

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

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 Document

**Prosecution's Response to Narcisse Arido's Request for Leave to Appeal the
"Decision on Requests to Exclude Western Union Documents and other Evidence
Pursuant to Article 69(7)"**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr James Stewart
Mr Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi
Mr Steven Sacha Powles

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Michael Gosnell
Mr Arthur Vercken De Vreuschmen

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Roland Azama Shalie Rodoma

Counsel for Narcisse Arido

Mr Charles Achaleke Taku
Ms Beth Lyons

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Section

Other

I. Introduction

1. The Arido Defence's request for leave to appeal¹ the Decision rejecting the Defence Requests to Exclude Western Union Documents and other Evidence under article 69(7) of the Rome Statute² should be dismissed. The Application disregards the exceptional nature of the article 82(1)(d) remedy.³ Moreover, the Application is filed at the penultimate stage of the trial proceedings, when the resolution of issues, if any, is more appropriately left to the imminent final appeal in the case.

2. None of the four issues⁴ advanced in the Application are appealable. Three out of the four Issues do not arise from the Decision: rather, the Defence misreads the Decision. All four Issues are no more than mere contrary opinions: the Defence's reluctance to accept the Chamber's findings does not show appealable errors in article 82(1)(d) terms.

3. Nor does the Application meet the remaining criteria for leave to appeal. It fails to show any significant impact on the fairness and expedition of the proceedings, or the outcome of the trial. Further, a few weeks short of the deadline for filing closing briefs in the case, the Appeals Chamber's intervention is unnecessary. As this Chamber has previously stated and noting the stage of the proceedings, "any potentially reversible error" can be "justly deferred to any final appeal under [a]rticle 81."⁵

¹ ICC-01/05-01/13-1869 ("Application").

² ICC-01/05-01/13-1854 ("Decision").

³ ICC-01/05-01/13-T-10-RED-ENG (open session), p. 11 lns. 3-12, where the Presiding Judge noted that "[w]hile the Chamber is mindful of the rights of the parties to seek legal remedy under [a]rticle 82(1)(d) of the Statute, I would like to remind that such interlocutory appeals are exceptional. And they are not or should not be an automatic reflex as it sometimes appears. They are neither meant to be a hidden application for reconsideration nor a legal tool to express mere disagreement with any of the Chamber decisions. And we all know that it lies in the nature of things that usually at least one party is not completely satisfied with what the Chamber decides. Furthermore, even if we talk about potentially reversible error this may be particular at the stage of proceedings that we have now reached better and justly deferred to any final appeal under [a]rticle 81."

⁴ Here, "Issues".

⁵ See fn. 3.

II. Submissions

4. None of the four Issues raised by the Defence are appealable. They fail to demonstrate “[a]n identifiable subject or topic requiring a decision for its resolution.”⁶ And because several of the Issues emanate from the Defence’s misreading of the Chamber’s findings, they do not even arise from the Decision.

A. The First Issue does not arise from the Decision and is not appealable

5. The First Issue—“[w]hether the Chamber erred in failing to provide and substantiate grounds for establishing the minimum threshold of ‘manifestly unlawful’”⁷—does not arise from the Decision. Although the Chamber made clear its findings and underlying reasons, the Defence’s formulation of this Issue ignores them. Likewise, the First Issue reflects no more than the Defence’s mere disagreement with the Decision. As such, it is not appealable.

6. *First*, the Defence incorrectly claims that the Chamber did “not submit any reasoning as to how it arrived at, or applied such a high threshold.”⁸ To the contrary, Chamber’s Decision is reasoned: it identified the facts relevant to its conclusion.⁹ The Chamber provided reasons as to why it would engage with national law only to the extent necessary to determine if “something so manifestly unlawful occurred that it amounts to a violation of the Statute or internationally recognised human rights.”¹⁰ As is clear from the Decision, the Chamber first ruled that it must, under article 69(7), explore whether a violation of the Statute or internationally recognised human

⁶ See ICC-01/04-168 OA3, para. 9; ICC-02/04-01/05-367, para. 22; ICC-02/05-02/09-267, p. 6; ICC-01/04-01/06-2463, para. 8; ICC-01/09-02/11-27, para. 7. See also ICC-01/04-01/06-1433 OA11 (Partly Dissenting Opinion of Judge Song), para. 4, specifying that “[a] decision ‘involves’ an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.” See also ICC-01/05-01/08-532, para. 17; ICC-02/05-02/09-267, para. 25; ICC-01/04-01/06-1557, para. 30; ICC-01/04-01/07-2035, para. 25; ICC-02/05-03/09-179, para. 27.

⁷ Application, paras. 12(i), 13-15.

⁸ *Contra* Application, para. 14.

⁹ ICC-01/04-01/06-773 OA5, para. 20; ICC-01/04-01/06-774 OA6, para. 30.

¹⁰ Decision, para. 34.

rights occurred.¹¹ It then determined that “[a]n [a]rticle 69(7) inquiry may engage with a discussion of the application of national law, which creates a tension with [a]rticle 69(8) of the Statute.”¹² The Chamber then reasoned that “[t]his tension requires [it] to balance its obligations under [a]rticle 69(7) and (8) of the Statute.”¹³ Accordingly the Chamber found that it would review national law “only to the extent necessary to determine whether a violation occurred under [a]rticle 69(7) of the Statute”¹⁴, *i.e.*, when “something so manifestly unlawful occurred[...].”¹⁵ Indeed, the Chamber even reasoned that “[i]n order to preserve the meaning of [a]rticle 69(8)” and “to maintain the limits on the kinds of violations specified in [a]rticle 69(7)”, infringements of domestic procedure do not *per se* constitute article 69(7) violations, even if such do not accord with the laws of the requested State in Part IX of the Statute.¹⁶ The Defence fails to acknowledge this reasoning, and thus the Issue does not arise from the Decision.

7. *Second*, by contesting the Chamber’s reasoning,¹⁷ the Issue expresses no more than a conflicting opinion, which does not thereby transform it into “[a]n identifiable subject or topic requiring a decision for its resolution.”¹⁸

8. Because the First Issue does not arise from the Decision and is not appealable, it should be dismissed.

B. The Second Issue is not appealable

9. The Second Issue—“[w]hether 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 to arbitrary and unlawful interference with his

¹¹ Decision, para. 33.

¹² Decision, para. 33.

¹³ Decision, para. 34.

¹⁴ Decision, para. 34.

¹⁵ Decision, para. 34.

¹⁶ Decision, para. 40; *see generally* Decision, paras. 32-40.

¹⁷ Application, paras. 13-15.

¹⁸ *See* ICC-01/04-168 OA3, para. 9. *Contra* Application, paras. 14-15.

privacy and unlawful attacks on his honour and reputation”¹⁹—is not appealable. It merely disagrees with the Chamber’s assessment, and seeks to revive a failed argument through this Application.

10. Indeed, the Arido Defence had full opportunity to ventilate their arguments alleging “misrepresentation” in the nature of the crime listed in the Austrian judicial order allowing access to the Western Union records.²⁰ And they did. The Chamber was not persuaded. Rather, it found “[no] indication that the order was based on a misrepresentation of facts or that the Austrian authorities were misled.”²¹ The Austrian authorities referred specifically to the first RFA in their order, and the first RFA clearly explained that “[t]hese money transfers could be linked to the commission of crimes under the jurisdiction of the Court *such as offenses against the administration of justice.*”²² The Arido Defence’s attempt to re-litigate this issue is unavailing.

11. Because the Second Issue amounts to no more than the Defence’s conflicting opinion, it is not appealable. It should be dismissed.

C. The Third Issue does not arise from the Decision and is not appealable

12. The Third Issue—“[w]hether 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”²³—does not arise from the Decision. Rather, it misreads the Decision, and wrongly assumes that, in requesting the Western Union records, the nature of Arido’s alleged crimes constituted a “misrepresentation”. Moreover, as

¹⁹ Application, para. 12(ii), paras. 16-18.

²⁰ See e.g., ICC-01/05-01/13-1795-Conf (“Arido Defence’s article 69(7) request”), paras. 43-44, 48.

²¹ Decision, para. 52.

²² Decision, para. 52 (emphasis added).

²³ Application, paras. 12(iii), 19-20.

with the Second Issue, it merely disagrees with the Decision, and is thus not appealable.

13. *First*, by claiming that “[t]he Prosecution was obliged to advise the Austrian authorities about the misrepresentation of facts that Mr Arido was suspected of Genocide[...],”²⁴ the Arido Defence disregards the Chamber’s findings that no such “misrepresentation” was indicated.²⁵ Thus, the premise of the argument is unfounded. It is also selective, appearing to confine itself to “the title of the order”, rather than its content.²⁶ The Issue does not therefore arise from the Decision.

14. Moreover, as with the Second Issue, which concerns the same paragraph of the Decision, the Defence merely disagrees with the Chamber’s reasoning.²⁷ However, contrary to the Application,²⁸ the Defence’s dissatisfaction with the findings does not imply an “absence of reasoning” *per se*. Such mere disagreement is not appealable.

15. Because the Third Issue does not arise from the Decision and shows no appealable error, it should be dismissed.

D. The Fourth Issue does not arise from the Decision and is not appealable

16. The Fourth Issue—“[w]hether 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”²⁹—does not arise from the Decision. It is also not appealable. The Defence misstates the Decision and continues to disagree with it.

²⁴ Application, para. 20.

²⁵ Decision, para. 52.

²⁶ Decision, para. 52; *contra* Application, para. 20.

²⁷ See paras. 9-11.

²⁸ Application, para. 19.

²⁹ Application, paras. 12(iv), 21-22.

17. The Defence wrongly claims an “absence of decision” on Arido’s challenge to the admissibility of the statements.³⁰ In fact, there was such a decision³¹—the Application simply fails to acknowledge it. In response to the Arido Defence’s arguments, the Chamber first found that the Arido Defence had previously challenged the admissibility of the statements under *inter alia* article 69(7), and that the Chamber had rejected that challenge.³² The Chamber then found that the Arido Defence had “[failed] to address any of the necessary criteria for reconsideration.”³³ Rather, the Arido Defence had “simply [ignored that the Chamber had rejected its earlier challenge].”³⁴ Even so, the Chamber did not find “any apparent reasons” warranting reconsideration at this stage.³⁵ Therefore, the Chamber’s earlier decision assessing the statements under article 69(7) stands. The Issue is thus unfounded.

18. Likewise, the Defence only expresses a contrary opinion—and in doing so, disregards its own failure to acknowledge the Chamber’s prior decision on the matter.³⁶

19. For these reasons, the Fourth Issue should be dismissed.

E. The remaining article 82(1)(d) criteria are not met

20. Article 82(1)(d) criteria are cumulative: a failure to fulfil any one of the criteria is fatal to any application for leave to appeal.³⁷ The Application fails to advance an appealable Issue as such. The Application should therefore be dismissed, without further consideration.

³⁰ *Contra* Application, para. 21.

³¹ Decision, paras. 75-76.

³² Decision, para. 75, fns. 82-83. *See* ICC-01/05-01/13-1241-Red, paras. 33-58. *See also* ICC-01/05-01/13-1432, paras. 4, 20-28, finding that “[t]he Arido Statements were not obtained by means of a violation of the Statute or internationally recognised human rights.”

³³ Decision, para. 75.

³⁴ Decision, para. 75.

³⁵ Decision, para. 76.

³⁶ *See* Arido Defence’s article 69(7) request, paras. 10-23.

³⁷ ICC-02/11-01/15-117, para. 26. ICC-02/11-01/15-132, para. 5. *See also* ICC-01/05-01/08-3273, para. 8, stating that the article 82(1)(d) criteria is cumulative, and “[f]ailure to fulfil one or more of these criteria is fatal to an application for leave to appeal.”

21. Nevertheless, the Application simply does not meet the remaining article 82(1)(d) criteria.

22. The Defence fails to show any impact on the fair and expeditious conduct of the proceedings, or the outcome of the trial.³⁸ Its hypothetical arguments fail to show that “fairness” may be affected in terms of the “norms of fair trial”, or why, if at all, the trial process should be purged of error to safeguard the integrity of the proceedings.³⁹ More so, as shown above, its arguments on an alleged lack of a reasoned opinion are unfounded.⁴⁰

23. Nor does the Application show any significant impact on the outcome of the trial, in terms of the article 74 decision.⁴¹ Merely because the Western Union records are not excluded under article 69(7),⁴² and thus available to the Chamber to consider, does not yet directly affect the outcome of the trial. To claim otherwise is premature. It would prejudice the outcome of the Chamber’s consideration of the totality of the available evidence in its article 74 decision and unduly speculate on the outcome of the proceedings. Likewise, positing the outcome of the Chamber’s ultimate decision—solely because Arido’s challenge to the admissibility of the statements failed—is equally premature.⁴³

24. Finally, the Appeals Chamber’s immediate resolution of the Issues will not materially advance the proceedings. Contrary to the Application,⁴⁴ an interlocutory appeal at this stage will only delay the proceedings. Nor is the Appeals Chamber’s intervention necessary. No “safety net for the integrity of the proceedings”⁴⁵—through appellate intervention—is needed, particularly when the Defence fails to

³⁸ Application, paras. 23-27.

³⁹ ICC-01/04-168 OA3, para. 11.

⁴⁰ *Contra* Application, para. 24.

⁴¹ ICC-01/05-01/08-1169, para. 35. *Contra* Application, paras. 26-27.

⁴² Decision, paras. 70-71.

⁴³ *Contra* Application, paras. 26-27; Decision, paras. 75-76.

⁴⁴ Application, paras. 28-30.

⁴⁵ ICC-01/04-168 OA3, para. 15. *Contra* Application, para. 28.

demonstrate any article 69(7) violation. Nor is appellate intervention required to “streamline the Trial Judgement.”⁴⁶ The Decision is not “fraught with error to cloud or unravel the judicial process.”⁴⁷ Even if there may be potential for a reversible error, such issues may justly be deferred to the stage of the final appeal,⁴⁸ which is imminent.

III. Relief Requested

25. For these reasons, the Application fails to meet the article 82(1)(d) criteria for leave to appeal. The Application should therefore be dismissed.



Fatou Bensouda, Prosecutor

Dated 6th Day of May 2016
At The Hague, The Netherlands

⁴⁶ *Contra* Application, para. 29.

⁴⁷ ICC-01/04-168 OA3, para. 16.

⁴⁸ ICC-01/05-01/13-T-10-RED-ENG, p. 11, lns. 3-12. *See also* ICC-01/05-01/08-3382, para. 13, stating that “[o]nce a judgement pursuant to Article 74 of the Statute is issued, the Defence is able, if it so wishes, to raise matters that it considers relevant directly with the Appeals Chamber.”