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Date: **14 January 2016**

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 the Prosecution's Second Application for Notice to be
given under Regulation 55(2) (ICC-01/05-01/13-1538)**

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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 opposes the “Prosecution’s Re-application for Notice to be Given under Regulation 55(2) with respect to the Accused’s Individual Criminal Responsibility”¹ (‘Second Request’). The request asserts that there is no legal impediment to giving notice under Regulation 55(2) of the Regulations of the Court (‘Regulation 55’) and incorporates the arguments from the “Prosecution’s Application for Notice to be Given under Regulation 55 (2) on the Accused’s Individual Criminal Responsibility”² (‘First Request’), yet the request fails to address any of the arguments raised by the Arido Defence in its response³ to the First Request which go precisely to the point of whether notice can be given. The Prosecution also states, without providing any support, that its case-presentation merits giving notice. As neither of these two bases can survive scrutiny, and the issuance of notice at this stage in the trial would compromise its fairness, the Prosecution’s request should be rejected.

2. The Arido Defence raises two specific points addressing factual findings the Prosecution claims can be identified in Pre-Trial Chamber II’s (‘Pre-Trial Chamber’) decision confirming the charges against Mr. Arido and the other Accused (‘Confirmation Decision’).⁴ However, the Arido Defence will not go further enter into details regarding the elements of the modes of liability discussed by the Prosecution or respond to the Prosecution’s arguments that the facts as confirmed by the Pre-Trial Chamber support the Prosecution’s proposed re-characterisation. This is because the purpose of the request is not for the Trial Chamber to actually re-characterise the facts now, but to provide notice to the parties that it may do so.

II. PROCEDURAL HISTORY

3. On 11 November 2014, the Pre-Trial Chamber rendered a decision confirming the charges against Mr. Arido and the other Accused.⁵ Mr. Arido stands charged pursuant to Article 70(1)(c) via Article 25(3)(a) or 25(3)(c) of the Rome Statute (‘Statute’); Article 70(1)(b) via Article 25(3)(c) of the Statute; Article 70(1)(a) via 25(3)(c) of the Statute⁶. The Arido Defence recalls that the Pre-Trial Chamber declined to confirm the remainder of the charges.⁷

¹ ICC-01/05-01/13-1538.

² ICC-01/05-01/13-922.

³ ICC-01/05-01/13-951 (‘Arido Response’).

⁴ ICC-01/05-01/13-749.

⁵ *Ibid.*

⁶ *Ibid.*, pp 53-54.

⁷ *Ibid.*, pp 54-55.

4. On 23 April 2015, the Office of the Prosecutor (“Prosecution”) filed a first application requesting the Trial Chamber VII (“Trial Chamber”) to provide notice according to Regulation 55(2)⁸. The Prosecution requests that the facts described in the charges may be re-characterised to accord with other forms of the Accused’s participation under Article 25 of the Rome Statute (“Statute”)⁹.

5. On 15 May 2015, the Arido Defence filed its response, respectfully requesting the rejection of the Prosecution’s application¹⁰.

6. On 15 September 2015, the Trial Chamber rejected the Prosecution’s request, holding that “the Prosecution did not provide any exceptional circumstances or any other reasons, nor are they apparent to the Trial Chamber, which justify providing notice at this time”.¹¹

7. On 8 January 2016, the Prosecution filed a second application requesting the Trial Chamber to provide notice according to Regulation 55(2) of the Regulations of the Court (“Second Request”).¹² The same day, the Arido Defence received notice from the Trial Chamber that the deadline to file a response was shortened.¹³

III. SUBMISSIONS

8. As the Second Request is virtually a re-capitulation of its First Request, the Arido Defence therefore re-incorporates the still relevant arguments *mutatis mutandis* raised in its first response.¹⁴

A. Fairness to the Accused

9. On the eve of the Defence case, the Prosecution’s Second Request could be characterised as an ambush which does nothing more than prejudice the Defence. The Arido Defence considers that if the Trial Chamber had thought that the Prosecution’s First Request had merit then it would have issued a notice under its *proprio motu* power. The Accused must have an adequate opportunity to respond to the Prosecution’s case, which was officially closed on 27 November 2015. Since that point the Defence has been obliged to indicate a provisional list of

⁸ ICC-01/09/01/11-922.

⁹ *Ibid.*, para 1.

¹⁰ ICC-01/05-01/13-951, para. 57.

¹¹ ICC-01/05-01/13-1250, para. 11.

¹² ICC-01/05-01/13-1538.

¹³ Email of 8 January 2015, subject line ‘Responses to ICC-01/05-01/13-1538’.

¹⁴ Arido Response, paras 2-56.

witnesses and “disclose all material in its possession which fell under its disclosure obligations”.¹⁵ This request of 8 January 2015 does not respect the minimum guarantees provided to Mr. Arido by Article 67 of the Statute.

10. Though incorporated by reference¹⁶, it bears repeating, in summary and in light of subsequent developments, the Arido Defence’s submissions regarding the various impacts upon fairness that the issuance of a notice under Regulation 55(2) would have. Notice would do irreparable harm to the rights of the Accused and may affect the legitimacy of the verdict. The Arido Defence has been on notice about the four charges and their modes of liability since 11 November 2014. The Prosecution’s request at this stage is akin to moving the goal-posts and is simply distracting from case preparation.

11. Firstly, given that re-characterisation actually only occurs in the judgement, notice would have the effect of casting a shroud of uncertainty over the subsequent proceedings.¹⁷ Effort directed to address the mere possibility of re-characterisation could prejudice efforts to effectively and completely address the charges as they stand.

12. Since the Prosecution First Request, the Arido Defence has requested an Updated Document Containing the Charges and sought leave for appeal of the rejection of that request due to its concerns regarding notice.¹⁸ Furthermore, and notwithstanding that the Trial Chamber has deemed it appropriate for the present case, the effect of the Chamber’s decision to defer “its assessment of the admissibility of evidence until deliberating its judgment”¹⁹ is to introduce uncertainty into the process as parties are left unsure of the status of the majority of the evidence that has been ‘submitted’. Thus, notice under Regulation 55 would compound what the defence has already considered other forms of uncertainty about the present case.

13. Furthermore, particularly with regards to Mr. Arido’s first charge²⁰, the Prosecution’s request that notice be given that Mr. Arido’s charges under Articles 70(1)(b) and Article 70(1)(c) may be re-characterised pursuant to Article 25(3)(a) (direct co-perpetration) and that all charges under Article 70(1)(a), (b), and (c) be re-characterised pursuant to Article 25(3)(d) certainly pushes the boundaries of legal certainty into the possibly absurd.

¹⁵ ICC-01/05-01/13-1450.

¹⁶ See Arido Response, paras 43-53.

¹⁷ *Ibid.*, paras. 46-47.

¹⁸ ICC-01/05-01/13-940-Conf and ICC-01/05-01/13-1089 respectively.

¹⁹ ICC-01/05-01/13-1285, para 9.

²⁰ ICC-01/05-01/13-749, p. 53 (v).

14. Mr. Arido's first charge and second charge are in the alternative. The Prosecution Second Request²¹ both may render the notion of alternative charging redundant – as both alternatives would now be subject to two identical modes of liability – and certainly leads to a situation where the Arido Defence must put forward a defence against a charge that potentially encompasses the majority of modes of liability in Article 25(3).

15. Secondly, the effect of notice may add time to the trial. ICC Judges sitting on appeals have recognised the possibility of this.²² If notice is given at this stage, it will likely lead to delays in the preparation for the Defence case and will add time to examination and cross-examination of the defence witnesses.²³ Furthermore, a subsequent re-characterisation of the charges would create a right under Regulation 55(3)(b) for the defence to recall witnesses, which cannot be an excluded possibility given the quite different nature of participation proposed by the Prosecution.

B. The claim that there are no legal obstacles to considering its request is incorrect

16. The Prosecution claims – on the basis of recent Appeals jurisprudence – that there are no legal or procedural obstacles to issuing a notice under Regulation 55²⁴; however, the failure of the Prosecution to grapple with the arguments raised in the Arido Response can raise two barriers to the Trial Chamber granting notice.

17. *The first barrier concerns the application of Regulation 55 in light of the ICC jurisprudence.* Firstly, according to the recent Appeals Chamber decision to which the Prosecution refers, the Appeals Chamber, “does not accept that a change in the narrative exceeds *per se* the facts and circumstances described in the charges”²⁵ yet it is clear that if the Pre-Trial Chamber rejects a fact, then such a fact cannot be relied upon for the purpose of notice or ultimately re-characterisation.²⁶ Secondly, the same judgement makes clear that a Trial Chamber should not give notice if the Chamber cannot fit the facts and circumstances found in the Confirmation Decision to the candidate modes of liability.²⁷ These two propositions are two sides of the same coin. If a fact has been rejected, then a Trial Chamber is precluded from relying upon it to give notice of a possible re-characterisation under Regulation 55. Many of the arguments raised by the

²¹ Second Request, para. 7.

²² ICC-01/04-01/07-3363, Dissenting Opinion of Judge Tarfusser, para. 6 and ICC-01/04-01/06-2205, para. 86 as cited in the Arido Response para. 48.

²³ Arido Response, para. 50.

²⁴ Second Request, paras 3-5.

²⁵ ICC-02/11-01/15-369, para. 70 quoting ICC-01/04-01/07-3363 (OA 13), para. 58.

²⁶ *Ibid.*, para. 71.

²⁷ *Ibid.*, paras 2 and 32.

Arido Defence in its first response go precisely to these two legal findings of the Appeals Chamber.

18. Firstly, as previously submitted and incorporated by reference²⁸, the Pre-Trial Chamber rejected several aspects of the Prosecution's case. Most notably, the Pre-Trial Chamber explicitly rejected the Prosecution's characterisation of the alleged acts and conduct and in doing so significantly reduced the live charges in the case. The Pre-Trial Chamber did not accept the Prosecutor's legal characterisation of the facts concerning the role of the Suspects under article 25 (3) (a) (indirect co-perpetration) and article 25 (3) (d). As such the Pre-Trial Chamber does not consider the modes of liability "contribution in any other way" as set out in article 25(3)(d) of the Statute applicable to the present case.²⁹ While the Gbagbo Appeals Judgement to which the Prosecution refers does not preclude re-instatement of modes of liability. It is submitted, that the forcefulness with which Pre-Trial Chamber rejected certain modes implicitly, and in some cases explicitly, rejected the facts associated with these charges and deprives the Trial Chamber of the basis to find that notice is appropriate.

19. Moreover, the Pre-Trial Chamber explicitly rejected the notion of a "common plan".³⁰ The Pre-Trial Chamber did not accept "the Prosecutor's view that the Suspects participated in a Common Plan as indirect co-perpetrators to defend Mr Bemba in the Main Case".

20. The Prosecution submits that there is no semantic difference between a 'common plan' and an 'overall strategy'. These two phrases are not synonymous. More importantly, the Prosecution's argument overlooks the fact that the Confirmation Decision was taken by Professional judges. It would be surprising indeed if, in addition to having explicitly rejected modes of liability, the Pre-Trial Chamber would inadvertently fail to make use of what is becoming a term of art at the ICC in favour of a less clear set of words. The most compelling and simple conclusion is that the different choice of words was intentional and intended to signify a different set of alleged facts and circumstances. This rejection thus, removes a critical basis of the Prosecution's argument for notice to be given.

21. Secondly, the Prosecution has failed to address Arido Defence arguments that go to the scope of the facts and circumstances. Regardless of its semantic meaning, as previously submitted and incorporated by reference, Mr Arido was explicitly excluded from the "overall strategy" by

²⁸ Arido Response, paras 6-9.

²⁹ *Ibid.*, para. 36.

³⁰ *Ibid.*, paras 14-17 for a full account.

the Pre-Trial Chamber.³¹ When discussing the “purported overall strategy of defending Mr. Bemba against the charges in the Main Case by means which included the commission of offences against the administration of justice”, the Pre-Trial Chamber noted that “while Mr Bemba, Mr Kilolo and Mr Mangenda played an essential role in the design and implementation of the overall strategy as referred to above, the involvement of Mr Babala and Mr Arido is more limited”.³² It explicitly excluded Mr. Arido (as well as Mr. Babala) from the participation in this “strategy”, stating that “Mr Bemba, as the ultimate beneficiary, was the coordinator of the offences; Mr Kilolo, as lead counsel in the Main Case, was mainly in charge of the implementation of the overall strategy, while Mr Mangenda, as case manager, was liaising between Mr Kilolo and Mr Bemba.”³³

22. If the Trial Chamber finds ambiguity with regards to the facts related to Mr. Arido that have been confirmed or rejected, clarification can be found by reference to the existence of Mr. Arido’s alternative charges.³⁴ This is a pertinent indication of the continuum of factual scenarios that the Pre-Trial Chamber considered to be demonstrated by the evidence.

23. *The second barrier concerns the permissible forms of charges under the Rome Statute.* The Prosecution has not addressed the Arido Defence claim that the modes of liability proposed by the Prosecution do not fall within the scope of Article 70. As previously described more fully in the Arido Response and incorporated by reference,³⁵ Regulation 55 was adopted with the situation of war crimes and crimes against humanity in mind, and that the modes of responsibility listed therein cannot all apply to Article 70 cases, which are of a very distinct character and of a lower complexity level. It is submitted, that only the simple modes of participation, namely commission and accomplice liability, apply to Article 70 offences. More specifically, the Arido Defence submits that common plan liability, or other extended forms of co-perpetration, cannot be used in respect of Article 70 offences. This interpretation is supported by both the Pre-Trial Chamber’s approach³⁶ and the practice of the *ad-hoc* tribunals.³⁷

³¹ *Ibid.*, para. 10 referring to ICC-01/05-01/13-749, para. 51.

³² *Ibid.*, para. 52.

³³ *Ibid.*

³⁴ ICC-01/05-01/13-749, p. 53.

³⁵ Arido Response, paras 27-31.

³⁶ *Ibid.*, para. 29.

³⁷ *Ibid.*, para. 30.

C. The Second Request asserts without support that its case-presentation merits giving notice under Regulation 55 and should thus be rejected

24. The Prosecution asserts that notice is merited at this point due to the reception by the Trial Chamber of a large volume of information which is either testimonial or material deemed “formally submitted”.³⁸ However, the Prosecution fails to explain why or how this vast array of information is relevant to its request, and this effectively leaves the Trial Chamber to guess, speculate, or search for which evidence the Prosecution thinks is adequate to prompt a Regulation 55 notice at this time. The lack of substance to this limb of its request renders it less an argument, and more an invitation for the Trial Chamber to consider the trial to date like a Rorschach inkblot to see what they see.

25. Firstly, requesting that the Trial Chamber issue a Regulation 55 notice on the basis of ‘formally submitted evidence’ places the horse before the cart. The Trial Chamber made clear that it will not examine the admissibility of the evidence until the judgement. To ask the Chamber to issue a notice on the basis of this submitted material is tantamount to requesting the Chamber to undertake this process. This is because, logically speaking, the only way that the material to which the Prosecution refers could provide any additional support to the argument for giving notice is if it was found to be authentic, reliable, relevant, and so on. In short, the Chamber’s “Decision on Prosecution Requests for Admission of Documentary Evidence”³⁹ would appear to procedurally preclude it considering this material for the purposes of Regulation 55 at this stage.

26. Secondly, in its application, the Prosecution has not even ventured to identify which excerpts or episodes in the approximately 100 hours of testimony between late September and early November 2015 are relevant. It is not sufficient to invoke testimony without comment or qualification as a basis for re-instatement of a more serious mode of liability. The Prosecution’s failure to discuss this information prejudices Mr. Aridos’s ability to respond.

27. It can also be added, that the testimonial record impacts upon the arguments raised by the Prosecution in its First Request regarding the facts and circumstances made out in the Confirmation of Charges Decision. It seems at least possible that some of the facts and circumstances described in the confirmation decision have been undermined or altered based upon the testimony of witnesses. It would then be artificial – and perhaps verging on improper – to rely upon these textual facts as supporting a re-characterisation, when subsequent *oral*

³⁸ ICC-01/05-01/13-1538, para. 6.

³⁹ ICC-01/05-01/13-1285.

testimony points in a different direction. If the Prosecution's position is that certain testimonial episodes further support particular facts and circumstances in the Confirmation Decision which in turn justify a re-characterisation, then the burden should be upon the Prosecution to give notice of these episodes so that the Defence is able to provide a response or alternative interpretations.

28. Thus, for the above reasons, it is submitted that so far as the Prosecution request is based upon the submitted evidence and recent testimony, it should be rejected for a lack of explanation as to which evidence is relevant to which re-characterisation, and moreover how its request is procedurally prudent at this stage.

D. Observations on the procedure to be followed should the Trial Chamber decide to grant the Prosecution's Request

29. As previously submitted and still relevant⁴⁰, should the Trial Chamber consider issuing notice under Regulation 55(2), according to Appeals Chamber jurisprudence, such notice should contain *precise* references to the facts and circumstances of the Confirmation of Charges Decision that the Trial Chamber would take into account for the change in the characterisation, as well as provide *details* as to the elements of the offences the inclusion of which is contemplated. It should further indicate how these elements are covered by the facts and circumstances in the Confirmation Decision.

30. It is also textually clear from Regulation 55(3)(a) that the Accused must have adequate time and facilities for the effective preparation of his or her defence – if necessary involving a suspension of hearings – and that the Chamber must give the Accused an opportunity to make submissions. These submissions can address the scope of the new modes of liability and also the measures necessary to safeguard the Accused's Article 67 rights. Having received these submissions, as the Chamber's obligation to ensure fairness under Article 64(2) is continuous, it follows and is submitted that the Trial Chamber will be obliged to consider whether it remains possible for the Accused to effectively prepare their defence – by for example conducting further investigations – and to have a fair trial. Such a consideration would, it is submitted, involve a consideration of whether the Accused will experience prejudice and whether any measures can sufficiently mitigate this prejudice.

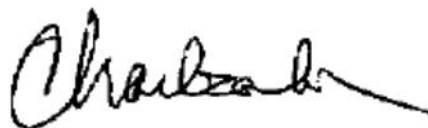
⁴⁰ Arido Response, paras 54-56.

IV. CONCLUSION

31. The Trial Chamber previously rejected the Prosecutions First Request. To conclude, the Prosecution's request appears to be little more than a reminder to the Trial Chamber that is under an obligation to give notice under Regulation 55 where appropriate. The policy arguments raised against re-characterisation are still relevant.⁴¹ In light of the above, the Arido Defence respectfully requests the Trial Chamber to reject the Prosecution's Request and order that Regulation 55 does not apply in the present case.

32. *Alternatively*, should the Trial Chamber grant the Second Request, the Arido Defence requests permission to present submissions regarding the modes of liability, the facts allegedly supporting the proposed re-characterisation, and other pertinent matters if it so chooses. Further, the Arido Defence requests that the Trial Chamber include the following information in any notice:

- a. Precise references to the facts and circumstances of the Confirmation of Charges Decision that the Trial Chamber would take into account for the change in the characterisation;
- b. The elements of the offences the inclusion of which is contemplated; and
- c. A clear indication as to how the Trial Chamber considers how these elements were covered by the facts and circumstances described in the Decision on the Confirmation of the Charges.



Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 14th Day of January 2016

The Hague, The Netherlands

⁴¹ Arido Response, paras 32-42.