



Original: English

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

Date: 31 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

Public Redacted Version of "Prosecution's Response to Arido's 'Request for Admission of Two Sentencing Hearing Transcripts Pursuant to Regulation 62 of the Regulations of the Court'", 14 August 2017, ICC-01/05-01/13-2195-Conf.

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr James Stewart
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

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations Other
Section**

Introduction

1. The Arido Request to admit D-4's testimony at the sentencing hearing¹ as additional evidence in the appeal against the article 74 judgment ("Judgment"),² or alternatively to take judicial notice thereof for the truth of its contents, should be rejected.³

2. D-4's testimony is not admissible as additional evidence under regulation 62 of the Regulations of the Court and the Appeals Chamber's settled jurisprudence. First, D-4 (Defence witness in the Main Case) was a witness available to Arido in the article 70 trial whom he elected not to call.⁴ D-4 subsequently testified for the Prosecution at the sentencing hearing following Arido's conviction, pursuant to article 70(1)(c), for corruptly influencing four witnesses, including D-4. Having failed to give the Trial Chamber the opportunity to consider D-4's evidence in its Judgment on the merits of his trial, Arido now belatedly seeks to introduce D-4's sentencing testimony for such purposes on appeal. The strict rules circumscribing the admission of additional evidence on appeal are designed to prevent precisely this sort of tactic.

3. Second, Arido fails to demonstrate that D-4's evidence could or would have led the Trial Chamber to enter a different verdict, in whole or in part.⁵ Arido does not accurately present D-4's testimony. D-4 did not testify that he, rather than Arido, had assigned ranks to the four Cameroonian witnesses (D-2, D-3, D-4 and D-6) in February 2012 in Douala.⁶ Instead, he testified that [REDACTED] a document that

¹ [REDACTED].

² ICC-01/05-01/13-1989-Red.

³ ICC-01/05-01/13-2189 ("Request" or "Arido Request").

⁴ ICC-01/05-01/13-1521-Conf-AnxA ("Arido Provisional Witnesses List"); ICC-01/05-01/13-1557-Conf-AnxA ("Arido Witness List") [REDACTED] and ICC-01/05-01/13-1705-Red ("Arido Revised Witness List") [REDACTED].

⁵ ICC-01/04-01/06-3121-Red ("*Lubanga* AJ"), paras. 1, 59.

⁶ *Contra* Arido Request, para. 23.

he had forged to assist in Arido's defence in the article 70 trial,⁷ which the Arido Defence introduced as evidence.⁸ Moreover, D-4 testified that he forged the document [REDACTED].⁹ Notably, he did not testify that these witnesses ever introduced themselves as soldiers to Arido.

4. In any event, D-4's testimony at the sentencing hearing could not and would not have affected the article 74 Judgement against Arido because his conviction was not predicated on the truth of the military status of the four witnesses. Rather, Arido's conviction was founded on his bribery of D-2, D-3, D-4 and D-6, and his tampering with their testimonies, including by giving them specific directions on how to present their military background, experience and training.¹⁰

5. Further, Arido's alternative request for the Appeals Chamber to take judicial notice of D-4's testimony, for the truth of its content, should also be dismissed. Judicial notice within the meaning of article 69(6) is limited to "facts of common knowledge"—meaning facts that are already notorious or well-known to at least the Chamber applying article 69(6).¹¹ The substance of D-4's testimony as recorded in T-53 does not refer to such facts.

6. Finally, Arido's further request to admit the Parties' sentencing submissions¹² is unsupported and should be summarily dismissed.

⁷ [REDACTED].

⁸ CAR-D24-0002-0003. See Judgment, para. 322. The Trial Chamber found the document unreliable. [REDACTED].

⁹ [REDACTED].

¹⁰ Judgment, paras. 668-672, 943-945.

¹¹ ICC-01/05-01/13-2159 A A2 A3 A4 A5 ("Judicial Notice AD"), para. 8.

¹² T-53, pp. 60-81 and ICC-01/05-01/13-T-55-Conf (T-55).

Level of Confidentiality

7. The Prosecution files this submission as “Confidential” pursuant to regulation 23bis(1) of the Regulations of the Court, because it refers to confidential information. The Prosecution will file a public redacted version in due course.

Submissions

8. Even if the transcripts of the sentencing hearing are part of the case record available to the Appeals Chamber, they were not available to the Trial Chamber when it decided on the guilt or innocence of Arido.¹³ Hence, to be considered by the Appeals Chamber as evidence in his appeal against the Judgment, Arido must meet the requirements of regulation 62 of the Regulations of the Court.¹⁴ He fails to do so.

A. Arido’s request for the admission of the Parties’ sentencing submissions (T-53, pages 60-81 and T-55) should be summarily dismissed

9. Arido does not provide any arguments to support his request for the admission of additional evidence on appeal of the Parties’ sentencing submissions, namely, T-53 (pages 60-81) and T-55. His arguments refer solely to D-4’s testimony, which is recorded in approximately the first sixty pages of T-53. Since Arido advances no argument, his request to admit T-53 (pages 60-81) and T-55 should be summarily dismissed.

10. In any event, the Parties’ sentencing submissions are not additional evidence on appeal nor can they be judicially noticeable material. Evidence sought to be admitted on appeal “must be shown to be relevant to a ground of appeal raised

¹³ ICC-01/05-01/13-2159 A A2 A3 A4 A5 (“Arido Additional Evidence AD”), para. 10.

¹⁴ Arido Additional Evidence AD, para. 10. *Contra* Arido Request, paras. 16-18, 29-30 (arguing that because the transcripts are part of the trial record, they should also be part of the record for appellate review).

pursuant to article 81(1) and (2) of the Statute.”¹⁵ Otherwise, “it would be of no use to admit evidence into the record that is irrelevant [...]”¹⁶ The Parties’ sentencing submissions are not “evidence” but rather “arguments”. Notably, they are not concerned with Arido’s conviction. Thus, they are irrelevant to this appeal and could not or would not have any impact on Arido’s conviction. Similarly, they cannot be judicially noticeable material, since they are “arguments” and thus subject to dispute.

11. Because of the foregoing, Arido’s request to admit the Parties’ sentencing submissions as additional evidence on appeal or, alternatively to take judicial notice of them, should be dismissed.

B. D-4’s testimony (T-53 pages 8-59) is not admissible as additional evidence on appeal

(i) D-4’s evidence was available to Arido during trial

12. Evidence relevant to guilt or innocence must, as a rule, be adduced at trial.¹⁷ The appeal process is only designed to be a corrective procedure and not a trial *de novo*.¹⁸ Therefore, admitting additional evidence on appeal is the exception, not the rule, and is thus highly circumscribed. It is not designed to re-open the evidentiary phase of the trial, or to allow the parties to remedy their trial mishaps by liberally admitting evidence available to them during trial but which they chose not to adduce for strategic reasons.¹⁹

¹⁵ *Lubanga* AJ, para. 54. See also regulation 62(1)(b) which considers that the proposed additional evidence must be shown to be relevant to a ground of appeal raised pursuant to article 81(1) and (2) of the Statute.

¹⁶ *Lubanga* AJ, para. 54.

¹⁷ *Lubanga* AJ, para. 57.

¹⁸ *Lubanga* AJ, para. 57.

¹⁹ *Ibid.*

13. As the Appeals Chamber has emphasised:

“[E]vidence relevant to a decision pursuant to article 74(2) of the Statute should, with only limited exceptions, be presented *before* the decision is taken. [A]llowing the admission of additional evidence on appeal, without further restriction, entails a real risk of litigation strategies that contemplate the presentation of evidence for the first time on appeal, even if such evidence was available at trial or, with due diligence, could have been produced.”²⁰

14. To be considered as additional evidence, it is not sufficient that the requested material was merely unavailable to the Trial Chamber and could not have been considered in deciding the guilt or innocence of the accused.²¹ Rather, the evidence must not have been available *to the requesting party* at trial, even with the exercise of due diligence. Indeed, “regulation 62(1)(b) of the Regulations of the Court [...] regulat[es] what the *requesting participant* needs to set out in his or her application [...] why the evidence was not presented before the Trial Chamber.”²²

15. Arido’s request to present D’4s testimony as additional evidence on appeal does not meet the standard in regulation 62, as developed by the Appeals Chamber, since it seeks the admission of evidence that was available to Arido but which he chose not to present for strategic reasons.²³ The Arido Request embodies the type of litigation that regulation 62 and the Appeals Chamber reject.

16. As the Prosecution noted in its Response Brief, Arido decided to drop D-4 as a Defence witness just three days after the Prosecution had disclosed the content of its interview of D-4.²⁴ Before listing D-4 as a witness, Arido was expected to have interviewed him, and to have enquired as to the relevant information related to the charges against Arido that he could provide. It appears that the Arido Defence had

²⁰ *Lubanga* AJ, para. 57. Emphasis in the original.

²¹ *Contra* Arido Request, para. 20.

²² *Lubanga* AJ, para. 58. Emphasis added.

²³ Arido Provisional List of Witnesses, Arido Witness List and Arido Revised Witness List.

²⁴ ICC-01/05-01/13-2170-Conf A A2 A3 A4 A5 (“Prosecution Response Brief”), paras. 669-671, 711, 731.

met with D-4, [REDACTED].²⁵ Since the aspects of D-4's testimony that Arido now seeks to introduce as additional evidence on appeal fall within this topic, D-4's evidence was plainly available to Arido at trial—by his own admission.²⁶ Arido Request thus undermines the corrective function of the appeal process and should be dismissed.²⁷

(ii) D'4s evidence could not and would not have changed the verdict

17. Furthermore, Arido fails to show how D-4's testimony could²⁸ or would²⁹ have led the Chamber to conclude differently. When analysed in the context of the offences for which Arido was convicted, and the entire evidence admitted at trial and relied upon by the Chamber,³⁰ D-4's testimony neither could have nor would have led the Trial Chamber to enter a different verdict.³¹

18. First, Arido does not accurately present D-4's testimony. Arido states that D-4 testified that he, rather than Arido, assigned military ranks to the Cameroonian witnesses.³² Significantly, however, D-4's evidence did not relate to the event *in Douala in February 2012*.³³ To the contrary, D-4 testified that [REDACTED] in a document that he had forged *for the purposes of the article 70 trial*, after he was contacted by the Arido Defence to testify in that case.³⁴ His evidence did not touch on the assignment of military ranks in 2012 at all, specifically since the Prosecution was prevented at the sentencing hearing from leading evidence on the merits of the

²⁵ [REDACTED].

²⁶ [Mrkšić Additional Evidence Decision](#), para. 6; [Ntagerura Additional Evidence Decision](#), para. 9.

²⁷ *Lubanga* AJ, para. 57.

²⁸ *Lubanga* AJ, paras. 1, 59.

²⁹ The *ad hoc* Tribunals have required this high threshold if the evidence, as in this case, was available or could have been discovered with reasonable diligence. The applicant must show that the exclusion of the evidence would amount to a miscarriage of justice: [Setako Additional Evidence Decision](#), para. 46; [Kajelijeli Additional Evidence Decision](#), para. 11; [Mrkšić Additional Evidence Decision](#), para. 9; [Sesay Additional Evidence Decision](#), para. 13.

³⁰ [Kvočka Additional Evidence Decision](#), p. 4; [Semanza Additional Evidence Decision](#), p. 3; [Sesay Additional Evidence Decision](#), para. 14.

³¹ *Lubanga* AJ, paras. 1, 59. *Contra* Arido Request, paras. 24-26.

³² Arido Request, para. 23.

³³ Judgment, paras. 334-340.

³⁴ CAR-D24-0002-0003. See Judgment, para. 322. The Trial Chamber found the document unreliable. [REDACTED].

charges against Arido.³⁵ Thus, D-4's evidence on this topic is irrelevant to Arido's conviction.

19. Further, D-2's and D-3's reliable and corroborated evidence demonstrate that it was *Arido* who directed the witnesses to state they held a certain military status—assigning them military ranks—and handed out military “insignia” to each of them. Moreover, D-2 took notes during Arido's “briefing” sessions, which contain references to D-2's alleged membership of the MLC youth wing and his purported military training. D-2's contemporaneous notes were introduced as corroborating evidence at trial.³⁶

20. In addition, during D-4's interview with the Prosecution [REDACTED], prior to his testimony at the sentencing hearing, [REDACTED].³⁷ [REDACTED]. Should the Chamber decide to admit D-4's evidence on the merits of the appeal, the Prosecution will seek to introduce this and other rebuttal evidence from D-4 relating to Arido's role in the assignment of military ranks.

21. Second, D-4 never testified that D-2 and D-3 were soldiers, or that he believed that they were soldiers. Rather, D-4 testified that he forged the document [REDACTED],³⁸ [REDACTED].³⁹

22. Notwithstanding, D-4 did *not* testify that the witnesses introduced themselves as soldiers to *Arido*. Arido fails to show how D-4's state of mind is relevant to Arido's knowledge and his conviction.⁴⁰ It is not and, on this basis too, Arido's request to admit D-4's testimony should be dismissed.

³⁵ ICC-01/05-01/13-2025 (Sentencing Witnesses Decision), para. 18.

³⁶ Judgment, paras. 334-340. See CAR-OTP-0079-1522 and CAR-OTP-0079-1526.

³⁷ [REDACTED].

³⁸ T[REDACTED].

³⁹ [REDACTED].

⁴⁰ *Contra* Arido Request, para. 22. See also paras. 24 and 26.

23. Moreover, Arido's assigning of military ranks to the Cameroonian witnesses was only a part of Arido's course of criminal conduct. As found by the Chamber, Arido initially met with D-2 and D-3 in January 2012 in Douala and offered them money and relocation in exchange for their testimony in favour of Bemba.⁴¹ In February 2012, Arido met with them again, and with other witnesses (such as D-4 and D-6) and prospective witnesses in Douala, and reiterated his promises, and further tampered with their evidence before the Court. On that occasion, Arido met with the purported witnesses (and conducted his criminal actions) before and after they met with Kilolo [REDACTED].⁴² Hence, even assuming *arguendo*, that D-4 had "assigned ranks to D-2 and D-4" in February 2012 in Douala, this would not undercut the reliable and corroborated evidence regarding Arido's promises of money and relocation to the four witnesses, and his briefing and instructions on how to present their background, experience and training to Kilolo and the Court.

24. In any event, D-2's and D-3's military status is irrelevant to Arido's conviction for corruptly influencing the four Cameroonian witnesses in Douala in 2012.⁴³ What matters—and what the Chamber predicated Arido's conviction on—was his offer to the four Cameroonian witnesses of money and relocation in exchange for their testimony favourable to Bemba, and his having tampered with their evidence, including by instructing and briefing them (or facilitating their briefing by others) to present themselves as military men to Kilolo and the Court,⁴⁴ and that he meant to engage in these actions.⁴⁵

⁴¹ Judgment, paras. 320-330.

⁴² Judgment, paras. 331-352.

⁴³ Judgment, paras. 669-672, 943-945.

⁴⁴ Judgment, para. 669.

⁴⁵ Judgment, para. 670.

(iii) No compelling reasons justify the admission of D-4's testimony

25. Arido's request that D-4's testimony be admitted in the "interests of justice" is also misconceived and unsupported.⁴⁶

26. The admission of additional evidence is an exceptional measure.⁴⁷ While the Appeals Chamber has discretion to admit additional evidence on appeal even if it does not meet some of the threshold requirements under regulation 62, compelling reasons must exist to do so.⁴⁸ Arido fails to demonstrate any. In fact, admitting D-4's testimony into evidence on appeal would undercut Trial Chamber VII's instructions that "[i]f and when the Prosecution Witness appears, the Chamber emphasises that he may only be examined on the matters allegedly proving that Mr Arido attempted to obstruct justice in this case. This is 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".⁴⁹

27. Nor does having "all material formally before the Appeals Chamber so that it can properly dispose of the matter" constitute a compelling reason.⁵⁰ An appeal is a corrective procedure—it is not a trial *de novo*.⁵¹ Further, and as shown above, D-4's evidence, even if it had been presented, could not (nor would not) have led the Trial Chamber to rule differently.⁵² Arido misreads D-4's testimony, which is in any event irrelevant to the appeal proceedings against his conviction.

28. The nature of the evidence—a transcript of a witness's testimony in a sentencing hearing—is also not a compelling reason.⁵³ The Appeals Chamber has

⁴⁶ Arido Request, paras. 27-30.

⁴⁷ *Lubanga* AJ, para. 57.

⁴⁸ *Lubanga* AJ, paras. 1, 62.

⁴⁹ Sentencing Witnesses Decision, para. 18.

⁵⁰ Arido Request, para. 27.

⁵¹ *Lubanga* AJ, para. 57.

⁵² *Contra* Arido Request para. 27. *See above*, paras. 12-24.

⁵³ *Contra* Arido Request, paras. 29-30.

clearly indicated that evidence submitted during the sentencing phase must comply with the requirements of regulation 62 to be considered as additional evidence in an appeal against a Judgment.⁵⁴

C. Arido's alternative request to judicially notice D-4's evidence is unfounded

29. Arido's alternative request for the Appeals Chamber to take judicial notice of D-4's testimony, for the truth of its content, pursuant to article 69(6),⁵⁵ should also be dismissed.

30. Judicial notice within the meaning of article 69(6) is limited to "facts of common knowledge", meaning facts that are already notorious or well-known to at least the Chamber disposing of the article 69(6) application.⁵⁶ The ICTY and ICTR Appeals Chamber has held that "[t]he term 'common knowledge' encompasses facts that are not reasonably subject to dispute: in other words, commonly accepted or universally known facts, such as general facts of history or geography or the laws of nature. Such facts are not only widely known but also beyond reasonable dispute."⁵⁷ D-4's testimony in the sentencing proceedings of this case does not fall within this category.

⁵⁴ *Contra* Arido Request, paras. 16-18, 29-30. See Arido Additional Evidence Decision, para. 10. See above para. 8.

⁵⁵ Arido Request, paras. 3, 29, 35.

⁵⁶ Judicial Notice AD, para. 8 ("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. Thus, judicial notice requires that the facts at issue are well known to, at least, the Chamber applying article 69 (6) of the Statute").

⁵⁷ [Karemera Judicial Notice AD](#), para. 22 and [Semanza AJ](#), para. 194 See also [Rutaganda AJ](#), para. 225 (holding that the underlying objective is to dispense with proof of officially recorded facts that are indisputable).

31. Although Chambers have taken judicial notice of ICC transcripts with respect to the dates and the contents of witnesses' testimony, they have declined to judicially notice the truth or falsity of the testimony itself,⁵⁸ as Arido asserts.

32. Further, "whether a fact qualifies as a 'fact of common knowledge' is a legal question. By definition, it cannot turn on the evidence introduced in a particular case, and so the deferential standard of review ordinarily applied by the Appeals Chamber to the Trial Chamber's assessment of and inferences from such evidence has no application."⁵⁹ Here, the "truth" or "falsity" of D-4's testimony, is readily disputable and it is not a "fact of common knowledge". As such, it cannot be judicially noticed by the Appeals Chamber.

Conclusion and Relief Requested

33. For the reasons set out above, the Prosecution requests the Appeals Chamber to reject the Arido Request in its entirety. Should the Appeals Chamber decide to admit as additional evidence on appeal D-4's evidence, the Prosecution would request to submit evidence in rebuttal.



Fatou Bensouda, Prosecutor

Dated this 31st day of August 2017⁶⁰

At The Hague, The Netherlands.

⁵⁸ ICC-01/05-01/13-1249 ("First Judicial Notice Decision"), para. 6. *See also* ICC-01/05-01/13-1473 ("Second Judicial Notice Decision").

⁵⁹ [Karemera Judicial Notice AD](#), para. 23.

⁶⁰ This submission complies with regulation 36, as amended on 6 December 2016: ICC-01/11-01/11-565 OA6 ("Al-Senussi Admissibility AD"), para. 32.