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

Date: **4 May 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 Request for Leave to Appeal the Trial Chamber VII's Decision on
Requests to Exclude Western Union Documents and Other Evidence Pursuant to
Article 69(7)**

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 Arido Defence hereby seeks leave to appeal the Trial Chamber VII's (the 'Chamber') decision rejecting its request to exclude, *inter alia*, Western Union documents and Mr. Arido's statements to French authorities (the 'Decision') pursuant to Article 82(1)(d) of the Rome Statute (the 'Statute') and Rule 155(1) of the Rules of Procedure and Evidence ('RPE').

2. The Arido Defence submits that the three requirements for granting interlocutory appeal pursuant to Article 82(1)(d) of the Statute are satisfied in respect of the appealable issues hereinafter identified. *First*, each of the issues for which appellate resolution is sought arises out of the Decision, and each is "essential for the determination of the Decision's correctness." *Second*, the Decision directly concerns Mr. Arido's right to a fair trial, as well as, the outcome of proceedings. *Third*, immediate appellate resolution will materially advance the proceedings by removing doubts about the issues that are of imminent importance to the Arido Defence's client.

II. PROCEDURAL HISTORY

3. On 8 April 2016, the Arido Defence filed a motion requesting that the Chamber declares the Western Union documents, two interviews conducted with Mr. Arido in France, and private emails of Mr. Arido inadmissible pursuant to Article 69(7) of the Statute.¹

4. On 29 April 2016, the Chamber, in its Decision, found the Western Union documents, Mr. Arido's statements to French authorities and other evidence admissible pursuant to Article 69(7) of the Statute. The Arido Defence request to exclude Mr. Arido's private emails was found moot.²

III. APPLICABLE LAW

5. Pursuant to Article 82(1)(d) of the 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 relevant Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. The 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".³ The Chamber is vested with the power to certify the

¹ ICC-01/05-01/13-1795-Conf.

² ICC-01/05-01/13-1854.

³ ICC-01/04-168, para. 19.

existence of an appealable issue;⁴ however, when determining whether leave to appeal should be granted, the 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.⁵

6. According to Rule 155(1) of the 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 to the Chamber that gave the decision. The application for leave to appeal 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.⁶

7. 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, nor merely a question over which there is disagreement or conflicting opinion".⁷ 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".⁸ 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.⁹ In other words, the issue "must be one likely to have repercussions on either of these two elements of justice".¹⁰

8. The Appeals Chamber has defined the term 'fair' as being associated with the norms of a fair trial and corresponding human rights, as per Articles 64(2) and 67(1) of the Statute.¹¹ In particular, it noted that the "expeditious conduct of the proceedings in one form or another constitutes an attribute to a fair trial".¹² The term 'proceedings' extends to proceedings prior and subsequent to the current proceedings.¹³

9. 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

⁴ ICC-01/04-168, para. 20.

⁵ See e.g. ICC-01/09-02/11-253, para. 28.

⁶ Regulation 155(2) of the RoC.

⁷ ICC-01/04-168, para. 9.

⁸ *Ibid.*

⁹ *Ibid.*, para. 10.

¹⁰ *Ibid.*

¹¹ *Ibid.*, para. 11.

¹² *Ibid.*

¹³ *Ibid.*, para.12.

trial.¹⁴ The 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.¹⁵

10. 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”.¹⁶ 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 hereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar *[sic]* the outcome of the trial”.¹⁷ The solving of the issue by the Appeals Chamber is aimed to “ensure that the proceedings follow the right course”.¹⁸

11. 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.¹⁹ The Arido Defence submits that the same reasoning applies in the present case.

IV. SUBMISSIONS

A. The Issues are “Appealable Issues” under Article 82(1)(d):

12. The Arido Defence seeks to leave to appeal the following issues arising from the Chamber’s Decision, namely:

- i. Whether the Chamber erred in failing to provide and substantiate grounds for establishing the minimum threshold of ‘manifestly unlawful’;
- ii. Whether the Chamber erred in failing to find that the misrepresentation of the facts of Mr. Arido being suspected of Genocide violated Mr. Arido’s right not to be subjected

¹⁴ ICC-01/04-168, para. 13.

¹⁵ *Ibid.*, para. 13.

¹⁶ *Ibid.*, paras 14-15.

¹⁷ *Ibid.*, para. 14.

¹⁸ *Ibid.*, para. 15.

¹⁹ ICC-01/09-02/11-253, para. 24.

to arbitrary or unlawful interference with his privacy and unlawful attacks on his honour and reputation;

- iii. Whether the Chamber erred by failing to provide any reasoned opinion about the Prosecution's breach of its duties and powers by not fully respecting "the rights of persons arising under the Statute" pursuant to Article 54(1)(c) of the Statute;
- iv. Whether the Chamber erred in failing to decide and provide reasons about the application of Rule 111 of the RPE with respect to Mr. Arido's French Statements.

13. The *first* issue affects several aspects of the Decision. The Chamber held that when reviewing the application of national law, it will engage "with national law solely to determine if something so manifestly unlawful occurred that it amounts to a violations of the Statute or internationally recognised human rights".²⁰ In other words, if any conduct at national level does not satisfy the high standard of 'manifestly unlawful', the Chamber will not examine whether an infringement of domestic rules of procedure transpired.

14. Considering the importance of the issue,²¹ the Chamber does not submit any reasoning as to how it arrived at, or applied, such a high threshold. The Decision also does not provide any references in support of the threshold of 'manifestly unlawful'. The absence of reasons is an issue that arises from the Decision and is connected with findings set out in paragraphs 34, 35, 51, and 59 through 71 that were essential to the ultimate disposition.²²

15. In light of the above, the Arido Defence submits that this issue is inextricably connected to the Chamber's ultimate determination of the requests, and thus, merits to be appealed and substantiated by a reasoned opinion.

16. The *second* issue concerns the correctness of the Chamber's finding in paragraph 52 of the Decision the deals with the misrepresentation of facts that Mr. Arido was suspected of Genocide according to the title of the first order of the Austrian Authorities. Accordingly, the Chamber found that there is not "any indication that the order was based on a misrepresentation of facts or that the Austrian authorities were misled".²³

²⁰ ICC-01/05-01/13-1854, para. 34.

²¹ *Ibid.*, para. 61.

²² *Ibid.*

²³ *Ibid.*, para. 52.

17. In that regard, the Arido Defence submits that the misrepresentation of the facts of Mr. Arido being suspected of Genocide violated Mr. Arido's right not to be subjected to arbitrary or unlawful interference with his privacy and unlawful attacks on his honour and reputation pursuant to, namely, Article 17 of the International Covenant on Civil and Political Rights ('ICCPR') and Article 12 of the United Nations Declaration of Human Rights ('UNDHR').²⁴

18. The Arido Defence states that this issue arises from the Decision, and leaves undetermined the alleged violations of Mr. Arido's rights as an accused, and thus merits being resolved pursuant to Article 64(2) and of the Statute.

19. The *third* issue concerns the Chamber's error in not addressing whether the Prosecution breached its duties and powers by not fully respecting "the rights of persons arising under the Statute" pursuant to Article 54(1)(c) of the Statute. The absence of reasoning is an issue that arises from the Decision and is connected with findings set out in paragraph 52 that were essential to the ultimate disposition of Mr. Arido's fundamental human rights.²⁵

20. The Arido Defence submits that the Prosecution was obliged to advise the Austrian authorities about the misrepresentation of facts that Mr. Arido was suspected of Genocide according to the title of the first order of the Austrian authorities. Even though the Prosecution maintained its recurring contact with the Austrian authorities, it never raised that the misrepresentation of facts criminalises Mr. Arido for a serious crime, which he never committed, and that may potentially cause major obstacles in his personal and/or professional endeavours.

21. The *fourth* issue affects the Chamber's Decision on the exclusion of Mr. Arido's statements to French authorities. It concerns the Chamber's failure to decide on the alleged violation of Rule 111 of the RPE with respect to Mr. Arido's French statements. The absence of a decision is an issue that emerges from the Decision and is connected with findings in paragraphs 75 and 76 that were essential to the ultimate disposition of the exclusion of Mr. Arido's French statements.²⁶

22. In that regard, the Arido Defence submits that this issue is inextricably connected to the Chamber's ultimate determination of the Arido Defence's request on exclusion of Mr. Arido's French interviews, and thus, merits to be appealed and substantiated by a reasoned opinion.

²⁴ See ICC-01/05-01/13-1795-Conf, para. 44.

²⁵ ICC-01/05-01/13-1854, para. 52.

²⁶ *Ibid.*, paras 75-76.

B. The Appealable Issues Affect the Fair and Expeditious Conduct of Proceedings or the Outcome of the Trial

23. As stated above, the Arido Defence wishes to emphasise that when determining whether a request for leave to appeal should be granted, the 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.²⁷

24. The Arido Defence submits that leaving the ‘Appealable Issues’ unresolved and unsubstantiated by a reasoned opinion would significantly affect the fair and expeditious conduct of the proceedings.

25. The ‘fair conduct of proceedings’ encompasses the assurance that proceedings are conducted in accordance with international human rights and the rights guaranteed in the Statute. Admission of the evidence obtained in violation of such rights necessarily affects those rights, as well as the fairness of the proceedings in which the information is admitted.

26. Considering that the Western Union documents and Mr. Arido’s statements to French authorities are an essential part of the charges against Mr. Arido *et al.*, the admission or not of such materials is susceptible to significantly affect the outcome of the trial.

27. In other words, if leave is granted and the appeal ultimately successful, reversal of the Decision may lead to the exclusion of essential evidence found to have been obtained in violations of both the Statute and international human rights standards. This could, self-evidently, have an impact on the outcome of the trial.

C. The Immediate Resolution of the Appealable Issues May Materially Advance the Proceedings

28. 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 actions along the right lines”, which “provides a safety net for the integrity of the proceedings”.²⁸ In the present case, there is no such ‘safety net’ since the Decision deals with the fundamental rights of Mr. Arido, and may be affected by errors which ought to be resolved by the Appeals Chamber.

²⁷ See e.g. ICC-01/09-02/11-253, para. 28.

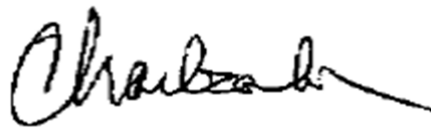
²⁸ ICC-01/04-168, para. 15.

29. In light of the fact that the Trial Chamber VII established the deadline for Closing Statements on 24 May 2016 and for Closing Arguments on 31 May 2016,²⁹ the immediate and urgent resolution of the above-mentioned issues by the Appeals Chamber will materially advance the proceedings. If the appealable issues are resolved now, they may not have to be raised by the Arido Defence in the Closing Statements and during the Closing Arguments, which may potentially result in streamlining the Trial Judgement.

30. The correctness of this important Decision can be adjudicated on an interlocutory basis without causing any interruption to trial proceedings whatsoever. Under this circumstances, granting an interlocutory appeal will ensure that the case proceedings are on proper foundations.

V. CONCLUSION

31. In light of the above, the Arido Defence respectfully requests leave to appeal the Trial Chamber VII's Decision on Requests to Exclude Western Union Documents and Other Evidence Pursuant to Article 69(7).



Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 4 Day of May 2016

Washington D.C., The United States of America

²⁹ ICC-01/05-01/13-1859, para. 6.