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No.: **ICC-01/05-01/13**
Date: **6 September 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 with Confidential Annexes A and B

Public Redacted Version of "Prosecution's Consolidated Response to the Appellants' Requests for Leave to Reply to 'Prosecution's Consolidated Response to the Appellants' Document in Support of Appeal'", 27 July 2017, ICC-01/05-01/13-2187-Conf

Source: **Office of the Prosecutor**

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

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Introduction

1. The Appellants' requests for leave to reply[1] to the Prosecution Consolidated Response to their respective appeals[2] should be rejected with the exception of two confined issues raised by Mangenda[3] and Arido's requests to reply to the Prosecution's submissions regarding additional evidence in rebuttal.[4] The Appeals Chamber should otherwise deny the rest of the requests for failing to show the requisite good cause. The Appellants do not identify new issues which could not have been foreseen when filing their appeals against the Conviction Decision. Rather, their requests largely repeat arguments already raised in their appeals, they do not accurately present the Prosecution's submissions and/or they simply disagree with the Prosecution's position. Authorising replies in those respects would not be in the interests of justice as required under regulation 60(1) of the Regulations of the Court.

2. Further, to the extent that the Appeals Chamber may authorise a reply, this should be restricted to the issues and examples specifically identified in the Appellants' respective requests.[5] Authorising open-ended replies—which would permit the Appellants to address topics beyond the topics and examples identified in the requests—would not permit the Appeals Chamber to determine whether the requested replies effectively serve the interests of justice thus potentially undermining their specific and limited purpose.

3. Finally, should the Appeals Chamber be minded to authorise all Appellants to reply to the requested issues, their replies should be limited to 20 pages each, to be filed no later than 21 September 2017.[6] For reasons of efficiency, any extension of time should be simultaneously granted to all Appellants who are authorised to reply.

[1] ICC-01/05-01/13-2182-Conf ("Mangenda Request"); ICC-01/05-01/13-2183-Conf ("Bemba Request"); ICC-01/05-01/13-2184 ("Kilolo Request"); ICC-01/05-01/13-2181-Conf ("Babala Request"); ICC-01/05-01/13-2180-Conf ("Arido Request").
[2] ICC-01/05-01/13-2170-Conf ("Prosecution Consolidated Response").
[3] Mangenda Request, paras. 8-9.
[4] Arido Request, para. 67.
[5] *Contra* Bemba Request, para. 11; Mangenda Request, para. 13.
[6] Annex A Bemba Request (generally not opposing this time-line suggested by Bemba in light of the length of the Prosecution Consolidated Response, the overlap with the Defence's response to the Prosecution's appeal against the Sentencing Decision and the Court recess).

Level of Confidentiality

4. The Prosecution files this submission as "Confidential" pursuant to regulation 23*bis*(2) of the Regulations of the Court, since it responds to submissions of the same classification**.** The Prosecution will file a public redacted version in due course.

Submissions

5. Leave to reply will generally be granted only after a showing of good cause.[7] If permitted, replies must be "narrowly tailored to only address new issues"[8] raised in a response which "could not have been foreseen",[9] and "may not be used to strengthen the arguments" previously advanced.[10] The Appeals Chamber will generally not be assisted by submissions which are irrelevant or unnecessary to assist the Chamber's deliberations,[11] or which fall reasonably within the scope of the moving party's original arguments.[12]

6. The Prosecution submits that the regime under regulation 60 of the Regulations of the Court applicable to final appeals,[13] which is "always discretionary and should be decided on a case-by-case basis",[14] should not depart from these principles developed in the context of replies under regulation 24(5) of the Regulations of the Court.[15] Indeed, replies to responses—regardless of the stage of the proceedings—are not an automatic right of the

[7] *See e.g.* ICC-01/05-01/08-294, para. 3; ICC-02/04-01/15-252, p. 3.
[8] ICC-01/05-01/08-3165-Red, para. 5. *See also* ICC-01/05-01/13-893-Red, para. 10 (rejecting a request for "leave to reply in order to clarify the record in the face of alleged misrepresentations" because "it does not identify any new issue which arises from the […] Response").
[9] ICC-02/11-01/15-284 OA7, para. 11.
[10] ICC-01/04-02/12-296-tENG, para. 7. *See also* ICC-01/05-01/08-3480 A ("*Bemba* Reply AD"), para. 8.
[11] ICC-01/04-01/06-824 OA7, para. 67 (finding that leave to reply was "unnecessary" and "not relevant to the deliberations of the Appeals Chamber").
[12] *See e.g.* ICC-01/09-01/11-1417 OA7 OA8, para. 13 (rejecting a request to make additional submissions—albeit under regulation 28, rather than as a reply—on the basis that the issues for which leave was sought fell "within the ambit of the issues on appeal", that the arguments in response were "foreseeable" in the circumstances, and that the applicants had already received the material possibility of presenting "all arguments" within the scope of their appeals).
[13] *See* regulation 60(1) ("Whenever the Appeals Chamber considers it necessary in the interests of justice, it may order the appellant to file a reply within such time as it may specify in its order").
[14] ICC-01/04-01/06-2982 A5 A6 ("*Lubanga* Reply AD"), para. 7; *Bemba* Reply AD, para. 8.
[15] *See* regulation 24(5) ("Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations. Unless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated.")

Parties and must serve the objective of assisting the Chambers in their decisions. It is thus only logical that the standards set out in both provisions are consistently interpreted.[16]

7. Hence, while the Appeals Chamber may, in granting leave, consider the pertinence of the issues for which a reply is requested to the adjudication of the appeal, this alone is not dispositive.[17] Even in *Bemba*, where this factor was taken into account, it was "in the circumstances of [that] case" and thus not indicative of a general rule.[18] Otherwise, if leave to reply were to be granted for *any* relevant issue—regardless of whether the appellants have advanced or could have advanced those arguments in their appeals—the filing of replies would become an automatic right. Such practice would undermine the filter set out in regulation 60(1), discourage careful and throrough drafting, unnecessarily prolong litigation, and would not serve the interests of justice. Indeed, if this practice were to become the norm, it would permit appellants to strategically withhold aspects of their argument from the main brief and incorporate them into their replies, in the knowledge that the respondent would not have the opportunity to respond in normal circumstances.

8. Similarly, authorising the Appellants to reply to issues which go beyond those identified in their requests would likewise permit them to eschew the threshold set out in regulation 60(1) since the Appeals Chamber would be unable to determine whether their requests could assist it to adjudicate the appeals.[19] Such practice is also unfair to the Prosecution, the respondent in this appeal, who is unable to comprehensively respond to the Appellants' requests.

9. Here, with the exception of limited replies that could be granted to Mangenda and Arido, replies on the remainder of the issues and examples identified would not serve the interests of justice since they do not raise any new issues that could not have been reasonably foreseen. Rather, the remainder of the identified issues fall within the following categories:

[16] *Contra* Bemba Request, para. 6 (arguing that "[t]he threshold for granting leave to reply is thus broader than the standard set out in Regulation 24, which is limited, in general, to new issues arising from the response, which could not be foreseen in the initial application"); Mangenda Request, para. 6 (arguing that "[r]egulation 60 [is] *lex specialis* [and] eschew the strict articulation and limitation of issues for reply that is characteristic of the practice concerning interlocutory matters").
[17] *Contra* Bemba Request, para. 7; Mangenda Request, para. 6.
[18] Bemba Reply AD, para. 8. *See also* ICC-01/04-02/12-123-Conf A ("*Ngudjolo* Reply AD"), [REDACTED].
[19] *Contra* Bemba Request, para. 11; Mangenda Request, para. 13.

- First, many of them simply repeat arguments already advanced in the Appellants' briefs or could have been reasonably anticipated.[20] Since the Appeals Chamber has already been briefed on such matters, it cannot benefit from repetitious submissions on the same issues.

- Second, other issues are inaccurate or merely misrepresent the Prosecution Consolidated Response.[21] They take the Prosecution's submissions in response out of context, or wrongly ignore that the Prosecution's arguments were directly responding to claims made by the Appellants. Authorising a reply on such matters merely prolongs the appeal process without serving the interests of justice. The Appeals Chamber already has the briefs of all the Parties in this appeal, and is thus well positioned to interprete the Parties' submissions itself.

- Third, other arguments merely reflect further disagreement with the Prosecution's submissions in its Consolidated Response.[22] Authorising a reply on such matters similarly cannot advance the interests of justice.

10. Nor is the alleged entitlement for the Defence to have the 'last word'[23] relevant or justify granting a reply. In *Ngudjolo*, [REDACTED].[24] It is unclear, however, whether this principle applies to regulation 60. The plain terms of rule 140(2)(d) restrict the 'last word' entitlement to witness examination – "[t]he defence shall have the right to be the last *to examine a witness*."[25] In any event, it is premature and speculative to rely on this alleged entitlement, since the Appellants may be permitted to address the Appeals Chamber last in an eventual oral hearing. This has been the practice in *Lubanga* and *Ngudjolo*.[26] Notably, this would also mean that replies are automatic when the Defence is the appellant. Such interpretation would defeat the purpose of regulation 60 which requires a case-by-case determination.

[20] *See e.g. below* paras. 14, 15, 20, 22, 29, 30.
[21] *See e.g. below* paras. 19, 21, 26, 29 and 30.
[22] *See e.g. below* paras. 12, 17, 18, 25, 36, 37.
[23] *Contra* Bemba Request, para. 10.
[24] *Ngudjolo* Reply AD, para. 9.
[25] Emphasis added.
[26] ICC-01/04-01/06-3068 A4 A5 A6, para. 2 and ICC-01/04-02/12-210.

11. Following the structure of its Consolidated Response, the Prosecution firstly addresses the common issues raised by the Appellants and secondly responds to specific submissions raised by individual Appellants.

A. Investigation

(a) Requests to reply to submissions on the law relating to article 69(7)

12. Arido and Mangenda fail to justify their requests for leave to reply on issues pertaining to the legal standard on the exclusion of evidence pursuant to article 69(7). Although Arido and Mangenda seek to make further submissions on the law relating to article 69(7),[27] they have already had full opportunity to do so. In particular, Mangenda has extensively submitted on the "inapplicability of article 69(8)" and related issues.[28] To the extent Mangenda merely wishes to contest the Prosecution's interpretation of his argument, the Appeals Chamber has both his brief and the Prosecution's, and can interpret Mangenda's argument for itself. Mere disagreements with the Prosecution's position are not grounds for reply. Further, Arido's contention that the Prosecution should have "checked the footnotes in the Arido Appeal Brief" and respond to his references to the trial record[29] cannot excuse Arido's failure to advance substantive arguments on appeal relating to the legal standard, and for those same reasons, also cannot justify a reply.

(b) Requests to reply to submissions regarding Western Union-related material

13. Mangenda raises two discrete factual issues relating to the Western Union-related material which fall within the proper scope of a reply.[30] The Prosecution has recently made available to the Defence [REDACTED]. In this context, Mangenda's proposed issues—that the Defence could purportedly not have "discharged [its burden to refute the contents of the investigator's report relating to the screening of the Western Union material]" because of "new disclosure from the Prosecution" and that "no documents were collected while Prosecution investigators were in Austria"[31]—potentially relate to this further documentation provided to Mangenda on 30 June 2017, after he had filed his brief. A reply on these two discrete issues can thus be justified. Notwithstanding, any reply should be limited to a maximum of 10 pages and solely address new arguments linked to the recently provided

[27] Arido Request, paras. 14-16, 35; Mangenda Request, para. 11.
[28] *See e.g.*, ICC-01/05-01/13-2143-Conf ("Mangenda Brief"), paras. 44-64.
[29] Arido Request, para. 14.
[30] Mangenda Request, paras. 8-9.
[31] *Ibid*, paras. 8-9.

document, and should not be construed as a freestanding opportunity to repeat earlier submissions made. Moreover, that the Prosecution does not oppose a limited reply on the issues does not imply that it agrees with Mangenda's interpretation or arguments.

14. None of Mangenda's other arguments relating to the Western Union-related material justify a reply. For example, although he disputes that the Prosecution's conduct fell within the screening of financial information and that the Austrian authorities endorsed the Prosecution's conduct,[32] these are all submissions he has already made. No further clarity is necessary. Moreover, to the extent that Mangenda appears to be contesting whether the Defence has the burden under article 69(7),[33] this is not a novel issue. The Prosecution has consistently advanced this position at trial, including in response to motions advanced by Mangenda.[34] Hence, he should have anticipated it and addressed this argument in his appeal brief.

15. None of the other Appellants raise issues related to the Western Union-related material requiring reply. Bemba and Arido dispute various aspects of the Western Union chronology, and the Prosecution's submissions.[35] The Prosecution's response on these issues did not raise new matters. Rather, the Prosecution's Response was a fair construction of the existing record to provide a comprehensible chronology of events in response to the Appellants' erroneous submissions. It could have been reasonably anticipated. The Appeals Chamber may assess the veracity and accuracy of that chronology by reviewing the sources cited by the Prosecution, along with the other information on the record. The record speaks for itself.

[32] Mangenda Request, para. 9.
[33] Mangenda Request, para. 8 ("One of the Prosecution's novel arguments is its claim that a burden rested on the Defence to refute […]".
[34] *See e.g.*, ICC-01/05-01/13-1472, p. 3; ICC-01/05-01/13-1483, para. 6; ICC-01/05-01/13-1605, para. 14; ICC-01/05-01/13-1786-Conf-Anx4, p. 9; ICC-01/05-01/13-1833-Conf, paras. 3-6; ICC-01/05-01/13-1849, para. 7; ICC-01/05-01/13-1852, para. 4.
[35] Arido Request, paras. 31-34 (screening of information) and para. 50, fn. 38 (whether the Trial Chamber needed to recapitulate all procedural decisions); Bemba Request, para. 14 b, c, e, f. (arguments that the Prosecution's screening violated bank secrecy, submissions on the Western Union consent forms, the purportedly "misleading" statement the Vienna Court did not rule on Caroline Bemba's immunity, that the Prosecution allegedly introduced Western Union related information before the Chambers in advance of court orders).

(c) Requests to reply to submissions on counsel immunity

16. Both Babala and Bemba seek to reply on the issue of counsel immunity, but no reply is warranted.[36] Bemba did not raise counsel immunity as a ground of appeal.[37] He cannot rely on the Prosecution's response to Kilolo's arguments to advance a completely new ground of appeal on reply. Even if Bemba had raised the matter at trial, he was still required to argue it specifically on appeal to make a case for a reply. And even if he had done so—which he did not—a reply would not be automatic. Litigation on appeal should not be unending; parties are expected to advance concrete arguments on appeal for them to be considered.

17. Babala raised the issue of immunity on appeal, in a single paragraph of his brief, including a passing reference to the Presidency Decision.[38] Merely because Babala disagrees with the Prosecution's position, including on whether or not the Presidency Decision is reviewable, does not justify a reply. All the arguments were entirely foreseeable. A reply is not an opportunity, and should not be used, to substantiate shell arguments and thus depriving the responding party the opportunity to properly address the issue.

(d) Requests to reply to submissions on Detention Centre logs, CDRs and privilege

18. Bemba's arguments to reply to the Prosecution's submissions on the Detention Centre logs, CDRs and privilege are unfounded.[39] Regarding the Detention Centre logs, Bemba essentially disputes the "reasonable suspicion" standard used to allow access to the Detention Centre logs—all arguments that Bemba has already advanced in his brief and to which the Prosecution has responded.[40] Bemba's disagreement with the Prosecution's reading of decisions and its assessment that its request to access the Detention Centre logs was sufficiently founded does not justify a reply.[41] Nor do alleged "misstatements" on the law and regulations on the purpose of Detention Centre monitoring and "the application and confidentiality of DU communications" or purported "erroneous" claims relating to the Defence's suggestion of alternative measures[42]—these are all arguments Bemba has already advanced on appeal. Merely because the Prosecution responded to them does not make them

[36] Babala Request, paras. 31-35; Bemba Request, para. 14. a, para. 34, fn. 60.
[37] Bemba Brief, paras. 141-187.
[38] ICC-01/05-01/13-2147-Conf - Corr ("Babala Brief"), para. 19.
[39] Bemba Request, paras. 14. d, g, h, i, j, m, r, s; paras. 15, 33-34, 37. The "Detention Centre logs" are also referred to as "DU logs".
[40] Bemba Brief, paras. 141-154; Prosecution Consolidated Response, paras. 98-106.
[41] Bemba Request, para. 14 d, h.
[42] Bemba Request, para. 14 r, s.

new or unforeseeable issues to warrant a reply. Moreover, the Appeals Chamber is in a position, based on the existing extensive record, to draw the necessary conclusions, without further submissions at this stage.

19. Bemba's arguments advanced in paragraph 15 to justify a reply relating to the CDRs are incorrect and unfounded. Bemba argues, without any proper basis, that the Prosecution provided "misleading" information about Ringtail.[43] From a preliminary view of this allegation, it appears from Bemba's suppositions that he conflates CDRs and logs, and that his premise is itself incorrect. In any event, this allegation is not only unspecific, it also adopts a strained reading of the Bemba Defence's email communication with the Prosecution (Bemba Request, Annex B). Nothing in the email communication supports Bemba's assertions. Bemba's statement that "[the] Prosecution has thus far declined to provide any clarity on this issue" is misleading.[44] To the contrary, as its email demonstrates, the Prosecution responded to the Bemba Defence's request [REDACTED].[45] [REDACTED].[46] [REDACTED].[47] In any event, Bemba only proposes three hypothetical situations as a basis, rather than properly identifying the intended scope of his reply.[48] Bemba's other argument apparently challenging P-361's testimony on the origins of the CDRs is brief and unclear.[49]

20. Likewise, regarding privilege, Bemba has already had a full opportunity to brief on issues of the legality of the Dutch interception process, the role of the Dutch Dean, alleged access by the Bemba Main Case team of purportedly privileged information, and the Prosecution's reliance on article 54 as a statutory basis for investigation.[50] Bemba has made full use of this opportunity.[51] It should be expected that the Prosecution has a different view on these issues. This different view, however, does not provide Bemba with reasons for further briefing. Moreover, Bemba has advanced many of these arguments in his pending

[43] Bemba Request, para. 15.
[44] Bemba Request, para. 15, fn. 38.
[45] [REDACTED].
[46] [REDACTED].
[47] [REDACTED]..
[48] Bemba Request, para. 15 (alleging either inaccurate and misleading information, a disclosure failure or disclosure of modified versions of CDRs).
[49] Bemba Request, para. 14. g.
[50] Bemba Request, para. 14 i, j, m, paras. 33-34.
[51] Bemba Brief, paras. 141-187.

additional evidence application.[52] Any additional arguments that he may have wished to make in reply are already on the record.

B. Submission of Evidence regime

21. Only Arido seeks to reply to the Prosecution's response regarding the submission of evidence regime.[53] But he merely takes issue with the Prosecution's statement that Arido "showed no error".[54] The submission that an appellant has failed to show error is normal, even routine, appellate practice. It does not warrant a reply. Nor, for that matter, does Arido's dissatisfaction with the Prosecution's submission that Arido's claim of "potential fair trial violations" was "vague and speculative".[55] The Appeals Chamber is able to read Arido's brief and decide for itself whether the Prosecution's submissions in this regard are valid or not, and a reply cannot be justified in these circumstances.

C. Elements of the Offences

22. Bemba's and Arido's requests to reply to the Prosecution Consolidated Response with respect to the elements of the offences should also not be granted since they merely disagree with submissions in the Prosecution Response or seek to repeat arguments already adduced:

- First, Bemba's claim that the Prosecution's arguments on unity of identity of counsel and client is new[56] is misconceived. The Prosecution's submission was directly responsive to Bemba's argument that if an accused is represented by counsel, he or she plays no role, but rather the counsel has sole responsibility.[57]

- Second, Arido's arguments as to the definition of "witness" in article 70(1)(c)[58] seek to repeat the same arguments that Arido has already advanced in his appeal brief.[59]

23. Thus, these submissions would not assist the Appeals Chamber in its determination.

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[52] *See generally* ICC-01/05-01/13-2172-Conf ("Bemba Additional Evidence Request").
[53] Arido Request, paras. 12 (fn. 11), 55.
[54] Arido Request, para. 55.
[55] Arido Request, para. 55.
[56] Bemba Request, paras. 28-32.
[57] Bemba Brief, paras. 35-36.
[58] Arido Request, paras. 47-49.
[59] *See* ICC-01/05-01/13-2145-Corr-Red ("Arido Brief"), paras. 200-212 .

D. Bemba

24. Bemba also seeks leave to reply within four broad themes:[60] that the Prosecution Consolidated Response contains "[i]naccurate or misleading statements",[61] "explicit or implicit concessions",[62] and new factual or legal arguments;[63] and that the Prosecution Consolidated Response misapplies the standard of appellate review.[64] The Prosecution has already addressed these claims to the extent they relate to cross-cutting procedural matters.[65] It now briefly addresses the remainder.

25. Professional disagreement between the Parties is usually to be expected in contentious litigation. Although Bemba characterises aspects of the Prosecution Consolidated Response as "[i]naccurate" or "misleading", his examples seem merely to reflect his disagreement with the Prosecution's position. Indeed, by definition, if the Prosecution agreed with the Appellants' interpretation of the Judgment in every particular, it would not contest the appeal. Accordingly, that the Prosecution *does* contest the appeal does not automatically justify a reply by the Appellants. Nor should reasonable objections or disagreements be mischaracterised as attempts to "mislead" the Appeals Chamber. For example, in addition to matters previously addressed:[66]

- Bemba claims that "[t]he Prosecution has now asserted that the codes used by Mr Babala and Mr Bemba did not concern political issues, whereas their Pre-Trial Brief and Bar Table Motions concede the opposite".[67] Yet the passage of the Prosecution Consolidated Response he cites reads, with citations to the Judgment: "*The Chamber* expressly rejected the suggestion that Bemba and Babala resorted to code language to discuss political affairs".[68]

- Bemba seeks to distinguish the manner in which bad character evidence may be admitted in "certain jurisdictions", on the basis that evidence of "attempts to

[60] Bemba Request, para. 2.
[61] Bemba Request, paras. 2, 13-16.
[62] Bemba Request, paras. 2, 17-21.
[63] Bemba Request, paras. 2, 22-36.
[64] Bemba Request, paras. 2, 37-38.
[65] *See above* paras. 15, 16, 18-20, 22.
[66] *See above* paras. 15, 16, 18-20, 22.
[67] Bemba Request, para. 14(l) (citing Prosecution Consolidated Response, para. 589).
[68] Prosecution Consolidated Response, para. 589 (emphasis added). *See also* paras. 534-535.

interfere with witnesses" is only admissible if it occurs in "the same case".[69] Yet not only did the Prosecution Consolidated Response accurately quote the legislative language,[70] but the example provided does indeed relate to the same case, namely, the co-perpetrators' attempts to frustrate the article 70 investigation.[71]

- Bemba simply disagrees with the Prosecution's view of the law on various issues, including the correct approach to inferential reasoning and the standard of proof. This does not mean that the Prosecution's submissions are "misleading" or "improper".[72]

- Bemba asserts that the Prosecution has "misconstrued" the significance of an apparent harmless error concerning the date of the multi-party call between Bemba and D-19.[73] The Prosecution disagrees.[74] However, even if this is so, Bemba specifically challenged this finding in his appeal,[75] where he was required to show impact. A reply is no opportunity for him to rectify ambiguities in his previous submissions.

- Bemba claims that the Prosecution "unfairly" pointed out the limitations in the evidence cited in his appeal. The Prosecution acknowledges Bemba's clarification that evidence does not exist on the material point; however this does not justify a reply.[76]

26. Bemba incorrectly asserts that the Prosecution Consolidated Response—which does indeed address relevant points of law, procedure or fact apparently overlooked by the Appellants—raises "new" arguments, thus requiring leave to reply as a matter of fairness.[77] Yet this is not the case, provided the arguments in response are pertinent to the claims made on appeal. To try and substantiate his claim, Bemba appears to take the Prosecution

[69] Bemba Request, para. 14(n).
[70] Prosecution Consolidated Response, para. 458 (text accompanying fn. 1650).
[71] Prosecution Consolidated Response, para. 466. The Prosecution notes that the Bemba Request cites "Response, para. 446" but understands this to be a typographic error for "466".
[72] Bemba Request, para. 14(p)-(q).
[73] Bemba Request, para. 14(t).
[74] Prosecution Consolidated Response, paras. 461-462.
[75] *See e.g.* Bemba Brief, para. 112.
[76] Bemba Request, para. 14(u). *See* Prosecution Consolidated Response, para. 485 (second bullet point).
[77] *See e.g.* Bemba Request, paras. 23, 28-32.

arguments out of context, or to assume premises which are incorrect. For example, in addition to matters previously addressed:[78]

- The Prosecution's arguments based on the common plan are all expressly based on the findings in the Judgment, which is the starting point for any appeal.[79] Nothing in the Prosecution Consolidated Response suggests that the Common Plan *focused* on "concealment" of the Common Plan rather than the charged crimes. Nor does it suggest the existence of "true" and "false" article 70 investigations.

- Bemba simply reasserts his disagreement about the meaning of "*notre frère*", without explaining why the Consolidated Response—which disagreed with *Bemba's* interpretation—raises a supposedly new issue.[80]

- Bemba's claim that the Prosecution's view of co-perpetration "broaden[s]" the interpretation of the Trial Chamber is wholly subjective. It is immaterial whether these matters were "substantively argued, or clearly articulated at trial".[81] The Appeals Chamber is obliged to apply the law correctly, and the Parties make their submissions on that basis.

27. The Prosecution firmly disagrees that it has made concessions on any point which "impact[s] the outcome of the Judgment"[82] or that it has misapplied the standard of appellate review.[83] Yet even if this were so, in any event, such matters do not warrant leave for reply. If the Prosecution has conceded a Defence argument, that will speak for itself. Likewise, the Appeals Chamber is well equipped, above all, to consider the arguments of the Parties within the applicable standard of review, and their "propriety".[84]

[78] *See above* paras. 15, 16, 18-20, 22.
[79] *Contra* Bemba Request, para. 24. *See e.g.* Prosecution Consolidated Response, paras. 416, 439, 449, 453 (citing *inter alia* Judgment, paras. 103, 681-691, 693-803, 808-820, 923-929).
[80] Bemba Request, para. 25. *See* Prosecution Consolidated Response, para. 506.
[81] *Contra* Bemba Request, para. 27.
[82] *Contra* Bemba Request, paras. 2(b), 17.
[83] *Contra* Bemba Request, paras. 2(e), 37-38.
[84] Bemba Request, para. 38.

E. Kilolo

28. Kilolo's Request, which does not identify or substantiate any issues upon which reply should be authorised, should be dismissed *in limine*.[85]

F. Mangenda

29. Mangenda's remaining factual arguments should be similarly dismissed since they seek to repeat arguments adduced in his appeal brief and/ or take the Prosecution's submissions out of context:

- The Prosecution's submission that the co-perpetrators' intercepted discussions of remedial measures to prevent or frustrate the Prosecution's article 70 investigation indicated that "Mangenda and Kilolo *acknowledged* their previous criminal activities and sought to conceal them" is not "incorrect, inaccurate, or unsubstantiated".[86] Instead, the Prosecution referred to the Chamber's findings in the Judgment which expressly rejected Mangenda's arguments at trial.[87] It would be inappropiate—and would fall outside the scope of regulation 60—to allow Mangenda to repeat those same arguments for the third time.[88]

- The Prosecution's submission on the irrelevance that "Kilolo did not raise the issue of the article 70 investigation with D-2 and D-3 on the telephone after he became aware of the leak [because] Kilolo knew that he was about to travel to Cameroon to pay them money" is similarly accurate.[89] Mangenda does not properly present the Prosecution Response and the relevant findings in the Trial Judgment: D-2 testified that, after his Main Case testimony, he, together with D-4 and D-6, received another CFAF 100,000 in Douala from Kilolo. Further, although Kilolo expected to also meet

[85] *See* Kilolo Request, p. 3.
[86] Prosecution Consolidated Response, para. 369, referred to in Mangenda Request, para. 9 ("the false scenario is irrelevant because it nevertheless includes some kind of tacit acknowledgement of the criminal conduct for which Mangenda was convicted").
[87] Judgment, para. 800 ("[t]he discussions are therefore revealing with regard to the co-perpetrators' earlier activities"). *See also* Judgment, para. 848 where the Chamber relied on "[Mangenda's] involvement in measures taken to counter the Article 70 investigation" to establish his intent to bring about the material elements of the offences.
[88] *See* Mangenda Brief, paras. 281-288 where Mangenda disagreed with, and challenged, the Chamber's rejection of his argument as to the ficticious cover-up.
[89] Mangenda Request, para. 9 (in p. 6) referring to Prosecution Consolidated Response, para. 370.

D-3 in the same location to give him the money and called him to arrange the meeting, D-3 was unable to travel and Kilolo finally transferred him the money through a third person.[90]

- Mangenda also takes the Prosecution's submissions in its Consoldiated Response as to Kilolo's distribution of mobile telephones to D-2, D-3, D-4 or D-6 out of context.[91] The Prosecution argued that the Chamber consistently distinguished between the VWU "handover" and the VWU "cut-off date" and that, regardless of a harmless error elsewhere in the Judgment, it correctly found that the phones were distributed to the four Cameroonian witnesses "a few days before the handover to the VWU and less than three weeks before the VWU cut-off date".[92] Any reply to this issue would entail a repetition of Mangenda's arguments in his brief, in which he extensively argued the impact of any such error.[93] Such submissions squarely contravene the Appeals Chamber's directions that replies should not repeat arguments already adduced in the appeal briefs.[94]

- Finally, Mangenda similarly fails to show that a reply is required with respect to the Prosecution's response to Mangenda's arguments regarding his contributions to the Common Plan.[95] That the Prosecution disagreed with Mangenda's understanding of the law on co-perpetration, addressed the jurisprudence adduced by Mangenda and referred the Appeals Chamber to other cases does not constitute a "new" and "unforeseeable" issue. Hence, Mangenda's request to reply on these issues should be dismissed.

G. Babala

30. Babala's remaining two issues also do not warrant a reply.[96] They are not new or unforeseeable. Rather than advancing the interests of justice, granting leave to reply on these issues would only prolong the already extensive briefing in this case.

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[90] Judgment, paras. 407-408.
[91] Mangenda Request, para. 10.
[92] Prosecution Consolidated Response, paras. 375-376 referring to Judgment, paras. 370-371.
[93] Mangenda Brief, para. 292.
[94] *Lubanga* Reply AD, para. 7; *Bemba* Reply AD, para. 8.
[95] Mangenda Request, para. 11 referring to Prosecution Consolidated Response, paras. 382-393.
[96] Babala Request, paras 27-30, 36-37.

- Babala's claim that "*le Procureur n'a pas répondu au Mémoire d'appel de la Défense*" reveals his dissatisfaction, but does not amount to an appropriate basis for a reply.[97] Rather, if as he claims, the Prosecution did not respond to his brief, his arguments initially advanced are intact. Replies can only arise from issues mentioned in response. Babala's request to re-iterate his submissions on the facts, the principle of legality, reasoning by analogy and induction and the mental elements does not justify a reply in the interests of justice in these circumstances.
- Likewise, Babala has already exercised his prerogative to advance arguments on whether he knew the beneficiaries of the money transfers and their identities as witnesses.[98] No further submissions are necessary.

H. Arido

31. The Prosecution does not oppose Arido's request to reply to the Prosecution's submissions regarding additional evidence in rebuttal.[99] However, Arido's remaining requests should be dismissed because they either misrepresent the Prosecution's arguments (indeed, they incorrectly frame the Prosecution's arguments) as alleging "new issues" that do not arise or merely disagree with the Prosecution's position.

(a) Rebuttal evidence

32. The Prosecution's submissions regarding additional evidence in response[100] is procedurally and legally sound.[101] Contrary to Arido's submissions, the Appeals Chamber has already decided in relation to his request to rule on the admissibility of the additional evidence *and* the evidence in response jointly with the other issues raised in the appeal pursuant to regulation 62(2)(b).[102] The Appeals Chamber specifically directed "the Prosecutor to set out in her consolidated response arguments on the First Application for Additional Evidence *and to adduce any evidence in response*."[103] Arido's submission that the

[97] Babala Request, paras. 27-30.
[98] Babala Brief, paras. 73-106.
[99] Arido Request, para. 67; Prosecution Consolidated Response, paras. 741-743.
[100] Prosecution Consolidated Response, paras. 741-743.
[101] *Contra* Arido Request, paras. 58, 64-67.
[102] *See* ICC-01/05-01/13-2160 ("Arido Additional Evidence Decision"), para. 11.
[103] Arido Additional Evidence Decision, para. 12.

Prosecution's "application is premature" and "procedurally wrong"[104] is inaccurate as it ignores the Appeals Chamber's directions.[105]

33. However, the Prosecution does not oppose Arido's request to reply to the submissions regarding the Prosecution's evidence in rebuttal which was raised for the first time in the Consolidated Response. The Prosecution thus requests the Appeals Chamber to direct Arido to set out short (no longer than 10 pages) and well-focused submissions in reply on the issue of whether the Prosecutor's additional evidence in rebuttal[106] should be admitted.

(b) The remaining requests should be dismissed

34. Arido's remaining requests should be dismissed since none of the matters he raises justify a reply under regulation 60.

35. First, Arido misunderstands or misrepresents the Prosecution's arguments by alleging "new issues" that do not arise. In particular:

- The Prosecution did not argue that Arido "cites no error".[107] When the Prosecution submits that "Arido fails to show any error",[108] it means that *the Chamber did not err* and that Arido either failed to identify an appealable error or to meet the standard on appeal.[109] Thus, as noted above,[110] it is not necessary to further address article 69(7) and (8) and the relationship between the Statute and national law.[111]

- The Prosecution's submission that it was not obliged to call D-4 and D-6 because it deemed D-2 and D-3's evidence to be sufficient to prove Arido's guilt beyond reasonable doubt[112] does not raise "the fundamental issue of [the Prosecution's] legal obligations to prove each and every element of the offence or crime charged and

[104] Arido Request, paras. 58, 64, 66.
[105] Even though the Prosecution expressly referred to it in its Response (*See e.g.* Prosecution Consolidated Response, fn. 2734).
[106] Prosecution Consolidated Response, para. 741.
[107] Heading *b). See* Arido Request, paras. 11-16.
[108] Arido Request, paras. 13-16.
[109] Further, contrary to Arido's submission, "[a] quick perusal of the Arido Defence Brief's 'Table of Contents' […] indicates" only that the word *error* is used several times in his brief, but does not show that Arido identified or substantiated *appealable* errors (Arido Request, para. 11).
[110] *See above* para. 12.
[111] Arido Request, para. 16.
[112] *E.g.* Prosecution Consolidated Response, paras. 730-731.

mode of liability".[113] Nor is the issue of "what is direct evidence, what is hearsay evidence and how is the concept of 'missing witnesses' applied in an evidentiary context"[114] new, since, as Arido concedes, it was "central" to his appeal.[115]

- The Prosecution submitted that the Cameroonian police report[116] is not incompatible with—and does not impact the reliably of—D-2's evidence concerning his stay at the relevant hotel, because it does not positively state that D-2 was elsewhere and not at that hotel.[117] This proposition does not raise the allegedly "new issue" of "re-defining" the Prosecution's obligations to prove the accused's guilt beyond reasonable doubt under article 66(3).[118]

- There is no suggestion in the Prosecution's submissions that the Confirmation Decision alleged, or that the Chamber found in the Judgment, that Arido influenced *at least* four witnesses.[119] Arido was charged with and convicted of offences related to four witnesses. The Prosecution remains of the view the *evidence* show that Arido influenced *at least* four witnesses—this view is inconsequential to the substance of this appeal.[120]

- The Prosecution did not advocate a restrictive view of article 81(1)(b)(iv),[121] but argued that Arido failed to show any ground that affects the *fairness or reliability of the proceedings or decision.*[122]

[113] *Contra* Arido Request, para. 40. *See* also Arido Request, paras. 36-45. Arido interestingly indicates that the principle of presumption of innocence allows a defence counsel to do nothing and say nothing (*See* Arido Request, para. 38).
[114] *Contra* Arido Request, para. 42.
[115] *Contra* Arido Request, para. 36.
[116] CAR-D24-0002-0001.
[117] The Cameroonian police report does not indicate that D-2 was elsewhere. Rather, two years after the event the Cameroonian authorities merely state that they could not find trace of D-2's stay at the relevant hotel. Prosecution Consolidated Response, paras. 749-751.
[118] *Contra* Arido Request, paras. 76-78.
[119] Prosecution Consolidated Response, para. 752. *Contra* Arido Request, para. 79.
[120] *See also* Judgment, paras. 331 (noting that D-2 and D-3 testified that "other people, among them other Main Case Defence witnesses such as D-7 and D-9 and prospective witnesses (who did not eventually testify) were also present at the time of the meeting in Doulala") and 802 ("As laid out above, the agreed plan involved, at least, the corrupt influencing of 14 Main Case defence witnesses, together with the presentation of their evidence").
[121] *Contra* Arido Request, paras. 50-53.
[122] Prosecution Consolidated Response, paras. 672-675, 687.

- The Prosecution's submission that D-4's testimony "'during the sentencing phase […] constitutes additional evidence for the purposes of the appeal against the Conviction Decision' because it 'was not part of the evidentiary record available to the Trial Chamber when it decided on the guilt or innocence'"[123] does not raise a new issue.[124] Arido overlooks that the Appeals Chamber—cited in the Prosecution Consolidated Response—has already dealt with the purported "new issue".[125]

36. Second, Arido's remaining requests express nothing but his disagreements with the Prosecution's submissions. They fail to show the need for further submissions on issues already extensively litigated.

37. In particular, Arido disagrees with: the Prosecution's submissions that Arido failed to demonstrate the impact of alleged errors on his conviction;[126] the Prosecution's interpretation that "rejects the Arido Defence's interpretation and application of Article 67(1)(a)";[127] the Prosecution's argument that the Chamber reviewed the evidence of D-2 and D-3 with "due caution";[128] the Prosecution's argument that the financial records were obtained pursuant to judicial authorisations by domestic authorities and/or Pre-Trial Chamber II;[129] the Prosecution's submissions that the Judgment's findings are consistent and that Arido conflated factual findings and their legal characterisation;[130] the Prosecution's submission that for the purpose of his conviction under article 70(1)(c) the military status of the witnesses[131] and Kokaté's role are immaterial;[132] and rule 111(1) and (2)[133] and the Bar Table Motion regime.[134] Since mere disagreements do not justify leave to reply, Arido's request to reply on these issues should be dismissed.

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[123] Prosecution Consolidated Response, para. 771 citing Arido Additional Evidence Decision, para. 10.
[124] *Contra* Arido Request, paras. 80-82.
[125] Prosecution Consolidated Response, para. 771 citing Arido Additional Evidence Decision, para. 10.
[126] Arido Request, paras. 17-22. The Prosecution notes that Arido's submission that he "discussed in detail" the impact on the Judgment of alleged errors in his closing argument suggests he might have misunderstood the law on appeal standard.
[127] Arido Request, paras. 23-26. *See e.g.* Prosecution Consolidated Response, para. 650.
[128] Arido Request, paras. 27-30. *See e.g.* Prosecution Consolidated Response, paras. 708-709.
[129] Arido Request, paras. 31-35. *See e.g.* Prosecution Consolidated Response, para. 6.
[130] Arido Request, para. 68-72. Arido in submits that "the Prosecution does not demonstrate […] why the inconsistencies identified in the Defence Brief are consistent" (Arido Request, para. 71).
[131] Arido Request, paras. 73-75. *See e.g.* Prosecution Consolidated Response, para. 703.
[132] Arido Request, paras. 84-85. *See e.g.* Prosecution Consolidated Response paras. 664-668.
[133] Arido Request, para. 83.
[134] Arido Request, paras. 54-56. *See e.g.* Prosecution Consolidated Response, paras. 152-153.

Conclusion and Relief Requested

38. For the reasons set out above, the Prosecution requests the Appeals Chamber:

- to deny the Appellant's requests for leave to reply to the Prosecution's Consolidated Response with the exception of the limited replies that may be granted to Mangenda and Arido as indicated above and which should not extend to more than 10 pages each;

- in the alternative, should the Appeals Chamber be minded to authorise replies to all Appellants on additional issues, each reply should be limited to 20 pages to be filed no later than 21 September 2017.

Fatou Bensouda, Prosecutor

Dated this 6th day of September 2017[135]

At The Hague, The Netherlands.

[135] This submission complies with regulation 36, as amended on 6 December 2016: ICC-01/11-01/11-565 OA6, para. 32.