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

Date: **17 August 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
"Prosecution's Request to Obtain Financial Information from the Registry"
(ICC-01/05-01/13-1966)**

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 10 August 2016, the Prosecution requested¹ Trial Chamber VII (“Trial Chamber”) to direct the registry to provide the Prosecution with financial information relating to (a) the costs associated with *The Prosecutor v. Jean-Pierre Bemba*² generally and (b) the “costs specifically incurred by the Court in relation to the Main Case Defence witnesses who are the subject of the charged offences”³ in the Article 70 case. The Prosecution explains that this is relevant to potential sentencing and expediency merits granting the request now so as to be prepared should it reach that stage.⁴

2. The Defence opposes this request for three principal reasons. These include: firstly, that no matter how the Prosecution frames the issue, the Request presumes guilt, contrary to the presumption of innocence; secondly, the presumption of guilt is used to justify a further intrusion into Defence resource usage which in turn impacts upon a fair trial in the particular case; and, thirdly, it is clear that the request should be directed to the Main Case chamber as the Trial Chamber lacks authority over Main Case disclosure.

II. SUBMISSIONS

A. The timing of the Prosecution’s request violates the presumption of innocence, as guaranteed in the Rome Statute

3. The presumption of innocence in Article 66(1) of the Statute is qualified by the important legal condition “until proved guilty before the Court in accordance with the applicable law”. Here, the Prosecution, prior to the rendering of any Judgment by the Trial Chamber, seeks to present its Request as a mere administrative practicality, in the interests of expediency.

4. In effect, the Prosecution is seeking detailed financial information in relation to defence witnesses in the Bemba Main Case as a “prophylactic” measure: in case there is a conviction or convictions in the Article 70 case, based on the alleged false testimony of witnesses in the Main Case. But the fact is that there is no Judgment yet in the Article 70, and there is no sentencing stage; yet, the act of requesting such information “in case of conviction” violates not only the

¹ ICC-01/05-01/13-1966 (‘Request’).

² ICC-01/05-01/08 (‘Main Case’).

³ Request, para. 1.

⁴ *Ibid.*, paras 2-3.

presumption of innocence, but is an unprincipled “fishing expedition” into the details of the Defence in the Main Case.

5. Given the centrality of an international criminal case in an individual’s life, inquiring into legitimate expenses of a Defence team will necessarily pry into matters that are either or both (a) private or (b) potentially protected by the right to silence – even if not directly related to the case. While opening such matters up post-judgement is improper, obliging this information to be shared with the Prosecution during deliberations is corrosive to the various rights of the Accused contained in the Statute, including the right to fair trial.

B. The Request is an unwarranted intrusion into Defence preparation, violates the principle of fair trial, and is prejudicial to the Defence

6. It is either naïve or absurd for the Prosecution to claim that “no confidentiality issues arise in respect of the transmittal of the Requested Information to the Prosecution”.⁵ It is also beyond belief that the Prosecution states that “the relevant witnesses have [no] legitimate expectation of privacy regarding the Requested Information”,⁶ when the Prosecution itself has in the past sought non-standard redactions⁷ for information that could, with some imagination, be related to costs included in an assessment by the Registry.

7. It is also significant that the Prosecution’s Request ventures once again into a maze of litigation to undermine Defence privilege and confidentiality. The Trial Chamber was confident to lift privilege under the illegality exception for materials transmitted to the Independent Counsel.⁸ However, the total costs associated with the Bemba Case and even the more limited request concerning the 14 witnesses will involve consideration of certainly confidential and conceivably privileged material⁹ that is unlikely to fall under the illegality exception. At the very least the Prosecution accessing such material during the Appeal in the Main Case – which is now underway – raises questions of fairness for the Main Case Bemba Defence.

8. The Request also violates this Trial Chamber’s ruling in respect to the Main Case. On 29 September 2015, the Trial Chamber explicitly noted that the Article 70 case was not to be a re-

⁵ Request, para. 9.

⁶ *Ibid.*

⁷ ICC-01/05-01/13-1015-Conf, para. 9.

⁸ ICC-01/05-01/13-947, paras 13-19.

⁹ Notably, the Trial Chamber appears to have accepted in footnote 25 of ICC-01/05-01/13-947 that a wide class of communications can potentially attract legal privilege through its citation of ICC-01/04-01/10-237, pages 7-8.

litigation of the Main Case.¹⁰ This followed a decision rejecting various concerns expressed by the various Co-Accused that concerned the Prosecution's failure to provide important material from the Main Case record.¹¹

9. The present Request invites re-consideration of these decisions, amongst many, as the Prosecution justification for its request for all the costs effectively raises the question of whether if the charged allegations are proven – given all the evidence in the Main Case – the Co-Accused were *actually* capable of achieving an acquittal and thus the harm the Prosecution suggests. The only way to answer this question is through an examination of the particular role that the Defence witnesses played in the circumstances of the entire case.

10. The Prosecution argument¹² concerning the costs associated with the 14 witnesses is similarly unconvincing. Given that the charges do not concern the substance of the witness testimony, but rather contacts, it is wrong to presume that – even in the event of a conviction – that Trial Chamber III received no benefit from hearing the witnesses.

C. The Prosecution's request is in the wrong venue: the Request should be directed to Trial Chamber III

11. Through to the present, requests for information concerning the Main Case have been directed to Trial Chamber III. It is unclear why the Prosecution is now making requests to Trial Chamber VII when Trial Chamber VII does not have authority over the information associated with the Request. As the Single Judge previous stated “Trial Chamber III, not this Chamber, has primary authority to decide whether to provide access to material in the Main Case record.”¹³

¹⁰ ICC-01/05-01/13-T-10-Red-ENG, p. 4, lines 9-10. *See also* ICC-01/05-01/13-1154, para. 14.

¹¹ ICC-01/05-01/13-1188.

¹² Request, para. 6.

¹³ ICC-01/05-01/13-1188, para. 13.

III. CONCLUSION

12. In light of the above, the Arido Defence respectfully requests Trial Chamber VII to reject the Prosecution's Request.

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

Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 17th Day of August 2016

Kampala, Uganda