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**International
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Court**

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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
“Narcisse Arido’s Request for Leave to Reply to the
‘Prosecution’s Consolidated Response to the Appellants’
Documents in Support of Appeals’ (ICC-01/05-01/13-2170-Conf)”, filed 24 July 2017**

Source: Counsel for Narcisse Arido

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

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I. INTRODUCTION

1. The Arido Defence files this Request for Leave to Reply to the ‘Prosecution’s Consolidated Response to the Appellants’ Documents in Support of Appeals (‘Prosecution Response’ or ‘Response’)¹ in order to comply with the Appeals Chamber’s ‘Decision on requests for variation of time limits for a request for leave to reply’ (‘Appeals Chamber Decision’).²
2. The Arido Defence asserts the right to amend this Request, at a future date, when the French translation is prepared for Appellant and he has had ample time to review and analyse the Prosecution’s Response, and to give instructions on this to counsel.³
3. The Defence reiterates that the lack of a French translation of the Prosecution’s Response means that Appellant, a Francophone, cannot be informed of the case against him. Hence, he cannot instruct his counsel in reference to issues for the Request for Leave to Reply.⁴ This continues to be an outstanding fair trial violation under Article 67 of the Statute.

II. APPLICABLE LAW

4. The Appeals Chamber has held that issues for the Reply must be “pertinent to the proper adjudication of the appeal.”⁵
5. The Regulations of the Court (‘RoC’) give the Appeals Chamber discretion to grant a leave to reply under two provisions. Based on Regulation 24(5) of the RoC, the Appeals Chamber has the discretion to determine the scope of a reply, if leave is granted. It includes the criterion of ‘new issues’ raised in the Response which the replying participant could not reasonably have anticipated. Under Regulation 60(1) of the RoC, a Reply may be ordered by the Appeals Chamber in the interests of justice.

¹ ICC-01/05-01/13-2170-Conf. This filing is confidential pursuant to Regulation 23 *bis* (1) of the Regulations of the Court as it responds to a confidential submission.

² ICC-01/05-01/13-2175.

³ At the time of the drafting of this Request, the reasons for the Appeals Chamber’s Decision have not yet been filed. Thus, the Appeals Chamber’s response to arguments concerning the translation is unknown, and is not discussed here.

⁴ See ICC-01/05-01/13-2174-Conf, paras 10-12.

⁵ See ICC-01/05-01/08-3480, para. 8.

6. Appellant hereby submits this Request for Leave to Reply under both provisions. If the Appeals Chamber does not find ‘new issues,’ then, in the alternative, Appellant requests that Leave to Reply be granted in the interests of justice. The underlying arguments for each are the same.

III. SUBMISSIONS

a) Accuracy is a foundational requirement for the resolution of appellate issues

7. As a threshold matter, the Defence submits that an accurate reading of both the ‘Judgment pursuant to Article 74 of the Statute (‘Trial Judgment’)⁶ and ‘Narcisse Arido’s Defence Document in Support of the Appeal Pursuant to Article 81’ (‘Arido Appeal Brief’ or ‘Appeal Brief’)⁷ is a prerequisite to the proper adjudication of the appellate issues.
8. The Defence expects the Prosecution to do its job, *i.e.*, to contest and disagree with the Defence analyses and conclusions in respect to the Trial Judgment which ultimately convicted Appellant. Appellant has raised numerous legal, factual, evidentiary, and procedural errors in his Appeal Brief⁸ which the Prosecution addresses in its Response.
9. But, unfortunately, the Prosecution Response is too often replete with inaccurate representations of the Trial Judgment and the Arido Appeal Brief.⁹ Repeatedly, the Prosecution misrepresents or mischaracterizes, distorts or misquotes and/or otherwise miscomprehends the Trial Judgment and/or the Defence arguments.
10. The Defence could not have anticipated these myriad permutations which raise new issues, affecting the whole Prosecution Response and which must be addressed in the sought Reply. For the purpose of this Request, we will provide selective, but not exhaustive, examples of these inaccuracies and errors.

⁶ ICC-01/05-01/13-1989-Red.

⁷ ICC-01/05-01/13-2145-Corr-Red.

⁸ Arido Appeal Brief, paras 105 to 111 (‘Chart B - Table of Grounds of Appeal’).

⁹ See, for example, Prosecution’s generalizations at **para. 648**, which appear to footnote most of the Arido Defence Brief.

b) The Prosecution wrongly asserts that the Defence cites no error

11. The Prosecution has the right to disagree with an error identified by the Defence, but it does not have the right to misrepresent and conclude that no error was cited. A quick perusal of the Arido Defence Brief's 'Table of Contents', and the respective sections cited, indicates that multiple errors are identified in the Trial Judgment, as well as their harm and prejudice to Appellant.¹⁰
12. Yet, repeatedly, the Prosecution wrongly states that the Appeal Brief cites no error,¹¹ causing one to wonder if the Prosecution was reading the same filed Arido Appeal Brief. Especially in zealous adversarial litigation, there must be a baseline of accuracy of representation of opposing arguments. This appears to be lacking in the Prosecution Response.
13. At **para. 237**, the Prosecution states that the Arido Defence "failed to show any error in the Chamber's definition and application of article 70(1)(c)." But, the Defence identifies and analyses legal errors in its Brief.¹²
14. At **para. 27**, the Prosecution alleges that the Arido Defence advances no error in respect to Article 69(7) of the Statute, referencing Arido Appeal Brief, paras 131-148 in the Prosecution Response, fn. 44. Clearly, the Prosecution did not check the footnotes in the Arido Appeal Brief carefully, which cite previous pleadings where the Defence has argued the legal issues, and the Trial Chamber has responded to same.¹³
15. Despite its "no errors cited" analysis, the Prosecution responds, in **para. 32**, to the error the Arido Defence cites in its Appeal Brief, paras 141-142, and misstates the Arido Defence position as the existence of human rights violations is the only relevant factor in Article 69(7). The Prosecution likely reached its conclusion (based on Prosecution Response, fn. 55, Arido 'suggests that the Chamber's interpretation "distorts the significance of international human rights"') by incorrectly reading the Arido position.

¹⁰ Arido Appeal Brief, paras 3 to 8.

¹¹ See, for example, Prosecution Response conclusions at **paras 15, 27, 152, 181, 237, 714, 790** (Conclusion that Arido has failed to show any legal or factual error).

¹² Arido Appeal Brief, paras 161-231.

¹³ See, for example, Arido Appeal Brief, para. 126, footnotes 131-136; and para. 127.

16. The equation of “distortion” with “only relevant factor” is, at least, a misrepresentation and perhaps also a miscomprehension that affects a critical issue on appeal: the interpretation and application of Article 69(7) and (8) of the Statute and the relation between the ICC law and national law.
- c) *The Prosecution wrongly asserts that the Arido Appeal Brief does not demonstrate that the errors materially affected the Judgment*
17. At its Response, **para. 9**, the Prosecution states: “None [referring to Appellants] identify an error affecting the Judgment.”
18. This is false: the Arido Appeal Brief discusses the material effect of specific errors on the judgment of conviction, for example, at paras 194, 279, 300, 332 and 341.
19. At its Response, **para. 674**, the Prosecution states: “Arido has not even attempted to show how the Chamber’s Arido Additional Requests Decision materially affected his conviction.”
20. Apparently the Prosecution did not read the pleadings carefully. The issues for which remedies were requested are discussed in detail in the Arido Defence Closing Submissions,¹⁴ and also found in Arido Appeal Brief.¹⁵ These issues include the illegalities of the Western Union collection, the security situation [REDACTED] and the human rights violations of [REDACTED].
21. As to the Leaves of Appeal, the Arido Defence has previously demonstrated that its requests meets the standards of Article 82(1)(d).¹⁶ The principles underlying the standards of Article 81(1)(d) are consistent with “materially affecting the Judgment.”
22. In sum, the Prosecution has failed to refute the evidence providing by the Arido Appeal Brief and other pleadings.

¹⁴ ICC-01/05-01/13-1904-Conf-Corr, paras 84 to 85.

¹⁵ Arido Appeal Brief, p. 100.

¹⁶ See, for example, Arido Requests for Leave to Appeal: ICC-01/05-01/13-1026, paras 37-38; ICC-01/05-01/13-1944, paras 15-17; ICC-01/05-01/13-1950, paras 24-25.

d) The Prosecution wrongly asserts that there were no violations of Appellant's right to notice

23. The issue of notice is fundamental to the fair trial rights of Appellant, and to his Appeal.¹⁷ The question of what constitutes notice within Article 67 remains unsettled at the trial level.
24. In its Response, at **para. 650**, the Prosecution rejects the Arido Defence's interpretation and application of Article 67(1)(a), particularly the "type of notice information" to which a defendant is entitled.
25. We note, however, that the Prosecution does not respond to the content of the Defence arguments, especially those in relation to the UDCC.
26. Two important issues are raised here: a) whether direct perpetration is subsumed under co-perpetration; and b) the parameters of the charging instrument, and whether an UDCC should have been ordered. The Defence is aware that these issues are not new, but, in the interests of justice, leave should be granted to address them in a Reply.

e) The Prosecution misrepresents that the Trial Chamber viewed the evidence of D-2 and D-3 with caution

27. The Prosecution wrongly concluded that the Trial Chamber treated the evidence of D-2 and D-3 with "due caution" and considered the evidence with "some caution."¹⁸ The problem is that the references to Trial Judgment sections at the Prosecution Response, fn. 3635, do not discuss the application of any caution to these witnesses.
28. In contrast, a search of the Trial Judgment indicated that the Trial Chamber articulated and applied "caution" in relation to the evidence of other witnesses whose testimony concerned other Appellants.¹⁹ Thus, the Prosecution's position is a blatant misrepresentation (and revision) of the Trial Chamber's position in the Judgment in respect to D-2 and D-3.

¹⁷ Violations of notice are extensively discussed at Arido Appeal Brief, paras 7-76.

¹⁸ Prosecution Response, paras 708-709.

¹⁹ Trial Judgment, paras 265, 267 (regarding Babala evidence), para. 427 (regarding D-23 testimony), para. 549 (regarding D-15 testimony), para. 597 (regarding D-54 testimony).

29. The issue of the treatment of the evidence of D-2 and D-3, as well as the “missing witnesses” D-4 and D-6, is the crux of the Trial Chamber’s conviction of Appellant, and is central to the Defence arguments on appeal. The Defence refers the Appeals Chamber to arguments in its Appeal Brief, particularly on accomplice/perpetrator status of D-2 and D-3.²⁰
30. But, here, the Prosecution has introduced two new issues:
- i) What is necessary to support an evidentiary standard to be applied to evidence from witnesses who are accomplices? How should such evidence be viewed: Can it serve as the sole basis for a conviction, as the evidence of D-2 and D-3 does in Appellant’s case and can it, as a matter of law, provide evidence for the participation of other, uncalled participants (D-4 and D-6) as a basis for conviction?
 - ii) Whether testimony of one accomplice can be corroborated by the testimony of another accomplice, and whether this runs afoul of Article 66?²¹
- f) The Prosecution wrongly asserts that financial records were obtained with judicial authorisation*
31. Conclusions based on analyses which accurately reflect the evidence are necessary to properly adjudicate the issues in this appeal, especially the Trial Judgment’s errors identified in respect to the Western Union evidence.²²
32. The Prosecution repeatedly asserts, as a conclusion, that the financial records and logs and recordings were obtained pursuant to judicial authorization.²³ The Response misrepresents and/or disregards the evidence concerning judicial authorisations.
33. The Response is wrong: some materials concerning Appellant were obtained without a prior judicial authorisation. As the Arido Appeal Brief’s ‘Chart A - Chronology of Events Related to the Unlawful Collection of Western Union Documents’²⁴ shows, the

²⁰ Arido Appeal Brief, paras 273-279.

²¹ At Response, para. 710, the Prosecution states that corroboration is not required, including for accomplice witnesses, reference Rule 63(4), at fn. 2646; *see also* Prosecution Response, **para. 682**.

²² Arido Appeal Brief, paras 123-149.

²³ Prosecution Response, para. 6.

²⁴ Arido Appeal Brief, paras 101 to 104.

Prosecution collected material about Appellant, including an Excel spreadsheet named “[REDACTED]”²⁵ without prior judicial authorisation. This information is based on OTP disclosures obtained from its own investigations, as identified by the “OTP” numbers.

34. Yet, the Prosecution simply ignores this evidence, and does not even bother to refute it. Since this is the Prosecution’s own material, the Defence could not have anticipated that the Prosecution would reach an erroneous conclusion and thus create a new issue on appeal based on its misstatement of the evidence.
35. Even if the Appeals Chamber does not deem this to be new, the Defence underscores that a reply to the legal issues interpreting the obligations of the ICC regarding international human rights norms, and the relation of national and international jurisdiction in applicability of the Article 69(7) and (8) of the Statute should be granted in the interests of justice. While the Prosecution often cites the *Lubanga Article 69(7) Decision*²⁶ as support, this is a Trial Chamber decision. The underlying legal issues, including international human rights violations and illegally obtained evidence, have not been addressed, to our knowledge, by this Appeals Chamber.

g) The Prosecution wrongly reverses the burden of proof and presumption of innocence turning them “topsy turvy” to place the burden on the Defence

36. Central to Appellant’s appellate argument is that he was wrongly convicted for an offence involving four persons, although only two of whom were called by the Prosecution to testify. As discussed in his Appeal Brief, the uncalled, “missing witnesses” were available to the Prosecution, which had the burden to present its case and prove the confirmed allegations beyond a reasonable doubt with evidence.²⁷
37. In its Response, the Prosecution provides no reasons why D-4 and D-6 were not called to testify in its case. Instead the Prosecution blames the Defence: the Defence could and should have called D-4 and D-6 to testify, but had a “strategic” reason not to do this.²⁸

²⁵ See CAR-OTP-0092-0022; See also Arido Appeal Brief, p. 101.

²⁶ Prosecution Response, footnotes 8, 10, 12, 13, 18, 55, 56, 69, 237; and paras 35, 52.

²⁷ Arido Appeal Brief, para. 317.

²⁸ Prosecution Response, para 731 (“If Arido considered that D-4 and D-6 could have assisted his defence or raised a reasonable doubt... he should’ve called them to testify...”); and **para. 727**.

38. Apparently, the Prosecution missed the principle that in a criminal trial, a defendant, or, in this case Appellant, has the right to remain silent and be presumed innocent. He has no burden of proof, at the ICC, or in any domestic or international system based on fair trial principles. Here, Mr. Arido, and his counsel could have done nothing and said nothing – session after session. The burden of proof beyond a reasonable doubt rests solely with the Prosecution.
39. The Prosecution’s assertion that Appellant could have called the “missing witnesses,” and its implication that the Defence should have done this is impermissible burden-shifting – plain and simple.
40. Thus, the Prosecution’s Response raises the fundamental issue of its legal obligations to prove each and every element of the offence or crime charges and mode of liability charged beyond a reasonable doubt. Its position essentially obliterates a defendant’s fair trial right to be presumed innocent, including the right to remain silent.²⁹
41. The Response arguments are rooted in a basic misconceptions or lack of knowledge of fundamental principles, which include evidentiary concepts such as “missing witnesses” and in an erroneous understanding of hearsay and how it should be treated.³⁰ Its position is that the evidence of D-2 and D-3 about the “missing” witnesses is direct evidence, and not hearsay.³¹ As the Defence has argued, the hearsay error lies in the fact that the Trial Chamber accepted the evidence of D-2 and D-3 about D-4 and D-6 for its content, which – in turn – it used as the sole basis to convict Appellant in respect to D-4 and D-6.³²
42. Hence, the Response raises new issues as to what is direct evidence, what is hearsay evidence and how is the concept of “missing witnesses” applied in an evidentiary context?

²⁹ See ICC-01/05-01/13-3123, para. 85 (In respect to Article 55(2) statements, Trial Chamber states “... [A]s a suspect, Mr. Arido is not duty-bound to incriminate himself.”). The Defence understands this as a statement in support of the right to remain silent.

³⁰ See, for example, Prosecution Response, **paras 711, 724-726**.

³¹ Response, **para. 724**.

³² Arido Defence Brief, paras 333-338.

43. But, addressing these issues solely as evidentiary distracts from the reality that the new issue presented by the Response is: What understanding of the basic principles of criminal law and the rights of a defendant will be applied to the facts of this case?
44. Even if the Appeals Chamber disagrees with this formulation, there is a need for a clarification of these basic principles, as evidenced by the Prosecution's misstatements and/or misunderstandings and/or ignorance in its Response.
45. There are also other examples of impermissible burden-shifting³³ in the Prosecution's Response, which presents new issues:
- i) The Response, at **para. 681**, states that the Arido Defence misunderstands the proof beyond a reasonable doubt standard, and the "*in dubio pro reo*" principle. The Prosecution offers not appellate legal support for its position, leading to the conclusion that this is a new and unsettled issue for the Appeals Chamber.
 - ii) The Response, at **paras 707-714**, wrongly espouses a "new" standard of evidence for a criminal trial – "reasonable consideration," arguing that the "Trial Chamber reasonably considered and assessed the testimony of D-2 and D-3." This presents the new issue on appeal of a) whether "reasonable consideration" can supplant "proof beyond a reasonable doubt" as the standard required for conviction and b) whether this "reasonable consideration" standard is applicable to accomplice evidence.
- h) The Prosecution Response in respect to Article 70(1)(c) of the Statute*
46. The Arido Appeals Brief argues that the Trial Judgment's inclusion of "potential witnesses" in Article 70 is an error because "potential witnesses" is not included in the Statute, and to simply "add it in" is *ultra vires*.³⁴ In the Response, **para. 255**, fn. 874, the Prosecution points out that a Defence pre-trial pleading³⁵ held a different position, *i.e.*, that potential witnesses were included in the definition of witnesses for the purposes of Article 70(1)(c). Upon reflection, the Defence reached the conclusion that the pre-trial position was not correct. The Defence thanks the Prosecution for its observation,

³³ See, for example, erroneous analysis of burden in Prosecution's Response, **paras 669-671, 700-701**.

³⁴ See full argument in Arido Appeal Brief, paras 162 to 195.

³⁵ ICC-01/05-01/13-978.

and wants to clarify that the current position in the Appeal Brief governs the Defence views.

47. At **para. 252**, the Prosecution erroneously argues that the Arido Defence position on the definition of “witness” “dilute[s]” and “narrow[s]” the application of the provision. While the scope of the provision has been argued in the Appellant’s Brief³⁶ and is not a new issue, the importance of the interpretation of the definition suggests that a Reply to the Prosecution on this point should be granted in the interests of justice.
48. At the Response, **para. 247**, the Prosecution misrepresents the Arido Appeal Brief arguments. The Prosecution rejects the Arido Defence arguments that the Trial Chamber’s “conduct” based analysis, without the element of intent, encourages a “strict liability” finding, in contradiction to the statutory requirements of intent. The Response refers to the Arido Appeal Brief at paras 204-205.³⁷
49. The point which the Arido Appeal Brief is making is that a finding of intent is required by Article 70, based on the Statute. To define it as a conduct crime, without the requirement of intent, is legally incorrect: conduct, alone, without intent, does not meet the requirements of the Statute.

³⁶ Arido Appeal Brief, footnote section on Article 70 and witness definition.

³⁷ Arido Defence Brief, **para. 204**: The Defence submits that the definition of “corrupting witnesses” as an “independent” or “stand alone” offence is legally incorrect, because it encourages a “strict liability” analysis which does not require a finding of intent. In contrast, Article 70 is unequivocal that a legal requirement of the offence is intentional conduct; and **para. 205**: But if you apply the strict liability analysis to this case, according to the Trial Chamber, the acts of promising money and relocation are sufficient, regardless of the outcome, or intent of these acts. Thus, the Trial Chamber treated its findings regarding Appellant’s promises of money and relocation, standing alone, as criminal acts.

i) The Prosecution Response wrongly narrows the scope of appellate review, particularly in respect to a definition of Article 81(1)(b)(iv)

50. In its Response, the Prosecution puts forward positions to narrow the scope of appellate review, although it fails to articulate any legal standards or precedents for this.³⁸
51. In its Response, **paras 672-675**, the Prosecution has raised a new issue to be resolved: the scope and definition of Article 81(1)(b)(iv). In particular, at **para. 673**, the Prosecution takes the position that the Arido Defence Closing Submissions requested remedies are “additional” requests and are “distinct from – and unrelated to – the merits of the case.” The Response makes assertions, with no argument and with no legal authority.
52. Article 81(1)(b)(iv) essentially articulates a right of a convicted person. For example, Appellant has raised a number of errors under this section, directly related to the fairness of the proceedings.
53. Prior to reading the Response, the Defence could not anticipate that this would be a new contested issue for the appeal. But the Prosecution has clearly taken the position that this section is restrictive and narrow, rather than broad and inclusive of fair trial and international human rights. For this reason, Appellant has included this issue in its Request for Leave to Reply to the Prosecution’s Response.

j) The Prosecution misrepresents the Arido Defence arguments on the Bar Table Motions

54. The Prosecution’s analysis in respect to the Bar Table Motions illustrates that it misunderstood the Arido Appeal Brief and the Defence arguments, which explain the impossibility of raising specific error or prejudice in respect to the Bar Table Motion evidence.³⁹

³⁸ For example, at **para. 86**, the Prosecution argues that the Trial Chamber was not required to “recapitulate its holdings on interlocutory procedural decisions” in its Judgement. At **para. 687**, it argues against appellate review of the denials of leaves of appeal.

³⁹ Arido Defence Brief, paras. 244-245. Note, the Arido Defence specifically responded to the Trial Chamber’s conclusions about evidence, such as the Cameroonian police report, when the Trial Chamber articulated its findings in the Judgment.

55. At **paras 152-153, 179, 181**, the Prosecution states that the Arido Defence shows no error and no prejudice regarding the regime of the Bar Table Motion, and concludes erroneously that Arido's reference to "potential fair trial violations" is vague and speculative.⁴⁰ The Prosecution's Response misses the central point: the Trial Chamber's decision making process precludes any litigation during the course of trial in respect to the Bar Table Motion evidence.
56. The Bar Table Motion issue is not new, and has been previously addressed. However, since it is apparent that the Prosecution increasingly relies heavily on documentary evidence submitted in a Bar Table Motion in its litigation, as it did in this Article 70 case, the Defence requests that the Appeals Chamber grants Leave to Reply in the interests of justice.
- k) The Prosecution's motion for Rebuttal Evidence is not legally supported, and, in any case, is premature, and should be part of a separate procedure
57. In its Response at **paras 733-740**, the Prosecution presents arguments against Appellant's Additional Evidence Request to admit [REDACTED] D-6, including [REDACTED].
58. The procedure for submission of additional evidence is governed by Regulation 62 of the RoC. While the Prosecution states that its arguments against the Arido Motion are in compliance with the Appeals Chamber Directions and Decision,⁴¹ the Defence submits that the arguments should have been made in a separate filing, and not in the Prosecution's Response to the Arido Appeal Brief.
59. The Arido Defence reserves the right to reply to the Prosecution arguments in a separate pleading, and not as part of its Reply, if leave is granted.
60. However, we note that [REDACTED] was disclosed as exculpatory evidence, in compliance with the Prosecution's continuing obligations to the Defence. This obligation is independent of the Defence, and the Prosecution's argument, at **para. 734**, that the Arido Defence did not exercise due diligence, is misplaced.

⁴⁰ Prosecution Response, **para. 179**.

⁴¹ ICC-01/05-01/13-2160.

61. The Defence notes that the Response gives no explanation as to why this exculpatory evidence was disclosed in the months after the end of the trial, or why the Prosecution neither called D-6 as a witness, nor took a statement from him – although he was named in the CoC.
62. Secondly, at **paras 741-747**, the Prosecution argues for the admission of rebuttal evidence, if Appellant’s request is granted by the Appeals Chamber.
63. The Defence opposes this motion. The proposed documents do not satisfy the legal criteria:⁴² the Prosecution has not demonstrated “an issue of significance,” that the evidence meets admissibility criteria or that its admission will not undermine Appellant’s rights. The evidence in question does not relate to the critical issue in case, namely the “missing witness” status of D-4 and D-6, and their participation in the war in CAR in 2003. The documents are irrelevant to the time period of the allegations, for example, a 2001 Decree cannot be probative of events in 2003. The document concerning [REDACTED] D-6 [REDACTED] is not dispositive to refute the Defence position, since the CAR army could have [REDACTED]. The statement of [REDACTED] is also irrelevant to the determination of a critical issue for this case. The author of the witness statement⁴³ has not been produced for cross-examination by Appellant. Hence the documents have no probative value, and the Prosecution has not demonstrated that their admission would outweigh any prejudicial effect on the Appellant.
64. In addition, the Defence submits that this application is premature: no decision has been reached by the Appeals Chamber on the ‘Narcisse Arido’s Application for the Submission of Additional Evidence Before the Appeals Chamber Pursuant to Regulation 62 of the Regulations of the Court.’⁴⁴
65. The Prosecution, at a later point, if the Arido evidence is admitted, should follow the procedures for admission of additional evidence and demonstrate how the evidence meets the legal admissibility criteria in the Statute, and any other similar criteria identified by the Appeals Chamber. The Appeals Chamber in *Lubanga* has noted that

⁴² See *Prosecutor v. Lubanga*, Decision on the Prosecution’s Application to Admit Rebuttal Evidence from Witness DRC-OTP-WWW-0005, 28 April 2011, para. 43 (ICC-01/04-01/06-2727-Red).

⁴³ Referred to in Response, **para. 741**, and taken by the OTP in 2016.

⁴⁴ See ICC-01/05-01/13-2116-Conf.

the “regulation is silent as to any standard for admission” for rebuttal evidence,⁴⁵ but references Article 69(4) of the Statute which lists some admissibility standards.

66. In sum, it is procedurally wrong for the Prosecution to use its Response as a vehicle to admit rebuttal evidence, and thus circumvent the legal requirements for admissibility. Once the Prosecution has made the appropriate filing, the Defence reserves the right to respond to the Prosecution arguments.
67. If the Appeals Chamber rejects this approach, the Defence suggests that the Prosecution’s rebuttal evidence arguments are a new issue, which could not have been anticipated. The Defence requests that appropriate space, separate from the length limits of the Reply, be allotted by the Appeals Chamber for it to respond to the Prosecution, if the Leave to Reply is granted.

l) The Prosecution misrepresents and misunderstands the Defence arguments on mode of liability; the CoC Decision and inconsistent legal findings

68. In its Response, **paras. 690-694**, the Prosecution does not comprehend the Defence legal arguments. For example, at **para. 692**, it alleges that the Arido submissions “confuse factual findings with their legal characterisations.” There is a dialectical relationship between factual findings and legal characterization, which the Prosecution misses.
69. At **para. 647**, the Prosecution represents the Trial Judgment as finding that Appellant and Kokaté “acted in concert.” The cited Trial Judgment paragraph 327 at fn. 2420 supports this finding. But, as the Defence has pointed out, there were no confirmed charges of “acting in concert.”
70. Thus, this Response raises the issue of whether a Trial Chamber can make a finding on a mode of liability which is not charged, especially when its own Judgment holds that it is bound by the CoC Decision.
71. As to the notion of inconsistent verdict and other legal inconsistencies, the Prosecution, in its Response, **paras 695-699**, takes the position that there are no inconsistent legal

⁴⁵ ICC-01/04-01/06-3121-Red, para. 64.

findings in the Judgment. But, the Prosecution does not demonstrate what exactly the Defence is alleged to have misrepresented, or why the inconsistencies identified in the Defence Brief⁴⁶ are consistent.

72. The Prosecution Response presents a new issue for appellate review: what are the elements of an inconsistent verdict and other legal consistencies, and their application to the issues raised in the Judgment.

m) The Prosecution does not address the Defence arguments in relation to the Judgment's misuse of the testimonies in the Bemba 'Main Case'

73. The Prosecution's Response, dealing with the Bemba 'Main Case' testimony, is at paras **697, 702-705**. The assertions in **para. 703** indicate that the Prosecution did not listen to or understand the Defence case at trial. Its Response states: "Whether the witnesses had a military status is immaterial for the purpose of Arido's conviction under Article 70(1)(c) [...] ." As the Arido Defence has stated, whether or not the persons were, in fact, soldiers or held a military status, is central to the Trial Judgment's findings on which it convicted Appellant.

74. In addition, nowhere does the Prosecution address a key part of the Defence argument: that the Trial Chamber added its own conclusion and/or understanding of the content of the Bemba 'Main Case' testimony in the Judgment, so there is no clear presentation of what the witness actually said in the 'Main Case', and what the Trial Chamber's interpretation is.⁴⁷ The Prosecution, for example, is silent on para. 388 of the Trial Judgment ("as instructed by Mr. Arido") and para. 391 ("consistent with Mr. Arido's instruction").

75. The use of prior testimony of a witness in a trial is not a new issue, and there are numerous rules and procedures in place to deal with this. However, this case presents errors of a Trial Chamber wrongly implementing judicial notice,⁴⁸ and the Defence seeks Leave to Reply, in the interests of justice.

n) The Prosecution's evidentiary arguments are not based in law

⁴⁶ Arido Defence Brief, paras 221-230.

⁴⁷ Arido Brief, paras. 247-261, particularly, para. 255 and 257.

⁴⁸ Arido Brief, paras. 247-269

76. For the proper adjudication of appellate issues, there must be a foundation of an accurate statement of law. The Prosecution Response misstates the law on evidence. One example is **at para. 750**, where it rejects any impact of the Cameroonian police report on D-2 and D-3 because “it does not provide positive evidence to the contrary.”
77. The Prosecution cites no legal authority for a standard of “positive evidence.” Is this proposed by the Prosecution as a standard to replace “reasonable doubt?” The Defence has proceeded on the premise that a reasonable doubt means one for which a reason is given, based on the evidence.⁴⁹
78. What constitutes “reasonable doubt” is not a new issue, but the way in which the Prosecution Response has re-defined it makes it a “new issue” to address.

o) The Prosecution misrepresents the Trial Judgment and the CoC Decision

79. At **para. 752**, in discussing the Trial Chamber’s position, the Prosecution states that “the evidence shows that Arido corruptly influenced *at least four witnesses*.” (italics added). Nowhere is there a conclusion found in either the Judgment or in the CoC that alleges or concludes “at least four witnesses.” Appellant is charged with four witnesses. The Prosecution is playing “fast and loose” with the law and evidence here.

p) The Prosecution wrongly treats the D-4 sentencing evidence as additional evidence

80. D-4 admitted under oath at the sentencing hearing that [REDACTED], a key element in the findings of the Trial Chamber’s conviction of Appellant under Article 70(1)(c).⁵⁰ But, at **paras 770-772**, the Prosecution erroneously argues that the sentencing hearing is not part of the appeal record, and that D-4’s testimony should be submitted as additional evidence. As support, the Prosecution refers to *Krajisnik Appeals Judgment* at para. 25 which addressed Rule 115. Rule 115 at the *ad hocs* concerns ‘additional evidence’, which is defined as “evidence not available at trial.”⁵¹

⁴⁹ *In re Winship*, 397 U.S. 358 (1970) (a “reasonable doubt,” at a minimum, is one based upon “reason” at *Jackson v. Virginia*, *supra.*, at 317.

⁵⁰ Arido Appeal Brief, paras 408-421.

⁵¹ See, Rule 115(b) of the ICTY RPE; and see also *Prosecutor v. Kanyarukiga*, Decision on Request to Admit Additional Evidence of 18 July 2008, ICTR Appeals Chamber, 1 Sept 2008, para. 5.

81. The logic of the Prosecution's erroneous argument is that the sentencing hearing – a hearing before the Trial Chamber on its judgment – is not a part of the trial, and that the sentencing obligations of the Judges for their judgment are not part of the trial.
82. Hence, the Prosecution Response has raised a new issue: is the sentencing hearing (and its evidentiary record) part of the trial record which is reviewable by the Appeals Chamber on appeal? The Defence seeks Leave to Reply on this point.

*q) The Prosecution misconprehends the procedural issues concerning Appellant's statements*⁵²

83. In its Response, **para. 759**, the Prosecution states that the “sole part of Rule 111 that applies” to questioning of Arido is Rule 111(2), implying that the requirements of Rule 111(1) are inapplicable to Mr. Arido's questioning by national authorities. This is erroneous: the Prosecution cites no legal authority to read the sub-sections of Rule 111 as “either/or”, “in the alternative” or “only applicable in certain circumstances.” The Prosecution's Response has introduced a new issue here: Whether the reading and interpretation of Rule 111 [or other rules] can be bifurcated where this is not written in the Statute?

r) The Prosecution fails to address the Defence arguments concerning Kokaté

84. The Prosecution position on Kokaté, in its Response, **paras 664-668**, boils down to: Kokaté's role does not matter, and is “immaterial to Arido's conviction.”⁵³ This unequivocal denial of Kokaté's role rejects evidence found in the trial record.⁵⁴
85. This Response has raised a fundamental issue of criminal law – what should be the Trial Chamber's position vis-à-vis the legal responsibility of an unindicted perpetrator, where the evidence relied upon by the Trial Chamber supports his leading role in the activities for which Appellant was convicted.

⁵² Arido Defence has briefed this issue extensively, and will not repeat its arguments here.

⁵³ Prosecution Response, para. 667.

⁵⁴ The Arido Defence has discussed Kokaté's role as an unindicted perpetrator and evidence in support from D-2 and D-3, in its Appeal Brief, for example, at paras 85-86, 291, 355-359, 425-427, 437-438, 446, 453 and 472. The Prosecution Response asserts that Defence misrepresented the evidence at **para. 779**.

IV. CONCLUSION

86. In light of the above, the Arido Defence respectfully requests that the Appeals Chamber grants its Leave to Reply to the Prosecution's Response, pursuant to Regulation 24(5) of the RoC, or in the alternative, pursuant to Regulation 60(1) of the RoC, in the interests of justice.



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Dated this 31st Day of August 2017
Washington D.C., The United States of America