



**Original: English**

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

**Date: 2 October 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 concerning the Prosecutor's request for introduction of two witness  
statements under rule 68 (2) (b) of the Rules of Procedure and 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 the “Prosecution’s Request to Admit Prior Recorded Testimonies and to Designate a Person Authorised to Witness a Declaration under Rule 68(2)(b)” of 25 August 2017 (ICC-01/05-01/13-2205-Conf),

*Renders the following*

## DECISION

The Prosecutor’s request to designate a person authorised to witness a declaration under rule 68 (2) (b) of the Rules is dismissed as moot.

## REASONS

### I. PROCEDURAL HISTORY

1. 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-R01<sup>1</sup> (“Application for Additional Evidence”).

2. On 18 May 2017, the Appeals Chamber rendered a decision in which it, *inter alia*, indicated that it would rule on the admissibility of document CAR-OTP-0094-1580-R01 as additional evidence on appeal jointly with the other issues raised in Mr Arido’s appeal, and, accordingly, directed the Prosecutor to set out arguments on the Application for Additional Evidence and to adduce any evidence in response.<sup>2</sup>

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<sup>1</sup> “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); a public redacted version was registered on 22 May 2017 ([ICC-01/05-01/13-2116-Red \(A\)](#)).

<sup>2</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 \(A A2 A3 A4 A5\)](#).

3. On 10 July 2017, the Prosecutor responded to the Application for Additional Evidence, and requested admission of three items of evidence in response to Mr Arido's proposed additional evidence,<sup>3</sup> among which the statements of Witness P-785 and Witness P-805<sup>4</sup> ("Statements").

4. On 18 August 2017, the Appeals Chamber, noting that the Statements were testimonial in nature, decided that should the Prosecutor wish to rely on this evidence, she should either apply for the introduction of the Statements pursuant to rule 68 of the Rules of Procedure and Evidence ("Rules") or request that Witness P-785 and/or Witness P-805 be heard orally.<sup>5</sup>

5. On 25 August 2017, the Prosecutor filed a request seeking that the Appeals Chamber designate a person authorised to witness declarations made under rule 68 (2) (b) (ii) and (iii) of the Rules, and admit the Statements pursuant to rule 68 (2) (b) of the Rules once the witness declarations have been made.<sup>6</sup>

6. On 30 August 2017, Mr Arido filed a response to the Prosecutor's Request, submitting that the Statements should not be introduced under rule 68 (2) (b) of the Rules.<sup>7</sup>

## II. MERITS

7. The Appeals Chamber observes that the Prosecutor requests the introduction of the Statements under rule 68 (2) (b) of the Rules in response to Mr Arido's proposed additional evidence on appeal. A decision by the Appeals Chamber on whether to introduce the Statements will therefore be made only if Mr Arido's proposed

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<sup>3</sup> The Prosecutor's response to the Application for Additional Evidence is contained at paragraphs 732-747 of the "Prosecution's Consolidated Response to the Appellants' Documents in Support of Appeal", ICC-01/05-01/13-2170-Conf (A A2 A3 A4 A5); a public redacted version was registered on 25 August 2017 ([ICC-01/05-01/13-2170-Corr-Red \(A A2 A3 A4 A5\)](#)).

<sup>4</sup> CAR-OTP-0093-0092-R01 and CAR-OTP-0093-0064-R01, respectively.

<sup>5</sup> "Decision on Mr Arido's request to respond to evidence adduced by the Prosecutor", ICC-01/05-01/13-2198 (A A2 A3 A4 A5).

<sup>6</sup> "Prosecution's Request to Admit Prior Recorded Testimonies and to Designate a Person Authorised to Witness a Declaration under Rule 68(2)(b)", ICC-01/05-01/13-2205-Conf (A A2 A3 A4 A5), para. 26.

<sup>7</sup> "Narcisse Arido's Response to 'Prosecution's Request to Admit Prior Recorded Testimonies and to Designate a Person Authorised to Witness a Declaration under Rule 68(2)(b)' (ICC-01/05-01/13-2205-Conf)", ICC-01/05-01/13-2212-Conf (A A2 A3 A4 A5); a public redacted version was registered on 6 September 2017 ([ICC-01/05-01/13-2212-Red \(A A2 A3 A4 A5\)](#)).

additional evidence is eventually admitted on appeal.<sup>8</sup> The Appeals Chamber recalls that, as announced, this determination will be made jointly with the disposal of Mr Arido's appeal.

8. The Appeals Chamber, however, observes that rule 68 (2) (b) of the Rules mandates that prior recorded testimony may only be introduced under this legal basis if accompanied by a declaration by the testifying person within the meaning of rule 68 (2) (b) (ii) of the Rules. While chambers of this court, including in the present case, have routinely allowed the conditional introduction of prior recorded testimonies under rule 68 (2) (b) of the Rules pending receipt of the declarations,<sup>9</sup> the Appeals Chamber considers that this course of action is not feasible in the present circumstances given that a determination on the Prosecutor's request for introduction of the Statements under rule 68 (2) (b) of the Rules will only be made if, in the disposal of Mr Arido's appeal, the Appeals Chamber eventually grants Mr Arido's request for admission of document CAR-OTP-0094-1580-R01 as additional evidence on appeal. Therefore, by that time, declarations under rule 68 (2) (b) (ii) and (iii) of the Rules by Witnesses P-785 and P-805 will have to have been received from the Prosecutor.

9. The Appeals Chamber notes that Trial Chamber VII authorised the Legal Counsel of the Registry, or any other person designated by him, to witness declarations under rule 68 (2) (b) of the Rules for the purpose of the present case.<sup>10</sup> In this regard, the Appeals Chamber, taking into account the need for continuity throughout different procedural stages in the same case, including for reasons of efficiency and expeditiousness, clarifies that this authorisation, in the absence of any compelling reason warranting its revocation or modification, remains in effect also at the present stage of the proceedings. The Prosecutor's request to designate a person

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<sup>8</sup> See "Decision on Mr Arido's request to respond to evidence adduced by the Prosecutor", 18 August 2017, ICC-01/05-01/13-2198, para. 10, referring to *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 \(A5\)](#), para. 64.

<sup>9</sup> See e.g. Trial Chamber, "Decision on the 'Motion on behalf of Mr Aimé Kilolo for the Admission of the Previously Recorded Testimony pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence'", 29 April 2016, [ICC-01/05-01/13-1857](#); *Prosecutor v. Dominic Ongwen*, "Decision on the Prosecution's Applications for Introduction of Prior Recorded testimony under Rule 68(2)(b) of the Rules", 18 November 2016, [ICC-02/04-01/15-596-Red](#).

<sup>10</sup> "Decision on the Prosecution's Request to Designate a Person Authorised to Witness a Declaration Under Rule 68(2)(b) of the Rules of Procedure and Evidence", 29 July 2015, [ICC-01/05-01/13-1109](#).

authorised to witness a declaration under rule 68 (2) (b) of the Rules is therefore moot.

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

  

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

Dated this 2<sup>nd</sup> day of October 2017

At The Hague, The Netherlands