

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: 12 May 2015

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

**Narcisse Arido's Response to Bemba and Kilolo's Requests for an *Ex Parte* Defence
Only Status Conference to Discuss Privileged Materials
(ICC-01/05-01/13-920-Red and ICC-01/05-01/13-939)**

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 21 April 2015, the Bemba Defence requested the Trial Chamber to convene a Defence team only status conference for the purpose of receiving submissions on the question of privileged and exculpatory material or material which is otherwise relevant to the Defence.¹

2. On 7 May 2015, the Kilolo Defence asked the Trial Chamber to temporarily suspend the present proceedings until a final judgement is rendered in the case of *Prosecutor v. Bemba* ('Main Case').² The Kilolo Defence argues that Mr. Kilolo is precluded from fully exercising his right to present evidence in light of his inability to rely on certain privileged information from the Main Case without violating his duties as counsel in the Main Case. In particular, Mr. Kilolo submits that such privilege can be waived, but only after the close of the Main Case, as it may contain information which could violate Mr. Bemba's right to remain silent.³ The Kilolo Defence further requested the holding of an *ex parte* status conference to discuss the matter.⁴

3. The Arido Defence finds that the question of privileged materials containing potentially exculpatory information or information material to the preparation of the Defence of the Accused other than the privilege holder is of the utmost importance in the present case, and fully supports the Bemba and Kilolo Defence's requests for an *ex parte* Defence only status conference

II. SUBMISSIONS

4. The Arido Defence fully supports the holding of a status conference to discuss the question of privileged material which may contain potentially exculpatory information or information material to the preparation of the Defence teams other than the privilege holder(s).

5. The Bemba Defence stated that, absent a waiver from the Defendant, Rule 73 (1) of the RPE does not envisage privilege to be lifted as a result of the fact that material might be exculpatory or otherwise relevant to the preparation of other Defence teams.⁵ It further asserted that the Chamber does not possess the power to lift privilege, even if the material contained

¹ ICC-01/05-01/13-920-Red, paras 19, 23.

² ICC-01/05-01/13-939.

³ *Ibid.*, paras 12-14, 16, 18.

⁴ *Ibid.*, para. 26.

⁵ ICC-01/05-01/13-920-Red, para. 20.

therein is exculpatory – in the absence of the consent of the privilege owner.⁶ Instead, the Bemba Defence submitted that the Trial Chamber “has a duty to implement counter--- balancing measures, in order to compensate for any resultant prejudice to the Defence.”⁷ The Kilolo Defence took the same position.⁸ As a result, the Bemba Defence and the Kilolo Defence proposed the holding of a Defence-only status conference to discuss the possibility of implementing measures which are compatible with Rule 73 (1) of the RPE.⁹

6. In particular, the Bemba Defence proposed a possible system to be discussed at the status conference. Such system would include the immediate disclosure of privileged materials to other defence teams on strict conditions of confidentiality, in order to further their investigations and preparation, but limiting the ability of the other defence teams to use the material as evidence to cases where the Defence for Mr. Bemba provides its consent first. Should the Defence for Mr. Bemba not be in a position to provide consent, two options would be available:

- (i) The Trial Chamber could order the Prosecution to withdraw any factual allegations pertaining to the privileged (exculpatory) materials; or,
- (ii) The Defence for Mr. Bemba could formulate factual admissions, which could be utilised in lieu of the privileged material.¹⁰

7. The Arido Defence finds that both the Bemba’s and the Kilolo’s requests raise the question of balancing the fundamental right of client-counsel privilege with another fundamental right, namely the right to present a Defence. The Arido Defence strongly feels that such issue should be addressed at the earliest opportunity, particularly in light of clear indications that the review undertaken by the Independent Counsel omitted material which contained potentially exculpatory materials and/or information material to the preparation of the Defence.¹¹ It is submitted that the holding of such conference would permit the Defence teams and the Trial Chamber to undertake a discussion on a system suitable to all actors.

⁶ ICC-01/05-01/13-920-Red, para. 21.

⁷ *Ibid.*, para. 21.

⁸ ICC-01/05-01/13-939, para. 25.

⁹ ICC-01/05-01/13-920-Red, para. 23; ICC-01/05-01/13-939, para. 26.

¹⁰ ICC-01/05-01/13-920-Red, para. 24.

¹¹ ICC-01/05-01/13-918-Conf-Exp, paras 7-21.

III. CONCLUSION

8. The Arido Defence supports the Bemba and Kilolo Defence requests for the holding of an *ex parte* Defence only status conference to discuss the question of privileged material containing potentially exculpatory material or information material to the preparation of the Defence.

Respectfully submitted,

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

Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 12th Day of May 2015

In The Hague, The Netherlands.