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

Date: **24 September 2015**

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF
THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA
WANDU AND NARCISSE ARIDO**

Public

**Narcisse Arido's Response to 'Prosecution Application for Leave to Appeal the
"Decision on Prosecution Application to Provide Notice pursuant to Regulation 55"
(ICC-01/05-01/13-1270)**

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

James Stewart

Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Melinda Taylor

Counsel for Aimé Kilolo Musamba

Paul Djunga Mudimbi

Steven Powles

Counsel for Jean-Jacques Mangenda Kabongo

Christopher Gosnell

Arthur Vercken

Counsel for Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Roland Azama Shalie Rodoma

Counsel for Narcisse Arido

Charles Achaleke Taku

Philippe Larochelle

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

**The Office of Public Counsel for
Victims**

The Office of Public Counsel for the Defence

Xavier-Jean Keïta

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and

Other

Reparations Section

I. SUBMISSIONS

1. On 18 September 2015, the Prosecution sought leave to appeal¹ a decision² taken by Trial Chamber VII ("Trial Chamber") rejecting the Prosecution's request that the Accused be formally given notice of the possibility that the material facts charged might be re-characterised pursuant to Regulation 55 of the Regulations of the Court ("RoC").³

2. The Prosecution submits that the issue arising from the impugned decision is:

Whether the Trial Chamber erred by taking into consideration an irrelevant factor, namely that the Prosecution did not seek leave to appeal the Confirmation Decision or request to amend the charges according to article 61(9) of the Rome Statute.⁴

3. The Arido Defence opposes the Prosecution's Request, as it fails to meet the criteria of Article 82 (1) (d) of the Statute. The purported issue neither arises from the Decision, nor, as the Prosecution contends, impacts upon the fairness, expeditiousness, or outcome of the trial. Finally, the suggestion that appellate attention would move the proceedings forward is based upon a misreading and misunderstanding of the Impugned Decision itself. In short, it submits that the Prosecution's Request expresses a mere disagreement with the Impugned Decision.⁵

4. As a preliminary matter, the Arido Defence notes that the Prosecution's motion is a recognition of that legal uncertainty surrounding the charging instruments in this case. The Arido Defence has also, unsuccessfully, opposed and appealed the manner into which the Decision Confirming the Charges ("Confirmation Decision") has been morphed into the Indictment in this case. The Arido Defence does not accept that the Prosecutor's disagreement with the Confirmation Decision can be expressed through a Regulation 55 request. However, it recalls that the Prosecution has the duty to know its case, and to properly convey it to the Accused. Here, the Prosecutor is using Regulation 55 to revisit the Confirmation Decision and to mould the case against the Accused. The Arido Defence further recalls that it opposes the application of Regulation 55 to Article 70 proceedings, as stated in its response to the Prosecution's initial motion.⁶

¹ ICC-01/05-01/13-1270 ("Prosecution's Request").

² ICC-01/05-01/13-1250 ("The Impugned Decision").

³ ICC-01/05-01/13-922.

⁴ Impugned Decision, para. 1.

⁵ ICC-01/04-168, para. 9.

⁶ ICC-01/05-01/13-951, paras 27-31.

A. The issue does not arise from the Impugned Decision

5. The Arido Defence submits that the Prosecution's proposed issue does not arise from the Impugned Decision. While the Trial Chamber noted the Prosecution's deliberate strategy to omit to seek leave to appeal the confirmation of charges decision, or to attempt to amend the charges, it still left open the possibility of granting the Prosecution's Request had it provided "any exceptional circumstances or any other reasons, nor are they apparent to the Chamber, which justify providing notice at this time".⁷ What the Trial Chamber took into account is not the Prosecution's failure to seek leave to appeal, but the fact that the modes of liability which the Prosecution sought to reinstate had been explicitly rejected by the Pre-Trial Chamber and that no additional argument by the Prosecution justified reinstating the modes of liability on the basis of the information currently available before the Trial Chamber. The issue proposed by the Prosecution therefore results from a misunderstanding of the Impugned Decision and does not arise from it.

B. The other criteria of Article 82 (1) (d) are not satisfied

6. The Prosecution's arguments that the further criteria of Article 82 (1) (d) are fulfilled are also either speculative or based upon incorrect assumptions.

7. Regarding fairness, the Prosecution states that:

The Issue significantly affects the fair conduct of the proceedings. The Decision - which limits the timely application of the Trial Chamber's power under regulation 55(2) on the basis of the non-exhaustion of a procedure designed for a different purpose - at the very least delays the issue of a regulation 55 notice until the later stages of the proceedings.⁸

8. This is however premised on a mistaken assumption, that is to say the Prosecution's arguments implicitly speculates that had the Trial Chamber not rejected the request for the reasons that it did, that it would have in fact given a Regulation 55 notice.

9. If it is the case that Regulation 55 applies to Article 70, then the power to issue a notice under Regulation 55 can be done *proprio motu*, and it cannot therefore be argued that the Decision is the sole and decisive factor as to whether a Regulation 55 notice is given. Thus, even under that alternative legal theory, the Trial Chamber's rejection of the Prosecution's request for the issuance of a notice does not affect the fairness of the trial since the possibility for a

⁷ Impugned Decision, para. 11.

⁸ ICC-01/05-01/13-1270, para. 7.

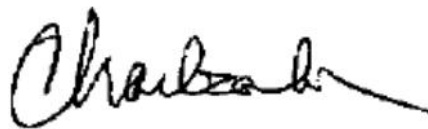
recharacterisation is still open. Furthermore, the Prosecution's argument about a "delay" in the proceedings is unfounded, since, whether notice be given now or later, the Trial Chamber would still in any event need to ensure that the Defence is given adequate time and facilities for an effective preparation.

10. The Prosecution also suggests that, the Impugned Decision could impact upon the outcome of the trial. The Prosecution's argument that the Accused cannot presently be convicted of the crimes charged on the basis of certain modes of liability amounts to a mere disagreement with the confirmation of charges decision and the Impugned decision. Since the Trial Chamber left open the possibility of a future Regulation 55 recharacterisation, the outcome of the proceedings is not affected by the Impugned Decision.

11. Finally, the Prosecution fails to provide reasons why appellate treatment would materially advance the proceedings.⁹ Judicial efficiency in other proceedings¹⁰ and the unification of ICC jurisprudence¹¹ are extrinsic to the question of whether resolution of the present issue would materially advance the present proceedings and are thus not relevant. The other reasons cited by the Prosecution, namely additional investigations, a prolonged evidentiary phase of the trial, or changes in Parties' strategy¹² would occur whether the Regulation 55 notice is issued now or at a later stage, if ever. In light of the fact that the Trial Chamber left open the possibility of a Regulation 55 recharacterisation, there is no need for the Appeals Chamber to intervene at this stage.

II. CONCLUSION

12. In light of the above, the Arido Defence respectfully requests Trial Chamber VII to reject the Prosecution's application for leave to appeal the Impugned Decision.



Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 24th Day of September 2015

The Hague, The Netherlands

⁹ ICC-01/05-01/13-1270, paras 12-14.

¹⁰ *Ibid.*, para. 14.

¹¹ *Ibid.*, para. 13.

¹² *Ibid.*, para. 12.