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**International
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Court**



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

Date: **9 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

**Public Redacted Version of
“Narcisse Arido’s motion on inadmissibility and exclusion of evidences”
(ICC-01/05-01/13-1795-Conf), filed 8 April 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 is seeking the inadmissibility and exclusion of three groups of evidence presented by the Prosecution ('OTP' or 'Prosecution').
2. The interview given by Mr. Arido in Lyon, France in November should be excluded as the interview was conducted in the absence of adequate legal counsel and Mr. Arido could not have given informed consent. Both interviews conducted in November and January should also be excluded on procedural grounds.
3. The emails related to the private life of Mr. Arido should be excluded as they are irrelevant to the case and they violate Mr. Arido's right to privacy.
4. The Western Union records should be excluded as they were obtained prior to judicial order, using misleading information, and they were also overly broad and are unreliable.

II. CONFIDENTIALITY

5. 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 3rd parties. The Arido Defence will file a public redacted version promptly.

III. PROCEDURAL HISTORY

6. On 9 March 2016, through an oral order, the Trial Chamber VII ('Trial Chamber' or 'Chamber') set a deadline for the filing of any further applications for the addition or removing of items of evidence from the record stating:

In particular this deadline applies to applications, first, to introduce prior recorded testimony pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence ('Rules'); and second, to formally submit any items through the so-called Bar Table; and third, to exclude any items of evidence pursuant to Article 69(7) of the Rome Statute ('Statute').¹

¹ ICC-01/05-01/13-T-42-CONF-ENG ET, p. 43, lines 1-5.

IV. APPLICABLE LAW

7. Article 69(4) of the Statute provides that “The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence”.

8. Article 69(7) of the Statute stipulates that “[e]vidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.”

9. It is recalled that the court “shall not rule on the application of a State’s national law”², but is also not bound by the decision of national courts on the admissibility of evidence.³ In that respect, the Defence considers that the application of Article 69(7) can be made irrespective of domestic law. Evidences obtained in violation of the statute or of internationally recognized human rights can be excluded although no violation of domestic law occurred.

V. SUBMISSIONS

A. 23 November 2013 French Interview⁴

10. The Defence recalls that the arrest and the interview of Mr. Arido occurred on 23 November 2013 as the result of the execution of an arrest warrant issued on 20 November 2013⁵. On 19 November 2013, a Request for Assistance (‘RFA’)⁶ was issued by the Prosecution specifically requesting the French authorities to authorize and facilitate the interview of Mr. Arido by the ICC Prosecution’s investigators.

11. During the interview, three representatives of the ICC were present, namely [REDACTED], investigator at the ICC, [REDACTED], deputy Prosecutor at the ICC, and a third redacted person from the ICC. Moreover, the interview concerned Article 70, and was conducted with Mr. Arido as a suspect, pursuant to Article 55(2).⁷

² Article 69(8) Rome Statute.

³ *Lubanga* Decision on the admission of material from the Bar table ICC-01/04-01/06-1981, para. 36.

⁴ CAR-OTP-0074-1065.

⁵ ICC-01/05-01/13-1-Red2-tENG.

⁶ CAR-OTP-0074-1048.

⁷ CAR-OTP-0074-1065, p. 1066: “[REDACTED]”.

1. *Violation of Arido's right to remain silent*

12. The right to be assisted by a lawyer during a criminal interrogation shall be regarded as an effective and practical right. As the European Court for Human Rights ('ECtHR') has clearly held that the mere assignment of a counsel "does not in itself ensure the effectiveness of the assistance he may afford an accused"⁸.

13. In parallel, the fundamental right to remain silent is articulated around proper instruction provided by counsel to the suspect. A suspect can waive his right to remain silent or to protect himself from self-incrimination. What is fundamental is that this waiver is exercised freely and according to adequate legal advice. As such, there is a clear link between the right to counsel and the right to remain silent (or to not incriminate oneself).⁹ Such a line was clearly drawn by the Trial Chamber in the *Katanga* case: "The right to a counsel in the context of pre-trial interrogations is to protect the essence of the accused's right, which is to be presumed innocent, to remain silent and not to be forced to self-incriminate. Even if counsel is not physically present, these rights may, under certain conditions, be sufficiently protected if the accused obtained adequate legal advice prior to the interrogation".¹⁰ (Our emphasis)

14. An Accused or Suspected person must provide informed consent to waive his or her rights. And as it has been clearly underlined in the *Katanga* and *Ngudjolo* case¹¹, whether this exists is determined by the adequacy of the legal assistance and the circumstances of the interview such as the information available to the lawyer. This has been clearly illustrated in the *Katanga* case where the Chamber considered that:

However, as this was the accused's first interview after he was detained and as he was unaware of the reasons for his detention, it is highly improbable that he would have obtained adequate legal advice from his lawyer prior to the interrogation. Indeed, even if he had been able to consult with his lawyer shortly before the interrogation, this advice would necessarily have been based on incomplete information. The Chamber considers, therefore, that, insofar as Mr. Katanga made self-incriminating statements on 20 January 2006, there are serious concerns that those statements were obtained from him in violation of his right to remain silent and of the privilege against self-incrimination.¹²

⁸ *Sannino v. Italy* No. 30961/03, ECHR, Appeal Judgement of 27 April 2006, para. 48, <http://hudoc.echr.coe.int/eng?i=001-75213>; see also *Imbrioscia v. Switzerland*, 24 November 1993, § 38, Series A no. 275, and *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37.

⁹ ICTY, *Halilovic*, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar table, IT-01-48-AAR73.2, AC, 19 August 2005, para. 15.

¹⁰ TC II, *Katanga*, Decision on the Prosecutor's Bar Table Motions ICC-01/04-01/07-2635, para. 62.

¹¹ TC II, *Katanga*, Decision on the Prosecutor's Bar Table Motions ICC-01/04-01/07-2635, paras 53 & 54.

¹² TC II, *Katanga*, Decision on the Prosecutor's Bar Table Motions ICC-01/04-01/07-2635, para. 63.

15. Here, Mr. Arido did not provide informed consent to be questioned. Firstly, Mr. Arido was not represented by a lawyer who had qualifications in international criminal law. [REDACTED], had been qualified as a lawyer for less than 2 years at the time of the interview, he had no experience in criminal and international criminal law. His professional work experience focused on French [REDACTED] law.¹³ Objectively, [REDACTED] could not provide adequate and effective legal advice in the areas required by Mr. Arido – international criminal law and procedure.

16. In addition, [REDACTED] did not even have access to the criminal file.¹⁴

17. For these reasons, the November interview was conducted in the absence of adequate legal counsel. Mr. Arido was not in a position to properly waive his right to remain silent and to not incriminate himself, and did not provide informed consent to be questioned.

2. Violation of Rule 111 of the RPE

18. Rule 111 of the RPE provides that the record of questioning shall be signed by the person who records and conducts the questioning, the suspect and his counsel. Moreover, the same rule provides that when someone has not signed, the reason shall be given in the said record.

19. The rule requires that three signatures appear. In the case at bar, both interviews (23 November 2013 and 17 January 2014) each have only two signatures. It appears that the interviews are signed by what seems to be Mr. Arido and the Police Officer, but they are not signed by counsel.

20. As a matter of law, both interviews should be excluded, based on a violation of Rule 111.

3. Admission of these interviews would be antithetical to the proceedings

21. In the *Katanga* case, the Trial Chamber highlighted the criteria to determine whether the violation through which the evidence has been obtained could be considered as being antithetical and damaging the integrity of the proceeding.¹⁵ It is well established that statements extracted from a suspect in violation of the fundamental right to the assistance of counsel would

¹³ CAR-D24-0004-0279, [REDACTED].

¹⁴ Questionnaire answered by [REDACTED].

¹⁵ *Lubanga* Decision on the admission of material from the Bar table ICC-01/04-01/06-1981, paras 42 and f. http://www.worldcourts.com/icc/eng/decisions/2009.06.24_Prosecutor_v_Lubanga2.pdf.

necessarily be antithetical to, and would seriously damage the integrity of the proceedings. Such view has been taken in the *Delalić*⁴⁶ and *Bagosora*¹⁷ cases:

As stated by the ICTY Chamber in *Delalić*, it is difficult to imagine a statement taken in violation of the fundamental right to the assistance of counsel which would not require its exclusion under Rule 95 of the Rules as being “antithetical to, and would seriously damage, the integrity of the proceedings.”¹⁸

22. The OTP is also bound to ensure the protection of the rights of the suspects, in accordance with its Code of Conduct.¹⁹ The Defence recalls the involvement of the OTP representatives – the investigators and Prosecutors in the interviews. Hence, it is fair to conclude that the OTP was aware of the violations, particularly in the 23 November 2013, and did nothing to stop them.

23. For all these reasons, admitting the interviews as statements obtained in violation of Arido’s rights to remain silent and right to adequate and effective counsel would be antithetical to and would seriously damage the integrity of the proceedings. Such material cannot be admissible, and should be excluded as per Article 69(7) of the Statute.

B. The Private emails of Mr. Arido are inadmissible and should be excluded

24. The Arido Defence notes that while the private e-mails were not used in court, the Prosecution included one of them²⁰, dated 12 November 2012 in its documents tendered for admission into evidence for witness [REDACTED]. The Defence opposed this inclusion of this document in an email to the Trial Chamber on 26 March 2016. The issue will be decided at the time of Judgment.

25. In the event that the Prosecution should attempt to include the private e-mails in evidence, we make this instant motion on inadmissibility and for exclusion of the evidence.

¹⁶ ICTY, *Prosecutor v. Delalić*, Decision On Zdravko Mucic’s Motion For The Exclusion Of Evidence, 2 September 1997, para. 43, <http://www.icty.org/x/cases/mucic/tdec/en/70902732.htm>.

¹⁷ *Lubanga* Decision on the admission of material from the Bar table ICC-01/04-01/06-1981, paras 42 and f. http://www.worldcourts.com/icc/eng/decisions/2009.06.24_Prosecutor_v_Lubanga2.pdf

¹⁸ *Ibid.*

¹⁹ Rule 69 of the Code of conduct of the Office of the Prosecutor; *see also* Regulation 41 of the Regulations of the Office of the Prosecutor.

²⁰ CAR-OTP-0092-5082-R01.

1. The emails lack probative value are inadmissible and should be excluded under Article 69(4) of the Statute

26. As we previously argued, the emails in question are not connected to the charges in this case against Mr. Arido. The substance of the emails deal with the private life of Mr. Arido. This is not the subject matter of this proceeding.

27. The emails clearly lack any probative value, and the use of such private emails in the proceeding is extremely prejudicial to Mr. Arido.

28. The Arido Defence, therefore, should the Prosecution try to use the private emails in any way in this proceeding, moves for their exclusion under Article 69(4) of the Statute.

2. The emails should also be excluded under article 69(7) of the Statute

29. Mr. Arido's emails generally (including the private emails) should be excluded because there was no independent monitoring mechanism put in place to filter the emails, and protect the rights of Mr. Arido.

30. The Prosecution obtained the emails *via* two different ways. A first one followed several RFAs²¹ from the Prosecution to the French Authorities through which the Prosecution requested the seizure of the content of mailboxes related to Mr. Arido's email address.

31. The Prosecution also received the content of the personal computer of Mr. Arido that had been seized the day of his arrest on 23 November 2013. Such computer has been sealed, and the Registry transmitted the content of this computer to the Prosecution on 28 January 2014.²²

32. The Prosecution itself specified that it had access to more than 5000 emails containing more than 2000 attachments, all of them related to Arido's email account.²³

33. It seems clear from the Prosecution filings that it began to investigate the content of Mr. Arido's emails and computer without having taken any precaution in order to prevent access to irrelevant, private, prejudicial or privileged material: "An initial review of the material is currently underway. Once complete, a full analysis of the email accounts will need to be

²¹ CAR-OTP-0091-0551.

²² ICC-01/05-01/13-140-Red, para. 12.

²³ ICC-01/05-01/13-140-Red, ft. 6: "Arido's email account includes approximately 5,000 messages containing approximately 2,000 attachments and corresponding metadata. 7 The seized materials provided".

conducted. However, the quantity of this material makes it impossible to complete this task by 31 January”.²⁴

34. And yet, on 25 April 2014, 3 months after the Prosecution obtained the emails, the Pre-Trial Chamber²⁵ appointed an independent counsel to review the emails in order to make sure emails made available to the Prosecution were relevant and not of a privileged nature.

35. Such procedure should have been followed as soon as the Prosecution had obtained the emails in question. Especially in light of the failure of the Prosecution to react when the Pre-Trial Chamber sent the emails to the Independent Counsel, its conduct confirmed this violation of privacy.

36. The lack of independent screening is a violation of Mr. Arido’s right to privacy. In such a context, these emails have been obtained in violation of an internationally recognized human right.²⁶

37. In addition to the violation of Mr. Arido private life, the admissibility of such email would be antithetical to and would seriously damage the integrity of the proceedings.

C. The Western Union records are inadmissible and should be excluded

38. The Arido Defence seeks to exclude the Western Union records for the following reasons, namely: (i) The absence of reasonable grounds to obtain financial records of Mr. Arido; (ii) the misrepresentation of the evidence to obtain the judicial orders; and (iii) The overly broad seizure of financial records for Mr. Arido and the lack of reliability of the data obtained. The Western Union financial records were obtained in contravention to Mr. Arido’s right to privacy, an internationally recognised human right.²⁷ This evidence is inadmissible pursuant to Article 69(7) of the Statute.

1. The absence of reasonable grounds to obtain financial records of Mr. Arido

39. Mr. Arido was not mentioned in the communications between the anonymous informant and the Prosecution.²⁸ However, the Prosecution obtained confidential financial records of Mr. Arido prior to an Austrian judicial order, authorising the seizure of financial records. The

²⁴ ICC-01/05-01/13-140-Red, para. 11.

²⁵ ICC-01/05-01/13-366.

²⁶ ICC-01/05-01/13-1284, para. 18.

²⁷ *Ibid.*

²⁸ ICC-01/05-01/13-292-Conf-Anx-A-Red.

ICC Prosecution attended in series of meetings at Western Union offices in Vienna, Austria to pre-screen 67 names, including Mr. Arido, against their database.²⁹ The screenings occurred on 19-20 October and 4-5 November 2012.³⁰

40. The Defence learned that on 28 September 2012³¹ and 4 October 2012³², an OTP investigator sent an email to P-0267 for an ‘urgent check’ that involved Mr. Arido. On 11 October 2012³³, P-0267 responded to the OTP investigator, forwarding an Excel spreadsheet³⁴. This document contained financial transactions for persons, *inter alia*, Mr. Arido. As further evidence that the Prosecution had confidential financial information of Mr. Arido in its possession, on 7 November 2012³⁵, an OTP investigator sent an email to P-0267 with three attachments, one being identified as: [REDACTED].xlsx³⁶.

41. The Defence recalls that the first Austrian judicial order was made on 15 November 2012³⁷. An analysis of the spreadsheets provided by P-0267 to the OTP investigators on 11 October 2012³⁸ and by the Austrian Prosecutor to the ICC Prosecution on 21 May 2013³⁹ reveals that they are identical for the tab of Mr. Arido. This demonstrates that the 11 October 2012 spreadsheet was illegally obtained prior to Austrian judicial order. No confidential financial information should have been shared with the Prosecution prior to 15 November 2015.

42. In sum, it appears that the investigation of Mr. Arido’s financial records began prior to any reasonable grounds to believe that he committed any offence.

2. The misrepresentation of the evidence to obtain the judicial orders

43. The Trial Chamber will recall that in November 2015, Prosecution witness P-0267 testified about Western Union transfer records. During his testimony, P-0267 provided the Defence with

²⁹ CAR-OTP-0092-0018, p. 1.

³⁰ *Ibid.*

³¹ CAR-OTP-0092-0021.

³² CAR-OTP-0092-0022.

³³ CAR-OTP-0092-0022, p. 0023.

³⁴ CAR-OTP-0092-0024.

³⁵ CAR-OTP-0092-0028.

³⁶ CAR-OTP-0092-0029.

³⁷ CAR-OTP-0092-0867.

³⁸ CAR-D20-0003-0012.

³⁹ CAR-OTP-0073-0278; CAR-OTP-0070-0005.

a judicial order from an Austrian Court⁴⁰. On this order, it referred to “criminal matter of the International Criminal Court Against: Narcisse Arido Subject/Because of: Genocide”⁴¹.

44. The Defence reiterates that Mr. Arido has never been a suspect nor has ever been investigated for the crime of genocide. The ICC Prosecution has never corrected this highly prejudicial error, nor has it submitted any evidence that it took curative action that Mr. Arido was a suspect in an investigation of offences against the administration of justice. These actions have breached Mr. Arido’s right not to be subjected to arbitrary or unlawful interference with his privacy and unlawful attacks on his honour and reputation pursuant to, namely, Article 17 of the International Covenant on Civil and Political Rights (‘ICCPR’)⁴² and Article 12 of the United Nations Declaration of Human Rights (‘UNDHR’)⁴³.

3. The overly broad seizure of financial records for Mr. Arido and the lack of reliability of the data obtained

45. The Article 70 investigation flowed from allegations of witness tampering in the *Bemba* main case. On 2 November 2012⁴⁴, a RFA was sent to the Austrian government with respect to “[t]ransmission of copies of records held by Western Union regarding all monies transacted, sent or received by or from the individuals listed [...]” (emphasis added). Both the pre-screened and the judicially ordered results for Mr. Arido date back to 2005.⁴⁵ Over 30 transactions occurred prior to the arrest of Mr. Bemba and almost 40 more were captured between the arrest and December 2011. In short, there were over 70 financial transactions that occurred before 2012 – seven years before the alleged offences in the Article 70 case. Objectively, the seizure was overly broad as the timeframe spans years that are totally unrelated to the charges.

46. On 3 November 2015⁴⁶, during the cross-examination of P-0267 by the Arido Defence, the witness was asked a question concerning the reliability of the information contained on one of the spreadsheets⁴⁷. The witness responded that “[o]f course, there might be human mistakes or something [...]”⁴⁸. When it was suggested that the Western Union agents may make errors

⁴⁰ CAR-OTP-0092-0867.

⁴¹ CAR-D24-0002-1363, p. 1.

⁴² UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html>.

⁴³ UNDHR

⁴⁴ CAR-OTP-0091-0351.

⁴⁵ CAR-OTP-0092-0024; CAR-OTP-0070-0005

⁴⁶ ICC-01/05-01/13-T-34-ENG RT 03-11-2015 T.

⁴⁷ CAR-OTP-0070-0005.

⁴⁸ ICC-01/05-01/13-T-34-ENG RT 03-11-2015 T, p. 24, lines 14-15.

because of inconsistent training, P-0267 replied, “We have our standard rules. And all the agents have to apply. Of course, human mistakes may appear when they enter the data, it’s not Western Union itself. We have our agent locations which are contractors to us. [...]”⁴⁹.

47. The Trial Chamber held that Article 69(7) of the Statute is two-pronged⁵⁰. Firstly, it must be demonstrated that the evidence either was obtained by a violation of the Statute or internationally recognised human right. Secondly, the evidence must cast 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.

48. To summarise, the Western Union records of Mr. Arido were obtained prior to judicial order and without reasonable grounds to believe that Mr. Arido had committed a crime pursuant to Article 70 of the Statute. The first Austrian judicial order on its face appears that it was authorised under the auspices of an investigation into crimes of genocide and not offences against the administration of justice. Finally, the seizure of records reached deep into the past, thrusting Mr. Arido’s private financial transactions into the spotlight to be scrutinized by Western Union, the Austrian Prosecution, the ICC Prosecution, the Defence teams and any other person who has had contact with them.

49. The Arido Defence respectfully submits that Mr. Arido’s internationally recognised right of privacy pursuant to the ICCPR⁵¹, European Convention on Human Rights⁵² and the UNDHR⁵³ was violated. This violation not only casts substantial doubt on the reliability of the evidence, it would also be antithetical to and would seriously damage the integrity of the proceedings. Mr. Arido was irreparably harmed and continues to be harmed due to this violation. The only possible remedy, and the deterrence of such conduct, is one in the same – the exclusion of evidence. The absence of this remedy would cause the legitimacy of the Court to be tainted and seriously damage the integrity of the proceedings.

⁴⁹ ICC-01/05-01/13-T-34-ENG RT 03-11-2015 T, p. 29, lines 18-21.

⁵⁰ ICC-01/05-01/13-1284, para. 17.

⁵¹ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html>.

⁵² Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html>.

⁵³ Article 12, General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html>.

VI. CONCLUSION

50. In light of the above, the Arido Defence respectfully requests Trial Chamber VII to rule as inadmissible and exclude as evidence a) the interviews of 23 November 2013 and 17 January 2014; (b) all of the emails seized, including the private emails; and (c) all of the Western Union records.

A handwritten signature in black ink, appearing to read 'Charles Achaleke Taku', with a long horizontal flourish extending to the right.

Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 9th Day of July 2016

The Hague, Netherlands