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

Date: **19 October 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

**Public Redacted Version of ‘Narcisse Arido’s Request for Leave to Appeal the Single
Judge’s Decision on Arido Defence Request to Interview Prosecution Investigators
(ICC-01/05-01/13-1279)’**

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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. The Arido Defence hereby seeks leave to appeal the Single Judge's Decision rejecting its request to interview Prosecution's investigators ('Impugned Decision')¹ pursuant to Article 82 (1) (d) of the Statute and Rule 155 (1) of the Rules of Procedure and Evidence ('RPE'). The Arido Defence requests that, given the importance to the preparation of the Defence, the fully composed Trial Chamber considers the present request pursuant to 132 *bis* (3) of the RPE.

2. The Impugned Decision rejects the Defence's request based on the fact that the Prosecution "has not definitively refused the requested interviews" and "also provided other avenues to the Arido Defence to obtain the information sought, for example, via the submission of a list of questions."² The Single Judge also stated that persons other than the Prosecution's investigators and P-260/P-245 were present at the relevant interviews and that the Defence should be able to identify them to contact them.³ Finally, the Single Judge held that the Arido Defence would be able to cross-examine P-245 and P-260.⁴ The Single Judge concluded by stating that the Arido Defence failed to demonstrate that it exhausted all measures to interview the investigators or obtain the information sought, or that other measures would be inadequate.⁵ Thus, the Single Judge did not consider that judicial intervention was necessary at the moment of taking the decision.

II. CLASSIFICATION

3. Pursuant to Regulation 23*bis* of the Regulations of the Court ('RoC') and Regulation 24 of the Regulations of the Registry ('RoR'), this request is submitted as confidential, as it refers to the Prosecution's investigative process. A public redacted version will be filed shortly.

III. APPLICABLE LAW

4. 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

¹ ICC-01/05-01/13-1279.

² *Ibid.*, para. 6.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

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”.⁶ The Pre-Trial Chamber is vested with the power to certify the existence of an appealable issue,⁷ 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.⁸

5. 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.⁹

6. 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”.¹⁰ 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”.¹¹ 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.¹² In other words, the issue “must be one likely to have repercussions on either of these two elements of justice”.¹³

7. 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.¹⁴ In particular, it noted that the “expeditious conduct of the proceedings in one form or another constitutes an attribute to a fair trial”,¹⁵ and that these fair trial principles applied at the pre-trial

⁶ ICC-01/04-168, para. 19.

⁷ *Ibid.*, para. 20.

⁸ *See e.g.* ICC-01/09-02/11-253, para. 28.

⁹ Regulation 155 (2) of the RoC.

¹⁰ ICC-01/04-168, para. 9.

¹¹ *Ibid.*

¹² *Ibid.*, para. 10.

¹³ *Ibid.*

¹⁴ *Ibid.*, para. 11.

¹⁵ *Ibid.*

stage.¹⁶ 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”.¹⁷ 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.”¹⁸ The term “proceedings” extends to proceedings prior and subsequent to the current proceedings.¹⁹

8. 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.²⁰ 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.²¹

9. 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”.²² 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”.²³ The solving of the issue by the Appeals Chamber is aimed to “ensure that the proceedings follow the right course”.²⁴

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*, para. 12.

²⁰ *Ibid.*, para. 13.

²¹ *Ibid.*

²² *Ibid.*, paras 14-15.

²³ *Ibid.*, para. 14.

²⁴ *Ibid.*, para. 15.

IV. SUBMISSIONS

A. Overview of the issue for which the Arido Defence seeks leave to appeal

10. The Arido Defence seeks leave to appeal the following issue emanating from the Impugned Decision, namely: under what conditions can a Trial Chamber compel a potential witness to appear for an interview under Article 64 (6) (f)?

B. The issue arises from the Impugned Decision

11. As stated above, 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.

12. As appears from the correspondence annexed to the Arido Defence's motion of 10 August 2015, the Defence has been trying to interview [REDACTED], the chief Prosecution's investigator in the present case, as well as other investigators, since 8 May 2015.²⁵ Claiming that no proper basis has been laid out for such interviews, the Prosecution has refused so far to allow the Defence to proceed with those interviews. The correspondence (as well as the motion of 10 August) lays out the topics on which the Defence intends to question the investigators.²⁶ Since it appears, following 3 months of unsuccessful correspondence, that the Defence and the Prosecution do not agree on what constitutes valid "forensic purpose", the Defence submitted the matter to the Trial Chamber's consideration on 10 August 2015.²⁷

13. On 22 September, the Single Judge rejected the Defence request based on the fact that the Arido Defence had not demonstrated that it had not exhausted other adequate measures to interview the investigators or obtain the information. The issue therefore arises from the Decision since the Trial Chamber has denied the Defence request based on conditions that are not apparent from a plain reading of Article 64. The Defence submits that if a request to compel a potential witness to appear for an interview under Article 64 (6) (f) could, on one hand be said to be premised on the demonstration of a valid forensic purpose for such interview, it could not on the other be made said to be conditional on the exhaustion of *inter partes* discussions between

²⁵ ICC-01/05-01/13-1139-Conf-Anx1.

²⁶ See ICC-01/05-01/13-1139-Conf, as well as, in particular, its annexes 1 and 3.

²⁷ ICC-01/05-01/13-1139-Conf.

the parties.

14. The Arido Defence recalls that the Trial Chamber held that “it is imperative that the Defence be able to test the reliability of the procedures employed in collecting the evidence against them”²⁸ and submits that the Single Judge failed to apply the Trial Chamber’s reasoning. Clearly, interviewing the individuals who were responsible to collect the evidence would fall under that purview. Assuming, for the sake of discussions, that it was necessary to do so, the Defence has laid out, in its correspondence and motion of 10 August the various topics it intended to question the investigators about, which clearly fall under Rule 77 of the RPE. Despite the clearly diverging opinions of the Prosecution and the Defence on the issue, the single Judge has ruled that *inter partes* activity was still necessary before a ruling could be obtained on the requested order to compel the investigators. In doing so, the Arido Defence submits that the Single Judge erred in law.

15. Further, the issue also arises from the Impugned Decision since the Single Judge based its decision not to grant the request on the fact that the Prosecution “has not definitively refused the requested interviews” and “provided other avenues to the Arido Defence to obtain the information sought, for example, via the submission of a list of questions”,²⁹ since “persons other than the Prosecution’s investigators and P-260/P-245 were present at the relevant interviews and that the Defence should be able to identify them to contact them”³⁰ and since the Arido Defence could cross-examine P-245 and P-260.³¹

16. The core legal texts of the Courts do not use the phrase ‘*inter partes*’, but do provide some scope for negotiations between parties as, for example, can be found in Rule 140 of the RPE. While communications between parties during a trial is an ordinary practice in many legal systems of the world to streamline the proceedings and avoid un-necessary use of Court time to resolve un-contentious issues, the elevation of this practice – without further discussion and absent a textual basis – to a seeming formal pre-condition for the exercise of its powers contributes to raising the issues put forward in this request for leave to appeal. The Trial Chamber has many countervailing obligations, and other than a passing reference to Article 64, the Single Judge failed to explain why he could rely upon the criteria of exhaustion of *inter partes* discussions to the exclusion of all others.

²⁸ ICC-01/05-01/13-1234-Conf, para. 13.

²⁹ *Ibid.*, para. 6.

³⁰ *Ibid.*

³¹ *Ibid.*

17. The Arido Defence submits that firstly, it could be that the Single Judge's sole reliance on the Prosecution's willingness to entertain the Arido Defence's request is misplaced. Indeed, it amounts to permitting the Prosecution to effectively bar Defence's access to information it is entitled to have on the sole basis of its subjective determination that the justification provided by the Arido Defence is not sufficient. It is clear from the communications between the Arido Defence and the Prosecution that the latter systematically refused to consider the Arido Defence's requests to interview the investigators, no matter the detailed reasons given, stating systematically "the request fails to provide an adequate basis to interview Prosecution investigators".³² As can be seen from the correspondence, the Prosecution is not even allowing the Defence to contact the investigators by email. To continue to pretend that the Prosecution is not, *per se*, opposing the Defence request is completely misguided. To this date the Prosecution has hindered the Defence efforts to investigate the case, including a persistent refusal to acknowledge that the investigators of this case detain key material information for the Defence.

18. The Arido Defence recalls that, similarly to Article 69 (2), disagreements between the Prosecution and the Defence as to whether a piece of information is relevant or material to the preparation of the Defence (or, in the words of the Prosecution, the 'forensic purpose') should be ruled upon by the Trial Chamber. Further, it also notes that, in drawing a parallel with the ECtHR case law in respect of the notion of exhaustion of domestic remedies, the exhaustion of avenues should be required only when actually possible and effective.³³

19. Secondly, the Arido Defence submits that the very purpose for which it seeks to interview the Prosecution's investigators is because they are privy to the methods and steps taken by the Prosecution to approach P-245 and P-260, particularly with regards to their contacts with and through [REDACTED]. Clearly, P-245 and P-260 are not privy to those investigative steps and

³² ICC-01/05-01/13-1139-Conf-Anx4.

³³ ECtHR, *Stögmüller v. Austria*, 10 November 1969, n° 1602/62, A 9, para. 11:" As to the point whether the proceedings instituted ("saisine") may embrace complaints concerning facts which occurred after the lodging of the Application, international law, to which Article 26 (art. 26) refers explicitly, is far from conferring on the rule of exhaustion the inflexible character which the Government seems to attribute to it. **International law only imposes the use of the remedies which are not only available to the persons concerned but are also sufficient, that is to say capable of redressing their complaints**" (emphasis added), available at <http://hudoc.echr.coe.int/fre?i=001-57582>.

ECtHR, *Vernillo v. France*, 20 February 1991, n° 11889/85, para. 27:" An action for damages may be relevant for the purposes of Article 26 (art. 26) of the Convention (see, among other authorities and mutatis mutandis, the Bozano judgment of 18 December 1986, Series A no. 111, p. 21, para. 49, and the de Jong, Baljet and van den Brink judgment of 22 May 1984, Series A no. 77, pp. 19-20, para. 39), but the only remedies which that Article (art. 26) requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. **The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied**" (emphasis added), available at <http://hudoc.echr.coe.int/fre?i=001-57672>.

therefore the Single Judge's reliance on the information they could give is misplaced.

20. The resolution of the issue is essential for the determination of matters arising in the judicial cause under examination,³⁴ as the result of the Impugned Decision is to prevent the Arido Defence from having access to information which is material to the preparation of its defence, and particularly for the cross-examination of P-245 and P-260. The immediate resolution of these questions is necessary in light of the fact they are scheduled to appear before the Court within the next three weeks.

21. Further, the resolution of the issue has the potential to materially affect the proceedings as it has the potential to prevent Mr. Arido from exercising his right to cross-examine witnesses in an effective manner.

22. In the *Muthaura et al.* case, the Single Judge of Pre-Trial Chamber II found that an issue going to the standard applied by the Single Judge and on the basis of which she reached her conclusion on the facts, constituted an appealable issue within the meaning of Article 82 (1) (d) of the Statute.³⁵ The Arido Defence submits that the same reasoning applies in the present case.

C. Leaving the issue unresolved would significantly affect the fair and expeditious conduct of the proceedings

23. The Arido Defence submits that the issue has the potential to affect the fair and expeditious conduct of the proceedings. Indeed, if the Single Judge is in error, then the result is the Arido Defence being unable to test the reliability of the procedures employed in collecting the evidence against them, namely the evidence of P-245 and P-260. This affects both Mr. Arido's right to an effective defence and his right to cross-examine witnesses, protected by Article 67 (1) (b) and (e). Moreover it appears that more topics which have a bearing on P-245 and P-260's credibility were brought to the attention of the Defence *after* the request was made to interview the investigators, for example [REDACTED] to P-245 and P-260, as well as reports prepared following contacts of P-260 with the Prosecution.

24. The Arido Defence submits that the judicial protection of the Accused - and therefore fairness - is impacted by the timing of intervention and not just by whether the intervention is eventually made. The Decision was given seven days before the beginning of trial and – as it

³⁴ ICC-01/04-168, para. 9.

³⁵ ICC-01/09-02/11-253, para. 24.

stands now – roughly two weeks before the testimony of P-260 and P-245. Investigations in [REDACTED] – as suggested by the Single Judge – are either costly last-minute, if administratively possible, and accessing information from staff members of the State Security service is far from guaranteed considering that [REDACTED] is not a state-party. While the decision stands the Arido Defence now has no choice but to continue pursuing the matter *inter partes* with the Prosecution. However, there is no reason to believe that the Prosecution will take a different stand than that which it has maintained thus far. This simply leads to a situation where the Trial Chamber will need to re-consider the Single Judges decision thus introducing delays.

25. Further, the Single Judge’s errors have the potential to impact Mr. Arido and his co-suspects’ right to an expeditious trial, as they may lead to the recall of P-245 or P-260 should the Arido Defence eventually be able to obtain information regarding the manner in which the Prosecution obtained their evidence. The Arido Defence recalls that the Appeals Chamber has unequivocally held that expeditiousness was an important component of a fair trial,³⁶ and that the “expeditious conduct of the proceedings in one form or another constitutes an attribute to a fair trial”.³⁷

D. The immediate resolution by the Appeals Chamber will materially advance the proceedings

26. In light of the fact that the two witnesses upon which the request touches, namely P-245 and P-260, are scheduled to testify within the next three weeks, the immediate and urgent resolution of the above mentioned issues by the Appeals Chamber will materially advance the proceedings, as it can help prevent a delay in their cross-examination and/or a possible recall.

27. 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”.³⁸ In the present case, there is no such “safety net” since the Impugned Decision touched upon the fundamental rights of the Mr. Arido, and may be affected by legal errors which ought to be resolved by the Appeals Chamber.

³⁶ ICC-01/05-01/08-1386, para 55.

³⁷ ICC-01/04-168, para. 11.

³⁸ ICC-01/04-168, para. 15.

V. CONCLUSION

24. In light of the above, the Arido Defence respectfully requests leave to appeal the Single Judge's Decision on Arido Defence Request to Interview Prosecution Investigators (ICC-01/05-01/13-1279).

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

Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 19th Day of October 2015

The Hague, The Netherlands