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Date: **6 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
"Decision on Outstanding Evidentiary Applications" (ICC-01/05-01/13-1858)**

Source: Counsel for Narcisse Arido

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I. INTRODUCTION

1. The Arido Defence hereby seeks leave to appeal Trial Chamber VII's ('Trial Chamber') "Decision on Outstanding Evidentiary Applications" ('Impugned Decision')¹.

2. The Trial Chamber found that two Prosecution reports² and one hand-written note³ submitted by the Arido Defence should have been formally submitted through Rule 68 of the Rules of Procedure and Evidence ('RPE'). Thus arises the issue of *the precise scope of 'prior recorded testimony' in Rule 68 RPE and also specifically whether this includes material created in other contexts and for other purposes* as an appealable issues within the meaning of Article 82(1)(d) of the Statute.

II. APPLICABLE LAW

1. 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".⁴ The Chamber is vested with the power to certify the existence of an appealable issue;⁵ 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.⁶

2. 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.⁷

3. 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

¹ ICC-01/05-01/13-1858.

² CAR-OTP-0072-0476 and CAR-OTP-0084-0087.

³ CAR-D24-0003-0054.

⁴ ICC-01/04-168, para. 19.

⁵ ICC-01/04-168, para. 20.

⁶ See e.g. ICC-01/09-02/11-253, para. 28.

⁷ Regulation 155(2) of the RoC.

its resolution, nor merely a question over which there is disagreement or conflicting opinion”.⁸ 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”.⁹ 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.¹⁰ In other words, the issue “must be one likely to have repercussions on either of these two elements of justice”.¹¹

4. 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.¹² In particular, it noted that the “expeditious conduct of the proceedings in one form or another constitutes an attribute to a fair trial”.¹³ The term ‘proceedings’ extends to proceedings prior and subsequent to the current proceedings.¹⁴

5. 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.¹⁵ 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.¹⁶

6. 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”.¹⁷ 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

⁸ ICC-01/04-168, para. 9.

⁹ *Ibid.*

¹⁰ *Ibid.*, para. 10.

¹¹ *Ibid.*

¹² *Ibid.*, para. 11.

¹³ *Ibid.*

¹⁴ *Ibid.*, para.12.

¹⁵ ICC-01/04-168, para. 13.

¹⁶ *Ibid.*, para. 13.

¹⁷ *Ibid.*, paras 14-15.

fairness of the proceedings or mar *[sic]* the outcome of the trial”.¹⁸ The solving of the issue by the Appeals Chamber is aimed to “ensure that the proceedings follow the right course”.¹⁹

3. 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.²⁰ The Arido Defence submits that the same reasoning applies in the present case.

III. SUBMISSIONS

1. *The issue arises from the Impugned Decision*

4. The two reports are dismissed because “the Arido Defence has not attempted to meet the Rule 68 criteria in relation to these two reports”.²¹ The criteria are relevant because “they qualify as prior recorded testimony under Rule 68 because these report *[sic]* reflect questioning of P-7 in his capacity as a witness in the context of the Main Case proceedings”.²²

5. As regards the hand-written note, the Trial Chamber excluded the submission of this item with the following reasoning:

The third item is a handwritten attestation, dated 10 May 2013, which purports to demonstrate the military background of D-4. Although the Arido Defence does not explain the origins of this note, the Chamber is satisfied from its date and formal tone (despite being handwritten) that this letter was written in the author’s capacity as a witness in the context of the Main Case proceedings. Because the Arido Defence has not attempted to meet the Rule 68 criteria in relation to this note, the Chamber does not recognise its formal submission.²³

6. Thus, the Trial Chamber concludes that the note is an attestation from the Main Case. The standard applied by the Trial Chamber for concluding that the note is a statement within the meaning of Rule 68 is not articulated.

7. While the Impugned Decision does not discuss the standard applied in respects of either the reports or the note, elsewhere in the Impugned Decision the Trial Chamber makes reference to one of its prior decisions on Rule 68²⁴ when applying that standard to materials submitted by

¹⁸ *Ibid.*, para. 14.

¹⁹ *Ibid.*, para. 15.

²⁰ ICC-01/09-02/11-253, para. 24.

²¹ Impugned Decision, para. 30.

²² *Ibid.*

²³ *Ibid.*, para. 31.

²⁴ Impugned Decision, footnote 25 references ICC-01/05-01/13-1478-Red-Corr, paras 32, 34.

the Kilolo Defence.²⁵ The prior decision places a cumulative emphasis on (a) “the person must understand, when providing his or her statement, ‘that he or she is providing information which may be relied upon in the context of legal proceedings’”²⁶ and (b) that “the tendering party wishes to adduce the prior recorded testimony for the truth of its contents.”²⁷

8. There is a qualitative difference between material generated in the context of the present case – that is created for the purposes of proving or disproving disputed issues in the present case – and material generated for the purposes of other proceedings which may be nonetheless probative in the present case. The two reports do not take the form of anything typically considered as prior recorded testimony, rather they are reports of a conversation with a source. From their content it is not clear that P-7 knew that reports of his or her meeting and phone-call would appear in any proceedings.

9. It can also be added that in the context of disclosure obligations under Rule 76 of the RPE the Single Judge has taken a more restrictive approach to the concept of ‘statement’ stating “‘prior statements’ within the meaning of Rule 76 are made only when witnesses are questioned about their knowledge *of the case* in the course of its investigation”.²⁸ The disclosure regime around prior recorded testimony – so critical to a fair and effective regime – was limited by the Single Judge to only those generated in the context of the present case. This divergence of interpretation of the scope of clearly similar subject matter is striking and points to the scope of the meaning of prior recorded testimony within the Rule 68 being an issue.

10. The standard of what does or does not constitute prior recorded testimony as applied is dispositive of the decision, thus if there is any doubt as regards its appropriateness to any of the three items, then the issue arises from the Impugned Decision.

2. *The issues impact upon the outcome of the trial and Appeals Chamber consideration would materially advance the proceedings*

11. While there is no requirement for the Defence to present a case, under Article 67(1)(e) of the Statute the Accused “shall [...] be entitled to [...] present other evidence admissible under this Statute” which is clearly part of a the Accused’s fair trial rights. The correctness of a standard that impacts upon these rights clearly goes the fairness of the trial. D4 is one of the four

²⁵ *Ibid.*, para. 17.

²⁶ ICC-01/05-01/13-1478-Red-Corr, para. 32.

²⁷ *Ibid.*, para. 34.

²⁸ ICC-01/05-01/13-1227, para. 9.

individuals who form the basis of the charges confirmed against Mr. Arido.²⁹ Any evidence that is relevant to the background of those individuals – clearly in dispute in the present case – impacts upon the outcome of the case³⁰ within the terms of Article 82(1)(d).

12. In the present circumstance, ensuring that the issue is addressed comprehensively and conclusively will advance the proceedings. The legal standard goes to the determination of a factual issue. The determination of the issue at this stage in the proceedings – rather than solely at a later stage if it is raised on appeal – renders clarity on points which could be key in a potential Trial Chamber judgement.

IV. CONCLUSION

13. In light of the above, the Arido Defence respectfully seeks leave from Trial Chamber VII to appeal the issue set out in paragraph 2 pursuant to Article 82(1)(d) for the reasons outlined above.



Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 6th Day of May 2016

Washington D.C., United States of America

²⁹ See for example ICC-01/05-01/13-749, para. 90.

³⁰ For example the Prosecution argues in its Pre-Trial Brief that Mr. Arido had “awareness that witnesses who he had introduced to the Defence and who testified to having been members of the CAR armed forces did not have the military background claimed, as admitted in his statement”, ICC-01/05-01/13-1110-Conf, para. 257.