

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: **17 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**

Confidential

**Narcisse Arido's Observations on the "Prosecution's Submissions on the
Appointment of Defence Counsel" (ICC-01/05-01/13-819-Conf)**

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 16 February 2015 the Prosecution filed confidential and *ex parte* submissions on the appointment of Melinda Taylor as Defence Counsel for Mr. Jean-Pierre Bemba Gombo.¹ Upon request by the Bemba Defence,² Trial Chamber VII directed the Registry on 23 February 2015 to reclassify ICC-01/05-01/13-819-Conf-Exp and ICC-01/05-01/13-823-Conf-Exp from Confidential *Ex Parte* to Confidential.³

2. The Arido Defence hereby submits its limited and focused observations on the Prosecution's submissions as those raise issues related to the fairness and integrity of the proceedings as such, and are therefore of concern to Mr. Arido.

II. CONFIDENTIALITY

3. Pursuant to Regulation 23*bis* of the Regulations of the Court ('RoC') and Regulation 24 of the Regulations of the Registry ('RoR'), this filing is classified as confidential as it refers to filings of the same designation.

III. PROCEDURAL HISTORY

4. On 17 December 2014, Mr. Kaufman requested Pre-Trial Chamber II to grant him leave to withdraw from representing Mr. Bemba.⁴ One day later, on 18 December 2014, Ms. Taylor accepted to represent Bemba in an email to the Counsel Support Section.⁵

5. Pre-Trial Chamber II granted Mr. Kaufman leave to withdraw on 8 January 2015.⁶ Subsequently, the Registry notified Pre-Trial Chamber II of the appointment of Ms. Taylor as lead counsel for Bemba, which was notified to the parties on 22 January 2015.⁷

¹ ICC-01/05-01/13-819-Conf-Exp.

² ICC-01/05-01/13-823-Conf-Exp.

³ Email sent by Matt Halling on behalf of Trial Chamber VII to the parties in ICC-01/05-01/13 and the Registry on 23 February 2015.

⁴ ICC-01/05-01/13-783, para. 10.

⁵ ICC-01/05-01/13-789-Conf-AnxII.

⁶ ICC-01/05-01/13-792.

⁷ ICC-01/05-01/13-796.

IV. APPLICABLE LAW

6. Pursuant to Article 67 (1) (d) of the Rome Statute, the Accused has the right “to conduct the defence in person or through legal assistance of the accused’s choosing”. This provision must be applied and interpreted in a manner consistent with international human rights law, as provided for in Article 21 (3) of the Statute.

7. Every person subjected to criminal proceedings is entitled to choose a counsel to represent him or her.⁸ Any assignment of counsel to an Accused by a court contravenes the principle of fair trial if a qualified counsel of the Accused’s own choosing is available and that counsel accepts the request from the accused to represent him or her.⁹ This is the more so in case the state is not paying for legal representation. Furthermore, the Accused has the right to instruct the counsel as to the strategy to adopt during the proceedings and the conduct of the case.¹⁰ In relation thereto, the Accused has the right “to communicate freely with counsel of the accused’s choosing in confidence”, as stipulated in Article 67 (1) (b) of the Rome Statute.

8. It is acknowledged that right to assistance by counsel of choice is not absolute. The Court’s legal framework acknowledges a small number of impediments to the exercise of the right to assistance by counsel of choice. However, these impediments are to be considered as exceptions to free choice of counsel and should therefore be interpreted in a restrictive manner.

9. Article 12 (3) of the Code of Professional Conduct for Counsel may amount to such an exception as it establishes that “Counsel shall not act in proceedings in which there is a substantial probability that counsel or an associate of counsel will be called to appear as a witness”.

10. In addition, Article 16 (1) of the Code sets out that “Counsel shall exercise all care to ensure that no conflict of interest arises”. In case such conflict arises, paragraph 3 of the same article prescribes that counsel shall “at once inform all potentially affected clients of the existence

⁸ See *e.g.* *Kulov v. Kyrgyzstan*, UN Human Rights Committee, Communication No. 1369/2005, 19 August 2010, para. 8.7, available at: <http://www1.umn.edu/humanrts/undocs/1369-2005.html>.

⁹ See *e.g.* *Estrella v Uruguay*, UN Human Rights Committee, Communication N. 74/180, 29 March 1983, para. 95, available <http://www1.umn.edu/humanrts/undocs/session38/74-1980.htm>; see also: Principle 5, Basic Principles of the Role of Lawyers, UN Crime Congress, August-September 1990, available at: <http://www.unrol.org/files/UNBasicPrinciplesontheRoleofLawyers.pdf>.

¹⁰ UN Human Rights Committee, CCPR General Comment 32 (2007), 23 August 2007, para. 37, available at: http://ccprcentre.org/doc/ICCPR/General%20Comments/CCPR.C.GC.32_En.pdf.

of the conflict and either (a) withdraw from the representation of one or more clients with the prior consent of the Chamber; or (b) seek the full and informed consent in writing of all potentially affected clients to continue representation”.

V. SUBMISSIONS

A. The Prosecution's Request must be approached with utmost caution as it touches upon Mr. Bemba's fair trial right to counsel of his choice

11. The Arido Defence wishes to express reservations about the manner in which the Prosecution request the Trial Chamber to exercise supervisory functions in respect of the choice of counsel exercised by Mr. Bemba. The Trial Chamber has not been endowed with explicit powers under the Statute to interfere with the choice of counsel. The exercise of any supervisory powers in this regard must be exercised with the utmost caution and restraint, and in light of the Trial Chamber's duty to protect the fair trial rights of the Accused.¹¹

12. Intervening in Mr. Bemba's choice of counsel and depriving him of his counsel of choice would be an extreme measure, which should only be taken by the Trial Chamber under exceptional circumstances. The Prosecution has not met the burden in demonstrating the existence of such exceptional circumstances.

13. It is furthermore submitted that the Prosecution lacks standing for objecting to the appointment of Ms. Taylor, because a significant amount of time has already passed since Ms. Taylor was appointed. Mr. Bemba is entitled to structural stability and continuation in his Defence. In this light - and bearing in mind the need of preventing further significant delays in the proceedings in case new counsel would have to be appointed for Mr. Bemba, a delay which would affect all the Accused in the present case - the Prosecution should have filed its application for review immediately after the appointment of Ms. Taylor. Its failure for having acted with due diligence in this matter triggers a lack of standing.

14. The Arido Defence furthermore observes that Mr. Bemba, besides having the statutory right of free choice of counsel, is entitled to choose a counsel with whom he has an established relationship of trust and counsel who is very much familiar with the main case, as he has the right to an effective Defence. In this light, the request as put forward by the Prosecution in its

¹¹ Article 64 (2) of the Rome Statute.

Submissions, appears to seek undue advantage as it tries to terminate representation by a counsel who has detailed knowledge of the facts and circumstances in the main case.

B. The Prosecution's Request is based on speculations

15. The Prosecution's Request is based on the argument that Article 12 (3) of the Code of Conduct is applicable to Ms. Taylor, namely that there is a substantial probability that Mr. Haynes and/or Ms. Gibson are to be called as witness in the this case. The Arido Defence submits that this is pure speculation.

16. The Arido Defence notes that the Prosecution's investigation should largely be completed at the stage of the confirmation of charges hearing.¹² In particular, the Prosecution should not continue investigating post-confirmation for the purpose of collecting evidence which it could reasonably have been expected to have collected prior to confirmation.¹³ This is precisely the case here. The Prosecution was fully aware of the roles and positions of Mr. Haynes and Ms. Gibson in the Defence team of Mr. Bemba in the Main Case. Despite this fact, it elected not to attempt to call them as witnesses. Making reference to this "possibility" now appears to serve no other purpose than to support its position that the Trial Chamber should intervene in relation to Mr. Bemba's choice of counsel. It is submitted that this does not constitute good cause for such far reaching intervention on the part of the Trial Chamber.

17. What is more, the Prosecution's submissions in this regard raise the question how the composition of the Prosecution Article 70's team relates to the Prosecution's team composition in the Main Case. The - purely speculative - concern that Ms. Taylor might have to examine Mr. Haynes or Ms. Gibson, individuals with whom she had a professional relationship, equally applies to the Prosecution. One can also speculate about the possibility that Prosecution staff in the Main Case or in the present case is called to testify in the present case, especially in relation to the manner in which the Prosecution organised its investigations and approached witnesses. Other tribunals have consistently held - in the case of expert witnesses - that the fact that a witness had worked with the Prosecution did not constitute a bar to this person being called as a witness.¹⁴ The same reasoning can be applied here, if one were to follow the Prosecution in its speculative approach in respect of 'possible' future witnesses.

¹² ICC-02/11-01/11-432, para 25; ICC-01/09-02/11-728, para. 119.

¹³ ICC-01/09-02/11-728, para. 121.

¹⁴ Reynaud Theunens, Philipp Coe, Ewa Tabeau, Richard Butler and Dorothea Hanson used to work for the Prosecution, see *Prosecutor v Mladić*, IT-09-92-T, Decision on Defence Motion to Disqualify Richard Philipps as an

C. The question of conflict of interest is a matter to be resolved between counsel and her client

18. The Prosecution also seeks to have the Trial Chamber review the appointment of Ms. Taylor on account of a perceived conflict of interests, arguing that Ms. Taylor's association with counsels in the Main Case could restrict her ability to pursue potentially viable defences.¹⁵ Again, this amounts to speculation, and a measure directly affecting the fundamental right of Mr. Bemba to choose counsel shall not be decided on such uncertain basis.

19. Furthermore, conflicts of interests are being approached by the Code as issues falling exclusively within the scope of the duties and responsibilities of the counsel, with the exception that counsel would have to decline to further represent a client in the event the latter will not provide the counsel with a "full and informed consent". It is submitted by the Arido Defence that any issue of conflict of interest is to be dealt with by the relevant counsel on the basis of Article 16 of the Code of Conduct. There is no basis in the law to expand the scope of application of Article 16 beyond that provision's clear and unequivocal wording, especially if such an expanding interpretation would interfere with the exercise of Mr. Bemba's fundamental rights.

20. Last but not least, Ms. Taylor is bound by the Code of Conduct, and particularly has the duty to "put the client's interests before [her] own".¹⁶ The Prosecution has failed to meet the burden to demonstrate that Ms. Taylor would ever fail to respect this obligation. As such, the Prosecution's Request is at best, mere speculation, and at worst, an indirect attack on Ms. Taylor's professionalism which contravenes the Prosecution's obligation to conduct itself honourably, professionally, faithfully and impartially with regards to other Court's actors.¹⁷ This should not be permitted.

Expert and Bar the Prosecution from Presenting His Report, 1 November 2012, para. 11; *Prosecutor v Galić*, IT-98-29, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philips, 3 July 2002, p. 2; *Prosecutor v Mladić*, IT-09-92-T, Decision on Defence Request to Disqualify Richard Butler as an Expert and Bar the Prosecution from Presenting His Reports, 19 October 2012, para. 16; *Prosecution v Popović et al.*, IT-02-65-A, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, para. 29; *Prosecutor v. Stanišić & Župljanin*, IT-08-91-T, Written Reasons for the Trial Chamber's Oral Decision Accepting Dorothea Hanson as an Expert Witness, 5 November 2009, paras 16, 17.

¹⁵ Prosecution Request, para. 26.

¹⁶ Article 16 (1) of the Code of Conduct for Defence Counsels.

¹⁷ Article 20 (a) of the Code of Conduct for the Office of the Prosecutor.

VI. CONCLUSION

21. In light of the above, the Arido Defence respectfully requests Trial Chamber VII to reject the Prosecution's request to review the appointment of Ms. Taylor as lead counsel for Bemba.

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 17th Day of March 2015

At Amsterdam, The Netherlands.