

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **18 February 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**

Confidential with Confidential Annexes 1, 2, 3, 4, 5, and 6

**Narcisse Arido's Request for a Rule 77 Disclosure Order Concerning the Documents
Related to the Cooperation between the Prosecution and the Cameroonian Authorities**

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 respectfully request the Trial Chamber VII ("Trial Chamber") to order the Prosecution to disclose any agreement, correspondence, meeting records, and responses to requests for assistance ("Requested Documents"), related to the cooperation between the Prosecution and the Cameroonian authorities, as referred to in Annex 1, 2, 3, 4, 5, and 6.

2. In light of the fact that a significant part of the Prosecution's evidence in support of its allegations against Mr. Arido originates from Cameroon, the Arido Defence argues that the Requested Documents are *material* for Defence preparation under Rule 77 of the Rules of Procedure and Evidence ("RPE").

3. The Requested Documents fall directly within the scope of the Trial Chamber's decisions¹ concerning the Prosecution's obligation to disclose documentation that pertains to the legality of the collection of evidence pursuant to Article 69(7) of the Rome Statute ("the Statute"). Those decisions indicate that any material that could be used to challenge evidence under Article 69(7) of the Statute are *material* to the Defence within the meaning of Rule 77 of the RPE.

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 as *confidential* as it refers to the Prosecution's investigative practices. The Arido Defence does not oppose to it being reclassified as *public* in the event the Trial Chamber finds that it should be.

III. PROCEDURAL HISTORY

5. On 5 May 2015, the Arido Defence contacted the Prosecution, requesting the disclosure of any official communications and related materials between the Prosecution and the Cameroonian authorities including the requests for assistance ("RFAs") and responses thereto.²

6. The Prosecution responded on 3 June 2015, stating that the Arido Defence's request for disclosure material was denied because "communications with national authorities concerning its investigations" were not disclosable.³

¹ ICC-01/05-01/13-1166; ICC-01/05-01/13-1172; ICC-01/05-01/13-1234; ICC-01/05-01/13-1542; *see also* ICC-01/05-01/13-1632.

² ICC-01/05-01/13-1141-Conf-AnxA.

7. On 20 July 2015, the Arido Defence specifically requested the Prosecution for undisclosed RFAs and related material from investigations in Cameroon.⁴ On 27 July 2015, the Prosecution again refused the Arido Defence request and reiterated that the Arido Defence failed to satisfy the requirements of a “specific and clear basis” for the disclosure of physical and other tangible items under Rule 77 of the RPE.⁵

8. Following this, on 10 August 2015, the Arido Defence requested the Trial Chamber to order the Prosecution to disclose its requests for assistance directed to the Cameroonian authorities (‘Arido Request’).⁶

9. Meanwhile, on 14 August 2015, the Trial Chamber ordered the Prosecution to disclose all material related to the assessment of the legality of the telephone surveillance of Mr. Mangenda.⁷ Notably, the Trial Chamber held that “material which enables the defence to assess the legality of evidence which the Prosecution intends to rely upon at trial is relevant to the preparation of the defence. It therefore falls under the Prosecution’s disclosure obligations as set out in Rule 77 of the Rules”.⁸ The Trial Chamber added that “it is not necessary for the defence to demonstrate the illegality of the proposed evidence, since this is precisely the reason why the material is sought.”⁹

10. On 10 September 2015, the Single Judge issued the ‘Decision on Defence Requests for Prosecution Requests for Assistance, Domestic Records and Audio Recordings of Interviews’ in which he ordered the Prosecution to disclose, within five days of notification of the decision, to the defence teams the requests for assistance directed to a number of national authorities.¹⁰

11. On 15 December 2015, the Bemba Defence requested the Trial Chamber to order the Prosecution to disclose specific correspondence and records related to the Prosecution’s request for assistance to Dutch authorities.¹¹

12. On 12 January 2016, the Single Judge issued the ‘Decision on the Bemba Defence Request for Disclosure of Communications with the Dutch Authorities’ and ordered the

³ ICC-01/05-01/13-1141-Conf-AnxB.

⁴ ICC-01/05-01/13-1141-Conf-AnxC.

⁵ ICC-01/05-01/13-1141-Conf-AnxD.

⁶ ICC-01/05-01/13-1141-Conf.

⁷ ICC-01/05-01/13-1148-Conf.

⁸ *Ibid.*, para. 10.

⁹ *Ibid.*, para. 10.

¹⁰ ICC-01/05-01/13-1234-Conf.

¹¹ ICC-01/05-01/13-1525-Conf.

Prosecution to disclose the Requested Material, stating that “[t]he Requested Material is therefore relevant to assessing the procedure by which evidence against the accused was collected.”¹²

13. In compliance with the 12 January 2016 Decision, the Prosecution disclosed 11 emails, and applied the Rule 81(1) redactions to the content of the disclosed emails. Following this, on 2 February 2016, the Bemba Defence requested the Trial Chamber to order the Prosecution to disclose the remaining materials, and to lift the Rule 81(1) redactions applied to the content of the impugned email.¹³

14. Finally, on 17 January 2016, the Single Judge granted the Bemba Defence request, and ordered the Prosecution to disclose “all records concerning the legality of collection of telecommunications evidence by the Dutch authorities, which are in the Prosecution’s possession”.¹⁴ Moreover, the Single Judge ordered the Prosecution to re-disclosed the impugned emails with all Rule 81(1) redactions lifted.¹⁵

IV. APPLICABLE LAW

11. 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 is automatically disclosed to the Defence along with other disclosures.¹⁶

12. The ICC Appeals Chamber has held that the expression “material to the preparation of the defence” has to be interpreted broadly¹⁷ and that Rule 77 encompassed “all objects that are relevant for the preparation of the defence”.¹⁸ In particular, it noted that certain objects, while not directly linked to exonerating or incriminating evidence, may otherwise be material to the

¹² ICC-01/05-01/13-1542-Conf.

¹³ ICC-01/05-01/13-1589-Red-Corr.

¹⁴ ICC-01/05-01/13-1632, para. 15.

¹⁵ *Ibid.*, paras 19 - 21.

¹⁶ See e.g. ICC-01/05-01/13-291; ICC-01/05-01/13/333.

¹⁷ ICC-01/04-01/06-1433 OA, para. 77; see also ICC-01/05-01/08-1594-red, para. 19.

¹⁸ *Ibid.*, para. 77.

preparation of the defence.¹⁹ This included material not directly related to the case but tending to explain the overall circumstances of a conflict.²⁰

13. 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 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.”

14. Pursuant to Article 69(7) of the Statute, information is not admissible before the Trial Chamber as evidence if “obtained by means of a violation of this Statute or internationally recognised human rights,” and if “the violation casts substantial doubt on the reliability of the evidence” or the “admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.”

V. SUBMISSIONS

A. The requested documents exist and are in the Prosecution’s custody

15. The Arido Defence submits that a number of Prosecution’s RFAs directed to the Cameroonian authorities confirm the existence of the Requested Documents. Given that the following documentation either originated from the Prosecution or was directed to it, it is in the Prosecution’s custody, and it remains undisclosed to the Arido Defence.

16. On 8 May 2013, the Prosecution submitted a RFA to the Cameroonian authorities, requesting them to monitor, among others, the following telephone number of Mr. Arido: ‘94822957’.²¹ In the same RFA, the Prosecution referred to a *note verbale* and the agreement between the Prosecution and the Cameroonian Embassy in The Hague.²² The Prosecution also confirmed to Cameroonian authorities that the Prosecution delegation will arrive to the Cameroon by the end of May or beginning of June 2013.²³

¹⁹ *Ibid.*, para 77.

²⁰ *Ibid.*, paras 76-82.

²¹ Annex 1: CAR-OTP-0091-0317, at 0318.

²² *Ibid.*, at 0317.

²³ *Ibid.*, at 0318.

17. Following this, on 20 May 2013, the Prosecution submitted a further RFA, requesting to localise the position of Mr. Arido on the basis of the following numbers: '75270152', and '94822957'.²⁴ The same RFA states that the Prosecution received a letter no. 033/ACLH13 on 5 February 2013, confirming that the agreement between the Prosecution and Cameroonian authorities allows the Prosecution to investigate on Cameroonian territory.²⁵

18. On 27 May 2013, the Prosecution requested the Cameroonian authorities for the assistance with obtaining any information related to two Mr. Arido's numbers: '75270152', and '94822957'.²⁶ In its RFA, the Prosecution confirms that it received a letter indicating Cameroon's agreement to let the Prosecution investigate on its territory.²⁷ Furthermore, the Prosecution makes reference to other prior letters with the Cameroonian authorities. The Prosecution also refers to a meeting with the Cameroonian authorities at the Seat of the ICC on 3 June 2013.²⁸

19. Finally, in the RFAs sent on 13 December 2013,²⁹ 5 February 2015,³⁰ and 18 June 2015,³¹ the Prosecution requested the Cameroonian authorities to localise and monitor several individuals from the Bemba *et al.* case. In these RFAs, the Prosecution again submits that it received a letter confirming Cameroon's agreement to let the Prosecution investigate on its territory.³²

B. The Prosecutions is under the obligation to disclose the requested documents

20. Rule 77 of the RPE creates a presumption of full disclosure of any documents which are material and/or relevant to defence preparation, and which are not exempted from disclosure by an express provision in the Statute or Rules. The Appeals Chamber has repeatedly stated that exceptions to this presumption are themselves very exceptional.³³

21. In particular, the Single Judge ruled that there are two stages to an application brought under Rule 77 of the RPE. *First*, on a *prima facie* basis from the Defence's perspective, it must be

²⁴ Annex 2: CAR-OTP-0091-0333, at 0337.

²⁵ *Ibid.*, at 0335.

²⁶ Annex 3: CAR-OTP-0091-0320, at 0323.

²⁷ *Ibid.*, at 0323

²⁸ *Ibid.*, at 0323 and 0324.

²⁹ Annex 4: CAR-OTP-0091-0326, at 0328 and 0329.

³⁰ Annex 5: CAR-OTP-0091-0307, at 0310.

³¹ Annex 6: CAR-OTP-0091-0312, at 0315.

³² Annex 4: CAR-OTP-0091-0326, at 0327; Annex 5: CAR-OTP-0091-0307, at 0308; Annex 6: CAR-OTP-0091-0312, at 0313;

³³ ICC-01/04-01/06-3031, para. 10; ICC-01/04-01/07-475, para. 70.

established whether the Requested Documents are material and/or relevant to the preparation of the defence.³⁴

22. *Second*, if the Requested Documents are material and/or relevant to the preparation of the defence, the Chamber must examine whether any restrictions on disclosure are justified under the Statute and Rules 81 and 82 of the RPE.³⁵

23. Although such conditions have never been invoked by the Prosecution in the present case, the Arido Defence submits that none of the restrictions on disclosure provided for in Rules 81 and 82 of the RPE would indeed hinder the Prosecution from disclosing the Requested Documents to the Arido Defence.

24. The restrictions on disclosure under Rule 81 of the RPE are connected to the need to preserve the security of Prosecution investigations, or the need to protect the safety of victims and witnesses. 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.³⁶ Therefore, the bare fact that the Arido Defence request concerns documents related to the cooperation between the Prosecution and Cameroonian authorities does not itself meet the parameters necessary to justify the non-disclosure of the Requested Documents under Rule 81 of the RPE. Moreover, ICC jurisprudence establishes that Rule 81(1) does not exempt the Prosecution from disclosure of “information and 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”.³⁷

25. Accordingly, when stressing that the understanding of illegality should be understood in broad terms, the Single Judge held in its 17 February 2016 Decision that “the Prosecution’s external correspondence does not qualify under [the Rule 81(1) of the RPE].”³⁸

26. With respect to the application of Rule 82 of the RPE, the Pre-Trial Chamber has held that the Prosecution has to 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

³⁴ ICC-01/05-01/13-1234, para. 11.

³⁵ *Ibid*, para. 11.

³⁶ ICC-01/04-01/07-475.

³⁷ ICC-01/04-01/06-2656-Red, para. 12.

³⁸ ICC-01/05-01/13-1632, para. 19.

³⁹ ICC-01/04-01/07-646.

Prosecution has not brought such matters to the attention of the Chambers yet, it must be presumed that the restrictions under Rule 82 of the RPE are not engaged.

C. The Defence has met its burden

26. Considering the burden placed on Defence to demonstrate that the Requested Documents are material and/or relevant and would indeed assist with the defence preparation, the Arido Defence refers to the *Lubanga* case, and the Single Judge's decision, holding that the term "material and/or relevant to the preparation of defence" must be interpreted broadly⁴⁰ and "understood as referring to all objects that are relevant for the preparation of the defence".⁴¹

27. Furthermore, the Appeals Chamber in the *Banda and Jerbo* case emphasised that even if "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" the Defence is still entitled to disclosure of such documentation under Rule 77 of the RPE.⁴²

28. In addition to the ICC jurisprudence, the ICTY jurisprudence also applies a low burden of proof for the Defence. The Chambers in *Popović et al.* and *Djordjević* held that the Defence does not have to prove that the material requested would indeed assist them, but rather it is only necessary to establish that it is *likely* to assist or that there is at least a good chance that it would.⁴³

29. With the above in mind, it is submitted that the Requested Documents fall precisely within the criteria of both Rule 77 of the RPE, and prior Trial Chamber's rulings concerning the materiality and/or relevance of the documents for the preparation of the defence. They should therefore be disclosed.

D. The right to potentially challenge the admissibility of the collected evidence

30. The Arido Defence submits that any undisclosed correspondence, meeting records, and responses to the Prosecution's RFAs are documents through which the Prosecution requested and collected the evidence that is related to Mr. Arido and his Co-Accused from the

⁴⁰ ICC-01/04-01/06-1433 OA11, paras 77-78; ICC-01/05-01/13-1234-Conf, para. 11.

⁴¹ ICC-01/05-01/13-1234-Conf, para. 11.

⁴² ICC-02/05/03/09-501, para. 42; see also Prosecutor v. *Karemera et al.*, "Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations", ICTR-98-44-AR73.11, 23 January 2008, para. 12, available at: <http://41.220.139.198/Portals/0/Case%5CEnglish%5CKaremera%5Cdecisions%5C080123.pdf>.

⁴³ 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/080206.pdf>

Cameroonian authorities. They likely contain the justifications and part of the evidential basis for the requests.

31. The Arido Defence intends to use such documents during the presentation of its defence case, and to initiate follow-ups related to the evidence from Cameroon. Furthermore, these documents are relevant to the drafting of the final brief because, in particular, the Requested Documents concern the legality of the Prosecution's investigations on the Cameroonian territory.

32. In order to be able to understand the way the evidence was collected, and to potentially prepare challenges to the admissibility of the evidence, the Arido Defence needs to know the manner in which the Prosecution collected the evidence. The Requested Documents may show preventive measures taken by the Prosecution or the lack thereof. Such preventive measures may impact upon the reliability of the actual collected evidence and/or its admissibility under Article 69(7) of the Statute.

33. It is submitted that an order for disclosure would be consistent with several decisions of the Single Judge on Rule 77 requests and the principle laid out therein.⁴⁴ This principle is namely that "it is imperative that the Defence be able to test the reliability of the procedure employed in collecting the evidence against them."⁴⁵ The Single Judge also added that "this particularly holds true if the Prosecution, as in the present case, relies to a large extent on intercepted data and communications."⁴⁶

34. It must be recalled that the Requested Documents reveal the methods and procedures applied by the Prosecution when conducting investigations and collecting telecommunications and other data from Cameroonian authorities. This data include telephone numbers, bank accounts, and location of Mr. Arido and other parties to the case. As the aforementioned data is on the Prosecution List of Evidence and may be used against Mr. Arido in testimony, closing arguments, or a final brief, access to the manner of collection is fundamental.

35. It is only after the analysis of the Requested Documents that the Arido Defence will be able to fully examine the legality of procedures followed by the Prosecution, by which the evidence related to Mr. Arido was requested, collected, and transmitted. Without the disclosure

⁴⁴ ICC-01/05-01/13-1166; ICC-01/05-01/13-1172; ICC-01/05-01/13-1234; ICC-01/05-01/13-1542.

⁴⁵ ICC-01/05-01/13-1542, para. 11.

⁴⁶ *Ibid.*, para. 11.

of the Requested Documents, the principle of full disclosure remains compromised, and the fair trial rights of the accused are violated.

VI. CONCLUSION

36. In light of the above, the Arido Defence respectfully requests Trial Chamber VII to:
- a. ORDER the Prosecution to disclose the agreements between the Prosecution and the Cameroonian authorities that permitted the Prosecution to investigate on Cameroonian territory, as referred to in Annex 1, and Annex 2;
 - b. ORDER the Prosecution to disclose the correspondence between the Prosecution and the Cameroonian authorities, as referred to in Annex 1, Annex 2, Annex 3, Annex 4, Annex 5, and Annex 6;
 - c. ORDER the Prosecution to disclose any records of the meetings between the Prosecution and the Cameroonian authorities, as referred to in Annex 1, and Annex 3;
- and
- d. ORDER the Prosecution to disclose any other documents relating to the involvement, presence, and participation in the investigation on the Cameroonian territory.



Chief Charles Achaleke Taku,
Counsel for Mr. Arido

Dated this 18 Day of February 2016

The Hague, The Netherlands