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

Date: **9 July 2016**

TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

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 Response to the Prosecution’s ‘Confidential redacted version of
‘Prosecution’s Application for Non-Standard Redactions’
(ICC-01/05-01/13-986-Conf-Red)”, filed 15 June 2015**

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

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I. INTRODUCTION

1. Pursuant to a 9 June 2015 email decision from Trial Chamber VII (“Trial Chamber”), on 9 June 2015, the Prosecution filed its “Confidential redacted version of ‘Prosecution’s Application for Non-Standard Redactions’ ”¹. The Arido Defence opposes the redactions proposed by the Prosecution. Broadly speaking, the Prosecution has failed to justify the necessity of its proposed redactions. Moreover, it does not explain why the proposed redactions are the least intrusive means of realising its stated goals of protecting “the dignity and privacy of witnesses”² and “further and ongoing investigations”³ given the importance of disclosure to the rights of the Defence.

II. CONFIDENTIALITY

2. Pursuant to Regulation 23^{bis} of the Regulations of the Court and Regulation 24 of the Regulations of the Registry, this request is submitted confidential as it responds to a filing that is classified as such.

III. PROCEDURAL HISTORY

3. On 22 May 2015, in an annex to its “Decision on Modalities of Disclosure”, the Trial Chamber adopted a “Protocol Establishing a Redaction Regime” (‘Redactions Protocol’).⁴ This protocol aims to provide “full respect for the rights of the accused and with due regard for the protection of witnesses, victims and other persons who might be at risk on account of the activities of the Court”⁵ while ensuring efficient trial-management and disclosure.

4. The Protocol provides for a regime of ‘non-standard redactions’⁶ whereupon an applicant must justify any redaction that exists beyond a specified series of categories.

5. On 9 June 2015, in an email decision, the Trial Chamber directed the Prosecution to “file a redacted version of its application” for non-standard “as soon as is possible” and directed “that

1 ICC-01/05-01/13-986-Conf-Red.

2 *Ibid.*, para. 1.

3 *Ibid.*, para. 1.

4 ICC-01/05-01/13-959-Anx.

5 *Ibid.*, para. 2.

6 *Ibid.*, para. 48-50

any Defence response to the Prosecution's application must be filed within five days of notification of the redacted version of the request.”⁷

6. On 9 June 2015, the Prosecution submitted a confidential redacted request for non-standard redactions.⁸ This request for redactions concerns personal details about several witnesses and the redaction of the names and function of two individuals [REDACTED].⁹

IV. APPLICABLE LAW

7. Pursuant to Article 64(2) of the Statute, the Trial Chamber is obliged “to ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused”.

8. Many of the rights of the accused are specified in Article 67(1). Pursuant to that subsection, under sub-item (e), the accused is given the right “to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her” as well as “to raise defences and to present other evidence admissible under this Statute.”

9. Article 67(2) obliges the Prosecution to disclose to the Defence “evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.”

10. Pursuant to Rule 81(4) of the Rules of Procedure and Evidence (‘RPE’), the Chamber may authorise the non-disclosure of *inter alia* material, the disclosure of which, would objectively threaten the safety of witnesses. This is permitted after examining whether the non-disclosure is necessary and proportionate to its interference with the rights of the Accused.¹⁰

11. Pursuant to Rule 81(2) of the RPE where the Prosecution is obliged to disclose material, but where disclosure “may prejudice further or ongoing investigations”, the Prosecutor may apply to the Chamber for a ruling on whether the material must be disclosed; however, without “adequate disclosure” the Prosecutor may not introduce such material into evidence at trial.

⁷ 9 June 2015 email from Trial Chamber VII, subject line: “Filing ICC-01/05-01/13-986-Conf-Exp”.

⁸ ICC-01/05-01/13-986-Conf-Red.

⁹ *Ibid.*, para. 10.

¹⁰ ICC-01/04-01/07-475 OA, paras 70-73.

V. SUBMISSIONS

12. As recognised by the Appeals Chamber, a redaction constitutes a form of non-disclosure.¹¹ It has been repeatedly stressed by the Appeals Chamber that full disclosure is the rule and that exceptions thereof must be justified.¹²

A. The necessity of the redactions proposed pursuant to Rule 81(4) has not been established

13. At the outset, the Arido Defence notes that the Prosecution bases its request upon obligations described under Articles 54(3)(f) and Article 68. Rule 81(4) is the procedural mechanism to mediate these obligations in the context of disclosure as is shown by the cross-references to those articles in that rule.

14. Non-disclosure pursuant to Rule 81(4) may only be authorised if disclosure of the information concerned would pose a danger to the particular person.¹³ The danger must pose an “objectively justifiable risk” and “arise from disclosing the particular information *to the Defence*, as opposed to disclosing the information to the public at large.”¹⁴ Only in the circumstance that redactions will overcome or reduce that risk¹⁵ should the Chamber entertain the proportionality of non-disclosure. If considering proportionality, the Chamber should consider factors such as alternative measures¹⁶, the relevance of the information to the Defence,¹⁷ the stage of proceedings¹⁸, and the effect of the non-disclosure on the equality of arms and the fairness of the trial.¹⁹

15. With regards to the effect of redactions upon the right to a fair trial, in the context of the lower standards applied at the Pre-Trial stage, the Appeals Chamber has noted that where “a redaction sought would involve withholding exculpatory information which was required to be disclosed, for fair proceedings” it would result in “a manifest inequality of arms” and there would be little doubt that a Pre-Trial Chamber would reject the application.²⁰

¹¹ ICC-01/04-01/06 A5 A6, para. 12.

¹² ICC-01/04-01/07-475 OA, para. 70.

¹³ *Ibid.*, para. 71.

¹⁴ *Ibid.*, para. 71 (a) and (b).

¹⁵ *Ibid.*, para. 72.

¹⁶ *Ibid.*, para. 72 (a).

¹⁷ *Ibid.*, para. 72 (c).

¹⁸ *Ibid.*, para. 72 (b).

¹⁹ *Ibid.*, para. 73 (a) and para. 72 (d).

²⁰ *Ibid.*, para. 62.

1. *The Prosecutor's request*

16. The Arido Defence notes that it is only in a partial position to respond to the non-standard redactions proposed under Rule 81(4) since limited information is provided in the Prosecution confidential redacted request. In this regard, the Arido Defence notes that the Appeals Chamber has stated that a Chamber should “give the Defence the greatest possible opportunity to make submissions on the issues involved, necessarily without revealing to the Defence the information which the Prosecutor alleges should be protected”²¹.

17. With regards to all the Prosecution requests pursuant to Rule 81(4), the justification that is given, for what is supposed to be an exceptional measure, is extremely terse. The Prosecution states that “the proposed redactions are limited in scope and necessary to protect the dignity and privacy of the witnesses”²² and “non-disclosure of the information is not prejudicial to, or inconsistent with the rights of the Accused because the information has no bearing on the material facts of this case”²³. Those are, however, mere assertions without any supporting argumentation or evidence.

18. The Arido Defence notes that the Prosecution has not provided any indication of an objective risk. Moreover, the Prosecution has not suggested why *disclosure to the defence*²⁴ would increase this risk.

19. The Arido Defence recalls that the Prosecution should outline why lesser forms of intrusion are not feasible.²⁵ In particular, it is unclear why simply maintaining the material confidential-to-the-parties is unsatisfactory.

20. With regards to requests (a) and (c), the Arido Defence cannot anticipate what relevance the information may have for other Co-Accused; however, the Arido Defence notes that with regards to request (b) it is difficult to see how banking details are not relevant in a case involving allegations of improper transfers of money.

21. Request (d) concerns information about witness [REDACTED].²⁶ The Appeals Chamber has noted that in assessing the question of relevance to the Defence, if information “may be of

21 ICC-01/04-01/07-475 OA, para. 73.

22 ICC-01/05-01/13-986-Conf-Red, para. 8.

23 *Ibid.*, para. 9.

24 ICC-01/04-01/07-475 OA, para. 71.

25 *Ibid.*, para. 108.

26 [REDACTED].

assistance to the case of the suspect or may affect the credibility of the case of the Prosecutor”²⁷ than evaluating the the request for non-disclosure requires “particular care”²⁸. As a result, the Arido Defence respectfully requests the Trial Chamber to consider whether the redactions sought contain information that may in any way impact upon the credibility of [REDACTED] or the statements that were made.

22. Furthermore, in the absence of any specificity from the Prosecution, the Arido Defence also notes that it may be the case that Mr. Arido or other parties or Counsels are already aware of the information for which redactions are sought. In any case, the imposition of strict non-standard redactions could have the opposite intended effect by increasing the risk to [REDACTED]. This is because absent preparation, the issue could inadvertently be raised by Counsel or be stumbled upon during investigations.

23. In light of the above, the Arido Defence requests the Trial Chamber to reject the Prosecution’s request and, if necessary, order that the information be kept confidential by the parties pursuant to its powers under Article 64(6)(c).

B. The redactions proposed pursuant to Rule 81(2) are unnecessary and unfair to the Defence

24. According to the Appeals Chamber, the test and conditions mentioned above²⁹ should be applied “*mutatis mutandis*”³⁰ to the authorisation for redactions pursuant to Rule 81(2) of the RPE. It must be emphasised that “the Prosecutor will have to establish that the potential prejudice to investigations is objectively justifiable, would result from disclosure to the Defence (as opposed to the general public) and could be overcome or reduced by redactions.”³¹

25. The Prosecution “seeks redactions to the names and functions of [REDACTED]” [*sic*]³². The Arido Defence opposes this request. The Prosecution has neither justified the necessity of the redactions, nor demonstrated that they are the least intrusive means of mitigating the alleged risks. This is the more so since the Defence has concerns about the conduct of [REDACTED] and whether they have exerted undue pressure upon key witnesses against the Accused.

27 ICC-01/04-01/07-475 OA, para. 72 (c).

28 *Ibid.* citing to ICC-01/04-01/06-773, OA5, para. 33.

29 See paras 14 and 15.

30 ICC-01/04-01/07-475 OA, paras 95-98.

31 *Ibid.*, para. 98.

32 *Ibid.*, para. 10.

26. Unless redacted from the Defence in paragraph 11 of its request, the Prosecution has not established “that such redactions are warranted and, in particular, that disclosure of the information for which redactions are sought ‘may prejudice further or ongoing investigations’.”³³

27. Furthermore, the Prosecution has not shown that providing the names of these individuals *to the Defence* will either place the individuals at risk or that it will interfere with ongoing or further investigations, it has merely stated “the proposed redactions are limited in scope and necessary to protect these investigations”³⁴ because it “continues to cooperate with these individuals [REDACTED]”

28. The Defence hastens to add that redacting the names of individuals from [REDACTED] may effectively impede the Defence in its own investigations. The Prosecutor has refused to communicate to the Defence a full listing of Call Data Records [REDACTED]. Thus, it will now be necessary for the Defence to cooperate with the individuals whose name the Prosecution endeavors to redact.

1. The necessity of the non-standard redactions

29. To the extent that the Prosecution’s arguments relate to investigations with regards to the present case, Rule 81(2) should not generally be applicable³⁵ because the Prosecution should have completed investigations by the Confirmation of Charges stage.³⁶ In this regard, the Prosecution has estimated that it has largely completed its disclosures, which by implication suggests that, absent exceptional follow-ups, it has largely completed its investigations in the present case.³⁷

30. The Prosecution has not demonstrated why at this point, having disclosed a great deal of material to the Defence concerning [REDACTED] cooperation, that circumstances have now changed and merit a more stringent regime.

31. To the extent that the Prosecution’s request may concern investigations in the [REDACTED], the Prosecution has not appeared to indicate why a redaction that limits information to the public is not sufficient.

33 ICC-01/04-01/07-475 OA, para. 97.

34 ICC-01/05-01/13-986-Conf-Red, para. 12.

35 ICC-01/04-01/06-3031 A5 A6, para. 9.

36 ICC-01/04-01/10-514 (OA 4), para. 44 citing ICC-01/04-01/06-568 (OA 3), para. 54.

37 ICC-01/05-01/13-T-8-CONF-ENG, p. 9, l. 8 to p. 10, l 15.

32. Redacting the name of the individual named in CAR-OTP-0080-0007³⁸ from the Defence is futile. The Defence is already aware of his function from the statement itself and [REDACTED] at any given moment is already in the public domain.³⁹ If this were not enough, his name is available elsewhere in disclosures as in for example a report from [REDACTED]⁴⁰. Similarly, with regards to the second individual, it appears likely that his name has also been disclosed to the Defence, albeit imperfectly, as has partially his title.⁴¹

33. The proposed redaction does little to limit whatever risk may or may not have been identified by the Prosecution. Since the information is already accessible to the Defence, the redaction as proposed should be rejected because it will not serve to reduce the risk to any investigation through disclosure to the Defence.

34. Even if the redactions of the individuals' names are necessary, the method proposed is not. Should the non-standard redactions be granted, an individual pseudonym should be given to each individual following the procedure in the Redactions Protocol⁴² so that the Defence can remain aware of the effect that each of these individuals may have upon the Prosecution's investigations.

2. Proportionality and fairness to the Accused

35. Should the Arido Defence have not correctly identified them, the identity of the individual named in CAR-OTP-0078-0155⁴³ should be disclosed to the Defence, at least confidentially, as it is material to the preparation of the Defence investigations, preparation, and the evaluation of potential witnesses.

36. The Prosecution asserts that "non-disclosure of the information is not prejudicial to, or inconsistent with, the rights of the Accused because the information has no bearing on the material facts of this case."⁴⁴ The Prosecution thus claims that the rights of the Accused are not affected because the information is not relevant to the Defence. The Arido Defence respectfully disagrees. The relevance of material must be "construed broadly"⁴⁵ and in the present case the relevance is quite clear.

38 CAR-OTP-0080-0007 at 0017, l. 378.

39 [REDACTED].

40 CAR-OTP-0073-0003, p. 2.

41 CAR-OTP-0078-155 at 0157, l. 45.

42 ICC-01/05-01/13-959-Anx, paras 23-25.

43 CAR-OTP-0078-0155, at 0156, l. 30.

44 ICC-01/05-01/13-986-Conf-Red, para. 13

45 ICC-01/04-01/06-3017, para. 10.

37. The material facts in the allegations against Mr. Arido are allegedly substantiated by the statements of witnesses D2, D3, D4, and D6. Recently disclosed witness statements show the Prosecution investigated in November 2014 allegations made by D3 that he was intimidated by [REDACTED].⁴⁶ It appears at least possible that the individuals whose identity the Prosecution proposes to redact purportedly for their [REDACTED] are the same person about whom D3 complain. In their statements to the Kilolo Defence, D4 and D6 also complain of communication from [REDACTED] that accompanied harassment by investigators.⁴⁷

38. If it is the case that the statements of these witnesses have been procured improperly, this may go to their admissibility; however, it will not be possible to identify the extent of the interference without knowing the identity of the individuals and the extent of the individuals involvement with the witnesses. Alternatively, if the circumstances of the taking of statements for these witnesses are such as to call into question their credibility, then the Arido Defence may be able to take certain decisions related to trial. Absent this key information, it may not be possible to take an informed decision about this critical issue. Mr. Arido's right to defend himself would therefore be irretrievably prejudiced. This may further lead to delays during the trial should such facts be discovered at a later stage.

39. As such, the decision to redact this material substantially impacts upon the rights of Mr. Arido to defend himself since he would be denied access to potentially exonerating information, and it may also impact his ability to call witnesses who could show that the allegations made by either D2 or D3 lack substance.

40. As a concluding remark, the Arido notes that the Appeals Chamber has stated that there is a need to continually monitor exceptions to the general rule of full disclosure.⁴⁸ Should the Prosecution's redactions be granted, the Trial Chamber and Prosecution should continue to evaluate whether the justification for these non-standard redactions has ceased on an on-going basis.

VI. CONCLUSION

41. The Arido Defence respectfully requests the Trial Chamber:

46 See for example starting at CAR-OTP-0085-0857 at 0869, l. 408.

47 For D4 see CAR-D21-0004-0310, p. 13, lines 424-429. For D6 see CAR-D21-0004-0354, p. 17, lines 568-573.

48 ICC-01/04-01/07-475 OA, para. 73(c).

- a. To reject the Prosecution's request for non-standard redactions under Rule 81(4) and, if necessary, order that the information be kept confidential by the parties.
- b. To reject the Prosecution's request for non-standard redactions with regards to [REDACTED];
- c. In the alternative should the non-standard redactions be granted, an individual pseudonym should be given to each individual following the procedure in the Redactions Protocol.⁴⁹
- d. Absent this alternative request, the Arido Defence requests that the Prosecution be barred from introducing evidence related to witnesses D2, D3, D4, and D6 without further disclosure.
- e. Order that the Prosecution disclose the redacted version of the documents for which redactions were sought no later than three days following the notification of the Chamber's decision on the request for redactions.⁵⁰



Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 9th Day of July 2016

The Hague, The Netherlands

⁴⁹ ICC-01/05-01/13-959-Anx, paras 23-25.

⁵⁰ ICC-01/05-01/13-T-2-Red-ENG, T. 32, l. 17-19; ICC-01/05-01/13-T-3-Red-ENG, T. 13, l. 6-8.