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

Date: 18 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

**Directions and Decision regarding Mr Arido's applications for additional
evidence filed pursuant to regulation 62 of the Regulations of the Court**

Directions and 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 Sarah Codde

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 Application for the Submission of Additional Evidence Before the Appeals Chamber Pursuant to Regulation 62 of the Regulations of the Court” of 14 March 2017 (ICC-01/05-01/13-2116-Conf (A)),

Having before it the “Corrigendum 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-01/05-01/13-2140-Conf), filed 19 April 2017” of 24 April 2017 (ICC-01/05-01/13-2140-Conf-Corr (A)),

Pursuant to regulations 23 *bis* and 62 of the Regulations of the Court,

Issues the following

DIRECTIONS AND DECISION

1. The Appeals Chamber will rule on the admissibility of the additional evidence sought in the application ICC-01/05-01/13-2116-Conf jointly with other issues raised in the appeal of Mr Narcisse Arido.
2. The Prosecutor is directed to set out arguments on the application ICC-01/05-01/13-2116-Conf and to adduce any evidence in response in her consolidated response to the documents in support of the appeals.
3. The Appeals Chamber dismisses the application ICC-01/05-01/13-2140-Conf-Corr as moot.
4. Mr Narcisse Arido is directed to file a public redacted version of the application ICC-01/05-01/13-2116-Conf by 16h00 on Monday, 22 May 2017.
5. Documents ICC-01/05-01/13-2140-Conf-Corr and ICC-01/05-01/13-2149-Conf are reclassified as public.

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”¹ (“Conviction Decision”), in which Mr Narcisse Arido (“Mr Arido”) was convicted of one offence against the administration of justice.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 requests the Appeals Chamber to admit as additional evidence on appeal a document and its English translation (“Requested Evidence”), which concerns witness D-6⁴ (“First Application for Additional Evidence”). Mr Arido submits that the Requested Evidence is relevant to his conviction of having corruptly influenced, *inter alia*, witness D-6 pursuant to article 70 (1) (c) of the Statute.⁵ In that regard, Mr Arido argues that this material relates to the Trial Chamber’s findings that he instructed witnesses D-2, D-3, D-4 and D-6 to “present themselves as soldiers, assigned the witnesses various military ranks, and handed out military insignia to each of them” and that Mr Arido “intentionally instructed and briefed the four witnesses (or facilitated their briefing by others) to present themselves as military men”.⁶

4. On 17 March 2017, the Prosecutor filed her response in which she submits that the First Application for Additional Evidence should be dismissed as moot since the Requested Evidence Mr Arido seeks to have admitted into evidence is already part of

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](#)).

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.

⁵ First Application for Additional Evidence, paras 14-16.

⁶ First Application for Additional Evidence, para. 14 (emphasis in original omitted, footnotes omitted).

the record.⁷ The Prosecutor indicates that in these circumstances she will not address the merits of the First Application for Additional Evidence.⁸ However, should the Appeals Chamber require submissions “on whether the [Requested Evidence] meet[s] the legal threshold to admit additional evidence on appeal”, the Prosecutor reserves her right to present such submissions.⁹

5. On 24 April 2017, Mr Arido filed his document in support of the appeal against the Conviction Decision¹⁰ (“Document in Support of the Appeal”).

6. On the same day, Mr Arido requested the Appeals Chamber to admit two documents as additional evidence on appeal (“Second Application for Additional Evidence”), which concern two decisions issued in April and May 2016 by the Higher Regional Court of Vienna pertaining to the collection of materials produced by Western Union (“Austrian Decisions”).¹¹ Mr Arido submits that the Austrian Decisions “invalidated the collection of the Western Union records” and relate to his grounds of appeal challenging the admissibility of the Western Union materials and the Trial Chamber’s failure to address remedies requested by Mr Arido.¹²

7. On 26 April 2017, the Prosecutor filed her response to the Second Application for Additional Evidence submitting that it should be dismissed as moot since both decisions are already part of the record of the case.¹³ As for her Response to the First Application for Additional Evidence, the Prosecutor indicates she will not address the merits of the application.¹⁴ However, should the Appeals Chamber require

⁷ “Prosecution’s response to ‘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-01/05-01/13-2118-Conf (A) (“Prosecutor’s Response to the First Application for Additional Evidence”), paras 1, 2, 6.

⁸ Prosecutor’s Response to the First Application for Additional Evidence, para. 4.

⁹ Prosecutor’s Response to the First Application for Additional Evidence, para. 4.

¹⁰ “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.

¹¹ “Corrigendum 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-01/05-01/13-2140-Conf), filed 19 April 2017”, ICC-01/05-01/13-2140-Conf-Corr (A), paras 1-2, 14, 22.

¹² Second Application for Additional Evidence, paras 14, 18-21.

¹³ “Prosecution’s Response to Arido’s Second Application for the Submission of Additional Evidence before the Appeals Chamber pursuant to Regulation 62 of the Regulations of the Court”, ICC-01/05-01/13-2149-Conf (A) (“Prosecutor’s Response to the Second Application for Additional Evidence”), paras 1-2, 5.

¹⁴ Prosecutor’s Response to the Second Application for Additional Evidence, para. 3.

submissions on “whether the [Austrian Decisions] meet the legal threshold to admit additional evidence on appeal”, the Prosecutor reserves her right to make such submissions.¹⁵

II. MERITS

A. Preliminary matter

8. The Appeals Chamber notes that the First and Second Applications for Additional Evidence were filed confidentially on the ground that they reveal confidential information regarding a protected witness¹⁶ and private money transactions.¹⁷ The Appeals Chamber observes that the First Application for Additional Evidence refers to information of confidential nature regarding a protected witness. With respect to the Second Application for Additional Evidence, the Appeals Chamber notes that it does not refer to any confidential financial information and more importantly, the reference to the Austrian Decisions has been publicly challenged and discussed at trial. In these circumstances, as this decision does not contain any confidential information which is not already publicly available or shall otherwise be kept confidential, it is issued as public. Furthermore, the Appeals Chamber directs MrArido to file a public redacted version of the First Application for Additional Evidence by 16h00 on Monday, 22 May 2017 and pursuant to regulation 23 *bis* (3) of the Regulation of the Court (“Regulations”) directs, on its own motion, the Registrar to reclassify as public the Second Application for Additional Evidence as well as the Prosecutor’s Response to the Second Application for Additional Evidence.¹⁸

B. The First Application for Additional Evidence

9. The Appeals Chamber notes that the Requested Evidence is referenced in support of the fourth ground of appeal in Mr Arido’s Document in Support of the Appeal.¹⁹ It observes that this material was not introduced as evidence before the Trial Chamber rendered the Conviction Decision.²⁰ While Mr Arido requested the Trial

¹⁵ Prosecutor’s Response to the Second Application for Additional Evidence, para. 3.

¹⁶ First Application for Additional Evidence, second para. 3.

¹⁷ Second Application for Additional Evidence, second para. 3.

¹⁸ See Prosecutor’s Response to the Second Application for Additional Evidence, para. 4.

¹⁹ See Document in Support of the Appeal, paras 321, 326-332.

²⁰ See First Application for Additional Evidence, paras 7-9.

Chamber to admit the Requested Evidence into evidence after the expiration of the time limit set by the Trial Chamber for all evidentiary submissions,²¹ the Trial Chamber rejected his request on the ground that it did not find that there were “exceptional circumstances warranting a belated admission”.²²

10. The Appeals Chamber notes further that Mr Arido submitted the Requested Evidence as evidence during the sentencing phase that took place after the rendering of the Conviction Decision.²³ At the sentencing hearing, the Trial Chamber confirmed that this material was “duly submitted” and would be considered by the Trial Chamber “when deliberating its sentencing determinations”.²⁴ Nonetheless, this does not change the fact that the Requested Evidence was not part of the evidentiary record available to the Trial Chamber when it decided on the guilt or innocence of Mr Arido. Therefore, the Appeals Chamber considers that the Requested Evidence constitutes additional evidence for the purposes of the appeal against the Conviction Decision, and can only be considered in the present appeal if admitted into evidence under regulation 62 of the Regulations. Thus, contrary to the Prosecutor’s submission, the First Application for Additional Evidence is not moot.

11. Accordingly, the Appeals Chamber shall provide directions concerning its ruling on the admissibility of the Requested Evidence. In view of Mr Arido’s intended use of this material in relation to his fourth ground of appeal,²⁵ the Appeals Chamber deems it appropriate to follow the procedure set out in regulation 62 (2) (b) of the Regulations.

12. The Appeals Chamber notes that the Prosecutor has yet to file her consolidated response to the five appellants’ documents in support of the appeals pursuant to

²¹ “Decision Closing the Submission of Evidence and Further Directions”, 29 April 2016, ICC-01/05-01/13-1859, p. 5; “Narcisse Arido’s Request that Trial Chamber VII Admit CAR-OTP-0094-1580-R01 into Evidence”, dated 14 August 2016 and registered on 15 August 2016, ICC-01/05-01/13-1968-Conf; a public redacted version dated 2 September 2016 was registered on 5 September 2016 ([ICC-01/0501/13-1968-Red](#)), para. 18.

²² “Decision on Arido Defence Request to Admit an Item into Evidence”, 1 September 2016, [ICC-01/05-01/13-1978](#), para. 10.

²³ Annex B to “Narcisse Arido’s Formal Submission of Additional Evidence to be Considered for Sentencing”, 23 November 2016, ICC-01/05-01/13-2054-Conf-AnxB, p. 2. *See also* Prosecutor’s Response to the First Application for Additional Evidence, para. 2.

²⁴ Transcript of 12 December 2016, [ICC-01/05-01/13-T-53-Red-ENG \(WT\)](#), p. 4 lines 1-9.

²⁵ *See* Document in Support of the Appeal, paras 253, 317, 326-332, 340, fn. 329.

regulation 59 of the Regulation of the Court. The Appeals Chamber thus finds it appropriate in the circumstances to direct the Prosecutor to set out in her consolidated response arguments on the First Application for Additional Evidence and to adduce any evidence in response.

C. The Second Application for Additional Evidence

13. The Appeals Chamber notes that the Austrian Decisions were submitted before the Trial Chamber and discussed by the parties in their submissions concerning the admissibility of the materials produced by Western Union.²⁶ These decisions were then taken into consideration by the Trial Chamber when deciding on the requests to exclude the Western Union materials under article 69 (7) of the Statute.²⁷ Considering that the Austrian Decisions were thus part of the evidentiary record available to the Trial Chamber and were in fact considered by it prior to rendering the Conviction Decision, the Appeals Chamber is of the view that they do not constitute additional evidence for the purposes of regulation 62 of the Regulations. The Appeals Chamber may therefore consider this material without the need that it be admitted under that regulation. Accordingly, the Second Application for Additional Evidence is dismissed as moot.

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

²⁶ See generally “Corrigendum to ‘Narcisse Arido’s Request for an Effective Remedy in Light of Two Austrian Decisions’, filed on 9 June 2016”, original confidential version registered on 13 June 2016 and the public version was registered on 5 August 2013, [ICC-01/05-01/13-1928-Corr](#); “Addendum submitted by the Defence for Mr Fidèle Babala Wandu to ‘Narcisse Arido’s Request for an Effective Remedy in Light of Two Austrian Decisions’ (ICC-01/05-01/13-1928-Conf)”, 4 April 2017, [ICC-01/05-01/13-1929-tENG](#), original French version registered on 10 June 2016 and the public version was registered on 5 August 2016 (ICC-01/05-01/13-1929); “Addendum submitted by the Defence for Mr Aimé Kilolo Musamba to ‘Narcisse Arido’s Request for an Effective Remedy in Light of Two Austrian Decisions’ (ICC-01/05-01/13-1928-Conf)”, 4 April 2017, [ICC-01/05-01/13-1938-tENG](#), original French version registered on 24 June 2016 and the public version was registered on 5 August 2016 (ICC-01/05-01/13-1938); “Public redacted version of ‘Prosecution’s Response to ‘Corrigendum to Narcisse Arido’s Request for an Effective Remedy in Light of Two Austrian Decisions’”, 27 June 2016, ICC-01/05-01/13-1939-Conf”, 15 July 2016, [ICC-01/05-01/13-1939-Red](#); “Corrigendum to Defence Response to ‘Narcisse Arido’s Request for an Effective Remedy in Light of Two Austrian Decisions’ (ICC-01/05-01/13-1928-Conf)”, 29 June 2016, [ICC-01/05-01/13-1941-Corr](#).

²⁷ “Decision on Request in Response to Two Austrian Decisions”, 14 July 2016, [ICC-01/05-01/13-1948](#), paras 21, 29, 42.



Judge Silvia Fernández de Gurmendi
Presiding Judge

Dated this 18th day of May 2017

At The Hague, The Netherlands