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

Date: **13 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
'Corrigendum of
"Narcisse Arido's Motion for Disclosure of Un-redacted 'Anonymous Emails', and
Disclosure of the Material Corroborating the Information Received from the
'Anonymous Informant' Pursuant to Article 67(2) of the ICC Statute and Rule 77 of the
Rules of Procedure and Evidence"
(ICC-01/05-01/13-1793-Conf-Corr), 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:

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I. INTRODUCTION

1. In its Opening Statement on 29 September 2015, the Prosecution clearly stated that this Article 70 case was initiated by an anonymous tip:

“On 14 June 2012, the Prosecution received an anonymous tip that individuals associated with Jean-Pierre Bemba Gombo’s defence were providing benefits to witnesses in exchange for false testimony and false documents. That sparked an exhaustive, disciplined and judicially authorised investigation spanning over a year.”¹

2. However, in the thread of the emails² with the Anonymous Informant there is clearly no reference to Mr. Arido.

3. There is, though, a person, ‘[REDACTED]’, who figures prominently in these exchanges. There are multiple references in multiple emails to ‘[REDACTED]’, who appears to be the subject and/or the object of Prosecution investigations.

4. As the Defence stated in its Opening Statement, it is not clear why the Prosecution has prosecuted Mr. Arido. There is no connection made between the anonymous tip and Mr Arido.

5. Over the last months, the Arido Defence has listened to the evidence adduced by the Prosecution. None of this has shed any light why the case against Mr. Arido was initiated.

6. The evidence, on the other hand, reveals potentially exculpatory material to Mr. Arido vis-à-vis the role of this ‘[REDACTED]’. The failure to disclose the un-redacted version of emails causes undue prejudice to Mr. Arido in the context of the potentially exculpatory material.³

7. For this reason, the Arido Defence requests the disclosure of the un-redacted email exchanges between the Anonymous Informant and the Prosecution provided in a filing ‘ICC-01/05-01/13-292-Conf-AnxA-Red’ as the material may be exculpatory, and in any case, the purpose for the maintenance of the redaction has expired.

8. The Arido Defence also requests disclosure of the material used to corroborate the information received from the Anonymous Informant pursuant to Article 67(2) of the Rome Statute (the ‘Statute’) and Rule 77 of the Rules of Procedure and Evidence (‘RPE’).

¹ ICC-01/05-01/13-T-10-CONF-ENG-ET, page 24, lines 18-22.

² ICC-01/05-01/13-292-Conf-AnxA-Red.

³ ICC-01/05-01/13-1166-Conf, para. 18.

II. CONFIDENTIALITY

9. 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 the Prosecution's investigations.

III. PROCEDURAL HISTORY

10. On 17 March 2014, the Single Judge of the Pre-Trial Chamber II ordered the Prosecution to provide him with a copy of email exchanges with the Anonymous Informant sought on an *ex parte* basis, as well as with any other information or material in its possession, allowing him to properly discharge his responsibilities.⁴

11. On 27 March 2014, the Single Judge of the Pre-Trial Chamber II ordered disclosure of all information provided by the Anonymous Informant. The Single Judge of the Pre-Trial Chamber II also ordered that all information leading to the Anonymous Informant's identification (in particular names and pseudonyms, email addresses, locations and travelling plans) be redacted.⁵

12. Following this, on 1 April 2014, a redacted version of the email exchanges with the Anonymous Informant were made available to, *inter alia*, the Arido Defence.⁶

13. On 5 May 2015, the Arido Defence in an *inter partes* request to the Prosecution requested:

"The identity, profession, research into background, motive, or credibility, and any other investigative documents related to the anonymous informant who sent emails to the Prosecution in June 2012 as disclosed in ICC-01/05-01/13-292-AnxA. In view of their centrality to the existence of the case against Mr. Arido, further information is material to the preparation of the defence".⁷

14. On 22 May 2015, the Trial Chamber VII (the "Trial Chamber") adopted the redaction protocol and the disclosure modalities.⁸

15. On 21 July 2015, the Bemba Defence requested the Trial Chamber to order the Prosecution to disclose all information concerning the identity of the Anonymous Informant.⁹

⁴ ICC-01/05-01/13-262.

⁵ ICC-01/05-01/13-298, pages 5-6.

⁶ ICC-01/05-01/13-292-Conf-AnxA-Red.

⁷ See item B1 on p. 3 of ICC-01/05-01/13-1141-Conf-AnxA.

⁸ ICC-01/05-01/13-959-Anx.

⁹ ICC-01/05-01/13-1098-Conf-Red.

16. On 21 August 2015, in its decision on Bemba Defence request, the Trial Chamber affirmed the Single Judge of the Pre-Trial Chamber II's reasoning and rejected the request.¹⁰

17. On 24 September 2015, following the Bemba Defence request for the reconsideration or, in the alternative, leave to appeal the Trial Chamber's Decision to maintain the redactions,¹¹ the Single Judge of the Trial Chamber VII (the 'Single Judge') rejected the request.¹²

18. On 29 September 2015, the Prosecution referred to an anonymous tip in its Opening Statement.¹³

19. On 29 February 2016, in its Opening Statement, the Arido Defence stated that: "Mr. Arido, your Honours, still does not know why he was charged before this Court".¹⁴

IV. APPLICABLE LAW

20. Pursuant to Article 67(2) of the Statute, the Prosecution shall, as soon as practicable, disclose to the Defence evidence in its possession which may affect the credibility of Prosecution evidence, or show or tend to show the innocence of the Accused or mitigate the guilt of the Accused. The Trial Chamber in *Banda and Jerbo* held that "a fundamental component of the right of the accused to a fair trial includes the right to disclosure of potentially exculpatory material."¹⁵

21. 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".

22. The ICC Appeals Chamber has held that the expression "material to the preparation of the defence" has to be interpreted broadly¹⁶ and that Rule 77 of the RPE encompassed "all objects that are relevant for the preparation of the defence".¹⁷ In particular, it noted that certain objects, while not directly linked to exonerating or incriminating evidence, may otherwise be

¹⁰ ICC-01/05-01/13-1166-Conf.

¹¹ ICC-01/05-01/13-1198-Conf.

¹² ICC-01/05-01/13-1282.

¹³ ICC-01/05-01/13-T-10-CONF-ENG-ET, page 24, lines 18-22.

¹⁴ ICC-01/05-01/13-T-39-CONF-ENG-ET, page 34, lines 20-21.

¹⁵ ICC-02/05-03/09-259, para 14; *see also* ICC-01/04-01/07-621, para. 3; ICC-01/04-01/06-1401, para. 79.

¹⁶ ICC-01/04-01/06-1433 OA, para. 77; *see also* ICC-01/05-01/08-1594-red, para. 19.

¹⁷ ICC-01/04-01/06-1433 OA, para. 77.

material to the preparation of the defence.¹⁸ This included material not directly related to the case but tending to explain the overall circumstances of a conflict.¹⁹

V. SUBMISSIONS

A. The Un-redacted Version of the Anonymous Informant Email Exchanges Is Exculpatory to Mr. Arido

23. *First*, it is important to highlight that Mr. Arido was not the object of the email exchanges and investigations related to the ‘tip’ from the Anonymous Informant. Nothing in the e-mails link the Anonymous Informant or the information provided to Mr. Arido. In relation to the affair Bemba, it is clear that ‘[REDACTED]’ was an object of interest to the Prosecution.²⁰

24. The Arido Defence submits that the exculpatory material from the impugned emails is necessary to present its final submission and argument for the Arido Defence case, and potentially rebut the Prosecution’s closing arguments.

25. It is therefore prejudicial to the fair trial rights of Mr. Arido for him not to be able to inspect the exculpatory material contained in the thread of the emails between the Anonymous informant and the Prosecution. Such information may indicate the existence of further relevant information, and lead to further investigations.

26. Second, the Arido Defence points out that the Prosecution has never indicated any interest in knowing who the Anonymous Informant is.²¹ To the contrary, in one of the emails, the Prosecution says that it ‘prefers’ not to know the name of the Anonymous Informant, and it never pressures the Anonymous Informant for his or her name in the correspondences which span approximately a nine-month period.²²

27. It is, however, odd that the Prosecution felt confident enough to pursue costly investigations on the basis of untested ‘tips’ from a random individual. The Arido Defence would also point out that it is odd that the Anonymous Informant makes no request for money or compensation for his or her services until the e-mail of March 2013, nine months after the initial

¹⁸ *Ibid.*

¹⁹ *Ibid.*, paras 76-82.

²⁰ See ICC-01/05-01/13-292-Conf-AnxA-Red: ‘[REDACTED]’ is mentioned in emails of 29 August 2012 (p.11); 30 August 2012 (p.10); 6 September 2012 (p.9); 10 September 2012 (p.8); 22 September 2012 (p.7); 27 September 2012 (p.6); 28 September 2012 (pp.4-5)

²¹ See ICC-01/05-01/13-292-Conf-AnxA-Red, p. 16.

²² See ICC-01/05-01/13-292-Conf-AnxA-Red: The Earliest e-mail is dated 14 June 2012 (pp.21-22) and the last e-mail in this group is dated 13 March 2013 (p.2).

contact in June 2012. Generally, anonymous informants seek some benefit in exchange for information they are providing, or promising to provide.

B. There Is No Objectively Justifiable Risk to the Anonymous Informant

28. The Arido Defence notes the Appeals Chamber's holding that "[t]he overriding principle is that full disclosure should be made. It must always be borne in mind that the authorisation of non-disclosure of information is the exception to this general rule."²³

29. In considering whether to authorise the non-disclosure of witnesses identity pursuant to Rule 81(4) of the RPE, the Appeals Chamber has summarised the relevant factors as encompassing:

“[A] thorough consideration of the danger that the disclosure of the identity of the person may cause; the necessity of the protective measure, including whether it is the least intrusive measure necessary to protect the person concerned; and the fact that any protective measures taken shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial potentially exculpatory material AND material which may affect the credibility of Prosecution evidence”.²⁴

30. Assessing danger should involve consideration of the following factors:

- a) The alleged danger must involve an objectively justifiable risk to the 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.²⁵

31. The Prosecution has not identified any objectively justifiable risk to the Anonymous Informant. In fact, the Prosecution had made it clear on several occasions that it does not know who the Anonymous Informant is.²⁶

32. Therefore, the Arido Defence submits that the disclosure of the un-redacted version supports Mr. Arido's fair trial rights under Article 67(2) of the Statute.

C. Disclosure as mandated under Rule 77 of the RPE

33. Rule 77 creates a presumption of full disclosure of any materials which are relevant to defence preparation, and which are not exempted from disclosure by an express provision in the

²³ ICC-01/04-01/07-475, para. 70.

²⁴ *Ibid.*, para. 67.

²⁵ *Ibid.*, para. 71.

²⁶ *See* ICC-01/05-01/13-1166-Conf, para. 15.

Statute or Rules. The Appeals Chamber has repeatedly stated that exceptions to this presumption are themselves very exceptional.²⁷

34. In order to establish the obligation to disclosure pursuant to Rule 77 of the RPE, the Defence needs to establish firstly, that the information requested is relevant to a particular aspect of defence preparation at that stage of the proceedings, and secondly, that there are no provisions in the Statute or Rules which restrict the requested disclosure.

35. The restrictions on disclosure set out in Rule 81 of the RPE are linked 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.²⁸

36. The Arido Defence requests disclosure of all the material used to corroborate the Anonymous Informant's information. The Prosecution, for example, began to investigate certain 'tracks' provided by the Anonymous Informant, and these are among the material requested by the Arido Defence.²⁹

²⁷ ICC-01/04-01/06-3031, para. 10; ICC-01/04-01/07-475, para. 70.

²⁸ ICC-01/04-01/07-475.

²⁹ See ICC-01/05-01/13-292-Conf-AnxA-Red, page 16: The Prosecution's Trial Lawyer Mr. Badibanga refers to certain 'tracks' in his email communication with the Anonymous Informant in email dated 4 July 2012, and states that: "[REDACTED]".

VI. CONCLUSION

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

- a) **ORDER** the Prosecution to disclose to the Defence the un-redacted version of e-mail exchanges between the Anonymous Informant and the Prosecution provided in a filing 'ICC-01/05-01/13-292-Conf-AnxA-Red'; and
- b) **ORDER** the Prosecution to disclose to the Defence the material that was used to corroborate the information received from the Anonymous Informant pursuant to Article 67(2) of the Statute Rule 77 of the RPE.



Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 13th Day of July 2016

The Hague, Netherlands