

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 10 March 2016

**TRIAL CHAMBER VII**

**Before:** Judge Bertram Schmitt, Presiding Judge  
Judge Marc Perrin de Brichambaut  
Judge Raul C. 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**

**Decision on Narcisse Arido's Request to Preclude the Prosecution from Using  
Private Communications**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

**The Office of the Prosecutor**

Ms Fatou Bensouda

Mr James Stewart

Mr Kweku Vanderpuye

**Counsel for Jean-Pierre Bemba Gombo**

Ms Melinda Taylor

**Counsel for Aimé Kilolo Musamba**

Mr Paul Djunga Mudimbi

**Counsel for Jean-Jacques Mangenda Kabongo**

Mr Christopher Gosnell

**Counsel for Fidèle Babala Wandu**

Mr Jean-Pierre Kilenda Kakengi Basila

**Counsel for Narcisse Arido**

Mr Charles Achaleke Taku

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for Victims**

**The Office of Public Counsel for the Defence**

**States Representatives**

**Others**

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Trial Chamber VII** ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Articles 68 and 69(7) of the Rome Statute ('Statute') and Rules 77 and 81(4) of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Narcisse Arido's Request to Preclude the Prosecution from Using Private Communications'.

1. On 29 February 2016, the defence team for Mr Arido ('Arido Defence') filed a submission ('Request') requesting that the Chamber find that the Office of the Prosecutor ('Prosecution') violated Mr Arido's right to privacy by its recent disclosure of 145 personal emails of Mr Arido ('Personal Emails').<sup>1</sup> The Arido Defence also sought an order that the Prosecution be precluded from using these emails at trial.<sup>2</sup>
2. On 7 March 2016, the defence team for Mr Bemba responded to the Request, submitting that the relief sought be granted.<sup>3</sup>
3. That same day, the Prosecution responded to the Request ('Response').<sup>4</sup> The Prosecution submits that: (i) the Personal Emails are clearly relevant to matters put at issue by the Arido Defence<sup>5</sup> and (ii) their disclosure is appropriate and consistent with the applicable law.<sup>6</sup>
4. The Chamber understands the heart of the Request as challenging the Prosecution's disclosure of the Personal Emails, rather than their collection.<sup>7</sup> The

<sup>1</sup> Narcisse Arido's Urgent Request to Preclude the Prosecution from Using Private Communications, ICC-01/05-01/13-1671-Conf, paras 1, 11 and 29(a).

<sup>2</sup> Request, ICC-01/05-01/13-1671-Conf, para. 29(b).

<sup>3</sup> Defence Response to 'Narcisse Arido's Urgent Request to Preclude the Prosecution from Using Private Communications' (ICC-01/05-01/13-1671-Conf), ICC-01/05-01/13-1701-Conf.

<sup>4</sup> Prosecution's Response to Arido's Urgent Request to Preclude the Prosecution from Using Private Communications (ICC-01/05-01/13-1671-Conf), ICC-01/05-01/13-1702-Conf.

<sup>5</sup> Response, ICC-01/05-01/13-1702-Conf, paras 3-6.

<sup>6</sup> Response, ICC-01/05-01/13-1702-Conf, paras 7-10.

<sup>7</sup> Request, ICC-01/05-01/13-1671-Conf, paras 12 and 15.

Prosecution makes it clear that the Personal Emails were originally considered as irrelevant, but that this evaluation changed with the filing of the Arido Defence's witness summaries and the expected testimonies of D24-1 and D24-13.<sup>8</sup>

5. The Chamber notes that the Arido Defence anticipates eliciting information through D24-1 and D24-13 on: (i) Mr Arido's morality; (ii) Mr Arido's motives for leaving Cameroon; and (iii) Mr Arido's political activism in the Central African Republic.<sup>9</sup> Noting the Prosecution's explanation as regards how the Personal Emails are relevant to each of these points,<sup>10</sup> the Chamber finds that the Arido Defence only presents unsubstantiated accusations of an 'intimidation tactic'<sup>11</sup> as a basis for doubting the Prosecution's good faith in assessing its disclosure obligations set out in Rule 77 of the Rules. The Chamber fails to see why the Prosecution's disclosure assessment is unreasonable in view of the content of the Personal Emails<sup>12</sup> and the anticipated witness testimonies. Considering the requirements set out in Article 69(7) of the Statute for declaring evidence inadmissible,<sup>13</sup> the Chamber finds that this disclosure was 'in accordance with the Statute' and 'in accordance with the law' for purposes of Mr Arido's internationally recognised right to privacy.<sup>14</sup>
6. The Chamber further notes that the Prosecution confidentially disclosed the Personal Emails to the defence teams only, and not the general public.<sup>15</sup> If any

<sup>8</sup> Response, ICC-01/05-01/13-1702-Conf, paras 3-6.

<sup>9</sup> Annex B to the Narcisse Arido's Transmission of Witness Summaries, 25 January 2016, ICC-01/05-01/13-1573-Conf-AnxB, pages 2, 10.

<sup>10</sup> Response, ICC-01/05-01/13-1702-Conf, paras 3-6.

<sup>11</sup> Request, ICC-01/05-01/13-1671-Conf, para. 26.

<sup>12</sup> The unique identification numbers for the Personal Emails are provided in footnote 9 of the Request.

<sup>13</sup> Article 69(7) of the Statute provides: 'Evidence 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.'

<sup>14</sup> See Decision on Kilolo Defence Motion for Inadmissibility of Material, 16 September 2015, ICC-01/05-01/13-1257, para. 16 (further citations therein).

<sup>15</sup> In this regard, the defence teams have professional secrecy and confidentiality obligations. See Article 8 of the Code of Professional Conduct for counsel.

interference with the right to privacy occurred as a result of disclosing the Personal Emails, it was a necessary and proportionate measure taken to protect the procedural rights of the accused, Mr Arido included. Disclosure of all information material to the preparation of the defence within the meaning of Rule 77 of the Rules is of central importance – this obligation must be exercised broadly and, as the Arido Defence itself has argued previously, also extends to information relating to proposed defence witnesses.<sup>16</sup> The act of disclosing the Personal Emails for the preparation of the defence was ‘strictly necessary by the specific features of the proceedings’<sup>17</sup> and did not unduly infringe upon Mr Arido’s dignity or privacy.

7. The Chamber therefore rejects the relief sought by the Arido Defence.
8. Notwithstanding the above, the Chamber emphasises that it does not require any evidence from the parties on Mr Arido’s character – good or bad. This kind of evidence does not have ‘much – if any – relevance to the Chamber’s Article 74 decision’,<sup>18</sup> and Mr Arido’s personal character has less connection to the charges than the previously litigated question of Mr Kilolo’s professional character. Moreover, any questioning with the Personal Emails will be assessed on a case-by-case basis, balancing the potential prejudice against countervailing considerations, including whether testimony elicited by the Arido Defence justifies the fair use of the Personal Emails by non-calling parties.

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<sup>16</sup> Decision on ‘Narcisse Arido’s Request for a Disclosure Order for Material Related to the Witnesses Indicated in ICC-01/05-01/13-1521-Conf-AnxA, pursuant to Article 67(2) and Rule 77’, 25 February 2016, ICC-01/05-01/13-1659 (dismissing as moot an Arido Defence request for disclosure of material related to Arido Defence witnesses on grounds that there was no information suggesting the Prosecution had not already done so).

<sup>17</sup> European Court of Human Rights, *Case of L.L. v. France*, 12 February 2007, 7508/02, para. 45, *quoted in* Request, ICC-01/05-01/13-1671-Conf, para. 16.

<sup>18</sup> *See* Decision on Relevance and Propriety of Certain Kilolo Defence Witnesses, 4 February 2016, ICC-01/05-01/13-1600, para. 15.

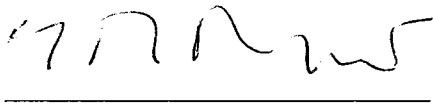
**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**REJECTS** the relief sought in the Request.

Done in both English and French, the English version being authoritative.



**Judge Bertram Schmitt, Presiding Judge**



**Judge Marc Perrin de Brichambaut**



**Judge Raul C. Pangalangan**

Dated 10 March 2016

At The Hague, The Netherlands