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

Date: **3 August 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 Requests for Leave to Appeal the Decision on Request in Response to
Two Austrian Decisions**

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

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Counsel for Aimé Kilolo Musamba

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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

The Office of Public Counsel for the Defence

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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'), Rule 155 of the Rules of Procedure and Evidence and Regulation 23 bis(3) of the Regulations of the Court ('Regulations'), issues the following 'Decision on Requests for Leave to Appeal the Decision on Request in Response to Two Austrian Decisions'.

I. Procedural History and Submissions

1. On 29 April 2016, the Chamber issued a decision rejecting, inter alia, requests to declare financial records emanating from Western Union ('Western Union Documents') inadmissible ('Western Union Decision').¹
2. On 20 April and 24 May 2016, the *Oberlandesgericht Wien* (Higher Regional Court of Vienna) rendered two rulings, repealing two lower-court rulings and denying authorisation of two judicial orders submitted by the Austrian public prosecutor's office concerning the collection of the Western Union Documents ('Austrian Rulings').²
3. In light of these ruling, on 9 June 2016, the defence for Mr Arido ('Arido Defence') filed a motion seeking reconsideration of the Western Union Decision and other related requests,³ which was joined by the other defence teams.
4. On 14 July 2016, the Chamber rejected the motion of the Arido Defence ('Impugned Decision').⁴

¹ Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7), ICC-01/05-01/13-1854.

² CAR-D24-0005-0013 (first *Oberlandesgericht* decision), CAR-D24-0005-0045 (official French translation of CAR-D24-0005-0013). CAR-D24-0005-0013 (second *Oberlandesgericht* decision), CAR-D24-0005-0034 (official French translation of CAR-D24-0005-0013).

³ Narcisse Arido's Request for an Effective Remedy in Light of Two Austrian Decisions, a corrected version was filed on 13 April 2016, ICC-01/05-01/13-1928-Conf-Corr.

⁴ Decision on Request in Response to Two Austrian Decisions, ICC-01/05-01/13-1948.

5. On 18 July 2016, the Arido Defence filed a request for leave to appeal the Impugned Decision ('Arido Request').⁵
6. On 20 July 2016, the defence for Mr Bemba ('Bemba Defence') also filed a request seeking leave to appeal the Impugned Decision ('Bemba Request', together with the Arido Request, 'Requests').⁶
7. On 22 July 2016, the Office of the Prosecutor ('Prosecution') filed its response to the Requests, submitting that they should be rejected ('Response').⁷
8. The Arido Defence seeks leave to appeal on three issues: (i) whether the material collected as a result of the Western Union Documents should be have been excluded; (ii) whether the Prosecution was 'at fault' in its request for financial records and (iii) whether the Chamber was obliged to provide an effective remedy pursuant to Article 21 of the Statute in light of the established violation.⁸
9. In respect of the first issue, the Arido Defence submits that the finding by the Chamber in the Impugned Decision that the admission of the Western Union Documents would not be antithetical to and would seriously damage the integrity of the proceedings does not 'logically and necessarily' prevent a finding that other evidence which is collected on the basis of the Western Union Documents is excluded.⁹ It submits that the Chamber did not provide any reasoning with regard to the rejection of the other materials and ignored the Arido Defence's arguments with regard to the fruit of the poisonous tree doctrine.¹⁰

⁵ Narcisse Arido's Request for Leave to Appeal 'Decision on Request in Response to Two Austrian Decisions' (ICC-01/05-01/13-1948), ICC-01/05-01/13-1950-Conf.

⁶ Request for Leave to Appeal the 'Decision on Request in Response of Two Austrian Decisions', ICC-01/05-01/13-1952.

⁷ 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", ICC-01/05-1/13-1955-Conf.

⁸ Arido Request, ICC-01/05-01/13-1950-Conf, para. 1. In respect of the third issue, the Chamber interpreted the sentence, since the issue as formulated in the request lacks coherence.

⁹ Arido Request, ICC-01/05-01/13-1950-Conf, paras 9-10.

¹⁰ Arido Request, ICC-01/05-01/13-1950-Conf, para. 11.

10. With regard to the second issue, the Arido Defence argues that the Chamber erred in the assessment of the Prosecution's conduct in the process of obtaining the Western Union Documents.¹¹
11. Concerning the third issue, the Arido Defence submits that the Impugned Decision does not provide a right to an effective remedy which, in view of the Arido Defence, is prescribed Article 21(3)¹² of the Statute.¹³
12. The Bemba Defence seeks leave to appeal for two issues: (i) the Chamber's omission to consider alternative grounds other than Article 69(7) of the Statute to exclude the Western Union Documents or an otherwise effective remedy and (ii) the question whether the Chamber assessed the Prosecution's conduct in the process of obtaining the Western Union Documents correctly.
13. In respect of the first issue the Bemba Defence purports that that the Chamber did not take all of their arguments brought forward into consideration on the issue of excluding the Western Union Documents and their return to the Austrian authorities.¹⁴
14. With regard to the second issue, it is argued that the Chamber failed to 'give adequate weight to improper conduct on the part of the [Prosecution]'.¹⁵
15. In its Response, the Prosecution argues that the first and third issue from the Arido Request and the first issue from the Bemba Request do not arise from the Impugned Decision¹⁶ and that the second issue from both the Arido and Bemba Request are mere disagreements.¹⁷ Further, it submits that the other criteria of Article 82(1)(d) of the Statute, significant impact on the fair and expeditious

¹¹ Arido Request, ICC-01/05-01/13-1950-Conf, paras 13-17.

¹² The Arido Defence cites to Article 21(2) of the Statute, *see* para.20. However, from the context it is clear that Article 21(3) is meant.

¹³ Arido Request, ICC-01/05-01/13-1950-Conf, paras 19-23.

¹⁴ Bemba Request, ICC-01/05-01/13-1952, paras 9-12.

¹⁵ Bemba Request, ICC-01/05-01/13-1952, paras 14-26.

¹⁶ Response, ICC-01/05-01/13-1955-Conf, paras 2, 5-8, 13-17.

¹⁷ Response, ICC-01/05-01/13-1955-Conf, paras 2, 9-12.

conduct of the proceedings and the significant impact on the outcome of the trial and the necessity of an immediate resolution by the Appeals Chamber are not met.¹⁸

II. Analysis

16. As a preliminary issue, pursuant to Regulation 23 *bis*(3) of the Regulations, the Chamber directs the Registry to reclassify the Arido Request and the Response as ‘public’.

17. Article 82(1)(d) of the Statute sets out the cumulative requirements for considering requests for leave to appeal, which are as follows:

- (i) whether the decision involves an issue that would significantly affect:
 - a) the fair and expeditious conduct of proceedings; or
 - b) the outcome of the trial; and
- (ii) in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

18. The Chamber recalls the applicable law relating to Article 82(1)(d) of the Statute as set out in previous decisions.¹⁹ 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.’²⁰

¹⁸ Response, ICC-01/05-01/13-1955-Conf, paras 18-22.

¹⁹ 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.

²⁰ 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.

Accordingly, as emphasised by the Appeals Chamber, a mere disagreement or conflicting opinion cannot form an appealable issue.²¹

19. As a preliminary comment, the Chamber notes that the Arido Defence, instead of formulating defined concrete subjects constituting issues of appeal, describes aspects of the Impugned Decision it wishes to address in general terms. However, where possible, the Chamber undertook to interpret the issues proposed by the Arido Defence in a manner which is consistent with the requirements of Article 82(1)(d) of the Statute.

20. The first issue of the Arido Request, whether derivative evidence ‘should have been excluded’, cannot be considered an issue in the meaning of Article 82(1)(d) of the Statute. It reiterates part of the original requests that led to the Western Union Decision.²² The Impugned Decision found, *inter alia*, that the Western Union Documents were not be excluded from the evidence and rejected on this reasoning the entire request for reconsideration. The Arido Defence does not provide any concrete facts or statutory provisions which were not considered by the Chamber. Accordingly, the issue is insufficiently discrete and is merely an attempt to re-litigate the Impugned Decision.

21. In respect of the third issue by the Arido Defence the Chamber finds that, even if interpreted restrictively, it is not concrete enough to constitute an appealable issue. The Arido Defence states that the right to an effective remedy should be applied without specifying the appealable error or the specific remedy. The contention that ‘the application of Article 21 to Article 69(7) [...] is an issue that arises out of the decision’²³ cannot be followed. Article 21 of the Statute is the

²¹ 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.

²² Western Union Decision, ICC-01/05-01/13-1854, paras 5-7, with regard to the exclusion of evidence other than the Western Union Documents.

²³ Arido Request, ICC-01/05-01/13-1950-Conf, para. 23.

provision containing the applicable law and its application can therefore not 'arise' from the Impugned Decision.

22. The second issue of the Arido Request and the second issue of the Bemba Request concern both the question of the correct assessment of the Prosecution's role in the acquisition of the Western Union Documents. Therefore the Chamber will address these issues together.

23. The Bemba Defence misrepresents the Austrian Rulings when contending that the wrongful conduct of the Prosecution led to the non-fulfilment of the required 'reasonable suspicion' standard – and thus to the repeal of the initial authorizations.²⁴ The part of the Austrian order cited in the support of this assertion²⁵ describes the 'reasonable suspicion' standard as a criteria for the lifting of the Austrian bank secrecy in an abstract manner, and is not related to the Prosecution's role or any information provided by it.

24. The Impugned Decision discusses extensively the role of the Prosecution in the procurement of the Western Union Documents.²⁶ The Bemba Defence submits the Chamber's finding 'fail to give adequate weight' of an alleged improper conduct of the Prosecution,²⁷ and the Arido Defence submits that the quality of the requests for assistance was insufficient and alleges that 'the Prosecution seemed to have significantly misled the Austrian authorities'.²⁸ These arguments are aimed to re-litigate this analysis in its entirety. Accordingly, both issues cannot constitute appealable issues. The Arido Defence further raises the matter of lack of acknowledgment by the Prosecution of any error,²⁹ which presents no

²⁴ Bemba Request, ICC-01/05-01/13-1952, paras 18.

²⁵ CAR-D24-0005-0013, at -0021: '*Das Bankgeheimnis darf nicht zur Verdachtsfindung durchbrochen werden, es müssen jedenfalls schon verdachtsbegründende Anhaltspunkte vorliegen.*' Official French translation: CAR-D24-0005-0033, at -0040: '*Le secret bancaire ne saurait être levé pour vérifier des soupçons ; en tout état de cause, il faut qu'existent déjà des indices fondant de tels soupçons.*' (the Bemba Defence cited to the unofficial English translation).

²⁶ Western Union Decision, ICC-01/05-01/13-1854, paras 36-39.

²⁷ Bemba Request, ICC-01/05-01/13-1952, para. 16.

²⁸ Arido Request, ICC-01/05-01/13-1950-Conf, para. 16.

²⁹ Arido Request, ICC-01/05-01/13-1950-Conf, para. 18.

connection to the issue and is not connected to the Impugned Decision in any way.

25. Similarly, the first issue of the Bemba Defence (that the Chamber omitted to consider whether there was another basis to exclude the Western Union Documents or provide otherwise an effective remedy) challenges the overall outcome of the decision as such. The Bemba Defence asserts that the authorisations to collect the Western Union Documents were repealed and thus vitiated the Court's right 'to retain and rely on them'.³⁰ The Bemba Defence argues that 'if the Trial Chamber had considered and adopted the arguments of the Defence'³¹ it would have ruled to exclude the evidence in question. The Impugned Decision addressed precisely this point, as the Austrian Rulings were the reason for the Chamber to reconsider the Western Union Decision³² and the Chamber held, again, that it could rely on the evidence. The fact that the Chamber did not adopt the arguments of the defence is, in and of itself, not an appealable issue.

26. Additionally, the Chamber finds that none of the issues requires an immediate solution by the Appeals Chamber. The Bemba Defence argues that the immediate intervention from the Appeals Chamber is required in order to prevent that the outcome of the trial is tainted by an error.³³ This is confusing the material advancement requirement with the requirement of a significant effect of the issue on the outcome of the trial. The Chamber does also not agree with the Arido Defence's argument that it would be impossible for the Appeals Chamber to assess other issues in the final judgement should the Western Union material and derivative evidence be excluded.³⁴ Article 83(2) of the Statute provides the various means for the Appeals Chamber to address any errors on appeal, and

³⁰ Bemba Request, ICC-01/05-01/13-1952, para. 16.

³¹ Bemba Request, ICC-01/05-01/13-1952, para. 12.

³² Impugned Decision ICC-01/05-01/13-1948, paras. 23-25.

³³ Bemba Request, ICC-01/05-01/13-1952, para. 13.

³⁴ Arido Request, ICC-01/05-01/13-1950-Conf, para. 25.

the Chamber fails to see why the Appeals Chamber's authority under this provision would be compromised unless leave to appeal was granted.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

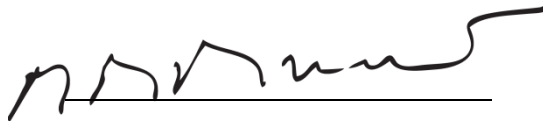
ORDERS the Registry to re-classify the Arido Request (ICC-010/5-01/13-1950-Conf) and the Response (ICC-010/5-01/13-1955-Conf) as 'public'; and

REJECTS the Requests.

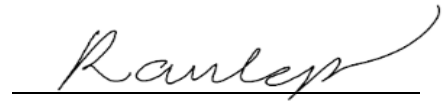
Done in both English and French, the English version being authoritative.

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Judge Bertram Schmitt, Presiding Judge

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Judge Marc Perrin de Brichambaut

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Judge Raul C. Pangalangan

Dated 3 August 2016

At The Hague, The Netherlands