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**International
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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**

Confidential

**Narcisse Arido's Request for Leave to Appeal
'Decision on Request in Response to Two Austrian Decisions' (ICC-01/05-01/13-1948)**

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 Trial Chamber VII's ("Trial Chamber") "Decision on Request in Response to Two Austrian Decisions"¹ ("Impugned Decision") on three issues:

- a. Whether the evidence collected as a result of the Western Union material should have been excluded;
- b. Whether the Prosecution was at fault in its request for the financial records; and
- c. Whether in light of a finding of a violation, that Article 21 obliges the Trial Chamber to provide an effective remedy.

II. CONFIDENTIALITY

2. Pursuant to Regulation 23bis of the Regulations of the Court ("RoC") and Regulation 24 of the Regulations of the Registry ("RoR"), this request is submitted as confidential since it refers to information in paragraphs 15 and 22 that come from evidence which is confidential. The Arido Defence does not object to the filing being reclassified public.

III. APPLICABLE LAW

3. Pursuant to Article 82(1)(d) of 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 Pre-Trial or Trial 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".² The Pre-Trial Chamber is vested with the power to certify the existence of an appealable issue,³ however when determining whether leave to appeal should be granted, the Pre-Trial Chamber must not justify or defend the

¹ ICC-01/05-01/13-1948.

² ICC-01/04-168, para. 19.

³ *Ibid.*, para. 20.

correctness of its decision, but instead determine whether the issues presented significantly affect the fairness of the proceedings.⁴

4. According to Rule 155(1) of the Rules of Procedure and Evidence ('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. The application for leave to appeal shall state the name and number of the case or situation and 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.⁵

5. 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, not merely a question over which there is disagreement or conflicting opinion".⁶ 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".⁷ 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.⁸ In other words, the issue "must be one likely to have repercussions on either of these two elements of justice".⁹

6. The Appeals Chamber has defined the term "fair" as being associated with the norms of a fair trial and corresponding human rights, as per Article 64(2) and 67(1) of the Statute.¹⁰ In particular, it noted that the "expeditious conduct of the proceedings in one form or another constitutes an attribute to a fair trial".¹¹ The term "proceedings" extends to proceedings prior and subsequent to the current proceedings.¹²

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

⁵ Regulation 155 (2) of the RoC.

⁶ ICC-01/04-168, para. 9.

⁷ *Ibid.*

⁸ *Ibid.*, para. 10.

⁹ *Ibid.*

¹⁰ *Ibid.*, para. 11.

¹¹ *Ibid.*

¹² *Ibid.*, para. 12.

trial.¹³ The Pre-Trial 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.¹⁴

8. 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”.¹⁵ 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 thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar [*sic*] the outcome of the trial”.¹⁶ The solving of the issue by the Appeals Chamber is aimed to “ensure that the proceedings follow the right course”.¹⁷

IV. SUBMISSIONS

A. **Whether the evidence collected as a result of the Western Union material should have been excluded**

9. The Trial Chamber found a violation of the right to privacy¹⁸ and concluded that it did not consider that the violation seriously impacted upon the integrity of proceedings.¹⁹ Yet, in its request for re-consideration, the Arido Defence requested that the evidence collected as a result of the Western Union material should also be excluded.²⁰

10. Though the Chamber may have found that the integrity of the proceedings is not seriously impacted by the collection of the Western Union material, this does not logically and necessarily exclude the possibility that the integrity of the proceedings could be impacted by the collection of other evidence gathered on the basis of a now recognised violation of internationally recognised human rights.

¹³ *Ibid.*, para. 13.

¹⁴ *Ibid.*, para. 13.

¹⁵ *Ibid.*, paras 14-15.

¹⁶ *Ibid.*, para. 14.

¹⁷ *Ibid.*, para. 15.

¹⁸ Impugned Decision, para. 28.

¹⁹ *Ibid.*, para. 38 (“The Chamber considers that the fairness of the trial has been guaranteed in relation to these records, despite the manner in which they were obtained”) and para. 39 (“the infringements to the right of privacy are not so severe as to taint the fairness of the proceedings”).

²⁰ ICC-01/05-01/13-1928-Conf-Corr, para. 28 (c) referring to *inter alia* ICC-01/05-01/13-1854, para. 5. and p. 25.

11. The Trial Chamber did not provide any reasoning as regards the other material. The Trial Chamber thus appears to have excluded a rule – the poison tree doctrine or similar – regarding the exclusion of derivative evidence which was raised. That exclusion rule is present in varying forms within many national systems²¹ and the request was rejected without discussion. The applicability of this rule within the evidential regime of the ICC is thus an issue that arises out of the decision and is constituted by the wider subject of the rules concerning the exclusion of illegally obtained evidence.

12. This issue is especially significant because of the Trial Chamber's rulings in this litigation. In its Decision of 29 April 2016, the Trial Chamber provided as one of the reasons for rejecting the defence motion, that in respect to the Western Union documents, "no violation of an internationally recognized human right has occurred."²² However, in its Decision, 14 July 2016, the Trial Chamber changes its view and concludes that "the internationally recognized right to privacy has been violated." The Trial Chamber tersely explains its change in reasoning, but more importantly, does not discuss the application of legal principles based on this change of position.²³

B. Whether the Prosecution was at fault in its request for the financial record and the evidence relevant to this assessment

13. The Trial Chamber relied heavily upon the lack of fault of the Prosecution in reaching its decision that the integrity of the proceedings was not impacted by the illegality of the acquisition of the Western Union material. Thus, the reasoning as regards whether the Prosecution was at fault is a critical issue at reaching the outcome of the Impugned Decision.

²¹ See *inter alia* from the United States: *Nardone v. United States* 308 U.S. 338 (1939), available at: <https://supreme.justia.com/cases/federal/us/308/338/case.html>, p. 307 ("The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wiretapping was unlawfully employed. Once that is established -- as was plainly done here -- the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree"); the United Kingdom: *A v Secretary of State for the Home Department* [2006] 2 A.C. 221, available at: <http://www.bailii.org/uk/cases/UKHL/2005/71.html>, para. 87 ("English law has developed a principle, illustrated by cases like *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, that the courts will not shut their eyes to the way the accused was brought before the court or the evidence of his guilt was obtained. Those methods may be such that it would compromise the integrity of the judicial process, dishonour the administration of justice, if the proceedings were to be entertained or the evidence admitted. In such a case the proceedings may be stayed or the evidence rejected on the ground that there would otherwise be an abuse of the processes of the court."); and the European Court of Human Rights: *Gäfgen v. Germany*, Application no. 22978/05, Judgment, 1 June 2015, available at: <http://hudoc.echr.coe.int/eng?i=001-99015>.

²² ICC-01/05-01/13-1854, para. 60.

²³ See para. 11 above on "fruit of the poisonous tree" doctrine".

14. Having first decided that “relevant factors to consider when evaluating the impact of a violation on the integrity of the proceedings include the nature of the violation in question and the fault, or lack thereof, of the Prosecution”²⁴, the Trial Chamber found that the Prosecution “was involved in the process that lead to the illegally obtained material, inasmuch as it triggered, via requests for assistance to the Austrian authorities, the process of requesting the judicial orders.”²⁵ According to the Trial Chamber, the Prosecution “complied with all the formal requirements by engaging with the national authorities in order to legally obtain the requested material. [...]”²⁶

15. The Chamber concluded that “Accordingly, it is clear [...] that the Prosecution did not act with the intention to circumvent national procedures, undertook the necessary steps to legally obtain the material and had to – especially because Austrian courts repeatedly issued respective orders – assume that it had obtained the Western Union Documents lawfully [...]”²⁷ Having decided to re-consider its prior ruling, at no point did the Trial Chamber engage with the argument raised by the Arido Defence, that the Prosecution Requests for Assistance leans much more in the direction that it is investigating Article 5 crimes and not Article 70 offences.²⁸ In particular, the RFA sent to the Austrian Prosecution, after enumerating the facts of the Bemba main case, it is not until the second page and only once that passing reference to Article 70 “crimes” and not “offences” that are part of transfers that “could be linked to the commission of crimes under the jurisdiction of the Court such as offenses against the administration of justice” are even mentioned.²⁹ The Austrian Prosecution request that connects Mr. Arido to genocide, which has been vigorously challenged by the Arido Defence as completely incorrect, is an indication of how misleading the Prosecution RFA was.

16. The Prosecution is made up of professional lawyers and investigators with a combined many-years of experience. While a gross drafting error is a possible explanation for the incorrect-representation, the fact that the Prosecution seemed to have significantly misled the Austrian authorities that it was investigating a different crime than it in fact was merits consideration in any discussion of the fault or lack thereof of the Prosecution.

²⁴ Impugned Decision, para. 33.

²⁵ *Ibid.*, para. 36.

²⁶ *Ibid.*

²⁷ Impugned Decision, para. 39.

²⁸ ICC-01/05-01/13-1795-Conf, paras 43 and 48.

²⁹ CAR-OTP- 0091-0351, para. 5.

17. As a finding of fault could have been determinative in the reasoning of the Trial Chamber, the Arido Defence submits that the question of whether the Prosecution was at fault arises out of the Impugned Decision.

18. Moreover, the Arido Defence notes that – to this day – the Prosecution has failed to acknowledge the errors in connection with the request for the Western Union documents and has objectively taken the position that the matter is not its concern even though this decision acknowledges the fact that a significant component of the prosecution case is based from evidence obtained through the violation of the defendant's internationally recognized human rights to privacy.

C. Whether in light of a finding of a violation, that Article 21 obliges the Trial Chamber to provide an effective remedy

19. The Trial Chamber found “In view of the Austrian Rulings, the Chamber considers that any further assessment whether there was manifestly unlawful conduct is not necessary and concludes that the internationally recognised right to privacy has been violated.”³⁰ It also noted that “not every violation of an internationally recognised human right leads automatically to the exclusion of the evidence under Article 69(7)(b) of the Statute.”³¹ However, the result of the Impugned Decision is that the evidence was not excluded.

20. Article 21(2) of the Statute indicates to the Trial Chamber that the “application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights”.

21. The right to an effective remedy for a violation of human rights as a part of fundamental human rights and part of customary international law is beyond dispute.³²

³⁰ Impugned Decision, para. 28.

³¹ *Ibid.*, para. 32.

³² See *inter alia*, UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html>, Article 2(3); UN Human Rights Committee (HRC), General comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: <http://www.refworld.org/docid/478b26ae2.html>, para. 15. See also: Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <http://www.refworld.org/docid/3ae6b3630.html>, Article 7; Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, available at: <http://www.refworld.org/docid/3ae6b36510.html>, Article 25; and Council of Europe, *European Convention for the*

22. As previously argued,³³ the exclusion of evidence is one remedy for a violation of a human right. Having found a violation attributable to the Court, then pursuant to Article 21, it must provide some kind of remedy to be effective; however, the decision provides no remedy. Moreover the Chamber did not discuss the disproportionality of the privacy violation and in this regard, it must also be recalled that the privacy violation concerned 67 people and involved financial records going back more than 5 years.³⁴

23. For this reason, the application of Article 21 to Article 69(7) in the context of a finding of violation of a human right is an issue that arises out of the decision. It is constituted by the wider subject of the effectiveness of human rights in criminal cases.

D. All three issues have the potential to impact upon the outcome of the trial and require the immediate resolution by the Appeals Chamber

24. The Western Union material and derivative material form much of the core of the Prosecution's case. Whether they are excluded – or another remedy is provided – may impact upon certain assessments made by the Trial Chamber as the proof of money transfers is a condition *sin qua non* of several allegations. All three issues go to the question of the status of this evidence – or other evidence – and particularly whether it can be considered. It can be added in passing that the issues have the potential to profoundly impact upon the fairness of proceedings.

25. Though the Trial Chamber is deliberating, and despite the Trial Chambers prior indications that an Appeal on the Judgement is the best venue for these issues,³⁵ immediate resolution by the Appeals Chamber is merited as it may become impossible for the Appeals Chamber to properly assess other potential issues in the Article 74 Judgement should the presently described issues be resolved in a manner that leads to the exclusion of the Western Union material and derivative evidence. As such, treatment of these issues in advance of the Judgement will chart the best trajectory for it.

Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html>, Article 13. See relatedly: *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005*, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

³³ ICC-01/05-01/13-1928-Conf-Corr, para. 3.

³⁴ See *inter alia* ICC-01/05-01/13-1795-Conf, para. 45-46.

³⁵ ICC-01/05-01/13-1854, para. 17.

V. CONCLUSION

26. In light of the above, the Arido Defence respectfully requests Trial Chamber VII to grant it leave to appeal the Impugned Decision on the above issue.³⁶



Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 18th Day of July 2016

The Hague, The Netherlands

³⁶ See paras 1 and sections A-C above.