

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **21 July 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

**Public Redacted Version of
“Narcisse Arido’s Request for Leave to Appeal
‘Decision on Requests by the Arido Defence provided in its Final Submissions
ICC-01/05-01/13-1943-Conf’ (ICC-01/05-01/13-1943-Conf)”
(ICC-01/05-01/13-1944-Conf), filed on 4 July 2016**

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I. INTRODUCTION

1. The Arido Defence hereby seeks leave to appeal Trial Chamber VII's ('Trial Chamber') "Decision on Requests by the Arido Defence provided in its Final Submissions" ('Impugned Decision').

II. CONFIDENTIALITY

2. Pursuant to Regulation 23*bis* 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 facts that are confidential and a decision of the same classification.

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".¹ The Pre-Trial Chamber is vested with the power to certify the existence of an appealable issue,² however when determining whether leave to appeal should be granted, the Pre-Trial 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.³

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

¹ ICC-01/04-168, para. 19.

² *Ibid.*, para. 20.

³ *See e.g.* ICC-01/09-02/11-253, para. 28.

shall also specify the reasons warranting immediate resolution by the Appeals Chamber of the matter at issue.⁴

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”.⁵ 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”.⁶ 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.⁷ In other words, the issue “must be one likely to have repercussions on either of these two elements of justice”.⁸

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.⁹ In particular, it noted that the “expeditious conduct of the proceedings in one form or another constitutes an attribute to a fair trial”.¹⁰ The term “proceedings” extends to proceedings prior and subsequent to the current proceedings.¹¹

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 trial.¹² 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.¹³

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

⁴ Regulation 155 (2) of the RoC.

⁵ ICC-01/04-168, para. 9.

⁶ *Ibid.*

⁷ *Ibid.*, para. 10.

⁸ *Ibid.*

⁹ *Ibid.*, para. 11.

¹⁰ *Ibid.*

¹¹ *Ibid.*, para. 12.

¹² *Ibid.*, para. 13.

¹³ *Ibid.*, para. 13.

action along the right lines”.¹⁴ 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”.¹⁵ The solving of the issue by the Appeals Chamber is aimed to “ensure that the proceedings follow the right course”.¹⁶

IV. SUBMISSIONS

9. The Arido Defence submits that the lack of reasoning and unarticulated conclusion concerning its request that the Trial Chamber “find that Mr Arido had ‘a reasonable apprehension for his safety’ with regards to the incident”¹⁷ is an issue that arises out the Impugned Decision. The Trial Chamber failed to explain why it rejected the remedy to make a finding, and the issue, as per the Prosecution theory of the case, raised goes towards proof of the elements of charges.

10. The Impugned Decision failed to provide reasons for its conclusion. In particular the Trial Chamber found “that Mr Arido was aware that he would be contacted by a staff member of the Registry”¹⁸ but also that “that the staff member was not able to provide an official authorisation for his mission”.¹⁹ Such findings appear contradictory or inconsistent on their face, and beg the question – was it reasonable for Mr. Arido to apprehend a threat to his security? This is the issue raised by the Arido Defence.

11. This question is particularly relevant given that the Arido Defence tendered material demonstrating the prevalence of political violence faced by former Central African Republic (“CAR”) citizens in Cameroon.²⁰ The Impugned Decision also fails to address that [REDACTED] does not preclude [REDACTED]. The proposition that [REDACTED], thus though the Trial Chamber may have had another unarticulated reason, in any case, absent further reasoning it cannot be contended that a Registry report is determinative of the matter.²¹ This conclusion is further warranted by the fact that [REDACTED] was found in possession of an expired ICC

¹⁴ *Ibid.*, paras 14-15.

¹⁵ *Ibid.*, para. 14.

¹⁶ *Ibid.*, para. 15.

¹⁷ Impugned Decision, para. 6.

¹⁸ *Ibid.*, para. 7.

¹⁹ *Ibid.*

²⁰ See CAR-D240003-0044 and CAR-D240004-0085.

²¹ Impugned Decision: “[REDACTED]”, para. 8.

identification badge, a UN expired identification badge²² covering about the same period time frame and a [REDACTED] Passport²³ suggesting strongly that he worked for different institutions in different capacities during the same year or time-frame.

12. The Impugned Decision fails to consider any of the contextual factors and the subjective position of Mr. Arido. [REDACTED]. The person he was meant to meet lacked – from his understanding – proper identification documents and the identification material that was present according to the Registry report was suspect. The Registry report makes clear that mission was not done “[REDACTED]” [REDACTED],²⁴ which suggests – especially given the Registry report – that [REDACTED] police would have also have been suspicious which would have further validated Mr. Arido’s fears.

13. Although Mr. Arido knew a registry staff would contact him, the non-responsive conduct of the Registry to his complaint during the pendency of the matter aggravated, rather than abated, his reasonable apprehension of fear.

14. In short, the reasoning fails to explain why the missteps admitted by the Registry do not constitute a reasonable apprehension of fear of abduction given the specific individual circumstances of Mr Arido. No steps were taken prior to the incident to specifically inform Mr. Arido of what would happen, and certainly no response – to this day – has been forthcoming from the appropriate organs of the ICC in respect to this matter.

15. The issue has the potential to impact the outcome of the trial. Though the Trial Chamber states “[i]t is not in the power or mandate of the Chamber to assess Mr Arido’s actions with respect to events unrelated to the charges”,²⁵ the Prosecution has suggested that the flight to France is proof of the *mens rea* elements of the charges or other elements.²⁶ Thus, an unreasoned and terse decision on this issue at this stage is tantamount to an unreasoned decision on an element of the Article 74 judgement.

²² ICC-01/05-01/08-2261-Conf-Red, para. 18 (2).

²³ See for example CAR-D24-0004-0278 [REDACTED].

²⁴ ICC-01/05-01/08-2261-Conf-Red, para. 37.

²⁵ Impugned Decision, para. 8.

²⁶ See *inter alia*, [REDACTED].

16. The immediate resolution by the Appeals Chamber will materially advance the proceedings. As stated by the Appeals Chamber, the purpose of interlocutory appeal is “removing doubts about the correctness of a decision or mapping a course of action along the right lines”, which “provides a safety net for the integrity of the proceedings”.²⁷

17. In light of the fact that, as mentioned, the issue concerns what may be an element of the *mens rea* or element of several charges, the immediate and urgent resolution of the above mentioned issues by the Appeals Chamber will materially advance the proceedings.

V. CONCLUSION

18. 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.²⁸



Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 21st Day of July 2016

The Hague, The Netherlands

²⁷ ICC-01/04-168, para. 15.

²⁸ See paras 9-10.