



Original: **English**

No.: ICC-01/05-01/13
Date: 20 February 2018

THE APPEALS CHAMBER

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Geoffrey A. Henderson
Judge Piotr Hofmański

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 "Prosecution's Response to Arido's Request for Leave to Reply to 'Prosecution's Consolidated Response to Mr Bemba's, Mr Babala's, and Mr Arido's Appeals against the Sentencing Decision'", 11 September 2017, ICC-01/05-01/13-2221-Conf

Source: Office of the Prosecutor

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Introduction

1. Arido seeks leave to reply to the Prosecution’s Consolidated Response to his appeal against the article 76 decision in this case, under regulation 60 of the Regulations of the Court.¹ This request should be dismissed.²

Confidentiality

2. This response is filed confidentially, consistent with regulation 23*bis*(2), because it refers to confidential filings.³

Submissions

3. To succeed in the Request, Arido must at least show that his proposed submissions will assist the Appeals Chamber in determining his appeal against the article 76 decision. However, he fails to do so.

4. Arido’s Request either misrepresents the Prosecution’s arguments—and incorrectly argues that they raise “new issues”—or merely disagrees with the Prosecution’s submissions, to which he effectively replies without the leave he purports to seek.

A. Arido must at least show that his reply will assist the Appeals Chamber in determining his appeal

5. Regulation 60(1) provides that the Appeals Chamber may order an appellant to file a reply whenever it considers it necessary in the interests of justice. This is a

¹ See ICC-01/05-01/13-2218-Conf (“Request”). See also ICC-01/05-01/13-2203-Conf (“Consolidated Response”).

² *Contra* Request, para. 37.

³ The Request is filed confidentially. Further, a public redacted version of the Consolidated Response, referred to in this response, has not yet been filed because public redacted versions of the appeal briefs for Arido and Babala have not yet been filed. See ICC-01/05-01/13-2166-Conf; ICC-01/05-01/13-2169-Conf.

discretionary determination which will be decided on a case-by-case basis.⁴ In this context, the Prosecution considers that the Appeals Chamber should ordinarily be guided by the principles developed in the jurisprudence related to regulation 24(5).⁵ This follows from the basic premise that the Parties have no right to reply, and the interests of procedural fairness and judicial economy in promoting comprehensive, well-considered, and clear appellate submissions. These considerations are common to regulations 24(5) and 60 alike.

6. At the very least, this same bench of the Appeals Chamber has recently indicated that it will not permit a reply if the moving party has not established that “further submissions on the issues identified” will assist in determining the appeals.⁶ The Prosecution submits that the Appeals Chamber should take this same approach in deciding the Request. Consequently, for the reasons which follow, it should be dismissed.

B. Arido mischaracterises the Prosecution’s arguments as alleging “new issues”

7. The majority of Arido’s submissions incorrectly characterise the Prosecution’s arguments as misrepresenting the Judgment and Arido’s Sentencing Brief, and raising “new issues” warranting further submissions.⁷ To the contrary, the Prosecution’s Consolidated Response does not raise any “new issue” that Arido could not have foreseen when he filed his appeal against the Sentencing Decision. The Prosecution squarely responded to the issues that Arido raised in his appeal.

8. The Chamber found that a group of prospective witnesses, “including D-2, D-3, D-4 and D-6, met with Mr Kilolo and *his legal assistant* for interviews in Douala. The day before their meeting with Mr Kilolo, Mr Arido met, *inter alia*, D-2, D-3, D-4 and

⁴ See ICC-01/05-01/13-2197 A A2 A3 A4 A5 (“Conviction Appeal Reply Decision”), para. 18.

⁵ See Conviction Appeal Reply Decision, para. 15 (recalling this submission).

⁶ Conviction Appeal Reply Decision, para. 18.

⁷ Request, paras. 8-15.

D-6 in group gathering with a view to giving precise directions as to the accounts the witnesses should provide to Mr Kilolo".⁸ The group of witnesses *included*—but was not limited to—D-2, D-3, D-4 and D-6, and at the time of the meeting Kilolo was with his legal assistant [REDACTED].⁹ Although the Prosecution did not refer to paragraph 129 of the Judgment, it did not misrepresent the Chamber's findings.¹⁰ In any event, the Chamber would not be assisted by further submissions on these peripheral matters.

9. Further, D-2, D-3, D-4 and D-6 de-briefed Arido on the substance of their interviews with Kilolo.¹¹ Thus, the Prosecution did not misrepresent the Chamber's findings¹² when it stated that Arido was aware that the witnesses gave a statement to Kilolo.¹³

10. The Prosecution did not misrepresent Arido's Sentencing Brief either.¹⁴ Rather, it responded to his erroneous submission that crimes of conduct—like the offences under article 70(1)(c)—do not cause "damage".¹⁵ Although they do not require a *result*, crimes of conduct cause *damage* by infringing a protected value—in this case the administration of justice.¹⁶

11. Finally, the Prosecution argued that the Chamber reasonably considered the witnesses' false testimony to *aggravate* Arido's sentence¹⁷ in the context of "assessing the *gravity of the offence*."¹⁸ The Prosecution did not challenge the Chamber's findings

⁸ Judgment, para. 129 (emphasis added). *See also* Judgment, paras. 131, 348-350.

⁹ *Contra* Request, paras. 8, 10-11.

¹⁰ Consolidated Response, para. 214. *Contra* Request, paras. 8, 10-11.

¹¹ Judgment, para. 351.

¹² *Contra* Request, para. 9.

¹³ Consolidated Response, para. 214.

¹⁴ ICC-01/05-01/13-2169-Conf ("Arido Sentencing Brief"). *See* Consolidated Response, para. 212. *Contra* Request, paras. 12-13.

¹⁵ *See* Arido Sentencing Brief, para. 49.

¹⁶ Consolidated Response, para. 212.

¹⁷ Consolidated Response, para. 222.

¹⁸ Consolidated Response, para. 221. *See also* paras. 211, 214.

on the lack of aggravating circumstances,¹⁹ but squarely responded to Arido's Sentencing Brief.²⁰

C. Arido disagrees with, and effectively replies without leave to, the Prosecution's arguments

12. Arido's remaining requests²¹ express nothing but his disagreement with the Prosecution's submissions. They fail to show the need for further submissions on issues already extensively litigated. Moreover, Arido effectively replies to the Prosecution's submissions without the leave he purports to seek.

13. Arido disagrees with, and replies to, the Prosecution's submission in response that the Chamber was fully entitled to consider the damage and harm caused by his offences, including the false testimony of D-2, D-3, D-4 and D-6.²² In particular, he disagrees with the Prosecution's response that the analysis of the gravity of an offence is not confined to the elements of that offence.²³ It also disagrees with the Prosecution's position that the Chamber found the evidence sufficient to establish *beyond reasonable doubt* that the false testimony occurred in the ordinary course of Arido's crimes and was foreseeable.²⁴ Further, Arido misunderstands the Prosecution's distinction between conduct for which Arido was convicted of, and conduct which can be considered as aggravating the sentence.²⁵ Contrary to Arido's

¹⁹ *Contra* Request, paras. 14-15.

²⁰ Arido Sentencing Brief, paras. 56-64.

²¹ Request, paras. 16-36.

²² Request, paras. 16-31. *See* Consolidated Response, paras. 211-223.

²³ Request, paras. 18-21. *See* Consolidated Response, para. 211, 213. In his submissions, Arido misunderstands the Prosecution's arguments. For instance, the Prosecution's submission that uncharged conduct can be taken into account *in sentencing*, squarely addresses Arido's argument that uncharged crimes cannot be taken into account *in gravity* (*See* Consolidated Response, para. 213 and Request, para. 20).

²⁴ Request, paras. 25-27. *See* Consolidated Response, paras. 214-222.

²⁵ *Contra* Request, paras. 28-31.

submission, the Prosecution did not argue that a standard lower than beyond reasonable doubt applies to aggravating factors.²⁶

14. Furthermore, the Appeals Chamber is well placed to interpret its ruling in *Lubanga*, and does not require additional submissions from the Parties to do so.²⁷ In the Consolidated Response, the Prosecution highlighted that the *Lubanga* Trial Chamber did not require that the consequences of a crime must have been *intended* by the perpetrator (within the terms of article 30(2)) in order to aggravate the sentence.²⁸ This is conveniently summarised in the passage of the *Lubanga* Appeal Judgment which the Prosecution consistently quoted and cited.²⁹ In the Prosecution's view, and consistently with other case law,³⁰ this is correct. First, the Prosecution did not state "that the Appeals Chamber's jurisprudence establishes" this conclusion³¹ and agrees that the *Lubanga* Appeals Chamber did not find it necessary to ultimately rule on this issue.³² However, the Prosecution submitted that the *Lubanga* Appeal Judgment can only be understood as affirming the *Lubanga* Trial Chamber's approach.³³ Second, although the *Lubanga* Appeals Judgment referred to aggravating circumstances, the same reasoning would apply to factors considered in assessing the gravity of the crimes, as long as they are not considered twice.³⁴ A reply is not required in this respect.

15. Finally, Arido—who argued that certain factors considered by the Chamber should have been labelled as "mitigating circumstance"—³⁵ disagrees with the

²⁶ *Contra* Request, paras. 30-31. Quite the contrary, the Prosecution expressly submitted that the Chamber found that the evidence was sufficient to establish *beyond a reasonable doubt* that the false testimony was foreseeable and occurred in the ordinary course of Arido's crimes (Consolidated Response, para. 222).

²⁷ *Contra* Request, paras. 23-24.

²⁸ *Contra* Request, para. 24.

²⁹ See Consolidated Response, paras. 33 (quoting the relevant paragraph), 153, 155, 166, 213-214.

³⁰ See Consolidated Response, fns. 63-64.

³¹ Request, para. 24.

³² *Lubanga* SAJ, para. 91.

³³ See Consolidated Response, paras. 32-33.

³⁴ See Consolidated Response, paras. 45, 154 (on the Chambers' discretion to consider factors as either aggravating circumstances or in determining the gravity of the crime). *Contra* Request, para. 24.

³⁵ Arido Sentencing Brief, paras. 92-98.

Prosecution's response that it is immaterial whether a sentencing factor is considered under rule 145(1)(c) or under rule 145(2) as long as the same factor is not considered twice.³⁶ This is not a "new issue", and his reply is not required.

D. Application of regulation 34(c) to matters under regulation 60

16. The Prosecution notes that Arido filed the Request more than two calendar weeks after the Prosecution filed its Consolidated Response. This is manifestly outside the time limit set by regulation 34(c), and suggests Arido's view that this provision does not apply to a matter under regulation 60.

17. The Prosecution further notes the Appeals Chamber's observation that "regulation 60", which governs the Request, "does not prescribe any time limit for the submission of requests for leave to reply and, accordingly, the Appeals Chamber has discretion to set a deadline for any such request."³⁷ However, the Appeals Chamber has not yet set any such deadlines in the context of the Defence appeals against the Sentencing Decision in this case.³⁸

18. It is the Prosecution's view that, if the deadline for the submission of *requests* for leave to reply under regulation 34(c) does not apply, then neither can the (even more abbreviated) two-day deadline for *responses* to such requests under the same provision. Nonetheless, out of an abundance of caution, and mindful that the Appeals Chamber has not yet confirmed this interpretation, the Prosecution has filed this response within the two-day deadline. Consequently, however, it is necessarily filed separately from (and without prejudice to) any response which may be due to any requests for leave filed by Mr Babala.

³⁶ Request, paras. 34-36; Consolidated Response, para. 226.


³⁷ ICC-01/05-01/13-2196 A A2 A3 A4 A5, para. 9.

³⁸ See e.g. ICC-01/05-01/13-2208; ICC-01/05-01/13-2211.

19. As already noted,³⁹ clarification by the Appeals Chamber that the response deadline in regulation 34(c) does not apply to matters governed by regulation 60 may, however, be of general assistance to the Parties and participants in this appeal and future proceedings.

Conclusion and Relief Requested

20. For the reasons set out above, the Prosecution requests the Appeals Chamber to deny Arido's Request



Fatou Bensouda, Prosecutor

Dated this 20th day of February 2018⁴⁰

At The Hague, The Netherlands.

³⁹ See ICC-01/05-01/13-2217-Conf A6 A7 A8, paras. 24-27.

⁴⁰ This submission complies with regulation 36, as amended on 6 December 2016: [ICC-01/11-01/11-565 OA6](#), para. 32.