



Original: **English**

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

Date: **12 March 2015**

TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Robert Fremr

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

**Narcisse Arido's Response to Mr. Bemba's 'Request concerning the review of seized
material' of 19 February 2015 (ICC-01/05-01/13-822)**

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. On 19 February 2015, the Bemba Defence requested Trial Chamber VII to immediately terminate the mandate of the Independent Counsel and to order that all privileged material should be reviewed first by Mr. Bemba's defence team before any waiver of privilege could be granted by them.

2. The Arido Defence supports the submissions made in the Bemba Defence's request. Now is an ideal moment for the Trial Chamber to review the propriety of procedures covering the work of the Independent Counsel. Though the position of the Arido Defence is that there is no legal basis for the Independent Counsel, should the Chamber continue to use the mechanism, then the Arido Defence submits that the Trial Chamber should be consulted to ensure fairness, and that changes to the procedure could be made that would reduce the potential interference that this mechanism has upon the fair-trial rights of the Accused.

II. PROCEDURAL HISTORY

3. On 13 December 2013, the Single Judge of Pre-Trial Chamber II ("Single Judge") ordered the appointment of an Independent Counsel tasked with "reviewing the Seized Material, as well as the Additional Seized Material, if any, with a view to identifying any item which is privileged or otherwise obviously irrelevant for the purposes of these proceedings"¹ and to "promptly submitting a report to the Single Judge as to the results of such review"². In that circumstance the seized material concerned "sealed documentary as well as electronic material" seized during the searches of the person and cell of Jean-Pierre Bemba, the residence of Narcisse Arido and the residence of Fidèle Babala.³

4. On 18 December 2013, the Single Judge rejected Mr. Kilolo's request for leave to appeal the appointment of the Independent Counsel and stated: "the Independent Counsel was appointed in the exercise of the Pre-Trial Chamber's powers to provide for the preservation of evidence pursuant to article 57(3)(c)"⁴ and that "the broad formulation of the powers vested in the Pre-trial Chamber pursuant to article 57 is precisely aimed at allowing a degree of flexibility

¹ ICC-01/05-01/13-41-Conf-Red, p. 6.

² *Ibid.*

³ ICC-01/05-01/13-41-Conf-Red, p. 3.

⁴ ICC-01/05-01/13-50, p. 4.

enabling the Chamber to provide for the needs arising in connection with the proceedings and to preserve their fairness.”⁵

5. On 17 April 2014, the Single Judge modified the procedural regime covering the Independent Counsel’s review of material seized from Mr. Bemba, whereby “all items identified as non privileged and relevant”⁶ in the Independent Counsel’s report required by the 13 December 2013 decision were to be made available to the Bemba Defence for review. The Bemba Defence was permitted five days following notification to provide observations to the Pre-Trial Chamber regarding any objections it might have.

6. On 25 April 2014, the Single Judge dismissed an application by the Bemba Defence to disqualify the Independent Counsel over concerns regarding independence.⁷

7. On the same day, the Single Judge also decided that the prior 13 December 2013 Independent Counsel regime applied to seized DVDs that contained the email accounts of Mr. Arido, Mr. Mangenda, Mr. Babala, and Mr. Kilolo.⁸

8. On 11 November 2014, Pre-Trial Chamber II issued its decision confirming charges under Article 61(7)(a) and (b) of the Statute. In that decision it decided that it could consider the information contained in telephone wiretaps for the purposes of that decision.⁹

9. On 23 January 2015, the Single Judge denied requests for leave to appeal the confirmation of charges decision on several bases that concerned the legality of the appointment and the usage of information generated by the Independent Counsel.¹⁰

10. On 19 February 2015, the Bemba Defence requested Trial Chamber VII to:

- a. Terminate the appointment of the Independent Counsel, with immediate effect; and
- b. Order that all privileged materials should henceforth be reviewed in accordance with the scheme set out in its Request.¹¹ The proposed scheme would operate in a manner

⁵ *Ibid.*

⁶ ICC-01/05-01/13-347-Red, p. 5.

⁷ ICC-01/05-01/13-362-Red.

⁸ ICC-01/05-01/13-366-Red.

⁹ ICC-01/05-01/13-749, paras. 13-14.

¹⁰ ICC-01/05-01/13-801, paras. 32-29.

¹¹ ICC-01/05-01/13-822, para. 46.

where Mr. Bemba's defence team would review the intercepted material and indicate for which information legal privilege is to be waived.¹²

III. APPLICABLE LAW

11. Pursuant to Article 64 (2) of the Statute, the Trial Chamber has the obligation to ensure that the trial is fair, expeditious, and conducted with full-respect for the rights of the accused.

12. In accordance with Article 64 (3) (a) of the Statute, "[u]pon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall: (a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings".

IV. SUBMISSIONS

A. The Trial Chamber has the power to review the procedure related to privileged materials

13. The Arido Defence agrees with the submissions of the Bemba Defence that the Trial Chamber has the ability to issue a new procedure concerning the review of privileged material which is currently being undertaken by the Independent Counsel.¹³ The Trial Chamber has the power to correct an error that was introduced at the pre-trial phase and which is to continue for much of the trial phase, particularly when it can potentially compromise the integrity of the proceedings, pursuant to Article 64 (2) of the Statute.

14. The Statute provides that the evaluation of the admissibility of evidence necessarily involves an examination of whether the "admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings" under Article 69 (7) (b). The Arido Defence stresses that the question of the legality of the process involving the Independent Counsel reviewing privileged material precedes the question of the admissibility of that evidence. Thus, if the collection is on-going, then presumably, the trial phase would be the appropriate venue to fully discuss the legality or method of its collection and revise its procedure. If the process were found to be incorrect and could not be fixed, than further collection should be foreclosed.

¹² ICC-01/05-01/13-822, paras. 29-30.

¹³ ICC-01/05-01/13-822, paras. 3-15.

B. The fairness of the trial demands that the Trial Chamber reviews the Independent Counsel regime

15. The Arido Defence supports the Bemba Defence's submission that the Trial Chamber has a duty to review the Independent Counsel regime. The Arido Defence has previously noted the absence of a textual legal basis¹⁴ – as can be found in other international criminal tribunals – for the Independent Counsel.¹⁵ While the Pre-Trial Chambers may have powers inherent to the judicial function so as to facilitate proceedings and cover eventualities unanticipated by the drafters of laws, such powers must be carefully circumscribed and, it is submitted, must be subjected to review if concerns arise in respect of their legality. Recognising the exceptional nature of asserting inherent/implicit powers, the Appeals Chamber has stated that

exploring the import of the concept of “implied powers” or “customary international criminal procedure” [...] would be incorrect in circumstances where the Court's legal framework provides for a conclusive legal basis. This is because, as previously held by the Appeals Chamber, pursuant to article 21 (1) of the Statute, recourse to other sources of law is possible only if there is a lacuna in the Statute or Rules of Procedure and Evidence.¹⁶

16. This is particularly so given that the use of such powers goes beyond the text which is agreed to by the State Parties, and which is aimed at protecting the fairness of the trial. Furthermore, since the Statute must be interpreted in compliance with internationally recognised human rights pursuant to Article 21 (3) (c) of the Statute, it is submitted that the exercise of inherent and implied powers must also conform to this standard.

17. The Trial Chamber's duty to review the Independent Counsel regime pursuant to Article 64 (2) is engaged because re-examination would ensure fairness and potentially expedite proceedings. The regime covering the resort to the Independent Counsel has been developed without respect for the principle *audi alteram partem* and covers different subject matter such as telephone intercepts, and DVDs containing email accounts, and different interests such as client-confidentiality and privacy. Given that there is not a statutory legal basis, and given that regulation of the powers incumbent upon Independent Counsel is spread across multiple filings, even a re-statement of the procedures covering the Independent Counsel would enhance fairness by putting the regime on a clearer footing. For example, it is unclear whether the 5 days permitted to Mr. Bemba to review “non privileged and relevant material”¹⁷ will also to the email

¹⁴ ICC-01/03-01/13-334, para. 8.

¹⁵ ICC-01/03-01/13-598, para. 60.

¹⁶ ICC-01/09-01/11-1598 (OA7), para. 105.

¹⁷ ICC-01/03-01/13-347-Red, p. 5.

accounts that are currently being analysed. Re-stating the regime, after giving an opportunity to the parties to submit observations, would assist with potential further legal concerns, which in turn might expedite the proceedings.

C. The Arido Defence should be provided with the right to be heard on the question of Independent Counsel

18. The Arido Defence wishes to stress the importance that the Trial Chamber provides an opportunity to the parties to provide observations. *Audi alteram partem* is a principle that has a long pedigree within the major legal systems of the world, and as such can be regarded an applicable source of law under Article 21 (1) (c) of the Statute. The Arido Defence submits that there are at least two reasons that should lead the Trial Chamber to conclude that Mr. Arido should be consulted with regards to any new regime.

19. Firstly, Mr. Arido could not make observations at the point when the *ad-hoc* regime was being conceived. While the resort to the Independent Counsel can be comprehended as a response to the *ex parte* nature of the proceedings pre-arrest-warrant,¹⁸ it is noted that Mr. Arido was only assigned a Defence counsel on 28 March 2014.¹⁹ This is nearly four months later than the time where the question of Independent Counsel was being discussed.²⁰ Thus, Mr. Arido was denied – by circumstances – an opportunity to provide observations or to fully challenge a mechanism that may affect his rights and interests. When the Arido Defence proposed an alternative regime, based on prior ICTY practice, for the review of the DVDs purportedly containing Mr. Arido's emails, the Single Judge responded:

CONSIDERING that, at this stage of the proceedings, establishing a system of acquisition, review and transmission of the DVDs other than the one devised in the 13 December 2013 Decision, including by adhering to either of the alternative models proposed by the Defence for Narcisse Arido and the Defence for Aimé Kilolo, would inevitably entail significant delays, likely to jeopardise the very possibility that the contents of the DVDs be eventually made available for the purposes of these proceedings.²¹

20. Secondly, Mr. Arido should be afforded the opportunity to make observations on any subsequent regime because the accusations against Mr. Arido, limited as they are, are derivative from proof of a primary offence. As such, Mr. Arido has an inherent right and interest in preserving the fairness and integrity of proceedings that could generate evidence in his case but

¹⁸ ICC-01/03-01/13-822, para. 37

¹⁹ ICC-01/03-01/13-300.

²⁰ See e.g. ICC-01/03-01/13-45.

²¹ ICC-01/05-01/13-366-Red, p.8.

which is not directly linked to the allegations made against him. Should the Trial Chamber request observations on a new procedural regime concerning the review of privileged materials, it is submitted that the Arido Defence should be given the opportunity to respond to any proposed regime.

D. A subsidiary regime should the Chamber not follow the Bemba request

21. As stated above, the Arido Defence endorses the Bemba Defence request. To date, only the full Pre-Trial Chamber II has endorsed the approach taken by the Single Judge with regards to the Independent Counsel. In case the Trial Chamber would not follow the Bemba application, the Arido Defence requests the Chamber to consider implementing – as a subsidiary proposal – the following:

Any material identified by the Independent Counsel or other suitable reviewer of confidential or private information for release to either the Prosecution, Chambers, or other parties, would forward the information to the party from whom the material emanates originally. That party would be permitted to:

- a. accept the transmission of material to the Prosecution and other parties; or,
- b. for material which might prejudice a party's interests, that party could divert the relevant materials, with an accompanying explanation, to a third party – rather than the Chambers – for review and a decision. This third party could confirm whether the release would indeed unduly prejudice legal privilege, privacy, or other interests. The third party could be one of *inter alia* a Dean of a Dutch bar association, a further independent counsel, or the Office of the Public Counsel for Defence.

V. CONCLUSION

22. In light of the above, the Arido Defence respectfully requests Trial Chamber VII to:
- a. Accept Mr. Bemba's request,
 - b. In case the Chamber would reject the Bemba-request, to adopt the modified proposal outlined in paragraph 21 of this filing.

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

Göran Sluiter, Counsel for Mr. Arido

Dated this 12th Day of March 2015

At Amsterdam, The Netherlands