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Date: **22 June 2015**

TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

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 Request for Leave to Appeal the 'Decision on the Submission of
Auxiliary Documents' (ICC-01/05-01/13-922)**

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. Pursuant to Article 82 (1) (d) of the Statute, the Arido Defence seeks leave to appeal Trial Chamber VII's ("Trial Chamber") "Decision on the Submission of Auxiliary Documents"¹ ("Impugned Decision") on three issues.

II. PROCEDURAL HISTORY

2. On 30 June 2014, the Prosecutor submitted its "Document Containing the Charges"² (the 'DCC') together with the list of evidence.

3. On 11 November 2014, Pre-Trial Chamber II ("Pre-Trial Chamber") issued its decision pursuant to Article 61 (7) (a) and (b) of the Rome Statute ('Confirmation Decision').³

4. On 13 April 2015, the defence of the five accused (together the 'Defence'), submitted, prior to the first status conference, the 'Joint Defence Observations on Modalities of Disclosure in Accordance with the Trial Chamber's Order Regarding the Agenda of the First Status Conference (ICC-01/05-01/13-824)'.⁴ In these observations, the Defence requested that the Trial Chamber order the Prosecution to provide auxiliary documentation to link disclosed evidence to specific criminal charges.

5. In the lead up to a Status Conference, on 13 April 2015, the Arido Defence requested the Trial Chamber to order an Updated Document Containing the Charges ('UDCC').⁵ On 24 April 2015, auxiliary documents, such as the UDCC⁶, were discussed at a status conference.

6. On 10 June 25 the Trial Chamber issued its "Decision on the Submission of Auxiliary Documents" ('Impugned Decision') wherein it decided by majority that "that the submission of an [UDCC] in this case is neither appropriate nor compatible with the procedural regime set out in the Statute"⁷ and that "the Chamber unanimously does not deem it necessary to exercise its

1 ICC-01/05-01/13-922.

2 ICC-01/05-01/13-526-Conf-AnxB1

3 ICC-01/05-01/749.

4 ICC-01/05-01/13-894.

5 ICC-01/05-01/13-901, paras 53-54.

6 ICC-01/05-01/13-T-8-Red-ENG, p. 57, l. 16-19; p. 62, l. 5 to p. 63, l. 1; p. 64, l. 20 to p. 65, l. 8; p. 66, l. 4 to p. 67, l. 25, p. 69, l. 5-6 and 13-19.

7 ICC-01/05-01/13-922, para. 20.

discretion under Article 64(2) of the Statute and to order the Prosecution to submit an element-based chart.”⁸

7. On 12 June 2015 the Arido Defence requested that the deadline to file leave to appeal of the Impugned Decision be suspended until Presiding Judge Eboe-Osuji notified the parties of his partially dissenting opinion. The same day, through a decision notified by email, the Trial Chamber informed the parties “that it grants the request for suspension of time limit. The deadline prescribed in Rule 155(1) of the Rules will be suspended until the notification of the partly dissenting opinion of Judge Eboe-Osuji on decision -992 and then commence anew (the full five days).”⁹

8. On 16 June 2015, Presiding Judge Eboe-Esuji filed his partial dissent.¹⁰

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”.¹¹ The Pre-Trial Chamber is vested with the power to certify the existence of an appealable issue,¹² 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.¹³

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

⁸ *Ibid.*, para. 8.

⁹ Email Decision 12 June 2015, subject line “Arido’s Request for a Suspension of the Time Limit, filing ICC-01/05-01/13-997-Conf”.

¹⁰ ICC-01/05-01/13-992-Anx.

¹¹ ICC-01/04-168, para. 19.

¹² *Ibid.*, para. 20.

¹³ See e.g. ICC-01/09-02/11-253, para. 28.

shall also specify the reasons warranting immediate resolution by the Appeals Chamber of the matter at issue.¹⁴

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”.¹⁵ Further, an issue is “a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination” and may be “legal or factual or a mixed one”.¹⁶ 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.¹⁷ In other words, the issue “must be one likely to have repercussions on either of [these] [...] two elements of justice”.¹⁸

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.¹⁹ In particular, it noted that the “expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial”,²⁰ and that these fair trial principles applied at the pre-trial stage.²¹ 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”.²² 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”.²³ The term “proceedings” extends to proceedings prior and subsequent to the current proceedings.²⁴

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.²⁵ The Pre-Trial Chamber, when deciding on a request for leave to appeal, “must ponder the

14 Regulation 65 (2) of the RoC.

15 ICC-01/04-168, para. 9.

16 *Ibid.*

17 *Ibid.*, para. 10.

18 *Ibid.*

19 *Ibid.*, para. 11.

20 *Ibid.*

21 *Ibid.*

22 *Ibid.*

23 *Ibid.*

24 *Ibid.*, para. 12.

25 *Ibid.*, para. 13.

possible implications of a given issue being wrongly decided on the outcome of the case”, thereby forecasting the consequences of such an occurrence.²⁶

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”.²⁷ 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”.²⁸ The solving of the issue by the Appeals Chamber is aimed to “ensure that the proceedings follow the right course”.²⁹

IV. SUBMISSIONS

15. The Arido Defence submits that three issues arise from the Impugned Decision.

A. Whether the Trial Chamber has the power to order an UDCC

16. In the Impugned Decision, the Majority found that the submission of an UDCC “is neither appropriate *nor compatible* with the procedural regime set out in the Statute” (emphasis added).³⁰ The manner in which this finding is stated leads to two contradictory readings, but in the context of the whole decision, this statement indicates that the Majority does not consider itself to have the power to order an UDCC.

17. Either the submission of an UDCC is inappropriate, which suggests that the submission of an UDCC is compatible with the Statute. Or, if the submission of an UDCC is incompatible with the Statute, then there is little reason to discuss appropriateness since an illegal act by a Trial Chamber would not be appropriate within the regime set out in the Statute.

18. At one point, the Impugned Decision seems to suggest that the Trial Chamber has the power to order an UDCC. This is when it states: “*In the present case, [...] the Confirmation Decision sets out clearly the ‘facts and circumstances’ of the case for the accused*” (emphasis

²⁶ *Ibid.*

²⁷ *Ibid.*, paras 14-15.

²⁸ *Ibid.*, para. 14.

²⁹ *Ibid.*, para. 15.

³⁰ ICC-01/05-01/13-922, para. 8.

added)³¹. However, the greater part of the reasoning makes a strong case that the Chamber does not have the power to order an UDCC.

19. Many other assertions made by the majority - though never completely explicit – suggest that the Majority considers itself precluded from ordering an UDCC. For example, the Majority reasons that the “Statute does not foresee the submission of a new charging document by the Prosecution post-confirmation.”³² It also notes that the Confirmation Decision’s “content cannot be placed at the disposal of the parties”³³ and an “UDCC is an updated version of a document given a specific purpose in the statutory scheme – and this purpose has been served when the confirmation decision is rendered.”³⁴

20. As such, the Arido Defence submits that the issue of whether a Trial Chamber has the power to order an UDCC is an appeal-able issue within the meaning of Article 82 (1) (d). Trial Chamber practice³⁵ and the Appeals Chamber³⁶ indicate that ordering an UDCC is permitted form of providing notice under certain circumstances; however, as discussed above, the Majority seems to have precluded this possibility.

21. In view of the above discussion, it is clear that the issue arises from the Impugned Decision, since it concerns most of the reasoning of the Impugned Decision. The issue is constituted by the larger subject of the scope of the powers of a Trial Chamber to realise its obligations of notification of the charges to the Accused.

1. The issue would significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial

22. Notice is clearly a fundamental aspect of a criminal trial, and an important aspect of the internationally recognised human rights principles concerning a fair trial.³⁷ In spite of the

31 ICC-01/05-01/13-922, para. 19.

32 *Ibid.*, para. 11.

33 *Ibid.*, para. 16.

34 *Ibid.*, para. 16.

35 ICC-01/04-01/06-1548; ICC-01/05-01/08-T-14-ENG, p. 13, l. 5-10; ICC-01/04-01/07-1547; ICC-01/09-01/11-439; ICC-01/09-02/11-450; ICC-01/04-02/06-450.

36 ICC-01/04-01/06-3121, paras 124-130.

37 “The Court considers that in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair.”, *Pélissier and Sassi v. France*, Application no. 25444/94, Judgement, 25 March 1999, para. 52, available at:

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58226>; see further: *Sejdovic v. Italy*, Application no.

56581/00, Judgement, 1 March 2006, paras 89-90, available at:

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72629>; *Mattoccia v. Italy*, Application no. 23969/94, Judgement, 25 July 2000, para. 60, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58764>;

Majorities claim that it is satisfied that the Confirmation Decision provides adequate notice³⁸, the majority excluded the legal possibility of an UDCC, and may have failed to consider the full scope of notice possible under the Statute. It, thus, could have easily miss-appreciated the negative impact that the failure to order an UDCC would have.

23. Improper notice will impact the expeditious of the trial for its entire duration since the scope of the charges will impact upon many issues and particularly litigation over the relevance of evidence. The Confirmation Decision does not make clear which evidence it rejects. Only approximately 42% of the evidence cited in the DCC is mentioned in the Confirmation Decision. As such, a majority of evidence is not mentioned in the Confirmation Decision.³⁹ Unlike other

and *Kamasinski v. Austria*, Application no. 9783/82, Judgement, 19 December 1989, para. 79, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57614>.

38 ICC-01/05-01/13-922, para. 19.

39 CAR-OTP-0074-1028, CAR-OTP-0079-0002, CAR-OTP-0074-1027, CAR-OTP-0072-0185, CAR-OTP-0073-0003, CAR-OTP-0072-0180, CAR-OTP-0072-0182, CAR-OTP-0073-0534, CAR-OTP-0074-0634, CAR-OTP-0074-0636, CAR-OTP-0080-0972, CAR-OTP-0078-0236, CAR-OTP-0080-1363, CAR-OTP-0074-0134, CAR-OTP-0077-1368, CAR-OTP-0082-0663, CAR-OTP-0082-0250, CAR-OTP-0075-0752, CAR-OTP-0072-0171, CAR-OTP-0073-0046, CAR-OTP-0072-0101, CAR-OTP-0077-1059, CAR-OTP-0072-0102, CAR-OTP-0077-1123, CAR-OTP-0077-1122, CAR-OTP-0077-1121, CAR-OTP-0077-1127, CAR-OTP-0077-1126, CAR-OTP-0077-1125, CAR-OTP-0077-1124, CAR-OTP-0077-1320, CAR-OTP-0077-1129, CAR-OTP-0077-1128, CAR-OTP-0074-1468, CAR-OTP-0074-1065, CAR-OTP-0074-0586, CAR-OTP-0080-1369, CAR-OTP-0080-1368, CAR-OTP-0080-1367, CAR-OTP-0074-0986, CAR-OTP-0080-1365, CAR-OTP-0080-1364, CAR-OTP-0074-0626, CAR-OTP-0074-0624, CAR-OTP-0080-1360, CAR-OTP-0075-1226, CAR-OTP-0075-1227, CAR-OTP-0079-1541, CAR-OTP-0080-0100, CAR-OTP-0074-0100, CAR-OTP-0082-0267, CAR-OTP-0082-0266, CAR-OTP-0082-0265, CAR-OTP-0075-0762, CAR-OTP-0075-0763, CAR-OTP-0082-0269, CAR-OTP-0082-0268, CAR-OTP-0082-0573, CAR-OTP-0079-0141, CAR-OTP-0077-1130, CAR-OTP-0077-1131, CAR-OTP-0077-1132, CAR-OTP-0077-1133, CAR-OTP-0077-1332, CAR-OTP-0075-0506, CAR-OTP-0074-0699, CAR-OTP-0075-3168, CAR-OTP-0074-0590, CAR-OTP-0074-0592, CAR-OTP-0072-0081, CAR-OTP-0074-0610, CAR-OTP-0075-0261, CAR-OTP-0075-0260, CAR-OTP-0075-0263, CAR-OTP-0075-0262, CAR-OTP-0075-0265, CAR-OTP-0075-0264, CAR-OTP-0075-0267, CAR-OTP-0075-0266, CAR-OTP-0074-0576, CAR-OTP-0078-0218, CAR-OTP-0075-0587, CAR-OTP-0074-1189, CAR-OTP-0074-1011, CAR-OTP-0082-0287, CAR-OTP-0082-0286, CAR-OTP-0074-1009, CAR-OTP-0074-1008, CAR-OTP-0074-1004, CAR-OTP-0074-1006, CAR-OTP-0074-1001, CAR-OTP-0082-0288, CAR-OTP-0074-1003, CAR-OTP-0074-1002, CAR-OTP-0080-1370, CAR-OTP-0074-0991, CAR-OTP-0074-0992, CAR-OTP-0079-0154, CAR-OTP-0074-0994, CAR-OTP-0074-0995, CAR-OTP-0074-0996, CAR-OTP-0074-0997, CAR-OTP-0074-0998, CAR-OTP-0074-0999, CAR-OTP-0082-0814, CAR-OTP-0080-0259, CAR-OTP-0074-0897, CAR-OTP-0072-0168, CAR-OTP-0082-0828, CAR-OTP-0077-1027, CAR-OTP-0080-1366, CAR-OTP-0074-0075, CAR-OTP-0077-1389, CAR-OTP-0082-1065, CAR-OTP-0074-0872, CAR-OTP-0074-0976, CAR-OTP-0074-0977, CAR-OTP-0080-1419, CAR-OTP-0082-0292, CAR-OTP-0082-0293, CAR-OTP-0082-0290, CAR-OTP-0082-0291, CAR-OTP-0077-1093, CAR-OTP-0077-1092, CAR-OTP-0074-1012, CAR-OTP-0080-1417, CAR-OTP-0080-1416, CAR-OTP-0075-0245, CAR-OTP-0075-0002, CAR-OTP-0075-0009, CAR-OTP-0082-0289, CAR-OTP-0079-1732, CAR-OTP-0074-0856, CAR-OTP-0075-0160, CAR-OTP-0071-0503, CAR-OTP-0074-0172, CAR-OTP-0080-0494, CAR-OTP-0082-0460, CAR-OTP-0080-1371, CAR-OTP-0080-1372, CAR-OTP-0077-1364, CAR-OTP-0074-0993, CAR-OTP-0074-0099, CAR-OTP-0074-0701, CAR-OTP-0080-1374, CAR-OTP-0072-0091, CAR-OTP-0075-0848, CAR-OTP-0080-1375, CAR-OTP-0075-0259, CAR-OTP-0073-0275, CAR-OTP-0074-0672, CAR-OTP-0078-0264, CAR-OTP-0073-0048, CAR-OTP-0080-1319, CAR-OTP-0079-0191, CAR-OTP-0080-1335, CAR-OTP-0079-0198, CAR-OTP-0072-0396, CAR-OTP-0077-0169, CAR-OTP-0079-0102, CAR-OTP-0080-0003, CAR-OTP-0077-1372, CAR-OTP-0077-1370, CAR-OTP-0074-0717, CAR-OTP-0080-1108, CAR-OTP-0074-0666, CAR-OTP-0080-1329, CAR-OTP-0080-1328, CAR-OTP-0070-0006, CAR-OTP-0074-1026, CAR-OTP-0080-0322, CAR-OTP-0075-0244, CAR-OTP-0080-1321, CAR-OTP-0080-1320, CAR-OTP-0080-1325, CAR-OTP-0080-1324, CAR-OTP-0082-0609, CAR-OTP-0080-0966, CAR-OTP-0079-1290, CAR-OTP-0072-0170, CAR-OTP-0078-0390, CAR-OTP-0079-1693, CAR-OTP-0082-0606, CAR-OTP-0074-0059, CAR-OTP-0075-0537, CAR-OTP-0082-0247, CAR-OTP-0079-1724, CAR-OTP-0079-1689, CAR-OTP-0073-0033, CAR-OTP-0077-

Pre-Trial Chambers⁴⁰, Pre-Trial Chamber II declined to indicate whether the evidence cited in the Confirmation Decision was only selective, or exhaustive, of the evidence that it considered supportive of the charges.⁴¹ Given the rejection of numerous charges and several modes of liability, it appears that litigation will continue without greater clarity. In this regard, in *inter partes* discussions, the Prosecution already appears to be attempting to re-introduce evidence related to the rejected false documents charges under the umbrella of other charges.

24. The Impugned Decision may also impact upon the outcome of the trial. As noted by Presiding Judge Eboe-Osuji in his dissenting opinion, convictions in other International Tribunals have been overturned upon final Appeal upon the basis of inadequate notice of a charge.⁴² Another way of putting this is, if the Confirmation Decision provides an inarticulate definition of the nature, cause, and content of the charge then it may facilitate the conviction of the Accused upon a basis not confirmed by the Pre-Trial Chamber.

2. The immediate resolution of the issue by the Appeals Chamber will materially advance the proceedings

25. The examination of this issue by the Appeals Chamber will greatly assist in moving the proceedings forward because the issue – and by implication notice – impacts upon virtually every aspect of the trial. Presiding Judge Eboe-Osuji's dissenting opinion, while respectful, suggests strong miss-givings with the form and content of the notification to the Accused. He also suggests that if the Trial Chamber lacks the power to remedy improper notice, then a proper remedy for incomplete notice, in fairness to the Accused, may be a stay of proceedings.⁴³

26. If the Trial Chamber is not in accord⁴⁴ with whether the Accused has been given proper notice, then this may impact upon the precision and timeliness of other decisions and litigation. Foremost amongst these will be litigation concerning Regulation 55, and the judgement under

1348, CAR-OTP-0072-0078, CAR-OTP-0080-1341, CAR-OTP-0080-1340, CAR-D04-0003-0398, CAR-OTP-0082-0248, CAR-OTP-0074-0574, CAR-OTP-0072-0173, CAR-OTP-0074-1030, CAR-OTP-0074-1031, CAR-OTP-0074-1032, CAR-OTP-0082-0107, CAR-OTP-0080-1317, CAR-OTP-0080-1330, CAR-OTP-0080-1332, CAR-OTP-0080-1333, CAR-OTP-0079-1286, CAR-OTP-0077-1366, CAR-OTP-0082-0245, CAR-OTP-0082-0244, CAR-OTP-0082-0328, CAR-OTP-0082-0246, CAR-OTP-0082-0249, CAR-OTP-0080-0299, CAR-OTP-0077-1069, CAR-OTP-0082-0322, CAR-OTP-0074-1029, CAR-OTP-0082-0614, and CAR-OTP-0082-0321.

⁴⁰ ICC-02/05-02/09-267, para. 23.

⁴¹ ICC-01/05-01/13-749, para. 25.

⁴² *Prosecutor v Kupreskić*, Appeals Judgement, IT-95-16, 23 October 2001, para. 114. available at: <http://icty.org/x/cases/kupreskic/acjug/en/kup-aj011023e.pdf>.

⁴³ ICC-01/05-01/13-922, para. 19.

⁴⁴ It is clear that Presiding Judge Eboe Osuji believes that a clarification would be appropriate, *see* ICC-01/05-01/13-922-Anx, paras 109-137.

Article 74. It also bares noting that greater definition of charges may head-off – at least some – subsequent issues in the final appeals of the judgement.

B. Whether the Statute provides that the Confirmation Decision is the means by which the ‘nature, cause, and content’ of the charges are to be formally communicated to the Accused for the purposes of Article 67 (1) (a)

27. The Majority states that “In the present case, [...] the Confirmation Decision sets out clearly the ‘facts and circumstances’ of the case for the accused”⁴⁵. A necessary premise for this conclusion is that the Confirmation Decision is a or *the* correct form of notice to the Accused as articulated in Article 67 (1) (a). The conclusion that the Majority considers the Confirmation Decision as the correct form of notice is strengthened by the statement that:

In other words, at the confirmation stage the Pre-Trial Chamber has the sole authority to define the parameters of the case for the purpose of ensuing trial proceedings; the confirmation of charges decision rendered under Article 61(7)(a) of the Statute *sets out the charges*, which, as such, also binds the Trial Chamber. (emphasis added).⁴⁶

28. Though the former clause of the sentence is uncontroversial, the latter clause indicates that the Confirmation Decision is, at least, *a* correct form of notice as contemplated by the Statute under Article 67 (1) (a). The Majority also notes that the Confirmation Decision’s “content cannot be placed at the disposal of the parties”⁴⁷ which also indicates that the Confirmation Decision is the definitive form of notice.

29. Though the Impugned Decision “invites” – that is to say does not requires – the Prosecution to submit a Pre-Trial Brief, it also states: a future Pre-Trial Brief “is not binding upon the Chamber”⁴⁸. Thus, while it would be inappropriate given the late stage of the proceedings in which it is submitted, the Chamber does not envision the Pre-Trial Brief providing the formal reference point required by Article 67 (1) (a).

30. The Arido Defence submits that the formal type of notice required by the Statute under Article 67 (1) (a) is an issue that arises out of the decision. As indicated by Presiding Judge Eboue-Osuji in his partial dissent⁴⁹, there are several strong textual indicators in the ICC rules that provide that the DCC is the mechanism to provide notice to the Accused. As such, the issue is

⁴⁵ ICC-01/05-01/13-922, para. 19.

⁴⁶ *Ibid.*, para. 12.

⁴⁷ *Ibid.*, para. 16.

⁴⁸ *Ibid.*, para. 21.

⁴⁹ ICC-01/05-01/13-922-Anx, paras 55-56.

constituted by the broader subject of the allocation of responsibility within the ICC to formulate charges.

1. *The issue would significantly affect the fair and expeditious conduct of the proceedings and the outcome of the case*

31. The Arido Defence repeats again that notice is a fundamental aspect of a fair trial⁵⁰, and incorporates the above arguments, *mutatis mutandis*, concerning the impact upon the expeditiousness and outcome of the trial.⁵¹

32. The issue may also prolong the proceedings and affect the expeditiousness because numerous legal issues arise from the conclusion that the Confirmation Decision is the primary or fundamental basis of notice. Procedural mechanisms such as Prosecution disclosure obligations and the amendment of charges upon new evidence may also be impacted since these obligations and powers are connected to the Prosecutions power of notice.

2. *The immediate resolution of the issue by the Appeals Chamber will materially advance the proceedings*

33. In addition to reference the more general comments above concerning the effect of notice upon the conduct of proceedings⁵², the reasoning of the Majority leaves open questions regarding to the relationship and relative importance of the DCC and the Confirmation Decision. If the Confirmation Decision is definitive, then clearly, what is not explicitly accepted in the Confirmation Decision does not form part of the charges. Yet, if the Confirmation Decision is not wholly definitive, then what rules or principles should mediate conflicts between the two? Objections that evidence does not fall within the ambit of the charges has the potential to raise further litigation. The immediate resolution of this issue will clarify the uncertainty and remove doubt from further decision making.

C. Whether Rule 136 (2) of the RPE requires the provision of an UDCC in multi-Accused trials

34. Through introductory reference, it is clear that the Impugned Decision is taken with Article 64 (2) as the legal basis.⁵³ This article obliges the Trial Chamber to ensure “full respect for the rights of the accused”. Rule 136 (2) of the RPE augments this obligation under particular

⁵⁰ See footnote 37 above.

⁵¹ See paras 23 to 24 above.

⁵² See paras 25 to 26 above.

⁵³ ICC-01/05-01/13-922, p. 3.

circumstances. It states: “In joint trials, each accused shall be accorded the same rights as if such accused were being tried separately”. One of the rights protected by the combination of Article 64(2) and Rule 136(2) must be that of notice as specified under Article 67 (1) (a).

35. Closely related to the idea of notice is the right in Article 67 (1) (b) ⁵⁴ which provides *inter alia* for “adequate time and facilities for the preparation of the Defence.” Without adequate notice, it will almost never be possible for the Defence to have adequate time to prepare since preparation will be either unfocused or miss-applied.

36. The Arido Defence submits that the issue arises out of the Impugned Decision because it fails at any point to discuss the distinct obligation placed by Rule 136(2) of the RPE. The issue is constituted by the broader subject of notice to the Accused in the context of multi-Accused cases.

1. The issue would significantly affect the fair and expeditious conduct of the proceedings and the outcome of the case

37. The Arido Defence incorporates its submissions, *mutatis mutandis*, regarding the importance of notice for fairness to the accused and the effect that improper notice has upon the expeditiousness and outcome of the trial.⁵⁵ It adds that in a trial involving one Accused, though the relevance of evidence brought forward by the Prosecution might be disputed, there is not uncertainty as to whether evidence being called relates to the alleged offences of the Accused. In the circumstances of a multi-Accused trial, particularly where allegations have been rejected by the Confirmation Decision, significant questions can arise regarding the specificity of the accusations and the evidential content thereof. This is already partly apparent from the Prosecution’s request⁵⁶, and Defence responses thereto, that notice be given to the Accused under Regulation 55.

2. The immediate resolution of the issue by the Appeals Chamber will materially advance the proceedings

38. The Arido Defence re-iterates its arguments above concerning the manner by which treatment of the issue will immediately and materially advance the proceedings.⁵⁷ It must be

⁵⁴ ICC-01/04-01/06-3121-Red, para. 129.

⁵⁵ See paras 23 to 24 above.

⁵⁶ ICC-01/05-01/13-922.

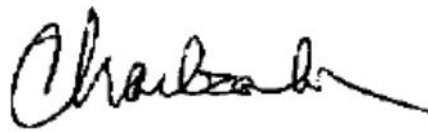
⁵⁷ See paras 25 to 26 above.

emphasised that proper notice goes to the core of a criminal judicial process and thus a failure to provide adequate or clear notice will dog the proceedings at virtually every turn.

V. CONCLUSION

39. In light of the above, the Arido Defence respectfully requests Trial Chamber VII grant it leave to appeal the issues of:

- a. Whether the Trial Chamber has the power to order an UDCC, as outline above in paragraphs 16 to 21;
- b. Whether the Statute provides that the Confirmation Decision is the means by which the ‘nature, cause, and content’ of the charges are to be formally communicated to the Accused for the purposes of Article 67 (1) (a), as outlined above in paragraphs 27 to 30; and
- c. Whether Rule 136 (2) of the RPE requires the provision of an UDCC in multi-Accused trials, as outlined above in paragraphs 30 to 36.



Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 22nd Day of June 2015

The Hague, The Netherlands