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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 Document

**Prosecution's Consolidated Response to Narcisse Arido's and Jean-Pierre Bemba
Gombo's Requests for Leave to Appeal the "Decision on Request in Response to
Two Austrian Decisions"**

Source: Office of the Prosecutor

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

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I. Introduction

1. This case is in its penultimate stage of the trial. Not only has Trial Chamber VII ("Chamber") closed the presentation of evidence,¹ it has also heard closing submissions.² All that remains is the delivery of the Trial Judgement. An interlocutory appeal is simply unnecessary at this late stage, when as this Chamber has already found, any "'potentially reversible error' may be 'better and justly deferred to any final appeal under [a]rticle 81'".³ Thus not only is the immediate intervention of the Appeals Chamber needless, to the contrary, it would be positively counterproductive, since it is likely to delay the Chamber delivering its article 74 decision.

2. Nor have Narcisse Arido and Jean-Pierre Bemba Gombo demonstrated that there is a potentially reversible error. Both requests for leave to appeal⁴ the Decision rejecting the request for an effective remedy in light of the two Austrian Decisions⁵ fail to meet the article 82(1)(d) test for leave to appeal. Arido's First and Third Issues, and Bemba's First Issue do not arise from the Decision; rather, the Defence raise phantom concerns. Arido's Second Issue and Bemba's Second Issue merely disagree with the Decision, but ignore the Chamber's findings. Further, both Applications fail to show any significant impact on the fairness and expedition of the proceedings, or the outcome of the trial.

II. Confidentiality

3. The Office of the Prosecutor ("Prosecution") files this submission as "Confidential" pursuant to regulation 23*bis* (2) of the Regulations of the Court, since

¹ ICC-01/05-01/13-1859 ("Decision Closing the Submission of Evidence and Further Directions"), paras. 4-5.

² Decision Closing the Submission of Evidence and Further Directions, para. 6.

³ ICC-01/05-01/13-1898 ("Decision denying ALAs on article 69(7) Decision"), para. 17.

⁴ ICC-01/05-01/13-1950-Conf ("Arido's Application") and ICC-01/05-01/13-1952 ("Bemba's Application"), together "Applications".

⁵ ICC-01/05-01/13-1948 ("Decision").

it responds to Arido's submission similarly classified. The Prosecution does not object to its submission being reclassified as public.

III. Submissions

4. The Applications must fail: they do not identify issues arising from the Decision, nor do they show "[a]n identifiable subject or topic requiring a decision for its resolution."⁶ Rather, they advance mere conjecture and conflicting opinion.

A. Arido's First Issue does not arise from the Decision

5. Arido's First Issue—"[w]hether the evidence collected as a result of the Western Union material should have been excluded"⁷—does not arise from the Decision. The Arido Defence misreads the Decision.

6. *First*, in formulating this Issue, the Arido Defence wrongly assumes that the Chamber did not consider the various reliefs sought by the Defence in its request for an effective remedy.⁸ Despite the Arido Defence's fleeting mention of the relief seeking to exclude the derivative evidence,⁹ as the Decision's plain text shows, the Chamber considered all the reliefs sought by the Defence, including the requests for the Chamber to reconsider its original article 69(7) Decision and to exclude the Western Union records and the derivative evidence.¹⁰ However, the Chamber found that there were no grounds to reconsider its article 69(7) Decision, and that the other

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 Arido's Application, paras. 9-12.

⁸ *Contra* Arido's Application, paras. 9-12.

⁹ See ICC-01/05-01/13-1928-Corr ("Arido's Effective Remedy Request"), paras. 4 (c) and 28 (c), stating only "re-consideration of decision ICC-01/05-01/13-1854, including granting all the forms of relief that were denied in that decision."

¹⁰ Decision, para. 9, fn. 12, reiterating the Arido Defence's request *inter alia* to (iii) re-consider the Western Union Decision and grant the initial relief requested (citing Arido's Effective Remedy Request, paras. 4 (c) and 28 (c)).

requested reliefs were not warranted.¹¹ Moreover, contrary to the Application,¹² the Chamber's Decision is reasoned: it identified the facts relevant to its conclusion.¹³

7. *Second*, the Arido Defence only speculates that the derivative evidence could have affected the integrity of the proceedings.¹⁴ Yet, it fails to explain why this should be so, especially when its source—the Western Union evidence—was itself not excluded.

8. For these reasons, Arido's First Issue should be dismissed.

B. Arido's Second Issue and Bemba's Second Issue are not appealable

9. Arido's Second Issue posits "[w]hether the Prosecution was at fault in its request for the financial record[s] and the evidence relevant to this assessment".¹⁵ Bemba's Second Issue queries "[w]hether the Trial Chamber omitted to give sufficient weight to allegations of improper conduct on the part of the Prosecution [...]".¹⁶ Both Issues revisit the Chamber's findings that the Prosecution "did not act with the intention to circumvent national procedures", but also "undertook the necessary steps to legally obtain the material [...]".¹⁷ Both Issues express mere contrary opinions and are thus not appealable.

10. The Defence attempts to raise the spectre of improper prosecutorial conduct yet again—despite clear findings to the contrary. Indeed, the Chamber held that although the *Oberlandesgericht* found that information provided by the Prosecution was insufficient, the Prosecution was in no position to know this. Rather, not only had the Prosecution complied with all formal requirements by engaging with the

¹¹ Decision, paras. 41-43.

¹² Arido's Application, paras. 11-12.

¹³ ICC-01/04-01/06-773 OA5, para. 20; ICC-01/04-01/06-774 OA6, para. 30. See Decision, paras. 20-43.

¹⁴ *Contra* Arido's Application, paras. 9-12.

¹⁵ Arido's Application, paras. 13-18.

¹⁶ Bemba's Application, paras. 1(ii), 14-26.

¹⁷ See *e.g.*, Decision, para. 39.

national authorities to obtain the Western Union documents, it also had reason to believe that it had complied with all the substantive requirements.¹⁸ Critically, when the first-instance Austrian court provided the requested judicial orders, the Prosecution was bound to accept the determination of that court as correct under Austrian law. Thus it was entitled to accept that the legal determination of the sufficiency of the RFA by the Austrian courts was correct and presume that all necessary conditions to legally obtaining the material had been fulfilled.¹⁹ Further, the repealed Austrian rulings “prevented the Prosecution from potentially providing further information to the Austrian authorities” to further substantiate the requests.²⁰ In light of these findings, the Defence’s attempt to impugn the Prosecution’s conduct is groundless.²¹

11. Moreover, in view of the Chamber’s rejection of similarly argued issues in relation to the original article 69(7) Decision, the Defence’s effort to re-litigate this issue does not assist. Although several of the Defence in this case including Arido have previously attempted to challenge the Prosecution’s conduct in earlier article 82(1)(d) applications, the Chamber was not persuaded.²² Rather, the Chamber found that such challenges were “based on a distortion of the Chamber’s reasoning”, and constituted mere disagreements.²³ The present challenges, similarly worded,²⁴ are no different.

12. For these reasons, Arido’s Second Issue and Bemba’s Second Issue are not appealable. They should be dismissed.

¹⁸ Decision, para. 36.

¹⁹ Decision, para. 37.

²⁰ Decision, para. 37.

²¹ See e.g., Bemba’s Application, para. 17, stating that “[i]t is now not disputed that the Prosecution requested Western Union to transmit confidential data directly to the Prosecution before any Court order had been issued.”

²² Decision denying ALAs on article 69(7) Decision, paras. 10-13.

²³ *Ibid.*

²⁴ Compare e.g., Arido’s Application, para. 16 and Decision denying ALAs on article 69(7) Decision, para. 13.

C. Arido's Third Issue and Bemba's First Issue do not arise from the Decision

13. Arido's Third Issue and Bemba's First Issue wrongly claim that the Chamber failed to consider an effective remedy. Both Issues misstate the Decision.

14. Arido's Third Issue—"whether in light of a finding of a violation, that Article 21 obliges the Trial Chamber to provide an effective remedy"²⁵—does not emanate from the Decision. Rather, in claiming "a violation attributable to the Court" and alleging that the Chamber "did not discuss the disproportionality of the privacy violation [...]",²⁶ the Arido Defence misreads the Decision. Indeed, the Chamber found that "the internationally recognised right to privacy [had] been violated",²⁷ but did not attribute that violation to the Court.²⁸ Rather, the Chamber found that the violation was "caused by an error of legal reasoning by a national court."²⁹ Nor did the Chamber fail to assess the nature of the privacy violation. To the contrary—the Chamber carefully considered whether the privacy violation was such to require the exclusion of evidence under article 69(7). However, it concluded, based on the nature of the violation, the Prosecution's conduct and the specificities of the case, that "[t]he infringements to the right of privacy are not so severe as to taint the fairness of the proceedings."³⁰

15. Likewise, Bemba's First Issue—alleging "[t]he Trial Chamber's omission to consider whether there was an alternative basis to exclude the documents under the Statute (*i.e.* other than *via* [a]rticle 69(7)), or otherwise provide an effective remedy"³¹—does not arise from the Decision. Rather, the Bemba Defence wrongly suggests that the Chamber failed to consider reliefs sought regarding the destruction

²⁵ Arido's Application, paras. 19-23.

²⁶ Arido's Application, para. 22.

²⁷ Decision, para. 28.

²⁸ Decision, paras. 32-39.

²⁹ Decision, para. 39.

³⁰ Decision, para. 39.

³¹ Bemba's Application, paras. 1(i), 2-13.

or return of the documents to Austria.³² Yet, the Chamber expressly considered, but rejected the requested reliefs.³³ The Bemba Defence misapprehends the Decision.

16. Nor is the Bemba Defence's reluctance to accept the Chamber's rejection of its arguments on privileges and immunities persuasive. Indeed, in rehearsing its earlier failed submissions, the Bemba Defence fails to acknowledge any of the Chamber's findings rejecting them.³⁴ Not only did the Chamber find that the Austrian court did not rule on issues of privileges and immunities, it also held that "[t]he facts underlying the allegation that a violation of privileges and immunities occurred were known at the time of the request leading up to the Western Union Decision and are independent of the Austrian Rulings."³⁵

17. For these reasons, Arido's Third Issue and Bemba's First Issue misread the Decision, and should be dismissed.

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

18. 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.³⁶ Since the Applications fail to advance an appealable Issue, they should therefore be dismissed without further consideration.

19. In addition, the Applications simply do not meet the remaining article 82(1)(d) criteria.

20. Neither Application shows any impact on the fair and expeditious conduct of the proceedings.³⁷ Bemba's Application is silent on this prong; Arido's Application

³² *Contra* Bemba's Application, paras. 2-3.

³³ Decision, para. 43, stating "[in] light of the above and in view that the Western Union Documents are not excluded from the evidence, the Chamber rejects this part of the Request."

³⁴ Bemba's Application, paras. 5-13; Decision, paras. 30-31. *See* ICC-01/05-01/13-1941 ("Bemba's Response to Arido's Request for Effective Remedy"), paras. 25-72.

³⁵ Decision, paras. 30-31.

³⁶ 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."

barely argues it—only “[adding] in passing that the issues have the potential to profoundly impact upon the fairness of proceedings.”³⁸ Nor, in view of the Chamber’s reasoned assessment and conclusion that the violation did not taint the fairness of the proceedings, can there even be such a significant impact.³⁹ The trial process need not be purged of error to safeguard the integrity of the proceedings.⁴⁰ To the contrary, an interlocutory appeal at this stage would only delay the delivery of the Trial Judgement.

21. Further, the Applications fail to 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 from the evidence at this stage,⁴² and thus available to the Chamber to consider, does not yet directly affect the outcome of the trial. To claim otherwise is premature and unduly speculates on the outcome of the Chamber’s consideration of the totality of the available evidence in its article 74 decision.

22. Finally, and critically, the Appeals Chamber’s immediate resolution of the Issues will not materially advance the proceedings. The Appeals Chamber’s intervention is not necessary “to chart the best trajectory.”⁴³ The Decision is not “fraught with error [so as] to cloud or unravel the judicial process.”⁴⁴ Moreover, contrary to the Applications,⁴⁵ and as this Chamber has already held, there is simply “[no] advantage in resolving issues at this stage, bearing in mind that issues of this kind may also be raised in an appeal against the final decision under [a]rticle 74 of the Statute.”⁴⁶ Even if, *arguendo*, there were potential for a reversible error, the

³⁷ Arido’s Application, para. 24; Bemba’s Application, paras. 2-26.

³⁸ Arido’s Application, para. 24.

³⁹ Decision, paras. 32-43.

⁴⁰ ICC-01/04-168 OA3, para. 11.

⁴¹ ICC-01/05-01/08-1169, para. 35. *Contra* Arido’s Application, paras. 24-25; Bemba’s Application, paras. 2-26.

⁴² Decision, paras. 40-43.

⁴³ *Contra* Arido’s Application, para. 25.

⁴⁴ ICC-01/04-168 OA3, para. 16.

⁴⁵ Arido’s Application, para. 25; Bemba’s Application, paras. 2-26.

⁴⁶ Decision denying ALAs on article 69(7) Decision, para. 17.

imminent final appeal remains the most appropriate forum.⁴⁷ To the contrary, permitting an interlocutory appeal at this late stage would only serve to delay the final judgement and thus impede, rather than materially advance, the proceedings.

IV. Relief Requested

23. For these reasons, the Applications fail to meet the article 82(1)(d) criteria for leave to appeal. The Applications should therefore be rejected.



Fatou Bensouda, Prosecutor

Dated 22nd Day of July 2016
At The Hague, The Netherlands

⁴⁷ 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 [a]rticle 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.”