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Date: **9 July 2014**

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

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

URGENT

**Narcisse Arido's Request for an Order Rejecting the Prosecution's Document
Containing the Charges (ICC-01/05-01/13-526-AnxB1) and for an Order to the
Prosecution to File an Amended and Corrected Document Containing the Charges**

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 respectfully requests the Single Judge of Pre-Trial Chamber II (‘Single Judge’) to reject the Prosecution’s Document Containing the Charges (hereinafter ‘DCC’)¹ and to order the Prosecution to file a new DCC. The request is based on the facts that the DCC contains new charges and fails to meet the requirements of Regulation 52 (c) of the Regulations of the Court (‘RoC’), thereby violating Mr. Arido’s right to be promptly informed of the nature, cause and content of the charges against him and his right to have adequate time to challenge the charges.

II. PROCEDURAL HISTORY

2. On 19 November 2013, the Prosecution requested the Single Judge of Pre-Trial Chamber II to issue an arrest warrant against Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido.² Mr. Arido was charged with two counts under Article 70 of the Statute, namely:

- i. Corruptly influencing witnesses, under Article 70 (1) (c) of the Statute read with article 25 (3) (c), by bribing witnesses to give false testimony (count 1); and,
- ii. Presenting evidence that the party knows is false or forged, under Article 70 (1) (b) of the Statute read with Article 25 (3) (c) by aiding, abetting or otherwise assisting in the presentation of evidence that the party knows is false or forged (count 2).³

3. On 20 November 2013, the Single Judge of Pre-Trial Chamber II (‘Single Judge’) issued an arrest warrant against Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido.⁴ Mr. Arido was charged with the two-abovementioned counts, under Article 25 (3) (c) of the Statute.

4. On 23 November 2013, Mr. Arido was arrested by the French authorities.⁵ Aimé Kilolo Musamba and Fidèle Babala Wandu were transferred to the Court on 25 November 2013, and Jean-Jacques Mangenda Kabongo on 4 December 2013. Mr. Arido was transferred to the ICC

¹ ICC-01/05-01/13-526-AnxB1-Conf. A public redacted version was filed on 4 July 2014: ICC-01/05-01/13-526-AnxB1-Red.

² ICC-01/05-01/13-19-Conf.

³ *Ibid.*, para. 91.

⁴ ICC-01/05-01/13-1-Red2-tENG.

⁵ ICC-01/05-01/13-25-Conf.

Detention Centre on 18 March 2014, and his initial appearance took place on 20 March 2014.⁶ The two counts he was charged with were read out to him.⁷

5. On 14 March 2014, the Single Judge ordered that the Prosecution and the Defence teams file their written submissions in lieu of an oral hearing for the confirmation of charges ('submissions on the confirmation of charges') by 30 June 2014.⁸

6. On 28 May 2014, the Single Judge amended the calendar for the confirmation of charges, scheduling the filing of the submissions on the confirmation of charges for 30 July 2014.⁹

7. On 30 June 2014, the Prosecution filed its Document Containing the Charges and its list of evidence.¹⁰

III. APPLICABLE LAW

8. In accordance with Article 61 (3) (a) of the Statute, a suspect shall be provided with a copy of the Document Containing the Charges on which the Prosecutor intends to bring the person to trial. Rule 121 (3) of the Rules of Procedure and Evidence ("RPE") complements the Statute and provides that the suspect must be provided with a "detailed description of the charges" at least 30 days before the date of the confirmation hearing.

9. Regulation 52 of the RoC specifies that the document containing the charges must contain:

- (a) The full name of the person and any other relevant identifying information;
- (b) A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court;
- (c) A legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.

10. Under Article 101 of the Statute, a person surrendered to the Court shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the

⁶ ICC-01/05-01/13-T-4-Red2-ENG.

⁷ *Ibid*, pp. 5-6.

⁸ ICC-01/05-01/13-255, pp. 7-8.

⁹ ICC-01/05-01/13-443.

¹⁰ ICC-01/05-01/13-526-AnxB1, AnxB2 and AnxE.

conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.

11. Article 67 (1) of the Statute enshrines the right of any suspect to be informed promptly and in detail of the nature, cause and content of the charge¹¹ and to have adequate time and facilities for the preparation of the Defence.¹² Article 60 (7) also guarantees the right of the Defence to object to the charges, challenge the evidence presented by the Prosecutor and present evidence at the confirmation of charges stage.

12. Pursuant to Article 60 (1) of the Statute, the Pre-Trial Chamber must satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed.

13. According to Article 61 (3) of the Statute, a suspect shall be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial “within a reasonable time before the hearing”. Rule 121 (3) of the Rules of Procedure and Evidence (‘RPE’) states that this reasonable time can be no later than 30 days before the date of the confirmation hearing.

14. Pursuant Article 64 (2) of the Statute, the Trial Chamber must ensure that a trial is fair and expeditious, with full respect for the rights of the accused and due regard for the protection of victims and witnesses. It is widely accepted that such obligation extends to the Pre-Trial Chamber.¹³

15. Under Article 57 (2) of the Statute, a Single Judge of the Pre-Trial Chamber may exercise the functions provided for in the Statute, unless otherwise provided for. In addition, pursuant to paragraph 3 of this same article, the Pre-Chamber may, at the request of the person who has been arrested, issue orders as may be necessary to assist the person in the preparation of his or her defence.

16. The ICC appeals chamber has held that “[h]uman rights underpin the Statute” and that the latter must “be interpreted and more importantly applied in accordance with internationally recognized human rights”.¹⁴

¹¹ Article 67 (1) (a) of the Statute.

¹² *Ibid.*, Article 67 (1) (b).

¹³ See e.g. ICC-02/11-01/11-33, para. 5; ICC-01/09-02/11-30, para. 6; ICC-01/05-01/08-528, para. 10.

¹⁴ ICC-01/04-01/06-772 OA4, para. 37.

17. Pursuant to Regulation 35 (2) of the Regulations of the Court, a Chamber may extend a time limit if good cause is shown by the requesting party.

IV. SUBMISSIONS

18. The Arido Defence submits that the Prosecution's DCC should be rejected as it contains one new charge (Article 70 (1) (a) of the Statute), three new modes of liability (Article 25 (3) (a), (b) and (d)) and two new alleged courses of conduct ("making promises to witnesses in exchange for false testimony" and "instructing witnesses on what to say when questioned in Court") which do not form part of the Prosecution's request for an Arrest Warrant or the Arrest Warrant itself.

19. In addition, the Arido Defence submits that the Prosecution's DCC significantly lacks the requisite level of detail to properly inform Mr. Arido of the charges against him, as it fails to link factual allegations to offences under Article 70 of the Statute, and fails to legally characterise the facts under the relevant elements of the offences.

20. The new charges and the lack of detail contained in the DCC blatantly violate Mr. Arido's right to be promptly informed of the nature, cause and content of the charges against him as well as his right to have adequate time to challenge the charges against him. The Arido Defence therefore requests the Single Judge to reject the Prosecution's DCC and order it to file a new, corrected version.

A. The DCC contains new charges

21. While under the Arrest Warrant Mr. Arido was charged with two counts under Article 70 (1) (b) and (c) of the Statute, both under the mode of liability referred to in Article 25 (3) (c), the Prosecution's DCC additionally charges Mr. Arido with one new offence under Article 70 (1) (a), three new modes of liability under Article 25 (3) (a), (b) and (d), and includes two courses of conduct which never formed part of the Prosecution's case. As a result, it violates Mr. Arido's right to a fair trial and must be rejected.

1. The DCC contains a new offence (Article 70 (1) (a))

22. In its DCC, the Prosecution charges Mr. Arido with offences under Article 70 (a), (b) and

(c) of the Statute. In particular, in paragraphs 132,¹⁵ 141¹⁶ and throughout pages 77-82 of the DCC, the Prosecution charges Mr. Arido with a violation of Article 70 (1) (a) of the Statute, that is: “giving false testimony when under an obligation, pursuant to Article 69, paragraph 1, to tell the truth”.

23. It is beyond challenge that Mr. Arido was only charged with offences under Article 70 (1) (b) and (c) of the Statute. The Prosecution’s request for Arrest Warrant reads:

There are reasonable grounds to believe that ARIDO is individually criminally responsible for the offences of:

- i. Corruptly influencing witnesses under **Article 70 (1) (c)** read with Article 25 (3) (c) by bribing witnesses to provide false testimony.
- ii. Presenting evidence that the party knows is false or forged under **Article 70 (1) (b)** read with Article 25 (3) (c) by aiding, abetting, or otherwise assisting in the crime of presenting evidence that he knows is false or forged.¹⁷

24. The Arrest Warrant reads:

[There are reasonable grounds to believe that Narcisse ARIDO] [i]s criminally responsible for several offences against the administration of justice, as alleged by the Prosecutor in the following counts:

COUNT 1

Corruptly influencing witnesses, within the meaning of **article 70(1)(c)** of the Statute, read with article 25(3)(c), by bribing witnesses to give false testimony;

COUNT 2

Presenting evidence that the party knows is false or forged, within the meaning of **article 70(1)(b)** of the Statute, read with article 25(3)(c), by aiding, abetting or otherwise assisting in the presentation of evidence that the party knows is false or forged.¹⁸

25. The Arrest Warrant was therefore issued for two counts only, under paragraphs B and C of Article 70. The Arido Defence notes that other suspects in the case had been charged with Article 70 (1) (a) of the Statute, and that therefore, the Prosecution could have foreseen charging Mr. Arido under this offence. By adding this new charge seven months into the case, the Prosecution shows that it failed to act diligently.

¹⁵ “ARIDO knew that his contributions were essential to the implementation of the Common Plan and that they would bring about the objective elements of **Article 70(1)(a), (b)** (false testimony and false documents), and (c). His contributions reflect his intent to engage in the course of conduct to carry them out.” (Emphasis added)

¹⁶ “Alternatively, KILOLO, and ARIDO are individually criminally responsible pursuant to Article 25(3)(b) for soliciting and/or inducing the giving of false testimony pursuant to **Article 70(1)(a)**.” (Emphasis added)

¹⁷ ICC-01/05-01/13-19-Conf, para. 91. (Emphasis added)

¹⁸ ICC-01/05-01/13-1-Red2-tENG, pp. 5-6. (Emphasis added)

26. The Arido Defence submits that, in addition to violating the fair trial rights of the suspect as described below in paragraphs 46 to 54 - the addition of a new offence violates Article 101 of the Statute, which states unequivocally that a person surrendered to the Court shall not be proceeded against for any conduct **other than the conduct (or course of conduct) which forms the basis of the crimes for which that person has been surrendered** – that is, the conduct listed in the Arrest Warrant.¹⁹

27. The Arido Defence wishes to also point out to the table contained at the end of the Prosecution's DCC, wherein it appears that Mr. Arido is charged with 43 counts.²⁰ Clearly, the Arrest Warrant was requested and issued for two counts only, and a count can only correspond to one offence under Article 70 of the Statute. The Prosecution's fanciful creation is unprecedented and unfounded and should not be permitted.

2. The DCC contains new modes of liability (Article 25 (3) (a), (b) and (d))

28. As referred to in paragraphs 23-24 above, in the Arrest Warrant, Mr. Arido was solely charged under Article 25 (3) (c) – that is aiding, abetting or otherwise assisting in the commission or attempted commission of a crime, for the purpose of facilitating the commission of such a crime.²¹

29. In the DCC, the Prosecution charges Mr. Arido with nearly all the modes of liability available under Article 25, namely: direct and indirect co-perpetration,²² ordering, soliciting or inducing the commission of a crime,²³ and contributing to the commission or attempted commission of a crime by a group of persons acting with a common purpose.²⁴ However, nearly two-thirds of the DCC is focused on the mode of liability of Article 25 (3) (a): co-perpetration, the other modes of liability being pleaded in the alternative.²⁵

30. The addition of Article 25 (3) (a) and (b) is particularly important in light of the fact that the modes of liability of co-perpetration and ordering/soliciting/inducing reflect a higher degree of individual responsibility as compared to aiding and abetting (Article 25 (3) (c)), the mode of

¹⁹ See also ICC-01/04-01/10-465-Red, para. 89: Article 101 of the Statute “should prevent the Prosecution from including in the DCC a crime which had not been described in any way in the warrant of arrest, on the basis of which the requested State agreed to arrest and surrender the person”.

²⁰ ICC-01/05-01/13-526-AnxB1-Red, pp. 77-82.

²¹ ICC-01/05-01/13-19-Conf, para. 91; ICC-01/05-01/13-1-Red2-tENG, pp. 5-6.

²² Article 25 (3) (a) of the Statute.

²³ Article 25 (3) (b) of the Statute.

²⁴ Article 25 (3) (d) of the Statute.

²⁵ ICC-01/05-01/13-526-AnxB1-Red, paras 20-139.

liability under which Mr. Arido was charged in the Arrest Warrant.

31. The wording and organisation of Article 25 clearly shows a gradation between the different modes of liability, corresponding to the level of involvement: committing; ordering, soliciting or inducing; aiding, abetting or otherwise assisting for the purpose of facilitating the commission of a crime; or “in any other way contribute to the commission or attempted commission” of a crime. It is also clear from looking at the legal requirements for each mode of liability that Article 25 (3) (a) is the most complex one, requiring the Accused to exercise a substantial control over the offence.²⁶

32. In other words, co-perpetration is a mode of commission of the crime, whether direct or indirect, where the suspect is a principal and an essential actor of the alleged crime, while aiding and abetting is a mode of accomplice liability, where the suspect is an accessory to the crime.²⁷ It is also useful to note that the ICTY has consistently held that aiding and abetting generally involved a lesser degree of individual criminal responsibility.²⁸

33. The Arido Defence notes that the Prosecution, when requesting the Arrest Warrant, alleged that co-suspects Mr. Kilolo and Mr. Babala were guilty of offences pursuant to Article 70 of the Statute under Article 25 (3) (a) of the Statute. This shows that the Prosecution had foreseen this mode of liability in the present case and yet, chose not to apply it to Mr. Arido. Further, while the Prosecution referred to an “ongoing scheme” in its request for Arrest Warrant, there was no mention of Arido being part of this “scheme”.²⁹ As a result, there was a reasonable expectation for Mr. Arido and his Defence team that he would not be charged with co-perpetration at a later stage.

34. Last but not least, while it is a relatively common occurrence at the ICC that modes of liability were added in the DCC as compared to the arrest warrant in previous cases, the Arido Defence notes that in all the cases before the ICC, the suspects - other than Mbarushimana -

²⁶ See e.g. ICC-01/04-01/07-717, para. 488; ICC-01/04-01/07-3436, para. 1387: “*Chaque mode de responsabilité présente en effet des caractéristiques et a des conséquences juridiques différentes qui traduisent diverses formes d’implication dans des activités criminelles*”; see also para. 1396 wherein Trial Chamber II held that the distinction between the modes of liability under Article 25 is based on the notion of control over the crime.

²⁷ See e.g. ICC-01/04-01/07-717, para. 484; ICC-01/04-01/06-803-tEN, para. 320.

²⁸ ICTY, *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Judgement, Appeals Chamber, 25 February 2004, para. 182: “Aiding and abetting is a form of responsibility which generally warrants a lower sentence than is appropriate to responsibility as a co-perpetrator”; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, Appeals Chamber, 28 February 2005, para. 92: “Aiding and abetting generally involves a lesser degree of individual criminal responsibility than co-perpetration in a joint criminal enterprise”; see also *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgement, Trial Chamber, 15 March 2002, para. 75.

²⁹ See ICC-01/05-01/13-19-Conf, para. 4; ICC-01/05-01/13-1-Red2-tENG, para. 19.

were originally charged with Article 25 (3) (a) of the Statute in the Arrest Warrant. The modes of liability added in the DCC were therefore of a lesser gravity. The current practice of the Prosecution, that is going from a lower mode of liability to the highest one, is therefore **unprecedented** – and rightly so. It should not be permitted.

3. The DCC contains two new alleged courses of action

35. In the request for Arrest Warrant, under the “concise statement of Article 70 offences” for Mr. Arido, the Prosecution lists three types of actions allegedly undertaken by Mr. Arido: Money transfers to Defence witnesses, fabrication of false documents and coaching witnesses to provide false testimony.³⁰

36. In the DCC, the Prosecution now charges Mr. Arido – in addition to the aforementioned - with “making promises to witnesses in exchange for false testimony” and “instructing witnesses on what to say when questioned in Court” in its DCC.³¹

37. The Arido Defence notes that the allegation of “making promises” appears nowhere in the Prosecution’s request for Arrest Warrant or in the Arrest Warrant itself. While the acts of “coaching witnesses” and of “instructing witnesses on what to say” were expressly referred to in the Prosecution’s request for Arrest Warrant, Mr. Arido was never mentioned in that regard.³²

38. While, as further explained below, the lack of specificity of the DCC does not permit the Arido Defence to know to which paragraph of Article 70 these actions relate, these new allegations nevertheless amount to new factual charges which appear nowhere in the Prosecution’s request for Arrest Warrant or in the Arrest Warrant itself and must therefore be rejected.

39. The Arido Defence wishes to point out that the two witnesses’ interviews on which the Prosecution relies mostly in its DCC in support of the new allegations against Mr. Arido have only been disclosed to the Defence on 20 June 2014 (INCRIM 15) even though they have been in the possession of the Prosecution since late February 2014 for one, and early April 2014 for the other-³³ that is **three and four months** after the Prosecution obtained the said evidence. In

³⁰ CC-01/05-01/13-19-Conf, paras. 9-15.

³¹ ICC-01/05-01/13-526-AnxB1-Red, paras 27, 35, 66, 69.

³² ICC-01/05-01/13-19-Conf, paras 15-16, 92-110; ICC-01/05-01/13-1-Red2-tENG, pp. 4-5, paras 14-15, 17.

³³ See the dates of interviews on the cover pages of CAR-OTP-0078-0155; CAR-OTP-0078-0171; CAR-OTP-0078-0178; CAR-OTP-0078-0184; CAR-OTP-0078-0194; CAR-OTP-0078-0198; CAR-OTP-0078-0206; CAR-OTP-0078-

addition to raising doubts as to whether the Prosecution respected the Single Judge's order to disclose evidence "as soon as practicable",³⁴ this shows that the Prosecution failed to act with due diligence in failing to inform the Chamber and the parties of the new factual charges. Indeed, Mr. Arido cannot be expected to go through the voluminous evidence disclosed by the Prosecution (more than 3206 documents)³⁵ in order to identify for himself the factual basis of the charges against him.³⁶

40. Finally, as stated by Pre-Trial Chamber I in the *Mbarushimana* case, Article 101 of the Statute – which embodies the principle of specialty at the ICC – "should prevent the Prosecution from including in the DCC a crime which had not been described in any way in the warrant of arrest, on the basis of which the requested State agreed to arrest and surrender the person".³⁷ While it eventually held that the addition of crimes which were "implicit" in the description of the course of conduct underlying the crimes in the request for Arrest Warrant, the Arido Defence states that it is not the case here since, as mentioned above, there was no explicit or implicit reference to Mr. Arido "coaching" witnesses or "promising" them things in exchange of false testimony in the request for Arrest Warrant or the Arrest Warrant itself.³⁸

B. The DCC fails to articulate the facts underlying the alleged offences

41. Pursuant to Regulation 52 (d) of the RoC, the DCC shall contain a legal characterisation of the facts to accord both with the crimes (in the present case, offences under Article 70 of the Statute) and the precise form of participation. As stated by the Single Judge in the present case, the DCC should identify with sufficient precision the facts underlying the alleged crimes and their legal characterisation.³⁹

42. The ICC Appeals Chamber has held that the term "facts" refers to the "factual allegations which support **each of the legal elements of the crime charges**" and stated that in the

0218; CAR-OTP-0078-0236; CAR-OTP-0078-0248; CAR-OTP-0078-0264; CAR-OTP-0078-0283; CAR-OTP-0080-0165-R01; CAR-OTP-0080-0007-R01; CAR-OTP-0080-0021; CAR-OTP-0080-0043; CAR-OTP-0080-0069; CAR-OTP-0080-0100; CAR-OTP-0080-0135; CAR-OTP-0080-0159; CAR-OTP-0080-0494-R01.

³⁴ ICC-01/05-01/13-T-3-Red-ENG, p. 12: "it is appropriate that the process of disclosure begin as early as practicable and continue to be carried out on an ongoing basis prior to the expiry of the dead-lines set forth in Rule 121(3) and 121(6)."

³⁵ The Arido defence notes that this includes translations and transcriptions of audio files. However, those do also need to be checked for consistency and are therefore included to provide an idea of the workload faced by the Arido Defence.

³⁶ ICC-01/04-01/10-465-Red, para. 112.

³⁷ ICC-01/04-01/10-465-Red, para. 89.

³⁸ *Supra*, para. 34; *see also* ICC-01/05-01/13-19-Conf, paras 15-16, 92-110; ICC-01/05-01/13-1-Red2-tENG, pp. 4-5, paras 14-15, 17.

³⁹ ICC-01/05-01/13-364, p. 5.

confirmation process “the facts [...] must be identified with sufficient clarity and details” in accordance with Article 67 (1) (a) of the Statute.⁴⁰

43. While the DCC presents extensively the legal characterisation of the facts under Article 25 (3) (a) of the Statute, it fails to legally qualify the facts under the respective offences contained in Article 70 and for which Mr. Arido is charged, namely paragraphs B and C.⁴¹ The Prosecution’s statement that “Based on the facts and circumstances described in paragraphs 20 to 109, Jean-Pierre BEMBA GOMBO, Aimé KILOLO MUSAMBA, Jean-Jacques MANGENDA KABONGO, Fidèle BABALA WANDU, and Narcisse ARIDO are respectively criminally responsible pursuant to Article 25(3) of the Statute for offences intentionally committed against the administration of justice in violation of Article 70 as particularised below” and the table contained in pages 77 to 82 of the DCC fail to meet the threshold required by Regulation 52 and the fundamental principles of criminal law, as it does not particularise which conduct falls under which Article 70 offences and the constitutive elements thereof.

44. The Arido Defence submits that the DCC lacks the level of detail which is required by Regulation 52 of the RoC, in that it fails to legally qualify the facts in relation to Article 70 of the Statute. Nowhere in the DCC is there information wherein the alleged conduct is characterised as one of the offences listed under Article 70 of the Statute, and there is no reference to the constitutive elements of the said offences. The DCC fails to respect the paramount need for exhaustiveness, clarity, thoroughness and factual and legal accuracy that are required in a DCC, in the interest of the parties and the overall efficiency of judicial proceedings.⁴²

45. As stated by Pre-Trial Chamber II in the Bemba case, “a DCC must state the material facts underpinning the charges and [...] [which] shall be specific enough to clearly inform the suspect of the charges against him or her, so that he or she is in a position to prepare properly his or her defence”.⁴³ It is the duty of the Prosecution to present all facts underpinning the charges,⁴⁴ a duty which it failed to respect in the present case.

⁴⁰ ICC-01/04-01/06-2205 OA 15 OA 16, para. 90, fn. 163. (Emphasis added).

⁴¹ As explained in paragraphs 22 to 26 above, Mr. Arido has never been charged with paragraph A of Article 70 and therefore the Prosecution shall not be permitted to include this new charge in the DCC.

⁴² ICC-01/05-01/13-134, para. 8.

⁴³ ICC-01/05-01/08-424, para. 208; *see also* paras 299-300, 311-312.

⁴⁴ *Ibid.*

46. The Arido Defence notes that since it has not been permitted to file its confirmation of charges submissions after those of the Prosecution,⁴⁵ the DCC is the only document that it has at its disposal to know and contest the charges. As a result of the lack of detail characterising the DCC, Mr. Arido cannot be said to have been informed in details of the nature, cause and content of the charges, is therefore unable to exercise his right to defend himself,⁴⁶ object to and challenge the Prosecution's allegations,⁴⁷ as he does not know to which offences correspond the alleged facts.

C. The DCC violates Mr. Arido's right to be informed promptly and in detail of the nature, cause and content of the charges and his right to have adequate time for the preparation of his Defence

47. In sum, more than seven months since the start of the proceedings, the Prosecution added **one new offence** (Article 70 (1) (a)), **three modes of liability** (Article 25 (3) (a), (b) and (d)), as well as **two courses of conduct** (making promises to witnesses in exchange for false testimony and instructing witnesses on what to say when questioned in Court) to the charges contained in the Arrest Warrant. Mr. Arido was never notified of these additions until 30 June 2014.

48. The right for a suspect to be informed promptly and in detail of the charges against him or her is one of the most fundamental aspects of a fair trial in criminal proceedings, which is protected by Article 67 (1) (a) of the Statute.⁴⁸ The underlying rationale is that the information provided must be sufficient to permit the Accused to prepare his/her defence, a right itself protected by Article 61 (1) (c) and (d).

49. Under human rights case law, a criminal charge has been defined as including both the law and the alleged facts on which it is based.⁴⁹ The ICTY has held that any basis for conviction 'that is factually and/or legally distinct from any already alleged in the indictment' constituted a new charge⁵⁰ and that a new mode of liability constituted a new charge.⁵¹

⁴⁵ ICC-01/05-01/13-364.

⁴⁶ Article 67 (1) (b) and (d) and Article 61 (6) of the Statute.

⁴⁷ Article 61 (6) of the Statute.

⁴⁸ Emphasis added; *see also* Article 14(3)(a) International Covenant on Civil and Political Rights; Article 6 (3) (a) of the European Convention on Human Rights; Article 8 (2) (b) of the American Convention on Human Rights.

⁴⁹ UN Human Rights Committee, 'General Comment 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Article 14)' (4/13/1984) 21 Session, 1984, para. 8, available at [http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2F39%2F40\(SUPP\)&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2F39%2F40(SUPP)&Lang=en).

⁵⁰ ICTY, *Prosecutor v Halilović*, Case No. IT-01-48-PT, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, ICTY Trial Chamber, 17 December 2004, para. 30; *see also* *Prosecutor v Prlić*, Case No. IT-04-74-PT,

50. At the ICC, it is recognised that the suspect is informed of the nature, cause and content of the charges by the following documents:

- a) The Prosecutor's application for a warrant of arrest and the Chamber's decision thereon;
- b) The Document Containing the Charges and the List of Evidence as well as any amendment thereto; and,
- c) The statements of Prosecution witnesses.⁵²

51. The Prosecution recognised this in the present case.⁵³ In other words, until the filing of the DCC, the Prosecution's request for Arrest Warrant and the Arrest Warrant itself are the only documents informing the suspect of the charges. Arguing that the Arrest Warrant does not contain the charges would amount to state that the suspects have not been informed of the charges against them, and that they have been held in pre-trial detention for more than seven months without charges, in a blatant violation of their fundamental fair trial rights.

52. Until 30 June 2014, the Arrest Warrant was the only charging document that the Arido Defence had at its disposal to prepare for the confirmation of charges submissions. In other words, since the transfer of Mr. Arido to the ICC and the appointment of his counsel, **four months ago**, the Defence has been preparing for the confirmation of charges on the basis of the information contained in the Arrest Warrant.

53. It is clear, the Arido Defence submits, that by adding one offence, two more serious modes of liability and two courses of conduct **seven months** after the issuance of the Arrest Warrant, the Prosecution cannot be said to have promptly informed Mr. Arido of the charges against him. Similarly, the provision of such new information a mere 30 days before the date set for the confirmation of charges submissions, after more than 3206 documents have been disclosed by

Decision on Prosecution Application for Leave to Amend the Indictment and on Defence Complaints on Form of Proposed Amended Indictment, ICTY Trial Chamber I, 18 October 2005, para. 13.

⁵¹ ICTY, *Prosecutor v. Lukić & Lukić*, Case No. IT-98-32/1-PT, Decision on Prosecution Motion Seeking Leave to Amend the Second Amended Indictment and on Prosecution Motion to Include UN Security Council Resolution 1820 (2008) as Additional Supporting Material to Proposed Third Amended Indictment as Well as on Milan Lukić's Request for Reconsideration or Certification of the Pre-Trial Judge's Order of 19 June 2008, 8 July 2008, para. 49; *See also* ICTR, *Prosecutor v. Bagaragaza*, Case No. ICTR-2005-86-T, Decision on the Prosecutor's Application for Leave to Amend the Indictment, 30 November 2006, para. 10: "Charges in the alternative or additional legal theories of liability, "even in the absence of new factual or evidentiary material, are considered new charges".

⁵² *E.g.* ICC-01/05-01/13-177, para. 6; ICC-01/05-01/08-307, para. 16, *see also* paras 12-14.

⁵³ ICC-01/05-01/13-128, para. 18.

the Prosecution⁵⁴ and reviewed by the Defence in light of the Arrest Warrant, cannot be said to respect Mr. Arido's right to adequate time and facilities to prepare his Defence or his right to object to the charges and challenge the Prosecution's evidence.

54. The Arido Defence further notes that pursuant to Article 101 of the Statute, a person surrendered to the Court shall not be proceeded against for any conduct **other than the conduct (or course of conduct) which forms the basis of the crimes for which that person has been surrendered** – that means the conduct listed in the Arrest Warrant. This so-called “rule of speciality” is a fundamental notion of extradition law, and has been deliberately incorporated in the ICC Statute. One might seek to criticise the application of this rule as far as the core crimes (Article 5 of the Statute) are concerned, in the sense that the application of the speciality rule should not result in impunity for genocide, crimes against humanity or war crimes. However, this rationale can certainly not apply in respect of Article 70-offences, which do not constitute crimes under international law and for which no international obligation to prosecute exists.

55. Finally, the Arido Defence further wish to emphasise that it has to operate with only **half of the minimum monthly budget** provided for by the Registry Legal Aid Policy for a “core defence team” composed of one counsel, one legal assistant and one case manager,⁵⁵ which seriously limits its ability to face such a significant change in the allegations against Mr. Arido within the current schedule.

D. Ordering the Prosecution to file an amended and corrected DCC is the only way to protect the fundamental fair trial rights of Mr. Arido

56. The Arido Defence finds that the Prosecution shall not be permitted to divert so significantly from the Arrest Warrant at a time so close to the deadline for the confirmation of charges submissions, particularly while it could have foreseen the changes at the time of the Arrest Warrant⁵⁶ or at the time of the initial appearance of Mr. Arido.⁵⁷ Permitting the Prosecution to do so would violate Mr. Arido's right to be promptly informed of the charges

⁵⁴ The Arido defence notes that this includes translations and transcriptions of audio files. However, those do also need to be checked for consistency and are therefore included to provide an idea of the workload faced by the Arido Defence.

⁵⁵ ICC-RoC85-02/14-2.

⁵⁶ *Supra*, paras 25, 32.

⁵⁷ The Prosecution had already interviewed one of the witnesses on which it bases the new factual charges early March 2014, at the time of Mr. Arido's initial appearance. *See* CAR-OTP-0078-0155; CAR-OTP-0078-0171; CAR-OTP-0078-0178; CAR-OTP-0078-0184; CAR-OTP-0078-0194; CAR-OTP-0078-0198; CAR-OTP-0078-0206; CAR-OTP-0078-0218; CAR-OTP-0078-0236; CAR-OTP-0078-0248; CAR-OTP-0078-0264; CAR-OTP-0078-0283.

against him as well as his right to have sufficient time to prepare his Defence. It would further go against the spirit and purpose of Statute, which must be applied and interpreted in light of internationally recognised human rights.⁵⁸ Finally, it would violate the rule of speciality, set out in Article 101 of the Statute.

57. In the present case, all the suspects other than Mr. Bemba have been held in pre-trial detention since November 2013 – that is more than **seven months of pre-trial detention** - even though they are charged with offences against the administration of justice which, are of far lower gravity than the crimes which are usually before the ICC. This is particularly important in light of the fact that this is a case where the offences charged can be punished by a fine **or** a sentence of a maximum of five years. While Mr. Arido was only transferred to the ICC in late March 2014, he had been in detention in France on the basis of the ICC Arrest Warrant since November 2013; he has therefore been held in pre-trial custody for more than seven months.

58. As a result, it is of crucial importance that the confirmation of charges stage proceeds with the utmost expediency in order to respect the suspects' right to be tried within a reasonable time,⁵⁹ particularly in light of the fact that the date set for the confirmation of charges submissions has already been extended from 30 May 2014 to 30 June 2014. As a result, the only option available to ensure that the rights of Mr. Arido and his co-suspects are respected is to order the Prosecution to remove the additional charge, the additional modes of liability and the additional courses of conduct from its DCC and to file an amended version.

59. The Arido Defence suggests that the Single Judge resorts for guidance to the practice at ICTY, in the absence of precedent at the ICC, where the Prosecution's request to amend the indictment a month prior to the start of the trial was rejected, because the Prosecution had not "acted diligently in approaching the matter and that the defence had not been given adequate notice".⁶⁰

60. In light of the Pre-Trial Chamber's obligation to ensure that a trial is fair and expeditious,

⁵⁸ Article 21 (3) of the Statute; *see also* ICC-01/04-01/06-772 OA4, para. 37.

⁵⁹ Article 67 (1) (c) of the Statute.

⁶⁰ ICTY, *Prosecutor v. Lukić & Lukić*, Case No. IT-98-32/1-PT, Decision on Prosecution Motion Seeking Leave to Amend the Second Amended Indictment and on Prosecution Motion to Include UN Security Council Resolution 1820 (2008) as Additional Supporting Material to Proposed Third Amended Indictment as Well as on Milan Lukić's Request for Reconsideration or Certification of the Pre-Trial Judge's Order of 19 June 2008, 8 July 2008, para. 54.

and that full respect is given to the rights of the suspect,⁶¹ and in accordance with the powers granted to him by Article 57 of the Statute, the Arido Defence respectfully requests the Single Judge to ensure the protection of the fundamental rights of Mr. Arido by ordering that the relevant parts of the Prosecution's DCC related to Article 70 (1) (a), Article 25 (3) (a) and (b) and to the allegations of "making promises to witnesses in exchange for false testimony" and "instructing witnesses on what to say when questioned in Court" be removed from the DCC insofar as they relate to Mr. Arido. It further requests the Single Judge to order the Prosecution to submit an amended DCC.

E. Alternative request for extension of time to file the list of evidence and the confirmation of charges submissions

61. Should the Single Judge reject the main request, the Arido Defence is left with no choice but to request an extension of time in order to ensure that the rights of Mr. Arido, in particular his right to adequate time to prepare his defence and his right to object to the charges and present evidence, are properly respected. As mentioned above, the Arido defence has been preparing on the basis of charges contained in the Arrest Warrant under the mode of liability of aiding and abetting. The addition of one new offence, two more serious modes of liability and two courses of action constitutes good cause to depart from the original deadline in order to ensure the respect of Mr. Arido's right to defend himself.

62. Further, the addition of the charges requires the Arido Defence to go back to thousands of documents disclosed by the Prosecution in order to analyse them in this new light, and also compels the Arido Defence to undertake further investigation in order to address the charges.

63. Therefore, the Arido Defence hereby requests an additional 60 days to prepare its list of evidence and its confirmation of charges submissions.

V. CONCLUSION

64. In light of the above, the Arido Defence respectfully request the Single Judge to order the Prosecution to remove any reference to Article 25 (3) (a) or (b), to Article 70 (1) (a) and to the allegations of "making promises to witnesses in exchange for false testimony" and "instructing

⁶¹ Article 64 (2) of the Statute, which extends to the Pre-Trial Chamber, *See e.g.* ICC-02/11-01/11-33, para. 5; ICC-01/09-02/11-30, para. 6; ICC-01/05-01/08-528, para. 10.

witnesses on what to say when questioned in Court” in relation to Mr. Arido in its DCC and to file an amended DCC.

65. In addition, the Arido Defence respectfully request the Single Judge to order that the deadline for the filing of its list of evidence and its submissions on the confirmation of charges start running from the time that a new, corrected DCC is submitted by the Prosecution.

66. Alternatively, should the main request be rejected, the Arido Defence requests an extension of time of 60 days from the dates set in the Single Judge’s decision ICC-01/05-01/13-255, in order to prepare its list of evidence and its confirmation of charges submissions on the basis of the new charges contained in the DCC.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'G. Sluiter', with a large, loopy initial 'G' and a horizontal line extending to the right.

Göran Sluiter, Counsel for Narcisse Arido

Dated this 9th Day of July 2014

At Amsterdam, The Netherlands