

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **25 February 2016**

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

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 the 'Prosecution's Response to the Materials the
Defence Intends to Use During
their Opening Statements' (ICC-01/05-01/13-1654)**

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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1. Following directions from Trial Chamber VII ("Trial Chamber"),¹ on 20 February 2016, the Arido Defence filed a list of material that it may directly or indirectly refer to during its opening statement.² On 24 February 2016, the Prosecution responded to this procedural notifications of the Defence stating:

[A]s appears from these materials, there may be some lack of clarity as to the proper scope of opening statements, which is quite distinct from that of closing statements. Specifically, the scope of opening statements is limited to the summarisation of, or commentary on, the evidence that the given Party intends to adduce during its case-in-chief and what it will prove. It is not evidence in itself, nor is it for the purpose of argument."³

2. That same day, by email the Trial Chamber shortened the deadline for responses to this filing to 4pm on 25 February 2016.⁴

3. As a preliminary matter, the Arido Defence notes that between the Counsels and Associate Counsels representing the three teams referred to in the Prosecution's motion, simply by merit of the requirement to be a member on the ICC List of Counsels and appointment requirements, there must be collectively a minimum of 54 years of experience represented.⁵

4. It is a fundamental premise that opening statements themselves are not evidence and the Arido Defence never made any representation to this effect in its filing. That said, the Defence, often prefers to support its opening statements with evidence. The content of the Opening Statement is for the Defence to decide. It is the Defence's right to raise the issues that the Defence will address and substantiate within the scope of the matters that fall for determination in the case. This may involve pointing to prior evidence; it will not be helpful to any party to make vague claims in the abstract.

5. The Prosecution's concern is pre-mature. While this almost goes without saying, if an issue arises during the opening statement, the Trial Chamber can and will decide upon the propriety of the information being put forward. This point arises from the jurisprudence cited by the Prosecution. It relies on the motion in *Kunarac*, paragraph 10 in respect to the purpose of opening

¹ ICC-01/05-01/13-1450, para. 4.

² ICC-01/05-01/13-1644-Conf-AnxA.

³ ICC-01/05-01/13-1645, para. 1.

⁴ Email of 24 February 2016, subject line 'shortening of response deadline for ICC-01/05-01/13-1654'.

⁵ Regulation 67 of the Regulations of the Court specifies that relevant experience for Counsel 'shall be at least ten years' and 'shall be at least eight' for an associate Counsel.

statements,⁶ however the Prosecution's motion fails to include the last sentence of paragraph 10 which reads: "Should the defence seek to introduce in their opening statement material which has no relevance to those issues, *the Trial Chamber will exercise its powers to exclude it at that time*"⁷ (emphasis added). Therefore, it is unclear – on its face – why the Prosecution is raising the issue of limits on opening statements at this time, before opening statements have been given, when the proper procedure is to object, if necessary, at the time of the statement, so that the Trial Chamber can make a determination.

6. The Arido Defence is aware of the confidentiality classification of various items and, as per the obligations contained in the Code of Conduct for Counsel, will not present confidential items in public thereby disclosing confidential information.

7. Also, Mr. Arido will decide if and when he will make an oral unsworn statement, as per his right under Article 67(1)(h). Since it is unsworn, there is no need to notify any documents to be referred to.

8. In sum, the Prosecution motion is not procedurally appropriate. The Trial Chamber's prior instructions indicate that the Prosecution should provide "objections to the use of such material"⁸ but does give license to the Prosecution to usurp the prerogative of the Judges to decide what is admissible or not. The Trial Chamber cannot be asked to gag the Defence through a predetermination of issues that have not arisen, and moreover it is submitted that it would not be fair for the Trial Chamber to change the standards half-way through the trial in a way that were not applicable to the Prosecution. In light of the above, the Arido Defence respectfully requests Trial Chamber VII reject the Prosecution's motion.

⁶ See footnote 4 of ICC-01/05-01/13-1645.

⁷ *Prosecutor v. Kunarac et al.*, Decision on Prosecution's Motion for Exclusion of Evidence and Limitation of Testimony, Case Nos. IT-96-23 & 23/1, 3 July 2000, para. 10, available at: <http://www.icty.org/x/cases/kunarac/tdec/en/00703EV213055.htm>.

⁸ ICC-01/05-01/13-1450, para. 4.

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

Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 25th Day of February 2016

The Hague, The Netherlands