

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 23 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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

Confidential

**Prosecution Request for leave to reply to the Arido Defence's "Response to
'Prosecutor's Request to Refer Potentially Privileged
Materials to Independent Counsel' (ICC-01/05-01/13-310-Conf)"**

Source: The Office of the Prosecutor

Document to be notified in accordance with Regulation 31 of the *Regulations of the*

Court to:

The Office of the Prosecutor

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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

States Representatives

Amicus Curiae

REGISTRY

Registrar

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section Others

I. Introduction

1. Pursuant to Regulation 24(5) of the Regulations of the Court (“RoC”), the Office of the Prosecutor (“Prosecution”) requests the Chamber’s leave to reply to the Arido Defence’s Response¹ to the Prosecution’s Request to Refer Potentially Privileged Materials to Independent Counsel (“Request”).²

2. A limited and focused Reply may benefit the Chamber and assist in the proper determination of the Request, particularly given that the Response raises issues beyond the Request’s scope.

II. Confidentiality

3. This filing is submitted as “Confidential” as it refers to the Request of the same designation. A public redacted version will be filed.

III. Submissions

4. The Defence Response advances several arguments. The Prosecution seeks to reply to three discrete questions:

A. The Suspect’s claimed standing to contest the Court’s initial assignment of an Independent Counsel and to challenge his appointment to review the email accounts of other suspects for privilege, including:

(i) Whether Rule 136(2) of the Court’s Rules of Procedure and Evidence (“Rules”) confers standing on a suspect in a joined case to assert claims

¹ ICC-01/05-01/13-334.

² ICC-01/05-01/13-310-Conf.

based on an alleged potential infringement of the rights and/or privileges of other suspects;³

(ii) whether the Suspect's joinder confers a correlative right to request reconsideration and/or leave to appeal decisions rendered in the case prior to the joinder;⁴

B. The legal basis for the appointment of an Independent Counsel, including:

(i) whether the appointment of an Independent Counsel is without basis under the Court's legal framework, or otherwise falls outside the scope of Article 57(3)(a) of the Rome Statute;⁵

(ii) whether international and/or domestic law supports the practice of appointing an 'independent counsel', 'judicial officer' or 'special master' to review potentially privileged material.⁶

C. The claimed privileged character of the Suspect's email communications.

(i) whether Suspect Bemba's alleged claim of privilege within communications contained in Arido's email accounts asserted before Trial Chamber III in the *Bemba* Case (ICC-01/05-01/08) can confer such status on the accounts,⁷ and

(ii) whether Suspect Arido can claim the privileged status of his accounts absent affirmative factual allegations establishing the basis for the claim (e.g., the assertion of an existing lawyer-client relationship, that the emails contain Suspect Bemba's lawyer-client communications,⁸ that Arido played a specific functional role within the *Bemba* Defence team entitling him to claim a privilege, or demonstrating another Court-recognised privilege);⁹

³ ICC-01/05-01/13-334, paras. 5 and 6.

⁴ ICC-01/05-01/13-334, para. 7.

⁵ ICC-01/05-01/13-334, paras. 14 and 18.

⁶ ICC-01/05-01/13-334, paras. 15 to 18.

⁷ ICC-01/05-01/13-334, para. 21.

⁸ See Rule 73(1)(a) and (b) of the Rules.

⁹ See Rule 73(3) (recognising a privileged relationship between a person and their doctor, psychiatrist, psychologist or counsellor, or clergy person).

(iii) whether a witness generally has standing to assert privilege in communications he/she may have had with Defence teams in relation to ICC proceedings.¹⁰

5. A limited Reply clarifying the law and correcting mischaracterisations of the Request concerning these issues “may benefit”¹¹ the Chamber, and is in the interests of justice.

IV. Requested Relief

6. For the foregoing reasons, the Prosecution requests that the Chamber grant it leave to reply to the Defence Response, pursuant to Regulation 24(5) of the Regulations of the Court.



Fatou Bensouda, Prosecutor

Dated this 23rd Day of April 2014
At The Hague, The Netherlands

¹⁰ ICC-01/05-01/13-334, paras. 22 and 23.

¹¹ ICC-01/05-01/08-2014, Order granting leave to reply, 15 December 2011, para. 4; see also ICC-01/05-01/08-2942, Decision on “Prosecution’s Request for leave to reply to Defence ‘Response to the Prosecution’s Application to Submit Additional Evidence’”, 22 January 2014, para. 4.