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

Date: **7 August 2014**

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Cuno Tarfusser
Judge Christine Van den Wyngaert

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

URGENT

**Narcisse Arido's Application for Leave to Appeal the Single Judge's "Decision on the
'Prosecution Request for Variation of Time Limit for Confirmation Response' Dated
4 August 2014" (ICC-01/05-01/13-610)**

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. The Arido Defence hereby seeks leave to appeal the 5 August 2014 Single Judge’s decision amending the calendar for the confirmation of charges.

II. PROCEDURAL HISTORY

2. On 28 May 2014, the Single Judge set the schedule for the confirmation of charges, which was as follows:¹

- i. 30 June 2014: Prosecution to file its Document Containing the Charges (‘DCC’);
- ii. 15 July 2014: Defence teams to file their respective Lists of Evidence;
- iii. 30 July 2014: Prosecution and Defence teams to file their respective submissions on the confirmation of charges;
- iv. 7 August 2014: Prosecution to file its reply to the written submissions of the Defence teams;
- v. 14 August 2014: Defence teams to file their reply to the Prosecution’s written submissions.

3. On 30 July 2014, the Defence teams and the Prosecution filed their submissions on the confirmation of charges.²

4. On 5 August 2014 at 10h56, or 2 days before the expiration of the Prosecution’s deadline, the Defence was notified of a Prosecution’s urgent request for variation of the time limit to file its response to the Defence teams’ confirmation of charges submissions, until “at least” 21 August 2014.³

5. A few hours later at 15h55, the Single Judge granted the Prosecution’s request, stating that “the length and complexity of the submissions filed by each of the Defence teams is such as to make it indeed difficult for the Prosecutor to adequately respond to them within the time limit originally set” and that accordingly, good cause for an extension of time limit had been shown.⁴

¹ ICC-01/05-01/13-443.

² ICC-01/05-01/13-594; ICC-01/05-01/13-597-Conf-AnxB; ICC-01/05-01/13-596-Conf; ICC-01/05-01/13-598-Conf; ICC-01/05-01/13-599-Conf; ICC-01/05-01/13-600-Conf-Corr.

³ ICC-01/05-01/13-608.

⁴ ICC-01/05-01/13-610, p. 3. (‘Impugned Decision’).

6. As a result, the Single Judge amended the calendar for the confirmation of charges, giving until 21 August 2014 to the Prosecution to file its reply to the written submissions of the Defence teams, and until 11 September 2014 for the Defence teams' to reply to the Prosecution's written submissions.⁵

7. The Kilolo Defence⁶ and the Arido Defence⁷ both opposed the Prosecution's request, however the Single Judge had already rendered his decision by the time those were filed.

8. On 6 August 2014, the Babala Defence sought leave to appeal the Single Judge's decision.⁸

III. APPLICABLE LAW

9. Pursuant to Article 82 (1) (d) of Statute, either party may appeal a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. The purpose of such procedure is to "pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial".⁹ The Pre-Trial Chamber is vested with the power to certify the existence of an appealable issue,¹⁰ however when determining whether leave to appeal should be granted, the Pre-Trial Chamber must not justify or defend the correctness of its decision, but instead determine whether the issues presented significantly affect the fairness of the proceedings.¹¹

10. According to Rule 155 (1) of the Rules of Procedure and Evidence ('RPE'), a party shall make a written application for leave to appeal to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal. The application for leave to appeal shall state the name and number of the case or situation and shall specify the legal and/or factual reasons in support thereof, in accordance with Regulation 65 (1) of the Regulations of the Court ('RoC'). It shall also specify the reasons warranting immediate resolution by the Appeals Chamber of the matter at issue.¹²

⁵ ICC-01/05-01/13-610, p. 4.

⁶ ICC-01/05-01/13-613.

⁷ ICC-01/05-01/13-614.

⁸ ICC-01/05-01/13-615.

⁹ ICC-01/04-168, para. 19.

¹⁰ *Ibid.*, para. 20.

¹¹ *See e.g.* ICC-01/09-02/11-253, para. 28.

¹² Regulation 155 (2) of the RoC.

11. The Appeals Chamber has ruled that only an “issue” may form the subject-matter of an appealable decision, which it defined as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.¹³ Further, an issue is “a subject the resolution of which is essential for the determination of the matters arising in the judicial cause under examination” and may be “legal or factual or a mixed one”.¹⁴ The issue must be one apt to “significantly affect”, that is, in a material way, either the fair and expeditious conduct of the proceedings, or the outcome of the trial.¹⁵ In other words, the issue “must be one likely to have repercussions on either of these two elements of justice”.¹⁶

12. The Appeals Chamber has defined the term “fair” as being associated with the norms of a fair trial and corresponding human rights, as per Article 64 (2) and 67 (1) of the Statute.¹⁷ In particular, it noted that the “expeditious conduct of the proceedings in one form or another constitutes an attribute to a fair trial”,¹⁸ and that these fair trial principles applied at the pre-trial stage.¹⁹ In the words of the Appeals Chamber, “breach of or deviation from the rules of a fair trial at the pre-trial stage of the proceedings may have implications on the proceedings and may affect the outcome of the trial”.²⁰ In other words, the question of “purging the pre-trial process of errors consequential [in the sense of fair trial] is designed as a safeguard for the integrity of the proceedings” is “at the core of Article 82 (1) (d) of the Statute.”²¹ The term “proceedings” extends to proceedings prior and subsequent to the current proceedings.²²

13. The Appeals Chamber also held that an issue will be appealable “where the possibility of error in an interlocutory or intermediate decision may have a bearing” on the outcome of the trial.²³ The Pre-Trial Chamber, when deciding on a request for leave to appeal, “must ponder the possible implications of a given issue being wrongly decided on the outcome of the case”, thereby forecasting the consequences of such an occurrence.²⁴

¹³ ICC-01/04-168, para. 9.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, para. 10.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, para. 11.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*, para. 12.

²³ *Ibid.*, para. 13.

²⁴ *Ibid.*, para. 13.

14. Regarding the second aspect of a request for leave to appeal (the immediate resolution by the Appeals Chamber), the Appeals Chamber has held that this criterion will be satisfied if the relevant Chamber rules that an authoritative determination on the appeal would “move forward” the proceedings and “remove doubts about the correctness of the decision or map a course of action along the right lines”.²⁵ The issue at stake must also be “such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar [*sic*] the outcome of the trial”.²⁶ The solving of the issue by the Appeals Chamber is aimed to “ensure that the proceedings follow the right course”.²⁷

IV. SUBMISSIONS

A. Request that the present leave to appeal be ruled upon by the full Pre-Trial Chamber

15. Pursuant to Rule 7 (3) of the RPE, the Arido Defence respectfully requests that the functions of the Single Judge be exercised by the full Pre-Trial Chamber. The Arido Defence notes that the Prosecution’s request was filed before the full Pre-Trial Chamber and not the Single Judge. The Arido Defence submits that, in light of the importance of the issue at stake, it is necessary that the full Pre-Trial Chamber decides upon the present request.

B. Appealable issues arising from the impugned decision

16. As stated above,²⁸ the Arido Defence wishes to emphasise that when determining whether a request for leave to appeal should be granted, the Pre-Trial Chamber must not justify or defend the correctness of its decision, but instead focus on determining whether the issues presented significantly affect the fairness of the proceedings. It respectfully submits that extending the proceedings for another month after already several months of delay does significantly impact the fairness of the proceedings.

17. The Impugned Decision raises the fundamental question of whether the Single Judge erred in law by deciding to further extend the already lengthy proceedings for another month, on the basis that the Prosecution showed good cause, while failing to request the views of the Defence

²⁵ *Ibid.*, paras 14-15.

²⁶ *Ibid.*, para. 14.

²⁷ *Ibid.*, para. 15.

²⁸ *Supra*, para. 8.

before making its decision. The appealable issues are therefore the following:

- i. The Single Judge erred in law by deciding on a Regulation 35 (2) of the RoC request without obtaining the views of the Defence teams, while the said Regulation provides that “where applicable, [a time limit may be extended] after having given the participants an opportunity to be heard”;
- ii. The Single Judge erred in law by failing to analyse whether the Prosecution demonstrated good cause for the extension of time, and in particular the fact that the delay could have been anticipated by the Prosecution, and thereby also violated his duty to provide a reasoned opinion;
- iii. The Single Judge erred in law by failing to consider the adverse impact of the extension of time on the proceedings as a whole, and on the Suspects’ right to a fair trial in particular, in light of his duty to ensure that the trial is fair and expeditious in accordance with Article 64 (2) of the Statute.

18. All of the above-mentioned issues emanate directly from the Impugned Decision. Their resolution is essential for the determination of matters arising in the judicial cause under examination,²⁹ as the Impugned Decision has for result to further delay the proceedings for another month, while the confirmation of charges proceedings having already been delayed for four months. The immediate resolution of these questions is necessary in light of the fact that Mr. Arido and his co-suspects have been held in pre-trial detention for more than **eight months**, and that as a result of the Impugned Decision, by the time a decision is rendered on the confirmation (or not) of the charges, the Article 70 case suspects (other than Mr. Bemba) would have been in pre-trial detention for nearly one year.

19. The resolution of each of the issues has the potential to materially affect the proceedings as each of the issues has the potential to result in a reversal of the Impugned Decision and the resulting reduction of the length of the pre-trial detention of the suspects.

20. In the *Muthaura et al.* case, the Single Judge of Pre-Trial Chamber II found that an issue going to the standard applied by the Single Judge and on the basis of which she reached her

²⁹ ICC-01/04-168, para. 9.

conclusion on the facts, constituted an appealable issue within the meaning of Article 82 (1) (d) of the Statute.³⁰ The Arido Defence submits that the same reasoning applies in the present case.

21. The Arido Defence recalls that the object of the remedy provided for in Article 82 (1) (d) of the Statute is to “pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”.³¹ It respectfully submits that, by delaying the issuance of the decision confirming or infirming the charges for another month on the basis of significant errors of law, the Impugned Decision does have significant repercussions on the fairness of the proceedings, as will be explained in details below when discussing its impact on the fairness and expeditiousness of the trial.

22. The Appeals Chamber had recently held, in the present case, that the mere statement that “*Les moyens d’appel à soulever sont nombreux et extensifs. Il y a des questions de droit fondamentaux qu’il faut développer alors qu’il n’existe, au sein de la CPI, pas de précédents. L’application de l’art. 70 du Statut de Rome en la matière est complexe*” did not constitute good cause for an extension of time with the meaning of Regulation 35 (2) of the RoC.³² The wording which was rejected for failing to show good cause is extremely similar to that used by the Prosecution in its request and which the Single Judge found constituted good cause, namely:

- i. The Defence submissions are extensive,³³ the five submissions and their substantive annexes total 848 pages,³⁴ and the Prosecution could not reasonably have anticipated that the Defence’s substantive confirmation submissions would average 170 pages per suspect;³⁵
- ii. The five defence teams raise issues particular to their client, which each require more than seven days to evaluate, analyse, and respond to,³⁶ and the Defence submissions differ from the Prosecution’s confirmation submission both on the facts and on the applicable law.³⁷

23. As a result, the likelihood that, if leave to appeal were granted, the Appeals Chamber would reverse the Single Judge’s decision, is significant.

³⁰ ICC-01/09-02/11-253, para. 24.

³¹ ICC-01/04-168, para. 19.

³² ICC-01/05-01/13-560 OA4, para. 18.

³³ ICC-01/05-01/13-608, para. 3.

³⁴ *Ibid.*, para. 1.

³⁵ *Ibid.*, para. 4.

³⁶ *Ibid.*

³⁷ *Ibid.*, para. 5.

C. The issues would significantly affect the fair and expeditious conduct of the proceedings (first element)

24. The Arido Defence submits that all three issues have the potential to affect the fair and expeditious conduct of the proceedings. First of all, by deciding on the Prosecution's request without hearing the Defence even though Regulation 35 (2) of the RoC does provide for the parties to be given an opportunity to be heard, the Single Judge deprived himself to considering the request with full knowledge of all the relevant considerations,³⁸ and deprived the Suspects from exercising their fundamental right to respond.

25. Second, the result of the Impugned Decision is that the proceedings are - once again - significantly delayed. The issues affect the fair and expeditious conduct the proceedings in two ways: by affecting Mr. Arido (and his co-suspects) right to be tried expeditiously and without undue delay and by resulting in Mr. Arido (and his co-suspects) being held in pre-trial detention for another month. As a result of the Impugned Decision, the totality of the confirmation of charges proceedings, from the arrest of the Suspects to the decision on the confirmation (or not) of the Charges by the Pre-Trial Chamber will be short of a full year – 11 ½ months – **that is more than some Article 5 cases**,³⁹ even though Article 70 cases are of significant less gravity, as recently stated by the Appeals Chamber,⁴⁰ and that the maximum sentence is 5 years.

26. Originally, the confirmation of charges submissions were due to be filed on 18 April 2014 and the last filing was due on 2 May 2014.⁴¹ On 14 March 2014, the Prosecution asked for an extension of time of four months, and was granted about one and a half month, until 30 May 2014, with the last filing being due 15 June 2014.⁴² On 28 May 2014, the Single Judge unilaterally

³⁸ See e.g. ICC-01/04-01/07-1434, para. 14.

³⁹ See e.g. in the case of *Lubanga*, Mr. Lubanga was arrested on 16 March 2006 and the decision was rendered on 29 January 2007, or a bit more than 10 months after the arrest (http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx); In the *Katanga* case, Mr. Katanga was transferred to the Court on 17 October 2007 and the decision on the confirmation of charges was rendered on 26 September 2008, or about 11 months (http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/Pages/democratic%20republic%20of%20the%20congo.aspx); In the *Ngudjolo Chui* case, Mr. Ngudjolo Chui was arrested on 6 February 2008 and the decision on the confirmation of charges was given on 26 September 2008, or a bit more than 7 months (http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/ICC-01-04-02-12/Pages/default.aspx); In the *Bemba* case, Mr. Bemba was arrested on 24 May 2008 and the confirmation of charges decision was issued on 15 June 2009, or a bit more than one year after his arrest (http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/icc%200105%200108/Pages/case%20the%20prosecutor%20v%20jean-pierre%20bemba%20gombo.aspx).

⁴⁰ ICC-01/05-01/13-560 OA4, para. 1.

⁴¹ ICC-01/05-01/13-T-3-Red-ENG, p. 6.

⁴² ICC-01/05-01/13-255, p. 7.

decided to amend the scheduling order for another month, and ordered that the submissions be filed on 30 July 2014, with the last submission being filed on 14 August 2014.⁴³ In short, the proceedings had already been extended for about four months before the Single Judge's decision to grant the Prosecution's request for extension of time. As a result of the Impugned Decision, the filings of the confirmation of charges submissions will end on 11 September 2014 instead of 2 May 2014, and the decision on the confirmation (or not) of the charges will be rendered at the latest on 11 November 2014 instead of 2 July 2014 as originally scheduled. That is more than four months of delay, during which the Suspects are being held in pre-trial detention.

27. The Arido Defence recalls that the Appeals Chamber has unequivocally held that expeditiousness was an important component of a fair trial,⁴⁴ and that the "expeditious conduct of the proceedings in one form or another constitutes an attribute to a fair trial".⁴⁵ The Impugned Decision touches upon the core of the right to an expeditious trial, which the Pre-Trial Chamber must ensure pursuant to Article 64 of the Statute. The Single Judge should have given due consideration to this fundamental question in accordance with Rule 101 (1) of the RPE, which provides that any time limit regarding the conduct of any proceedings shall be made with due regards to the need to facilitate the fair and expeditious proceedings, bearing in mind – in particular – the rights of the Defence and the victims. The Impugned Decision also ignores the requirement – when assessing the Prosecution's request – that "all those participating in the proceedings to whom any order is directed shall endeavour to act as expeditiously as possible, within the time limit ordered by the Court", taking into account the rights of the Accused to be tried without undue delay.⁴⁶

28. In addition, the Impugned Decision also violates Mr. Arido's right, during a joint trial, to be accorded the same rights as if tried individually.⁴⁷ Indeed, the Impugned Decision is based on the number of pages and complexity of the submissions filed by the Defence teams as a whole. The proceedings are delayed and the co-suspects being held longer in pre-trial detention because – even though it was the choice of the Prosecution to charge the suspects jointly – the Prosecution argued that the amount of work required to respond to the Defence submissions was simply too much. In short, the fact that all suspects in the case decided to exercise their fundamental right to object to the Prosecution's case on the confirmation of charges and challenge its evidence, in accordance with Article 61 (6) of the Statute, is now being used against

⁴³ ICC-01/05-01/13-443, p. 5.

⁴⁴ ICC-01/05-01/08-1386, para 55.

⁴⁵ ICC-01/04-168, para. 11.

⁴⁶ Rule 101 (2) of the RPE.

⁴⁷ Rule 136 (2) RPE.

their fundamental right to an expeditious trial and their right not to be unduly held in pre-trial detention.

29. The Arido Defence submits that the Single Judge's decision is invalid as it fails to respect to respect the procedure set by the Court's statutory framework which provides the Defence with a right to respond to the Prosecution's submissions,⁴⁸ a right that is explicitly provided for in Regulations 35 (2) of the RoC. Further, had the Single Judge provided the Arido Defence (and the co-suspects) with the opportunity to exercise its fundamental right to respond to and to challenge the Prosecution's arguments, his decision on the Prosecution's request may have been different.

30. Similarly, had the Single Judge properly assessed whether the Prosecution objectively demonstrated good cause – instead of a mere statement that “the length and complexity of the submissions filed by each of the Defence teams is such as to make it indeed difficult for the Prosecutor to adequately respond to them within the time limit originally set” –⁴⁹ the Single Judge may have found that the Prosecution failed to show good cause, and therefore the calendar for the confirmation of charges would have remained the same.

31. Finally, had the Single Judge assessed the potential adverse impact of the Prosecution's request on the rights of the Defence and the fairness of the proceedings as a whole, the Impugned Decision could have been different.

32. In sum, had the Single Judge rejected the Prosecution's request on the basis of any of the three issues which have been left unaddressed, the last filing would be on 14 August 2014 and therefore the decision on the confirmation (or not) of the charges would have been rendered at the latest on 14 October 2014. The delaying of the proceedings and the resulting continued detention of the suspects are issues that significantly affect the fair and expeditious conduct of the proceedings, and as a result, the determination of the correctness of the Impugned Decision shall be brought before the Appeals Chamber.

⁴⁸ Regulation 24 (1) of the RoC.

⁴⁹ ICC-01/05-01/13-610, p. 3.

D. The immediate resolution by the Appeals Chamber will materially advance the proceedings (second element)

33. In light of the fact that the continued detention of Mr. Arido and his co-suspects is a direct consequence of the errors contained in the Impugned Decision, the immediate and urgent resolution of the above mentioned issues by the Appeals Chamber will materially advance the proceedings, as the resulting delay could be prevented by a review of the Impugned Decision.

34. As stated by the Appeals Chamber, the purpose of interlocutory appeal is “removing doubts about the correctness of a decision or mapping a course of action along the right lines”, which “provides a safety net for the integrity of the proceedings”.⁵⁰ In the present case, there is no such “safety net” since the Impugned Decision touched upon the fundamental rights of the suspects without providing them with the opportunity to be heard, and is affected by significant legal errors which ought to be resolved by the Appeals Chamber. It goes to the heart of the proceedings, namely the expeditiousness of the trial and the right to be tried without undue delay. Any delay taking place at the current stage has an effect on the totality of the proceedings since it delays everything. Furthermore, should the charges not being confirmed against Mr. Arido, he would have spent one year on pre-trial detention.

35. The Arido Defence is conscious that, as a result of the lateness of the Prosecution’s request – a mere 2 days before the expiration of its deadline, even though it was fully aware of the length and complexity of the Defence submissions for six days, since the evening on 30 July 2014 where it was notified of the Defence submissions – it may be difficult that a decision on the present request and, if granted, a decision from the Appeals Chamber, will be rendered before the expiration of the Prosecution’s 7 August 2014 deadline. However, it submits that the Defence should not be unduly prejudiced by the lack of diligence of the Prosecution, and that the Pre-Trial Chamber and, if applicable, the Appeals Chamber can rule on the issues before 21 August 2014, date at which the Prosecution shall submit its response.

⁵⁰ ICC-01/04-168, para. 15.

V. CONCLUSION

36. The Arido Defence respectfully requests the Pre-Trial Chamber to grant it leave to appeal the Single Judge's decision on "Decision on the 'Prosecution Request for Variation of Time Limit for Confirmation Response' Dated 4 August 2014" (ICC-01/05-01/13-610).

A handwritten signature in black ink, appearing to read 'G. Sluiter', with a large, stylized loop at the beginning and a horizontal line extending to the right.

Göran Sluiter, Counsel for Mr. Arido

Dated this 7th Day of August 2014

At Amsterdam, The Netherlands