

**Cour
Pénale
Internationale**



**International
Criminal
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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO

Public Redacted Document

Public redacted version of “Prosecution’s Response to Arido’s Urgent Request to Preclude the Prosecution from Using Private Communications”, 7 March 2015, ICC-01/05-01/13-1702-Conf

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. Trial Chamber VII (“Chamber”) should reject the Arido Defence’s request to preclude the Office of the Prosecutor (“Prosecution”) from using communications obtained from Arido’s email account (“Request”).¹ The communications are (i) clearly relevant to matters put at issue by the Arido Defence in this case, and (ii) their disclosure to the Parties is appropriate and consistent with the applicable law.

II. Confidentiality

2. This response is filed confidentially because it addresses a filing of the same designation. A “Public Redacted” version will be filed shortly.

III. Submissions

A. The disclosed communications are relevant to matters put at issue by Arido

3. The Prosecution obtained the content of Arido’s email account on 23 January 2014. It timely extracted and disclosed all relevant communications.² At the time of the initial extraction, the Prosecution excluded email correspondences concerning Arido’s [REDACTED] and character, considering such items irrelevant to any matter at issue in this case. That evaluation changed, however, with the filing of Arido’s Witness Summaries of the expected testimonies of D24-0001 and D24-0013, which placed the Accused character and other matters squarely at issue.

¹ ICC-01/05-01/13-1671-Conf. The Prosecution notes that the Bemba Defence supports the relief requested by the Arido Defence.

² The relevant emails were disclosed during the pre-confirmation phase on 18 March, 11 April, 12 May and 27 June 2014 in Pre-Confirmation INCRIM packages 7, 8 and 16 and Pre-Confirmation Rule 77 Packages 6, 7, 9 and 12.

4. Contrary to the Arido Defence's contention that the disclosed communications are irrelevant to these proceedings,³ the correspondences identified in the Request⁴ are directly responsive to the prospective character evidence Arido intends to lead at trial, as well as other factual issues in dispute.⁵ *First*, the large majority of these communications refute character evidence to be elicited from Witness D24-0001. The Arido Defence's submission that it does not intend to call character witnesses⁶ is belied by D24-0001's summary of anticipated evidence, which provides that the Witness will testify about "(t)he morality of her husband from when she knew him and their relationship thereafter."⁷ There could be no clearer example of character evidence, nor of Arido's intention to lead it in this case. Further, the evidence of dishonesty, reflected in the recently disclosed email correspondences, is undeniably relevant to rebut evidence of good character, which Arido's Witness Summaries expressly place at issue.

5. *Second*, two of the emails identified by the Arido Defence are relevant to Arido's motives in departing Cameroon, another topic about which both Witness D24-0001 and Arido are expected to testify at trial according to the Defence's Witness Summaries.⁸ In an email correspondence of 12 November 2012 at 15h52 addressed to Arido, the sender suggested that "*l'objectif principal*" of Arido's departure from Cameroon to Europe was to "*avoir les papiers et trouver un cadre privilégié pour la poursuite de [s]a these et exercice de [s]on metier d'avocat*" [sic].⁹ In his response of the same day at 21h07, Arido mentions no threats related to his leaving Cameroon.¹⁰ This email exchange is plainly inconsistent with the prospective testimony of Witness D24-0001, who is expected to give evidence on the "(t)he threats to Mr. Arido's

³ Request, para. 23.

⁴ Request, para. 11 and fn. 9.

⁵ CAR-D24-0004-0092 at 0092, 0100.

⁶ Request, para. 26.

⁷ CAR-D24-0004-0092 at 0092.

⁸ CAR-D24-0004-0092 at 0092, 0100.

⁹ CAR-OTP-0092-5081-R01 at 5081, CAR-OTP-0092-5082-R01 at 5082.

¹⁰ CAR-OTP-0092-5082-R01 at 5082.

security and his family that led to his departure from Cameroon to France.”¹¹

6. *Third*, the Request lists at least two email correspondences relating to Arido’s political activism in the Central African Republic (“CAR”), a topic of Arido’s anticipated testimony in this case.¹² In an email to [REDACTED] on 25 March 2013 at 21h10, Arido explains his strategy to take power in the CAR.¹³ In another email of 23 April 2013 at 21h14, [REDACTED] sent Arido several photographs of alleged victims of the conflict in the CAR.¹⁴ It should also be noted that [REDACTED], an article disclosed by the Arido Defence.¹⁵ The Parties in this case should be provided communications between Arido and [REDACTED], given the latter’s connection to the evidence Arido will give in Court.

B. The disclosure of Arido’s communications is appropriate and consistent with the applicable law

7. Regarding the purported violation of Arido’s right of privacy,¹⁶ the Prosecution notes that any interference with such right is lawful, necessary and proportionate to the aim pursued.¹⁷ *First*, the Prosecution’s acquisition of Arido’s email account is consistent with articles 54 and 70 of the Rome Statute and rule 165(1) of the Rules Procedure and Evidence, which give the Prosecution a wide mandate to collect evidence relevant to its investigations. As already pointed out by this Chamber, these provisions are sufficiently precise, accessible, and foreseeable as to their effects.¹⁸ *Second*, as demonstrated above, these communications are necessary to refute evidence that the Arido Defence intends to elicit at trial. *Third*, the disclosure of these

¹¹ CAR-D24-0004-0092 at 0092.

¹² CAR-D24-0004-0092 at 0100.

¹³ CAR-OTP-0092-5385 at 5385.

¹⁴ CAR-OTP-0092-5397-R01.

¹⁵ CAR-D24-0001-0040.

¹⁶ Request, paras. 13-25

¹⁷ ICC-01/04-02/06-786-Red, para. 33.

¹⁸ ICC-01/05-01/13-1257, paras. 18-20.

communications to the Parties in this case as opposed to the public is proportionate to the aim pursued, as it enables the Parties, including the other four Defence teams, who may pursue defences antithetical to Arido, to be adequately prepared to challenge the evidence Arido intends to present at trial. In addition, in similar circumstances, the Chamber has previously found “this type of information may be potentially important for the Defence.”¹⁹

8. Further, there is no violation of any third-party rights in the confidential disclosure of the communications.²⁰ The Prosecution has taken all reasonable measures to protect third parties in communication with Arido. The redaction of contact information, including email addresses and telephone numbers of third parties mentioned in Arido’s correspondences limits the potential exposure of these individuals to any risk as a result of these proceedings. Additionally, should these correspondences be used in Court, the Chamber may provide for appropriate protective measures, such as the use of private session to limit public dissemination of the names of third parties or information which may otherwise identify them.

9. Nevertheless, as recently decided in the *Ongwen* case, rule 81(4) does not provide for a general protection of the privacy and well-being of victims and witnesses²¹ or, by the extension, of third parties.²² Along the same lines, the Appeals Chamber has limited non-disclosure of third person information pursuant to rule 81(4), to circumstances concerning “a danger to the particular person”.²³ The Appeals Chamber identified two factors to be considered when assessing the alleged risk of danger: “a) the alleged danger must involve an objectively justifiable risk to the

¹⁹ ICC-01/05-01/13-1015-Conf, para. 8.

²⁰ *Contra* Request, para. 27.

²¹ ICC-02/04-01/15-383-Red, paras. 3, 5. In *Ongwen*, the Single Judge ordered the disclosure of “sensitive personal information” related to a Prosecution witness, considering that the purpose of rule 81(4) redaction is “to protect the safety of witnesses and victims, and *not to protect their privacy or their well-being more generally.*” ICC-02/04-01/15-383-Red, para. 3 (emphasis added).

²² The Appeals Chamber has held that rule 81(4) implicitly extends to “persons at risk on account of the activities of the Court”. See ICC-01/04-01/07-475 OA, para. 56. See also ICC-01/04-01/06-3118-Red2, para. 7.

²³ ICC-01/04-01/07-475 OA, para. 71.

safety of the person concerned; b) the risk must arise from disclosing the particular information to the Defence, as opposed to disclosing the information to the public at large (...).²⁴

10. The Arido Defence does not demonstrate the existence of an objective risk to the safety of third-parties mentioned in Arido's emails as a result of the Prosecution's disclosure to the Parties in this case, as opposed to the public. The Request, in this respect, fails as a matter of law, and should be dismissed.

IV. Relief Requested

11. For the foregoing reasons, the Request should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 10th Day of March 2016
At The Hague, The Netherlands

²⁴ ICC-01/04-01/07-475 OA, para. 71.