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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 Request for Leave to Appeal
'Decision on Defence Requests for Disclosure of Materials from the Record of the
Case of *The Prosecutor v. Jean-Pierre Bemba Gombo* and Related Matters'
(ICC-01/05-01/13-1188)**

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

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I. INTRODUCTION

1. On the 10 August 2015, the Arido Defence made five requests to Trial Chamber VII related to issues concerning disclosure and remedies for disclosure violations ('Arido Defence Request').¹ On the 25 August 2015, the parties were notified of the appointment of a Single Judge for the pre-trial period of the trial phase² and on 27 August 2015, the Single Judge of Trial Chamber VII ('Single Judge') issued his "Decision on Defence Requests for Disclosure of Materials from the Record of the Case of The Prosecutor v. Jean-Pierre Bemba Gombo and Related Matters"³ (the 'Impugned Decision').

2. The Arido Defence requests leave to appeal three issues which it is submitted arise from the Impugned Decision.

II. APPLICABLE LAW

3. 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 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".⁴ The Trial Chamber is vested with the power to certify the existence of an appealable issue,⁵ 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 determine whether the issues presented significantly affect the fairness of the proceedings.⁶

4. 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

¹ ICC-01/05-01/13-1141-Conf-Corr.

² ICC-01/05-01/13-1181.

³ ICC-01/05-01/13-1188.

⁴ ICC-01/04-168, para. 19.

⁵ *Ibid.*, para. 20.

⁶ *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.⁷

5. 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”.⁸ 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”.⁹ 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.¹⁰ In other words, the issue “must be one likely to have repercussions on either of [these] [...] two elements of justice”.¹¹

6. 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.¹² In particular, it noted that the “expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial”¹³. The term “proceedings” extends to proceedings prior and subsequent to the current proceedings.¹⁴

7. 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.¹⁵ The 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.¹⁶

8. 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

⁷ Regulation 65 (2) of the RoC.

⁸ ICC-01/04-168, para. 9.

⁹ *Ibid.*

¹⁰ *Ibid.*, para. 10.

¹¹ *Ibid.*

¹² *Ibid.*, para. 11.

¹³ *Ibid.*

¹⁴ *Ibid.*, para. 12.

¹⁵ *Ibid.*, para. 13.

¹⁶ *Ibid.*

action along the right lines”.¹⁷ 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”.¹⁸ The solving of the issue by the Appeals Chamber is aimed to “ensure that the proceedings follow the right course”.¹⁹

III. SUBMISSIONS

9. The Arido Defence submits that a request for leave to appeal sits squarely within those decisions that may “significantly affect the rights of the accused or which touch upon the central legal and factual issues in the case” and thus must be taken by a full Chamber pursuant to Rule 132 *bis* (6). However, in any case the Arido Defence requests that pursuant to Rule 132 *bis* (3) of the Rules of Procedure and Evidence (‘RPE’) that the decision on leave be put to and decided by the full Trial Chamber.

Issue 1 – Whether Rule 132 *bis* (6) RPE allows a Single Judge to rule on a disclosure violation motion

10. The issue of whether a Single Judge can enter a decision on a disclosure violation is an issue that arises out of the decision. The issue is constitutive of the larger subject of the scope of permissible decisions that can be taken under of Rule 132 *bis* (6).

11. The Arido Defence made its request regarding a disclosure violation on 10 August 2015. On 25 August 2015, Trial Chamber VII elected a Single Judge pursuant to Rule 132 *bis* RPE. The Single Judge then decided upon three separate defence filings on 27 August 2015. Included in this was a decision on five separate Arido Defence requests. Amongst them was the request that the Trial Chamber “Find that the Prosecution has violated its disclosure obligations under Article 67 (2) of the Statute by failing to disclose to the Defence the material [indicated with specificity in the filing]”²⁰.

12. The Single Judge found in the Impugned Decision that “portions of the Requests” – that is to say *inter alia* the Arido Defence request – “alleging [...] disclosure violations are directly related to access to material (speculated to be) in the Main Case record and are therefore premature”²¹.

¹⁷ *Ibid.*, paras 14–15.

¹⁸ *Ibid.*, para. 14.

¹⁹ *Ibid.*, para. 15.

²⁰ ICC-01/05-01/13-1141-Conf-Corr, para. 37.

²¹ ICC-01/05-01/13-1188, para. 13.

The Single Judge thus took a decision on the request to find a disclosure violation – appearing to condition his decision upon the results of a request to Trial Chamber III or otherwise decline to respond to the request. The issue thus arises out of the text of the decision.

13. Rule 132 *bis* (1) allows for the designation of a Single Judge to exercise the functions listed at Article 64 (3) (a) and is a departure from the rule provided for in Article 39 (2) (b) (ii) that requires three judges to exercise the functions of the Trial Chamber. This is broadly confirmed by the preparatory work.²² Article 64 (3) (a) allows the Trial Chamber to “confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of proceedings”. Article 51 (4) requires that the Rules of Procedure and Evidence “shall be consistent with this Statute”, thus due to the constraint imposed by Article 39 (2) (b) (ii), the powers that can be exercised by a Single Judge must be strictly defined. Anything less than a strict interpretation of the scope of the powers provided to the Single Judge would run afoul of the principle *delegatus non potest delegare*. More simply this is to say that the fully composed Trial Chamber cannot delegate certain powers – it and *only* it can exercise them.

14. A confirmation that such designation is strictly limited to the functions of Article 64 (3) (a) and remains consistent with the Statute²³, is found in Rule 132 *bis* (6) which states “[t]he judge shall not render decisions which significantly affect the rights of the accused”. As for the rest of Rule 132 *bis*, any of the powers conferred upon a Single Judge following that Rule are confined to the exercise of the functions listed at Article 64 (3) (a), which textually does not refer to ruling on alleged disclosure violations by the parties but rather the adoption of procedures for the conduct of proceedings.

15. At least two reasons suggest that some disclosure related issues are beyond the competency of a Single Judge to decide under Rule 132 *bis*. Firstly, assessing allegations of serious disclosure violations is not listed within the powers in Rule 132 *bis* (5). Rule 132 *bis* (5) provides for “ensuring proper disclosure between the parties” in sub-item (a) which is a much more modest power than assessing allegations of fundamental breaches of fairness. Secondly, Article 64 (3) (c) creates a distinct category of functions, specifically related to disclosure issues, that a Trial Chamber must deal with upon being assigned a case. As Article 64 (3) (c) is not the legal basis for Rule 132 *bis*, the power contained therein is beyond the reach of the Single Judge. It is thus an issue whether the Single Judge can address allegations of disclosure violations by himself.

²² ICC-ASP/11/41, paras 4 (d) and 5.

²³ ICC-ASP/11/41, paras 4 (e) and 5.

16. The denial of access of exculpatory material goes to the heart of a fair trial.²⁴ Thus a decision upon whether the Defence has been denied access to exculpatory material may fall within those decisions that “significantly affect the rights of the accused or which touch upon the central legal and factual issues” under sub-rule (6). A disclosure violation – particularly with regards to exculpatory material – significantly affects the rights of the Accused to an effective defence. While the impact of the denial of exculpatory material is far reaching, two particularly relevant dimensions are the preparation of the Defence before trial – in that exculpatory evidence will shape trial strategy and investigations – and the capacity of the Defence to effectively cross-examine witnesses which is protected in Article 67 (1) (e).

17. The issue significantly affects both the fairness and expeditious conduct of proceedings. If the request for assessment of an alleged disclosure violation falls within those decisions that “significantly affects the rights” of the Accused in the sense of Rule 132 *bis* (6), then this must suffice for the purposes of Article 82 (1) (d).

18. As part of a joint effort which necessarily involves compromises on the final text, the Joint Defence request to Trial Chamber III²⁵ does not request the specific items identified in paragraph 19 of the Arido Defence Request. If the Impugned Decision was improperly decided and Trial Chamber III does not grant wide access, then the Arido Defence will be obliged to make requests to Trial Chamber III throughout the proceedings which may delay – potentially significantly – the proceedings.

19. More generally, as just discussed above, the issue is strongly connected with fundamental aspects of a fair trial. If sub-rule (6) prohibits decisions such as the Impugned Decision, then that decision will improperly have impacted upon the ability of the Defence to prepare for trial and cross-examine witnesses. This impact has the potential for further delays since material which comes into the possession of the Defence at a late stage may result in the need to recall witnesses since opportunities may have been missed to explore particular information with them.

20. Similarly, if an allegation of disclosure violations is captured by Rule 132 *bis* (6), then an improper treatment of a request of this nature has the potential to impact upon the outcome of the case. Where, for example, the requested material discredits Prosecution witnesses credibility, then this could lead the Trial Chamber to conclude that a witness against Mr. Arido cannot be relied upon. Thus a potentially improper decision has the potential to be decisive.

²⁴ ICC-02/05-03/09-259, para. 14.

²⁵ ICC-01/05-01/08-3282-Conf-Exp-AnxA.

21. Treatment by the Appeals Chamber will materially advance the proceedings. An issue such as the one just described has the potential to mire the trial and the preparations thereof in problems. In the perception of the public, it may damage the legitimacy of subsequent factual findings. Rather than being addressed once at trial, these factual findings may be appealed following the final judgement. Furthermore, correcting a potentially erroneous decision now could avoid subsequent delays. Finally, the Impugned Decision merely pushes the issue of disclosure violation closer to the start of trial date which only increases the potential impact upon planning and time-lines should the Trial Chamber III decision lead to more litigation before Trial Chamber VII. Moreover, if Trial Chamber III rejects the Joint Defence request, it appears that the Single Judge has tied the hands of Trial Chamber VII by suggesting that it is not competent to examine an allegation of disclosure violations unless it has authority over the evidence.

Issue 2 – The standard of review applicable to a request for a finding of a disclosure violation

22. The Arido Defence submits that the definition of the standard of review of an allegation of disclosure violation is an issue that arises out of the decision.

23. As stated above²⁶, in the Impugned Decision, the Single Judge took a decision with regards to a request to find a disclosure violation. By referring to the request as ‘speculative’ the decision apparently finds no disclosure violation. Even a finding to delay taking a decision is implicitly an interim finding regarding whether a disclosure violation has been established. However, the Impugned Decision is so tersely reasoned that it is unclear what standard of review was applied.

24. Prior ICC jurisprudence does not provide a clear standard of review. A Chamber has stated: “the Chamber considers it to be appropriate for a reprimand to be issued, as a form of sanction against the Prosecution, in cases of clear violations of this right”²⁷

25. However, in that case the material was disclosed and there was agreement between the parties that it should have been. This completely masks the standard. Logically speaking a disclosure violation cannot be premised solely on the eventual disclosure of the material – otherwise the Trial Chamber would have a significantly diminished control over proceedings. The Prosecution could simply choose to not disclose material and there would therefore never be a disclosure violation.

²⁶ See para. 11.

²⁷ ICC-01/09-02/11-728, para. 90.

26. The *ad-hoc* tribunals have applied a standard that, if an accurate statement of customary international law, could suggest that the Impugned Decision was improperly taken. An example of this standard at the ICTY has been recently stated in *Karadžić* where it is said:

“In order to establish a violation of this obligation by the Prosecution, the Accused must ‘present a *prima facie* case making out the probable exculpatory or mitigating nature’ of the materials in question.”²⁸

27. A reason that the Single Judge could have had for dismissing the Arido Defence request for a finding of a disclosure violation *may* be found where it is stated that the “Prosecution submits that it has already discharged its disclosure obligations relating to the Main Case record”.²⁹ However, this also introduces obscurity with regards to the standard applied.

28. At the *ad-hoc* tribunals, Trial Chambers have considered that the Prosecution’s disclosure obligations must be considered with reference to the whole institution. In particular, it has been found that the prosecution must actively review the material in the possession of the Office of the Prosecutor and not only the documents in possession of this trial team.³⁰ Succinctly, it has been stated:

“The Office of the Prosecutor, in relation to its disclosure requirements, must be seen as a whole. It is irrelevant whether the prosecutor in charge of the case may have had actual knowledge of the material”³¹

29. It is thus also a question whether the international standard involves considering the Prosecution as a whole and whether this was in the mind of the Single Judge when the Impugned Decision was taken. From the motivation of the decision it is not clear.

²⁸ *Prosecutor v Radovan Karadžić*, IT-95-5/18-T, 21 January 2014, ‘Decision on Accused’s Eighty-Fifth Disclosure Violation Motion’, para. 17, available at: http://www.icty.org/x/cases/karadzic/tdec/en/140121_1.pdf.

²⁹ ICC-01/05-01/13-1188, para. 13.

³⁰ *Prosecutor v. Karemera et al*, No. ICTR-98-44-T, ‘Decision on Defence Motion for Disclosure of RPF Material and for Sanctions Against the Prosecution’, 20 October 2006, para. 12, available at: http://www.worldcourts.com/ictt/eng/decisions/2006.10.19_Prosecutor_v_Karemera_2.pdf.

³¹ *Prosecutor v Karemera et al*, No. ICTR-98-44-T, ‘Decision on Joseph Nzirorera’s Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures’, 25 October 2007, para. 15, available at: <http://www.peterrobinson.com/ICTR/Decision%20Finding%20Disclosure%20Violations.pdf>; *Prosecutor v Nindiliyimana et al*, No. ICTR-00-76-T, ‘Decision on Bizimungu’s Motion for Reparation Following the Prosecution’s Failure to Disclose Documents Affecting the Credibility of Prosecution Witness AOE’, 18 February 2009, para. 7, available at: <http://41.220.139.198/Portals/0/Case%5CEnglish%5CNindiliyimana%5Cdecisions%5C090218.pdf>.

30. This issue significantly affects the fairness and expeditiousness of the proceedings and will impact upon the outcome. To repeat further the importance of the disclosure of exculpatory evidence would be patronising. It suffices to state that when a violation of disclosure is alleged, the application of the correct standard of review of that allegation also goes to the heart of a fair trial. The standard applied thus has the capacity to profoundly impact upon fairness for the purpose of Article 82 (1) (d).

31. In particular, the way in which the standard is applied has the potential to intentionally or unintentionally place the burden – improperly – upon the Defence to identify exculpatory material. This issue is particularly acute if the Single Judge failed to consider the Prosecution as a whole. Moreover, if the burden was reversed, then for Mr. Arido the unfairness is particularly heightened since access to the main case file is well beyond his control.

32. An injustice caused by breach of a fundamental aspect of a fair trial also has the independent capacity to delay a trial as an Accused's Defence teams attempts to rescue fairness from the wreckage of a unfair decision through litigation.

33. It is also trite to point out that an unfair decision can strongly impact upon the outcome of trial. The Arido Defence considered the disclosure violations serious enough to warrant requesting a temporary stay of proceedings. Being deprived of a decision on that issue also clearly affects the outcome of this trial, since it may impact upon a proper and informed assessment of the evidence the Prosecutor intends to adduce.

34. Thus, treatment by the Appeals Chamber would materially advance the proceedings with regards to this issue due to its seriousness. Put otherwise, the Accused claims that there is exculpatory evidence from the main case which should have been disclosed a long time ago by the Prosecutor, and that these proceedings should be temporarily halted for a determination to be made on that topic. Instead of issuing a decision on that request, the Single Judge may have appropriated the functions of the Trial Chamber and then rendered an unmotivated decision on the issue applying an unclear legal standard. An immediate resolution of this issue is clearly necessary to avoid an injustice to the accused and to set the proceedings back on track.

35. An interlocutory appeals decision could also provide peripheral benefits to the case as a whole. A more clear articulation of the threshold to be applied with regards to access to exculpatory material in the main case would assist the parties in shaping their requests – both in regards to form but also whether to put forward a given request. It could also assist the Trial

Chamber in assessing these requests. As indicated by the number of requests from other parties and the arguments above³², it appears that the Arido Defence request will not be last request of this kind before the trial is completed.

Issue 3 – Whether Rule 132 *bis* (3) RPE requires that a party be given the opportunity to request that the Trial Chamber consider its request

36. The Arido Defence submits that whether the Single Judge should have consulted with the Defence before giving his decision is an issue that arises from the Impugned Decision. This issue stems from the broader subject of the procedural requirements and scope of powers granted under Rule 132 *bis*.

37. Rule 132 *bis* (2) RPE states that the Single Judge “may at any time [...] if appropriate, at the request of a party, refer specific issues to the Trial Chamber”. This therefore appears to create a procedural right for a party – that is to say that when presenting an issue, a party may request that it be considered by a full panel.

38. The procedural obligation is furthered suggested by the legal basis of Article 64 (3) (a) which is indicated in sub-rule (1) and in the preparatory work³³. That article obliges a Trial Chamber to confer with the parties before the trial. This article therefore provides for some expectation of consultation. Though this occurred with regards to other trial preparations³⁴, the possibility of a Single Judge was not mooted by the Trial Chamber at that time.

39. If it is the case that Rule 132 *bis* provides a procedural right to the Defence to request full-Chamber consideration, then by taking the Impugned Decision individually, the Single Judge denied the Arido Defence the opportunity to make this request since the Arido Request was made on 10 August 2015 – that is to say 15 days before a Single Judge was elected and certainly well before it could be expected that it would be decided under the Rule 132 *bis* regime. The Impugned Decision was taken swiftly two days later on 27 August 2015.

40. This raises the issue of whether between the 25th and 27th, the Single Judge should have solicited the Arido Defence views on whether its request – originally put before a full panel of a majority of different judges – required decision by a full panel of the newly constituted Chamber rather than the completely un-anticipated Impugned Decision from the Single Judge.

³² See paras 18-19.

³³ ICC-ASP/11/41, paras 4 (d) and 5.

³⁴ ICC-01/05-01/13-824, para. 2 (f).

41. The issue has the capacity to affect the fair and expeditious conduct of proceedings. Small decisions taken in the pre-trial phase – that is to say between the confirmation of charges and the opening statements – have the capacity to frame and shape the subsequent trial profoundly. The text of the legal basis – Article 64 (3) (a) – makes clear through direct reference that decisions taken during this period can impact upon the fairness and expeditiousness of a trial.

42. With regards to the effect on fairness of the issue, it must be noted that prior to the adoption of Rule 132 *bis*, State Parties appear to have indicated their concern regarding the potential impact upon fairness of a Single Judge making decisions at trial stage.³⁵ This concern was considered alleviated by both them and indeed a committee of judges by the inclusion of safeguards³⁶ – that is to say precisely those contained in sub-rule (3).

43. A unfair procedural defect has the capacity to set in motion a chain reaction of litigation. In this regard the observations on the effect on the expeditiousness and outcome elsewhere in this filing are also relevant to a degree.³⁷

44. As a concluding remark, it is submitted that the issue would benefit from examination by the Appeals Chamber and materially advance the proceedings. In the present case, clearing away doubts as to whether the Arido Defence request was disposed of in an overly brisk manner will provide greater solidity for decisions upon the issue of disclosure violations which may follow in due course. More broadly, clarification of the procedural regime of this rule may assist these proceedings as they progress and indeed others as well.

³⁵ ICC-ASP/11/41, para. 5.

³⁶ ICC-ASP/11/41, paras 4 (e) and 5.

³⁷ See paras 17 and 31-32 above.

IV. CONCLUSION

45. In light of the above, the Arido Defence respectfully requests the fully composed Trial Chamber VII to grant it leave to appeal the three issues as outlined above.

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

Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 1st Day of September 2015

The Hague, The Netherlands