

**Cour
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**International
Criminal
Court**



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

Date: **22 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 Urgent Request to Preclude the Prosecution from Using Private
Communications” (ICC-01/05-01/13-1671-Conf), filed 27 February 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. The Arido Defence strongly objects to the disclosure of private emails in the most recent Prosecution Rule 77 disclosure. The disclosure of these materials is not relevant to the proceedings and the disclosure of this material – even to the parties in the case – constitutes a serious violation of Mr. Arido’s privacy rights. The Prosecution should not be permitted to use this material at trial.

II. CONFIDENTIALITY

2. 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 private communications of Mr. Arido. The Arido Defence opposes to it being reclassified as *public*.

III. PROCEDURAL HISTORY

3. On 11 December 2015¹, the Arido Defence made a request for material related to the persons on its list of witnesses. The Request was made pursuant to Article 67(2) of the Rome Statute (‘Statute’) and Rule 77 of the Rules of Procedure and Evidence (‘Rules’).

4. On 23 February 2015², the Prosecution disclosed 329 items under Rule 77 to all the parties (‘Rule 77 Disclosure’).

5. The Prosecution filed a consolidated response to Arido’s Disclosure Requests on 24 February 2016³. This response stated that the Prosecution had disclosed all materials that were relevant to the preparation of the Arido Defence’s witnesses.

¹ ICC-01/05-01/13-1521.

² ICC-01/05-01/13-1652 and ICC-01/05-01/13-1652-Conf-AnxB.

³ ICC-01/05-01/13-1656.

IV. APPLICABLE LAW

6. Article 21(3) of the Statute provides that the application and interpretation of the Statute “must be consistent with internationally recognized human rights”.

7. Trial Chamber VII (“Trial Chamber”) has recognised the right to privacy “in accordance with the highest international standards.”⁴ Amongst the sources of this right recognised by the Trial Chamber are Article 17 of the International Covenant on Civil and Political Rights (‘ICCPR’)⁵ and Article 8(1) of the European Convention of Human Rights (‘ECHR’).⁶

8. Rule 81(4) of the Rules stipulate that “[t]he Chamber dealing with the matter shall, on its own motion or at the request of [...] the accused [...] take the necessary steps to ensure the confidentiality of information, in accordance with [...] article 68, to protect the safety of witnesses and victims and members of their families [...]”. The Appeals Chamber on two occasions has held the provision to implicitly extend to third “persons at risk on account of the activities of the Court”⁷.

9. Further asserting Article 12 of the Universal Declaration of Human Rights,⁸ Article 17 of the ICCPR provides that “(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation; (2) Everyone has the right to the protection of the law against such interference or attacks.”

10. Article 8 of the ECHR states that “[e]veryone has the right to respect for his private and family life, his home and his correspondence.” This right can only be interfered “in accordance with the law” and as “necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

⁴ ICC-01/05-01/13-1284, para. 18.

⁵ 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>.

⁶ 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>.

⁷ ICC-01/04-01/07-475, para. 56; ICC-01/04-01/06-3118-Red2, para. 7.

⁸ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html>.

V. SUBMISSIONS

11. The Rule 77 Disclosure contained 145 personal emails of Mr. Arido (the ‘Private Information’).⁹ Virtually all of these concern correspondences with third parties. [REDACTED].¹⁰

12. Though there is a threshold question regarding the legality of the collection of this material which has been previously disputed, the Arido Defence submits that particularly the personal emails should not have been disclosed and certainly should not be produced as evidence in Court.

A. The material disclosed is protected by the right to privacy

13. The Private Information is clearly protected by the right to privacy. Individuals under the ECHR benefit from “respect” for their “private [...] life, [...] and [their] correspondence.” [REDACTED].¹¹ [REDACTED].¹² Furthermore, the notion of correspondences goes beyond letters¹³ and clearly covers emails.

14. Similarly, the ICCPR prohibits interference with “privacy [...] or correspondence[s]”. Under that instrument a Special Rapporteur has defined privacy as:

the presumption that individuals should have an area of autonomous development, interaction and liberty, a “private sphere” with or without interaction with others, free from State intervention and from excessive unsolicited” intervention by other uninvited individuals. *The right to privacy is also the ability of individuals to determine who holds information about them and how is that information used.* (emphasis added)¹⁴

15. The disclosure of the Private Information is an affront to, and inference with, Mr. Arido’s right to privacy. [REDACTED]. The protection of personal information is of fundamental

⁹ [REDACTED].

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

¹³ For example Telexes in the 1980’s, see *Campbell Christie v. the United Kingdom*, 27 June 1994, Appl. No. 21482/93, p.11 available at: <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-1870&filename=001-1870.pdf&TID=ihgdqbxnfi>.

¹⁴ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, UN Doc. A/HRC/23/40, 17 April 2013, para. 22, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf.

importance to a person's enjoyment of his private and family life and as a result, its disclosure to a third party can constitute an interference with private life.¹⁵

B. The interference with Mr. Arido's privacy serves no legitimate purpose and is unnecessary

16. The ECtHR, when adjudicating on the confrontation between the right to produce evidence during a trial and the right to private life, has held that "in the Court's view, any unavoidable interference of this connection should be limited as far as possible to that which is *rendered strictly necessary by the specific features of the proceedings* and by the facts of the case" (emphasis added).¹⁶ Such reasoning flows from the classic three step test, which enables the Court to discern violations of human rights. These steps are: (1) whether it is provided by law; (2) whether it fulfils a legitimate aim; and (3) whether it is proportionate. In other words, such interferences will be analysed by the Court on a case-by-case basis.

17. At a minimum, any interference with the right to privacy must be prescribed by law. Moreover, it must not be arbitrary. The Human Rights Committee has noted in its general comment that "arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances". It is submitted that given the complete irrelevance of the material, its manner of disclosure, and its possible ultimate use in Court by the Prosecution, serves no legitimate aim.

18. For interference to the right to privacy to be upheld, the interference must also be justified by reference to a legitimate aim such as, for example, public security or health. There is no legitimate aim served by the Prosecution's disclosure of this material, or alternatively, any conceivable purpose is outweighed by privacy considerations.

19. While parties may submit evidence within a trial that can conflict with the right to privacy, and this is particularly true when the evidence in question is necessary to prove innocence by establishing certain facts or disproving elements of offences, there are limitations. As noted

¹⁵ "'70. It is true that Article 6 (art. 6) does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 (art. 8) of the Convention", *Doorson v. the Netherlands*, Application no. 20524/92, 26 March 1996, para. 70, available at: <http://hudoc.echr.coe.int/eng?i=001-57972>.

¹⁶ ECtHR, *L. L. c/ France*, n° 7508/02, 10 October 2006, para. 45, available at: <http://hudoc.echr.coe.int/eng?i=001-77356>.

above,¹⁷ the ECtHR has attempted to balance these considerations by finding that “interference [...] should be limited [to] that which is rendered strictly necessary”. Although, the *L L* case was a civil case, the reasoning should be the same within a criminal proceeding particularly because in most cases the interests involved will be significantly graver. In that respect, the French Criminal Supreme Court ruled that it must be verified whether, within the meaning of Article 8 of the ECHR, the evidence interfering with the private life of the defendants constitutes *as a necessary and a proportionate* measure in order to protect public order and rights of the civil party.¹⁸

20. Notwithstanding the absence of a legitimate purpose for it, the breach of Mr. Arido’s right to privacy by the disclosure in question is in any case neither necessary nor proportionate for the protection of the public order or any other legitimate purpose for at least four reasons.

21. Firstly, the Prosecution’s actions violate the intent of a prior order of the Single Judge. The Single Judge clearly understood that Mr. Arido’s emails should be treated with care when he decided that the Independent Counsel should review the material obtained from Mr. Arido’s [REDACTED] email account in April 2014¹⁹ underlining that “appropriate measures need to be taken, with a view to preventing undue access by either party to information of a privileged nature, as well as to ensure that *information of a private nature, or otherwise obviously irrelevant for the purposes of these proceedings, be promptly returned to their legitimate owners*” (emphasis added).²⁰

22. Secondly, the Arido Defence made it abundantly clear that the disclosure of such materials would have led to a breach of Arido’s right to privacy. Throughout the proceedings the Arido Defence has emphasised the privacy interest in these emails. For example, on 9 May 2014, the Arido Defence requested that the Single Judge “ensure that the information contained on the DVDs are not given to the Prosecution prior to [the Single Judge’s] review of the reports submitted by the Registrar and the Independent Counsel.”²¹ Later, on 7 November 2014, the

¹⁷ *Ibid.*

¹⁸ Cass. crim., 24 avr. 2007, n° 06-88.051 : JurisData n° 2007-039020 : “Mais attendu qu'en prononçant ainsi, sans rechercher si l'examen public et contradictoire devant la juridiction correctionnelle, à la demande du médecin de l'établissement qui avait pris en charge Jean-Claude Y..., de pièces de son dossier médico-social, couvert par le secret professionnel, constituait une mesure nécessaire et proportionnée à la défense de l'ordre et à la protection des droits de la partie civile au sens de l'article 8 de la Convention européenne des droits de l'homme, la cour d'appel n'a pas donné de base légale à sa décision”, available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000017782600&fastReqId=379583495&fastPos=1> .

¹⁹ ICC-01/05-01/13-366-Conf, p. 10.

²⁰ *Ibid.*, p. 7.

²¹ ICC-01/05-01/13-389-Conf, para. 10.

Arido Defence made a request²² to the Pre-Trial Chamber asking for a copy of Mr. Arido emails. It was strongly emphasised at this time that the right to privacy was engaged.²³

23. Thirdly, the material is irrelevant to the proceedings, and thus is not necessary for the pursuit of the Prosecution case.

24. Fourthly, the Arido Defence was already in possession of this material though its transmission ordered by the Court. Any remote possibility that it could be legitimately and necessarily introduced into the proceedings to the surprise of the Arido Defence was not present.

25. [REDACTED].

C. The material is irrelevant to the proceedings and should not have been disclosed

26. In this case, there is no compelling reason as to why this material should be brought into the proceedings. Firstly, [REDACTED]. Secondly, [REDACTED]. Thirdly, [REDACTED]. Fourthly, [REDACTED].

27. [REDACTED]²⁴ [REDACTED].²⁵ [REDACTED].

28. Out of courtesy and professionalism, the Prosecution should have afforded the Arido Defence timely notice to object to the use of the material. This can be contrasted with the fact that the Defence teams did not dive into the private lives of the Prosecution's witnesses public social media pages [REDACTED].²⁶ Unlike unsecured social media accounts, Mr. Arido has a reasonable expectation of privacy of personal emails from his personal [REDACTED] account.

VI. CONCLUSION

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

- a. FIND that the Prosecution violated Mr. Arido's right to privacy; and
- b. ORDER that the Prosecution be precluded from using the the Private Information described in footnote 9 above at trial.

²² ICC-01/05-01/13-745-Conf.

²³ *Ibid.*, *inter alia* paras 13-15 and 25.

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ ICC-01/05-01/13-T-27-CONF-ENG, p. 42 (private session) (lines 4-6).

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

Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 22nd Day of July 2016

The Hague, The Netherlands