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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, AIME KILOLO MUSAMBA, JEAN-JACQUES
MANGENDA KABONGO, FIDELE BABALA WANDU AND NARCISSE ARIDO***

Public Document

**Prosecution Response to “Narcisse Arido’s Request for Leave to Appeal the
‘Decision on the Submission of Auxiliary Documents’(ICC-01/05-01/13-922)”**

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I. Introduction

1. The Arido Defence application for leave to appeal¹ Trial Chamber VII's decision rejecting the Defence request for an updated document containing charges in the case² should be dismissed. The Application fails to meet the test in article 82(1)(d) of the Statute—criteria essential for any application for leave to appeal to be successful. None of the three Issues show significant impact on the fair and expeditious conduct of the proceedings or the outcome of the trial. Nor will the Appeals Chamber's immediate resolution materially advance the proceedings.

2. Moreover, although the First Issue arises from the Decision, the Second and Third Issues—based largely on speculative assertions—do not. Further, while the Second Issue misunderstands the Appeals Chamber's law on how proper notice of charges may be given, the Third Issue merely disagrees with the Decision. Because two of the three Issues are not appealable, and none of the Issues merit leave to appeal, the Application cannot succeed. It should be rejected.

II. Submissions

A. The Issues must be appealable

3. The Appeals Chamber has held that “only an issue may form the subject-matter of an appealable decision. [...] 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.”³ Moreover, according to the Appeals Chamber's consistent case law,

¹ ICC-01/05-01/13-1026 (“Application”).

² ICC-01/05-01/13-992 (“Decision” or the “Majority’s findings”). *See also* ICC-01/05-01/13-992-Anx-Corr-Anx (“Dissent”). Updated Document containing the charges is referred to as “UDCC”, and Document containing the charges as “DCC”.

³ 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

mere disagreements or conflicting opinions fall short of constituting appealable issues.⁴

B. The First Issue arises from the Decision, but fails to meet the article 82(1)(d) criteria

4. Although the First Issue—whether the Trial Chamber has the power to order an UDCC⁵—arises from the Decision, it fails to meet the article 82(1)(d) criteria.

5. The Prosecution agrees with the Arido Defence that the First Issue, as framed, arises from the Decision.⁶ The Decision, at its crux, dealt with whether the Trial Chamber could order an UDCC.⁷ The Decision may be fairly interpreted to mean that the Majority intended to make a legal finding of wider import on the compatibility of UDCCs with the statutory framework *per se*, and not only on whether it was appropriate to file an UDCC in this case. Therefore, irrespective of the Majority having qualified its findings, *i.e.*, “in this case”,⁸ the Majority appears to have questioned whether the filing of an UDCC would *ever* be compatible with the statutory regime. Because the Majority’s rejection of the Defence’s request to file an UDCC in this case was based, in part,⁹ on its misunderstanding that no Chamber

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.”

⁴ See *e.g.*, ICC-01/04-168 OA3, para.9; 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.

⁵ Application, paras.16-21.

⁶ Application, paras.16-21.

⁷ Decision, paras.8-18.

⁸ See Decision, para.8, stating “[t]he Chamber by Majority (Judge Eboe-Osuji dissenting) finds that the submission of an UDCC in this case is neither appropriate nor compatible with the procedural regime set out in the Statute.” The Majority then went on to examine the relevant statutory provisions (Decision, paras.9-16), an exercise that would not have been strictly necessary if its finding was meant to be limited only to whether the UDCC had practical utility in this case. See also Dissent, para.3, stating that the orientation of the Decision “*may* now or in the future be assumed as bearing towards a judicial view that the basic documents of this Court have left Trial Chambers without any discretion to order or authorise the filing of a UDCC.” The Dissent (para.3) also stated “[t]hat qualifier sheds no light upon the obvious question whether the ‘procedural regime set out in the Statute’ is *ever* ‘compatible with’ the idea of a Trial Chamber having the discretion to direct or authorise the Prosecutor to file a UDCC.”

⁹ In addition to its general finding on the purported incompatibility of the UDCC with the statutory regime (Decision, paras.9-16), the Majority also found that a UDCC was unnecessary on the facts of this case. In

could ever order a UDCC, the First Issue arises from the Decision and is appealable.

6. Indeed, the First Issue does not merely disagree with the Majority's findings. To the contrary, the Majority's finding that a UDCC is incompatible with the statutory framework does not accord with the Appeals Chamber's own law. Significantly, in the *Lubanga* Appeal Judgement, the Appeals Chamber implicitly acknowledged that UDCCs were compatible with the statutory framework, and that Chambers retained the discretion to order such UDCCs depending on the circumstances of the case. It recognised that "[f]urther details of the charges, as confirmed by the Pre-Trial Chamber, may, depending on the circumstances, also be contained in other auxiliary documents".¹⁰ In recalling the practice at this Court, the Chamber then endorsed the filing of a UDCC, as one such auxiliary document, as was done in *Kenyatta* and *Katanga/Ngudjolo*.¹¹ Moreover, even in *Lubanga*, the Appeals Chamber found that information about the charges was contained not only in the DCC and the Confirmation Decision, but also in the Amended DCC (which, like the proposed UDCC in this case, is a document not expressly referred to in the statutory instruments, but may be provided by the Prosecution before the start of the trial) and the Summary of Evidence.¹² Equally, the Dissent to the Decision adopts this understanding.¹³

particular, the Majority found that the Confirmation Decision sets out clearly the 'facts and circumstances' of the case for the Accused, presenting a description of the factual allegations and their legal characterisation, thus satisfying the minimum requirements of [a]rticle 67(1)(a) of the Statute. The Prosecution agrees with the Majority (paras.18-19), and the Dissent (para.132), that the Accused have been given proper notice of the charges.

¹⁰ ICC-01/04-01/06-3121-Red A5 ("*Lubanga* Appeal Judgement"), para.124. *See also* para.128, where the Appeals Chamber found that "[...]all documents that were designed to provide information of the charges, including the auxiliary documents, must be considered to determine whether an accused was informed in sufficient detail of the charges." The Appeals Chamber applied only two caveats (i) only information made available before the start of the trial hearings may be taken into account; (ii) the Prosecution's submissions made in advance of the trial hearings providing additional details on the factual allegations can be considered to determine if the accused's right to be informed in detail of the charges was violated (*see* paras.129-130). *See also* Dissent, paras.21-22.

¹¹ *Lubanga* Appeal Judgement, paras.125-126.

¹² *Lubanga* Appeal Judgement, paras.132-134.

¹³ *See e.g.*, Dissent, paras.21-22. *See also* Application, para.20, stating that "[o]rdering an UDCC is permitted form of providing notice under certain circumstances."

7. The First Issue, therefore, does not merely provide a conflicting opinion. The question of whether the Trial Chamber was empowered to order a UDCC was an issue that the Majority had to resolve to determine “matters arising in the judicial cause under examination”, *i.e.* whether a UDCC could have been ordered *in this case*.¹⁴

8. Yet, the First Issue fails to meet the article 82(1)(d) criteria for leave to appeal. First, the Issue does not significantly affect the fairness of the proceedings. Even if the Majority had found that it had the power to order an UDCC, such a document is unnecessary in this case because clear notice of the charges already exists.¹⁵ Any UDCC provided by the Prosecution would have very little practical utility in this case.

9. Moreover, the Application speculates that because the Majority excluded the legal possibility of an UDCC, “[it] may have failed to consider the scope of notice possible under the Statute.”¹⁶ Not only is such submission mere conjecture about the Chamber’s decision making process, it is also irrelevant. As the Majority has already found, “the minimum requirements of [a]rticle 67(1)(a) of the Statute” requiring the accused to be informed promptly and in detail of “the nature, cause and content of the charge” are met.¹⁷ When the Accused have already been properly informed of the charges against them, any UDCC or other auxiliary document, would only provide additional—but not essential—notice.

10. The Arido Defence fails to articulate any substantive challenge to the notice provided in this case such that it may make the proceedings unfair. Nor can he, or any of the other Accused, raise a credible challenge to the notice provided, given the

¹⁴ Emphasis added.

¹⁵ Decision, para.19.

¹⁶ Application, para.22.

¹⁷ Decision, para.19.

volume and specificity of the materials made available to them.

11. Second, the First Issue does not significantly impact the expedition of the proceedings. The Application wrongly claims that “improper notice” will affect the expedition of the trial for its entire duration.¹⁸ However, contrary to the Application,¹⁹ the Confirmation Decision—as the Majority recognises—sets out clearly the “facts and circumstances” of the case against the five Accused, describes the factual allegations and their legal characterisation, and satisfies the minimum requirements of article 67(1)(a).²⁰ Indeed, the Majority’s express finding that proper notice exists and the Dissenting Judge’s finding that the Confirmation Decision both simplified the DCC in a helpful manner and provided a compendium of the confirmed counts,²¹ underscores that such claims about “improper notice” are (and will remain) merely hypothetical.

12. Further, the Application is wrong to suggest that the Confirmation Decision must mention all the evidence submitted to the Pre-Trial Chamber.²² As the Appeals Chamber has held, the confirmation process must only identify the facts with sufficient detail and clarity to provide proper notice under article 67(1)(a)—it need not discuss or engage with every item of evidence presented.²³ Indeed, even if the Confirmation Decision had listed only some of the evidence, as the Appeals Chamber has found, the confirmation of charges process has a limited purpose—that of filtering out cases and charges insufficient to justify trial.²⁴ Neither is the Prosecution required to submit any more evidence for confirmation than is strictly necessary to

¹⁸ Application, para.23.

¹⁹ Application, para.23.

²⁰ Decision, para.19.

²¹ Decision, para.19; Dissent, para.132. The Dissenting Judge would only have ordered a UDCC in the case for “a post-confirmation clean up of the DCC”. (Dissent, para.133).

²² Application, para.23.

²³ ICC-01/04-01/06-2205 OA15 OA16 (“*Lubanga* Appeal Decision of 8 December 2009”), fn.163; *Lubanga* Appeal Judgement, para.121.

²⁴ ICC-01/04-01/10-514 OA4 (“*Mbarushimana* Appeal Decision of 1 December 2014”), para.47.

meet the threshold of “substantial grounds” to believe.²⁵ As such, the Arido Defence’s claim that “litigation will continue without greater clarity” because the Confirmation Decision did not list all the evidence²⁶ is unfounded both in law and in fact. Equally, the claim that “the Prosecution already appears to be attempting to re-introduce evidence related to the rejected false documents charges under the umbrella of other charges”²⁷ is both unsubstantiated and incorrect.

13. Third, the Arido Defence fails to show that the First Issue significantly impacts the outcome of the trial. It merely relies on a general statement in the Dissent that convictions in other international tribunals have been overturned on appeal for the lack of notice.²⁸ This statement does not apply to this case where proper notice exists. Neither has the Arido Defence shown that it is not so.

14. Finally, immediate appellate intervention is not warranted. Even though the Majority’s findings do not follow the Appeals Chamber’s law, the Appeals Chamber need not restate its own clear law at this stage. The Appeals Chamber is not an advisory body.²⁹ Yet again, the Application wrongly relies on a broad statement made by the Dissenting Judge to claim that he allegedly had “strong misgivings” about the notice in this case.³⁰ To the contrary, the Dissent specifies that the Confirmation Decision simplified the DCC in a helpful manner in this case, and provided a compendium of the counts confirmed.³¹ Nor, contrary to the Application,³² is there any indication that the Trial Chamber is “not in accord” as to whether the Accused have proper notice of the charges. Moreover, while the Arido Defence makes sweeping claims that the regulation 55 litigation, the article 74

²⁵ *Mbarushimana* Appeal Decision of 1 December 2014, para.47.

²⁶ Application, para.23.

²⁷ Application, para.23.

²⁸ Application, para.24; Dissent, para.19.

²⁹ ICC-01/04-503 OA4 OA5 OA6 (“*DRC Situation* Appeal Decision of 30 June 2008”), para.30.

³⁰ Dissent, para.19; *Contra* Application, para.25.

³¹ Dissent, para.132.

³² Application, para.26.

judgement and the final appeal will be impacted,³³ such claims remain unsubstantiated. That the Defence may wish to raise issues of notice in future stages of this case is no reason to grant leave to appeal at this stage of the proceedings.

15. Because the First Issue fails to meet the article 82(1)(d) criteria, it should be dismissed.

C. The Second Issue is not appealable and does not meet the article 82(1)(d) criteria

16. The Second Issue—whether the Statute provides that the Confirmation Decision is the means by which the “nature, cause and content” of the charges may be formally communicated to the Accused for the purposes of article 67(1)(a)³⁴—does not arise from the Decision. The Arido Defence also disagrees with the Decision, and misunderstands the Appeals Chamber’s relevant law on whether the Confirmation Decision can provide notice of the charges. Such disagreement is not appealable.

17. Indeed, as the *Lubanga* Appeal Judgement states, “[...]all documents that were designed to provide information about the charges, including auxiliary documents, must be considered to determine whether an accused was informed in sufficient detail [...]”.³⁵ This, as shown by the Appeals Chamber’s own practice, includes the confirmation decision in a case.³⁶ The Arido Defence, when disputing if “the Confirmation Decision is a [...] correct form of notice” under article 67(1)(a),³⁷ merely disagrees with this established practice.

³³ Application, para.26.

³⁴ Application, paras.27-30.

³⁵ *Lubanga* Appeal Judgement, para.128.

³⁶ *Lubanga* Appeal Judgement, para.132.

³⁷ Application, paras.27-28 (emphasis added).

18. Moreover, in claiming that the Majority found that the Confirmation Decision is “the definitive form of notice”,³⁸ the Arido Defence misunderstands the Decision. The plain text of the Decision reveals no such finding. Indeed, such a finding would run counter to the Appeals Chamber’s jurisprudence,³⁹ which has never limited the issue of notice to the confirmation decisions alone. Further, the Application appears to conflate the Confirmation Decision’s recognised function “to define the parameters of the charges at trial”⁴⁰ and its purported function, according to the Arido Defence, of giving the most definitive notice.

19. Likewise, in claiming that the Majority did not envision a pre-trial brief could give the appropriate notice,⁴¹ the Application further misunderstands the Decision. The Majority did not make an explicit finding on whether a pre-trial brief could provide notice. Indeed, given that the Confirmation Decision already provided the appropriate notice of charges, it did not need to. Further, although the Majority did not rule on whether a pre-trial brief could give notice of the charges, it still found that such a document “could be beneficial to the Defence in the preparation for trial”, and in that context, “invite[d] the Prosecution” to prepare one.⁴² The Application takes the Majority’s findings out of context. For these reasons, the Second Issue does not arise from the Decision, and is not appealable.

20. Additionally, the Second Issue fails to meet the article 82(1)(d) criteria. As the Application itself acknowledges,⁴³ it only repeats—without elaboration—its earlier arguments advanced for the First Issue. As already shown,⁴⁴ none of these arguments can succeed. Further, the Arido Defence claims, without support, that proceedings will be prolonged because of the impact on “numerous legal issues”, “Prosecution

³⁸ Application, paras.27-28.

³⁹ See e.g., *Lubanga* Appeal Judgement, paras.132-134.

⁴⁰ *Lubanga* Appeal Judgement, para.124; Decision, para.12.

⁴¹ Application, para.29.

⁴² Decision, para.21.

⁴³ Application, para.31.

⁴⁴ See paras.8-14.

disclosure obligations” and “the amendment of charges upon new evidence”.⁴⁵ Such arguments remain hypothetical at this stage.

21. Neither does the Arido Defence show that immediate intervention by the Appeals Chamber is required at this stage.⁴⁶ The Application argues that the Majority’s reasoning remains uncertain on “the relationship and relative importance of the DCC and the Confirmation Decision”, and requires clarification.⁴⁷ Yet, no matter the Majority’s language, the Appeals Chamber’s law is settled. As the Appeals Chamber has found, the confirmation decision “defines the parameters of the charges at trial.”⁴⁸ Both the Majority and the Dissent echoed this narrow principle.⁴⁹ There is no ambiguity. The Appeals Chamber need not intervene.

22. The Second Issue neither arises from the Decision nor is it appealable. It also fails to meet the article 82(1)(d) criteria. It should therefore be dismissed.

D. The Third Issue is not appealable and does not meet the article 82(1)(d)

23. The Third Issue—whether rule 136(2) of the Rules of Procedure and Evidence requires a UDCC to be provided in multi-accused trials⁵⁰—does not arise from the Decision. Indeed, as the Application notes,⁵¹ the Decision does not refer to “any distinct obligation” of notice under rule 136(2). As such, the Arido Defence raises topics extraneous to the Decision, and simply disagrees with it by suggesting that the Decision should have addressed it. Moreover, the Application wrongly understands

⁴⁵ Application, paras.31-32.

⁴⁶ To the extent that the Application relies on its arguments under the First Issue (Application, para.33, referring to paras.25-26), the Prosecution likewise relies on its arguments in response: *see* paras.8-14 above.

⁴⁷ Application, para.33.

⁴⁸ *Lubanga* Appeal Judgement, para.124.

⁴⁹ Decision, para.12, stating “[t]he Pre-Trial Chamber has the sole authority to define the parameters of the case for the purpose of ensuing trial proceedings[...];” Dissent, para.136, stating “[e]ven when a UDCC is required or authorised to be filed, the confirmation decision is the overarching authoritative document that controls the UDCC.”

⁵⁰ Application, paras.34-38.

⁵¹ Application, paras.34-36.

the obligations of notice in multi-accused trials. Rule 136(2) places no greater obligation of notice or “broader subject of notice” beyond what is already required in article 67(1)(a). The Application’s misapprehension does not show the Third Issue is appealable. Equally, given the Chamber’s findings on proper notice,⁵² the Issue is speculative. Nor, in these circumstances, does the Arido Defence elaborate why “it will almost never be possible for the Defence to have adequate time to prepare[...].”⁵³

24. The Third Issue also fails to meet the article 82(1)(d) criteria. Yet again, the Application relies on its earlier arguments,⁵⁴ which, as already shown,⁵⁵ demonstrate no impact on fairness and expedition of the proceedings, nor the outcome of the trial. For the rest, the Arido Defence speculates that in a multi-accused trial, “significant questions can arise regarding the specificity of the accusations and the evidential content thereof.”⁵⁶ But no explanation is forthcoming as to why that may be so, given the Majority’s recognition that Arido, and his co-Accused, are all on proper notice of the charges. Neither, contrary to the Application,⁵⁷ is the relevance of the regulation 55 request to the Arido Defence’s argument apparent. The Prosecution remains free to request recharacterisation of the charges, under regulation 55, as required. Far from demonstrating that the Third Issue would “significantly” affect the proceedings, the Application fails to show any impact at all.

25. Yet again, the Third Issue, like the others, does not merit immediate appellate intervention.⁵⁸ The Application fails to properly acknowledge the Majority’s finding that the Accused had proper notice. Nor does it acknowledge that the Dissenting Judge found that the Confirmation Decision not only greatly simplified the DCC, but also provided a compendium of the confirmed counts. In these circumstances, the

⁵² Decision, para.19.

⁵³ *Contra* Application, para.35.

⁵⁴ Application, para.37.

⁵⁵ *See* paras.8-14.

⁵⁶ Application, para.37.

⁵⁷ Application, para.37.

⁵⁸ As the Application does not elaborate further, the Prosecution rests on its earlier arguments. *See* paras.8-14.

Arido Defence's submission that the issue of notice "will dog the proceedings at virtually every turn"⁵⁹ cannot persuade.

26. The Third Issue does not arise from the Decision, nor is it appealable. It also does not meet the article 82(1)(d) criteria. It should therefore be dismissed.

III. Relief Requested

27. None of the three Issues meet the criteria for leave to appeal under article 82(1)(d). In addition, the Second and Third Issues do not arise from the Decision and are not appealable. As a result, the Application should be rejected.



Fatou Bensouda, Prosecutor

Dated this 26th day of June 2015
At The Hague, The Netherlands

⁵⁹ Application, para.38.