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

Date: 19 May 2016

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul C. 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

**Decision on Narcisse Arido's request for leave to appeal the
'Decision on outstanding evidentiary applications'**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

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Mr Charles Achaleke Taku

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

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REGISTRY

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Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber VII ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Article 82(1)(d) of the Rome Statute ('Statute') and Rule 155 of the Rules of Procedure and Evidence, issues the following 'Decision on Narcisse Arido's Request for Leave to Appeal the "Decision on Outstanding Evidentiary Applications"'.

I. Procedural background

1. On 29 April 2016, the Chamber issued a decision on outstanding evidentiary applications ('Impugned Decision').¹
2. On 6 May 2016, the defence for Narcisse Arido ('Arido Defence') submitted a request for leave to appeal the Impugned Decision ('Request')² on the following issue: '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'.³
3. On 10 May 2016, the Prosecution submitted its response to the Request,⁴ submitting that it be dismissed.

II. Submissions

4. The Arido Defence seeks leave to appeal the Impugned Decision to the extent that the Chamber rejected the Arido Defence request to recognise three items as formally submitted into evidence. These items concern two investigative reports summarising telephone calls with Main Case witness P-7 and a handwritten attestation allegedly demonstrating D-4's military background. The items were

¹ Decision on Outstanding Evidentiary Applications, ICC-01/05-01/13-1858.

² Narcisse Arido's Request for Leave to Appeal the "Decision on Outstanding Evidentiary Applications" (ICC-01/15-01/13-1858), ICC-01/05-01/13-1871.

³ Request, ICC-01/05-01/13-1871, para. 2.

⁴ Prosecution's Response to Narcisse Arido's Request for Leave to Appeal the "Decision on Outstanding Evidentiary Applications", ICC-01/05-01/13-1885.

dismissed on the ground that they failed to meet the Rule 68 criteria to introduce prior recorded testimony.⁵

5. The Arido Defence states that the Impugned Decision does not discuss the standard applied in respect of either the reports or the note⁶ and challenges the Chamber's interpretation of the scope of 'prior recorded testimony' under Rule 68.⁷

III. Analysis

6. The Chamber recalls the applicable law relating to Article 82(1)(d) of the Statute as set out in previous decisions.⁸ As formulated by the Appeals Chamber, 'an issue is constituted by a subject the resolution of which is essential for the determination of matters *arising in the judicial cause under examination*.'⁹ Consequently, a subject can only emerge as an appealable issue if it evolves out of the judicial cause under examination, being the Impugned Decision in this case.

7. The issue described in the Request is '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'.¹⁰ However, the disputed interpretation of Rule 68 was actually rendered in a prior decision,¹¹ as noted by both the Arido Defence¹² and the Prosecution.¹³ In this earlier decision, the Chamber interpreted Rule 68 and defined the notion of 'prior recorded

⁵ Impugned Decision, ICC-01/05-01/13-1858, paras 30-31.

⁶ Request, ICC-01/05-01/13-1871, para. 7.

⁷ Request, ICC-01/05-01/13-1871, para. 7.

⁸ Decision on Babala Defence request for leave to appeal ICC-01/05-01/13-800, 27 March 2015, ICC-01/05-01/13-877, paras 5-7; Decision on the Request for Leave to Appeal the Decision ICC-01/05-01/13-893-Red, 28 May 2015, ICC-01/05-01/13-966, paras 12-13; Decision on Babala Defence Request for Leave to Appeal the Decision Related to the Timing of Opening Statements, 16 September 2015, ICC-01/05-01/13-1258, para. 8.

⁹ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, OA 3, para. 9, emphasis added.

¹⁰ Request, ICC-01/05-01/13-1871, para. 2.

¹¹ Corrigendum of public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests, 12 November 2015, ICC-01/05-01/13-1478-Red-Conf, paras 27-34.

¹² Request, ICC-01/05-01/13-1871, para. 7.

¹³ ICC-01/05-01/13-1885, para. 5.

testimony' – this definition was then cited to and applied in the Impugned Decision.¹⁴

8. Therefore, the standard adopted in the Impugned Decision to conclude that the three items fall under the scope of Rule 68 does not arise from the Impugned Decision. It is noted that the Arido Defence did not seek leave to appeal the Chamber's interpretation of Rule 68 when it was first set out, even though the Chamber relied on this interpretation to recognise the formal submission of documents over the Arido Defence's objection.¹⁵
9. Since the criteria of Article 82(1)(d) are cumulative, the conclusion that the request fails to identify an appealable issue arising from the Impugned Decision means that there is no need for the Chamber to further assess the remaining criteria. The relief sought must be rejected.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY
REJECTS the Request.**

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Raul C. Pangalangan

Dated 19 May 2016

At The Hague, The Netherlands

¹⁴ Impugned Decision, ICC-01/05-01/13-1858, para. 17 Fn. 25 and para. 30 Fn. 38.

¹⁵ ICC-01/05-01/13-1478-Red-Corr, paras 42-47.