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**International
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Court**



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Date: **10 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 Outstanding Evidentiary Applications"**

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 its request to submit investigative reports relating to P-7 and a handwritten note purporting to show D-4's military background² should be dismissed. The Application is no more than the Arido Defence's attempt to obfuscate its own failure to meet the rule 68 criteria.

2. The sole issue³ advanced is not appealable. The Arido Defence merely disagrees with the Trial Chamber VII ("Chamber")'s assessment. Nor does the Issue show any impact on the fairness and expedition of the proceedings, or the outcome of the trial. Nor is the Appeals Chamber's immediate intervention necessary, once the Chamber has declared the close of evidence in the case.⁴ 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

II. Submissions

A. The Issue is not appealable

3. The Issue—"[t]he 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[...]"⁶—is not appealable. It fails to show "[a]n identifiable subject or topic requiring a decision for its resolution."⁷ Rather, the Arido Defence merely

¹ ICC-01/05-01/13-1871 ("Application").

² ICC-01/05-01/13-1858 ("Decision").

³ Here, "Issue".

⁴ See ICC-01/05-01/13-1859, para. 4, stating that "[p]ursuant to Rule 141(1) of the Rules, the Presiding Judge considers it appropriate to declare that the submission of evidence in this case is closed."

⁵ See ICC-01/05-01/13-T-10-RED-ENG, p. 11, lns. 3-12.

⁶ Application, para. 2 (p. 3), paras. 4-10 (pp. 5-6).

⁷ 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-

disagrees with the Decision, and attempts to deflect from its own failure to properly meet the rule 68 criteria for submitting evidence.

4. The Application merely contests and disagrees with the Chamber's findings rejecting submission of the documents.⁸ In an effort to distract from the earlier inadequate submissions,⁹ it wrongly claims that "[t]he Impugned Decision does not discuss the standard applied in respects of either the reports or the note[...]"¹⁰ The Chamber not only discussed the basis for its consideration of these documents, but also found that the Arido Defence had failed to even discuss the basis.¹¹ For both sets of documents, the Chamber found that the "[t]he Arido Defence has not attempted to meet the Rule 68 criteria[...]"¹²

5. Indeed, the Arido Defence's earlier submissions were sparse.¹³ Yet, an application for leave to appeal is not a vehicle by which to supplement earlier submissions.¹⁴ Nor is it appropriate at this stage to seek to re-interpret the existing law, including findings of a prior decision issued on 12 November 2015.¹⁵ For these reasons, the Issue is not appealable in article 82(1)(d) terms, and should be dismissed.

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.

⁸ Application, paras. 4-10.

⁹ See ICC-01/05-01/13-1789 ("Arido Defence's Bar Table Request"), paras. 8-20 and ICC-01/05-01/13-1789-Conf-AnxA.

¹⁰ *Contra* Application, para. 7.

¹¹ Decision, paras. 30-31.

¹² Decision, paras. 30-31.

¹³ Arido Defence's Bar Table Request, paras. 8-20.

¹⁴ Application, paras. 7-10.

¹⁵ *Contra* Application, paras. 7-10. See also Decision, fn 38, citing ICC-01/05-01/13-1478-Red-Corr, paras. 32, 34.

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

6. Article 82(1)(d) criteria are cumulative: a failure to fulfil any one criterion is fatal to an application for leave to appeal.¹⁶ Because the Issue is not appealable, the Application need not be considered further.

7. Nor does the Application advance any cogent reasons to meet the remaining article 82(1)(d) criteria.

8. *First*, the Defence fails to concretely address any potential impact on the fair and expeditious conduct of the proceedings, or the outcome of the trial.¹⁷ Nor is there any such impact, in terms of the “norms of fair trial”.¹⁸

9. *Second*, there is no significant impact on the outcome of the trial, in terms of the article 74 decision.¹⁹ Merely because the three documents were not considered formally submitted²⁰ does not mean that this would affect the outcome of the trial. Contrary to the Application,²¹ claiming that “[a]ny evidence relating to [D-4’s background] impacts the outcome of the case” is premature and speculative. It prejudices the Chamber’s consideration of the totality of the available evidence before it in its article 74 decision.

10. *Third*, and finally, the Appeals Chamber’s immediate resolution of the Issues will not materially advance the proceedings. To the contrary, an interlocutory appeal will only delay them: the resolution of issues, if any, is more appropriately left to the

¹⁶ 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.”

¹⁷ Application, para. 11.

¹⁸ ICC-01/04-168 OA3, para. 11.

¹⁹ ICC-01/05-01/08-1169, para. 35. *Contra* Application, para. 9.

²⁰ Decision, paras. 25-32.

²¹ Application, para. 11.

imminent final appeal.²² Nor, is the Appeals Chamber's intervention even necessary here. The Appeals Chamber is not an advisory body:²³ it need not address the Arido Defence's speculative concerns, correct its erroneous reading of the Decision, or remedy its failure to properly seek the submission of evidence.

III. Relief Requested

11. The Application should be dismissed. The Issue does not meet the article 82(1)(d) criteria for leave to appeal.



Fatou Bensouda, Prosecutor

Dated 10th Day of May 2016
At The Hague, The Netherlands

²² 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.”

²³ ICC-02/04-01/05-371 OA2, paras. 5, 11 (Diss. Op. Judge Pikis).