [REDACTED].⁴⁷ Furthermore, [REDACTED] makes a reference to a police file. [REDACTED].⁴⁸

33. Thus, from disclosed evidence and [REDACTED], it is clear that either statements exist or a strong likelihood exists that several statements may be held by different institutions.

C. The Prosecution is under a legal obligation to obtain and disclose any prior statements of its witnesses

34. The Arido Defence submits that – in the interests of the truth – in the present circumstances Article 54 (1) (a) and Rule 76 read together create an obligation upon the Prosecution to seek to obtain prior statements of witnesses that it aims to call at trial. As

³⁸ CAR-OTP-0084-0157-R01, p. 2, ‘B’.

³⁹ CAR-OTP-0078-0178; CAR-OTP-0078-0184.

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ [REDACTED].

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ CAR-OTP-0075-0785-R01 (“[REDACTED].”); CAR-OTP-0075-0786-R01 (“[REDACTED]”; “[REDACTED]”).

⁴⁸ CAR-OTP-0085-0857, 0869, l. 413: “[REDACTED]” (emphasis added).

described above, it appears that the Prosecution neither has these⁴⁹ nor has attempted to collect this information.⁵⁰

35. It is quite unbelievable that in a case that concerns alleged misrepresentations of witness backgrounds, that it appears that the Prosecution has not made an attempt to investigate this element of its case. As outlined in the applicable law above, the Prosecution is under an obligation to investigate both incriminatory and exculpatory evidence. Particularly the material described above concerning P-0245 and P-0260⁵¹ could in fact fall within either designation. That material could either suggest that these witnesses were in fact what they claimed to be, or alternatively that they misrepresented their background and experience. The Arido Defence submits that information that is so highly relevant as this must fall squarely within the Prosecution's obligation to pursue the truth as described in the Code of Conduct and as codified within Article 54 (1) (a) of the Statute.

36. The credibility of P-245 and P-260 rests at the core of this case. That the Prosecutor has never investigated these witnesses judicial past and questioned them about past statements is in flat contradiction with Article 54 (1) (a) as well as with the Code of Conduct.

37. Though ultimately finding that the material requested by the Defence was of a different kind, Single Judge Jorda also stated in the *Lubanga* decision referred to above that:

‘rule 76 of the Rules does not limit the Prosecution's disclosure obligations to prior statements “in the possession or control of the Prosecutor”; and that, therefore, the Prosecution is under an obligation to make its utmost effort to obtain the prior statements of those witnesses on whom the Prosecution intends to rely at the confirmation hearing which have been taken by other entities’.⁵²

38. The Arido Defence submits that this is an accurate statement of the rules. This approach has been applied previously at the ICTR.⁵³ In deciding upon a request relating to

⁴⁹ See para. 3 (c) and (f).

⁵⁰ See para. 3 (f).

⁵¹ See paras 29-32.

⁵² ICC-01/04-01/06-718, p. 4.

⁵³ *Prosecutor v. Callixte Nzabonimana*, ‘Decision on Callixte Nzabonimana’s Motion for an Order Concerning Disclosure of Gacaca and Judicial Material Relating to Prosecution Witnesses’, ICTR-98-44D-T, 29 October

records from Gacaca courts and other judicial materials, that Chamber provided a more elaborated form of Judge Jorda's reasoning. The ICTR Chamber noted that the requested information may be material to the Defence and also of assistance to the Chamber, that the Defence needs to make reasonable efforts to obtain the material, and that because the Prosecution is in a better position to obtain the consent from witnesses who do not agree to meet with the Defence, that it should be the one to do so.⁵⁴

39. The Arido Defence thus requests that Trial Chamber order the Prosecution to secure particularly any statements given by P-0245 and P-0260 as well as all statements given by the witnesses it has included upon its list of witnesses.⁵⁵

D. The Arido Defence has made a reasonable attempt to access these statements and been unsuccessful

40. The Defence has undertaken several *inter partes* exchanges regarding disclosure, visited [REDACTED] in [REDACTED], sought interviews through the VWU, and has requested an interview – pursuant to the Witness Contact Protocol – with P-0245 and P-0260 for the limited purpose of obtaining this material.

41. The Arido Defence finds itself in a situation where past statements of Prosecution witnesses likely exist, yet the Prosecution did not make efforts to obtain them and the witnesses refuse to be interviewed to either confirm the existence of these statements or to provide their consents to obtain such statements. The absence of consent from these witnesses – whom the Defence cannot communicate with – creates a systematic block to access this potentially important material. As a result, the Arido Defence is left with no other procedural venue but to request the intervention of the Trial Chamber.

42. The Arido Defence respectfully requests the Trial Chamber to order the Prosecution to seek the consent of its witnesses and to obtain their prior statements pursuant to the Prosecution's obligations under Rule 76 (1) of the RPE and Article 54 (1) (a) of the Statute. It is clear from disclosed material thus far that the Prosecution has been able to access

2009, available at:

<http://41.220.139.198/Portals/0/Case%5CEnglish%5CNzabonimana%5Cdecision%5C091029.pdf>.

⁵⁴ *Ibid.*, paras 26-30.

⁵⁵ ICC-01/05-01/13-1048-Conf-AnxA.

similar material and thus it appears that the Prosecution is better placed to do so. If the obligation to pursue the truth is to have meaning, then pursuing information that could pull a disputed issue definitively in one direction or another must fall squarely within it.

43. It can be added that the Defence cannot be put in a situation where it would learn of the existence of a past statement during the cross examination of a witness. Such situation could lead to unnecessary delays and postponements which could easily be avoided. It is submitted that the witnesses could not refuse to answer questions on these issues at trial, it is therefore to the benefit of all parties that such issues be resolved before trial. For this reason, should the Trial Chamber disagree that the Prosecutor has a positive duty to obtain and disclose past relevant statements of its witnesses to the Defence, the Arido Defence respectfully requests the Trial Chamber to order the Prosecution to obtain from their witnesses detailed information on the existence of past statements and consent for the Defence to have access to that material to allow the Defence to obtain that material itself. To ease this process, and concretely illustrate its request, the Arido Defence attaches a model consent form.⁵⁶

VI. CONCLUSION

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

- a. ORDER the Prosecution under Rule 76 (1) to disclose any further statements, as described above⁵⁷, of its witnesses that it intends to call it may have in its possession, including but not limited to P-245 and P-0260,
- b. ORDER the Prosecution to disclose all statements in its possession that have been given by individuals central to its case as listed above.⁵⁸
- c. ORDER the Prosecution to obtain prior statements given by its witnesses, and to confirm that it is in the process of doing so;

Alternatively:

⁵⁶ See Annex 9.

⁵⁷ See paras 18 to 24.

⁵⁸ See para. 17.

- d. ORDER the Prosecution to provide its witnesses⁵⁹ with the form attached in Annex 9 so as to seek a list of prior statements and the consent of these witnesses to access this material.



Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 11th Day of July 2016

The Hague, The Netherlands

⁵⁹ As listed in footnote 26 of this request.