

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/05-01/13 A A2 A3 A4 A5

Date: 18 August 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**

Confidential

**Decision on Mr Arido's request to respond to evidence adduced by the
Prosecutor**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for Jean-Pierre Bemba Gombo
Ms Melinda Taylor
Ms Mylène Dimitri

Counsel for Aimé Kilolo Musamba
Mr Michael G. Karnavas

Counsel for Jean-Jacques Mangenda Kabongo
Mr Christopher Gosnell
Mr Peter Robinson

Counsel for Fidèle Babala Wandu
Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido
Mr Charles Achaleke Taku
Ms Beth Lyons

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu, and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute” of 19 October 2016 (ICC-01/05-01/13-1989-Red),

Having before it “Narcisse Arido’s Request for Leave to Reply to the ‘Prosecution’s Consolidated Response to the Appellants’ Documents in Support of Appeals [*sic*]’ (ICC-01/05-01/13-2170-Conf)” of 24 July 2017 (ICC-01/05-01/13-2180-Conf (A A2 A3 A4 A5)),

Renders the following

DECISION

1. Should the Prosecutor wish to rely on testimonial evidence by Witnesses P-785 and/or P-805, she shall, by 16h00 on Friday, 25 August 2017, either apply for the introduction of their prior recorded testimony pursuant to rule 68 of the Rules of Procedure and Evidence or request that the witnesses be heard orally before the Appeals Chamber.
2. Mr Arido may file submissions, not exceeding 10 pages, in response to the Prosecutor’s proposed evidence in response by 16h00 on Wednesday, 30 August 2017.

REASONS

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 19 October 2016, Trial Chamber VII rendered its “Judgment pursuant to Article 74 of the Statute”¹ (“Conviction Decision”), in which Mr Narcisse Arido

¹ ICC-01/05-01/13-1989-Conf; a public redacted version was registered on the same date ([ICC-01/05-01/13-1989-Red](#)).

(“Mr Arido”) was convicted of one offence against the administration of justice under article 70 of the Statute.²

2. On 1 November 2016, Mr Arido filed an appeal against the Conviction Decision.³

3. On 14 March 2017, Mr Arido filed an application in which he requested the Appeals Chamber to admit, as additional evidence on appeal, document CAR-OTP-0094-1580-R01⁴ (“Application for Additional Evidence”).

4. On 24 April 2017, Mr Arido filed his document in support of the appeal against the Conviction Decision⁵ (“Document in Support of the Appeal”).

5. On 18 May 2017, the Appeals Chamber rendered a decision in which it, *inter alia*: (i) indicated that it would rule on the admissibility as additional evidence of document CAR-OTP-0094-1580-R01 jointly with the other issues raised in Mr Arido’s appeal; and (ii) directed the Prosecutor to set out arguments on the Application for Additional Evidence and to adduce any evidence in response in her consolidated response to the documents in support of the appeal⁶ (“Directions”).

6. On 10 July 2017, the Prosecutor filed her consolidated response to, *inter alia*, Mr Arido’s Document in Support of the Appeal⁷ (“Consolidated Response”), in which she responded to the Application for Additional Evidence and requested admission of three items of evidence in response to Mr Arido’s proposed additional evidence.⁸ In

² [Conviction Decision](#), p. 457.

³ “Narcisse Arido’s Notice of Appeal against the Trial Chamber VII’s ‘Judgment pursuant to Article 74 of the Statute’ (ICC-01/05-01/13-1989-Conf)”, dated 31 October 2016 and registered on 1 November 2016, [ICC-01/05-01/13-1995](#) (A).

⁴ “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 (A), paras 1, 2, 22. A public redacted version was registered on 22 May 2017 ([ICC-01/05-01/13-2116-Red \(A\)](#)).

⁵ “Corrected Version of ‘Narcisse Arido’s Document in Support of Appeal Pursuant to Article 81’, (ICC-01/05-01/13-2145-Conf), filed 24 April 2017”, original version registered on 24 April 2017 and corrigendum registered on 8 May 2017, ICC-01/05-01/13-2145-Conf-Corr, with annexes. A public redacted version of the corrected version was registered on 31 May 2017 ([ICC-01/05-01/13-2145-Corr-Red](#)).

⁶ “Directions and Decision regarding Mr Arido’s applications for additional evidence filed pursuant to regulation 62 of the Regulations of the Court”, [ICC-01/05-01/13-2160 \(A A2 A3 A4 A5\)](#).

⁷ “Prosecution’s Consolidated Response to the Appellants’ Documents in Support of Appeal”, ICC-01/05-01/13-2170-Conf.

⁸ Consolidated Response, paras 732-747.

particular, the Prosecutor requests admission of: (i) a decree of the Ministry of Defence of the Central African Republic dated 2001; (ii) a statement of Witness P-805; and (iii) a statement of Witness P-785.⁹

7. On 24 July 2017, Mr Arido filed a request seeking leave to reply to the Consolidated Response, contending that the Prosecutor wrongly made submissions in relation to his Application for Additional Evidence in her Consolidated Response and opposing the Prosecutor's request for admission of evidence in response¹⁰ ("Request"). Mr Arido submits that the Prosecutor's arguments concerning his Application for Additional Evidence should have been made in a separate filing and thus, in these circumstances, he "reserves the right to reply to the Prosecution arguments in a separate pleading [...] if leave is granted".¹¹ Mr Arido argues that the documents sought to be admitted as evidence in response by the Prosecutor "do not satisfy the legal requirements", "have no probative value, and the Prosecution has not demonstrated that their admission would outweigh any prejudicial effect on the Appellant".¹² Mr Arido finally contends that the Prosecutor's request for admission of evidence in response is "premature" and "procedurally wrong".¹³

8. On 27 July 2017, the Prosecutor filed her response to the Request¹⁴ ("Response"), submitting that Mr Arido's contention that her application for admission of the evidence in response is "'premature' and 'procedurally wrong' is inaccurate as it ignores the Appeals Chamber's directions".¹⁵ However, the Prosecutor does not oppose the granting of the Request given that her submissions on the evidence in response were raised for the first time in her Consolidated Response.¹⁶

⁹ Consolidated Response, para. 741.

¹⁰ "Narcisse Arido's Request for Leave to Reply to the 'Prosecution's Consolidated Response to the Appellants' Documents in Support of Appeals [*sic*]' (ICC-01/05-01/13-2170-Conf)", ICC-01/05-01/13-2180-Conf (A A2 A3 A4 A5), paras 57-67.

¹¹ Request, paras 58-59.

¹² Request, para. 63.

¹³ Request, paras 64-66.

¹⁴ "Prosecution's Consolidated Response to the Appellants' Requests for Leave to Reply to 'Prosecution's Consolidated Response to the Appellants' Document in Support of the Appeal'", ICC-01/05-01/13-2187-Conf (A A2 A3 A4 A5) ("Response"), para. 32.

¹⁵ Response, para. 32.

¹⁶ Response, para. 33.

II. MERITS

9. At the outset, the Appeals Chamber notes that Mr Arido's submissions that the Prosecutor's request for admission of evidence in response is "premature" and "procedurally wrong" are misplaced. As noted above, in its Directions, the Appeals Chamber, *inter alia*, directed the Prosecutor to set out arguments on the Application for Additional Evidence and to adduce any evidence in response in her Consolidated Response.¹⁷

10. Turning to the merits of the Request, the Appeals Chamber notes that the admissibility of Mr Arido's proposed additional evidence – and, consequently that of the evidence in response adduced by the Prosecutor under regulation 62 (2) (b) of the Regulations of the Court if the underlying proposed additional evidence is admitted into evidence¹⁸ – will be decided jointly with the disposal of the appeal. Therefore, the Appeals Chamber considers it appropriate that Mr Arido be given the opportunity to place on the record his submissions in response to the Prosecutor's proposed evidence.

11. At the same time, the Appeals Chamber observes that the evidence which the Prosecutor presents in response to Mr Arido's proposed additional evidence includes, in addition to the decree, two statements provided to the Office of the Prosecutor by Witnesses P-785 and P-805.¹⁹ These items of evidence are testimonial in nature. The Appeals Chamber observes that, in accordance with the legal instruments of the Court, testimonial evidence may only be introduced in the proceedings either when provided orally before a Chamber or, in case it has previously been recorded, in any of the scenarios enumerated in rule 68 of the Rules of Procedure and Evidence ("Rules").²⁰ However, the Prosecutor does not advance any arguments as to whether the relevant requirements set out in rule 68 of the Rules for the introduction of the

¹⁷ Directions, para. 12.

¹⁸ See *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction", 1 December 2014, [ICC-01/04-01/06-3121-Red](#), para. 64.

¹⁹ Consolidated Response, para. 741.

²⁰ See article 69 (2) of the Statute. The Appeals Chamber observes that there may be other situations in which testimonial evidence may be introduced in the proceedings, such as when measures under article 56 of the Statute have been taken. They are however not applicable in the circumstances of the present case.

prior recorded testimony of Witnesses P-785 and P-805 are met, nor does she request that these witnesses be heard orally.

12. In these circumstances, the Appeals Chamber finds it appropriate to clarify that, should the Prosecutor wish to rely on testimonial evidence of Witnesses P-785 and/or P-805 in response to Mr Arido's proposed additional evidence, she shall either seek that their prior recorded testimony be introduced pursuant to rule 68 of the Rules or request that the witness(es) be heard orally before the Appeals Chamber. In the interest of judicial efficiency of the present proceedings, the Appeals Chamber directs that any such request be made by 16h00 on Friday, 25 August 2017.

13. Mr Arido may file, by 16h00 on Wednesday, 30 August 2017, any submission in response to the Prosecutor's proposed evidence,²¹ including to any request that the Prosecutor may file in accordance with the present decision as concerns the proposed evidence of Witnesses P-785 and P-805. Mr Arido's submissions in that regard shall not exceed 10 pages.

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



Judge Silvia Fernández de Gurmendi
Presiding Judge

Dated this 18th day of August 2017

At The Hague, The Netherlands

²¹ This includes the decree which is document CAR-D24-0005-0056.