

**Cour
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**International
Criminal
Court**

Original: English

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

Date: 16 July 2015

TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

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 Nacisse Arido's Request for Leave to Appeal the 'Decision on the
Submission of Auxiliary Documents'**

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

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Legal Representatives of Victims

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Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

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Detention Section

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Others

Trial Chamber VII (the ‘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 (the ‘Statute’) and Rule 155 of the Rules of Procedure and Evidence (the ‘Rules’), issues, by Majority, Judge Eboe-Osuji dissenting, the following ‘Decision on Narcisse Arido’s Request for Leave to Appeal the ‘Decision on the Submission of Auxiliary Documents’’.

I. PROCEDURAL HISTORY

1. On 10 June 2015, the Chamber issued, by Majority, its ‘Decision on the Submission of Auxiliary Documents’ (the ‘Impugned Decision’),¹ thereby rejecting the defence request for an Updated Document Containing the Charges (the ‘UDCC’). On 16 June 2015, Judge Eboe-Osuji appended his partly dissenting opinion thereto.²
2. On 22 June 2015, the defence team for Mr Arido (the ‘Defence’) requested that the Chamber grant leave to appeal that decision (the ‘Request’).³
3. On 26 June 2015, the Office of the Prosecutor (the ‘Prosecution’) responded to the Request.⁴

¹ ICC-01/05-01/13-992.

² ICC-01/05-01/13-992-Anx-Corr.

³ ICC-01/05-01/13-1026.

⁴ ICC-01/05-01/13-1039.

II. SUBMISSIONS

A. The Defence

4. The Defence requests leave to appeal three issues:

1. *Whether the Trial Chamber has the power to order a UDCC*

5. The Defence submits that most of the reasoning in the Impugned Decision suggests that the Chamber does not have the power to order a UDCC pursuant to the Statute.⁵ The Defence submits that the resolution of this issue would significantly affect the fair conduct of the proceedings, due to the fundamental nature of the right of the accused to adequate notice of the charges against him. The Defence argues that the Chamber may have 'failed to consider the full scope of notice possible under the Statute' and 'miss-appreciated the negative impact' of not ordering a UDCC.⁶ It submits that resolution of the issue would significantly affect the expeditious conduct of the proceedings as improper notice will affect the entire trial and impact on many issues, particularly litigation on the relevance of evidence in light of the Confirmation Decision's lack of clarity over which evidence it rejects.⁷ It further submits that the issue may affect the outcome of the trial, because, as noted in the partly dissenting opinion of Judge Eboe-Osuji, convictions at other international tribunals have been overturned on the basis of inadequate notice.⁸
6. The Defence further submits that the immediate resolution of the issue by the Appeals Chamber will materially advance the proceedings because it, and by implication the question of notice of the charges, impacts on almost every aspect of the trial.⁹ Referring to the partially dissenting opinion of Judge Eboe-

⁵ ICC-01/05-01/13-1026, paras 16-19.

⁶ ICC-01/05-01/13-1026, para. 22.

⁷ ICC-01/05-01/13-1026, para. 23.

⁸ ICC-01/05-01/13-1026, para. 24.

⁹ ICC-01/05-01/13-1026, para. 25.

Osuji, it submits that discord within the Chamber as to whether the accused has received proper notice may impact upon other decisions and litigation.¹⁰

2. Whether the Statute provides that the Confirmation Decision is the means by which the 'nature, cause, and content' of the charges are to be formally communicated to the Accused for the purposes of Article 67 (1)(a) of the Statute

7. The Defence submits that the Impugned Decision finds that the Confirmation Decision is *a*, and potentially *the*, correct form of notice to the accused of the charges as required by Article 67(1)(a) of the Statute.¹¹ The Defence repeats, *mutatis mutandis*, its submissions under the first issue concerning impact upon the fairness, expeditiousness and outcome of trial.¹² It also submits that 'numerous issues', including Prosecution disclosure obligations and the amendment of charges upon new evidence, may be impacted by the conclusion that the Confirmation Decision is the primary means of notice.¹³ The Defence further submits that immediate resolution by the Appeals Chamber will clarify the uncertainty said to be left regarding the relationship between the Document Containing the Charges and the Confirmation Decision.¹⁴

3. Whether Rule 136(2) of the Rules requires the provision of a UDCC in multi-Accused trials

8. The Defence submits that, despite taking Article 64(2) of the Statute as a legal basis, the Impugned Decision fails to discuss the distinct obligation created by Rule 136(2) of the Rules to provide adequate notice to each accused in a multi-

¹⁰ ICC-01/05-01/13-1026, para. 26.

¹¹ ICC-01/05-01/13-1026, paras 27-30.

¹² ICC-01/05-01/13-1026, para. 31.

¹³ ICC-01/05-01/13-1026, para. 32.

¹⁴ ICC-01/05-01/13-1026, para. 33.

accused trial as if they were being tried separately.¹⁵ The Defence again repeats, *mutatis mutandis*, its submissions under the first issue concerning impact upon the fairness, expeditiousness and outcome of trial.¹⁶ It also submits that uncertainty may exist in a multi-accused trial concerning the relevance of evidence to a particular accused which does not exist in a single accused trial, raising 'significant questions regarding the specificity of accusations and the evidential content thereof'.¹⁷ The Defence finally repeats its above arguments that immediate appellate intervention will materially advance the proceedings.¹⁸

B. The Prosecution

9. Noting that the reasoning of the Majority appears to question the power of any Chamber to order a UDCC, the Prosecution agrees that the first issue arises from the Impugned Decision but submits that the question fails to meet the criteria in Article 82(1)(d) of the Statute.¹⁹ The Prosecution submits that the issue does not significantly affect the fairness of proceedings, because even if the Majority had expressly found a power of the Chamber to order a UDCC, it would have been unnecessary in this case because clear notice of the charges exists in the form of the Confirmation Decision, and any UDCC or other auxiliary document would only provide additional notice.²⁰ It submits that the issue does not significantly affect the expedition of proceedings, for the same reason that the Confirmation Decision has provided proper notice, and observes that the request is wrong, in light of jurisprudence of the Appeals Chamber, to suggest that the Confirmation Decision must engage all of the

¹⁵ ICC-01/05-01/13-1026, paras 34-36.

¹⁶ ICC-01/05-01/13-1026, para. 37.

¹⁷ ICC-01/05-01/13-1026, para. 37; citing ICC-01/05-01/13-922.

¹⁸ ICC-01/05-01/13-1026, para. 38.

¹⁹ ICC-01/05-01/13-1039, paras 4-8.

²⁰ ICC-01/05-01/13-1039, paras 8-9.

evidence.²¹ It submits that the issue would not significantly impact upon the outcome of trial, averring that the Defence has incorrectly (since proper notice was given in this case) relied on a general statement in the partially dissenting opinion of Judge Eboe-Osui that convictions have elsewhere been overturned on appeal for lack of notice.²² Finally it submits that, although in the Impugned Decision the Chamber departed from Appeals Chamber jurisprudence, appellate intervention is unwarranted in the present case as it is not clear that the Majority and Judge Eboe-Osui are at odds as to whether the accused have received proper notice of the charges.²³

10. The Prosecution submits that the second issue does not arise from the Impugned Decision, as its plain text reveals no finding that the Confirmation Decision is *the* definitive form of notice. It argues that in claiming that the Impugned Decision did not envision that a Pre-Trial Brief could give appropriate notice, the Defence misunderstands the decision.²⁴ The Prosecution further submits that the second issue fails to meet the criteria of Article 82(1)(d) of the Statute, in that it repeats the arguments advanced for the first issue, does not support the claims of prolonged proceedings, and does not justify immediate appellate intervention, because irrespective of the certainty or uncertainty of the Impugned Decision's reasoning, the Appeals Chamber's jurisprudence as to whether the Confirmation Decision may provide notice under Article 67(1)(a) of the Statute is settled.²⁵

11. The Prosecution submits that the third issue does not arise from the Impugned Decision, with which the Defence simply disagrees.²⁶ The Prosecution further submits that the issue fails to acknowledge the finding in the Impugned

²¹ ICC-01/05-01/13-1039, paras 11-12.

²² ICC-01/05-01/13-1039, para. 13

²³ ICC-01/05-01/13-1039, para. 14

²⁴ ICC-01/05-01/13-1039, paras 16-18.

²⁵ ICC-01/05-01/13-1039, paras 20-22.

²⁶ ICC-01/05-01/13-1039, para. 23.

Decision that the accused had proper notice of the charges²⁷ and also fails to meet the criteria in Article 82(1)(d) of the Statute, demonstrating no impact on the fairness and expedition of proceedings nor outcome of the trial.²⁸

III. APPLICABLE LAW

12. Article 82(1)(d) of the Statute sets out the requirements applicable to the granting of a request 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.

13. The Chamber recalls that, for the purposes of the first part of this test, the Appeals Chamber has defined an 'issue' as 'an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion [...] 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. The issue may be legal or factual or a mixed one'.²⁹

IV. ANALYSIS

14. Each of the issues presented by the Defence for certification for leave to appeal to the Appeals Chamber rely upon arguments concerning the adequacy of the accused's right to notice of the charges, in order to substantiate the view that

²⁷ ICC-01/05-01/13-1039, para. 25.

²⁸ ICC-01/05-01/13-1039, para. 24.

²⁹ Appeals Chamber, 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, para. 9.

these issues impact upon the fairness, expeditiousness and outcome of the trial.³⁰

15. The Majority, in paragraphs 18 and 19 of the Impugned Decision set out the reasons why the Confirmation Decision provides adequate notice of the charges to the Defence, and consequently why a UDCC is not necessary in this case. The Majority emphasised that the Confirmation Decision 'clearly' contained the facts and circumstances which underline the crimes charged and confirmed, 'thus satisfying the minimum requirements of Article 67(1)(a) of the Statute' and providing adequate notice of the charges to the accused. The Majority found that in the instant case, a UDCC would be repetitive in light of a pre-existing clear Confirmation Decision.³¹

16. Furthermore, it must be acknowledged that the Defence has no freestanding right to the provision of a UDCC under the Statute or elsewhere. Moreover, the rights of the accused to be informed of the case against them and to a fair trial, while sufficiently met by the Confirmation Decision, will be further enhanced through the receipt of a Pre-Trial Brief which the Chamber has invited the Prosecution to produce in the present case.³² The Pre-Trial Brief is intended to assist the defence, and indeed the Chamber, in the preparation for trial with an explanation of the Prosecution case and an indication of the evidence it plans to rely on at trial.³³

17. Thus, the resolution either way of the first two issues on appeal would not affect the Chamber's reasoning regarding the *necessity* of issuing a UDCC. Neither of these issues can be said to be 'essential for the determination of matters arising in the judicial cause under examination', which is a requirement for qualifying as an appealable issue. Lastly, the Chamber does

³⁰ ICC-01/05-01/13-1026, paras 22-24, 31-32 and 37.

³¹ ICC-01/05-01/13-992, para. 19.

³² ICC-01/05-01/13-992, para. 21.

³³ ICC-01/05-01/13-992, para. 21.

not consider that the third issue significantly affects the fairness and expeditiousness of the proceedings or the outcome of the trial. As previously noted, in addition to the Confirmation Decision, the Impugned Decision also invited the Prosecution to file a Pre-Trial Brief in order to assist all five accused in preparing for trial, in light of which the Chamber does not consider that a UDCC would significantly alter the exercise of the accused's rights beyond the present circumstances.

18. The Defence has not substantiated how the issues raised meet the requirements of Article 82(1)(d) of the Statute.

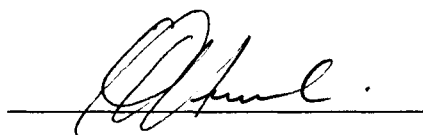
FOR THE FOREGOING REASONS THE CHAMBER HEREBY

REJECTS the Request, by Majority.

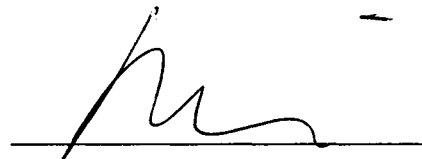
Judge Eboe-Osuji will append his dissenting opinion in due course.

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

Judge Chile Eboe-Osuji, Presiding



Judge Olga Herrera Carbuccion



Judge Bertram Schmitt

Dated 16 July 2015

At The Hague, The Netherlands