

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **22 May 2017**

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
“Narcisse Arido’s Application for the Submission of Additional Evidence Before the
Appeals Chamber Pursuant to Regulation 62 of the Regulations of the Court”
(ICC-01/05-01/13-2116-Conf), filed 14 March 2017**

Source: Counsel for Narcisse Arido

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

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I. INTRODUCTION

1. The Arido Defence hereby makes an application for the submission of additional evidence – namely item CAR-OTP-00941580-R01 (‘item’) and its translation CAR-D24-0005-0056 – before the Appeals Chamber pursuant to Regulation 62 of the Regulations of the Court (‘RoC’).
2. This [REDACTED] document, which was disclosed after the final arguments of the trial-phase, concerns [REDACTED] witness D-6 in relation to [REDACTED]. The Defence considers the item exculpatory and the failure to consider it in the Article 74 Judgement both a legal, factual, and/or procedural error. The item comprises an important element of at least 8 grounds of appeal for which the Defence has given notice.

II. CONFIDENTIALITY

3. Pursuant to Regulation 23*bis* of the RoC and Regulation 24 of the Regulations of the Registry (‘RoR’), this request is submitted confidential as it refers to confidential information concerning a protected witness.

III. PROCEDURAL HISTORY

4. On 7 March 2016, during trial, the Arido Defence notified a revision of its list of witnesses that dropped most of its witnesses.¹ This notification was in response to a 4 March 2016 disclosure that indicated that the Prosecution was investigating witnesses on its witness list. The Defence considered that this raised “fundamental issues of fair trial and process”.²
5. On 9 March 2016, the Presiding Judge of Trial Chamber VII (‘Trial Chamber’) set a deadline of 8 April 2016 for all evidentiary submissions, including requests to recognise material as formally submitted³ and on 29 April 2016, the Presiding Judge declared the presentation of evidence closed in this case.⁴
6. On 25 July 2016 the Prosecution disclosed to the Arido Defence item CAR-OTP-0094-1580-R01 pursuant to Rule 77 of the Rules of Procedure and Evidence.⁵ The item is an interview

¹ ICC-01/05-01/13-1705-Conf.

² *Ibid.*, para. 6.

³ Hearing of 9 March 2016, ICC-01/05-01/13-T-42-Red2, p.54, line 18 to p.43, line 12.

⁴ ICC-01/05-01/13-1859.

⁵ ICC-01/05-01/13-1962.

between D-6 [REDACTED] in which the witness indicates that he has a military background.⁶ D-6 was a Bemba Main Case witness and an individual who is part of the conviction entered against Mr Arido. In its e-mail, the Prosecution noted the potentially exculpatory nature of the material.⁷

7. The Defence brought the item to the attention of the Trial Chamber noting⁸ that it had requested a translation and “may request the Chamber to consider this material if it turns out to be relevant”. The translation of the item was received on 5 August 2016. A courtesy copy⁹ of the translated item was sent on 8 August 2016 and the item was formally disclosed on 9 August 2016 as CAR-D24-0005-0056. A request for the admission of the item into evidence was made on 14 August 2016.¹⁰
8. On 1 September 2016,¹¹ the Trial Chamber rejected the Appellant’s request indicating that the Trial Chamber considered that the Arido Defence “knew of the existence of the Interview but also had knowledge of its contents”.¹² Since “the Arido Defence [did] not provide any information as to why it did not itself try to obtain the Interview”¹³ the Trial Chamber rejected the request due to the absence of exceptional circumstances following the closure of evidence.
9. On 19 October 2017, the Trial Chamber delivered its Judgment pursuant to Article 74. That day, it convicted Mr Arido for *inter alia* having “intentionally instructed and briefed the four witnesses (or facilitated their briefing by others) to present themselves as military men to Mr Kilolo and the Court even while believing that they did not have such a background.”¹⁴ The Trial Chamber concluded that Mr Arido “corruptly influenced D-2, D-3, D-4 and D-6 within the meaning of Article 70(1)(c) of the Statute”¹⁵

⁶ CAR-D24-0005-0056 at 0077.

⁷ Email of 25 July 2016, subject ‘160725 CAR ART 70 - Prosecution disclosure - Trial Rule 77 package 50’ (“Please find below the [...] link to access Rule 77 package 50, it may contain potentially exculpatory information, which is being disclosed to you”).

⁸ Email, sent 25 July 2016, subject line “D6 evidence from today's Rule 77 disclosure”.

⁹ The courtesy copy incorrectly had the item number listed as CAR-D24-0005-0033.

¹⁰ CC-01/05-01/13-1968-Conf.

¹¹ ICC-01/05-01/13-1978.

¹² *Ibid.*, para. 8

¹³ *Ibid.*, para. 10.

¹⁴ ICC-01/05-01/13-1989-Conf, para. 944.

¹⁵ *Ibid.*, para. 945.

10. On 14 February 2017, the Appellant gave notice of its intention to challenge the Judgment.¹⁶
On 22 February 17, the Appellant amended this notice.¹⁷

IV. APPLICABLE LAW

11. Pursuant to Regulation 62(1) of the RoC:

1. A participant seeking to present additional evidence [on Appeal] shall file an application setting out:

(a) The evidence to be presented;

(b) The ground of appeal to which the evidence relates and the reasons, if relevant, why the evidence was not adduced before the Trial Chamber.

V. SUBMISSIONS

12. The item and its translation for which the Arido Defence now requests submission are exculpatory and should have been considered in the trial Judgment as they impact upon the charges confirmed and the findings made by the Trial Chamber and thus support the substantiation of appealable issues.

A. The evidence to be presented

13. Though the Defence postpones full argumentation for the document in support of the appeal, the relevance of CAR-OTP-0094-1580-R01 is clear only when placed in the context of the charges. According to the Confirmation of Charges decision:

On the [day before the meeting with Kilolo in Douala], D2, D3, D4 and D6 were also instructed on what to say to Mr Kilolo, *in particular as regards their military status* and some events that took place in Bangui (“pour pouvoir les raconter à Kilolo dès qu’il va arriver”).¹⁸

Consequently, “based on the evidence”,¹⁹ the Pre-Trial Chamber II confirmed charges, including:

¹⁶ ICC-01/05-01/13-2106-Conf.

¹⁷ ICC-01/05-01/13-2110-Conf.

¹⁸ ICC-01/05-01/13-749, para. 90 (emphasis added).

¹⁹ *Ibid.*, para. 96.

that Mr Arido bears criminal responsibility as a perpetrator under article 25(3)(a) of the Statute for intentionally corruptly influencing D-2, D-3, D-4 and D-6 in accordance with article 70(1)(c) of the Statute[.]²⁰

14. In its Judgment the Trial Chamber found that:

Mr Arido admitted that he instructed D-2, D-3, D-4 and D-6 to present themselves to Mr Kilolo and to the Court as FACA soldiers, even though he believed that they had no military background.²¹

Subsequent, the Trial Chamber found:

Mr Arido instructed the witnesses to present themselves as soldiers, assigned the witnesses various military ranks, and handed out military insignia to each of them.²²

As mentioned above, the Trial Chamber found that Mr Arido:

intentionally instructed and briefed the four witnesses (or facilitated their briefing by others) *to present themselves as military men* to Mr Kilolo and the Court even while believing that they did not have such a background.²³

And had thus “corruptly influenced D-2, D-3, D-4 and D-6 within the meaning of Article 70(1)(c) of the Statute”.²⁴

15. For the purpose of the present request, it is observed that the military background of witness D-6 figured in the reasoning of both the Pre-Trial Chamber and Trial Chamber as regards both the offences which were confirmed and for which Mr Arido was ultimately found guilty.
16. Part of the item and its translation which are the subject of the present application are a record of an interview that D-6 [REDACTED]. This interview prompted answers to such questions as [REDACTED]. When asked about the specifics of what D-6 did while employed in the Central African Republic, D-6 reportedly responded:

[REDACTED] *I was in the army, [REDACTED]. I was employed by the army* [REDACTED].²⁵

D-6 represented to [REDACTED] that he had a military background. Thus, the item is relevant to the charges against Mr Arido related to witness D-6 in several ways. As a record

²⁰ *Ibid.*, para. 96

²¹ ICC-01/05-01/13-1989-Conf, para. 128.

²² *Ibid.*, para. 130.

²³ *Ibid.*, para. 944.

²⁴ *Ibid.*, para. 945.

²⁵ CAR-D24-0005-0056 at 0077 (emphasis added).

coming from [REDACTED], the document contains indicia of reliability and authenticity such as a letterhead and contact information for [REDACTED] that conducted the interview. Moreover, the item was disclosed by the Prosecution and there has been – to date – no indication that it is anything less than what it appears to be: [REDACTED] and other accompanying documentation.

B. The ground of appeal to which the evidence relates

17. The item relates to grounds of appeal that are procedural, substantive, and procedural and substantive in nature.
18. The item and its translation relate most directly to the procedural and substantive ground that: *the Trial Chamber erred in rejecting exculpatory evidence regarding [REDACTED] D-6 which was [REDACTED] and disclosed late by the Prosecution.*²⁶
19. With regards to procedural errors, the item and its translation relate to: *the Trial Chamber erred by not ruling on the Defence objections to selective, delayed, and late disclosures of material relevant and necessary to the preparation and presentation of the Defence.*²⁷
20. With regards to the substantive errors, the item and its translation are also relevant to:
 - a. The Trial Chamber erred by failing to provide a full and reasoned opinion on the findings on evidence and conclusions, as per Article 74(5);²⁸
 - b. The Trial Chamber erred in its approach to, and assessment of evidence;²⁹
 - c. The Trial Chamber erred by making legal and factual findings and conclusions which were adverse to the Appellant, and which were not based on proof beyond a reasonable doubt;³⁰

²⁶ ICC-01/05-01/13-2110-Conf, section I

(“The Trial Chamber erred in its legal, factual, and evidentiary conclusions regarding the Appellant”), para. 32.

²⁷ *Ibid.*, para. 17.

²⁸ *Ibid.*, section D.

²⁹ *Ibid.*, section H

(“The Trial Chamber’s evidentiary errors are legal, factual and procedural”), para. 22.

³⁰ *Ibid.*, section I, para. 27.

- d. The Trial Chamber erred in giving any weight to the hearsay evidence about D-4 and D-6, admitted through the testimony of P-260 (D-2) and P-245 (D-3), which violated the Appellant's fair trial right to confront the witnesses and evidence against him;³¹
- e. The Trial Chamber erred by not addressing the Appellant's argument that, as a matter of law, the allegations regarding D-4 and D-6, who were missing witnesses, should be dismissed;³² and
- f. The Trial Chamber erred in its approach to and handling of Trial Chamber III testimony, and superimposed its own analysis on the actual testimony before Trial Chamber III and reached conclusions which were not supported by proof beyond a reasonable doubt.³³

C. Why the evidence was not adduced before the Trial Chamber

- 21. When the item was submitted it was rejected – not on admissibility grounds but on procedural ones. Regardless of the Trial Chamber's reasons for rejecting the item for inclusion in its Judgment, the reason the item was not adduced at trial was because it was not in the possession of the Appellant until following the closing statements.

³¹ *Ibid.*, section I, para. 30.

³² ICC-01/05-01/13-2110-Conf, section I, para. 31.

³³ *Ibid.*, section I, para. 38.

VI. CONCLUSION

22. In light of the above, the Arido Defence respectfully requests the Appeals Chamber to grant its Application to present items CAR-OTP-0094-1580-R01 and its translation CAR-D24-0005-0056 as additional evidence for the purpose of the appeal against the Trial Judgment pursuant to Regulation 62(1) RoC.



Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 22nd Day of May 2017

Washington D.C., The United States of America