

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **13 April 2014**

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

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 'Prosecutor's Request to Refer Potentially Privileged
Materials to Independent Counsel' (ICC-ICC-01/05-01/13-310-Conf)**

Source: Counsel for Mr. Narcisse Arido

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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Introduction

1. On 2 April 2014, the Prosecution filed a request to refer potentially privileged materials to Independent Counsel” (“Prosecution’s Request”).¹ The Bemba Defence filed its response on 8 April 2014² and the Magenda Defence on 6 April 2014.³ On 9 April 2014, the Single Judge shortened the time limit for the filing of responses to the Prosecution’s Request by the Kilolo and the Arido defence teams to 14 April 2014.⁴ On 10 April 2014, the Babala Defence filed a response.⁵
2. The Defence for Narcisse Arido (“the Arido Defence”) hereby files its response to the Prosecution’s Request.
3. The Prosecution has submitted the request to the Single Judge to issue an order to (i) appoint an independent counsel to review the email accounts of Mr. Mangenda and Mr. Kilolo for potentially privileged and/or legally protected confidential information, and to provide all non-privileged information contained therein to the Prosecution on a rolling basis as and when they are reviewed; and (ii) instruct the Registry to copy/extract Mr. Arido’s and Mr. Babala’s email accounts in the presence of the independent counsel and to promptly transmit the copied/extracted material to the Prosecution.

Submissions

4. The Arido Defence first and foremost objects to the appointment of independent counsel in this case and to assigning him/her any role in the reviewing of potentially privileged material.
5. The Arido Defence has standing to raise at the present stage of the proceedings the issue of appointment of independent counsel, pursuant to Rule 136 (2) of the Rules of Procedure and Evidence of the ICC. According to this provision each accused in a joint trial shall be accorded the same rights as if they were tried separately. Given the fact that all other defendants in the present proceedings have had the opportunity to challenge the (initial) appointment of independent counsel, it would violate Rule 136 (2) if Mr. Arido

¹ ICC-01/05-01/13-310-Conf.

² ICC-01/05-01/13-311-Conf.

³ ICC-01/05-01/13-316.

⁴ ICC-01/05-01/13-323.

⁵ ICC-01/05-01/13-329.

would be deprived of that same opportunity, because he was arrested and surrendered to the Court later in time.

6. In this respect, the Defence points to the established principle at the ICC according to which suspects in a joint case must have an opportunity to request reconsideration, and alternatively, leave to appeal of those decisions issued in the case against the person co-prosecuted, where it can be shown that the interests of the respective Defences are affected.⁶ It is self-evident that the rights of Mr. Arido are affected by the Decision to appoint and assign tasks to the independent counsel. It is also clear that Mr. Arido has had no prior opportunity to challenge the appointment and role of the independent counsel.
7. On this basis, the Arido Defence requests full reconsideration of the Decision in the present case to appoint independent counsel and the attribution of any mandate to independent counsel, on the following grounds.
8. The Arido Defence submits that there is no legal basis permitting the appointment of such an independent counsel or giving him/her a mandate to perform, in essence, investigative tasks.
9. The origin of the creation of this new legal phenomenon within the ICC context lies in the Decision of the Single Judge of 29 July 2013 (redacted version 3 February 2014).⁷ But this Decision does not provide any legal basis under the law of the ICC for the appointment and mandate of independent counsel.
10. It is submitted that Article 21 of the ICC Statute sets out a clear and mandatory methodology for the identification of and resort to the Court's applicable law. In case there is a pressing (procedural) problem which requires urgent resolution, the Court is obliged to apply the sources of law, in the same hierarchical order, as set out in Article 21.
11. The Prosecution's Request is unprecedented. There is no Decision of an ICC Chamber, neither in this case nor any other case, in which the appointment and mandate of independent counsel finds precedence and solid ground in any of the sources of law contained in Article 21 of the ICC Statute.
12. When a similar situation arose in the Mbarushimana case in 2011,⁸ the Pre-Trial Chamber I originally ordered the Registry to conduct a search of the material based on keywords to

⁶ ICC-01/04-01/07-259, p. 5.

⁷ ICC-01/05-52-Red2.

⁸ ICC-01/04-01/10-67. The Prosecution had seized material at Mr. Mbarushimana's premises, including potentially privileged communications – which it has quarantined. It had requested the Chamber (or someone

be provided by the Defence as well as the Prosecutor and approved by the Chamber, and to provide the materials it believed contained privileged information to the Chamber for its review. In light of technical difficulties implementing such procedure, the Pre-Trial Chamber I later ordered the Registry to provide copies of the material to the Defence, with a view to allowing them to review the said documents and identify those over which it claimed privilege.⁹ A list was subsequently given by the Defence to the Pre-Trial Chamber I, which made the final decision as to the nature of the information.¹⁰

13. Notably, the Pre-Trial Chamber I recognised that certain documents, while not “ostensibly” appearing to be communications between a person and his or her legal counsel, may attract privilege depending on their content and the circumstances, context or purpose of their creation or communication. Regarding this category of documents, the Pre-Trial Chamber requested the Defence to provide further information explaining why and how the said document should be covered by privilege.¹¹
14. In light of this relevant case law and since the appointment and mandate of an independent counsel can certainly not be based on the sources of law contained in Article 21 (1) (a) and 21 (b) of the Statute, the Single Judge would have to inquire into general principles of national legal systems, as provided for in Article 21 (c) of the Statute.
15. However, should the Single Judge review domestic law, it is submitted that there is no support in domestic legal systems for the appointment of independent counsel and the mandate that the Prosecution seeks to be attributed to him/her.
16. If regard would be had to relevant case law of other international criminal tribunals, such as the ICTY, the conclusion should furthermore be drawn that the primary responsibility for reviewing seized material and asserting privilege lies with the Defence.¹²
17. Furthermore, if and when the issue of review arises in respect of privilege assertions made by the Defence, the ICTY Appeals Chamber in the *Popović et al.* case¹³ found that

designated by the Chamber) to review the material in order to determine whether they contained any privileged information and were therefore not be made available to the Prosecution.

⁹ ICC-01/04-01/10-105; see also ICC-01/04-01/10-158, ICC-01/04-01/10-237 and ICC-01/04-01/10-277.

¹⁰ ICC-01/04-01/10-237 & ICC-01/04-01/10-277.

¹¹ ICC-01/04-01/10-237.

¹² ICTY, *Prosecutor v. Gotovina*, Decision on Requests For Permanent Restraining Orders Directed To The Republic of Croatia, 12 May 2010, para. 41.

¹³ ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Decision on Prosecution Motion for the Appointment of Independent Counsel to Review Material Potentially Subject to Lawyer-Client Privilege, 16 July 2012 (public redacted version) (“Popović 16 July 2012 Decision”). The Prosecutor requested the appointment of an independent counsel to review seized material that contained communications between counsel and his client, for the limited purpose of determining whether any lawyer-client privilege applied. It also requested that a competent judicial authority be designated to adjudicate any dispute which may arise between the appointed independent counsel and any potential privilege holder as to whether privilege applied

the best approach was for a judge of the tribunal not sitting on the case to determine whether any lawyer-client privilege attached to any of the material in question – and referred the matter to the President of the tribunal, for him to designate a judge to review the material.¹⁴ It defined the mandate of the Judge to be as follow:

- (a) Identify to the prosecution any material s/he does not consider to be protected;
 - (b) Identify to any potential privilege holder the material he or she considers to be potentially protected under the ICTY Rules and provide a brief description of each item, with a view to allowing any identified potential privilege holders the opportunity to make an ex parte lawyer-client privilege claim;
 - (c) Provide the material for which the judge finds that an identified privilege holder has established a lawyer-client privilege claim;
 - (d) Return to the OTP material, which are not privilege and those for which no lawyer-client privilege claim has been made.¹⁵
18. As a result, without a basis in the applicable sources of ICC law, and without precedence in other international criminal tribunals or domestic justice systems, an 'independent counsel' cannot be lawfully appointed and not lawfully perform any functions in the context of the present proceedings.
19. The problem of 'independent counsel' in the present proceedings is exacerbated by the fact that - among others - the following elements of the independent counsel –and his/her functioning- remain secret or unknown:
- a. What is the identity of the independent counsel?
 - b. By what body of law is the counsel bound in the performance of his/her functions?
 - c. What is precisely his/her mandate?
 - d. How can the defence identify and hold the counsel accountable for errors in performance of his/her functions?
20. The questionable and uncertain mandate of the independent counsel comes to the forefront when one considers the Prosecution application in respect of Mr. Arido's email accounts. According to the Prosecution's request, the independent counsel should be present when Mr. Arido's email account is copied/extracted by the Registry; there is no explanation at all, on the part of the Prosecutor, what this presence should entail, and – in particular - what protection is offered for Mr. Arido's rights on account of this 'mere presence'.

¹⁴ Popović 16 July 2012 Decision, para. 9.

¹⁵ Popović 16 July 2012 Decision, para. 9.

21. The Defence would like to draw the attention of the Single Judge to the filing in the main case against Mr. Bemba dated 9 April 2014 ('Defence Urgent Request for Disclosure and Injunctive Relief concerning Privileged Defence Communications').¹⁶ Reference is made in that filing to the fact that Mr. Arido was a defence witness in the main case against Mr. Bemba.¹⁷ As a result, there have been communications between Mr. Arido and the Bemba Defence team that should be regarded as privileged; also the Prosecution has expressly recognized that material concerning Mr. Arido could be privileged.¹⁸
22. The Defence asserts that a witness has standing in having protected as privileged the communications he/she may have had with Defence teams in relation to ICC proceedings. An individual engaging in professional communications with counsel should be able to count on secrecy and confidentiality. This goes further than merely a lawyer-client privilege, and their respective interests.
23. As soon as a witness, who may be in a particularly vulnerable position, is no longer able to count on confidentiality of his/her communications with Defence teams this will negatively impact on a witness' cooperation to give testimony. This does not only jeopardise the right of a defendant to obtain the attendance and examination of witnesses on his behalf, as protected in Article 67 (1) (e) of the Statute, but may eventually undermine the administration of justice as a whole.
24. Alternatively, should the Single Judge consider that Mr. Arido may not directly rely on the privileged nature of the communications he has had with the Bemba Defence team, this is not decisive in the present proceedings. Mr. Arido is entitled to investigations in his case that are lawful. Furthermore, Mr. Arido has the right to prevent the collection of evidence which is the result of unlawful investigations and which – in case of admission - would seriously damage the integrity of the proceedings.
25. In light of the foregoing, Mr. Arido submits that the Bemba defence team should be enabled first to review his email account so that (a) it can identify whether any of the materials are privileged, (b) it can determine whether transmission of any of the materials in Mr. Arido's account to the Prosecutor would prejudice the safety, physical and psychological well-being, dignity and privacy of Mr. Arido in his capacity as an ICC witness for the Bemba defence team.

¹⁶ ICC-01/05-01/08-3036.

¹⁷ *Id.*, para. 83.

¹⁸ ICC-01/05-01/13-T-2-Red-ENG, p. 12, lines 12-17.

26. Should the need for review arise in respect of 'privilege-claims' by the Bemba Defence, this should be organised in a transparent and impartial manner. In the firm conviction of the Arido Defence, such review can only be done by a Judge not sitting in the present proceedings, and not sitting in the 'main case' concerning Mr. Bemba.
27. The Defence also would like to raise its concern that reviewing the email account of Mr. Arido could potentially take considerable time. In addition to the time that would be required by the Independent Counsel for his/her review, the Prosecution will surely also need additional time in order to review the material. Last but not least, it is fundamental that the Defence teams be given sufficient time to review the material and, should it be necessary, to undertake further investigation as a result. In all likelihood, this process will result in further delay in the proceedings. It would be unduly prejudicial to postpone the proceedings further for the apparent purpose of admitting allegedly incriminating evidence, which will in turn, engender a need for the Defence to review the materials and consider collecting evidence in response.
28. Mr. Arido insists on – and has a right to - clearing his name in the face of unjustified accusations, within the shortest period of time.

Conclusion

29. On the basis of the foregoing, the Defence respectfully requests the Single Judge to :
 - a. Deny the Prosecution's request;
 - b. To adjudge and declare that there is no legal basis for the appointment of and exercise of powers by an independent counsel in the present proceedings;
 - c. To terminate the appointment and mandate of the independent counsel in the present proceedings;
 - d. To declare null and void and to exclude from evidence the results of all activities undertaken by independent counsel thus far in the present proceedings;
 - e. To enable the Bemba Defence team in the main case first to review Mr. Arido's email account for privileged information and for information which is capable, in case of transmission to the Prosecutor of prejudicing the safety, physical and psychological well-being, dignity and privacy of Mr. Arido in his capacity as an ICC witness, before any of the materials in Mr. Arido's email account can be transmitted to the Prosecution;

- f. Should the need for review arise in respect of any possible claims to privileged information within the email account of mr. Arido made by the Bemba Defence team in the main case, to organise such review in a fair and transparent manner, by appointing -or having appointed- an ICC judge not sitting in the present case or in the main case against mr. Bemba.
- g. To strictly adhere to the timeline in the present proceedings.



Göran Sluiter, Counsel for Mr. Arido

Dated this 13th Day of April 2014

At Amsterdam, The Netherlands