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Date: **10 February 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 'Prosecution's Motion to Exclude the Testimony of
Witness D23-P-0001 and the Submission of his Report' (ICC-01/05-01/13-1605)**

Source: Counsel for Narcisse Arido

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

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I. INTRODUCTION

1. The Prosecution's request to exclude the testimony of the Mangenda Defence's expert should be rejected as it violates fair trial rights. It fails to make out its arguments and moreover offers an interpretation of the Statute that would unduly fetter the Court's protective role vis-à-vis human rights. Given that evidence generated in Austria concern Mr. Arido, the proposed expert testimony may directly impact upon his case.

II. PROCEDURAL HISTORY

2. On 3 November 2015, the Single Judge issued directions on the defence presentation of evidence, setting 7 January 2016 as the date by which each defence team must submit its final list of witnesses, summaries of the anticipated testimony, and list of evidence.¹ Subsequently, this date was postponed by email to 21 January 2016.

3. On 3 February 2016, the Mangenda Defence, pursuant to the extension previously granted by the Trial Chamber, submitted a summary of the proposed expert testimony of witness D23-P-0001.²

4. Following this, on 8 February 2016, the Prosecution filed its motion to exclude the report and anticipated testimony of Mangenda Defence witness D23-P-0001 ('the Request'). According to the Prosecution, the Mangenda Defence, through the purported witness on Austrian law, seeks to elicit evidence that is *prima facie* inadmissible.³

III. SUBMISSIONS

A. The Prosecution's position is either contradictory or unduly narrows the scope of Article 69(7)

5. The Prosecution argues that the violation of national law should not be relevant to determine the admissibility of evidence under Article 69(7) of the Statute. This position is supported by reference to a Lubanga decision where the Chamber, in order to determine the admissibility of evidences gathered during a search and seizures in Congo, disregarded a decision of a Congolese Court that found a violation of Congolese law. The Prosecution states:

¹ ICC-01/05-01/13-1450.

² ICC-01/05-01/13-1592.

³ ICC-01/05-01/13-1605.

The [Lubanga] defence even presented a decision by a Congolese court ruling that the search and seizure was unlawful. However, the Lubanga Chamber rejected that argument, noting that it was “not bound by the decisions of national courts on evidentiary matters” and “the mere fact that a Congolese court has ruled on the unlawfulness of the search and seizure conducted by the national authorities cannot be considered binding on the Court.”⁴

6. Having put this forward, the Prosecution then goes on to state that:

While article 69(7) may require a determination on national law such as where, as presumably suggested here, Mangenda asserts a violation to the right to privacy, it does not ipso facto permit the Chamber to make determinations on national law.⁵

7. However the Prosecution continues:

To the extent Mangenda may *wish to advance the violation of national laws toward establishing a violation of article 69(7)*, it is free to pursue such a determination before the relevant national authorities. For instance, in circumstances, like here, where a claim under article 69(7) may be dependent on a determination of national law, the burden is on Mangenda to obtain that determination from the relevant national authorities. (emphasis added)⁶

8. Thus, after first noting as per Lubanga that the relevance of compliance with national law is irrelevant, the Prosecution suggests the Mangenda Defence to seize the National Court so as to establish a violation of Article 69(7). In such situation, the Prosecution’s position can conceivably be understood in two ways.

9. Either, the Prosecution’s position is that a violation of Article 69(7) is dependent on the recognition of a violation of national law. In such a case, the Prosecution’s submissions would directly contradict itself. Indeed, it initially argues that violation of national law even when recognized by a national court is useless for the purpose of a claim under Article 69(7). Such a paradox would seem to deprive the Mangenda Defence from challenging the evidence gathered in Austria.

10. However, if the Prosecution’s position is that domestic law can be considered only where a Defence team has obtained a ruling of non-compliance with international human rights law from a national court, then its aim seems to be to neuter the role of Article 69(7) and this understanding should be disregarded.

⁴ ICC-01/05-01/13-1605, para. 4.

⁵ *Ibid.*, para. 13.

⁶ *Ibid.*, para. 14.

11. Firstly, the process of obtaining such a ruling can be extremely time intensive – this would preclude scrutiny of the human rights violations of most evidence obtained at the ICC. Secondly, and more fundamentally, not all national courts are competent to rule on the application of international human rights law.⁷ This would place evaluation of the means and methods of the obtaining of evidence beyond a regime of accountability in circumstances where evidence was collected in countries where courts lacked this competence.

12. Both understanding would lead to the same situation, which is that had the evidences been gathered by national authorities under national law, the Defence would not have any effective means to challenge the admissibility of such evidence through an Article 69(7) claim. While this should be rejected on its face, it might be added that such a regime would cut against the principle of effectiveness in human rights law which, it is submitted, enters the courts legal framework through Article 21(3).

B. Testimony regarding national law is not *prima facie* irrelevant

13. The Prosecution asserts that the anticipated testimony of the Mangenda Defence witness is *prima facie* irrelevant due to a plain reading of Article 69(8). While a reading of Article 69(8) might appear to preclude a discussion of national law, the presumption that examination of this Article could create can be easily rebutted or may not exist at all.

14. Many international human rights standards are only meaningful by reference to national law. Indeed, international human rights instruments require that infringement of certain rights shall be specifically prescribed by law.⁸ There is thus an inescapable interaction between national law and international human rights law.

15. The fact that the Prosecution refers to two decisions that have been taken at the ICC regarding compliance with international human rights law in the collection of evidence cannot be taken to mean that out of the wide range of international human rights at no point will national law be relevant to a consideration of whether an action or evidence was taken in contravention of international human rights law.

⁷ See, for example, the Canadian Supreme Court case *R. v. Hape*, [2007] 2 SCR 292, 2007 SCC 26 (CanLII), paras 54-56 which indicate that international law can inform the interpretation of laws, but not be directly applicable. Available at: <http://canlii.ca/t/1rq5n>.

⁸ See, for example, European Convention of Human Rights Article 5 (Right to liberty), Article 8 (right to respect of private life and family life), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression), or Article 11 (freedom of assembly and association); See also The International Convention on Civil and Political Rights Article 12 (Right to liberty), Article 17 (right to privacy), Article 18 (freedom of religion), or Article 22 (freedom of association).

16. While the ICC understandably treads carefully in this domain, an examination of non-compliance with international human rights, such as occurred in Lubanga, may be an indirect examination of national law or practice and consideration of the domestic context is, by extension, relevant. This is even clear from the Prosecution's Request where it takes its position in part by indirectly appealing to compliance within three national systems.⁹

17. Due to this interaction, consideration of the Mangenda Defence's expert witness may assist Trial Chamber VII in assessing the admissibility of evidence – or other issues – at the judgement and it is submitted that it cannot be *prima facie* excluded at this stage.

IV. CONCLUSION

18. For the reasons above, the Arido Defence respectfully requests Trial Chamber VII to reject the Prosecution's Request.



Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 10th Day of February 2016

The Hague, The Netherlands

⁹ ICC-01/05-01/13-1605, paras 7, 13, and 15.