

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/05-01/08**

Date: **2 October 2014**

TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF
THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO**

Public

**Public Redacted Version of “Narcisse Arido’s Request for Leave to Appeal the
Decision on ‘Registry Transmission of a Submission received from the Defence for Mr
Narcisse Arido dated 18 August 2014’ (ICC-01/05-01/08-3134-Conf)”
(ICC-01/05-01/08-3142-Conf)**

Source: Counsel for Narcisse Arido

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor

Fatou Bensouda

Jean-Jacques Badibanga

Counsel for Jean-Pierre Bemba Gombo

Peter Haynes

Kate Gibson

Melinda Taylor

Counsel for Narcisse Arido

Göran Sluiter

Legal Representatives of the Victims

Marie Edit Douzima-Lawson

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Paolina Massidda

The Office of Public Counsel for the Defence

Xavier-Jean Keïta

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Natacha Schauder

Detention Section

**Victims Participation and
Reparations Section**

Other

I. INTRODUCTION

1. The Defence for Narcisse Arido (hereinafter ‘Arido Defence’) in the case of *Prosecutor v. Bemba Gombo, Kilolo Musamba, Mangenda Kabongo, Babala Wandu and Arido*, number ICC-01/05-01/13 (‘Article 70 proceedings’) hereby seeks leave to appeal from Trial Chamber III (‘Trial Chamber’) regarding its 5 September 2014 decision on the Arido Defence’s request for access to confidential filings and decisions related to evidence presented by the Bemba Defence team.¹

II. CONFIDENTIALITY

2. [REDACTED].

III. PROCEDURAL HISTORY

3. On 18 August 2014, the Arido Defence filed a “Request for Access to Confidential Filings and Decisions Related to Evidence Presented by the Bemba Defence Team” (‘Request’),² which was transmitted to Trial Chamber III by the Registry on 19 August 2014.³ The Arido Defence asked the Trial Chamber for access to the unredacted versions of Prosecution and Defence filings regarding challenges on the authenticity of documents which the Bemba Defence presented as evidence;. The Arido Defence also asked for access to any past and future filings related to these documents, as well as filings related to three witnesses [REDACTED].

4. The Prosecution responded on 22 August 2014.⁴ It did not oppose the request, but asked the Trial Chamber to give due consideration to the fact that certain information contained in the requested documents either does not relate to the issues raised by the Arido Defence or contains information that could affect the security of witnesses. It also requested the Trial Chamber to reject the Arido Defence’s request for access to past or future confidential filings.

5. On 22 August 2014, the Victims’ representative filed its response, and deferred to the Trial Chamber.⁵ The Bemba Defence filed its response on 27 August 2014 and also deferred to the Trial Chamber’s judgement.⁶

¹ ICC-01/05-01/08-3134-Conf.

² ICC-01/05-01/08-3116-Conf-Anx.

³ ICC-01/05-01/08-3116-Conf.

⁴ ICC-01/05-01/08-3120-Conf.

⁵ ICC-01/05-01/08-3119-Conf.

⁶ ICC-01/05-01/08-3125-Conf.

6. Rejecting the Arido Defence's request ('Impugned Decision'), the Trial Chamber rendered its decision on 5 September 2014.⁷ It found that a collective reading of the publicly redacted versions of the Prosecution and Defence filings and of the Decision, "provides Mr Arido's defence with the requested information", and that therefore, access to the unredacted versions of the documents was "unwarranted and unnecessary".⁸ The Trial Chamber further rejected the Arido Defence's request for access to any past or future confidential filings or decisions related to the contested documents as well as to witnesses CAR-D04-PPPP-0002, CAR-D04-PPPP-0003 and CAR-CHM-PPPP-0001, on the basis that it failed to identify the specific documents necessary for the effective representation of Mr. Arido.⁹

IV. APPLICABLE LAW

7. Pursuant to Article 82 (1) (d) of the 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".¹⁰ The Trial Chamber is vested with the power to certify the existence of an appealable issue,¹¹ however when determining whether leave to appeal should be granted, the Trial Chamber must not justify or defend the correctness of its decision, but instead must determine whether the issues presented significantly affect the fairness of the proceedings.¹²

8. 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.¹³

⁷ ICC-01/05-01/08-3134-Conf.

⁸ *Ibid.*, para. 11.

⁹ *Ibid.*, para. 12.

¹⁰ ICC-01/04-168, para. 19.

¹¹ *Ibid.*, para. 20.

¹² See e.g. ICC-01/09-02/11-253, para. 28.

¹³ Regulation 155 (2) of the RoC.

9. 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”.¹⁴ 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”.¹⁵ 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.¹⁶ In other words, the issue “must be one likely to have repercussions on either of these two elements of justice”.¹⁷

10. 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.¹⁸ In particular, it noted that the “expeditious conduct of the proceedings in one form or another constitutes an attribute to a fair trial”,¹⁹ and that these fair trial principles applied at the pre-trial stage.²⁰ 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”.²¹ In other words, the question of “purging the pre-trial process of [consequential] errors [...] in other words those that would effect a fair trial,] is designed as a safeguard for the integrity of the proceedings” and is “at the core of Article 82 (1) (d) of the Statute.”²²

11. 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

¹⁴ ICC-01/04-168, para. 9.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, para. 10.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, para. 11.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*, para. 13.

²⁴ *Ibid.*

12. 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 [...]posed] 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

V. SUBMISSIONS

A. Appealable issues arising from the impugned decision

13. As stated above,²⁸ the Arido Defence wishes to emphasise that when determining whether a request for leave to appeal should be granted, the 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.

14. The Impugned Decision raises three appealable issues, namely:

- i. Whether, by denying the Arido Defence access to confidential information directly related to a constitutive element of one of the charges against Mr. Arido (Article 70 (1) (b)), Trial Chamber III violated Mr. Arido’s right to challenge the evidence against him;
- ii. Whether, by denying the Arido Defence’s request, the Trial Chamber violated Mr. Arido’s right to be treated equally with his co-suspects since those others have access to the unredacted versions;
- iii. Whether a request for access to past and future filings related to specific documents or witnesses fails to meet the threshold of specificity required when requests for access to documents in another case are met.

²⁵ *Ibid.*, paras 14-15.

²⁶ *Ibid.*, para. 14.

²⁷ *Ibid.*, para. 15.

²⁸ *Supra*, para. 8.

15. 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 since the Impugned Decision has the effect of preventing Mr. Arido having access to information which is necessary for the preparation of his Defence. Access is necessary because this information is directly relevant to the charge of providing false/forged documents under Article 70 (1) (b) of the Statute. The immediate resolution of these questions is necessary in light of the fact that the charges against Mr. Arido are in the process of being assessed by Pre-Trial Chamber II to assess whether they are sufficient to proceed to trial and that the requested information could have a bearing on this decision.

16. The resolution of each of the issues has the potential to materially affect the proceedings as each one has the potential to change the decision of Pre-Trial Chamber II under Article 61 (7) of the Statute and could result in the charges against Mr. Arido not being confirmed.

17. 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”.³⁰ It respectfully submits that, the Impugned Decision does have significant repercussions on the fairness of the proceedings, as will be explained in detail below when discussing its impact on the fairness and expeditiousness of the trial.

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

18. The Arido Defence submits that all three issues have the potential to affect the fair and expeditious conduct of the proceedings. Indeed, the requested information relate to one core elements of the charge against Mr. Arido under Article 70 (1) (b) of the Statute, namely the false/forged character of the documents which Mr. Arido is alleged to have provided to the Bemba Defence team. The Arido Defence requested access to redacted information related to the steps taken by the Prosecution to investigate the authenticity of the contested documents, the credibility of the witnesses [REDACTED], and the authenticity of the contested documents. Such information is necessary for the Arido Defence to be able to properly challenge the alleged false/forged character of the contested documents.

²⁹ ICC-01/04-168, para. 9.

³⁰ ICC-01/04-168, para. 19.

19. The Trial Chamber's refusal to grant the Arido Defence access to past and future filings and decisions related to the contested documents, and to the witness [REDACTED], prevents Mr. Arido from having access to information which bears direct relevance to the charges against him.

20. The issues touch directly upon a number of Mr. Arido's fundamental rights, the most important of all being his right to challenge evidence presented against him.³¹ Without access to the requested information, Mr. Arido is effectively deprived of this right with regards to a large part of the charges against him.

21. In addition, the Impugned Decision violates Mr. Arido's right to be treated equally with his co-suspects,³² since the Mangenda and Kilolo Defence teams have access to the requested information since they were previously on the case. It appears that the Bemba Defence team in the Article 70 proceedings also has access to the said information, via Mr. Bemba himself. As a result, Mr. Arido is deprived of information that is available to his co-suspects.

22. Finally, the requested information would permit Mr. Arido to challenge the Prosecution's arguments regarding one of the constitutive elements of Article 70 (1) (b) of the Statute. As a result, should it the Prosecution be able to establish that there are no substantial grounds to believe that the documents are unauthentic, the charges against Mr. Arido under Article 70 (1) (b) may be confirmed and as a result, a trial would take place against Mr. Arido on this basis. The issues therefore have a direct impact on the expeditiousness of the proceedings.

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

23. In light of the fact that the issues relate directly to a constitutive element of the charges against Mr. Arido under Article 70 (1) (b) of the Statute, their immediate resolution by the Appeals Chamber will materially advance the proceedings, as the charges brought against Mr. Arido may not be confirmed by Pre-Trial Chamber II should the requested information further support the Arido Defence's arguments related to the authenticity of the contested documents.

³¹ Article 67 (1) (e) of the Statute.

³² Article 67 (1) of the Statute.

24. 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”.³³ In the present case, there is no such “safety net” since the Impugned Decision touched upon the fundamental rights of Mr. Arido to challenge the charges against him.

VI. CONCLUSION

25. The Arido Defence hereby requests Trial Chamber III to grant it leave to appeal its 5 September 2014 decision entitled “Decision on ‘Registry Transmission of a Submission received from the Defence for Mr Narcisse Arido dated 18 August 2014’” (ICC-01/05-01/08-3134-Conf). ”.

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 2nd Day of October 2014

At Amsterdam, The Netherlands

³³ ICC-01/04-168, para. 15.