



**Original: English**

**No. ICC-01/05-01/13 A A2 A3 A4 A5  
Date: 25 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**

**Public**

**Decision on Mr Arido's application for admission of two hearing transcripts as  
additional evidence**

**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**

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**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 Admission of Two Sentencing Hearing Transcripts Pursuant to Regulation 62 of the Regulations of the Court” of 2 August 2017 (ICC-01/05-01/13-2189 (A)),

Having before it “Narcisse Arido’s Request for Leave to Reply to ‘Prosecution’s Response to Arido’s “Request for Admission of Two Sentencing Hearing Transcripts Pursuant to Regulation 62 of the Regulations of the Court”” of 18 August 2017 (ICC-01/05-01/13-2199-Conf (A)),

Pursuant to regulations 24 (5) and 62 of the Regulations of the Court,

*Renders* the following

## DECISION

1. The above-mentioned requests are rejected.
2. The Prosecutor is directed to file a public redacted version of document ICC-01/05-01/13-2195-Conf by 16h00 on Thursday, 31 August 2017.
3. Mr Narcisse Arido is directed to file a public redacted version of document ICC-01/05-01/13-2199-Conf by 16h00 on Wednesday, 6 September 2017.

## REASONS

### I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 19 October 2016, Trial Chamber VII (“Trial Chamber”) rendered its “Judgment pursuant to Article 74 of the Statute”<sup>1</sup> (“Conviction Decision”), in which Mr Narcisse Arido (“Mr Arido”) was convicted of one offence against the administration of justice.<sup>2</sup>
2. On 1 November 2016, Mr Arido filed an appeal against the Conviction Decision,<sup>3</sup> and on 24 April 2017, he submitted his document in support of the appeal.<sup>4</sup>
3. On 10 July 2017, the Prosecutor filed her consolidated response to, *inter alia*, Mr Arido’s document in support of the appeal.<sup>5</sup>
4. On 2 August 2017, Mr Arido filed an application, requesting that the Appeals Chamber admit as additional evidence on appeal two transcripts of the sentencing proceedings in the present case or, in the alternative, take judicial notice thereof<sup>6</sup> (“Request”). The transcripts in question are: (i) the English and French versions of document ICC-01/05-01/13-T-53-CONF, which consists of, *inter alia*, the transcript of witness D-4’s testimony<sup>7</sup> on 12 December 2016 (“Witness D-4’s Testimony”); and (ii) the English and French versions of document ICC-01/05-01/13-T-55-CONF which is a transcript of Mr Arido’s oral submissions on sentencing presented before the Trial Chamber on 14 December 2017 (“Sentencing Submissions”).<sup>8</sup> Mr Arido asserts that Witness D-4’s Testimony is relevant to the sixth ground of appeal

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

<sup>2</sup> [Conviction Decision](#), p. 457.

<sup>3</sup> “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 \(A\)](#).

<sup>4</sup> “Narcisse Arido’s Document in Support of Appeal Pursuant to Article 81, ICC-01/05-01/13-2145-Conf, with annexes. A corrected version was registered on 8 May 2017 (ICC-01/05-01/13-2145-Conf-Corr) and a public redacted version of the corrected version was registered on 31 May 2017 ([ICC-01/05-01/13-2145-Corr-Red \(A\)](#)) (“Document in Support of the Appeal”).

<sup>5</sup> “Prosecution’s Consolidated Response to the Appellants’ Documents in Support of Appeal”, ICC-01/05-01/13-2170-Conf (A A2 A3 A4 A5).

<sup>6</sup> “Narcisse Arido’s Request for Admission of Two Sentencing Hearing Transcripts Pursuant to Regulation 62 of the Regulations of the Court”, 2 August 2017, [ICC-01/05-01/13-2189 \(A\)](#).

<sup>7</sup> Witness D-4 is identified in transcript ICC-01/05-01/13-T-53-CONF as witness P-256.

<sup>8</sup> Request, footnote 1.

advanced in the Document in Support of the Appeal – alleged errors in factual, evidentiary and legal findings and conclusions.<sup>9</sup>

5. Mr Arido submits that Witness D-4's Testimony contradicts the Trial Chamber's finding that he had assigned ranks and insignias to witnesses D-2 and D-3 and had instructed them to present themselves as military persons.<sup>10</sup> Mr Arido argues that, during the sentencing hearing, witness D-4 testified that it was he rather than Mr Arido who assigned ranks to witnesses D-2 and D-3 and that during a meeting with them, they introduced themselves as soldiers.<sup>11</sup> Mr Arido further avers that the Witness D-4's Testimony calls into question the Trial Chamber's findings concerning D-2, D-3, D-4 and D-6 and asserts that, had this evidence been adduced before the Trial Chamber rendered the Conviction Decision, he could have been acquitted.<sup>12</sup>

6. Mr Arido maintains that it is in the interests of justice to admit the proposed transcripts given that (i) witness D-4 is central to his conviction and therefore the requested transcript would have impacted upon the Conviction Decision; and (ii) Witness D-4's Testimony "is central to several arguments" made in his request for leave to reply to the Prosecutor's response to the documents in support of the appeal.<sup>13</sup> He also submits that there is no prejudice in admitting the requested transcripts as additional evidence.<sup>14</sup> Should the Appeals Chamber consider that the transcripts for which admission as evidence is requested do not fall within the scope of additional evidence, Mr Arido requests that the Appeals Chamber take judicial notice thereof.<sup>15</sup>

7. On 14 August 2017, the Prosecutor filed her response to the Request, opposing it and requesting its rejection<sup>16</sup> ("Response"). The Prosecutor submits that witness D-4 was a witness whom Mr Arido could have called to testify and, as such, because he fails to explain why this evidence was not presented at trial, Mr Arido does not meet

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<sup>9</sup> Request, para. 25.

<sup>10</sup> Request, para. 22.

<sup>11</sup> Request, para. 23.

<sup>12</sup> Request, paras 24, 26.

<sup>13</sup> Request, paras 27-28.

<sup>14</sup> Request, paras 31-33.

<sup>15</sup> Request, paras 3, 29.

<sup>16</sup> "Prosecution's Response to Arido's 'Request for Admission of Two Sentencing Hearing Transcripts Pursuant to Regulation 62 of the Regulations of the Court'", ICC-01/05-01/13-2195-Conf (A).

the standard set out in regulation 62 of the Regulations of the Court (“Regulations”).<sup>17</sup> She further contends that Mr Arido does not demonstrate in what manner the evidence proffered by witness D-4 during the sentencing hearing would have led the Trial Chamber to enter a different verdict.<sup>18</sup> The Prosecutor maintains that Mr Arido misrepresents Witness D-4’s Testimony.<sup>19</sup> She asserts that, in any event, Witness D-4’s Testimony would not have affected the Conviction Decision.<sup>20</sup> With regard to Mr Arido’s alternative request for the Appeals Chamber to take judicial notice of Witness D-4’s Testimony and the Sentencing Submissions transcripts, the Prosecutor contends that they do not refer to facts of common knowledge and accordingly the request should be dismissed.<sup>21</sup> Finally, she requests summary dismissal of Mr Arido’s request to admit his Sentencing Submissions.<sup>22</sup>

8. On 18 August 2017, Mr Arido filed a request for leave to reply to the Response<sup>23</sup> (“Request for Leave to Reply”).

## II. MERITS

9. At the outset, the Appeals Chamber notes that the Response and the Request for Leave to Reply were filed as confidential documents on the ground that they “refer [...] to confidential information”,<sup>24</sup> and that no public redacted versions thereof have been filed to date. Nonetheless, the present decision is rendered publicly as it does not contain information which warrants confidential treatment. In addition, the Appeals Chamber directs the Prosecutor to file a public redacted version of the Response by Thursday, 31 August 2017, and Mr Arido to file a public redacted version of the Request for Leave to Reply by Wednesday, 6 September 2017.

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<sup>17</sup> Response, paras 2, 12-16.

<sup>18</sup> Response, paras 3, 17.

<sup>19</sup> Response, paras 3, 18, 21-22, 27.

<sup>20</sup> Response, paras 4, 17-24, 27.

<sup>21</sup> Response, paras 5, 29-32.

<sup>22</sup> Response, paras 6, 9-11.

<sup>23</sup> “Narcisse Arido’s Request for Leave to Reply to ‘Prosecution’s Response to Arido’s “Request for Admission of Two Sentencing Hearing Transcripts Pursuant to Regulation 62 of the Regulations of the Court”””, ICC-01/05-01/13-2199-Conf (A).

<sup>24</sup> Response, para. 7; Request for Leave to Reply, footnote 1.

### **A. Preliminary Issue – Mr Arido’s Request for Leave to Reply to Prosecutor’s Response**

10. In his request for leave to reply, Mr Arido submits that, pursuant to regulation 60 of the Regulations, “it is in the interests of justice to correct misrepresentations of [his] arguments and inaccurate statements found in the [Response]”.<sup>25</sup> Mr Arido intends to elaborate in his reply on the following issues: (i) the Prosecutor misreads the application of article 69 (6) of the Statute and misrepresents his request for judicial notice;<sup>26</sup> (ii) the Prosecutor’s statement that he does not provide any arguments in support of his request is flawed and unsubstantiated;<sup>27</sup> (iii) the Prosecutor mischaracterises ‘evidence’ and ‘arguments’;<sup>28</sup> (iv) the Prosecutor misrepresents Witness D-4’s Testimony;<sup>29</sup> and (v) the Prosecutor misrepresents his allegation that witnesses D-2 and D-3 introduced themselves as soldiers.<sup>30</sup> Mr Arido asserts that a reply to the identified issues is “pertinent to the proper adjudication of the appeal, and thus, may assist the Appeals Chamber”.<sup>31</sup>

11. Contrary to Mr Arido’s submission,<sup>32</sup> requests for leave to reply to responses other than responses to the document in support of the appeal are governed by regulation 24 (5) and not regulation 60 of the Regulations. The Appeals Chamber notes that regulation 24 (5) of the Regulations provides that leave of the Chamber is required to reply to a response. The Appeals Chamber considers that the question of whether leave to reply should be granted lies within its discretionary powers and must be considered on a case-by-case basis.<sup>33</sup> In the circumstances of the present case, the Appeals Chamber is not persuaded by Mr Arido’s submission<sup>34</sup> that a reply on the identified issues would assist the Appeals Chamber in its decision on the Request. Mr Arido’s Request for Leave to Reply is accordingly rejected.

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<sup>25</sup> Request for Leave to Reply, paras 2, 7-11, 27.

<sup>26</sup> Request for Leave to Reply, paras 12-14.

<sup>27</sup> Request for Leave to Reply, paras 15-16.

<sup>28</sup> Request for Leave to Reply, paras 17-19.

<sup>29</sup> Request for Leave to Reply, paras 20-22.

<sup>30</sup> Request for Leave to Reply, paras 23-26.

<sup>31</sup> Request for Leave to Reply, paras 3.

<sup>32</sup> Request for Leave to Reply, paras 7-10.

<sup>33</sup> See e.g. *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on Mr Bemba’s request for leave to reply to the Prosecutor’s response to the additional evidence request”, 2 December 2016, [ICC-01/05-01/08-3479 \(A\)](#), para. 7.

<sup>34</sup> Request for Leave to Reply, paras 2-3, 27.

## B. Request to admit Witness D-4's Testimony

12. At the outset, the Appeals Chamber notes that Mr Arido argues that sentencing hearing transcripts are part of the appeal record and that, despite an Appeals Chamber decision on the issue,<sup>35</sup> “it remains unclear whether the Sentencing hearing transcripts fall within the scope of the ‘additional evidence’ or not”.<sup>36</sup> The Appeals Chamber recalls that in the decision alluded to by Mr Arido, it was held that evidence heard during the sentencing phase “was not part of the evidentiary record available to the Trial Chamber when it decided on the guilt or innocence of Mr Arido” and, therefore, “can only be considered in the present appeal if admitted into evidence under regulation 62 of the Regulations”.<sup>37</sup>

13. Regulation 62 of the Regulations provides in relevant part:

1. A participant seeking to present additional evidence 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.

14. In interpreting the legal framework governing the admission of additional evidence on appeal, the Appeals Chamber found that additional evidence would be admissible if: the Appeals Chamber is convinced of the reasons why such evidence was not presented at trial, including whether it could have been presented with the exercise of due diligence;<sup>38</sup> and it is demonstrated that the additional evidence, if it had been presented before the Trial Chamber, could have led the Trial Chamber to enter a different verdict, in whole or in part.<sup>39</sup> As to relevance, the Appeals Chamber, noting regulation 62 (1) (a) of the Regulations, considered that “the proposed additional evidence must be shown to be relevant to a ground of appeal raised

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<sup>35</sup> “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 \(A A2 A3 A4 A5\)](#) (“Directions”).

<sup>36</sup> Request, paras 16-18, 29-30.

<sup>37</sup> Directions, para. 10.

<sup>38</sup> *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 \(A 5\)](#) (“*Lubanga A5 Judgment*”) para. 58.

<sup>39</sup> *Lubanga A5 Judgment*, para. 59.



pursuant to article 81 (1) and (2) of the Statute”.<sup>40</sup> Finally, it has been found that it is within the Appeals Chambers’ discretion to admit additional evidence on appeal despite a negative finding on one or more of the above-mentioned criteria, if there are compelling reasons for doing so.<sup>41</sup>

15. The Appeals Chamber notes that Mr Arido does not propose to hear witness D-4 as an additional witness on appeal but seeks the introduction of Witness D-4’s Testimony. The Appeals Chamber also observes that witness D-4 did not testify during the trial proceedings, but did so during the sentencing phase. The Appeals Chamber notes that the purpose of hearing this witness was to examine, for sentencing purposes, whether Mr Arido attempted to obstruct the administration of justice in the present case rather than in the case of the *Prosecutor v. Jean-Pierre Bemba Gombo*.<sup>42</sup> The Trial Chamber repeatedly recalled the limited scope of witness D-4’s testimony and warned the parties, before and during the hearing, that the examination of the witness was “not a further opportunity to litigate the merits of the present case, as the Chamber has already decided upon the merits of this case in its judgment”; it also intervened to remind the parties of the limited purpose and scope of the witness’ testimony.<sup>43</sup>

16. The Appeals Chamber finds that, given the purpose of the witness’ testimony at the sentencing hearing and the manner in which the witness was questioned, any information that may be included in Witness D-4’s Testimony regarding the facts underlying the Conviction Decision is incomplete since the testimony focused on issues distinct from those addressed and adjudicated in the Conviction Decision. Therefore, the Appeals Chamber finds that his evidence could not have led the Trial Chamber to enter a different verdict, in whole or in part, in respect of Mr Arido. Given this finding, the Appeals Chamber sees no need to consider the other criteria for the admission of additional evidence on appeal, notably the reasons why such

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<sup>40</sup> *Lubanga A5 Judgment*, para. 54.

<sup>41</sup> *Lubanga A5 Judgment*, para. 62.

<sup>42</sup> See Transcript of 12 December 2017, ICC-01/05-01/13-T-53-CONF-ENG, p. 5, lines 5-8, p. 31, lines 4-6, 14-17, p. 60, lines 16-21; “Decision on Sentencing Witnesses and Setting an Article 76(2) Hearing”, 11 November 2016, ICC-01/05-01/13-2025 (“Decision on Sentencing Witnesses”), para. 18; “Prosecution’s Notification of Witness Summaries for Sentencing Proceeding”, 4 November 2016, ICC-01/05-01/13-2009, para. 2.

<sup>43</sup> Decision on Sentencing Witnesses, para. 18; Transcript of 12 December 2017, ICC-01/05-01/13-T-53-CONF-ENG, p. 5, lines 8-11, p. 19, lines 10-15, p. 20, lines 6-7, p. 30, lines 19-20, p. 31, lines 4-6.

evidence was not presented at trial, including whether it could have been presented with the exercise of due diligence.

17. In light of the above considerations, the Appeals Chamber rejects Mr Arido's request to admit the Witness D-4 Testimony as additional evidence on appeal.

### **C. Request to admit Mr Arido's Sentencing Submissions**

18. With respect to the Sentencing Submissions, the Appeals Chamber notes that this is a transcript of oral submissions made on 14 December 2016 before the Trial Chamber by Mr Arido's counsel. Mr Arido fails to explain how such submissions can constitute additional evidence on appeal. The Appeals Chamber considers that submissions advanced by a party in the proceedings do not constitute "evidence". Therefore, the Appeals Chamber rejects Mr Arido's request to admit into evidence his Sentencing Submissions.

### **D. Request for judicial notice**

19. With regard to Mr Arido's alternative request for the Appeals Chamber to take judicial notice of both Witness D-4's Testimony and the Sentencing Submissions pursuant to article 69 (6) of the Statute, the Appeals Chamber finds this request ill-founded. The Appeals Chamber recalls that "the purpose of article 69 (6) of the Statute is to avoid the need to introduce evidence going to the proof of facts that are already notorious".<sup>44</sup> This provision therefore does not constitute a suitable legal basis for the introduction of evidence – in particular, like in the present case, of testimonial evidence on matters disputed between the parties – or of submissions made by the parties in the course of the proceedings.

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



**Judge Silvia Fernández de Gurmendi**  
**Presiding Judge**

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<sup>44</sup> "Decision on Mr Bemba's 'Request for Judicial Notice'", 17 May 2017, [ICC-01/05-01/13-2159 \(A A2 A3 A4 A5\)](#), para. 8.

Dated this 25<sup>th</sup> day of August 2017

At The Hague, The Netherlands