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PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Cuno Tarfusser
Judge Christine Van den Wyngaert

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 Submissions on the Confirmation of
Charges, 30 July 2014 (ICC-01/05-01/13-598-Conf)**

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

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I. INTRODUCTION

1. Pursuant to the Single Judge's order of 28 May 2014¹ and in accordance with Article 61 of the Statute and Rule 165 (3) of the Rules of Procedure and evidence, the Arido Defence hereby files its submissions on the Confirmation of Charges.

2. The present submissions react to the Document Containing the Charges against Mr. Arido, which was filed by the Prosecution on 30 June 2014 (hereinafter 'DCC').² The DCC is supposed to represent the culmination of all Prosecution efforts in the investigation of the offences against the administration of justice which have allegedly been committed in the case of *the Prosecutor v. Jean-Pierre Bemba* ('Bemba case').

3. The Arido Defence cannot help but expressing its surprise at the amount of already scarce ICC resources which have been invested at every level into this investigation. One wonders whether these resources could not be better allocated to the ICC's fight against impunity for the crimes set out in Article 5 of the Statute. This is the more the case, because the alleged Article 70-offences in this case could in the opinion of the Arido Defence be effectively investigated at the national level, as provided for by Rule 162 of the Rules of Procedure and Evidence.

4. A significant allocation of investigative and prosecutorial resources to a case such as the present one may create the impression that the charged suspects *must* be involved in the commission of at least *some* crimes. Not only would such a view be inconsistent with the presumption of innocence, it is also of the essence in the evaluation of evidence not to mix matters of quantity and quality.

5. The Pre-Trial Chamber shall thus resist any temptation to be impressed by the mere quantity of investigative acts in the present case. Rather, it must in a clinical and surgical manner examine the totality of the evidence, in light of the formulated charges and the applicable rules and standards.

6. It will be argued in the present submissions that none of the charges formulated by the Prosecution against Mr. Arido can be confirmed. On the basis of its analysis of the DCC and

¹ ICC-01/05-01/13-443.

² ICC-01/05-01/13-526-Conf-AnxB1.

the evidence cited by the Prosecution in support of its allegations, the Arido Defence submits that the Prosecution fails to meet its evidentiary burden. Therefore, the Arido Defence requests the Pre-Trial Chamber to decline to confirm all charges against Arido, as stipulated in Article 61 (7) (b) of the Statute.

II. CLASSIFICATION

7. Pursuant to Regulation 23*bis* of the Regulations of the Court ('RoC') and Regulation 24 of the Regulations of the Registry ('RoR'), this request is submitted as confidential as it refers to confidential filings and evidence.

III. APPLICABLE LAW

8. The Arido Defence, as a preliminary matter, briefly sets out some key elements of the applicable law, which governs the remainder of the present submissions.

A. Confirmation of charges

9. The purpose of the confirmation hearing is limited "to committing for trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought".³ It is governed by the following principles:

- the presumption of innocence;
- the burden of proof is on the Prosecution, and;
- the Defence will have the final word.⁴

10. Under Article 61 (7) of the Statute, the Pre-Trial Chamber shall not confirm the charges unless the Prosecution has shown that there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.⁵ The substantial grounds to believe standard has been defined as whether the Pre-Trial Chamber is thoroughly satisfied that the Prosecution's allegations are sufficiently strong to commit the suspect to trial.⁶

³ ICC-01/04-01/06-803, 29, para. 37.

⁴ ICC-01/04-01/06-T-30-EN, p. 10-13.

⁵ Article 61 (7) of the Statute.

⁶ ICC-01/04-01/06-803-tEN, para 39.

11. While the evidence shall be assessed as a whole, each allegation must be supported with evidence that provides a substantial ground to believe the accused has committed that particular crime.⁷ This is so that the Accused is in an effective position to properly prepare his/her Defence within the framework of admissible and reliable evidence.⁸

12. The Prosecution shall furnish all material facts and evidence, which go beyond a mere theory or suspicion.⁹ The Prosecution shall also inform the accused of each legal requirement behind the crimes charged.¹⁰

13. Furthermore, all parties must abide by the cardinal rules of interpreting the Courts applicable law. The cardinal ICC-rules relevant to interpretation of its legal framework can be found in Articles 21 (3) and 22 of the Statute.

14. Article 21 (3) obliges any organ of the Court to apply and interpret any source of applicable law, as set out in Article 21, consistently with internationally recognised human rights. Article 22 embodies the fundamental principle of legality and requires organs of the Court, among other things, to construe the definition of a crime strictly, not extend it by analogy, and in case of ambiguity interpret the definition in favour of the suspect/accused.

15. The Arido Defence submits that the content of Article 22 applies irrespective of its codification and place in the statute, because it embodies a human rights norm and a general principle of (criminal) law. This is important to bear in mind, because it is argued below in paragraphs 319 to 335 that Part III of the Statute does not apply to Article 70-offences, which is supposed to be a self-contained regime within the Statute.

B. Admissibility and assessment of evidence

16. When assessing evidence for the purposes of the confirmation of charges, the Pre-Trial Chamber shall be guided by Articles 21, 64, 67 and 69 of the Statute as well as Rules 63, 64, 68, 70, 76-78, 121 and 122 of the RPE.¹¹ In particular, Article 69 (4) of the Statute provides that while “taking into account, *inter alia*, the probative value of evidence and any prejudice that such

⁷ ICC-01/04-01/06-803, para 39.

⁸ ICC-01/05-01/08-424, para 206-209, 299-300, 311-312.

⁹ ICC-01/04-01/06-803-tEN, para. 37 ; ICC-01/04-01/10-465-Red, para. 41.

¹⁰ ICC-01/05-01/08-424, paras 206-209, 299-300, 311-312.

¹¹ ICC-01/04-02/06-309, para. 10.

evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules, the Court may rule on the relevance or admissibility of any evidence”.¹² This is to ensure that no accused goes to trial unless there are substantial grounds to believe that that person has committed the crimes charged.¹³ In particular, “in order to make this determination as to the sufficiency of the evidence, the Pre-Trial Chamber must necessarily draw conclusions from the evidence where there are ambiguities, contradictions, inconsistencies or doubts as to credibility arising from the evidence”.¹⁴ In other words, the Pre-Trial Chamber may exclude evidence which is plainly unreliable or incredible.¹⁵

17. On the basis of admissible evidence, the Pre-Trial Chamber must consider its reliability. In doing so, the Chamber is guided by many factors, such as:

- the nature of the disclosed evidence;¹⁶
- the context in which the evidence was obtained;¹⁷
- the reliability of the evidence;¹⁸
- the evidence’s credibility;¹⁹
- the contemporaneousness of the evidence;²⁰
- the purpose and adequate means of evaluating the evidence.²¹
- the source of the evidence, and;²²
- the evidence’s nexus to the charges of the case or the suspect.²³

18. In determining the reliability of witnesses, various factors are taken into account such as the personal status of the witnesses, their truthfulness, voluntariness and trustworthiness.²⁴ In the *Mbarushimana* case, Pre-Trial Chamber I held that, when there is conflict or contradiction between items of evidence submitted by the Prosecution or when the Defence introduces conflicting evidence, it must engage in an assessment of the credibility and weight of this

¹² Article 69 (4) of the Statute; *see also* ICC-01/04-01/06 OA, paras 50, 51.

¹³ ICC-01/04-01/07-412, p. 4.

¹⁴ ICC-01/04-01/10-514, para. 39.

¹⁵ *Ibid.*

¹⁶ ICC-01/05-01/08-424, para. 59.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ ICC-01/04-01/07-2635, para. 27.

²¹ *Ibid.*

²² ICC-01/05-01/08-424, para. 59.

²³ *Ibid.*

²⁴ *Ibid.*

evidence in light of the whole of the evidence submitted for the purpose of the confirmation hearing.²⁵ As a result, the Pre-Trial Chamber must “assess the intrinsic coherence of each item of evidence in light of the whole of the evidence submitted for the purposes of the confirmation hearing”.²⁶

1. Inconsistencies

19. Inconsistencies in witness statements have in the past led Pre-Trial Chambers not to rely upon such evidence.²⁷ Witness statements with minor inconsistencies not diminishing the capacity of the overall statement have still been accepted.²⁸ Although inconsistencies in witness statements do not lead to an automatic rejection, it is the Chamber’s duty to evaluate where these inconsistencies cast doubt onto the overall credibility and reliability of the evidence.²⁹ Where evidence, assessed in light of the whole of the evidence, is found to contain inconsistencies, ambiguities or contradictions, caution must be exercised in using it.³⁰

2. Evidence from witnesses with a criminal record or political motives

20. The criminal record or political motives of any witness relied on by a party may affect the witness’s credibility, given that such information therefore falls within the scope of article 67(2) of the Statute.³¹ These two factors raise concerns of whether the witness has a personal gain such as evading Prosecution or benefiting politically, in giving their testimonies.³² As a result, the possible political motives of a witness, or his/her status as a suspect may cast doubt on their reliability.³³ Although, it does not automatically mean that their evidence will be considered inadmissible, the Pre-Trial Chamber must assess the credibility of witnesses on each issue regarding their personal status.³⁴

3. Hearsay

21. Although hearsay is not inadmissible *per se*, it is problematic as it does not permit the Chamber to know the source of the information, which therefore deprives it of vital

²⁵ ICC-01/04-01/10-465-Red, para. 46.

²⁶ ICC-01/04-01/10-465-Red, para. 47.

²⁷ ICC-01/04-01/06-2842, paras 102-103, 265, 406, 436, 479, 499, 902.

²⁸ *Ibid.*, para 676.

²⁹ ICC-01/05-01/08-424, para. 55.

³⁰ ICC-01/04-01/10-465-Red, para. 47.

³¹ ICC-01/04-01/07-717, para. 181, *citing to* ICC-01/04-01/06-649, p. 3; ICC-01/05-01/08, para. 57.

³² ICC-01/05-01/08-424, para. 57.

³³ *Ibid.*

³⁴ ICC-01/05-01/08-424, para 57; ICC-01/05-01/08-424, paras 57, 450.

information relating to the source of the evidence³⁵. This makes it impossible for the Pre-Trial Chamber to assess the trustworthiness and probative value of the source.³⁶

4. Documentary evidence

22. Documentary evidence does not have a lower standard of admissibility or relevance.³⁷ Such acceptable evidence includes open-source information which is publically available, official certified documents that are not publically available or private documents that can be authenticated by the party against whom they are tendered.³⁸ However, Pre-Trial Chambers cannot admit unauthenticated documentary evidence since such evidence lacks probative value.³⁹

³⁵ ICC-02/11-01/11-432, para. 28; ICC-01/04-01/07-71, para 137.

³⁶ ICC-02/11-01/11-432, para.29.

³⁷ ICC-01/04-01/07-2635, para 12.

³⁸ *Ibid.*, para 24.

³⁹ *Ibid.*, para 22.

SUBMISSIONS

IV. PROCEDURAL OBJECTIONS

23. The Arido Defence submits a number of procedural objections concerning the Prosecution's unlawful selection of Mr. Arido as a suspect in this case, the irregularities that have occurred in the investigations in this case and the defects in the DCC which violate Mr. Arido's right to a fair trial.

24. It will be argued that the aforementioned violations trigger a variety of remedies which will be requested at the end of the present part.

25. At the outset the Arido Defence wishes to point out that it is well aware of the unique characteristics and the specific object and purpose of the confirmation of charges hearing. At the same time the case law pertaining to the ICC confirmation hearing has - up until now - exclusively been developed in respect of Article 5-crimes. It already follows from Rule 165 (3) that the confirmation procedure may be different in nature in respect of Article 70-offences.

26. The Arido Defence submits that because of the allegations being restricted to Article 70-offences, there is reason to deal in a comprehensive fashion with issues that in respect of Article 5-crimes could be passed on to the trial phase. It is in everyone's interest to avoid as much as possible - even more so in respect of Article 70-offences which are not crimes under international law and to which the entire 'impunity-discourse' is inapplicable – the conduct of trials, which will take up a significant portion of the Court's scarce resources.

A. Arbitrary Prosecution

27. The Arido defence is aware of the fact that Rule 165 (2) stipulates that Article 53 and 59, and any rules thereunder, shall not apply in respect of investigations into Article 70-offences. Nevertheless, Article 53 contains essential standards regarding the exercise of prosecutorial discretion, such as the one set out in Article 53 (2) (c).

28. It would be unthinkable that in respect of Article 70-offences the exercise of prosecutorial discretion would not be governed by any legal standard.⁴⁰ The Pre-Trial Chamber is invited to fill in the gaps. The Arido Defence submits that in light of the Court's scarce resources and the fact that Article 70-offences are not the Court's core business, it is appropriate to subject the exercise of prosecutorial discretion in respect of Article 70-offences to rigorous scrutiny.

29. The Arido Defence submits that during the entire Pre-Trial phase and upon closer examination of the totality of evidence, including the evidence brought forward by the Prosecution and the DCC, it comes to the conclusion that the Prosecution has exercised its discretion in charging Mr. Arido with Article 70-offences in an arbitrary, and therefore unlawful, manner.

30. The Arido Defence in this respect submits that irrespective of the formal non-applicability of Article 53, 'the interests of justice' as well as the 'gravity of the crime' should continue to guide the Prosecution in its exercise of discretion in respect of Article 70-offences. It is furthermore submitted that these illusive notions, certainly when applied in respect of Article 70-offences, require elaboration; the Prosecution should provide explanation why Mr. Arido has been singled out for Prosecution, in light of other cases and situations of Article 70-offences, or simply: the broader prosecutorial policy in respect of Article 70-offences.

31. It should be pointed out that the Prosecution has drafted a number of (publicly available) policy papers and strategic plans.⁴¹ None of these refers to prosecutorial strategy and/or policy in respect of Article 70-offences. While an OTP policy paper on case selection is not (yet?) publicly available according to the OTP website, the Arido Defence seriously doubts whether this potentially vital policy paper would deal with Article 70-offences at all.

32. It should further be pointed out that neither the DCC nor any other Prosecution filing in this case explains - to suspects, Judges and the public - the broader policy and its application to Mr. Arido of case selection regarding Article 70-offences.

⁴⁰ It is noted that with the non-applicability of art. 53 to investigations into art. 70-offences the prosecution might argue that its own Regulations (Regulations of the Office of the Prosecutor) when there are (implicit) references to art. 53 would equally not be applicable (cp. Regulations 29 and 33). This would, undesirably, exacerbate the legal vacuum in respect of prosecutorial activities regarding art. 70-offences and should be avoided.

⁴¹ See OTP website: http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court%20office%20of%20the%20prosecutor/policies%20and%20strategies/Pages/documents.aspx

33. Human rights which govern exercise of prosecutorial discretion in the selection of cases/suspects are above all the principle of equality and its corollary, the principle of non-discrimination⁴² as well as the principle of impartiality. It is generally accepted that the non-discrimination principle is one of the cornerstones of human rights protection. It is unclear to the Arido Defence which were the relevant factors which guided the Prosecution in its decision to select Mr. Arido's case and there is reason to believe - on the basis of factors and circumstances to be elaborated upon below - that Mr. Arido's right to be treated equally and/or not to be subjected to arbitrary prosecution more broadly,⁴³ was violated.

34. The standard in international criminal proceedings for unlawful/arbitrary prosecution appears to be the one set out in the *Delalić et al.* appeals judgement at the ICTY.⁴⁴ The ICTY Appeals Chamber ruled:

The crimes of which Landžo was convicted are described both in the Trial Judgement and in the present judgement at paragraphs 565-570. The Appeals Chamber considers that, in light of the unquestionably violent and extreme nature of these crimes, it is quite clear that the decision to continue the trial against Landžo was consistent with the stated policy of the Prosecution to "focus on persons holding higher levels of responsibility, or on those who have been *personally responsible for the exceptionally brutal or otherwise extremely serious offences*." A decision, made in the context of a need to concentrate prosecutorial resources, to identify a person for Prosecution on the basis that they are believed to have committed *exceptionally* brutal offences can in no way be described as a discriminatory or otherwise impermissible motive.⁴⁵

35. It follows from this finding that (a) the Prosecution had justified the selection of Landžo for prosecution, on account of the exceptionally brutal nature of the crimes he committed, and (b) the reasons for this selection corresponded with the established prosecutorial policy in the selection of cases; hence the Appeals Chamber concluded there was no impermissible motive in the selection of Landžo for prosecution.

⁴² As expressly recognized by the UN Charter, which states in Article 1(3) that "One of the main purposes of the United Nations consists in 'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion'".

⁴³ ECtHR, *Willis v United Kingdom*, 11 June 2002, para. 48, available at

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60499>; ECtHR *Okpisi v Germany*, 25 October 2005, para. 33, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70767>; See also Human Rights Committee in *Boržov v Estonia*, Communication No 1136/2002 (2004), para. 7.2: "an individual may be deprived of his right to equality before the law if a provision of law is applied to him or her in arbitrary fashion, such that an application of law to an individual's detriment is not based on reasonable and objective grounds". available at http://search.ohchr.org/search?q=No.+1136%2F2002&btnG=Search&spell=1&client=default_frontend&output=xml_no_dtd&proxystylesheet=en_frontend&ulang=en&sort=date%3AD%3AL%3Ad1&entqr=3&entqrm=0&oe=UTF-8&ie=UTF-8&ud=1&site=default_collection.

⁴⁴ ICTY, *Prosecutor v. Delalić et al.* (aka 'Celibići case'), Case No. IT-96-21, Judgement, Appeals Chamber, 20 February 2001, paras 596-619, available at <http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>.

⁴⁵ *Ibid.*, para. 614.

36. It is pointed out that the Prosecution in this case has never justified the selection of Arido and has not established any policy for the selection of ‘Article 70-cases’. There is reason to believe Mr. Arido has been selected for an impermissible motive, also in light of the three grounds to be discussed below.

37. There are three grounds on the basis of which the Arido Defence submits that Mr. Arido’s prosecution, in the absence of a policy and/or reasoning from the Prosecution convincingly justifying selection of his case, is arbitrary:

- (i) the Prosecution has failed to prosecute its own intermediaries and witnesses in the Lubanga and Ngudjolo/Katanga cases for Article 70-offences, while - in comparison – Mr. Arido’s alleged criminal conduct appears less serious;
- (ii) the Prosecution has failed to prosecute, in the present case, other persons allegedly involved in implementing the alleged common plan, while - in comparison and on the basis of the DCC - Mr. Arido’s alleged criminal conduct appears less serious;
- (iii) the Prosecution has failed to prosecute any witness in the present case, against whom there is - according to the Prosecution - overwhelming evidence that they have committed perjury, while it cannot be said that Mr. Arido’s alleged criminal conduct is inherently more serious in nature.

1. The Prosecution has failed to prosecute its own intermediaries and witnesses in the Lubanga and Ngudjolo/Katanga cases for Article 70-offences, while - in comparison – Mr. Arido’s alleged criminal conduct appears less serious

38. It is submitted, at the outset, that other potential situations of Article 70-offences - not concerning the present case - and the Prosecution’s approach to these situation is a relevant factor in assessing the exercise of prosecutorial discretion in the present case.

39. The Arido Defence further submits there is an impressive body of evidence, including a number of judicial findings, that one or more intermediaries working for the Prosecution and one or more Prosecution witnesses have committed one or more of the offences set out in Article 70.⁴⁶

⁴⁶ It exceeds the scope of these submissions to set out in detail the scope and nature of allegations against the OTP intermediaries and the witnesses corruptly influenced by them; the matter is very well known to those closely following the ICC. The Arido Defence refers for a comprehensive overview of the issue of OTP intermediaries, including references to relevant decisions and flings, to C. Buisman, ‘Delegating Investigations: Lessons to be

40. To the knowledge of the Arido Defence, the commission of Article 70-offences by OTP intermediaries and witnesses has never been the object of genuine and thorough criminal investigations.

41. It is a fact that none of the Prosecution intermediaries or Prosecution witnesses who gave false testimony under oath has ever been prosecuted for Article 70-offences, let alone other persons who could have been involved in the implementation of a possible common plan evidenced by the crimes committed.

42. The Arido Defence notes that Judge Van den Wyngaert, in a dissenting opinion to the *Katanga* Trial Judgement, has expressed her surprise about the fact that the Prosecution is investigating and prosecuting the present case, but has failed to do so in respect of cases directly concerning the Prosecution:

I note, in passing, that the Prosecution has shown great zeal in other cases before this Court pursuing persons whom it suspects of having suborned testimony by launching a string of Prosecutions under article 70. However, despite repeated requests and reminders by the Chamber in this case, the Prosecutor has still to take any initiative with regard to witness P-159, whose testimony the Prosecutor had to withdraw.⁴⁷

43. The Arido Defence submits that the alleged conduct with which Mr. Arido is charged in the DCC is less serious than the conduct of certain intermediaries working for the Prosecution in the DRC situation. In fact, these intermediaries were far more heavily involved in investigations, including the far more frequent - over a far longer period of time - contacts with witnesses some of whom were according to the evidence corruptly influenced,⁴⁸ than Mr. Arido was in the present case, as alleged in the DCC.

44. The failure to prosecute any suspect of Article 70-offences who was related to the Prosecution, either as intermediary or as witness, while Mr. Arido is presently prosecuted for alleged conduct arguably being of a less serious nature is a significant factor that - in the absence of further explanation or justification- contributes to the arbitrary nature of his prosecution.

Learned from the Lubanga Judgment', 11 Northwestern Journal of International Human Rights (2013), pp. 30 – 82, available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1143&context=njihr>.

⁴⁷ ICC-01/04-01/07-3436-AnxI, para. 140 (internal citations omitted).

⁴⁸ ICC-01/04-01/06-2434-Red2, para. 140: 'There is evidence, at this stage of the case, from a range of witnesses that intermediaries 321 (REDACTED) and 316 (REDACTED) may have misused their positions in varying ways, but the underlying allegation is that they have persuaded or invited witnesses to give false testimony to the Court.'

2. The Prosecution has failed to prosecute in the present case other persons allegedly involved in implementing the alleged common plan, while - in comparison and on the basis of the DCC – Mr. Arido’s alleged criminal conduct appears less serious

45. It follows clearly from the DCC that the Prosecution also conducted investigations in relation to other individuals who allegedly were involved in implementing the common plan; however they were not prosecuted.⁴⁹

46. While the inclusion of persons for prosecution can be restricted –for reasons of judicial economy - the Prosecution has no unfettered discretion in this regard. It carries the burden, on the basis of a broader policy or other convincing arguments, to explain why Mr. Arido was considered a more suitable candidate for prosecution than other persons who were according to the Prosecution also involved in implementing the alleged common plan.

47. Such an explanation is the more required when the DCC refers to one of the other persons allegedly involved in the common plan as someone who allegedly has instructed Mr. Arido to identify individuals to be presented falsely as witnesses in the Bemba case.⁵⁰ Arguably, in the Prosecution’s own logic this would amount to a higher degree of responsibility in the overall alleged common plan and positions Mr. Arido into a subordinate role, again according to the logic and allegations in the DCC.

48. The DCC refers in paragraph 20 to the selected suspects in this case as the ‘main co-perpetrators of the common plan’. The Prosecution does not, however, explain the difference between ‘normal’ and ‘main’ co-perpetrators and also fails to provide any explanation justifying the inclusion of Mr. Arido in the group of ‘main co-perpetrators’.

49. Without a convincing explanation, the selection of Mr. Arido over other persons allegedly involved in the common plan, including someone who is alleged to have instructed Mr. Arido, amounts to another factor contributing to the arbitrary character of Mr. Arido’s Prosecution.

⁴⁹ DCC, para. 21.

⁵⁰ *Ibid.*, para. 28.

3. **The Prosecution has failed to prosecute any witness in the present case, against whom there is - according to the Prosecution - overwhelming evidence that they have committed perjury, while it cannot be said that Mr. Arido's alleged criminal conduct is inherently more serious in nature**

50. The Prosecution's case is in essence based on the fact that, allegedly, a number of Defence witnesses who testified for Mr. Bemba presented false evidence before the Court, while under oath. This is an offence under Article 70 (1) (a) of the Statute. Nonetheless, the Prosecution has decided not to prosecute any of these individuals.

51. There are reasons to believe that Prosecution witnesses have committed perjury in other ICC cases. The Prosecution has not provided any explanation, neither by means of a broader policy nor in this specific case, why it has refrained from prosecuting any witness for perjury, but instead has selected Mr. Arido for prosecution.

52. It is submitted that the alleged criminal conduct attributed to Mr. Arido in the DCC is not inherently more serious than the act of giving false testimony under oath. For example, under Dutch law commission of perjury carries a maximum penalty of six years imprisonment,⁵¹ while the maximum penalty for threatening, intimidating witnesses or interfering with testimony is four years.⁵²

53. What is more, the prosecution of at least some witnesses who have allegedly committed perjury appears necessary to represent an adequate and even-handed picture of the crimes allegedly committed in this 'situation'. In addition, without the prosecution of key perjuring witnesses in this case, there remains doubt - in the absence of a judgement of guilt- whether these witnesses have in fact committed perjury.

54. The failure to prosecute any witness against whom there is, according to the Prosecution, significant evidence that he/she has committed perjury is another factor attributing to the arbitrary nature of Mr. Arido's Prosecution, since - in the absence of any explanation from the Prosecution - Mr. Arido's alleged criminal conduct is not inherently more serious in nature than the act of perjury.

⁵¹ Articles 207 (1) and 207a (1) of the Dutch Penal Code.

⁵² *Ibid.*, Article 285a (1).

B. Irregularities in the conduct of the investigations

55. The Arido Defence submits that in the investigations in this case several irregularities occurred. The Arido Defence is fully aware of this Court's usual line of reasoning in that the determination which the Court is supposed to make pursuant to "article 61(7) of the Statute relates to the assessment of the evidence available and not the manner in which the Prosecution conducted its investigations".⁵³ However, it is not established that this line of reasoning applies equally to confirmation hearings regarding Article 70-offences. In the interests of justice, including preventing that scarce resources are unnecessarily spent on an Article 70-case going to trial, the Pre-Trial Chamber is at liberty to make the necessary determinations in respect of irregularities that have occurred in the conduct of the investigations. Such determinations are the more necessary, also in confirmation hearings regarding Article 5-crimes, when irregularities in the investigations have a bearing on the quality of the evidence and thus have an impact on the answer to the question whether that evidence establishes substantial grounds to believe that Mr. Arido committed the offences as set out in the DCC.⁵⁴

1. The Prosecution's contacts with and interrogation of [REDACTED]/witnesses D-2 and D-3

56. While conducting its investigation, the Office of the Prosecution has interrogated [REDACTED]/witnesses D-2 and D-3 in violation of the Court's legal framework, [REDACTED]. The Prosecution has furthermore deployed in its dealings with and interrogation of D-2 and D-3 unlawful investigative methods, which cast serious doubts on the probative value of their statements.

57. The statements of D-2 and D-3, as well as the Prosecution's investigative methods, are discussed in detail in Part VI-C-2 (paragraphs 211-262) ; these sections also set out the legal consequences the Arido Defence wishes the Chamber to attach to the entire set of events surrounding the questioning of D-2 and D-3. They need no further discussion here.

⁵³ ICC-01/09-01/11-373, para. 51.

⁵⁴ ICC-02/05-02/09-243-Red, para. 48.

2. The appointment of and activities of independent counsel

58. In the present case the Single Judge has appointed an independent counsel, who played a significant part in the proceedings, including the performance of investigative activities. There is no basis to be found for an intervention by an independent counsel within the Court's legal framework.

59. As far as the legality of appointment and further activities of the independent counsel are concerned the Arido Defence wishes to point out that this matter has been explored by [REDACTED] in an "avis de droit" submitted by the Kilolo Defence.⁵⁵ By and large, the Arido Defence agrees with his analysis and findings.

60. In addition, it is submitted that the principle of procedural legality plays an important role, as far as the legality and predictability of criminal investigations are concerned. The legal framework and procedure of the ICC attaches stronger importance to the principle of legality, i.e. providing for a clear basis in written sources of law for exercise of investigative –or penal– power, than the ad hoc Tribunals.⁵⁶ It is to be noted that even at the ad hoc Tribunals, the use of independent counsel or amicus curiae for the purpose of conducting investigations in contempt cases has an explicit basis in written sources of law (cp. Rule 77 (C) (iii) SCSL RPE, and Rule 77 (C) (ii) of the ICTR RPE).

61. The European Court of Human Rights on several occasions referred to the principle of procedural legality to ensure the right to a fair trial and equality of arms and labelled the principle a general principle of law. Behind this reasoning is the overt concern that an individual must be aware with sufficient degree of clarity and foreseeability of the investigative acts that may be used against him.⁵⁷

⁵⁵ CAR-D21-0004-0595; see also *Navigating law and politics: the prosecutor of the International Criminal Court and the independent counsel*. (Symposium on Treaties, Enforcement, and U.S. Sovereignty), Danner, Allison Marston *Stanford Law Review*, May, 2003, Vol.55(5), p.1633(33) [Peer Reviewed Journal] Cengage Learning, Inc.)

⁵⁶ See concurring opinion of Judge Van den Wyngaert, ICC-01/04-02/12-4, para. 9: "as a preliminary observation, I note that the sources of law on which the ICC can draw are significantly different from the law applied at the *ad hoc* tribunals, where, as acknowledged by the Pre-Trial Chamber, customary international law plays a much more prominent role than at the ICC."

⁵⁷ ECtHR, *Kruslin v. France*, 24 April 1990, Application no. 11801/85, para. 36: "In short, French law, written and unwritten, does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities", available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57626>; see also para. 30.

62. Furthermore, the Court has conducted proceedings with strong regard for the principle of procedural legality. Regarding the matter of witness proofing/familiarisation, it has for instance held that “prior to undertaking the analysis required by article 21 (3) of the Statute, the Chamber must find a provision, rule or principle that, under article 21 (1) (a) to (c) of the Statute, could be applicable to the issue at hand”.⁵⁸ Or simply, the Chamber insisted on finding a legal basis in the Statute explicitly permitting a certain practice. Related to the application of the principle of procedural legality, the Court has also acknowledged that it has to use its inherent powers only sparingly because “its proceedings are governed by an extensive legal framework of instruments in which the States Parties have spelt out the powers of the Court to a great degree of detail”.⁵⁹

63. The Single Judge has not substantively responded to Arido’s earlier challenge that the appointment and subsequent activities of the independent counsel lack a basis in the applicable law and are therefore unlawful.⁶⁰ There was no mention of any applicable source of law justifying the appointment and activities of independent counsel in the said Decision. The Arido Defence is therefore compelled to reiterate its position that the appointment and investigative activities of the independent counsel are unlawful.

C. The Prosecution failed to provide proper notice to Mr. Arido

64. The Arido Defence has complained at an earlier stage with the Single Judge about the form of the DCC.⁶¹ In his Decision, the Single Judge has not responded in substance to any of the arguments levelled by the Arido Defence against the form of the DCC; it is therefore compelled to raise them again in the context of the present submissions.

65. The Arido Defence submits the DCC contains three flaws which unduly prejudice Arido’s right to be able to adequately respond, and thus violate his 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 DCC, if compared to the Arrest Warrant, contains one new count, three new modes of liability - demonstrating the Prosecution’s inconsistent labelling of criminal responsibility - and different courses of conduct.

⁵⁸ ICC-01/04-01/06-679, para. 10,

⁵⁹ ICC-02/05-03/09-410, para. 78.

⁶⁰ ICC-01/05-01/13-366-Conf, pp. 6-11.

⁶¹ ICC-01/05-01/13-567, pp. 4-7.

Until Mr. Arido received the DCC, he was completely unaware of these new factors and this leads to a violation of his right to a fair trial.

66. Especially the addition of the new modes of liability in the DCC is problematic from a fair trial perspective. The Prosecution charged Mr. Arido in the Arrest Warrant with only aiding and abetting pursuant to article 25(3)(c) of the Statute which constitutes a lesser degree of responsibility than the 2 modes of liability the Prosecution newly introduced in the DCC, namely co-perpetration and ordering/soliciting/inducing (pursuant to articles 25(3)(a) and (b) of the Statute). In a previous decision this Court stated that:

Although the Prosecution may generally charge in the alternative, he should be consistent throughout his Application about the actual mode(s) of liability that he intends to present to the Chamber. Moreover, the possibility for the Prosecution to charge in the alternative does not necessarily mean that the Chamber has to respond in the same manner. In particular, the Chamber is not persuaded that it is best practice to make simultaneous findings on modes of liability presented in the alternative. **A person cannot be deemed concurrently as a principal and an accessory to the same crime.**⁶²

67. So in other words, co-perpetration is a mode of liability, where the suspect is a principal and an essential actor of the alleged crime. Aiding and abetting on the other hand is a mode of accomplice liability, where the suspect is an accessory to the crime.⁶³ The Court has determined explicitly that an inconsistency or lack of precision may raise an issue of deficiency of the DCC.

68. In accordance with Regulation 52 (d) of the Regulations of the Court, the DCC should contain a legal characterisation of the facts to concur with the crimes or offences as well as the precise form of participation. The Single Judge in the present case has determined that the DCC should identify with sufficient precision the facts underlying the alleged crimes and their legal characterisation.⁶⁴ However, the Arido Defence is of the opinion that the DCC lacks the level of precision as required by the abovementioned regulation because it fails to legally qualify the facts in relation to Article 70 of the Statute.

D. Requested remedies

69. The Arido Defence requests a number of remedies to be granted in respect of the aforementioned violations and irregularities.

⁶² ICC-01/09-01/11-1, para. 36. (emphasis added)

⁶³ ICC-01/04-01/06-803-tEN, para. 320.

⁶⁴ ICC-01/05-01/13-364, p. 5.

70. At the outset it is pointed out that the Pre-Trial Chamber is at liberty to adopt the remedies it deems fit in the context of the confirmation hearing, especially since there is no fixed format and no settled rules regarding decisions that can be taken in confirmation proceedings *for Article 70-offences*.

71. It is also pointed out that it is firmly established jurisprudence at international criminal tribunals that 'any violation of the accused's rights entails the provision of an effective remedy pursuant to Article 2(3) (a) of the ICCPR'.⁶⁵ Pursuant to Article 21 (3) of the Statute, the Pre-Trial Chamber is obliged to interpret and apply the Statute consistent with internationally recognised human rights.

72. Regarding the matter of arbitrary Prosecution, it is submitted that the logical and appropriate remedy in this instance is the termination of proceedings against Mr. Arido. This can be achieved by simply declining to confirm the charges against Mr. Arido.

73. As to the irregularities that occurred in the context of D-2 and D-3, the Arido Defence refers to paragraphs 211-261 below, wherein it requests the Pre-Trial Chamber not to rely on such evidence.

74. Regarding the unlawful appointment and activities of independent counsel, the logical and appropriate remedy is the exclusion from evidence of all results of investigative activities performed by independent counsel. The Arido Defence requests the Pre-Trial Chamber to adopt this remedy.

75. Finally, as far as the defects in the DCC are concerned, the appropriate remedy in the ordinary course of events is that the Pre-Trial Chamber orders the Prosecution to repair them and to afford Mr. Arido sufficient time to respond to the revised DCC. However, as is further argued below, the Prosecution has not brought sufficient evidence allowing the Pre-Trial Chamber to confirm any of the charges against Mr. Arido. As a result this remedy is only of a subsidiary nature, in case the Pre-Trial Chamber would not follow the Arido Defence in its primary position that none of the charges against Mr. Arido can be confirmed.

⁶⁵ ICTR, *Kajelijeli v. The Prosecution*, Case No. ICTR-98-44A-A, Judgement, Appeals Chamber, 23 May 2005, para. 255.

76. In the alternative to the aforementioned requested remedies, the Arido Defence respectfully requests the Pre-Trial Chamber to adopt any remedy it deems fit, in case it were not to follow the Arido Defence in its primary position that none of the charges against mr. Arido can be confirmed.

V. ELEMENTS OF THE OFFENCES

77. The Arido Defence considers it necessary to discuss the elements of crimes with which Mr. Arido is charged. This is required to be able to determine with precision the scope of conduct that may be regarded as criminal in nature and - in that light - to adequately evaluate the evidence. It is also done with a view to assisting the Pre-Trial Chamber in its vital role in shaping the Court's jurisprudence for this and future 'Article 70-cases'.

A. Rules of interpretation

78. To date, the ICC has not had the occasion to develop a comprehensive analysis of the crimes against the administration of justice listed under Article 70, as this is the first case of that type before the Court.

79. This lack of analytical elaboration is also reflected in the Prosecution's Arrest Warrant and the DCC,⁶⁶ which substantially fail to specifically link the factual reconstruction with the requirements provided by Article 70 of the Statute.

80. It must be borne in mind that only when the Prosecution meets the required standard of proving all of the elements of relevant Article 70-offences, the charges against Mr. Arido can be confirmed. The elements of Article 70 have to be interpreted strictly.

81. Article 22 of the ICC Statute states that the definition of a crime shall be strictly construed and shall not be extended by analogy, and that in case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted. It is important to note that Article 22 (2) itself is not to be interpreted strictly, but rather in a contextual and purposive manner.⁶⁷

⁶⁶ ICC-01/05-01/13-19-Conf; see also ICC-01/05-01/13-1-Red2-tENG, para. 11, wherein the Single Judge acknowledged "with regret, object to the lack of concision which marks the Application, and the decision to articulate the counts in generic terms: a statement of the necessary temporal and geographic circumstances in which the crimes were allegedly committed would have been preferable, even at this early juncture. The Single Judge also takes issue with the repetitive and hence unduly complicated manner in which the facts are set out. Nonetheless, the Single Judge considers that he is able to navigate the body of evidence tendered by the Prosecutor, relying also on Independent Counsel's work".

⁶⁷ See William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010), p. 410.

82. The Arido Defence recalls that according to the Vienna Convention on the Law of Treaties, which applies to the ICC Statute,⁶⁸ “[a] treaty shall be interpreted in good faith in accordance **with the ordinary meaning** to be given to the terms of the treaty in their context and in the light of its object and purpose”.⁶⁹ It also states that “recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.”⁷⁰

B. Article 70 deals with offences, not crimes

83. From the outset, it is fundamental to recall the *sui generis* legal framework which characterises the legal category of “offences”. The wording “offences” is clearly distinct from the one of “crimes”. While the latter marks the ordinary ambit of jurisdiction of the Court over the “most serious crimes of concern to the international community as a whole”, the former only represents a functional and incidental competence of the Court aimed to preserve its functioning.

84. The distinction has been strongly highlighted during the Rome Conference. The draft Statute adopted by the International Law Commission did not contemplate Court jurisdiction over offences against administration of justice,⁷¹ instead requiring the States Parties to extend their domestic laws in order to cover such offences and to cooperate with the Court in investigating and prosecuting them.⁷²

⁶⁸ ICC-01/04-168 (Appeals Chamber), para. 33.

⁶⁹ Vienna Convention on the Law of Treaties, Art.31 (1), available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

⁷⁰ *Ibid.*, Art. 32.

⁷¹ Report of the International Law Commission on the Work of its Forty-Sixth Session, Draft Statute for an International Criminal Court, 2 May – 22 July 1994, U.N. Doc. A/49/10 (1994), Art. 44 para. 2, p. 22, (available at: http://legal.un.org/ilc/documentation/english/A_49_10.pdf#xml=http://legal.un.org/dtSearch/dtisapi6.dll?cmd=GetPdfHits&DocId=69&Index=D%3a%5csites%5clegal%5cile%5cdtSearch%5cIndexes%5cDocuments%2dEngl ish&HitCount=6&hits=1+2+3+4b+4c+4d+&.pdf).

⁷² *Ibid.*, pp. 55-59: “States Parties shall extend their law of perjury to cover evidence given under this Statute by their nationals and shall cooperate with the Court investigating and where appropriate prosecuting any case of suspected perjury”.

85. The position changed during further negotiations. However, after recognising that a general agreement had been reached over the inclusion of the “offences” in the Statute, the *ad hoc* Committee stated, in its final report:

The view was however expressed that careful attention should be paid to the way in which the provision would operate in practice and it was suggested that the **grounds for inadmissibility of evidence should be more narrowly circumscribed**.⁷³

86. The same approach was also reflected in the declarations rendered by the representatives of states parties, all agreeing on the fact that “the serious crimes under discussion did not include the offences covered by article 70”⁷⁴ and that, differently from core crimes, “a statute of limitations would be necessary for offences such as those covered by article 70”.⁷⁵

87. It is also significant that the Rules of Procedure and Evidence provide for a separate and autonomous regime on “Offences and misconduct against the Court”.⁷⁶ Rules 162 to 167 contain specific procedural provisions which largely derogate from those applicable to core crimes.

88. In addition, the different character of Article 70-offences has also been recently highlighted by the Appeals Chamber, according to which:

Offences under article 70 of the Statute, while certainly serious in nature, are **by no means considered to be as grave as the core crimes** under article 5 of the Statute, being genocide, crimes against humanity, war crimes, and the crime of aggression, which are described in that provision to be “the most serious crimes of concern to the international community as a whole”.⁷⁷

89. In interpreting the scope and content of Article 70-offences it is important to bear in mind that it includes one mode of liability only, namely direct commission (“intentionally”). It

⁷³ Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court [A/50/22\(SUPP\)](#), 7 September 1995, para 182-184, (available at http://www.legal-tools.org/uploads/tx_ltpdb/doc21168.pdf).

⁷⁴ Declaration rendered by the representative of Ireland, 2nd meeting, 16 June 1998, para. 63, available at http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf.

⁷⁵ Declaration rendered by the representative of Republic of Korea, 2nd meeting Tuesday, 16 June 1998, para. 48, available at http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf; see also the declaration rendered by the Chairman (Canada), which, summarizing the proceedings, stated that: “many delegations were opposed to a statute of limitations with respect to core crimes, although some distinguished between war crimes and other core crimes. While some delegations thought that the complementarity principle was relevant to the issue, others disagreed in view of the seriousness of the crimes in question. Related issues such as the need to ensure a speedy and fair trial had been raised, as had the point that offences under article 70 should be dealt with differently”, 2nd meeting of the Committee of the Whole, Tuesday 16 June 1998, para. 74, available at http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf.

⁷⁶ Chapter 9 “Offences and misconduct against the Court”, section I, RPE.

⁷⁷ ICC-01/05-01/13-558 OA, para. 64; see also ICC-01/05-01/13-558-Anx.2, para. 6. (emphasis added)

must be pointed out that when a specific form of liability is regarded necessary in Article 70, this is included in the definition of the offence, such as soliciting a bribe in Article 70 (1) (f).

90. It is furthermore important to resort to a systematic interpretation of Article 70, which should result in clear and logical demarcation of criminal conduct *inter se*. For example, Article 70 (1) (a) deals with perjury and is – as argued below - restricted to an individual having taken the oath under Article 69 (1) of the Statute; Article 70 (1) (c) directs itself to persons who corruptly influence a witness, including inducing perjury. It is clear that a strict interpretation of Article 70 (1) (a) is logical in the structure of Article 70 as a whole, because individuals who are allegedly the ‘cause’ of perjury fall within the ambit of Article 70 (1) (c).

C. Article 70 (1) (A) – Giving false testimony

91. Article 70 (1) (a) states that “giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth” constitutes an offence against the administration of justice. Article 69(1) of the statute relates to the duty of “each witness” to give an undertaking as to the truthfulness of the evidence to be given.

92. By explicitly referring to Article 69 (1), Article 70 (1) (a) contains a clear delimitation of its scope: this offence can only be committed by a “witness” who has testified before the Court under oath. In other words, there are three essential conditions for Article 70 (1) (a) to apply: having acquired the quality of “witness” in accordance with the relevant rules contained in the Statute and Rules, having appeared before the Court, and, finally, having rendered the declaration of solemnity provided in Article 69 (1).

93. That criminal liability in case of perjury is reserved for the witness who has taken the oath finds support in the law of the ad hoc Tribunals. In the RPE of the ICTY perjury is penalised in a separate provision, Rule 91. Contrary to Rule 77, which deals with acts of contempt of court, and which contains alternative modes of liability – incitement and attempt-, Rule 91 only contains liability for the witness who has given false testimony under oath. No form of liability other than direct commission by the witness under oath is available under Rule 91, nor has any non-witness ever been charged with liability under Rule 91.

94. While the Arido Defence is aware that in certain national systems other persons than witnesses can be held liable for perjury - such as subornation of perjury in Scotland and the US - legal systems appear too fragmented to establish any general principle of law in this regard. For example, the crime of perjury under Dutch law only triggers criminal liability for the witness under oath (cp. Article 207 of the Dutch Penal Code). Furthermore, in systems where subornation of perjury is penalised this appears to be done on the basis of a specific statutory provision criminalising such conduct,⁷⁸ and not through application of modes of liability to persons others than the witness under oath.

95. As a last point, the Arido Defence submits that, as is the case with the law of the ad hoc Tribunals, there is no need to extend the criminal liability under Article 70 (1) (a) to individuals who do not possess the quality of a witness under oath. Like Rule 77 (a) (iv) of the ICTY RPE, Article 70 (1) (c) offers the appropriate and sole basis to hold accountable individuals who are – as non-witnesses- involved in the commission of perjury.

96. The Arido Defence concludes that, in light of the applicable rules of (strict) interpretation, liability under Article 70 (1) (a) is reserved to a witness who has taken the oath under Article 69 (1).

D. Article 70 (1) (b) – Presenting evidence that the party knows is false or forged

1. Article 70 (1) (b) is limited to an action committed by a party

97. Article 70 (1) (b) provides that “presenting evidence that the party knows is false or forged” constitutes an offence against the administration of justice.

98. At the outset, in respect of the definition of this offence, it should be noted that this is not a criminal offence under the law of the ad hoc Tribunals; it cannot be found in Rule 77 of the ICTY RPE. Likewise, it is not available in the law of the State that would normally exercise jurisdiction over this offence, the Netherlands, which has also decided not to incorporate this offence while implementing its obligations under the Rome Statute.⁷⁹

⁷⁸ Title 18 of the United States Code, Section 1622 provides that: "Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned not more than five years, or both; *see* title 18 entitled Crimes and Criminal Procedure, Chapter 29, pg. 286, available at <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title18/pdf/USCODE-2011-title18-partI-chap79-sec1622.pdf>.

⁷⁹ Tweede Kamer des Staten-Generaal, Vergaderjaar 2001-2002, 28 099, nr. 3, 1 - Algemeen, Memorie van Toelichting, available at:

99. One indeed wonders whether the conduct in Article 70 (1) (b) should have been penalised; also as a result of its restriction to a party in ICC-proceedings, it might as well have been relegated to the realm of professional obligations for counsel and related disciplinary proceedings. Also in light of this background, there are even more reasons to apply this provision in the most restrictive fashion.

100. The reference to a “party” is clearly aimed to limit the ambit of application to the Accused and to those who appear before the Court with an official function of representation, be it the Prosecution, the Defence, the victims’ representative or a witness. The party is the exclusive object of the *actus reus* - ‘presenting’ - and the exclusive object of the *mens rea* – intentional commission and having to know that the evidence is false or forged. Because of this double restriction to party (counsel), both *actus reus* and *mens rea*, one has difficulty in seeing how under the offence’s current definition it could extend to liability of others than suspect or a counsel (or member of Defence or Prosecution team). There is no evidence that drafters intended the provision to serve as a basis to hold other categories of persons criminally liable.

2. Article 70 (1) (b) excludes testimony

101. A second element of limitation in Article 70 (1) (b) is provided by the term “evidence”. From the content of the provision, in fact, it is self-evident that the term only refers to documentary evidence, or else the expression “evidence or testimony” would have been used. This is further reinforced by the French and Spanish version of Article 70 (1) (b) which respectively refers to the “Production d’éléments de preuve faux ou falsifiés en connaissance de cause” (as opposed to “témoignage”) and, to the “Presentar pruebas a sabiendas de que son falsas o han sido falsificadas” (as opposed to “testimonio”).

102. In addition, the plain reading of the sentence “presenting evidence” also makes it clear that it only relates to documentary evidence: one does not “present” a witness; the witness himself/herself presents his/her testimony. The verb “presenting”, in the ordinary language, has the meaning of give, provide, or make something known,⁸⁰ an act which is not logically applicable to a person.

<https://zoek.officielebekendmakingen.nl/dossier/28099/kst-28099-3?resultIndex=14&sorttype=1&sortorder=4>.

⁸⁰ See “to present”, Cambridge Dictionary Online, available at:

http://dictionary.cambridge.org/dictionary/british/present_5?q=presenting; The Oxford Dictionary Online, with specific reference to the legal field, defines “presenting” as “Bring (a complaint, petition, or evidence) formally to the notice of a court”, at <http://www.oxforddictionaries.com/definition/english/present?q=presenting#present-2>.

103. Further, the action of presenting testimony can only be carried out directly by the witness in the course of a trial. To this regard, the International Institution for Conflict Prevention and Resolution's Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration, in its Section II dedicated to "Presentation of Witnesses", only refers to the capacity to present other's testimony in the case of "Testimony of Witnesses in Written Form".⁸¹ Whereas, in case of "Testimony of Witnesses in Oral Form", witnesses "present the evidence in her/his own words",⁸² being only possible for a third party to assist a witness in presenting his or her evidence "through questioning"⁸³ during the trial.

104. The Arido Defence concludes that, in light of the applicable rules of (strict) interpretation, liability under Article 70 (1) (b) is reserved to a party to the ICC-proceedings and to real evidence, documents, excluding testimonial evidence.

E. Article 70 (1) (c) – Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence

105. Article 70 (1) (c) encompasses four different types of behaviour:

- i. Corruptly influencing a witness,
- ii. Obstructing or interfering with the attendance or testimony of a witness,
- iii. Retaliating against a witness for giving testimony, or,
- iv. Destroying, tampering with or interfering with the collection of evidence.

106. The Prosecution only charges Mr. Arido with "corruptly influencing witnesses", as becomes clear from pages 76-81 of the DCC.

107. According to article 70 (1) (c), the individual must have intentionally and "corruptly" influenced a witness. Therefore, the Prosecution must bring evidence of elements of 'corruption' and of 'influence', which will both be further developed below.

⁸¹ International Institution for Conflict Prevention and Resolution ('CPR') Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration, Section II, letter (a). Available at: <http://www.cpradr.org/About/NewsandArticles/tabid/265/ID/614/CPR-Protocol-on-Disclosure-of-Documents-and-Presentation-of-Witnesses-in-Commercial-Arbitration.aspx>.

⁸² *Ibid.*, Section II, letter (b).

⁸³ *Ibid.*

108. At the outset, it must be noted that corruptly influencing a witness is not a crime in every legal system. In the implementation of Article 70 in the Dutch legal order it was acknowledged that bribing a witness was not penalised under Dutch law, and the legislator did not find it necessary to still do so in light of the content of Article 70 (1) (c).⁸⁴ There may be thus disagreement among national systems whether this conduct requires criminalisation, which is - again - a consideration in favour of - further - restrictive interpretation.

109. The element of ‘influence’ can be described as effect on someone’s behaviour. In the context of this particular offence it means that the Prosecution carries the burden of proving the causal link, namely that the actions attributed to Mr. Arido in the DCC did have effect on the relevant behaviour of witnesses, i.e. their testimonies before the ICC.

110. The element of ‘corruptly’ appears more difficult to define. It does not appear in any of the definitions of contempt at the ad hoc tribunals. It can be expected that an overview of national legal systems may trigger highly fragmented approaches/definitions, especially when knowing that the Dutch legal system, for example, has not penalised this offence to start with.

111. The United Nations Convention against Corruption of 2003 may be of useful interpretative guidance, especially its section 25, dealing with the obstruction of justice, which reads in relevant part as follows:

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony (...)

112. Essential are the elements ‘promise, offering or giving of an undue advantage’ and ‘to induce false testimony’. It follows that any –promised or given- advantage must be undue, improper, **and** must serve to induce false testimony. Bearing in mind the principle of restrictive interpretation, the Pre-Trial Chamber is requested to apply both elements cumulatively in respect of all allegations against Mr. Arido under Article 70 (1) (c).

113. This will serve the useful purpose of excluding from the scope of application of Article 70 (1) (c) the payment of minimal sums of money aimed at covering expenses of witnesses (which

⁸⁴ Tweede Kamer der Staten-Generaal, Vergaderjaar 2001-2002, 28 099, nr. 3, 1 - Algemeen, Memorie van Toelichting, available at: <https://zoek.officielebekendmakingen.nl/dossier/28099/kst-28099-3?resultIndex=14&sorttype=1&sortorder=4>.

is certainly not an undue advantage; ‘undue’ meaning: unwarranted or inappropriate because excessive or disproportionate).

114. Likewise methods used to persuade witnesses to cooperate with Defence teams, especially persuading witnesses to give testimony in The Hague, are not necessarily covered by Article 70 (1) (c), even if the methods would be unlawful or would otherwise amount to an undue advantage. While in the witness’ perception, he/she may feel inclined to provide testimony that suits the interests of the individual who has offered/given the witness an undue advantage, it still needs to be established that the (undue) advantage was given to induce false testimony.

115. The Arido Defence concludes that in light of the definition of Article 70 (1) (c), the Prosecution carries the burden of proving that Mr. Arido is criminally liable (a) by promising, offering or giving to witnesses an undue advantage, and (b) by doing so, has induced the witness to give false testimony, and (c) by doing so has in fact influenced the witness’ testimony.

F. Article 70 is limited to direct and intentional commission

116. Last but not least, the Arido Defence notes that paragraph 1 of Article 70 clearly limits the level of participation required for a conviction under Article 70: such offence falls within the ambit of Article 70 only if “committed intentionally”. In other words, the only mode of liability which can be used is direct commission. This matter will be further addressed below in Part VII-E (paragraphs 327 to 350).

G. Conclusion on the elements of the offences

117. The Arido Defence respectfully requests the Pre-Trial Chamber to apply the aforementioned analysis in respect of the elements of relevant Article 70-offences to the charges brought against Mr. Arido.

VI. FACTUAL SUBMISSIONS

118. The Arido Defence has discussed the definition of Article 70-offences in Part V above, and has argued that - on the basis of a restrictive approach in the sense of Article 22 (2) of the Statute - the offences set out in Article 70 (1) (a) and Article 70 (1) (b) are restricted to individuals acting in the quality of, respectively, witness and party to ICC proceedings.

119. The restriction of these offences to individuals acting in a specific quality has consequences for the charges that can be levelled against Mr. Arido, which should be limited to Article 70 (1) (c). It also makes a significant portion of the evidence brought by the Prosecution against Mr. Arido irrelevant.

120. Yet, with a view to assisting the Pre-Trial Chamber, the present part of the Arido Defence submissions deals with the totality of the evidence brought by the Prosecution against Mr. Arido, even if it appears to predominantly - or even exclusively - pertain to offences set out in Article 70 (1) (a) and (b).

A. Background: Mr. Arido as expert witness

121. From the outset, the Arido Defence wishes to point out that Mr. Arido was involved with the Defence team of Jean-Pierre Bemba Gombo (hereinafter “Bemba Defence team”), albeit to a very limited degree, as an “expert” witness. He was asked to provide advice to the Bemba Defence team on the question of military operations in CAR [REDACTED].

122. This is evidenced by a number of email exchanges between Mr. Arido and Mr. Kilolo, at the time lead counsel for the Bemba Defence team. On [REDACTED], Mr. Arido sent Mr. Kilolo the outline of his report on the “[REDACTED] military operations in Central African Republic (‘CAR’)” (“[REDACTED] *opérations militaires en République Centrafricaine*”).⁸⁵ Mr. Arido sent the full report to Mr. Kilolo on [REDACTED].⁸⁶

⁸⁵ CAR-OTP-0075-0246. The attachments are under CAR-OTP-0075-0248, CAR-OTP-0075-0249, CAR-OTP-0075-0250. The same document and its attachments are also on e-court under CAR-D21-0003-0170.

⁸⁶ CAR-OTP-0075-0334, the attachments are under CAR-OTP-0075-0335 (table des principales abbréviations) and CAR-OTP-0075-0341 (actual report). The same document and its attachments are also on e-court under CAR-D21-0003-0098, CAR-D21-0003-0121 and CAR-D21-0003-0137.

123. Mr. Arido was paid a total of 6,028 USD in exchange of his report - 834,32 USD by Mr. Kilolo on 18 February 2012, when it was agreed that he would prepare a report,⁸⁷ 450 USD by Mr. Kilolo on 20 April 2012, after Mr. Arido sent the outline to Mr. Kilolo,⁸⁸ and 4,744 USD on 25 May 2012 through Mr. Babala, a few days before Mr. Arido gave the final version of the report to the Bemba Defence team.⁸⁹ It is notable that this amount is similar, although still less, to the ones received by the other expert witnesses who worked for the Bemba Defence team: [REDACTED],⁹⁰ [REDACTED]⁹¹ and [REDACTED].⁹²

124. On 22 September 2012, Mr. Arido was sent 1,264 USD by Robert Nginamau.⁹³ This was the day Mr. Arido was scheduled to travel to The Hague to testify.⁹⁴ Mr. Arido had his own business, a small company providing certain stationery items, and he and his wife were the sole employees. The result of him travelling to The Hague was that he would lose the earnings he normally had made during that time. This sum of money was provided to him as compensation for the lost earnings resulting from his travel and scheduled testimony in The Hague, something which had been arranged between him and Mr. Kilolo at the time they were discussing him coming to testify.

125. It is a fact of common knowledge that at the ICC and other tribunals (expert) witnesses are provided with a certain amount of money for their “lost earnings”, that is, to compensate for the time they spend testifying at the ICC and not working.⁹⁵ It is noted that the amount

⁸⁷ CAR-OTP-0070-0005, tab 1 (Narcisse Arido), row 75; *see also* Prosecution’s summary of Western Union payments, CAR-OTP-0072-0168, p. 1 (0168), entry N. 4.

⁸⁸ CAR-OTP-0070-0005, tab 1 (Narcisse Arido), row 77; *see also* Prosecution’s summary of Western Union payments, CAR-OTP-0072-0168, p. 1 (0168), entry 3. As stated earlier, Mr. Arido sent the outline of his report to Mr. Kilolo on 18 April 2012 (CAR-OTP-0075-0246).

⁸⁹ CAR-OTP-0070-0005, tab 1 (Narcisse Arido), row 78; *see also* Prosecution’s summary of Western Union payments, CAR-OTP-0072-0168, p. 1 (0168), entry 2. As stated in the earlier paragraph, Mr. Arido submitted the full report to Mr. Kilolo on [REDACTED] (CAR-OTP-0075-0334).

⁹⁰ CAR-D21-0003-0004; CAR-D21-0003-0006 (same as CAR-D21-0003-0004); *see also* CAR-D21-0003-0193.

⁹¹ CAR-D21-0003-0047; CAR-D21-0003-0150; CAR-D21-0003-0186; *see also* CAR-D21-0003-0189; CAR-D21-0004-0052.

⁹² CAR-D21-0003-0004; CAR-D21-0003-0006 (same as 0003-0004).

⁹³ CAR-OTP-0070-0005, tab 1 (Narcisse Arido), row 80; *see also* Prosecution’s summary of Western Union payments, CAR-OTP-0072-0168, p. 1 (0168), entry 1.

⁹⁴ Mr. Arido was scheduled to travel to The Hague on 22 September 2012 and leave on [REDACTED], or a total stay of [REDACTED]. *See* CAR-OTP-0075-1496-R01; *see also* CAR-OTP-0075-1476-R01 (12 September 2012, Mr. Arido sends his travel document to the VWU representative, attaching CAR-OTP-0075-1477); CAR-OTP-0075-1481-R01 ([REDACTED], Email from VWU representative acknowledging receipt of the travel document).

⁹⁵ Regulation 85 of the RoR: “Witnesses, victims who appear before the Court and accompanying support persons may be provided with an attendance allowance as compensation for wages, earnings and time lost as a result of their absence from their place of residence in connection with appearance before the Court. Witnesses, victims who appear before the Court and accompanying support persons shall not be required to submit a request or any supporting documentation in order to receive the attendance allowance”; *see also* ICTY Directive on Allowances for Witnesses and Expert Witnesses, Articles 7 and 17: “The Tribunal shall provide witnesses with an attendance allowance as compensation for wages, earnings and time lost as

planned for by the VWU – 6 euros a day –⁹⁶ does not fully compensate for the lost of earnings for Mr. Arido. The amount of 1,264 USD was calculated on the basis of the earnings of Mr. Arido via his company, [REDACTED]. Whether or not the appropriate ICC-procedure was followed in this respect is a matter that Mr. Arido cannot be aware of, nor can any other ICC-witness be.

126. Although Mr. Arido has nothing to do with any ICC rules and regulations that govern his payment for legitimate activities - providing an expert report, the Arido Defence nevertheless welcomes and endorses the filing by the Kilolo Defence, which is intended to provide clarity in respect of the sums of money the Prosecution has provided to its witnesses.⁹⁷

127. Emails exchanged between Mr. Arido and his friends further show clearly that it was Mr. Arido's understanding that he was hired by the Bemba Defence to do an expertise, and that he thought of his role with the Bemba Defence team as that of expert witness before the ICC.⁹⁸

128. Therefore, while it was never formalised with the Registry, the relationship between Mr. Arido and the Bemba Defence team was limited to one of provision of "scientific" advice. It has to be noted that Mr. Arido, for whom it was the first time to be involved in a case before the ICC, had no way to know of the procedure required at the ICC for the use of expert witnesses.

129. The Arido Defence hereby submits that the evidence clearly shows that all payments received by Mr. Arido from the Bemba Defence team or persons associated to them were solely related to the preparation of the expert report and his loss of earnings. The Prosecution fails to demonstrate otherwise.

a result of testifying. Witnesses shall not be required to submit a request or any supporting documentation in order to receive the attendance allowance", available at http://www.icty.org/x/file/Legal%20Library/Miscellaneous/it200_rev1_corr2_en.pdf; STL, Registry Regulations on Assistance and Allowances for Victims and Witnesses Testifying Before the Special Tribunal for Lebanon, Article 14: "The Registrar shall provide victims and witnesses with an attendance allowance as compensation for wages, earnings and time lost as a result of testifying. Victims and witnesses shall not be required to submit a request or any supporting documentation in order to receive the attendance allowance", *see also* Article 24, available at: <http://www.stl-tsl.org/en/documents/victims-participation-documents/victims-and-witnesses-unit-documents/registry-regulations-on-assistance-and-allowances-for-victims-and-witnesses-testifying-before-the-special-tribunal-for-lebanon>; SCSL, practice direction on Allowances for Witnesses and Expert Witnesses, articles 7 and 16, available at: http://www.rscsl.org/Documents/PRACTICE_DIRECTION_Payment_Allowances.pdf.

⁹⁶ *See* CAR-OTP-0075-1496-R01, p. 1 (1496).

⁹⁷ ICC-01/05-01/13-520; ICC-01/05-01/13-591.

⁹⁸ *See e.g.* CAR-OTP-0075-0553-R01; CAR-OTP-0075-0764.

B. The Prosecution’s case on the alleged false/forged documents is not supported by the evidence

130. The Arido Defence submits that taken individually and taken as a whole, the evidence provided by the Prosecution fails to show that there is credible and tangible proof permitting to determine the existence of substantial grounds to believe that Mr. Arido participated in the offence of presenting evidence that the party knows is false or forged pursuant to Article 70 (1) (b) of the Statute.

1. Prosecution’s allegations

131. The Prosecution alleges that Mr. Arido provided 14 false or forged documents to the Bemba Defence team. These documents are “messages portés” and [REDACTED]. The documents concerned are:⁹⁹

- Number 1.* CAR-D04-0003-0128;
- Number 2.* CAR-D04-0003-0129;
- Number 3.* CAR-D04-0003-0130;
- Number 4.* CAR-D04-0003-0131;
- Number 5.* CAR-D04-0003- 0132;
- Number 6.* CAR-D04-0003-0133;
- Number 7.* CAR-D04-0003-0134;
- Number 8.* CAR-D04-0003-0135;
- Number 9.* CAR-D04-0003-0136;
- Number 10.* CAR-D04- 0003-0137;
- Number 11.* CAR-D04-0003-0138;
- Number 12.* CAR-D04-0003-0139;
- Number 13.* CAR-D04-0003-0140;
- Number 14.* CAR-D04-0003-0141.

132. According to the Prosecution, “ARIDO and possibly [REDACTED] provided 14 false or forged documents to the Bemba Defence in furtherance of the common plan”,¹⁰⁰ which were subsequently added to the Bemba Defence exhibit list on 13 July 2012¹⁰¹ and presented as evidence by the Bemba Defence in the main case.¹⁰² The Prosecution alleges that the provision of the false documents constituted an essential contribution of Mr. Arido to the common plan.¹⁰³

⁹⁹ DCC, para. 42, fn. 125.

¹⁰⁰ DCC, para. 42.

¹⁰¹ DCC, para. 43, *citing to* CAR-OTP-0080-1108, pp. 7-8 (entries 130-143).

¹⁰² DCC, para. 43.

¹⁰³ DCC, para. 117.

133. Accordingly, the Prosecution charges Mr. Arido with a violation of Article 70 (1) (b) of the Statute for presenting 14 documents that he knew was false or forged in Court from 13 July 2012 to 23 November 2013, pursuant to Article 25 (3)(a) (indirect co-perpetrator), (c) and (d).¹⁰⁴

2. On the number of documents

134. From the outset, the Arido Defence notes that the number of alleged “false/forged” documents is not 14, but 13. The documents bearing the numbers CAR-D04-0003-0128 and CAR-D04-0003-0135 are identical, CAR-D04-0003-0135 simply being a better scanned version of CAR-D04-0003-0128.

3. The Prosecution fails to present sufficient evidence that Mr. Arido was the source of the documents

135. In support of its allegation that Mr. Arido provided the alleged false/forged documents to the Bemba Defence, the Prosecution relies on a 1 May 2012 email sent by Mr. Arido to Mr. Kilolo, on the metadata attached to the documents on e-court and provided by the Bemba Defence, to transcripts from the Bemba case, and to one phone communication between Mr. Kilolo and Mr. Mangenda.

a. The evidence does not show that Mr. Arido sent the documents to Mr. Kilolo

136. The Prosecution alleges that Mr. Arido sent at least seven of the documents to KILOLO on 1 May 2012, following an earlier transmission on 21 February 2012.¹⁰⁵

137. The Prosecution relies upon an email that Mr. Arido sent to Mr. Kilolo on 1 May 2012, attaching 7 of the alleged false documents.¹⁰⁶

138. Firstly, the Arido Defence notes that the email sent from Mr. Arido[REDACTED] email to Mr. Kilolo is not an email sending the alleged false documents to [REDACTED], but rather an email forwarding a 30 April 2012 email to which the documents were attached, sent by a person named [REDACTED] to both Mr. Kilolo and Mr. Arido.¹⁰⁷ Therefore, it cannot be said

¹⁰⁴ *Ibid.*, p. 81 (count 43).

¹⁰⁵ *Ibid.*, para. 42.

¹⁰⁶ *Ibid.*, para. 42, fn. 127.

¹⁰⁷ CAR-OTP-0075-0259-R01; *see also* CAR-D21-0002-0001, p. 1, which is the same document uploaded by the Kilolo Defence.

to show that Mr. Arido sent the documents to Mr. Kilolo, as [REDACTED] had already sent the documents to Mr. Kilolo on 30 April 2012. Clearly, forwarding an email containing documents that were already sent to a person cannot be said to amount to substantial grounds to believe that Mr. Arido provided the alleged 7 false documents to Mr. Kilolo.

139. Secondly, the Arido Defence notes that the email contains 7 attachments:

- i. [REDACTED];
- ii. [REDACTED];
- iii. [REDACTED];
- iv. [REDACTED];
- v. [REDACTED];
- vi. [REDACTED];
- vii. [REDACTED].

140. In other words, the Prosecution provides no evidence – other than the metadata - for documents numbers 2-7,¹⁰⁸ that is for 6 documents out of the alleged 13 false documents (documents No. 1 and 8 being the same).

141. Last but not least, it must be noted that the quality of the pdf versions of the documents attached to the email from [REDACTED] significantly differs from the version that was uploaded on e-court by the Bemba Defence team. Had the documents sent by [REDACTED] been the ones that the Bemba Defence received for the first time, the scanned versions would have been identical when comparing the attachments to [REDACTED] email and the versions on e-court.

b. Metadata

142. The Prosecution alleges that Mr. Arido had transmitted all the 13 alleged false/forged documents on 21 February 2012.¹⁰⁹ In support of this allegation, in footnote 128, all the Prosecution relies upon is the fact that [REDACTED].

143. It is important to provide a number of background information to put into context the question of metadata and their very limited probative value.

¹⁰⁸ CAR-D04-0003-0129; CAR-D04-0003-0130; CAR-D04-0003-0131; CAR-D04-0003- 0132; CAR-D04-0003-0133; CAR-D04-0003-0134.

¹⁰⁹ DCC, para. 42, fn 128.

144. Regulation 26 of the Regulations of the Court ('RoC') provide that whenever possible, evidence other than live testimony shall be presented in electronic form. To this aim, the RoC provide that the Court shall establish an electronic system supporting its daily judicial and operational management and its proceedings.¹¹⁰ The Registry is responsible for the implementation of this system,¹¹¹ which is known as e-court. Each Defence team has its own electronic evidence management system, called "ringtail", on which they upload the other party's disclosures as well as the documents that they want to use during the proceedings. Ringtail is a necessary step for a party to prepare the evidence it wants to use in court, and these documents are exported and provided to the Court Management Section of the Court ('CMS') which uploads the documents on e-court.

145. A number of technical steps are required for the Defence to put documents on Ringtail, which need not be discussed here.¹¹² However, once a team member has put the Defence documents on the Defence team's ringtail, he/she has to manually enter a number of information about each document – the title, the date, the type of document, the language, ect... - those are called "metadata".¹¹³ One of these fields is the "Chain of Custody", field [REDACTED]. According to the E-court Protocol, such field should "list all entities/persons who had custody of the item, in chronological order".¹¹⁴

146. It is important to note that it is the sole responsibility of the party uploading the documents into the system to enter this type of information. While the ICC has a "unified technical protocol for the provision of evidence, witness and victims information in electronic form" ('E-court Protocol'),¹¹⁵ there is no oversight from persons or entities other than the members of the Defence team regarding the veracity of the information contained in the metadata.

147. In other words, the information to be included in the "chain of custody" metadata is left at the entire discretion of the party uploading the evidence. As a result, it has very limited probative value.

¹¹⁰ Regulation 26 (1) of the RoC.

¹¹¹ *Ibid.*, Regulation 26 (2).

¹¹² See unified technical protocol for the provision of evidence, witness and victims information in electronic form", ICC-01/05-01/13-35-Anx ('E-court Protocol').

¹¹³ E-court Protocol, p. 8.

¹¹⁴ *Ibid.*, p. 13.

¹¹⁵ See *e.g.* in the present case ICC-01/05-01/13-35-Anx.

148. The Single Judge in the present case previously held that “the metadata required under the e-court protocol are ‘designed to minimise the document management and technology costs to the participants and the Court and to allow for the efficient management of proceedings’, **as such neutral in respect of the reliability of a given document**.”¹¹⁶ The same reasoning applies to the reliability of the chain of custody metadata [REDACTED].

c. Information provided in Court

149. The Prosecution also relies on transcripts 231, 234 and 241 from the Main case in support of its allegation that Mr. Arido provided the alleged false/forged documents to the Bemba Defence team,¹¹⁷ however, there is no mention of Mr. Arido’s name in these transcripts or in any court discussion of the documents. Transcript 231 relates to the day where the Bemba Defence sought to have the documents admitted into evidence.¹¹⁸ The reference to transcript 234 is a discussion of the said documents with the victims’ representative and D-053,¹¹⁹ and transcript 240 is also a discussion of the said documents between the victims’ representative and D-059.¹²⁰ None of them even mentions the name of Mr. Arido. As a result, these documents cannot be said to provide evidence that Mr. Arido provided the said documents to the Bemba Defence.

d. Phone communication

150. The Prosecution notes that “Arido and possibly [REDACTED]” provided the documents to Mr. Kilolo on 1 May 2012,¹²¹ referring to, *inter alia*, a conversation between Mr. Mangenda and Mr. Kilolo dated 6 November 2013.¹²²

151. In this conversation, Mr. Kilolo says, word by word according to the transcription:

¹¹⁶ ICC-01/05-01/13-181, p. 4.

¹¹⁷ DCC, para. 42, fn. 125.

¹¹⁸ The Arido Defence notes that when asking the admission into evidence of the documents associated with D-53, the Bemba Defence referred mostly to the corresponding number on its exhibit list - namely N. 61-62, 64-69 - [ICC-01/05-01/08-T-231-Red-ENG, pp. 59-60] however, the Bemba Defence exhibit list which was provided to the Arido Defence by the Prosecution does not appear to have the same numbering [CAR-OTP-0080-1108-R01]. Therefore, the Arido Defence is unable to assess whether the totality of the alleged false/forged documents have actually been tendered in court, a fact that is important in determining whether the offence under Article 70 (1) (b) took place or not.

¹¹⁹ ICC-01/05-01/08-T-234-Red-ENG, pp. 29-36.

¹²⁰ ICC-01/05-01/08-T-240-Red-ENG, pp. 5-12.

¹²¹ DCC, para. 42, fn. 126.

¹²² CAR-OTP-0080-1138, p. 118 (1255) (report of Independent Counsel); CAR-OTP-0082-0924, p. 6 (0929) (Translation/transcription).

[REDACTED]¹²³ He later says [REDACTED].¹²⁴

152. In this document, Mr. Kilolo states very clearly that the documents came from [REDACTED], while Mr. Mangenda's language clearly shows that they are saying that Mr. Arido gave them the documents [REDACTED].¹²⁵ The reference to [REDACTED].

153. In other words, rather than supporting the argument that Mr. Arido provided the documents to the Bemba Defence, this conversation shows that in fact, it was [REDACTED] who provided such documents, and that Mr. Kilolo and Mr. Mangenda appear to have decided to keep stating that Mr. Arido gave them the documents, because it was their position before.

e. Other evidence

154. In support of its allegations, the Prosecution also refers to the interview given by D-2 to the Prosecution on [REDACTED] in support of its allegation.¹²⁶ The cited part of the interview refers to Mr. Arido telling D-2 that [REDACTED].¹²⁷ [REDACTED].¹²⁸ It is unclear how this is relevant to show that Mr. Arido provided the alleged false documents to the Bemba Defence team. Furthermore, in Part VI-C-2 below (paragraphs 211 to 262), it is submitted that the statement by D-2 should be excluded from evidence and lacks in its entirety probative value.

155. The Prosecution also relies on an email sent by [REDACTED] to Mr. Arido on [REDACTED],¹²⁹ in support of its allegation that Mr. Arido gave the alleged false documents to Kilolo on 1 May 2012.¹³⁰ [REDACTED]. It is unclear how this supports the Prosecution's allegation as [REDACTED] is not one of the alleged false documents, and the Prosecution does not explain its relevance.

f. Other evidence shows that Mr. Arido did not give the documents to the Bemba Defence

156. As explained above, the evidence used by the Prosecution to support its argument that Mr. Arido provided the alleged false/forged documents to the Bemba Defence team fails to

¹²³ CAR-OTP-0082-0924, p. 6 (0929). Defence translation: [REDACTED] (emphasis added)

¹²⁴ CAR-OTP-0082-0924, p. 12 (0935). Defence translation: [REDACTED]. (emphasis added)

¹²⁵ CAR-OTP-0082-0924, p. 12 (0935).

¹²⁶ CAR-OTP-0080-0069, p. 10 (0078).

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*, pp. 9-10 (0077-0078).

¹²⁹ CAR-OTP-0075-1226, attaching CAR-OTP-0076-1227.

¹³⁰ DCC, para. 42, fn 127.

support the requisite “substantial” grounds to believe standard. In addition, the Arido Defence submits that other evidence in the present case support the Defence’s position that Mr. Arido was not the person who provided the documents to the Bemba Defence.

157. On 18 September 2012, Mr. Kilolo sent an email entitled “[REDACTED]”¹³¹ to Mr. Arido, with the 14 alleged false/forged documents as attachments.¹³² He asked Mr. Arido to “analyse” them (“*voici les documents à analyser*”),¹³³ in order to know [REDACTED].¹³⁴

158. Had Mr. Arido been the person providing documents to the Bemba Defence team, knowing they would be false, it is illogical that Mr. Kilolo would contact him in order to undertake an analysis of the documents.

g. Conclusion on the source of the allegedly false/forged documents

159. The Prosecution fails to provide sufficient evidence that Mr. Arido provided the documents to Mr. Kilolo on 21 February 2012 or 1 May 2012. An email that is not coming from Mr. Arido but from a third person who sent them directly to Mr. Kilolo and containing 7 of the alleged false documents does not constitute direct and substantial evidence that Mr. Arido provided the alleged false documents to the Bemba Defence. Similarly, [REDACTED], as discussed above, has in itself no probative value as to the real source of the documents. Further, the Arido Defence also notes that the Prosecution fails to present evidence as to how and when Mr. Arido would have obtained the documents. The fact that [REDACTED] to analyse the documents in September 2012 supports the fact that Mr. Arido was not the one who provided the documents.

4. The Prosecution fails to present sufficient evidence that the documents were false/forged

160. The Arido Defence submits that the Prosecution failed to provide sufficient evidence that the documents were false or forged. It appears that it based itself on the fact that the headers, formulation, signature and stamps differed from other documents, and deduced from this fact that they were false.

¹³¹ CAR-OTP-0075-0538; the attachment is CAR-OTP-0075-0539.

¹³² [REDACTED] - under CAR-OTP-0075-0539.

¹³³ CAR-OTP-0075-0538.

¹³⁴ Original: “*voici les documents à analyser*. [REDACTED]”, CAR-OTP-0075-0538.

161. However, the Arido Defence notes that the Prosecution has failed to conduct forensic investigations, including but not limited to contacting a forensic handwriting expert. It is therefore unable to show that there are substantial grounds to believe that the alleged documents are false or forged. Similarly, the Prosecution has failed to obtain information from the relevant services of the CAR army. It must be noted that the documents are dated of a period of high trouble and tension in CAR, and that as a result, the proper procedures may not have always been followed - it was war after all.¹³⁵ As a result, a difference in header, format or wording cannot be said to constitute reasonable evidence that the documents are false or forged. The bottom line is that without any evidence as to how supposedly real official CAR documents should look like, there is no way of assessing whether the documents in question are false, let alone that one can address the question whether alleged deviations from the normal situation can nevertheless be explained by certain factors, still making the documents real.

162. The Prosecution solely relies on the evidence given by witnesses [REDACTED]. [REDACTED] commented on documents number 3, 4, 5, 6, 9, 10 and 13 in a statement,¹³⁶ and documents 8¹³⁷ and 2¹³⁸ when testifying before the Bemba Trial Chamber. He stated that the documents were “false” [REDACTED].¹³⁹ The Prosecution also relies on the evidence of [REDACTED] provided to the Bemba Trial Chamber on [REDACTED], wherein he repeated the evidence provided in his statement to the Prosecution.¹⁴⁰

163. [REDACTED] provided comments to documents number 8, 11 and 12.¹⁴¹ Regarding number 8, [REDACTED].¹⁴² Regarding document 11, [REDACTED].¹⁴³ Finally, for document 12, [REDACTED].¹⁴⁴

164. The Arido Defence notes that both [REDACTED] have a personal interest in stating that the documents are false or forged. Indeed, [REDACTED].

¹³⁵ See also CAR-D21-0004-0084, p. 10 (0093).

¹³⁶ As numbered in paragraph 131 above.

¹³⁷ ICC-01/05-01/08-T-353-CONF-ENG, p. 74.

¹³⁸ ICC-01/05-01/08-T-353-CONF-ENG, p. 77-78.

¹³⁹ CAR-OTP-0069-0010.

¹⁴⁰ DCC, para. 42, fn. 125, *citing to* ICC-01/05-01/08-T-353-CONF-ENG.

¹⁴¹ As numbered in paragraph 131 above.

¹⁴² CAR-OTP-0069-0083, p. 18 (0100).

¹⁴³ CAR-OTP-0069-0083, pp. 17-18 (0099-0100) (English translation: CAR-OTP-0069-0206, pp. 17-18 (0222-0223)).

¹⁴⁴ CAR-OTP-0069-0083, p. 15 (0097) (English translation: CAR-OTP-0069-0206, p. 15 (0220)).

165. In addition, the Arido Defence submits that the evidence provided by [REDACTED] fails to meet the requisite threshold for the confirmation of charges, as he does not provide information as to how the documents are false or forged, but rather makes assumptions that they are. This does not constitute evidence. [REDACTED]¹⁴⁵ Finally, [REDACTED].¹⁴⁶

166. The Prosecution also relies on the evidence provided by [REDACTED] Witness D-53 [REDACTED] in Court.¹⁴⁷ D-53's evidence however, goes against what the Prosecution alleges: even when cross-examined by the victims' representative on certain of the documents, he testified that:

Well, the letterheads of the documents were different. Well, that doesn't startle me. That's just a matter of form, but each time you see Ministry of National Defence, Office of the Chief of Staff and so on and so forth. A letter is different from a hand-delivered message. The fact that the layout might have been somewhat different generally speaking in armies there are different kinds of documents that are preprinted and the format may be different from one to another. As for the signature, I beg your pardon, I'm sorry, but I'm not a specialist in handwriting, so I'm not in a position to make any comments about the signatures on these documents.¹⁴⁸

167. The Prosecution also cited to the evidence of Bemba Defence [REDACTED] witness D-59's evidence [REDACTED].¹⁴⁹ When asked about some of the documents, D-59 said "they seem to be taking these documents in a very light-mannered way" and also suggested they call a handwriting expert or the like.¹⁵⁰ While he expressed concerns over the lack of care of preparation of the documents, nowhere in his testimony did he assert that the documents he was shown were false or forged.

168. In addition, the Arido Defence notes that a Kilolo Defence witness in the present proceedings, [REDACTED],¹⁵¹ [REDACTED],¹⁵² said that the documents were "apparently authentic".¹⁵³ While he pointed out a number of differences in the language used,¹⁵⁴ or typos,¹⁵⁵ he stated that the documents were authentic.¹⁵⁶

¹⁴⁵ CAR-OTP-0069-0083, p. 19 (0101) (bottom) (English translation: CAR-OTP-0069-0206, p. 19 (0224).

¹⁴⁶ CAR-OTP-0069-0083, p. 21 (0103). (English translation: CAR-OTP-0069-0206, p. 22 (0227).

¹⁴⁷ DCC, para. 42, fn. 125.

¹⁴⁸ ICC-01/05-01/08-T-234-Red-ENG, pp. 35-36.

¹⁴⁹ DCC, para. 42, fn. 125.

¹⁵⁰ ICC-01/05-01/08-T-240-Red-ENG, pp. 6.

¹⁵¹ CAR-D21-0004-0068, p. 7 (0074).

¹⁵² CAR-D21-0002-0009, p. 1 (0009).

¹⁵³ *Ibid.*, p. 3 (0011); CAR-D21-0004-0068, pp. 11-12 (0078-0079).

¹⁵⁴ CAR-D21-0002-0009, pp. 3-4 (0011-0012).

¹⁵⁵ CAR-D21-0004-0068, p. 11 (0078).

¹⁵⁶ *See* CAR-D21-0004-0068, p. 11 (0078); CAR-D21-0004-0272, p. 24-27 (0295-0298).

169. D-53 also stated, [REDACTED], that the *message portés* seemed authentic.¹⁵⁷ [REDACTED].¹⁵⁸ [REDACTED].¹⁵⁹ [REDACTED].¹⁶⁰

170. The Arido Defence respectfully submits that the Prosecution failed to meet the requisite standard for the confirmation of charges. The only witness who unequivocally claims the documents are false, [REDACTED], has an interest in saying so. Other witnesses contradict his evidence or – at least - leave open the possibility that the documents are authentic. This does not only mean the threshold of sufficient evidence is not met, but it also creates so much doubt that Mr. Arido could certainly not have known the documents could have been false. This is discussed in the next section.

5. The Prosecution fails to present sufficient evidence that Mr. Arido knew that the documents were false or forged, or that they were going to be used at trial

171. As stated above, the Arido Defence submits that the Prosecution failed to provide evidence establishing substantial grounds that Mr. Arido provided the documents to the Bemba Defence team.¹⁶¹

172. Should the Trial Chamber find otherwise, the Arido Defence submits that in any event, the Prosecution provides no evidence that Mr. Arido knew that the documents were false/forged. It recalls that Article 70 offences are limited to those committed intentionally, which means that the Prosecution should demonstrate that there are substantial grounds to believe that Mr. Arido knew that the documents were false/forged. In the DCC, the Prosecution simply follows the assumption that Mr. Arido did know that the documents were false, but fails to provide how or why it attributes such knowledge to him.

173. In addition, the Prosecution provides no evidence that Mr. Arido knew, had he provided the Bemba Defence with the said documents, that those were to be presented as evidence to the Court.

174. In its application for an arrest warrant, the Prosecution alleged that [REDACTED],¹⁶² that [REDACTED]¹⁶³ and that [REDACTED].¹⁶⁴

¹⁵⁷ CAR-D21-0004-0084, p. 10 (0093).

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *See supra*, paras 135-159.

175. At the outset it is submitted that the assumptions by the Prosecution are highly speculative and could at best only amount to circumstantial evidence, which fails to repair the significant holes in the Prosecution's presentation and discussion of evidence. Nevertheless, because of the fact that the Prosecution makes incorrect allegations, equating Mr. Arido's departure from [REDACTED] with evidence that he knew the documents he allegedly provided were false and were being challenged in Court, the Arido Defence wishes to explain the circumstances of Mr. Arido's departure from [REDACTED].

176. As stated above, [REDACTED].¹⁶⁵ He was told that this person was there to assist him with regards to his future testimony in the Bemba case, and that he had to hand over his travel documents to that person so that he could organise the trip. Upon his failure to present any valid official Court document or a mission order, and upon being informed that [REDACTED]. Mr. Arido feared that his identity as a Defence witness for Mr. Bemba had been discovered [REDACTED] and that he was in danger. He informed the [REDACTED] who in turn informed [REDACTED] authorities of the matter, and fled the country to seek refuge in France as a result, [REDACTED].

177. [REDACTED].¹⁶⁶ Notwithstanding this fact - and the fact that it would not be the first time that one of VWU's staff is alleged to have behaved improperly with witnesses -¹⁶⁷ a number of objective elements show that Mr. Arido had reasons to fear for his safety. Firstly, Mr. Arido's security concerns with the [REDACTED]; Secondly, whether or not the VWU representative [REDACTED]; Thirdly, [REDACTED];¹⁶⁸ Fourthly, [REDACTED]; Finally, there is ample evidence that former CAR military living in [REDACTED] were under constant security threats.¹⁶⁹ The Bemba Trial Chamber and the VWU recognised this since protective measures have been granted to Bemba Defence witnesses.

¹⁶² ICC-01/05-01/13-19-Conf, para. 82.

¹⁶³ ICC-01/05-01/13-19-Conf, para. 82; *see also* para. 90 "[REDACTED]"; para. 103 "[REDACTED]".

¹⁶⁴ ICC-01/05-01/13-19-Conf, para. 105.

¹⁶⁵ For further details *see* ICC-01/05-01/13-413-Conf-Exp.

¹⁶⁶ *See* VWU's report of events filed in the Main Case and disclosed to the Defence by the Prosecution, albeit in a redacted version: ICC-01/05-01/08-2261-Conf-Red.

¹⁶⁷ *See* ICC Press Release of 20 December 2013, entitled "The external independent review submits its report on alleged sexual abuses in DRC", ICC-CPI-20131220-PR977, available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr977.aspx; *see also* Independent Review Team, Public Report, Post incident review of allegations of sexual assault of Four Victims Under the Protection of the International Criminal Court in the Democratic Republic of Congo by a Staff Member of the Court, available at <http://www.icc-cpi.int/iccdocs/registry/Independent-review-team-ReportEng.pdf>.

¹⁶⁸ ICC-01/05-01/08-2261-Conf-Red, para. 8.

¹⁶⁹ *See e.g.* [REDACTED].

178. Shortly after the event, Mr. Arido contacted the ICC several times to raise his security concerns, but no measures were taken.¹⁷⁰ He also informed Mr. Kilolo, at the time lead counsel for Mr. Bemba in the main case, of the various letters he sent to the VWU and the ICC and of his security concerns.¹⁷¹

179. [REDACTED].¹⁷²

180. Mr. Arido was not trying to hide from the ICC since as soon as he arrived in France ([REDACTED]), on [REDACTED], he approached the French authorities, asking for temporary stay as asylum seeker.¹⁷³ As is clear from the letter [REDACTED], Mr. Arido was fully transparent regarding his arrival in France, including by explaining that he used a visa that was given to him to testify before the ICC, and that he did not testify because of his security fears.¹⁷⁴

181. Email communications from Mr. Arido also show that he was still willing to testify, even after the [REDACTED] incident in [REDACTED] and after [REDACTED], the date on which the alleged false documents that he allegedly provided were discussed in court.¹⁷⁵ He was in touch with the VWU and sent them his travel document in [REDACTED].¹⁷⁶

182. After a certain time, Mr. Arido was disappointed and worried by the lack of actions taken by Mr. Kilolo¹⁷⁷ and the ICC/VWU and did not come to testify before the Court. A review of Mr. Arido's email exchanges with his friends and relatives show that he was perceiving a serious threat against him, which is why he decided not to testify before the ICC.¹⁷⁸

¹⁷⁰ CAR-OTP-0075-1254-R01 ([REDACTED], attaching CAR-OTP-0075-1255, CAR-OTP-0075-1256 and CAR-OTP-0075-1257, which is also under CAR-OTP-0075-1455-R01); CAR-OTP-0075-1454-R01 ([REDACTED] (AR-OTP-0075-1254-R01) which shows that the email was sent); CAR-OTP-0075-1455-R01 ([REDACTED], attaching CAR-OTP-0075-1456-R01 & CAR-OTP-0075-1457-R01).

¹⁷¹ See CAR-D21-0002-0062; CAR-D21-0002-0059; CAR-OTP-0075-0605-R01 (31 October 2012); CAR-OTP-0075-0490 ([REDACTED]); CAR-OTP-0075-0490 ([REDACTED]); CAR-OTP-0075-0589-R01 ([REDACTED]); CAR-OTP-0075-0594-R01 ([REDACTED]); CAR-OTP-0075-0594-R01 ([REDACTED]); CAR-OTP-0075-1459-R01 ([REDACTED]); CAR-OTP-0075-0598-R01 ([REDACTED]); CAR-OTP-0075-0602 ([REDACTED]).

¹⁷² See CAR-D24-0001-0020-R01

¹⁷³ CAR-OTP-0073-0551: [REDACTED].

¹⁷⁴ CAR-OTP-0073-0551, p. 2 (0552), last paragraph.

¹⁷⁵ See e.g. [REDACTED], CAR-OTP-0075-0553.

¹⁷⁶ CAR-OTP-0075-1476-R01 ([REDACTED], attaching CAR-OTP-0075-1477); CAR-OTP-0075-1481-R01 ([REDACTED]).

¹⁷⁷ See e.g. CAR-OTP-0075-0751-R01 ([REDACTED]).

¹⁷⁸ See e.g. CAR-OTP-0075-0603-R01, [REDACTED]; CAR-OTP-0075-1140-R01 [REDACTED];

183. Even having taken the decision not to testify, Mr. Arido was never trying to “hide” from the ICC. In February 2013 he wrote to the [REDACTED], explaining that he left [REDACTED] for France, and [REDACTED].¹⁷⁹ That same month (February 2013), Mr. Arido wrote an article for the newsletter of “*Europe Ecologie les Verts*” on the CAR conflict, which was made publicly available online, and which included his name, phone number and email address.¹⁸⁰ Clearly, someone trying to “hide” from the ICC would not do that. Mr. Arido applied for asylum in France [REDACTED], and also included information related to the incident with the VWU staff member in his application [REDACTED].¹⁸¹ When he was interviewed by the French police upon his arrest in November 2013, he also expressed his security concerns related to him being a witness at the ICC.¹⁸²

184. In any event, had Mr. Arido wanted to stay out of the reach of the ICC, he would not have gone from a state non party to the Rome Statute, [REDACTED], to a state party, France.

6. Conclusion on the allegations related to the provision of false/forged documents

185. On the basis of the foregoing, the Arido Defence submits that the Prosecution has not brought sufficient evidence establishing substantial grounds permitting the Pre-Trial Chamber to confirm the charge of presenting false documents to the Court.

186. There is not sufficient evidence that Mr. Arido sent the allegedly false documents to the Bemba Defence team, and there is equally not sufficient evidence that if Mr. Arido would have sent them he knew – or not even could have known - these were false documents to be presented at trial. There is even not sufficient evidence that the documents are false to start with.

187. It is disconcerting that the Prosecution has resorted to highly circumspect circumstantial evidence in an endeavour to repair serious shortcomings in its investigations. Apparently the Prosecution believes that Mr. Arido got cold feet after having learned of the Prosecution challenging the authenticity of the documents he allegedly provided at the Bemba trial and for that reason failed to appear as a witness. This assumption is false and contradicted by the available evidence. But what is more, similar speculations and types of circumstantial evidence

¹⁷⁹ CAR-OTP-0075-2354.

¹⁸⁰ CAR-D24-0001-0040, p. 8 (0047).

¹⁸¹ CAR-D24-0001-0032-R01.

¹⁸² CAR-D24-0001-0030, p. 2 (0031).

should not play such significant role in the administration of justice, particularly in light of the fact that it has been pivotal in securing the arrest and (unreasonably long) detention of Mr. Arido.

C. The Prosecution fails to establish substantial grounds to believe that Mr. Arido has corruptly influenced witnesses

188. According to the Prosecution, in addition to providing false/forged documents to the Bemba Defence, Mr. Arido implemented the common plan by:

- i. Identifying and procuring false witnesses;
- ii. Facilitating and paying for the participation of the false witnesses;
- iii. Promising things to witnesses;
- iv. Illicitly coaching them.¹⁸³

189. The Prosecution alleges that Mr. Arido organised and participated in a February 2012 meeting in Douala with a number of prospective witnesses, [REDACTED], Mr. Kilolo and one of his colleagues. It is alleged that Mr. Arido promised money and relocation to the prospective witnesses in exchange of false testimony, that he told them to provide false information to Mr. Kilolo, and that he paid them.

190. The Arido Defence notes the lack of detail of the DCC regarding which conduct qualifies under which element of Article 70 offences – that is, which conduct constitutes a violation of article 70 (1) (a), (b) or (c) and how it meets the elements of this offence. The Arido Defence recalls that “it is the duty of the Prosecutor to furnish all facts underpinning the charges and to present evidence in relation to **each legal requirement of the crime**”.¹⁸⁴ The Prosecution has failed to do so, since the legal requirements of the crimes are not even discussed. This is even more problematic, as was already discussed, since this is the first time charges are formulated at the ICC in respect of Article 70-offences, and since the drafting history and other interpretative tools in respect of these offences (including the non-inclusion of Article 70-offences in the ICC elements of crimes) offer little guidance as to their definition.

191. The Arido Defence submits that it is not for the Judges or the parties to try to guess what the charges are and what evidence is supposed to support them, but for the Prosecution to present them clearly and in an organised manner. The failure of the Prosecution to have done so results in the Defence being forced to guess which factual evidence is supposed to support which charge. This goes against the basic principle that the burden of proof is on the

¹⁸³ DCC, paras 22, 27, as repeated in para. 117.

¹⁸⁴ ICC-01/05-01/08-424, paras 206-209, 299-300, 311-312.

Prosecution, as well as the right of the Defence to be informed in detail of the nature, cause and content of any charge, as provided for in Article 67 (1) (a) of the Statute. Further, the Prosecution is basically throwing all the evidence it has to the judges, and letting them pick and chose what goes under which charge. That should not be permitted.

192. It must be noted that the totality of the Prosecution's evidence only regards one meeting that Mr. Arido allegedly arranged between prospective witnesses and Mr. Kilolo – that of February 2012 in Douala, Cameroon, where D-2, D-3, D-4, D-6, D-7 and D-9 were present.¹⁸⁵ During this meeting and the days that preceded and followed, the Prosecution argues that Mr. Arido paid each of these witnesses.¹⁸⁶

193. The Prosecution bases itself mostly on the evidence of D-3, D-2, on email communications and on a number of western union payment sheets.

1. Preliminary observations

a. The Prosecution does not provide any evidence in respect of 11 out of 14 witnesses

194. In paragraphs 33, 45-109 and in pages 76-81 of the DCC, the Prosecution charges Mr. Arido with offences under Article 70 (1) (a), (b) and (c) for events related to 14 witnesses.¹⁸⁷ The Arido Defence notes that the Prosecution only obtained a statement or interview from D-2, D-3, D-55, D-56 and D-64. D-55,¹⁸⁸ D-56¹⁸⁹ and D-64¹⁹⁰ told the Prosecution that they did not know Arido.

195. The Arido Defence further notes that the DCC does not even mention Mr. Arido's name with regard to D-15,¹⁹¹ D-54,¹⁹² D-26,¹⁹³ D-29,¹⁹⁴ D-25,¹⁹⁵ D-56,¹⁹⁶ D-64,¹⁹⁷ D-55,¹⁹⁸ D-23,¹⁹⁹ D-6²⁰⁰ and D-13.²⁰¹

¹⁸⁵ DCC, para. 68.

¹⁸⁶ DCC, paras 33-34.

¹⁸⁷ D-14, D-54, D-26, D-3, D-2, D-4, D-29, D-25, D-13, D-57, D-64, D-55, D-23 and D-6.

¹⁸⁸ CAR-OTP-0074-0872 (translation of CAR-OTP-0074-0860), p. 10 (0881).

¹⁸⁹ CAR-OTP-0077-0149, pp. 6-7 (0154-0155).

¹⁹⁰ CAR-OTP-0074-1112, p. 11 (1122).

¹⁹¹ DCC, paras 46-51.

¹⁹² *Ibid.*, paras 52-59.

¹⁹³ *Ibid.*, paras 60-64.

¹⁹⁴ *Ibid.*, paras 82-85.

¹⁹⁵ *Ibid.*, paras 86-89.

¹⁹⁶ *Ibid.*, paras 90-92.

¹⁹⁷ *Ibid.*, paras 93-96.

¹⁹⁸ *Ibid.*, paras 97-100.

196. The Arido Defence further notes that D-26,²⁰² D13,²⁰³ D-15,²⁰⁴ D-25²⁰⁵ and D-29²⁰⁶ have all provided evidence that they have not lied under oath and have not been provided, offered or promised money in exchange for false testimony in the Bemba Case.

197. Therefore, it is clear that the Prosecution fails to provide evidence showing that there are substantial grounds to believe that Mr. Arido was involved in the commission of offences under Article 70 of the Statute regarding D-15, D-54, D-26, D-29, D-25, D-56, D-64, D-55, D-23, D-6 and D-13.

198. In sum, the Prosecution's case against Mr. Arido is solely based on the evidence of two witnesses: D-2 and D-3. The Arido Defence objects to violation of prosecutorial disclosure obligations related to these witnesses. In spite of having interviewed these witnesses [REDACTED], the Prosecution waited until 10 days before the filing of its DCC – 20 June 2014, to disclose them to the Defence. At best, the Prosecution was hoping to find better and more reliable evidence against Mr. Arido and when failing, decided to use D-2 and D-3. At worst, the Prosecution intentionally refrained from disclosing them in an effort to have a trial (confirmation hearing) by ambush. In addition, the Arido Defence wishes to point out that the audio recordings of D-3's second interview which took place on [REDACTED]²⁰⁷ and the audio recordings of the totality of D-2's interviews with the Prosecution have never been disclosed to the Defence.²⁰⁸

199. In addition to witnesses D-2 and D-3, the Prosecution also charges Mr. Arido in relation to D-4 [REDACTED].²⁰⁹ This is done on the basis of D-2 and D-3's interviews and on the basis of a payment made by Mr. Arido to D-4.

200. The fact that Mr. Arido is accused of criminal behaviour in respect of three witnesses only is further illustrated in the Prosecution's "Graphic Summary of Charges [sic] Instances"

¹⁹⁹ *Ibid.*, paras 101-104.

²⁰⁰ *Ibid.*, paras 105-106.

²⁰¹ *Ibid.*, paras 107-109.

²⁰² CAR-D21-0004-0184, p. 1 (0184).

²⁰³ CAR-D21-0004-0179, p. 1 (0179).

²⁰⁴ CAR-D21-0004-0102, p. 12 (0113).

²⁰⁵ CAR-D21-0004-0211, p. 6 (0216).

²⁰⁶ CAR-D21-0004-0581, p. 7 (0587).

²⁰⁷ The audio number is CAR-OTP-0079-1591, see p. 1 (0165) of CAR-OTP-0080-0165-R01.

²⁰⁸ The audio number are CAR-OTP-0078-0305 and CAR-OTP-0078-0306 for the first interview, see CAR-OTP-0080-0007, p. 1 (0007) and CAR-OTP-0080-0100, p. 1 (0100), and CAR-OTP-0079-1589 for the second interview on [REDACTED], see p. 1 (0494) of CAR-OTP-0080-0494.

²⁰⁹ DCC, paras 79-81.

attached to its DCC,²¹⁰ supposedly showing the [REDACTED]. In this ‘Graphic Summary’ Arido is only linked to D-2, D-3 and D-4.

201. Despite this restriction to three witnesses, the Prosecution still charges Mr. Arido for crimes in relation to all the other witnesses, as is clear from the table contained in pages 76-81 of its DCC. The Arido Defence recalls that Prosecution must offer “concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations”,²¹¹ which must go beyond mere theory or suspicion.²¹² Clearly, the Prosecution fails in the present case regarding D-15, D-54, D-26, D-29, D-25, D-56, D-64, D-55, D-23, D-6 and D-13.

202. Regarding D-4, the Prosecution bases its allegations on the evidence provided by D-2 and D-3, to assert that D-4 was also present at the February 2012 meeting with Mr. Arido and Mr. Kilolo in Douala, that Mr. Arido offered D-4 money in exchange for falsely testifying and that he directed D-4 to lie about being in the CAR forces.²¹³ The Prosecution also relies on a [REDACTED] payment of [REDACTED] that Mr. Arido made to D-4 [REDACTED].

203. The Arido Defence points out that the Prosecution does not have an interview or witness statement provided by D-4. D-4 did however, provide a statement to the Defence team of Mr. Kilolo, where stated that:

- i. He does not personally know Mr. Arido;²¹⁴
- ii. Kilolo directly contacted him to discuss the possibility of being a witness for Mr. Bemba;²¹⁵
- iii. They met for the first time in [REDACTED]²¹⁶ and when talked about the events of 2003;²¹⁷
- iv. [REDACTED] met Mr. Kilolo for a second time around [REDACTED].²¹⁸ Mr. Kilolo brought him directly to the VWU;²¹⁹

²¹⁰ ICC-01/05-01/13-526-Conf-AnxC1.

²¹¹ ICC-01/04-01/06-803-tEN, para. 39.

²¹² ICC-01/04-01/06-803-tEN, paras 37-38; Soering v. The United Kingdom, 1/1989/161/217, European Court of Human Rights, 7 July 1989, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57619#{"itemid":\["001-57619"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57619#{); judgement *Mamatkulov and Askarov v. Turkey*, 46827/99 and 46951/99, European Court of Human Rights, 4 February 2005, available at: <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-68183>; ICC-01/04-01/07-717, para. 65.

²¹³ DCC, para. 80, fn. 239.

²¹⁴ CAR-D21-0004-0310, p. 11 (0320).

²¹⁵ *Ibid.*, p. 8 (0317).

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*, p. 9 (0318).

²¹⁸ *Ibid.*, p. 8 (0317).

²¹⁹ *Ibid.*, p. 10 (0319).

- v. He was not promised any money nor was he told what to say.²²⁰ The only money he was given was for his transportation.²²¹

204. While in this statement D-4 also denies having ever received money from Mr. Arido,²²² it is important to recall that the money transfer was of an insignificant amount: [REDACTED]. D-2 could have easily forgotten such a small amount.

205. In addition to contradicting D-2 and D-3's evidence, D-4's evidence clearly disproves the Prosecution's allegations that Mr. Arido is responsible for offences under Article 70 of the Statute in relation to D-4.

- b. The Prosecution's case is in fact only related to one specific event and based only on D-2 and D-3's evidence

206. D-2 and D-3 both had lengthy interviews with the Prosecution on the same set of events related to Mr. Arido. It concerns an alleged February 2012 trip to Douala and alleged meetings during this trip, where Mr. Arido allegedly made promises to a number of potential Bemba Defence witnesses, and allegedly told them to lie to Mr. Kilolo, counsel for Mr. Bemba at the time. The Arido Defence will address the allegations made by the Prosecution in detail below. However, in light of the Prosecution's efforts to mix the evidence against Mr. Arido with that against his co-suspects, it is important to keep in mind that the alleged events regarding Mr. Arido took place over a very short period, between late January and late February 2012. D-2 told the Prosecution that after the first meeting with Mr. Kilolo, Mr. Arido had left for France and was not involved with the Bemba Defence.²²³

- c. The Prosecution's reliance on Mr. Arido's statement to the French authorities

207. The Prosecution attempts to rely on the 23 November 2013 interview of Mr. Arido with the French police. First of all, the Arido Defence notes that the evidence resulting from this interview is inadmissible, on account of Article 69 (4) and 69 (7) of the Statute. Article 55 (2) of

²²⁰ *Ibid.*

²²¹ [REDACTED], *see* CAR-D21-0004-0310, p. 10 (0319).

²²² CAR-D21-0004-0310, p. 11 (0320).

²²³ CAR-OTP-0080-0021, p. 20 (0040): [REDACTED].

the Statute was not respected, as a result of which evidence has been obtained in violation of the Statute and/or internationally protected human rights and/or admission of the evidence would disproportionately prejudice Arido's right to a fair trial.

208. The first defect regarding the application of Article 55 (2) relates to the fact that while it is noted that Article 55 (2) was read to Mr. Arido,²²⁴ this does not appear in the "Procès verbal". In addition, Mr. Arido was not informed of his right not to incriminate himself or to confess guilt, as protected by Article 55 (1) of the Statute, and the interviewers did not obtain Mr. Arido's clear and informed consent to waiving his right to remain silent. It does not appear that he was informed of his right to consult with his counsel at anytime either.²²⁵ There is also no audio recording of the interview, contrarily to Rule 112 of the Rules of Procedure and Evidence. Notwithstanding this fact, the Arido Defence points out that while Mr. Arido has stated [REDACTED], he does not say anything about them having provided false evidence. In addition, Mr. Arido explained that he had left CAR in [REDACTED], and that therefore he was unable to explain whether the Bemba Defence witnesses were in CAR or what they were doing.²²⁶ In any event, he said nothing about the witnesses being offered money or coached.

209. It must also be noted that the Prosecution's reliance on Mr. Arido's 23 November 2013 interview with the French police – where members of the Prosecution were also present – cannot be taken in isolation. Since the Prosecution finds that Mr. Arido is credible in his interview, as it relies on it, it is also important to note that in the same interview Mr. Arido denied knowing anyone related to Mr. Bemba other than Mr. Kilolo;²²⁷ that he never got money from the Bemba Defence other than the payment for his expert report;²²⁸ that he never paid the Bemba Defence witnesses;²²⁹ and that he never provided false/forged documents to the Bemba Defence, but that he was approached by Mr. Kilolo to provide comments on these documents.²³⁰ He also said that all he ever did for the Bemba Defence was to present his expert report and never presented individuals to the Bemba Defence.²³¹

²²⁴ CAR-OTP-0074-1065-R01, p. 2 (1066): [REDACTED].

²²⁵ CAR-OTP-0074-1065-R01, p. 2 (1066).

²²⁶ *Ibid.*, p. 5 (1069).

²²⁷ *Ibid.*, p. 3 (1067).

²²⁸ *Ibid.*

²²⁹ *Ibid.*, p. 4 (1068).

²³⁰ *Ibid.*, p. 4 (1068); p. 5 (1069).

²³¹ *Ibid.*

210. The Prosecution has failed to explain on what grounds it relies on certain elements of Mr. Arido's statement and not on others. Without an adequate explanation, the Prosecution's approach comes down to impermissible 'cherry-picking', which unjustifiably denatures Mr. Arido's statement as a whole.

2. D-2 and D-3's evidence cannot be relied upon

211. The Arido Defence submits that the evidence provided by D-2 and D-3 is not admissible because of procedural irregularities surrounding their interviews. In addition, they cannot be said to be reliable as most of the evidence was obtained through the use of leading questions. In addition, both witnesses' lack credibility as they both lied under oath – D-2 even lied to the Prosecution during the interview – and both have a personal interest in providing false information to the Prosecution: D-2 [REDACTED], and D-3 [REDACTED].

212. The Appeals Chamber has held that “In determining whether to confirm charges under article 61 of the Statute, the Pre-Trial Chamber may evaluate ambiguities, inconsistencies and contradictions in the evidence or doubts as to the credibility of witnesses” and that “any other interpretation would carry the risk of cases proceeding to trial although the evidence is so riddled with ambiguities, inconsistencies, contradictions or doubts as to credibility that it is insufficient to establish substantial grounds to believe the person committed the crimes charged”.²³² As a result, the Pre-Trial Chamber must “take great care in finding that a witness is or is not credible”.²³³

a. Prosecution misled D-2 and D-3 [REDACTED]

213. The Prosecution misled D-2 and D-3 in respect of the fact that [REDACTED], and in respect of the fact that their interviews would be used as evidence in the present case. As a result, the Arido Defence submits that [REDACTED]. As a result, their evidence is not admissible.²³⁴

214. Both D-2 and D-3 [REDACTED].²³⁵ The Arido Defence questions the Prosecution's power to do this and challenges the overall legality and validity [REDACTED], as well as the

²³² ICC-01/04-01/10-514 OA, para. 46.

²³³ *Ibid.*, para. 48.

²³⁴ ICC-01/04-01/06-803-tEN, para. 59.

²³⁵ D-3: CAR-OTP-0077-1095; D-2 (CAR-OTP-0078-0303).

methods used to arrive at this result. No matter how one tries to [REDACTED] which is not provided for in the law of the ICC, [REDACTED].

215. It is clear that from the Prosecution's perspective, it possesses significant evidence against two individuals allegedly having committed the crime of perjury. [REDACTED]. [REDACTED], because there is no proper legal framework [REDACTED]. There is an impressive amount of research, especially in the United States, showing how easily individuals who have nothing to lose may acknowledge guilt and are prepared to provide false statements, [REDACTED].²³⁶

216. It is undeniable that the Prosecution has extended to D-2 and D-3 [REDACTED]. By now, it should be known to the Prosecution, especially in light of its experiences with its intermediaries, how [REDACTED] individuals jeopardises accurate fact-finding, and how it is inconsistent with the Prosecution's obligations in that regard, as set out in Article 54 (1) (a) of the Statute.

217. It is clear that in its interactions with witnesses D-2 and D-3, the Prosecution was not interested in objectively searching for the truth, which would include [REDACTED], but in strengthening its case against the presently targeted suspects. This is done even at the cost of using methods not provided for in the law of the ICC and [REDACTED].

218. [REDACTED].²³⁷ [REDACTED]²³⁸ [REDACTED]²³⁹ [REDACTED]²⁴⁰ [REDACTED].²⁴¹ This is misleading, and is an element that further strengthens the illegality of the investigative methods applied in respect of D-2 and D-3.

219. The Prosecution also told D-2 and D-3 that [REDACTED].²⁴²

²³⁶ See e.g. Martinez, Spencer (1999), *Bargaining for Testimony: Bias of Witness Who Testify in Exchange for Leniency*. Cleveland State Law Review Law Journals. 47 Clev. St. L. Rev. 141, available at <http://engagedscholarship.csuohio.edu/clevstlrev/vol47/iss2/3>; Northwestern University School of Law, Center on Wrongful Convictions (Winter 2004-2005); *The Snitch System*, Bluhm Legal Clinic, available at <http://www.innocenceproject.org/docs/SnitchSystemBooklet.pdf>; Eagles, Catherine. (Fall 2008), *Co-defendants, Accomplices and Co-conspirators: Common Evidence Issues and Selected Cases*, University of North Carolina School of Government, available at: <http://www.sog.unc.edu/sites/www.sog.unc.edu/files/200510EaglesCoD.pdf>.

²³⁷ CAR-OTP-0077-1095, preamble, points 2, 3, 4 – compare with the name on p. 2 near the signature, and with points 1, 5, 7 and 8.

²³⁸ CAR-OTP-0077-1095, point 6: [REDACTED].

²³⁹ CAR-OTP-0078-0303, point 6: [REDACTED]; see also CAR-OTP-0080-0007, p. 12 (0018) : [REDACTED]."

²⁴⁰ CAR-OTP-0080-0165, p. 4 (0168).

²⁴¹ CAR-OTP-0080-0494-R01, p. 2 (0495): [REDACTED].

220. Finally, the Arido Defence notes that the witnesses have not signed their transcribed interview, nor has the Prosecution provided a scan of the sealed bags in which it allegedly put the audio recording of the interviews signed by the witnesses, as referred to in the interviews.²⁴³ The Prosecution also fails to provide evidence that it has in fact informed D-2 and D-3 that their interviews would be disclosed to the Defence teams, [REDACTED].²⁴⁴

221. The Arido Defence recalls that in the *Lubanga* case, Pre-Trial Chamber I held that “the first and foremost measure required under article 68 (1) of the Statute and rule 86 of the Rules is to inform each prospective witness of the fact that a party intends to rely on his or her statement, or the report or transcript of his or her interview for the purpose of the confirmation hearing in a specific case”.²⁴⁵

222. In the present case, it cannot be said that D-2 and D-3 were clearly and unequivocally informed [REDACTED]. As a result, it is inadmissible.

b. The interrogation of D-2 and D-3 was not directed at establishing the truth but at obtaining evidence supporting the allegations against suspects in the present case

223. At the beginning of the interviews with D-2 and D-3, the Prosecution’s investigator explains the article 70 case to them, emphasising the fact that all the Article 70 suspects are in jail,²⁴⁶ and explaining – unnecessarily - to the witnesses what penalty they face.²⁴⁷ Immediately after, the Prosecution tells D-2 and D-3 that [REDACTED].²⁴⁸ [REDACTED],²⁴⁹ [REDACTED].²⁵⁰

224. [REDACTED].²⁵¹ [REDACTED].²⁵² [REDACTED].²⁵³ [REDACTED].”²⁵⁴

²⁴² CAR-OTP-0078-0155-R01, p. 14 (0168): “[REDACTED]”; CAR-OTP-0080-0007, pp. 6-7 (0013-0014): [REDACTED]

²⁴³ D-2: CAR-OTP-0080-0007, p. 7 (0013): [REDACTED] D-3, CAR-OTP-0078-0155-R01, p. 14 (0168): [REDACTED]

²⁴⁴ D-2: CAR-OTP-0080-0007, p. 8 (0014): [REDACTED]; D-3: CAR-OTP-0078-0283, pp. 4-5 (0286-0287): [REDACTED]

²⁴⁵ ICC-01/04-01/06-803-tEN, para. 59.

²⁴⁶ CAR-OTP-0080-0165, p. 8 (0162) [REDACTED] CAR-OTP-0080-0007, p. 4 (0010): [REDACTED].

²⁴⁷ CAR-OTP-0080-0165, p. 9 (0163): [REDACTED] ; CAR-OTP-0080-0007, p. 4 (0010): [REDACTED]

²⁴⁸ CAR-OTP-0078-0155-R01, p. 9 (0163): [REDACTED]; CAR-OTP-0080-0007, p.4 (0010): [REDACTED] ”.

²⁴⁹ CAR-OTP-0078-0155-R01, p. 10 (0164); CAR-OTP-0080-0007, p.4 (0011).

²⁵⁰ CAR-OTP-0078-0155-R01, p. 10 (0164) [REDACTED]. *See also* same language in CAR-OTP-0080-0007, p.4 (0011).

²⁵¹ CAR-OTP-0078-0155-R01, p. 10 (0164): [REDACTED]; CAR-OTP-0080-0007, p.4 (0011): [REDACTED].

²⁵² CAR-OTP-0078-0155-R01, p. 11 (0165): [REDACTED].

²⁵³ CAR-OTP-0078-0155-R01, pp. 11-13 (0165-0167); CAR-OTP-0080-0007, p. 4 (0011).

²⁵⁴ CAR-OTP-0080-0007, p. 12 (0018).

225. The Arido Defence also submits that the Prosecution, when interviewing D-2 and D-3, put pressure on these witnesses to tell them what they wanted to hear. This was done indirectly, by referring to the present proceedings, emphasising the fact that the suspects were in prison, including Mr. Arido, who is presented as a witness [REDACTED] and referring to the possible sentence under Article 70. Immediately thereafter – while this fact is still in the head of the witnesses – the Prosecution’s investigator goes onto saying that [REDACTED]. Taking into account that D-2 and D-3 have just been told that one of Bemba’s witness is being prosecuted by the ICC, was put in jail, and risks up to a five year prison sentence, [REDACTED] creates fear, and the corresponding incentive to tell the Prosecution what it wants to hear. This must be kept in mind by the Pre-Trial Chamber when deciding on the probative value of the evidence of D-2 and D-3. This is particularly important in light of the fact that a number of [REDACTED] having been pressured [REDACTED] to give evidence for the Prosecution.²⁵⁵ The vulnerable position of D-2 and D-3 cannot be underestimated and their evidence as a result lacks credibility, in addition to the claim that the investigative methods used by the Prosecution are ground for exclusion of the interviews pursuant to Article 69 (4) and/or 69 (7) of the Statute.

- c. There are reasonable grounds to believe that D-3’s evidence was coerced or otherwise obtained by oppressive and unlawful means

226. There is evidence for the belief that D-3 was coerced into providing an interview to the Prosecution. This concerns the evidence given by D-4, stating that D-3 was approached by the Prosecution. D-3 called D-4, saying that he was really threatened and fled [REDACTED]. One day, on the phone D-3 told D-4 that [REDACTED].²⁵⁶ After that he never called back.²⁵⁷

227. The belief that D-3 has been coerced to provide evidence for the Prosecution is further evidenced by the fact [REDACTED].²⁵⁸ [REDACTED].²⁵⁹ [REDACTED]²⁶⁰ [REDACTED].²⁶¹ [REDACTED].²⁶²

²⁵⁵ See CAR-D21-0004-0354, pp. 14-18 (0367-371); CAR-D21-0004-0310, pp. 13-14 (0322-0323).

²⁵⁶ CAR-D21-0004-0310, p. 17 (0326).

²⁵⁷ CAR-D21-0004-0310, p. 17 (0326).

²⁵⁸ CAR-OTP-0078-0155-R01, p. 3 (0157): [REDACTED].

²⁵⁹ CAR-D21-0004-0354, p. 17 (0370).

²⁶⁰ CAR-D21-0004-0310, p. 15 (0324).

²⁶¹ *Ibid*, p. 17 (0326).

²⁶² *Ibid*.

228. It is to be noted that the ICC Registry appears to have little confidence in the methods used by [REDACTED].²⁶³ In light of this Registry's perspective, it appears plausible that [REDACTED] has coerced D-3 into 'cooperating' with the ICC Prosecution. The evidence pointing at the use of such methods should either result in the exclusion of D-3's statement pursuant to Article 69 (4) and/or 69 (7) or deprive the statement of probative value.

d. The Prosecution inappropriately led the witnesses' evidence

229. At the outset, the Arido Defence points out that interrogation techniques used by -certain - Prosecution investigators have already been severely criticised by Pre-Trial Chamber I in the *Mbarushimana* Confirmation Decision, as being 'utterly inappropriate', as the Prosecution investigator did not refrain from putting questions in 'leading terms', and as such techniques 'seem hardly reconcilable with a professional and impartial technique of witness questioning;' the Pre-Trial Chamber concluded that the probative value of evidence obtained by such means may be significantly weakened.²⁶⁴

230. It is submitted that this equally applies –possibly even more so- to the interview techniques and investigative methods used in respect of D-2 and D-3.

231. The extensive use of leading questions - instead of "open" questions where the witness is asked in general terms about relevant information - by Prosecution's investigators during D-2 and D-3's interviews can be clearly noted, including the "reformulation" of the witnesses' evidence in a way that fits the Prosecution's case, and the insistence on repeating certain questions when the Prosecution did not obtain a satisfactory answer.

232. The Arido Defence recalls that according to the Code of Conduct for the Office of the Prosecutor, the Prosecution shall conduct investigations "with the goal of establishing the

²⁶³ See ICC-01/05-01/13-19-Conf, para. 111.

²⁶⁴ ICC-01/04-01/10-465-Red, para. 51: "Finally, the Chamber wishes to highlight its concern at the technique followed in several instances by some Prosecution investigators, which seems utterly inappropriate when viewed in light of the objective, set out in article 54(l)(a) of the Statute, to establish the truth by "investigating incriminating and exonerating circumstances equally". The reader of the transcripts of interviews is repeatedly left with the impression that the investigator is so attached to his or her theory or assumption that he or she does not refrain from putting questions in leading terms and from showing resentment, impatience or disappointment whenever the witness replies in terms which are not entirely in line with his or her expectations. Suggesting that the witness may not be "really remembering exactly what was said", complaining about having "to milk out" from the witness details which are of relevance to the investigation, lamenting that the witness does not "really understand what is important" to the investigators in the case, or hinting at the fact that the witness may be "trying to cover" for the Suspect, seem hardly reconcilable with a professional and impartial technique of witness questioning. Accordingly, the Chamber cannot refrain from deprecating such techniques and from highlighting that, as a consequence, the probative value of evidence obtained by these means may be significantly weakened." (internal citations omitted)

truth” and must “consider all relevant circumstances when assessing evidence, irrespective of whether they are to the advantage or the disadvantage of the Prosecution”. In addition, it shall ensure that “all necessary and reasonable enquiries are made”.²⁶⁵

233. The Arido Defence points out that there is abundant empirical research demonstrating how leading questions can affect human memory and in and of themselves trigger incorrect answers.²⁶⁶ There is thus every need to avoid them, especially in this context in which the Prosecution has steered the content of the interviews in a very specific direction, including by using impermissible investigative methods.

234. Examples of leading questions include:

- [REDACTED]²⁶⁷
- [REDACTED]²⁶⁸
- [REDACTED]²⁶⁹
- [REDACTED]²⁷⁰
- [REDACTED]²⁷¹ [REDACTED]²⁷²
- [REDACTED]²⁷³
- [REDACTED]²⁷⁴
- [REDACTED]²⁷⁵
- [REDACTED]²⁷⁶
- [REDACTED]²⁷⁷

²⁶⁵ Code of Conduct for the Office of the Prosecutor, para. 49.

²⁶⁶ See e.g. E.F. Loftus and G. Zanni, ‘Eyewitness testimony: The influence of the wording of a question’, *Bulletin of the Psychonomic Society* (1975), pp. 86 – 88; A Comparison of Adult witnesses' Suggestibility Across Various Types of Leading Questions, S.J. Sharman and M.B. Powell, *Applied Cognitive Psychology*, 2012, Vol. 26(1), p. 48-53 [Peer Reviewed Journal]; Interrogative pressure and responses to minimally leading questions, J. Baxter, J.C.W. Julian and C. Marley, *Personality and Individual Differences*, 2006, Vol. 40(1), p. 87-98 [Peer Reviewed Journal], *SciVerse ScienceDirect Journals*; Leading with questions: Ask don't tell, A. Sobel, *Leader to Leader*, 2013, Vol. 2013 (67), p. 24-29 [Peer Reviewed Journal].

²⁶⁷ CAR-OTP-0080-0043, p. 9 (0051).

²⁶⁸ *Ibid.*, p. 9 (0051).

²⁶⁹ *Ibid.*, p. 14 (0056).

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*, p. 22 (0064).

²⁷² *Ibid.*

²⁷³ *Ibid.*, p. 24 (0066).

²⁷⁴ *Ibid.*, p. 9 (0051).

²⁷⁵ CAR-OTP-0078-0236-R01, p. 5 (0240).

²⁷⁶ *Ibid.*, p. 6 (0241).

- [REDACTED]²⁷⁸
- [REDACTED]²⁷⁹

235. In addition to asking numerous leading questions, the Prosecution also reformulated the witnesses' evidence in a way that fit its case. [REDACTED]²⁸⁰. [REDACTED]²⁸¹ [REDACTED]²⁸²

236. Last but not least, the Prosecution repeatedly kept asking the same question to the witnesses, until it got the answer it was hoping for. [REDACTED],²⁸³ [REDACTED].²⁸⁴

237. [REDACTED],²⁸⁵ [REDACTED].²⁸⁶ [REDACTED]²⁸⁷ [REDACTED].²⁸⁸

238. The behaviour of the Prosecution when interviewing D-2 and D-3 must be regarded in light of the "Guidelines on Witness Preparation" decided by Trial Chamber V in the *Ruto and Sang* case stating that during witness preparation, the questioning lawyer should not "seek to influence the substance of the witness' answers, either directly or indirectly" including by "leading the witness in an inappropriate way".²⁸⁹

e. The Prosecution's evidence lacks probative value as it is provided by witnesses who are stating having lied under oath

239. The fact that both witnesses recognise having lied while under oath as a result of having been given money and other advantages affects the reliability of their evidence. In addition, their position in the present case is one of accomplice to the crimes charged, as they were the principal perpetrator of the event – to give false evidence in Court – which underlines the totality of the allegations against Mr. Arido.

²⁷⁷ *Ibid.*, pp. 10-11 (0245-0246).

²⁷⁸ CAR-OTP-0078-0218-R01, p. 7 (0224).

²⁷⁹ *Ibid.*, p. 15 (0232).

²⁸⁰ CAR-OTP-0080-0021, p. 11 (0031). (emphasis added)

²⁸¹ CAR-OTP-0080-0043, p. 8 (0050).

²⁸² CAR-OTP-0078-0218-R01, p. 18 (0235).

²⁸³ CAR-OTP-0080-0021, p. 22 (0042).

²⁸⁴ CAR-OTP-0080-0135, p. 8 (0142).

²⁸⁵ CAR-OTP-0080-0021, p. 11 (0031). (emphasis added)

²⁸⁶ CAR-OTP-0080-0043, p. 8 (0050). (emphasis added)

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*

²⁸⁹ ICC-01/09-01/11-524-Anx, para. 27. The Prosecution had filed "Proposed Guidelines on Witness Preparation", where it noted that preparation sessions with witnesses, counsel shall not "seek to influence the substance of the witness' answers, either directly or indirectly", ICC-01/09-01/11-446-AnxA, p. 4.

240. The fact that witnesses allegedly have lied under oath is in and of itself an essential factor that seriously reduces the probative value of any subsequent interview of such witnesses. However, the matter is exacerbated when witnesses claim to have done so because they were promised money or other favourable treatment. [REDACTED].

f. D-2 lied in his interview to the Prosecution

241. D-2's propensity to provide false evidence is further illustrated in his interview to the Prosecution. [REDACTED].²⁹⁰ [REDACTED]²⁹¹ [REDACTED].²⁹²

242. In addition, while he first said that it was [REDACTED] who "briefed him", following the Prosecution's insisting on Mr. Arido, D-2 later said that it was Mr. Arido who told him what to say.

243. Similarly, [REDACTED], D-2 told the Prosecution that [REDACTED].²⁹³ It is quite suspicious that [REDACTED]. While he said that [REDACTED]. The fact that he did not is, to say the least, suspicious. The Arido Defence notes that the probative value of these [REDACTED] is extremely limited in the absence of [REDACTED]. The explanations given by D-2, who clearly lied to the Prosecution during the first interview, cannot be taken as evidence of [REDACTED].

g. Both D-2 and D-3 have an interest in providing false information to the Prosecution

244. Both D-2 and D-3 have an interest in providing false information to the Prosecution, even if this meant unjustifiably incriminating Mr. Arido. While D-3 stated very explicitly that [REDACTED], D-2 admitted [REDACTED].

²⁹⁰ CAR-OTP-0080-0021, p. 22 (0042).

²⁹¹ CAR-OTP-0080-0135, p. 2 (0136): [REDACTED].

²⁹² CAR-OTP-0080-0135, p. 8 (0142).

²⁹³ CAR-OTP-0080-0494.

i. D-3's [REDACTED]

245. When being interviewed by the Prosecution, D-3 stated that [REDACTED].²⁹⁴ [REDACTED].

246. Another witness who testified on behalf of Mr. Bemba in the main case, [REDACTED], informed the Kilolo Defence that [REDACTED].²⁹⁵ [REDACTED].²⁹⁶ [REDACTED].²⁹⁷ [REDACTED].²⁹⁸

ii. D-2's interest [REDACTED]

247. It is clear from D-2's transcription that [REDACTED] are very important for him – according to him, those were the reasons he gave false testimony in the Bemba Case.²⁹⁹ He tells the Prosecution that he is [REDACTED],³⁰⁰ and [REDACTED].³⁰¹ This must be seen in the context of D-2's [REDACTED].³⁰² [REDACTED].³⁰³

248. It should also be noted that, in apparent effort to please the Prosecution, [REDACTED],³⁰⁴ [REDACTED].³⁰⁵

249. D-2 is [REDACTED]. As a result, D-2's evidence must be viewed in light of the fact that [REDACTED] pushed him to allegedly lie under oath before the Court, and that he felt strongly that [REDACTED]. If he was been prepared once to lie in ICC-proceedings to [REDACTED], he certainly would be prepared to do it again, if this would assist him in obtaining that result.

iii. D-2 [REDACTED]

²⁹⁴ CAR-OTP-0078-0184, p. 5 (0188): “ [REDACTED].

²⁹⁵ CAR-D21-0004-0037, p. 4.

²⁹⁶ *Ibid.*, p. 8.

²⁹⁷ CAR-D21-0004-0037, p. 9, 10 (0045, 0046).

²⁹⁸ CAR-D21-0004-0037, p. 9, 13 (0045, 0049).

²⁹⁹ See e.g. CAR-OTP-0080-0021, p. 15 (0035): [REDACTED]; CAR-OTP-0080-0135, p. 11 (0145): [REDACTED]; CAR-OTP-0080-0135, p. 24 (0158): [REDACTED].”

³⁰⁰ CAR-OTP-0080-0159, p. 2 (0160).

³⁰¹ CAR-OTP-0080-0159, p. 3 (0161).

³⁰² Cross-reference to above/below.

³⁰³ CAR-OTP-0080-0159, p. 2 (0160).

³⁰⁴ CAR-OTP-0080-0021, p.22 (0042).

³⁰⁵ CAR-OTP-0080-0494, p. 17 (0510): [REDACTED]. (emphasis added)

250. The Arido Defence submits that D-2 provided false evidence to the Prosecution in an attempt to [REDACTED].

251. D-2 and Mr. Arido [REDACTED].³⁰⁶ D-2 admitted to that in his interview with the Prosecution, [REDACTED],³⁰⁷ [REDACTED]³⁰⁸ and [REDACTED].³⁰⁹ When viewing the interview as a whole, it is obvious that D-2 thought that Mr. Arido [REDACTED].

252. In addition, D-2 [REDACTED].³¹⁰ [REDACTED].³¹¹

253. In view of [REDACTED]³¹² [REDACTED].³¹³ As a result, his evidence must be viewed with abundant caution.

h. It is not convincingly established that D-2 and D-3 lied under oath

254. The case of the Prosecution in relation to Mr. Arido is based on the fact that D-2 and D-3 allegedly lied under oath, giving evidence in relation to the 2002-2003 events in CAR and stating that they were part of the CAR armed forces, [REDACTED]. During their interviews with the Prosecution, both said that they were never in the military. D-2 stated that he [REDACTED],³¹⁴ while D-3 stated that he was [REDACTED].³¹⁵

255. The Arido Defence recalls that according to the Code of Conduct for the Office of the Prosecutor, the Prosecution shall conduct investigations “with the goal of establishing the truth” and must “consider all relevant circumstances when assessing evidence, irrespective of whether they are to the advantage or the disadvantage of the Prosecution”. In addition, it shall ensure that “all necessary and reasonable enquiries are made”.³¹⁶

256. First of all, the Prosecution has provided no evidence that D-2 and D-3 actually lied in Court and were never part of the CAR military. It also failed to provide any evidence of their

³⁰⁶ CAR-OTP-0075-0738-R01 [REDACTED]; CAR-OTP-0075-0761-R01; CAR-OTP-0075-0785-R01; CAR-OTP-0075-0786-R01.

³⁰⁷ CAR-OTP-0080-0043, p. 3 (0045).

³⁰⁸ CAR-OTP-0080-0043, p. 3 (0045).

³⁰⁹ CAR-OTP-0080-0021, p. 20 (0040).

³¹⁰ see CAR-OTP-0075-0761-R01 [REDACTED]; CAR-OTP-0075-0785-R01 [REDACTED]; CAR-OTP-0075-0786-R01 [REDACTED]; CAR-OTP-0075-0789-R01 [REDACTED]. ”)

³¹¹ CAR-OTP-0075-0785-R01 [REDACTED].

³¹² CAR-OTP-0075-0789-R01.

³¹³ CAR-OTP-0080-0135, p. 21 (0155): [REDACTED].

³¹⁴ CAR-OTP-0080-0021, p. 3 (0023).

³¹⁵ CAR-OTP-0078-0178, pp. 3-5 (0180-0182).

³¹⁶ Code of Conduct for the Office of the Prosecutor, paragraph 49.

[REDACTED], or any other documentary evidence asserting that what they told the Prosecution was true. The Arido Defence recalls that the Prosecution must present evidence in relation to each legal requirement of the offence.³¹⁷ In the present case, the existence of a false testimony is at the root of the offences charged, and by failing to provide concrete and tangible proof that D-2 and D-3 in fact lied in Court, the Prosecution failed to meet its burden of proof. As a result, the whole Prosecution case collapses, as there is no evidence that they actually lied in Court. This is of crucial importance in light of the fact that D-2 and D-3's evidence critically lack reliability, as it has been explained above.³¹⁸

257. In addition, D-2 [REDACTED]³¹⁹ [REDACTED].³²⁰ In his words, [REDACTED].³²¹ [REDACTED].³²²

258. Last but not least, D-2 gave a [REDACTED] long interview to the Bemba Defence, where [REDACTED]³²³ [REDACTED].³²⁴ [REDACTED].³²⁵ It is hard to believe that someone could provide such a detailed account without knowing the facts. [REDACTED].³²⁶

259. The Prosecution failed to ask questions which were crucial to establish the truth, including whether D-2 or D-3 had any document proving their lack of military background, or to undertake investigation on this question, for instance by asking other witnesses about them. As a result of the Prosecution's failure, the Pre-Trial Chamber is left without information crucial to its determination pursuant to Article 61 (7) of the Statute.

260. The Arido Defence is not arguing that D-2 and D-3 testified truthfully, neither can such burden be put on the Defence. The Prosecution carries the burden of proof fully and unconditionally.

261. What matters is that in its investigations, the Prosecution appears convinced that witnesses D-2 and D-3 have committed perjury at the instruction of – among others – Mr. Arido. In its investigations, the Prosecution steered the interrogation in the direction of

³¹⁷ ICC-01/05-01/08-424, paras 206-209, 299-300, 311-312.

³¹⁸ See *supra*, paras 211-262.

³¹⁹ CAR-OTP-0080-0021, p. 9 (0029): [REDACTED]

³²⁰ CAR-OTP-0080-0021, p. 9 (0029): [REDACTED]

³²¹ CAR-OTP-0080-0021, p. 11 (0031).

³²² CAR-OTP-0075-0785-R01 [REDACTED]; CAR-OTP-0075-0786-R01 [REDACTED]; [REDACTED].

³²³ CAR-D21-0004-0463, p. 2 (0464): [REDACTED]

³²⁴ CAR-D21-0004-0463, p. 45 (0507).

³²⁵ CAR-D21-0004-0463, p. 57 (0519): [REDACTED]

³²⁶ CAR-D21-0004-0463, p. 59 (0521).

confirmation of this assumption. However, the Prosecution failed to critically challenge the witnesses' answers and failed to put to them the most basic and logical questions. This is not limited to the issues above, but one also wonders why the Prosecution has not focused on the specifics of the perjury and illegal coaching. For example, why not ask the witnesses more and in depth about the specific questions and specific answers they were supposed to give during questioning at the ICC?

262. The defective and superficial approach by the Prosecution in respect of D-2 and D-3 should not be without consequences. In case the Pre-Trial Chamber would not rule the statements of D-2 and D-3 to be inadmissible or to lack probative value, it has no other choice - according to the Arido Defence - than to rule in the alternative that there is no evidence that D-2 and D-3 have committed perjury. This finding, inevitably, has consequences for the allegations, in fact and in law, against Mr. Arido.

3. Finding false witnesses

263. According to the Prosecution, [REDACTED] had instructed Mr. Arido to identify individuals to be presented falsely as witnesses in the Bemba case.³²⁷ To support this allegation, the Prosecution relies on D-3's evidence as well as on two email exchanges.

264. It must be noted that it is not a crime for a Defence team to identify and approach witnesses capable of supporting its case, and to be assisted by others in this endeavour. Rather it would be a violation of professional obligations if counsel were to find and call a witness knowing he/she is likely to give evidence incriminating the client.³²⁸ Once a potential useful witness has been identified, a Defence team is at liberty to persuade that witnesses to cooperate in giving evidence at the ICC. There is no subpoena power for the Court, on account of Article 93 (1) (e) of the Statute, and the Defence is not in a position to directly request a state to take the witness statement, a power which is only available to Chambers and the Prosecution pursuant to Article 93 (1) (b). Hence, especially for the Defence, the persuasion of witnesses is an important matter - which may be further complicated by a witness being reluctant or afraid to testify - and there is nothing wrong with resorting to several methods of persuasion, as long as this is within the limits of the law. For a fact, the Prosecution also uses a variety of means to persuade its witnesses to cooperate in testifying.

³²⁷ DCC, para. 28.

³²⁸ See e.g. Code of Professional Conduct for Counsel, ICC-ASP/4/Res.1, Art. 14 (2) (a), 16, 24 (2).

265. The Arido Defence notes that, as explained above in paragraph 125 and below in paragraphs 292 to 297, that matters such as the payment of expenses as well as pointing out to the (potential) witness the possibility to exercise the fundamental right to apply for asylum, while giving testimony at the seat of the Court, are lawful and legitimate matters of discussion between a witness and a party in proceedings at the Court. Therefore, certain promises in this respect, depending in their precise formulation, fall by far short of any of the offences set out in Article 70.

266. It is regrettable that the Prosecution has, in the present case, lost sight of this general background to the realities of Defence work, in which, furthermore, misunderstandings between counsel and witnesses can arise. It is also regrettable that the Prosecution has failed to take into account that Mr. Arido has no legal knowledge, let alone knowledge of the ICC framework and that therefore, his knowledge of the ins and outs of the procedure is non-existent.

267. Thus, even if one were to accept that Mr. Arido served some role as intermediary for the Bemba Defence team in finding useful witnesses, he cannot be expected to exactly know, without adequate instructions, what type of conduct is permissible and not. Clearly, on account of its own experience with intermediaries, the Prosecution would wholeheartedly agree with this assertion.

268. While one could emphasise the maxim *ignorantia juris non excusat*, a mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime.

269. It is against the aforementioned background that the Arido Defence now moves to challenge of Prosecution evidence regarding finding and corruptly influencing witnesses.

270. The Prosecution refers to a [REDACTED] email from Mr. Arido to Mr. Kilolo, [REDACTED].³²⁹ While it may be possible that [REDACTED] was the person who put Mr. Kilolo in touch with Mr. Arido, it does not constitute evidence that [REDACTED] put Mr. Arido in charge of finding “false” witnesses. To the contrary, when put into its context, it relates to the fact that Mr. Arido did not come to testify as a result of his security concerns and resulting frustrations with Mr. Kilolo and the ICC for failing to take action.³³⁰

³²⁹ CAR-OTP-0075-0848.

³³⁰ See *supra*, paras 174-183; see e.g. CAR-OTP-0075-0751-R01 [REDACTED].

271. The Prosecution also relies upon [REDACTED].³³¹ [REDACTED].³³² Again, there is no reference to the provision of false evidence before the ICC.

272. The other evidence cited by the Prosecution relate to [REDACTED] alleged presence at the February 2012 meeting in Douala³³³ and to email exchanges between Mr. Arido and [REDACTED], which say nothing about the ICC or the Bemba case.³³⁴

273. While the use of circumstantial evidence is permitted, this evidence must still, taken as a whole, show that there are substantial grounds to believe that an offence has been committed. Instead of providing concrete and tangible evidence, the Prosecution presents evidence which, taken at its highest, shows that Mr. Arido assisted the Bemba Defence with finding witnesses – a fact that is not criminal in and of itself. The Prosecution’s attempt to impose its own interpretation as if it were evidence goes against the burden of proof and in particular its obligation to provide concrete and tangible proof underpinning each specific allegation. In the present case, the Prosecution’s case equated mere theory, which does not meet the requisite threshold for the confirmation of charges.³³⁵

4. Bribing witnesses

274. According to the Prosecution, the money received from Nginamau and Babala was used by Kilolo, Babala and Arido to pay D-64, D-57, D-55, D-45, D-29, D-25, D-23, D-6 and D-4.³³⁶ The Prosecution also alleges that these funds were used to pay witnesses and/or their close associates, including D-2,³³⁷ D-3, D-4, D-6,³³⁸ and D-7.³³⁹

275. However, the Prosecution fails to provide evidence that Mr. Arido paid any of the witnesses for them to give false evidence before the Court. All the payments allegedly made by Arido – a grand total of less than 90 euros – were provided to D-2 and D-3 for their

³³¹ CAR-OTP-0075-0752-R01.

³³² *Ibid.*

³³³ CAR-OTP-0078-0218 at 0226, 0229, 0233- 0235.

³³⁴ CAR-OTP-0075-0537-R01.

³³⁵ *See e.g.* ICC-01/04-01/06-803-tEN, para. 37.

³³⁶ DCC, para. 33.

³³⁷ *Ibid.*, para. 74.

³³⁸ *Ibid.*, para. 34.

³³⁹ *Ibid.*

transportation and food, as it explained below. As a result, the Prosecution fails to show substantial grounds that Mr. Arido bribed witnesses.

276. First of all, the names of D-64 [REDACTED], D-57 [REDACTED], D-55 [REDACTED], D-45 [REDACTED], D-29 [REDACTED], D-25 [REDACTED], D-23 [REDACTED], D-6 [REDACTED] appear nowhere in the payment lists of Mr. Arido obtained by the Prosecution. Further, none of them gave evidence to the Prosecution about having received money from Mr. Arido. In fact, D-55, D-57 and D-64 all told the Prosecution that they had never met Mr. Arido,³⁴⁰ and D-25³⁴¹ and D-29³⁴² have provided evidence that they have not been provided, offered or promised money in exchange for false testimony in the Bemba Case.

277. Secondly, regarding D-2 and D-3, the Arido Defence notes that none of them alleges that Mr. Arido paid him in exchange of giving false information to Mr. Kilolo. According to D-2, Mr. Arido gave him:

- i. 15,000 CFA (22,8 euros) on the day they arrived in Douala, for the bus trip;³⁴³
- ii. 10,000 CFA (15,24 euros) on the next day, to buy food;³⁴⁴
- iii. 10,000 CFA (15,24 euros) on the last day, for the transportation back [REDACTED].³⁴⁵

278. D-3 told the Prosecution that Mr. Arido gave him:

- i. [REDACTED] for his transportation [REDACTED] before going to Douala in February 2012;³⁴⁶
- ii. 10,000 CFA (15,24 euros) in [REDACTED] for his transportation to go back from Douala [REDACTED],³⁴⁷
- iii. 10,000 CFA (15,24 euros) at an unknown date but after February 2012, for his transportation.³⁴⁸

³⁴⁰ D-55, see CAR-OTP-0074-0872 (translation of CAR-OTP-0074-0860), p. 10; D-56, see CAR-OTP-0077-0149, pp. 6-7 (0154-0155); D-64, see CAR-OTP-0074-1112, p. 11.

³⁴¹ CAR-D21-0004-0211, p. 6

³⁴² CAR-D21-0004-0581, p. 7.

³⁴³ CAR-OTP-0080-0021, p. 12 (0032).

³⁴⁴ *Ibid.*, p. 16 (0036).

³⁴⁵ *Ibid.*, p. 18 (0038).

³⁴⁶ CAR-OTP-0078-0218, p. 4 (0221); CAR-OTP-0078-0264, p. 17 (0280).

³⁴⁷ CAR-OTP-0078-0184, p. 9 (0192).

³⁴⁸ CAR-OTP-0078-0248, pp. 4-5 (0251-0252).

279. In sum, Mr. Arido allegedly gave 35,000 CFA (53,35 euros) and [REDACTED] to D-2 and D-3, for their food and transportation. There is nothing criminal in this.

280. Thirdly, regarding D-4,³⁴⁹ The Prosecution states that “ARIDO offered D-4 money in exchange for falsely testifying and directed him to lie about being in the CAR armed forces.”³⁵⁰ However, D-4 gave evidence to the Kilolo Defence that he was not promised any money nor was he told what to say³⁵¹ and that the only money he was given was for his transportation.³⁵² The Prosecution fails to demonstrate that the [REDACTED] payment made by Mr. Arido to D-4 [REDACTED] was in any way related to the Bemba case.

281. Fourthly, regarding D-7, the Arido Defence notes that the alleged payments are dated of [REDACTED]³⁵³ – a time where Mr. Arido had not met Mr. Kilolo, and a time that is outside of the scope of the DCC. In any event, the Prosecution fails to provide any evidence that these payments were in any way related to the Bemba case.

282. The Arido Defence notes the Prosecution’s allegation that “NGINAMAU, F. BEMBA, C. BEMBA provided sums of money regularly to KILOLO, MANGENDA, ARIDO & [REDACTED]”³⁵⁴ and that “ARIDO was provided funds by the other co-perpetrators and other persons involved in implementing the common plan including KILOLO, BABALA, NGINAMAU and [REDACTED].”³⁵⁵

283. At the outset in respect of this allegation, it should be recalled that Mr. Arido provided the Bemba Defence with an expert report for which he received a mutually agreed upon sum of money.³⁵⁶ Clearly, it was not a matter of concern for Mr. Arido – nor should it be - that he received this sum not only from Mr. Kilolo but also other sources.

284. The Arido Defence notes that no payment from F. Bemba or C. Bemba have ever been made to Mr. Arido, and that only two payments have been made by Nginamau to Mr. Arido, one of 100 USD on 27 January 2012 and one of 1,264 USD on 22 September 2012.

³⁴⁹ DCC, para. 80.

³⁵⁰ *Ibid.*

³⁵¹ CAR-D21-0004-0310, p. 10 (0319).

³⁵² [REDACTED]. CAR-D21-0004-0310, p. 10 (0319).

³⁵³ CAR-OTP-0073-0033, p. 1 (0033), row 11, p. 3 (0035), rows 1-2.

³⁵⁴ DCC, para. 28.

³⁵⁵ DCC, para. 34.

³⁵⁶ *See supra*, Part VI-A, paras 121-129.

285. The Prosecution fails to provide any evidence that this money was sent in order to assist in a criminal scheme aiming to obtain false evidence for the Bemba Defence. The Arido Defence notes that the first payment was made shortly after the first contact between Mr. Arido and Mr. Kilolo, to permit Mr. Arido to pay for his transportation to [REDACTED] to meet Mr. Kilolo. The second one, as explained in further details above, was made in order to cover Mr. Arido's loss of income during his scheduled testimony in The Hague.³⁵⁷ On 2 and 14 February 2012, Mr. Kilolo gave 157.77 and 157.11 USD respectively. He also transferred 450 USD to Mr. Arido on 20 April 2012. On [REDACTED] transferred [REDACTED] to Mr. Arido. The Prosecution fails to provide any evidence linking the wire transfer made by [REDACTED] to Mr. Arido with the Bemba case. The payments from Mr. Kilolo were related to Mr. Arido travel to Doula, that is his transport, food, accommodation and loss of earnings to meet Mr. Kilolo and discuss the expert report.

286. The Prosecution also refers to a 4,744 USD payment of Mr. Babala to Mr. Arido on 25 May 2012,³⁵⁸ which it alleges was made in furtherance of the common plan. However, as explained above, this payment was made on behalf of Mr. Kilolo as payment for Mr. Arido's expert report.³⁵⁹

287. The Prosecution fails to provide specific and substantiated evidence that Mr. Arido paid any of the prospective witnesses, as the only evidence it provides relates to less than 90 euros being given to D-2 and D-3 over the course of several months, to pay for their transportation and food.

5. Making promises in exchange for false testimony

288. The Prosecution alleges that Mr. Arido made promises improperly to prospective witnesses to encourage them to testify falsely.³⁶⁰

³⁵⁷ *Ibid.*, paras 124-126.

³⁵⁸ DCC, para. 32, citing to CAR-OTP-0070-0005, tab 1 Narcisse Arido, rows 3, 78. The Arido Defence notes that the name of Babala only appears once, at row 78. Row 3 refers to a payment sent by Mr. Arido's relative, [REDACTED].

³⁵⁹ *See supra*, Part VI-A, paras 121-12; *see also* Mr. Arido's interview with the French judicial authorities and OTP on 23 November 2013, CAR-OTP-0074-1065-R01, p. 2 (1066): [REDACTED].

³⁶⁰ DCC, para. 35.

289. D-2 and D-3 are the only witnesses talking about Mr. Arido's making promises to them. As far as the status as well as the probative value of their interviews are concerned, the Arido Defence refers to its submissions above in paragraphs 211 to 262.

290. If the Pre-Trial Chamber were to make use of D-2 and D-3's interviews on this particular matter, the language attributed to Mr. Arido contains important nuances which are ignored in the DCC. It must be noted that Mr. Arido only talks about possibilities and does not effectively promise relocation or money. According to D-2, he talked about a [REDACTED],³⁶¹ [REDACTED].³⁶² [REDACTED].³⁶³ A third time, following the Prosecution's insistence and the leading questions of the investigator, reformulating what D-2 said in a way that suits their case better [REDACTED],³⁶⁴ D-2 stated "[REDACTED]."³⁶⁵ Of course, the Prosecution relies on this last answer, alleging that Mr. Arido told D-2 that [REDACTED].³⁶⁶

291. It shall also be noted that according to D-3's evidence, all that Arido told him was that they have an "opportunité de se faire **un peu** d'argent"³⁶⁷ and that [REDACTED].³⁶⁸ [REDACTED].³⁶⁹ This does not constitute a promise of relocation or money, nor does it refer to the provision of false testimony.

292. The Arido Defence submits that telling people about the possibility of relocation as a result of a testimony before the ICC cannot be said to amount to an improper promise. The Prosecution itself informs its potential witnesses of the fact that the ICC has a victims and witnesses' unit section which can provide for security measures, including relocation.³⁷⁰

293. It is important to put the alleged comments of Mr. Arido into their proper context: most of the [REDACTED] potential witnesses were [REDACTED],³⁷¹ and the potential testimony to be given related to Mr. Bemba – someone perceived negatively in the region. In this context, it appears normal that, if proven that Mr. Arido in fact approached potential witnesses, he would tell people of whom he knew the background and concerns that in providing evidence

³⁶¹ CAR-OTP-0080-0021, p. 10 (0030). (emphasis added)

³⁶² CAR-OTP-0080-0021, p. 11 (0031). (emphasis added)

³⁶³ CAR-OTP-0080-0043, p. 8 (0050). (emphasis added)

³⁶⁴ *Ibid.*, p. 8 (0050).

³⁶⁵ *Ibid.*

³⁶⁶ DCC, paras. 35, 74.

³⁶⁷ CAR-OTP-0078-0184, p. 6.

³⁶⁸ *Ibid.*

³⁶⁹ CAR-OTP-0078-0206, p. 12 (0217) (emphasis added).

³⁷⁰ See e.g. with D-2, CAR-OTP-0080-0007, p. 9 (0015): [REDACTED] (emphasis added)

³⁷¹ See e.g. CAR-D24-0001-0009; CAR-D24-0001-0016; CAR-D24-0001-0018; CAR-D24-0001-0023; CAR-D24-0001-0028.

for the Bemba Defence team, there is a possibility that the Court orders their relocation. Again, while the wording allegedly used may not have been that of a lawyer or an investigator, it cannot be said to amount to a promise.

294. As far as the alleged promise of a stay and/or asylum is concerned, the following must be borne in mind. There is no promise of asylum but merely a reference to the possibility or opportunity to request asylum. Such information is harmless and fully correct. What is more, not only can ICC witnesses apply for asylum, two ICC witnesses have in fact obtained full residence status as an asylum seeker in the Netherlands.³⁷² By and of its nature, informing potential witnesses of the possibility to apply for asylum in Europe cannot amount to an improper promise; nor is it a form of deception – or raising false expectations – as all applications for asylum by non-detained ICC-witnesses who have until this day be made have been granted by the Dutch authorities.

295. The Arido Defence is aware of the part of D-3's interview in which he claims that Mr. Arido would have told him that even "if we lie, we will be assisted by a lawyer who will defend us".³⁷³ The Arido Defence again refers to its arguments regarding admission and probative value of D-2 and D-3's statements.³⁷⁴

296. Even if the Pre-Trial Chamber were to consider this part of the interview to be true, it is not indicative of any promise in exchange for false testimony. Although a context is missing, the Arido Defence understands this to serve [REDACTED].

297. There is nothing wrong with informing a potential witness about the [REDACTED]. The Arido Defence further points out that the language 'even if we lie (...)' indicates that false testimony is an exceptional and undesirable situation which is not supposed to happen.

6. Instructing witnesses on what to say in Court ("illicit coaching")

298. First of all, the Arido Defence notes that the crime of "illicit coaching" does not appear under Article 70 of the Statute and the Prosecution fails to explain under which Article 70 offence this allegation falls. As a result, Mr. Arido is not able to defend himself, as he does not

³⁷² Counsel for Mr. Arido represents both these witnesses and can - if this information were to be challenged-present evidence in support of this fact. He refrains from doing so at this stage, with a view to protecting confidential information and avoiding the efforts to insert the necessary redactions.

³⁷³ CAR-OTP-0078-0218, p. 17 (0234).

³⁷⁴ See *supra*, paras 211 to 262.

know which crime he is alleged to have committed. In light of the absence of proper notice on the part of the Prosecution, this allegation must be disregarded by the Pre-Trial Chamber.

299. In addition, in its DCC, the Prosecution defines “illicit coaching” as:

instructing witnesses on what to say when questioned in court, including scripting their evidence, dictating and rehearsing false answers and/or questions to be posed by the parties and participants in the *Bemba* case, or to contested issues in the trial proceedings, **shortly before or after** witnesses had been administered the solemn undertaking under Article 69(1) of the Statute and Rule 66 of the Rules (“illicit coaching”).³⁷⁵

300. The Prosecution cites to the partly dissenting opinion of Judge Eboe-Osuji to the Trial Chamber V Decision on witness preparation in the *Ruto and Sang* case, wherein he held that “Witness coaching may be defined as preparing the witness in a manner that involves improper influence upon the witness, **intentionally exerted by counsel**, with the view to rendering false evidence into testimony. As far as it goes, coaching is truly subornation of perjury, since the witness is being fraudulently manipulated to give testimony that is false”.³⁷⁶

301. Although the matter of individual responsibility is dealt with in details in Part VII below (paragraphs 319 to 350), the Arido Defence wishes to already points out at this stage that subornation of perjury is a mode of liability which exists in the US and Scotland and amounts to persuasion to commit perjury. It is defined as follows:

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned not more than five years, or both.³⁷⁷

302. This mode of liability of perjury is not available under the Statute, for reasons explained above in paragraphs 91 to 96. Thus no charge can be formulated against any suspect for subornation of perjury.

303. Notwithstanding this fact, if one were to construe the constitutive elements of the ‘crime’ of illicit coaching, two constitutive elements exist:

- i. It has to take place “shortly before or after” the witness testifies; and
- ii. It can only be done by “counsel”.

³⁷⁵ DCC, para. 22, bullet point N. 3. (emphasis added)

³⁷⁶ DCC, para. 22, bullet point N. 3, fn. 40, citing to ICC-01/09-01/11-524, para. 27. (emphasis added)

³⁷⁷ Title 18 of the United States Code, Section 1622, *supra* fn. 87.

304. According to D-2 and D-3, the alleged “coaching” took place in February 2012. Both testified in the main case in June 2013.³⁷⁸ Clearly, more than [REDACTED] before the alleged testimony cannot be said to qualify as “shortly before” D-2 and D-3’s testimonies. Further, Mr. Arido was never a counsel on the Bemba Defence team. In fact, he was never a member of the team. His only relationship to the team was the provision of an expert report on the strategic planning of military operations in CAR at the time of the Bemba indictment.

305. As a result, the Prosecution failed to provide evidence in relation to each constitutive elements of the ‘crime’ of “illicit coaching”, thereby failing to establish reasonable grounds to believe that Mr. Arido committed the crime of illicit coaching.

306. In any event, the Arido Defence submits that the evidence provided by D-2 and D-3 – if found credible despite all the above-mentioned issues - does not provide substantial grounds to believe that Mr. Arido committed the alleged ‘crimes’.

307. D-3 said that Mr. Arido only told him that he would introduce him as a “Caporal” to Mr. Kilolo.³⁷⁹ D-3 stated that they did not discuss the details of what had to be said.³⁸⁰ According to D-3, [REDACTED].³⁸¹ D-3 does not remember the substance of what he was allegedly told.³⁸² The Arido Defence submits that this does not constitute substantial evidence that Mr. Arido actually coached witnesses.

308. D-2 said that [REDACTED].³⁸³ He later said that Mr. Arido allegedly told him to say that that he was one of the youth from the MLPC.³⁸⁴ He said that the “biggest” briefing took place at their [REDACTED].³⁸⁵ Even though he had originally said that [REDACTED].³⁸⁶ On his second interview, about a month later, he suddenly stated that it was Mr. Arido who told him in great details what he had to say to Mr. Kilolo, and provided [REDACTED]. In light of the lack of consistency and clarity of D-2’s evidence, it cannot be said to provide substantial grounds to believe that Mr. Arido actually committed the alleged offence.

³⁷⁸ DCC, paras 65, 73.

³⁷⁹ CAR-OTP-0078-0218, p. 8 (0225).

³⁸⁰ CAR-OTP-0078-0206, p. 6 (0211).

³⁸¹ *Ibid.*, pp. 6-7 (0211-0212).

³⁸² CAR-OTP-0078-0218, pp. 9-10 (0226-0227).

³⁸³ CAR-OTP-0080-0021, p. 17 (0037); *see also* CAR-OTP-0080-0043, p. 21 (0064): [REDACTED].

³⁸⁴ CAR-OTP-0080-0043, p. 8 (0051).

³⁸⁵ CAR-OTP-0080-0043, p. 17 (0059).

³⁸⁶ CAR-OTP-0080-0069, p. 11 (0110); p. 15 (0114).

309. The lack of reliability of D-2 and D-3's evidence is further illustrated by the fact that D-4, who, according to both witnesses, was also there when the "briefing meeting" with [REDACTED] took place, said categorically that he was not promised any money nor was he told what to say.³⁸⁷

310. In support of its "illicit coaching" allegation, the Prosecution also refers to a number of e-mails³⁸⁸ none of them related to the provision of false evidence by witnesses. The Prosecution fails to explain their relevance.

311. The Prosecution's also argues that Mr. Arido participated in meeting during which Mr. Kilolo paid witnesses whom Mr. Kilolo had instructed to testify falsely.³⁸⁹ The Arido Defence notes that D-2 did not give evidence that Mr. Arido was present when he met with Mr. Kilolo in Douala,³⁹⁰ and D-3 explicitly stated that Mr. Arido was not there during the alleged interview in February 2012.³⁹¹ The Prosecution also relies on two emails sent from Mr. Arido's email address to Mr. Kilolo on [REDACTED],³⁹² to D-2 on [REDACTED],³⁹³ as well as one email from D-2 to Mr. Arido on [REDACTED].³⁹⁴ None of them relate to the alleged illicit witness coaching. The Prosecution fails to explain how these three emails provide substantial grounds to believe that Mr. Arido participated in meetings where witnesses were allegedly briefed by Mr. Kilolo.

312. The Prosecution also relies on an [REDACTED] email from D-2 to Mr. Arido³⁹⁵ where the former tells him that [REDACTED].³⁹⁶ However, the Prosecution takes this email out of its context, presumably to give the impression that Mr. Arido gave instructions to D-2 regarding his testimony. However, this email from D-2 was in response to an earlier email of Mr. Arido of the same day, where Mr. Arido was talking about [REDACTED]. As explained above, D-2 was [REDACTED].³⁹⁷ In the email, Mr. Arido tells D-2 that he knew that [REDACTED], and

³⁸⁷ CAR-D21-0004-0310, p. 10 (0319).

³⁸⁸ DCC, para. 29.

³⁸⁹ DCC, para. 117.

³⁹⁰ CAR-OTP-0080-0021, p.16 (0036); CAR-OTP-0080-0069, p. 3 (0071).

³⁹¹ CAR-OTP-0078-0236, p. 4 (0239).

³⁹² CAR-OTP-0075-0848.

³⁹³ CAR-OTP-0075-0762-R01.

³⁹⁴ CAR-OTP-0075-0763-R01.

³⁹⁵ DCC, para. 117.

³⁹⁶ CAR-OTP-0075-0763-R01.

³⁹⁷ See *supra*, paras 251-253.

advises D-2 to [REDACTED].³⁹⁸ He then tells D-2 that Mr. Kilolo would be in [REDACTED], but tells D-2 that [REDACTED].³⁹⁹

313. It must also be noted that earlier, in [REDACTED], Mr. Arido had informed D-2 that he withdrew from the Bemba case because of his security concerns and the lack of protection from Mr. Kilolo and the ICC, telling D-2 “[REDACTED]”.⁴⁰⁰ Instead of supporting the Prosecution’s case that Mr. Arido was part of a common plan to provide Defence witnesses for Mr. Bemba in order to defend him, this directly contradict the information provided to the Prosecution by D-2: instead of encouraging witnesses to testify for the Bemba Defence, Mr. Arido was trying to discourage D-2 to testify on behalf of the Bemba Defence.

7. Conclusion on witnesses

314. The obstacles are numerous and insurmountable for the Pre-Trial Chamber to find that there are substantial grounds to believe that Mr. Arido bribed or coached witnesses to give false evidence. The Prosecution (via its investigators) has used unlawful investigative methods in its dealings with and interrogation of D-2 and D-3. It has, among other things, misled D-2 and D-3, has engaged in [REDACTED], and has used an oppressive and leading line of questioning, steering the interview in the direction of obtaining evidence incriminating Mr. Arido. The Prosecution has knowingly and wilfully disregarded its obligation to search for the truth in an objective manner and Mr. Arido’s right to a fair trial.

315. Both in isolation and viewed together, the unlawful investigative methods should result in excluding the D-2 and D-3 interviews from the evidence, pursuant to Article 69 (7) and/or Article 69 (4) of the Statute.

316. In case the Pre-Trial Chamber would still admit these interviews it is submitted on the basis of the foregoing that the statements both intrinsically and in light of the totality of the evidence lack probative value, to such a degree that they cannot be relied upon with a view to confirm any of the charges against Mr. Arido. In this respect it is repeated that, among other things, D-2 and D-3 are regarded by the Prosecution as lying witnesses in the Bemba case and they continue to lie in their statements to the Prosecution. Furthermore, both D-2 and D-3

³⁹⁸ CAR-OTP-0075-0762-R01.

³⁹⁹ *Ibid.*

⁴⁰⁰ CAR-OTP-0075-0567-R01.

have an interest in providing evidence against Mr. Arido – in addition of doing so to avoid being prosecuted themselves – [REDACTED].

317. In case the Pre-Trial Chamber would in spite of the foregoing still choose to rely on (parts of) the interviews of D-2 and D-3, it is submitted that their evidence does not show any illegitimate payment made by Mr. Arido, nor does it establish substantial grounds to believe that Mr. Arido improperly promised them things in exchange for false testimony and illicitly coached them.

D. Conclusion on the factual submissions

318. On the basis of the above, the Arido Defence submits that the evidence presented by the Prosecution, taken as a whole, fails to meet the requisite standard to confirm the charges.

VII. INDIVIDUAL CRIMINAL RESPONSIBILITY

A. Preliminary Arguments

319. In its DCC, the Prosecution charges Mr. Arido with modes of liability under Article 25 (3) (a), (b), (c) and (d).

320. The charges in respect of each mode of liability are based on evidentiary assumptions by the Prosecution, which fail to meet the applicable standard of proof, as described in Part VII above.

321. The Mr. Arido Defence has asserted in Part V that significant portion of the evidence brought by the Prosecution is not relevant in light of the scope of application of Article 70-offences; it has also argued in Part VI-C-2 why certain evidentiary items should not be admitted; in Part VI, it has been concluded that an analysis of the totality of the evidence referred to by the Prosecution in the DCC shows it is far from constituting substantial grounds to believe that Mr. Arido committed the alleged offences.

322. As a result of the foregoing, the Prosecution has brought no relevant evidence allowing the Pre-Trial Chamber to establish substantial grounds to believe that Mr. Arido committed any of the crimes charged. Nevertheless, the Arido Defence intends to challenge the Prosecution's submissions regarding individual criminal responsibility on a number of additional grounds. Before it does so, a few preliminary observations are in order.

323. As a first preliminary observation, the Mr. Arido Defence repeats that in accordance with Articles 66 (2) and 67 (1) (i) of the Statute, the burden of proving any of the modes of individual criminal responsibility is fully and unconditionally on the Prosecution. It notes that other than for Article 25 (3) (a), the Prosecution fails to articulate the constitutive elements of the modes of liability and to provide evidence in support of each element of the mode of liability.

324. The second preliminary observation is a reminder of the rules of interpretation, especially Article 22 (2) of the Statute. The fundamental rule embodied in this provision imposes the obligation on the Pre-Trial Chamber to interpret crimes restrictively and in case of ambiguity

and opt for an interpretation in favour of the suspect, in accordance with the principle *in dubio pro reo*.

325. There can be little doubt that the fundamental principle set out in Article 22 (2) of the Statute applies with equal force in relation to the definition of criminal responsibility.⁴⁰¹

326. It is to be noted that the Prosecution makes no reference in its DCC to Article 22 (2) Statute or in any other way exercises caution in applying Article 25 to this case. Rather, and suprisingly, the Prosecution fully applies the modes of liability set out in Article 25 to offences against the administration of justice, whereas this is inconsistent with both the letter of art 25 of the Statute, and Article 70 of the Statute, as well as with the vital conceptual distinction between Article 5-crimes and Article 70-offences. This matter will be further addressed in the next section.

B. The modes of liability listed in Article 25 do not apply in respect of Article 70 offences

327. For the following reasons, Article 25 cannot be applied to Article 70 offences.

1. The wording of the Statute makes it clear that Article 25 does not apply to Article 70-offences

328. To start with, a mere textual reading of the Statute shows unequivocally that Article 25 is inapplicable to Article 70-offences.

329. First of all, Article 70 (1) reads “The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally”. The French version reads “La Cour a compétence pour connaître des atteintes suivantes à son administration de la justice lorsqu’elles sont commises intentionnellement”. It is clear that only the direct commission of the offences, with the criminal intention to commit them, is the mode of liability applicable to Article 70 offences. Had it been otherwise, the Article would not use this wording and refer to the modes of liability contained in Article 25.

⁴⁰¹ ICC-01/04-02/12-4 (Concurring Opinion of Judge Christine Van den Wyngaert), paras 18-19; *also see* William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: OUP 2010), p. 410.

330. In addition, Article 25 (2) and (3) of the Statute refer to *crimes* (“crimes” in French, “crímenes” in Spanish) within the jurisdiction of the Court. The conduct referred to in Article 70 is, however, not a *crime* but an *offence* (“atteintes” in French, “delitos” in Spanish), and thus falls outside the scope of Article 25.

331. The Arido Defence recalls that the ICC Statute is an international treaty, and as such its interpretation is subjected to the Vienna Convention on the Law of Treaties (‘VCLT’).⁴⁰² Article 31 of the Vienna Convention of the Law of the Treaties provides for the internationally recognised rule on interpretation of treaties, and states that “[a] treaty shall be interpreted in good faith in accordance **with the ordinary meaning** to be given to the terms of the treaty in their context and in the light of its object and purpose”.⁴⁰³ The Arido Defence submits that the fact that the modes of liability listed in Article 25 do not apply to Article 70 offences is clear if one looks at the ordinary meaning, but also at the object and purpose of the distinction between Article 5 crimes – dealing with the most serious international crimes – and Article 70 offences – dealing with offences against the administration of justice.

332. Thirdly, the fact that the drafters of the Statute intended to create for Article 70 - offences a separate and self-contained regime – unconnected to Part III of the Statute - also follows from other elements distinguishing Article 70-offences from the Court’s ‘core crimes’.

333. As referred to above, contrary to the Article 5-crimes, Article 70 includes in the definition the applicable mens rea-standard: ‘when committed intentionally’. Hereby, Article 70-offences, as *lex specialis*, fall outside the scope of application of Article 30 of the Statute, which discusses the mental element of crimes within the jurisdiction of the Court. Reference to ‘intentionally’ in Article 70 of the Statute would indeed have been redundant and illogical if drafters would consider Part III, including Article 30, applicable.

334. Fourthly, from the perspective of a systematic interpretation of the Statute as a whole it is also self-evident that Article 70-offences do not fall within the scope of application of Part III of the Statute. There can, for example, be no doubt that command responsibility (Article 28)

⁴⁰² "The interpretation of treaties, and the Rome Statute is no exception, is governed by the Vienna Convention of the Law of the Treaties (23 May 1969)," ICC-01/04-168 (Appeal Chamber), para. 33.

⁴⁰³ Vienna Convention on the Law of Treaties, Art.31 (1), available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>. (emphasis added)

and non-applicability of statutes of limitations (Article 29) do not apply to Article 70-offences.⁴⁰⁴

335. It is clear that Part III of the Statute has been drafted exclusively for the application in respect of Article 5-crimes, and that Article 70-offences have been deliberately placed in Part VI of the Statute. They should be treated as a self-contained regime as pertains to both definition and modes of liability. This is further evidenced by paragraph 2 of Article 70, which states that the **principles and procedures** governing the Court's exercise of jurisdiction over offences under this Article will be provided in the Rules of Procedure and Evidence. (emphasis added)

2. The Prosecution should not be permitted to rely on common plan liability, or other extended forms of co-perpetration, in respect of Article 70-offences

336. As far as Article 25 is concerned, its definition has been inspired by the unique characteristics of international crimes.⁴⁰⁵ The Article 5-crimes can be referred to as so-called system criminality; there is a long and fiercely conducted debate in international criminal justice regarding the question if and how those behind the scenes – the *Hinterman*, 'intellectual authors', or 'masterminds' – can be held accountable for commission of Article 5-crimes.⁴⁰⁶

337. It is widely known that modes of responsibility which serve the purpose to hold a wide group of persons criminally accountable for 'core crimes', such as joint criminal enterprise at the *ad hoc* Tribunals and co-perpetration under Article 25 (3) (a) of the Statute, continue to divide both practitioners and scholars in the field of international criminal justice.⁴⁰⁷

⁴⁰⁴ Declaration rendered by the representative of Republic of Korea, 2nd meeting Tuesday, 16 June 1998, para. 48, available at http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf; see also the declaration rendered by the Chairman (Canada), which, summarizing the proceedings, stated that: "*many delegations were opposed to a statute of limitations with respect to core crimes, although some distinguished between war crimes and other core crimes. While some delegations thought that the complementarity principle was relevant to the issue, others disagreed in view of the seriousness of the crimes in question. Related issues such as the need to ensure a speedy and fair trial had been raised, as had the point that offences under article 70 should be dealt with differently*", 2nd meeting of the Committee of the Whole, Tuesday 16 June 1998, para. 74, available at http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf.

⁴⁰⁵ See K. Ambos, Article 25: Individual Criminal Responsibility, in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Hart Publishing 2nd ed. 2008), at p. 743.

⁴⁰⁶ See e.g. on system criminality: A. Nollkaemper and H. Van der Wilt (eds.), *System Criminality in International Law* (Cambridge University Press 2009).

⁴⁰⁷ It exceeds the scope of these submissions to mention all (critical) literature; as examples: J.D. Ohlin, 'Searching for the Hinterman – In Praise of Subjective Theories of Imputation', 12 *JICJ* (2014), pp. 325 – 343; E. Van Sliedregt, 'The Curious Case of International Criminal Liability', 10 *JICJ* (2012), pp. 1171 – 1188; S. Wirth, 'Co-perpetration in the *Lubanga* Trial Judgement', 10 *JICJ* (2012), pp. 971 – 995; Héctor Olásolo, 'Joint Criminal Enterprise and its Extended Form: A Theory of Co-Perpetration Giving Rise to Principal Liability, a Notion of Accessorial Liability, or a Form of Partnership in Crime?' (2009) 20 *Criminal Law Forum* 264; Wirth, Steffen *Journal of International Criminal Justice*, 2012, Vol. 10(4), pp.971-995, Oxford University Press; Individual Criminal Responsibility in International Criminal Law: Joint criminal enterprise or co-perpetration? Falch, Helene

338. The Arido Defence wishes to point out that the ICC Appeals Chamber has yet to pronounce itself on the legality and scope of application of the common plan - responsibility under Article 25 (3) (a) of the Statute. It further notes that responsibility on the basis of a common-plan has been criticised in individual opinions as an unacceptable expansion of the application of Article 25 (3) (a) of the Statute.⁴⁰⁸ As a result, already in respect of Article 5-crimes, the common plan - responsibility is controversial and not yet definitively settled in ICC jurisprudence. In this light, it is simply wrong to extend and apply lock-stock-and-barrel the common plan-responsibility to Article 70-offences.

339. Even if one were to justify expanded notions of responsibility, such as JCE or common plan-liability, such a justification is inevitably rooted in the unique characteristics of international crimes.⁴⁰⁹ Among these unique characteristics one can mention the extreme gravity of the crimes, the magnitude and systematic nature of criminal conduct, and the high number of individuals involved in its commission. None of these apply to the commission of Article 70-offences.

340. The Appeals Chamber has already made it clear that Article 70-offences are of less gravity than Article 5-crimes.⁴¹⁰ This implies that modes of liability which are in significant part rooted in the gravity of Article 5-crimes cannot be applied to Article 70-offences. This is clear for command responsibility and should equally apply to common plan-liability.

341. In its DCC the Prosecution has ignored the important conceptual distinctions to be made between Article 5-crimes and Article 70-offences and the consequences for individual criminal responsibility.

342. This important conceptual distinction is explicitly made at other international criminal tribunals. At the ICTY, and also ICTR, the Statute provides for criminal liability for core crimes

Julie 2011; Norwegian Open Research Archives (NORA); Shaping the Spiderweb: Towards the Concept of Joint Commission Through Another Person Under the Rome Statute and Jurisprudence of the International Criminal Court Čerņić, Jernej Criminal Law Forum, 2011, Vol.22(4), pp.539-565, Springer Science & Business Media B.V.

⁴⁰⁸ Concurring Opinion Judge Christine Van den Wyngaert, Ngudjolo Judgement, 18 December 2012, ICC-01/04-02/12-4, paras 18, 35 and 36.

⁴⁰⁹ See in this respect Van Sliedregt who explains the distinctive features of international criminal responsibility on account of the intrinsic features which go to the nature of international crimes; *supra* footnote 407, pp. 1171 – 1175.

⁴¹⁰ ICC-01/05-01/13-558, para. 64.

in case of committing, planning, ordering, instigating or aiding and abetting;⁴¹¹ in respect of contempt offences against the administration of justice, Rule 77 of the ICTY and ICTR RPE and Rule 60 of the STL RPE restricts the modes of liability to commission, incitement and attempt. In other words, other international Judges have adopted modes of liability for contempt cases which are clearly distinct from those applicable to core crimes. The *ad hoc* Tribunals' law and practice in this regards serve, it is submitted, as an important tool in interpreting the phrase 'when committed intentionally' in Article 70, to which provisions in part III, including Article 25 of the Statute, cannot be applied.

343. It must be noted that both the ICTY and ICTR have conducted and finalised several 'contempt cases', including cases in which the allegations are similar to the ones in the present case.⁴¹² In none of these cases have the competent Chambers expanded the scope of individual responsibility beyond what was explicitly provided for in the rules of procedure and evidence; joint criminal enterprise-liability was never applied.

344. In their legislative and adjudicative activities, the Judges of the ICTY and ICTR have thus not found it necessary to expand the modes of liability for 'contempt-offences' beyond simple commission, incitement and attempt. The Arido Defence suggests that this should provide guidance to the Pre-Trial Chamber when deciding on whether or not to confirm the charges.

⁴¹¹ UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993, Article 7; UN Security Council, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994, Article 6.

⁴¹² **ICTY:** *Prosecutor v. Rasić*, Written Reasons for Oral Sentencing Judgement, IT-98-32/1-R77.2, 6 March 2012, (available at http://www.icty.org/x/cases/contempt_rasic/tjug/en/120306.pdf); see also, *ibid.*, Appeal Judgement, Case No. IT-98-32IJ-R77.2-A, 16 November 2012, available at:

http://www.icty.org/x/cases/contempt_rasic/acjug/en/121116_judgement.pdf; *Prosecutor v. Beqaj*, Judgement on Contempt Allegations, Case No. IT-03-66-T-R77, 27 May 2005, available at:

http://www.icty.org/x/cases/contempt_beqaj/tjug/en/050527.pdf; *Prosecutor v. Haraqia & Morina*, Case No. IT-04-84-R77.4, 17 December 2008, available at:

http://www.icty.org/x/cases/contempt_haraqija_morina/tjug/en/081217judg_en.pdf; *Prosecutor v. Tabaković*, Case No. IT-98-32/1-R77.1, Sentencing Judgement, 18 March 2010, available at:

http://www.icty.org/x/cases/contempt_tabakovic/tjug/en/100318.pdf.

ICTR: *Prosecutor v. Nshogoza*, Case No. ICTR-07-91-T, Trial Judgement, 7 July 2009, available at:

<http://www.unict.org/Portals/0/Case/English/Nshogoza/decisions/090707-judgement.pdf>.

SCSL: *Independent Counsel v. Brima Samura*, SCSL-05-01-0018, Judgement in Contempt Proceedings, 26 October 2005, available at: <http://www.scslsdocs.org/documents/view/6580-19151>; *Prosecutor v. Senessie*, Case No. SCSL-11-01, Judgement in Contempt Proceedings, 21 June 2012, available at:

<http://www.scslsdocs.org/documents/view/6759-19972>; *Independent Counsel v. Bangura et al.*, Case No. SCSL-11-02-0071, Judgement in Contempt Proceedings, 11 October 2011, available at:

<http://www.scslsdocs.org/documents/view/6813-6813>; *Independent Counsel v. Prince Taylor*, Case No. SCSL-12-02-0051, Judgement in Contempt Proceedings, 25 January 2013, available at:

<http://www.scslsdocs.org/documents/view/6937-6937>; *Independent Counsel v. Brima et al.*, Case No. SCSL/05/02/119-132, Sentencing Judgement in Contempt Proceedings, 21 September 2005, available at: <http://www.scslsdocs.org/documents/view/6619-19236>.

345. For the application and interpretation of modes of liability for the purpose of Article 70-offences the Chamber may further have regard to ‘general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime’, as provided for in Article 21 (1) (c) of the Statute. This may be necessary (‘failing that (...)’, first words of Article 21 (c)), as the sources set out in Article 21 (a) and (b) of the Statute are not likely to clarify scope and content of modes of liability in respect of Article 70-offences.

346. It is submitted that the Netherlands is the state that would normally exercise jurisdiction over the charged offences, which would – if proven - be committed in whole or in part, or at least have effect, on Dutch territory. The Article 70-offences have, to a certain degree, been incorporated in the Dutch Penal Code,⁴¹³ and not in the International Crimes Act of 2003 which includes the Article 5-crimes and incorporates principles of international criminal law such as universal jurisdiction and command responsibility in relation to these ‘core crimes’. The Dutch legislator has recognised and acted in accordance with the conceptual distinction between Article 5-crimes and Article 70-offences.

347. This distinction obviously has consequences for the available modes of liability under Dutch law. Bearing in mind the available modes of liability under Dutch law, set out in Articles 45, 46, 47 and 48 of the Dutch Penal Code, as well as the jurisprudence in respect of co-perpetration,⁴¹⁴ it would not be possible under Dutch law to hold Mr. Arido accountable for participation in and contribution to a common plan, as charged by the Prosecution in this case.

348. It exceeds the scope of these submissions to conduct a comprehensive survey of modes of liability available in all national legal systems regarding Article 70-offences. The Arido Defence is nevertheless convinced if one were to do so, the common plan liability as charged by the Prosecution and as it was developed for application to Article 5-crimes, would not be available in many national legal systems for Article 70-offences, and as a result such mode of

⁴¹³ See, e.g., Article 285a, penalising intimidating witness witnesses, and Article 207a, penalising perjury before an international court.

⁴¹⁴ See e.g. Uitspraak Hoge Raad der Nederlanden ECLI:NL:HR:2013:1966, 17 December 2013, available at <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2013:1964&keyword=bewuste+en+nauwe+samenvatting>; ECLI:NL:HR:2014:1301, 3 June 2014, available at <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2014:1301&keyword=ECLI%3aNL%3aHR%3a2014%3a1301>

liability cannot be considered part of general principles of law.⁴¹⁵ The Prosecution failed to demonstrate otherwise.

3. Interim conclusion

349. On the basis of the above and bearing in mind the rules of interpretation set out in Article 21 (3) of the Statute and the fundamental principle codified in Article 22 (2) of the Statute, the Pre-Trial Chamber is requested:

- (i) Not to apply Article 25 of the Statute to the offences set out in Article 70, but to base individual criminal responsibility on the content of Article 70 exclusively, notably the words ‘when committed intentionally’;
- (ii) To have regard to law and practice of other international criminal tribunals, the ICTY, ICTR, SCSL and STL and to the general principles of law of national legal systems, in defining scope and content of ‘committed’ in the sense of Article 70, while bearing in mind and acting in accordance with the fundamental rule enshrined in Article 22 (2) of the Statute.

350. In the alternative, in case the Chamber would find Article 25 of the Statute applicable to Prosecution of Article 70-offences:

- (i) To decline to confirm charges for common plan-liability on account of this form of liability (a) not having a legal basis in the Statute, or (b) being reserved to the prosecution of Article 5-crimes.

C. The Prosecution fails to show that there are substantial grounds to believe that Mr. Arido can be held criminally responsible

351. It follows from the previous section that the Mr. Arido Defence considers Article 25 not applicable to Article 70-offences; on that basis alone the Pre-Trial Chamber cannot confirm individual criminal liability as charged by the Prosecution.

⁴¹⁵ See Concurring Opinion Judge Christine Van den Wyngaert, Ngudjolo Judgement, 18 December 2012, ICC-01/04-02/12-4, para. 17: ‘(...) in view of the radical fragmentation of national legal systems when it comes to defining modes of liability, it is almost impossible to identify general principles in this regard. It is therefore very unlikely that the control theory could aspire to such a status.’

352. Nevertheless, even if one were to apply Article 25, as interpreted in respect of Article 5-crimes by various chambers of this Court, fully to the conduct which is reproached to Mr. Arido, it should not result in the confirmation of charges.

353. It will be argued below in respect of each mode of liability charged that both in fact and in law the Prosecution's DCC does not succeed in bringing sufficient evidence to establish substantial grounds that Mr. Arido committed any of the crimes charged.

1. Article 25 (3) (a) – Commission as a co-perpetrator

354. In order to support allegations related to liability under Article 25 (3) (a), the Prosecution must show that the suspect's actions fulfil both the objective (*Actus Reus*) and subjective (*Mens Rea*) elements of the mode of liability.

355. The objective elements are fivefold:

- (a) the suspect must be part of a common plan or an agreement with one or more persons;
- (b) the suspect and the other co-perpetrator(s) must carry out **essential contributions in a coordinated manner** which result in the fulfilment of the material elements of the crime;
- (c) the suspect must have **control** over the organisation;
- (d) the organisation must consist of an **organised and hierarchical apparatus of power**;
- (e) the execution of the crimes must be secured by **almost automatic compliance with the orders** issued by the suspect.⁴¹⁶

356. The subjective elements are fourfold:

- (a) **intent and knowledge** within the meaning of Article 30 of the Statute or the elements of crime;
- (b) **specific intent** where required;
- (c) suspect and other co-perpetrators must be **mutually aware and accept** that implementing the common plan will result in the fulfilment of the material elements of the crimes;

⁴¹⁶ ICC-02/05-02/09- 243-Red, para. 160, *see also* fn 246; ICC-01/04-01/07-717, paras 500-518.

- (d) suspect must be **aware of the factual circumstances enabling him to exercise joint control** over the commission of the crime through another person.⁴¹⁷

357. The Arido Defence recalls that the Prosecution must present evidence in relation to **each legal requirement of the crime**,⁴¹⁸ which includes the alleged modes of liability.

a. Mr. Arido never participated in a Common Plan

358. The Prosecution argues that there existed a common plan to defend Mr. Bemba against charges of crimes against humanity and war crimes, from January 2012 to November 2013. According to the Prosecution, the common plan was implemented by means which included offences against the administration of justice.⁴¹⁹ According to the Prosecution, Mr. Bemba was the main beneficiary of the plan.⁴²⁰ The Prosecution submits that the existence of the common plan and its espousal by the co-perpetrators is demonstrated by the actions of the co-perpetrators.⁴²¹

359. The Arido Defence submits that the Prosecution does not provide any evidence that Mr. Arido's alleged actions were in any way directed to assisting Mr. Bemba. The Prosecution failed to indicate which of the actions supposedly demonstrating the existence of the common plan can in its view be attributed to Mr. Arido, and also failed to demonstrate how and why by his alleged actions Mr. Arido has espoused the common plan.

360. The Arido Defence submits that Mr. Arido is too remote from the 'Bemba Defence team' and/or Bemba network to incorporate him in any common plan. The following factors need to be taken into account:

- (a) Mr. Arido is not a member of Bemba's Defence team;
- (b) Mr. Arido has only communicated with Mr. Kilolo, as a result of Mr. Arido being a (expert) witness for the Bemba Defence, but not with any other co-suspect;
- (c) In the communications between the other co-suspects, including the intercepted calls, there is no reference to Mr. Arido, with one minor exception;⁴²²
- (d) He communicated openly with Mr. Kilolo, not using any coded language;

⁴¹⁷ ICC-02/05-02/09-243-red, para. 161.

⁴¹⁸ ICC-01/05-01/08-424, paras 208, 300.

⁴¹⁹ DCC, para. 110.

⁴²⁰ *Ibid.*

⁴²¹ *Ibid.*, para. 111.

⁴²² *See supra*, paras 150-153.

- (e) The communications were very limited in number, time and scope;

361. Even if the Pre-Trial Chamber found that there are substantial grounds to believe that Mr. Arido undertook the actions charged, these actions were to benefit himself and the witnesses – who got money in return – but not Mr. Bemba. There is nothing in the evidence suggesting the contrary; there is no evidence where Mr. Arido express any sympathy for Mr. Bemba or any support for his Defence. These alleged action, as is clear from the wording Mr. Arido allegedly used when approaching D-2 and D-3, were only motivated by financial and personal reasons. There is not one time where D-2 or D-3 – the only witnesses providing evidence against Mr. Arido - state that Mr. Arido presented his “proposal” as being one to benefit Mr. Bemba. To the contrary, they both report that when Mr. Arido allegedly talked to them about being a witness in the Bemba case, he talked about a “opportunity to make a bit of money”,⁴²³ a “deal” that he got,⁴²⁴ about the fact that they could get asylum⁴²⁵ or be relocated.⁴²⁶ In other words, if this were true – which it is not – the motive behind Mr. Arido’s action was not in any way to defend Mr. Bemba, but to get financial or material benefits.

- b. The Prosecution fails to show that Mr. Arido’s alleged contribution was “essential” and coordinated

362. In paragraph 117 of its DCC, the Prosecution presents Mr. Arido’s alleged contributions to the common plan, stating that they comprised at least one of the following acts:

- i. Providing false or forged documents to Mr. Kilolo to present as evidence before the Court;
- ii. placing witnesses in contact with Mr. Kilolo with the knowledge that they would be illicitly coached on what to say when testifying in court and paid in exchange for their false testimony;
- iii. improperly inducing individuals to falsely testify as witnesses in the Bemba case;
- iv. arranging and participating in meetings during which Mr. Kilolo paid witnesses whom Mr. Kilolo had instructed to testify falsely; and
- v. illicitly coaching witnesses on [REDACTED] instructions.

⁴²³ CAR-OTP-0078-0184, p. 6 (0189).

⁴²⁴ CAR-OTP-0080-0010, p. 10 (0030).

⁴²⁵ *Ibid.*

⁴²⁶ CAR-OTP-0078-0206, p. 12 (0217).

363. The Prosecution fails, however, to explain why these contributions should be regarded as essential, and as important, how these constitute coordinated actions with the other alleged co-perpetrators. Especially in light of Mr. Arido's position outside the Bemba Defence team, it requires explanation why his acts should be regarded as essential.

364. Moreover, as was already argued in Part VI, the Prosecution has not brought sufficient evidence in respect of each of the acts mentioned in paragraph 117. Even if the Pre-Trial Chamber found that the factual allegations by the Prosecution were substantiated, the Arido Defence submits that promising two potential witnesses that they could "make some money" and possibly get asylum, telling D-3 what his alleged military rank was, and telling D-2 what to tell to Mr. Kilolo, cannot be said to constitute substantial grounds to believe that Mr. Arido's contribution to the common plan was essential. There is also no evidence that by his alleged actions, Mr. Arido coordinated with any of the alleged co-suspects.

c. The Prosecution fails to provide evidence of the fulfilment of the other objective elements of Article 25 (3) (a)

365. In order to show that a person shall be held responsible under Article 25 (3) (a) of the Statute, the Prosecution must also show that Mr. Arido had control over the organisation, that the organisation consisted of an organised and hierarchical apparatus of power and that the execution of the crimes was secured by almost automatic compliance with the orders issued by the suspect.⁴²⁷ There is nothing on these elements in the DCC – therefore, the Prosecution cannot be said to have provided evidence related to each underlying element of the mode of liability.

366. It shall be noted that the concept of co-perpetration coincides with that of joint control over the crime by reasons of the essential nature of the various contributions of the commission of the crime. Every co-perpetrator has one or more essential tasks directed at the commission of a crime, and one of the co-perpetrators has overall control over the crime since they mutually depend on each other. This also means that each of them could frustrate the commissions of the crime by not carrying out his task(s).⁴²⁸ According to Pre-Trial Chamber I "what is decisive is whether the co-perpetrator performs an essential role in accordance with the common plan".⁴²⁹

⁴²⁷ ICC-02/05-02/09- 243-Red, para. 160; *see also* fn 246; ICC-01/04-01/07-717, paras 500-518.

⁴²⁸ ICC-01/04-01/06-2842, para. 925, *citing to* ICC-01/04-01/06-803-tEN, para. 342 and 347.

⁴²⁹ ICC-01/04-01/06-2842, para. 1000.

367. The Arido Defence recalls that the Prosecution's case is based on the alleged false testimony of 14 witnesses and the alleged presentation of 14 false documents. Taking into account that the Prosecution only provided evidence in relation to only 3 out of the 14 witnesses, it can hardly be said that had Mr. Arido not conducted his alleged "task", the common plan of defending Mr. Bemba would have been in any way frustrated. Regarding the alleged false documents, there is no evidence that Mr. Arido provided the documents. As a result, it cannot be said that Mr. Arido had any control over the offences used to pursue the common plan.

368. Similarly, the Prosecution does not show that the alleged co-perpetrators participated in an organised and hierarchical apparatus of power. As stated above, Mr. Arido was never in contact with Mr. Bemba, Mr. Babala or Mr. Mangenda.

369. Finally, the Prosecution provides no evidence that the execution of the crimes was secured by almost automatic compliance with the orders issued by the suspect. Mr. Arido was a potential witness, physically remote from the rest of the alleged co-perpetrators, and that he never had any communications with the co-suspects other than Mr. Kilolo; none of these communications were related to the commission of crimes. In addition, there is absolutely no evidence of Mr. Arido issuing any sort of order to any of the co-suspects or anybody else.

- d. The Prosecution fails to demonstrate that the subjective elements of Article 25 (3) (a) are fulfilled

370. The Prosecution must show that there are substantial grounds to believe that Mr. Arido fulfilled the requisite *mens rea* for Article 70 (1) (a), (b) or (c). In addition, the Prosecution must show that he and the other alleged co-perpetrators were mutually aware and accepted that implementing the common plan will result in the fulfilment of the material elements of the crimes. Finally, the Prosecution must show that Mr. Arido was aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person.⁴³⁰

⁴³⁰ ICC-02/05-02/09-243-red, para. 161.

e. Intent and Knowledge

371. In paragraphs 130 to 132 of the DCC, the Prosecution presents its arguments related to the intent and knowledge of Mr. Arido. It relies on a statement allegedly made by Mr. Arido to prospective witnesses.⁴³¹ As explained in paragraphs 295 to 297 above, this alleged statement must be seen in its context, and when doing so, it is clear that such statement was not related to the false provision of evidence but to the possibility of asylum. The Prosecution also relies on a number of alleged facts to establish the intent and knowledge of Mr. Arido in paragraph 131. Each is discussed below.

372. First, the Prosecution alleges that Mr. Arido knew that the false/forged documents he supplied were intended to be introduced in the Bemba trial, and that the fact that Mr. Arido denied having send the false/forged documents to Mr. Kilolo despite his computer record showing the contrary add to his intent and knowledge of the crimes. As is already discussed in other part of this brief,⁴³² there is no evidence that Mr. Arido actually provided the documents to the Bemba Defence. Contrarily to what the Prosecution said, he did not send them to Mr. Kilolo by email, but a person named [REDACTED] did. In addition, there is no evidence supporting the Prosecution's allegation that Mr. Arido knew and intended that such documents would be used in Court.

373. Second, the Prosecution states that Mr. Arido recognised that the Bemba witnesses did not have a military background and were not in the CAR armed forces. To support this assertion, the Prosecution relies on Mr. Arido's 23 November 2013 interview to the French Police.⁴³³ As stated in above, in paragraphs 207 to 210, this interview was obtained in violation of the Statute, and the selective use of elements of the interview constitutes impermissible 'cherry picking'.

374. Third, the Prosecution relies on Mr. Arido's denial of having received money from Mr. Kilolo around the time of the provision of the false/forged documents. The Arido Defence recalls that there is no evidence that Mr. Arido provided the false/forged documents to Mr. Kilolo. There is however evidence that he provided an expert report to the Bemba Defence team, for which he was paid, as discussed above in paragraphs 121 to 129. As argued, the only

⁴³¹ DCC, para. 130, fn. 386, *citing to* CAR-OTP-0078-0218, p. 17 (0234).

⁴³² *See* Part VI-B, paras 135-159.

⁴³³ DCC, para. 131, fn. 391, *citing to* CAR-OTP-0074-1065, p. 2 (1066).

payments that Mr. Arido received in relation to the Bemba case were payments for his expert report and payment for his loss of income linked to his possible testimony before the ICC.

375. Fourth, according to the Prosecution, Mr. Arido's military background permitted him to identify the false/forged character of the documents, as well as of the testimony given by the witnesses. However, the Arido Defence recalls that Mr. Arido was not in the CAR army at the time of the crimes alleged against Mr. Bemba – 2002/2003. He had already left for [REDACTED]. As pointed out by D-53, these times were troubled time, and it is not unusual for the format and wording to be different from one document to another. As explained in paragraphs 171 to 184 above, even if Mr. Arido had provided the alleged documents to the Bemba Defence, there is no evidence that he knew they were false/forged.

376. Fifth, the Prosecution relies on the alleged fact that Mr. Arido worked on an expert report with D-53 and D-59, who were questioned in Court about the alleged false/forged documents. However, the Prosecution fails to provide support for this assertion. The 23 November 2013 statement by Mr. Arido on which the Prosecution relies only refers to Mr. Arido having written an expert report for Mr. Kilolo; there is no mention of D-53 and D-59 and him having written an expert report together.⁴³⁴ In addition, it must be noted that Mr. Arido's report contains no reference to the alleged false/forged documents.⁴³⁵

377. Sixth, by allegedly informing witnesses that they would receive money and/or have an opportunity to move to Europe in exchange for false testimony, the Prosecution finds that Mr. Arido demonstrated his intent and knowledge. The Arido Defence refers the Pre-Trial Chamber to paragraphs 274 to 297 above, wherein it explains that first, there is no evidence that Mr. Arido promised money to the witnesses, and second, that informing witnesses about the possibility of relocation or asylum is not criminal. This does not constitute evidence that Mr. Arido intended to participate in a common plan to defend Mr. Bemba through the commission of crimes or that he even knew about it.

378. Finally, the Prosecution argues that by arranging for Kilolo and Mangenda to meet witnesses he had recruited to coach them to testify falsely in exchange of payment showed his intent and knowledge. Again, there is no evidence that Mr. Arido introduced witnesses to Mr. Kilolo while knowing they were going to be coached, as D-2 and D-3 are the only witnesses

⁴³⁴ CAR-OTP-0074-1065-R01.

⁴³⁵ CAR-OTP-0075-0341; *see also* Part IV-B above.

providing evidence in this sense, and their interviews should be fully discreted, for reasons already provided.

379. The Arido Defence submits that in light of the common plan charged, i.e. the Defence of Mr. Bemba at the ICC, it is impossible for an individual outside the Bemba Defence team, such as Mr. Arido, to know whether his contributions were essential to that plan. The Prosecution has brought no evidence showing that Mr. Arido was aware of the scope and content of the case against Bemba, the Defence strategy, strengths and weaknesses of the Defence case, and so on. This makes it impossible for Mr. Arido, if the allegations would be true – *quod non*-, to appraise whether his role would in fact be essential to the Bemba Defence.

f. Mutual awareness

380. In paragraphs 133 to 134, the Prosecution argues that the alleged co-perpetrators were mutually aware of and accepted that implementing the common plan would result in the realisation of the objective elements of the offences. Although the Prosecution refers to the fact that the common plan would “by design” and “in the normal course of events” result in the commission of offences against the administration of justice, defending Mr. Bemba against war crimes and crimes against humanity before the ICC cannot be said to be inherently criminal. Therefore, the Prosecution needs to show that the mutual awareness was not of the fact that other peoples were working towards providing a Defence to Mr. Bemba, but a mutual awareness that they were involved in the commission of article 70 offences. It fails to do so.

381. In paragraph 134 of the DCC, the Prosecution refers to six facts which, according to the Prosecution, establish the alleged co-perpetrators’ mutual awareness. None of these alleged facts can apply to Mr. Arido, even if proven, for the following reasons:

- (i) Mr. Arido has never been in contact with Mr. Bemba, making it impossible for him to devise and adopt any alleged common plan with Bemba’s direction;
- (ii) Mr. Arido was never a member of the Bemba Defence team and had only – minimal- contact with Mr. Kilolo, making it impossible for him to know whether other co-suspects espoused the common plan;
- (iii) Mr. Arido only had minimal contact with Mr. Kilolo and did not communicate with any co-suspect; as a result, the Prosecution does not present any evidence that Mr. Arido knew about the roles and/or actions of other alleged co-perpetrators;

- (iv) The Prosecution presents no evidence that Mr. Arido had means at his disposal coming from the Bemba Defence, other than the agreed sum paid for the elaboration of his (expert) report;
- (v) There is no evidence Mr. Arido discussed and coordinated the implementation of the alleged common plan with other co-suspects. His limited communications with Mr. Kilolo were confined to practical issues related to the production of his expert report;
- (vi) Since Mr. Arido had only with Kilolo minimal contact, there is no evidence he was aware of other alleged contributions to the plan, let alone he could be aware that other alleged contributions furthered the implementation of the common plan.

g. Awareness of the circumstances permitting the exercise of joint control

382. In paragraph 139, the Prosecution argues that Mr. Arido was aware of the factual circumstances enabling him to exercise control over the offences jointly with the other alleged co-perpetrators. As stated above, the Prosecution failed to provide evidence regarding the “control” that Mr. Arido had within the common plan. Taking the evidence as a whole, it is obvious that Mr. Arido had no control over the common plan.

383. The fact that Mr. Arido was not part of the alleged Bemba network comes to the fore in the Prosecution allegations that the co-perpetrators were aware of the factual circumstances enabling them to exercise joint control over the offence. Remarkably, when the Prosecution discusses the awareness of co-suspects - Mr. Bemba, Mr. Kilolo, Mr. Mangenda and Mr. Babala⁴³⁶ - no reference is made to any contact/relationship they may have with Mr. Arido, even though the Prosecution emphasises the alleged contacts they had with each other. Rather, the awareness is essentially based on either membership of Defence team or on the allegation of being a close ally/aide to Mr. Bemba. Mr. Arido does not fall under either category, as he did not even know Mr. Bemba or the other co-suspects other than Mr. Kilolo.

384. It is repeated that Mr. Arido does not have a position anywhere close to the Bemba Defence team and/or alleged Bemba network. His involvement in an alleged common plan is not based on any evidence supporting a position close to any of the co-suspects. Without any contact or relationship with any of the co-suspects other than Mr. Kilolo – which was strictly related to the provision of an expert report – it cannot be stated that Mr. Arido was even aware

⁴³⁶ DCC, paras. 135-138.

of a common plan, even less so exercising control over its implementation. The Arido Defence further refers to the arguments contained in Part VI in response to the Prosecution's allegations contained in paragraph 139.

385. Even if the concrete allegations against Mr. Arido were established, the Prosecution brings no evidence that his involvement would be more than incidental and limited in time and scope. Especially, bearing in mind the duration of Defence activities in a case at the ICC, the minimal alleged role of Mr. Arido in the entire alleged scheme falls seriously short of justifying inclusion in the alleged common plan.

2. Article 25 (3) (b) – ordering, soliciting or inducing the commission of a crime

386. Liability under Article 25 (3) (b) is imputed to Mr. Arido – and Mr. Kilolo - in paragraph 141 of the DCC. It is alleged that Mr. Arido has solicited and/or induced the giving of false testimony pursuant to Article 70 (1) (a). To support this allegation, the Prosecution refers to the facts which allegedly underpin Mr. Arido's liability under Article 25 (3) (a) (common plan). Reference is made to instructing others to commit acts leading to the commission of charged offences against the administration of justice, but it is only by reference to the footnotes (footnotes 432-434 in the DCC) that one is able to identify the witnesses that were allegedly solicited/induced by Mr. Arido to give false testimony.

387. The Arido Defence recalls its arguments above in Part V (paragraphs 91 to 96) that any liability under Article 70 (1) (a) is restricted to a witness under oath.

388. The Arido Defence also recalls the (factual) challenges to the Prosecution's evidence in Part VI of these submissions. As a result, there is not sufficient evidence to confirm charges against Mr. Arido under Article 25 (3) (b).

389. In addition, the Arido Defence submits that soliciting/inducing giving false testimony (Article 70 (1) (a)) and commission of corruptly influencing a witness (Article 70 (1) (c)) do not appear to have materially distinct elements, in the sense of the Blockburger test, as incorporated in international criminal law in the seminal ruling by the ICTY Appeals Chamber in the *Čelebići* case, that "multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially

distinct element not contained in the other.”⁴³⁷ This is not the case here as the Prosecution is charging both offences based on the same alleged set of conduct.

390. Indeed, one fails to see where corruptly influencing a witness would materially differ from the criminal conduct to solicit/induce false testimony; as a result one is confronted with a situation of impermissible cumulative convictions if the case would go to trial and there would be sufficient evidence for both charges.

391. Whereas it may be argued that only cumulative convictions and not cumulative charging is prohibited, both go obviously hand in hand: where cumulative convictions cannot be had it makes no sense to allow cumulative charging.⁴³⁸ The matter of cumulative charging was addressed in the *Ruto et al* confirmation decision, from which it follows that cumulative charging - in case there are no materially distinct elements between two counts charged - is indeed impermissible.⁴³⁹

3. Article 25 (3) (c) – Aiding, abetting or otherwise assisting in the commission of a crime

392. In paras. 142 and 143 the Prosecution charges Mr. Arido under Article 25 (3) (c) for aiding, abetting or otherwise assisting the commission of offences charged under Article 70 (1) (a), (b) and (c).

393. Article 25 (3) (c) requires that the contribution of the aider and abettor must be carried out “for the purpose of facilitating the commission of [the] crime”. This provision, which seems to refer to *dolus directus*, implies that “under article 25 (3) (c) of the Statute [...] intent is always

⁴³⁷ ICTY, *Prosecutor v. Delalić et al.* (aka ‘Celebići case’), Case No. IT-96-21, Judgement, Appeals Chamber, 20 February 2001, para. 412, available at <http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>; see also, ICTR, *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Appeals Judgement, 16 November 2001, paras 358-360, available at <http://www.unict.org/Portals/0/Case/English/Musema/decisions/011116-apl-judg.pdf>.

⁴³⁸ Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev, and Salvatore Zappalà (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press, 2013), p. 428, footnote 402.

⁴³⁹ ICC-01/09-01/11-373 23-01-2012, para.s 280 “The Chamber disagrees with the Defences’ argument. The definition of persecution contains materially distinct elements not present in the definition of murder, namely the requirement of proof that a particular group was targeted on the basis of certain discriminatory grounds described in article 7(l)(h) of the Statute. Murder, by contrast, requires proof that the accused caused the death of one or more persons, regardless of whether the act or omission causing the death discriminates in fact or was intended as discriminatory”, para. 281 : “The same holds true with respect to persecution and deportation or forcible transfer; the former requires, as “materially” distinct elements not included in the definition of deportation or forcible transfer, proof of intent to discriminate. On the contrary, deportation or forcible transfer requires, inter alia, proof that the perpetrator displaced one or more persons, regardless of whether the conduct was intended as discriminatory. Accordingly, the practice of cumulative or multiple charging as to these crimes on the basis of the same conduct is permissible.”

required”.⁴⁴⁰ However, as it has been recognized, the *mens rea* standard required by the Statute for aiding and abetting is higher than the one required in the *ad hoc* tribunals. In fact, “unlike the jurisprudence of the *ad hoc* tribunals, article 25(3)(c) of the Statute requires that the person act with the purpose to facilitate the crime; knowledge is not enough for responsibility under this article”.⁴⁴¹ Furthermore, although not explicitly required by the Statute, the ICC jurisprudence has recognised that the contribution of the aider and abettor must be “substantial”: “the drafters surely did not intend for a person, not part of the common plan or criminal group, to be criminally liable if his contribution was anything less than substantial. This is particularly clear, given that the standard for aiding and abetting requires a substantial contribution”.⁴⁴²

394. The Arido Defence recalls its arguments contained in Part V (paragraphs 91 to 104) that any liability under Article 70 (1) (a) and (b) is restricted to individuals with specific qualities, respectively witnesses and parties, and its analysis in Part VI of the evidence brought by the Prosecution, from which it follows that Mr. Arido did not aid, abet or otherwise assisted in any of the Article 70-offences.

395. In addition, it is submitted that the particularities by which the Prosecution seeks to support this mode of liability in paragraph 142 are clearly not applicable to Mr. Arido, as they all relate to communications with Mr. Bemba as well as to the provision of financial means to bribe witnesses. Indeed, Mr. Arido did not transfer money to alleged co-perpetrators or witnesses, did not use coded language to conceal the alleged common plan, and did not provide any financial means to any alleged co-perpetrator to bribe witnesses.

⁴⁴⁰ ICC-01/04-01/10 119/150, para.289; *see also* ICC-01/04-01/06-803, para. 337.

⁴⁴¹ ICC-01/04-01/10 119/150, para. 274. See also paragraph 281, according to which “*The Chamber emphasises that the principles set out by the ad hoc tribunals with respect to the analogous modes of liability cannot be applied to the modes of liability set out in article 25(3) without modification, as there are a number of differences between those modes of liability and those set out in the Statute. For instance, as mentioned earlier, the jurisprudence of the ad hoc tribunals does not require the aider and abettor to share the intent of the perpetrator to commit the crime, whereas under article 25(3)(c) of the Statute the aider and abettor must act with the purpose of facilitating the commission of that crime*”.

⁴⁴² 1996 Draft Code, Report of the International Law Commission on the Work of its Forty-Eighth Session, 5 June-26 Aug., 1996, U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10, Article 2, available at: http://legal.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf; ICTY, *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-A, 9 May 2007, Judgment, para. 187, available at: http://www.icty.org/x/cases/blagojevic_jokic/acjug/en/blajok-jud070509.pdf; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Judgment, 26 September 2013, para. 362, available at: <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf>.

4. Article 25 (3) (d) – Intentional contribution to the commission or attempted commission of a crime by a group of persons acting with a common purpose

396. Mr. Arido is also charged with responsibility under Article 25 (3) (d) of the Statute, as submitted in paragraphs 144 – 146 of the DCC. This liability is based on the alleged facts underpinning Mr. Arido's liability under Article 25 (3) (a).

397. The Arido Defence refers to its analysis of the evidence brought by the Prosecution (Part VI above) which makes the Prosecution charges in respect of each mode of liability lack sufficient evidentiary support, and also draws the attention to its submissions made in respect of the individual criminal responsibility charged under Article 25 (3) (a) of the Statute.

398. In addition, the Arido Defence wishes to point out that the common purpose liability provided for in Article 25 (3) (d) of the Statute, being included in Part III of the Statute which is intended to apply to Article 5-crimes only, does not lend itself for application to Article 70 - offences. In this regard, the Mr. Arido Defence refers to its analysis of the applicability of Article 25 to Article 70-offences contained in Part VII above (paragraphs 327 to 350).

399. The Arido Defence also points out that neither the *ad hoc* Tribunals nor the 'normal state of jurisdiction', The Netherlands, provide for 'common purpose liability', in respect of Article 70-offences.

C. Conclusion on individual criminal responsibility

400. On the basis of the foregoing, the Arido Defence first requests the Pre-Trial Chamber to adjudge and declare that the modes of liability under Article 25, as they have been developed in the case law of the ICC in relation to Article 5-crimes, cannot be applied to Article 70-offences; subsidiary, the Pre-Trial Chamber is requested to adjudge and declare that co-perpetration under Article 25 (3) (a), as it has been developed in the case law of the ICC in relation to Article 5 crimes, cannot be applied to Article 70-offences.

401. In addition, the Pre-Trial Chamber is requested to decline confirming the charges on the basis of the fact that there is not sufficient evidence that Mr. Arido is individually criminally responsible for any charge.

VIII. CONCLUSION

402. On the basis of the foregoing, the Arido Defence respectfully requests the Pre-Trial Chamber to find that the Prosecution has failed to provide sufficient evidence that there exists substantial grounds to commit Mr. Arido to trial, and to decline to confirm all charges against Mr. Arido, as stipulated in Article 61 (7) (b) of the Statute.

403. The immediate corollary of the finding that all charges against Mr. Arido are rejected is that the Pre-Trial Chamber orders his immediate release. This is hereby requested.

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

Göran Sluiter, Counsel for Mr. Arido

Dated this 20th Day of November 2014

At Amsterdam, The Netherlands