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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 Redacted Document

Public redacted version of “Prosecution’s response to Narcisse Arido’s request for leave to appeal the “Decision on Arido Defence Request to Interview Prosecution Investigators””, 2 October 2015, ICC-01/05-01/13-1330-Conf

Source: Office of the Prosecutor

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I. Introduction

1. The Defence for Narcisse Arido's request for leave to appeal the Single Judge's decision rejecting its request to interview Prosecution Investigators¹ should be dismissed. The Application is no more than "an automatic reflex" against the Decision—"a legal tool to express mere disagreement" with the Decision.² And even though the Chamber's recent guidance to use article 82(1)(d) applications for leave to appeal sparingly was issued the day after this Application was filed, the Arido Defence could not have been unaware of the Chamber's consistent position on the exceptional nature of this remedy. To date,³ no less than 15 written reasoned decisions on applications for leave to appeal in this case guide the Parties. Because the Application disregards the exceptional nature of the article 82(1)(d) remedy, merely disagrees with the Decision, and simply rehashes the Arido Defence's earlier failed arguments, it should be dismissed for these reasons alone.

2. The Application does not identify any appealable issue.⁴ The Issue advanced does not arise from the Decision, which the Arido Defence fundamentally misunderstands and fails to read as a whole. Nor does the Application meet the stringent criteria for leave to appeal. It fails to show any impact on the fairness and expedition of the proceedings, or the outcome of the trial. Further, the Appeals Chamber's intervention is unnecessary at this stage.

¹ ICC-01/05-01/13-1311-Conf ("Application"); ICC-01/05-01/13-1279 ("Decision").

² ICC-01/05-01/13-T-10-CONF-ENG (open session), p. 3 lns. 3-12, where the Presiding Judge noted that "[w]hile the Chamber is mindful of the rights of the parties to seek legal remedy under [a]rticle 82(1)(d) of the Statute, I would like to remind that such interlocutory appeals are exceptional. And they are not or should not be an automatic reflex as it sometimes appears. They are neither meant to be a hidden application for reconsideration nor a legal tool to express mere disagreement with any of the Chamber decisions. And we all know that it lies in the nature of things that usually at least one party is not completely satisfied with what the Chamber decides. Furthermore, even if we talk about potentially reversible error this may be particular at the stage of proceedings that we have now reached better and justly deferred to any final appeal under [a]rticle 81."

³ Fourteen of these decisions are public: *see e.g.* ICC-01/05-01/13-1307; ICC-01/05-01/13-1282; ICC-01/05-01/13-1278; ICC-01/05-01/13-1258; ICC-01/05-01/13-1096; ICC-01/05-01/13-1089; ICC-01/05-01/13-966; ICC-01/05-01/13-877 ; ICC-01/05-01/13-801; ICC-01/05-01/13-502; ICC-01/05-01/13-456; ICC-01/05-01/13-348; ICC-01/05-01/13-187; ICC-01/05-01/13-51.

⁴ Alleged issue or "Issue".

II. Level of Confidentiality

3. The Prosecution files this response as “Confidential” pursuant to regulation 23bis(2) of the Regulations of the Court, because it responds to a submission of the same classification. It will file a public redacted version of its response.

III. Submissions

A. The Issue is not appealable

4. The Application fails at the threshold: the Issue—under what conditions can a Trial Chamber compel a potential witness to appear for an interview under [a]rticle 64(6)(f)⁵—is not appealable, since it does not arise from the Decision.⁶

5. Indeed, nowhere in the Decision did the Single Judge expressly consider a Chamber’s power to compel potential witnesses to appear for interviews.⁷ Nor did the Chamber need to. As the Decision makes amply clear, its thrust was different.

6. First, the Single Judge recalled that Parties were required to, in good faith, exhaust *inter partes* and other reasonable measures before requesting the Chamber’s assistance on matters pertaining to the conduct of investigations.⁸ Second, the Single Judge noted that the Prosecution had not definitively refused the interviews with its

⁵ Application, para. 10.

⁶ See ICC-01/04-168 OA3, para. 9; ICC-02/04-01/05-367, para. 22; ICC-02/05-02/09-267, p. 6; ICC-01/04-01/06-2463, para. 8; ICC-01/09-02/11-27, para. 7. See also ICC-01/04-01/06-1433 OA11 (Partly Dissenting Opinion of Judge Song), para. 4, specifying that “[a] decision ‘involves’ an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.” See also ICC-01/05-01/08-532, para. 17; ICC-02/05-02/09-267, para. 25; ICC-01/04-01/06-1557, para. 30; ICC-01/04-01/07-2035, para. 25; ICC-02/05-03/09-179, para. 27.

⁷ Decision, paras. 1-6.

⁸ Decision, para. 5.

Investigators.⁹ Third, and significantly, the Single Judge found that the Prosecution had provided other avenues to the Arido Defence to obtain the requested information, including by submitting a list of questions.¹⁰

7. Fourth, and equally critically, there were other measures independently available to the Arido Defence to secure the information. As the Single Judge noted, the Arido Defence should be able to identify the “persons other than the Investigators, P-260 and P-245 [...] present at the relevant interviews” “if it wishes to contact them.”¹¹ Likewise, the Arido Defence “will also have the opportunity to examine P-260 and P-245—who are as well-placed as the Investigators to provide at least some of the information sought—when they appear before the Chamber.”¹²

8. The Arido Defence simply fails to consider the totality of the Single Judge’s findings, in rejecting its original request. The Application is premature. Indeed, the Arido Defence was required to demonstrate either (i) that it had exhausted the identified measures or other measures to interview the Investigators or obtain the information sought; or (ii) that these or other measures would be inadequate.¹³ But the Application misreads the import of this finding. The Defence’s failure to acknowledge the critical aspects of the Decision—including that it was required to first exhaust the measures available or show that they were inadequate—undermines its Application.¹⁴ Equally, its effort to parcel out and challenge each of the Chamber’s findings on the individual measures offered to obtain information,¹⁵ without considering them as a whole, is no more than a mere disagreement.

⁹ Decision, para. 6.

¹⁰ Decision, para. 6.

¹¹ Decision, para. 6.

¹² Decision, para. 6.

¹³ Decision, para. 6.

¹⁴ See *e.g.*, Application, para. 19, offering conclusory statements such as [REDACTED], without considering other measures available.

¹⁵ Application, paras. 13-19.

9. Moreover, the Defence's claim only rehearses its earlier arguments¹⁶ which have now been rejected. Indeed, its repeated references to its original Motion, Addendum and related correspondence¹⁷ cannot assist it to persuade the Single Judge/the Chamber to grant leave to appeal.

10. The Defence's claim also reveals its misunderstanding of several provisions of the Statute and the Rules.¹⁸ Although the Defence seeks to challenge the Single Judge's reliance on *inter partes* measures, it simply fails to persuade why the Decision was not appropriately grounded in article 64.¹⁹ It does not explain why rule 140 would be relevant.²⁰ Nor does it consider that the Single Judge equally provided for "other reasonable measures", in addition to *inter partes* steps.²¹ Likewise, the Application's reference to article 69(2)²²—providing for testimony in person and also by means of video or audio technology—is not apparent. Nor is its reliance to the case law of the European Court of Human Rights (on the exhaustion of domestic remedies)²³ apposite.

11. Further, in claiming that the Decision [REDACTED],²⁴ the Application is both wrong and speculative. Equally, the Defence's comments alleging that the Prosecution [REDACTED]²⁵ are both gratuitous and irrelevant to its Application.

¹⁶ See generally ICC-01/05-01/13-1139-Conf ("Original Request") and ICC-01/05-01/13-1165-Conf-Corr ("Addendum"). The Single Judge has ordered the Arido Defence to file public redacted versions of these filings (Decision, p. 5).

¹⁷ See e.g., Application, paras. 12, 14, 23.

¹⁸ See e.g., Application, para. 13, [REDACTED].

¹⁹ *Contra* Application, para. 13. For example, article 64(6)(f) allows the Chamber to "rule on any other relevant matters." Article 64(8)(b) states "[a]t the trial, the presiding judge may give directions for the conduct of the proceedings, including to ensure that they are conducted in a fair and impartial manner."

²⁰ *Contra* Application, para.16. Rule 140 relates to "the order and manner in which the evidence shall be submitted to the Trial Chamber."

²¹ Decision, paras. 5-6.

²² Application, para. 18.

²³ Application, para. 18.

²⁴ Application, para. 17.

²⁵ Application, para. 17.

12. For all these reasons, the Issue is not appealable. It does not arise from the Decision, but instead results from the Defence's own misapprehension. Further, the Application merely disagrees with and contests the Decision, and should therefore be dismissed.

B. The article 82(1)(d) test is not met

13. Article 82(1)(d) criteria are cumulative: a failure to fulfil any one of the criteria is fatal to any application for leave to appeal.²⁶ Because it fails to identify an appealable issue arising from the Decision, the Application should be dismissed, without further consideration.

14. Even so, the Application simply does not meet the remaining article 82(1)(d) criteria.

15. First, the Defence fails to show any impact on the fairness of the proceedings.²⁷ Although the Defence claims that [REDACTED] and [REDACTED] are affected,²⁸ it only hypothesises. Its claim wrongly assumes that interviewing the Prosecution Investigators is the only option available to the Defence to obtain the information sought. This is incorrect. It only recently (on 25 September 2015) availed itself of one of the options available to it to obtain the information sought, submitting a list of questions to the Prosecution.²⁹ That option has been available to the Arido Defence since 7 August 2015, as noted in the Decision.³⁰ The Defence's claims of unfairness are thus unfounded and premature. So too is its supposition that it is prevented

²⁶ ICC-02/11-01/15-117, para. 26. ICC-02/11-01/15-132, para. 5. *See also* ICC-01/05-01/08-3273, para. 8, stating that the article 82(1)(d) criteria is cumulative, and "[f]ailure to fulfil one or more of these criteria is fatal to an application for leave to appeal."

²⁷ Application, paras. 23-25.

²⁸ Application, para. 23.

²⁹ [REDACTED].

³⁰ Decision, para. 6;fn. 15, noting ICC-01/05-01/13-1177-Conf, paras. 3, 9-11 and 15-16. *See also* ICC-01/05-01/13-1177-Conf-Anx C.

[REDACTED].³¹ Yet again, the Application fails to acknowledge the other measures—not limited to only those that are *inter partes*—at the Defence’s disposal. It does not demonstrate that they are inadequate in any way. Nor is the Chamber precluded from addressing any issues of fairness during the course of the trial, if and when they should arise. The fairness of the proceedings is, therefore, not affected.

16. Second, there is no impact on the expedition of the proceedings. The Defence’s reluctance to pursue its own investigations to recover the information sought³² undermines its own Application. Neither is it relevant that [REDACTED], or that [REDACTED].³³ Likewise, the Defence only speculates that P-245 and P-260 may be recalled.³⁴ Such submissions are premature. In these circumstances, the Defence’s claim that it [REDACTED] is neither accurate, nor germane, nor appropriate.

17. Third, the Application does not argue any impact on the outcome of the trial.³⁵ There is none.

18. And finally, the Appeals Chamber’s immediate resolution of this Issue will not materially advance the proceedings. Contrary to the Application,³⁶ the Appeals Chamber need not intervene to correct the Defence’s misunderstanding of the Decision. Nor is any [REDACTED] needed,³⁷ when the Defence fails to demonstrate any violation of Mr Arido’s rights. And indeed, even if there may be potential for a reversible error, such issues may—as this Chamber has reminded the Parties only this week—be justly deferred to the stage of the final appeal.³⁸

³¹ Application, para. 20.

³² Application, para. 24.

³³ *Contra* Application, para. 24.

³⁴ Application, para. 25.

³⁵ Application, paras. 23-27.

³⁶ Application, paras. 26-27.

³⁷ *Contra* Application, para. 27.

³⁸ ICC-01/05-01/13-T-10-CONF-ENG, p. 3, lns. 3-12.

19. For these reasons, the Application does not meet the article 82(1)(d) criteria, and should be dismissed.

IV. Relief requested

20. The Issue is not appealable. It also does not meet the article 82(1)(d) criteria for leave to appeal. The Application should therefore be dismissed.



Fatou Bensouda, Prosecutor

Dated this 19th October 2015
At The Hague, The Netherlands