Cour
Pénale
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International
Criminal
Court

Original: **English** | No.: **ICC-01/05-01/13**
Date: **1 December 2014**

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

Narcisse Arido's Request for Leave to Appeal the "Decision pursuant to Article 61 (7) (a) and (b) of the Rome Statute" (ICC-01/05-01/13-749)

Source: **Counsel for Narcisse Arido**

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I. INTRODUCTION

1. The Arido Defence hereby seeks leave to appeal the Pre-Trial Chamber's Decision partly confirming the charges against Mr. Arido.[1]

II. PROCEDURAL HISTORY

2. On 11 November 2014, Pre-Trial Chamber II ("Pre-Trial Chamber") issued its decision pursuant to Article 61 (7) (a) and (b) of the Rome Statute.[2]

3. The Pre-Trial Chamber confirmed the following charges against Mr. Arido:

i. Perpetration (commission) under Article 25 (3) (a) of the Statute for intentionally corruptly influencing D-2, D-3, D-4 and D-6, by instructing them to either provide false information or withhold true information during their testimony in Court and encouraging their testimony with money transfers and the possibility of a relocation in Europe under Article 70 (1) (c),[3] or alternatively as an accessory for aiding, abetting or otherwise assisting in the commission of the offences pursuant to Article 25 (3) (c) by way of instructing them to falsely testify and encouraging their testimony with money transfers and the possibility of a relocation in Europe under Article 70 (1) (c);[4]

ii. Aiding, abetting or otherwise assisting in the commission of the offence of presenting false evidence by Bemba, Kilolo and Mangenda, according to Article 70 (1) (b), by way of instructing D-2, D-3, D-4 and D-6 on the false information to provide in Court and introducing them to Kilolo under Article 25 (3) (c) of the Statute;[5]

iii. Aiding, abetting or otherwise assisting in the commission of the offence of giving false testimony under Article 70 (1) (a) by way of recruiting D-2, D-3, D-4 and D-6, instructing, persuading or otherwise influencing them, including by way of transfers of money and the possibility of a relocation in Europe, to state false information or

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[1] ICC-01/05-01/13-749.
[2] ICC-01/05-01/13-749 (hereinafter: 'Impugned Decision').
[3] Impugned Decision, para. 96 and p. 53.
[4] *Ibid.*
[5] *Ibid.*

withhold true information before Trial Chamber III, pursuant to Article 25 (3) (c) of the Statute.

4. On 14 November 2014, the Babala Defence requested a stay of the time limit applicable to a request for leave to appeal (or an extension of time for the filing of the request for leave to appeal the Decision on the Confirmation of Charges) until the provision of a French translation of the Decision.[6] The Single Judge granted the request on the same day stating that the 5 days deadline provided for in Regulation 155 (1) of the RPE would start running only from the date of reception of the French translation of the Decision on the Confirmation of Charges.[7]

5. The Mangenda Defence submitted a request for leave to appeal the confirmation of charges decision on 14 November 2014.[8] The Prosecution responded on 20 November 2014, opposing the request.[9]

6. On 17 November 2014, the Arido Defence requested an extension of the page limit for the filing of its request for leave to appeal of the Pre-Trial Chamber's Decision confirming the charges.[10] The prosecution did not oppose the request.[11] The Single Judge granted the Arido Defence's request on 20 November 2014, stating that the parties' applications for leave to appeal the decision on the confirmation of the charges will not be subject to the page limit set forth in Regulation 37 (1) of the RoR.[12]

7. The French translation of the Decision on the Confirmation of Charges was received on 25 November 2014.[13] On 27 November 2014, the Babala Defence and the Bemba Defence sought leave to appeal the Decision on the confirmation of charges.[14] The Kilolo Defence filed its request for leave to appeal on 28 November 2014.[15]

[6] ICC-01/05-01/13-754.
[7] ICC-01/05-01/13-756.
[8] ICC-01/05-01/13-755.
[9] ICC-01/05-01/13-762.
[10] ICC-01/05-01/13-757.
[11] ICC-01/05-01/13-761.
[12] ICC-01/05-01/13-763. The decision was notified on 21 November 2014.
[13] ICC-01/05-01/13-749-tFRA.
[14] ICC-01/05-01/13-769 and ICC-01/05-01/13-768.
[15] ICC-01/05-01/13-771.

III. APPLICABLE LAW

8. Pursuant to Article 82 (1) (d) of Statute, either party may appeal a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. The purpose of such procedure is to "pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial".[16] The Pre-Trial Chamber is vested with the power to certify the existence of an appealable issue,[17] however when determining whether leave to appeal should be granted, the Pre-Trial Chamber must not justify or defend the correctness of its decision, but instead determine whether the issues presented significantly affect the fairness of the proceedings.[18]

9. According to Rule 155 (1) of the Rules of Procedure and Evidence ('RPE'), a party shall make a written application for leave to appeal to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal. The application for leave to appeal shall state the name and number of the case or situation and shall specify the legal and/or factual reasons in support thereof, in accordance with Regulation 65 (1) of the Regulations of the Court ('RoC'). It shall also specify the reasons warranting immediate resolution by the Appeals Chamber of the matter at issue.[19]

10. The Appeals Chamber has ruled that only an "issue" may form the subject-matter of an appealable decision, which it defined as "an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion".[20] Further, an issue is "a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination" and may be "legal or factual or a mixed one".[21] The issue must be one apt to "significantly affect", that is, in a material way, either the fair and

[16] ICC-01/04-168, para. 19.
[17] *Ibid.*, para. 20.
[18] *See e.g.* ICC-01/09-02/11-253, para. 28.
[19] Regulation 65 (2) of the RoC.
[20] ICC-01/04-168, para. 9.
[21] *Ibid.*

expeditious conduct of the proceedings, or the outcome of the trial.[22] In other words, the issue "must be one likely to have repercussions on either of [these] […] two elements of justice".[23]

11. The Appeals Chamber has defined the term "fair" as being associated with the norms of a fair trial and corresponding human rights, as per Article 64 (2) and 67 (1) of the Statute.[24] In particular, it noted that the "expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial",[25] and that these fair trial principles applied at the pre-trial stage.[26] In the words of the Appeals Chamber, "breach of or deviation from the rules of a fair trial at the pre-trial stage of the proceedings may have implications on the proceedings and may affect the outcome of the trial".[27] In other words, the question of "purging the pre-trial process of errors consequential [in the sense of fair trial] is designed as a safeguard for the integrity of the proceedings" is "at the core of Article 82 (1) (d) of the Statute".[28] The term "proceedings" extends to proceedings prior and subsequent to the current proceedings.[29]

12. The Appeals Chamber also held that an issue will be appealable "where the possibility of error in an interlocutory or intermediate decision may have a bearing" on the outcome of the trial.[30] The Pre-Trial Chamber, when deciding on a request for leave to appeal, "must ponder the possible implications of a given issue being wrongly decided on the outcome of the case", thereby forecasting the consequences of such an occurrence.[31]

13. Regarding the second aspect of a request for leave to appeal (the immediate resolution by the Appeals Chamber), the Appeals Chamber has held that this criterion will be satisfied if the relevant Chamber rules that an authoritative determination on the appeal would "move forward" the proceedings and "remove doubts about the correctness of the decision or map a course of action along the right lines".[32] The issue at stake must also be "such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative

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[22] *Ibid.*, para. 10.
[23] *Ibid.*
[24] *Ibid.*, para. 11.
[25] *Ibid.*
[26] *Ibid.*
[27] *Ibid.*
[28] *Ibid.*
[29] *Ibid.*, para. 12.
[30] *Ibid.*, para. 13.
[31] *Ibid.*
[32] *Ibid.*, paras 14-15.

determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar [*sic*] the outcome of the trial".[33] The solving of the issue by the Appeals Chamber is aimed to "ensure that the proceedings follow the right course".[34]

IV. Submissions

A. Overview of the issues for which the Arido Defence seeks leave to appeal

14. The Arido Defence seeks leave to appeal on seven issues emanating from the Impugned Decision. They relate to the interpretation of the mode of individual responsibility under Article 25 (3) (c), the interpretation of Article 70 offences, and the standard of proof under Article 61 (7) of the Statute, namely:

i. **Issue 1:** Whether the standard of proof under Article 25 (3) (c) of the Statute requires that the Suspect's act(s) have only "an effect" on the commission or attempted commission of the offence;

ii. **Issue 2:** Whether a correct interpretation of Article 70 (1) (c) and Article 25 (3) (c) of the Statute permits the application of an accessory mode of liability to a conduct offence;

iii. **Issue 3:** Whether the standard of proof under Article 61 (7) of the Statute requires the Pre-Trial Chamber to provide a reasoning for its legal interpretation of Article 70 offences;

iv. **Issue 4:** Whether the standard of proof under Article 61 (7) of the Statute requires the Pre-Trial Chamber to draw conclusions from witnesses' evidence where there are ambiguities, contradictions, inconsistencies or doubts as to their credibility and therefore provide detailed reasoning as to its conclusion;

v. **Issue 5:** Whether the standard of proof under Article 61 (7) of the Statute allows the Pre-Trial Chamber to find that Mr. Arido encouraged the testimony of witnesses with money transfers in the absence of evidence of Mr. Arido transferring money to witnesses;

vi. **Issue 6:** Whether the standard of proof under Article 61 (7) of the Statute permits the Pre-Trial Chamber to find that there were substantial grounds to believe that Mr. Arido committed the alleged offences related to false testimony in the absence of objective evidence that the witnesses lied under oath and on the sole basis of the witness' evidence;

vii. **Issue 7:** Whether the standard of proof under Article 61 (7) of the Statute permits

[33] *Ibid.*, para. 14.
[34] *Ibid.*, para. 15.

the Pre-Trial Chamber to confirm three separate charges based on the exact same set of facts (cumulative charging).

15. The requirements of Article 82 (1) (d) of the Statute for each issue are discussed in detail below.

B. Issues related to the interpretation of Article 25

1. Issue 1: Whether the standard of proof under Article 25 (3) (c) of the Statute requires that the Suspect's act(s) have only "an effect" on the commission or attempted commission of the offence

a. <u>The issue arises from the Impugned Decision</u>

16. At paragraph 35 of the Impugned Decision, the Pre-Trial Chamber found that the elements of Article 25 (3) (c) of the Statute were met "insofar as the accessory's contribution has an effect on the commission of the offence and is made with the purpose of facilitating such commission."[35]

17. The Arido Defence submits that the Pre-Trial Chamber used an incorrect standard of proof by finding that any act which will have an effect on the commission or attempted commission of an offence would fulfill the constitutive elements of Article 25 (1) (c), and by assessing the evidence presented by the Prosecution in light of a lower standard of proof, thereby committing a legal error. As such, the issue relates to the broader subject of the statutory interpretation of individual criminal responsibility under Article 25.

18. Should leave to appeal this issue be granted, the Arido Defence will submit that a reasonable interpretation of Article 25 (3) (c) of the Statute, in accordance with the *travaux préparatoires*, Article 21 of the Statute and the Vienna Convention on the Law of Treaties as well as in light of customary international law, makes clear that a finding of "substantial effect" on the commission or attempted commission of an offence is an essential element of Article 25 (3) (c).

19. The Pre-Trial Chamber's decision to confirm the charges is made on the basis that the alleged behaviour of Mr. Arido meets the threshold of "sufficient evidence to establish substantial grounds to believe" that the requirements of Article 25 (3) (c) were met. As a result,

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[35] Impugned Decision, para. 35.

the issue directly emanates from the Impugned Decision. While the Pre-Trial Chamber does not discuss in detail the "effect" that the alleged actions of Mr. Arido had on the offences, it confirmed the charges against Mr. Arido for Article 70 (1) (a) and (b) offences solely based on this mode of liability, and for Article 70 (1) (c) offences as an alternative to direct perpetration.[36] More specifically, with regards to Article 70 (1) (a), the Pre-Trial Chamber found that Mr. Arido recruited D-2, D-3, D-4 and D-6, instructed, persuaded or otherwise influenced them, including by ways of transfers of money and the possibility of a relocation in Europe, to state false information or withhold true information before Trial Chamber III.[37] With regards to Article 70 (1) (b), the Pre-Trial Chamber found that Mr. Arido instructed D-2, D-3, D-4 and D-6 on the false information to provide in Court and introduced them to Mr. Kilolo.[38] Regarding offences under Article 70 (1) (c), the Pre-Trial Chamber found that Mr. Arido instructed D-2, D-3, D-4 and D-6 to testify falsely and encouraged their testimony with money transfers and the possibility of a relocation in Europe.[39]

b. <u>The issue would significantly affect the fair and expeditious conduct of the proceedings and the outcome of the case</u>

i. Fairness

20. The issue relates to an interpretation of the elements of Article 25 (3) (c) of the Statute. It therefore affects the fair conduct of the proceedings. Since the confirmation of the charges is based on the assessment made by the Pre-Trial Chamber following a standard of proof that was potentially incorrect, the Pre-Trial Chamber may have therefore applied a lower threshold than required for the confirmation of the charges brought pursuant to Article 25 (3) (c). The Arido Defence recalls that the object of the remedy provided for in Article 82 (1) (d) of the Statute is to "pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial".[40]

21. If the Appeals Chamber were to find that Article 25 (3) (c) requires a substantial effect on the offences, the Pre-Trial Chamber would therefore have unfairly lowered the standard of proof below what is required to prove the charges under this mode of liability. The issue has a direct

[36] Impugned Decision, pp. 53-54.
[37] *Ibid.*, p. 54.
[38] *Ibid.*, p. 53.
[39] *Ibid.*
[40] ICC-01/04-168, para. 19.

impact on whether the evidence presented by the Prosecution would be sufficient to satisfy its burden of proof, and therefore also affects the degree to which the Defence can challenge the Prosecution's evidence regarding the contribution of Mr. Arido to the crimes charged.[41] This significantly impacts the fairness of the proceedings.

22. This was recognised in the *Mbarushimana* case, where Pre-Trial Chamber I held that "applying an erroneous burden of proof can create a 'direct and detrimental impact' on correctly assessing the evidence and can affect the degree to which the Defence can effectively challenge the evidence presented, thus affecting the fairness of the proceedings".[42] In the *Muthaura et al.* case, the Single Judge of Pre-Trial Chamber II also found that an issue going to the standard applied by the Single Judge, and on the basis of which she reached her conclusion on the facts, constituted an appealable issue within the meaning of Article 82 (1) (d) of the Statute.[43] The Arido Defence respectfully requests the Pre-Trial Chamber to follow the same reasoning.

23. In addition, should the trial proceed on the basis of the standard of proof used by the Pre-Trial Chamber without the clarification of the Appeals Chamber, Mr. Arido's presumption of innocence would not be properly respected as it leaves open the possibility that Mr. Arido would undergo trial on the basis of a possible error in assessing whether there existed substantial grounds to believe that Mr. Arido participated in the alleged offences. Finally, the possibility of the proceedings continuing on the basis of a potentially artificially low standard may compromises the legal certainty, in the absence of an authoritative definition of the constitutive elements of Article 25 (3) (c).

24. Finally, Mr. Arido's right to be tried without undue delay would be impacted by the issue, as he would be committed to trial on the basis of the application of an erroneous legal standard. This is particularly true in light of the fact that the Article 70 proceedings is composed of five suspects and that the confirmation of stage proceeding in itself has lasted significantly longer that some Article 5 cases.

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41 *See e.g.* ICC-01/04-01/10-487, para. 39.
42 ICC-01/04-01/10-487, para. 11; *see also* para. 39.
43 ICC-01/09-02/11-253, para. 24.

ii. Expeditiousness

25. The issue significantly impacts on the expeditious conduct of the proceedings for two reasons. First, since the issue formed the basis of the confirmation of the charges against Mr. Arido, the immediate resolution will assist in the efficiency of the proceedings as it would prevent the trial from going forward on the basis of a legal error made by the Pre-Trial Chamber, or, should the Appeals Chamber find that the Pre-Trial Chamber was correct, will ensure that the proceedings are properly continued against Mr. Arido.

26. In addition, the potential impact of the Pre-Trial Chamber's alleged error is that the charges against Mr. Arido may have been declined, had it used the proper standard. As a result, no trial would take place in his regard, which undoubtedly would affect the expeditiousness of the proceedings since there would simply be no proceedings against Mr. Arido.

iii. Outcome of the case

27. The Arido Defence requests the Pre-Trial Chamber to ponder the possible implications of a given issue being wrongly decided on the outcome of the case, and in doing so, to foresee the possible consequences of it having used an incorrect legal standard when rendering its decision pursuant to Article 61 (7).[44] Those are clear: should the Pre-Trial Chamber have erred in finding that Article 25 (3) (a) does not require a substantial effect on the crimes, the use of the correct legal standard could have led to the charges against Mr. Arido not being confirmed. Should Mr. Arido be committed to trial on the basis of an incorrect standard, the doubts that remain over the legal certainty of this standard may well lead to peripheral – but disruptive – legal disputes as each party proceeds upon their own understanding of the standard the Trial Chamber will apply in the subsequent Trial Judgement.

c. <u>The immediate resolution of the issue by the Appeals Chamber will materially advance the proceedings</u>

28. The immediate resolution of the issue by the Appeals Chamber will materially advance the proceedings, as it would provide the parties and the Trial Chamber with an authoritative interpretation of the elements required to establish criminal liability pursuant to Article 25 (3) (c),

[44] ICC-01/04-168, para. 13.

especially in relation to Article 70 offences for which there exists no jurisprudence to guide the Trial Chamber. In addition this is the first time that this mode of liability is defined by the Court, all the other cases having proceeded on the basis of Article 25 (3) (a).

29. The intervention of the Appeals Chamber would further assist the parties in collecting and presenting evidence, and the Trial Chamber in assessing the evidence during trial. A ruling by the Appeals Chamber would settle the issue[45] of whether Article 25 (3) (c) requires the suspect's actions to have any effect or a substantial effect on the alleged offences, thereby preventing that the alleged legal error of the Pre-Trial Chamber continues to hinder the trial.[46]

2. Issue 2: Whether a correct interpretation of Article 25 (3) (c) of the Statute permits the application of an accessory mode of liability to a conduct offence (Article 70 (1) (c))

a. <u>The issue arises from the Impugned Decision</u>

30. The Impugned Decision is the first to provide a legal definition of, and interpret Article 70 (1) (c) of the Statute. It is also the first one to discuss the constitutive elements of Article 25 (3) (c). In the Impugned Decision, the Pre-Trial Chamber held that the offence of corruptly influencing witnesses under article 70 (1) (c) of the Statute could be "constituted independently from whether the pursued impact or influence is actually achieved".[47] In other words, it found that corruptly influencing witnesses was a "conduct" offence and not an offence of result.[48]

31. The Pre-Trial Chamber found that, as an alternative charge, that "pursuant to Article 70 (1) (c) and Article 25 (3) (c) of the Statute, for the purpose of facilitating the commission of the offence, Mr. Arido aided, abetted or otherwise assisted the commission of the offence of corruptly influencing witnesses D-2, D-3, D-4 and D-6 by way of instructing them to falsely testify and encouraging their testimony with money transfers and the possibility of a relocation in Europe".[49]

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45 ICC-01/04-168, para. 14.
46 *Ibid.*, para. 16.
47 *Ibid.*
48 Impugned Decision, para. 30.
49 *Ibid.*, p. 53.

32. The Arido Defence submits that the Pre-Trial Chamber committed a legal error in applying an accessory mode of individual responsibility to a conduct offence. Firstly, the application of Article 25 (3) (c) to the "conduct" offence referred to in Article 70 (1) (c) raises difficult questions of causation that are not articulated by the Pre-Trial Chamber and, due to the fact that this issue never arose in the past, this requires greater judicial analysis before proceedings on this basis can be considered sound. In cases of accessory liability, many national and international jurisdictions require proving a causal contribution by an accessory to an outcome or consequence brought about by a principle actor or actors. Unless the International Criminal Court has departed from this, the present confirmed charge would require proving a causal contribution to the conduct. For some conduct offences this may be possible, for others it is outright unintelligible. For example, national jurisdictions have found that the exercise of freewill by a principal perpetrator may in some circumstances break the causal force allegedly set in motion by the accessory.

33. Secondly, the Arido Defence submits that the combination of Article 25 (3) (c) and Article 70 (1) (c) introduces interpretational complexity, which may be indicative of a legal error. Article 70 (1) (c) appears to prescribe one unified offence. If this were not the case, the various listed items would be presented in separate sub-sections, as other criminal acts in Article 70 have been. The simplest and most legally predictable assumption is that all the listed elements of this sub-section share the same nature. In other words, following the Impugned Decision, they are offences of conduct and not of consequence. Examining Article 70 (1) (c), it becomes difficult to reconcile how it is possible to aid and abet the *conduct* of "destroying, [or] tampering with […] evidence" which appears to be an offence of consequence. Such interpretational complexity, introduced by the finding in the Impugned Decision that Article 70 (1) (c) is a conduct offence, may suggest that the correct explanation is that Article 25 (3) (c) cannot legally be combined with Article 70 (1) (c).

34. The Arido Defence respectfully requests leave to develop this issue further in an appeal. The application of Article 25 (3) (c) to a conduct offence, first articulated in the Impugned Decision, is a necessary premise forming one of the charges that Mr. Arido faces. Being both an essential component of one charge and also textually rooted in the Impugned Decision, the issue arises out of the Impugned Decision.

b. <u>The issue would significantly affect the fair and expeditious conduct of the proceedings</u>

i. Fairness

35. The issue significantly affects the fairness and expeditiousness conduct of the proceedings. Indeed if Article 25 (3) (c) cannot be applied to Article 70 (1) (c) in the manner that it has been, then the proceedings and any subsequent sentence would infringe both the principles of *nullum crimen sine lege* and *nulla poena sine lege*, as found in Article 22 (1) and Article 23 of the Statute respectively. Subjecting an individual to defend himself against a non-legal founded charge is clearly unfair.

ii. Expeditiousness

36. Where a charge lacks a legal basis, following the arguments found in above paragraphs 26 and 26 which apply *mutatis mutandis* to the present issue, it is clear that any proceeding on the basis of an improper charge unduly lengthens the process. Similarly, whether an improper or miss-founded charge is confirmed will have a profound impact upon the outcome of a trial.

c. <u>The immediate resolution of the issue by the Appeals Chamber will materially advance the proceedings</u>

37. An immediate resolution by the Appeals Chamber will materially advance the proceedings. In taking an incorrect legal approach to the interpretation of Article 70 (1) (c) and combining it with Article 25 (3) (c) the Pre-Trial Chamber has introduced a degree of uncertainty into the way forward. While it may be the case that its interpretation may turn out to be correct, the contribution of the Appeals Chamber can provide greater certainty and guidance which would greatly move the proceedings forward.

38. As mentioned in paragraph 27 above, where a novel interpretation introduces uncertainty into the application of the law, parties will attempt to proceed upon their own understanding of the correct application of the law upon trial judgement and final appeal. This may differ from the interpretation of the Pre-Trial Chamber. Unnecessary disputes can thus be avoided through the intervention of the Appeals Chamber by assisting the Defence and Prosecution to tailor their arguments accordingly.

C. Issue related to the interpretation of Article 70 offences

1. Issue 3: Whether the standard of proof under Article 61 (7) of the Statute requires the Pre-Trial Chamber to provide reasoning for its legal interpretation of Article 70 offences

a. The issue arises from the Impugned Decision

39. In the Impugned Decision, the Pre-Trial Chamber provides its interpretation of the sub-sections of Article 70[50] with a paragraph being devoted to each of the three offences charged.

40. The Arido Defence submits that the Pre-Trial Chamber committed a legal error by failing to provide a reasoned opinion for its findings related to the interpretation of the Article 70 offences. It submits that the Pre-Trial Chamber was under the obligation to provide reasoning as to why it found that certain elements were or were not part of the elements of offences under Article 70 (1) (a), (b) and (c).[51] The Arido Defence's position is that in light of its obligation to establish, pursuant Article 61 (7) of the Statute, that there exists substantial grounds to believe that the suspects committed each of the offences as charged, and in light of the fact that Article 70 offences have never been defined by the Court, the Pre-Trial Chamber was under a positive obligation to provide justification regarding its conclusion as to the constitutive elements of the offences under Article 70 (a) to (c).

41. In the context of a different legal issue, the Appeals Chamber has found that: "the extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates *with sufficient clarity the basis of the decision*. Such reasoning will not necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion."[52] In the present case, the Pre-Trial Chamber failed to provide reasons as to why it found that certain elements formed part of the Article 70 offences.

[50] Impugned Decision, paras 28-30.
[51] ECtHR, *Higgins and Others v. France*, Application No. 134/1996/753/952, Judgment of 19 February 1998, para. 42, available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58129.
[52] ICC-01/04-01/06-773, para. 2, and applied in ICC-02/11-01/11-278-Red, para. 47 (emphasis added).

42. The Arido Defence notes, for example, that in addressing Article 70(1)(c), the Pre-Trial Chamber uses three sentences to outline its interpretation of this provision.[53] Two sentences are used to characterise the *actus Reus* of the offence, and one sentence provides a decision on an issue disputed by the various defence teams in their submissions on the Document Containing the Charges. No explanation is given as to how these definitional elements are arrived at; no reference is made to Article 21 or 22 (2) of the Statute, which obliges any Chamber to interpret the crimes within the Statute in case of ambiguity in favour of the suspect/accused, let alone did the Pre-Trial Chamber presented a reasoned application based on these Articles. The same applies to the Pre-Trial Chamber's interpretation of Article 70 (1) (a)[54] and (b).[55]

43. This legal issue arises out of the decision since the interpretations of Article 70 form the basis of the confirmation of the charges confirmed against Mr. Arido and the other suspects. Its interpretation forms an essential intermediate conclusion to the decision to confirm the charges and as a result, the issue emanates from the Impugned Decision.

b. <u>The issue would significantly affect the fair and expeditious conduct of the proceedings and the outcome of the case</u>

i. Fairness

44. First of all, the issue affects the fairness of the Pre-Trial Chamber's finding that there exist substantial grounds to believe that Mr. Arido committed the charged offences, since, by not detailing its reasoning regarding the constitutive elements of the offence, the Pre-Trial Chamber's interpretation of the offences cannot be sufficiently challenged. As a result of the Pre-Trial Chamber's alleged error, the Arido Defence is effectively prevented from assessing the correctness of the Pre-Trial Chamber's interpretation of the Article 70 offences and therefore it prevents Mr. Arido from exercising his right to appeal on this area of the law or to challenge it during trial. The issue affects the fairness of the proceedings because it limits the rights of an effective Defence. Part of the rationale of the need for reasons is that without them, the right of

[53] Impugned Decision, para. 30
[54] *Ibid.*, para. 28.
[55] *Ibid.*, para. 29.

the Defence to appeal errors is hindered.[56] This is because the method of decision cannot be scrutinised and thus any errors in the judicial process cannot be easily corrected.

ii. Expeditiousness

45. In light of this unfairness, the absence of reasons can also be seen to affect the expeditiousness of proceedings. Where the basis for an interpretation of an offence is insufficiently articulated, further issues may require a decision as suspects and the Prosecution attempt to assess the actual parameters of the offence. This may needlessly expand the duration of the trial. To the contrary, an effective resolution of the issue by the Appeals Chamber would assist the parties in investigating and presenting evidence, and the Trial Chamber in assessing the said evidence, thereby rendering the trial more expeditious.

46. In addition, the arguments contained in paragraphs 25 to 26 above in relation to issue 1 apply *mutatis mutandis* to the present issue.

iii. Outcome of the case

47. In addition, the lack of reasons in the Decision affects the outcome because the committal of an individual to trial using a legal interpretation of the Statute, the basis of which is insufficiently articulated, sets the stage for an almost inevitable appeal post trial judgement which may reverse many aspects of the judgement. Furthermore, the likelihood of an interim appeal arising concerning the definition of Article 70 is also increased.

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[56] See *inter alia* Article 14 (5) of International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: http://www.refworld.org/docid/3ae6b3aa0.html [accessed 25 November 2014]; ICTY*, Prosecutor v Naletilić and Martinović*, Case No. IT-98-34-A, Appeals Judgement, 3 May 2006, para. 603, available at: http://icty.org/x/cases/naletilic_martinovic/acjug/en/nal-aj060503e.pdf; ICTY, *Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A., Appeals Judgement, 12 June 2002, para. 41, available at: http://icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf; HRC, Communication No. 283/1988, *A. Little. v. Jamaica* (Views adopted on 1 November 1991), in UN doc. GAOR, A/47/40, para. 9 read in conjunction with para. 8.5, available at: http://www1.umn.edu/humanrts/undocs/html/dec283.htm; ECtHR, *Van Hulst v the Netherlands*, HRC Communication 903/1999, UN Doc CCPR/C/82/D/903/1999 (2004), para. 6.4, available at: http://www.un.org/ga/search/view_doc.asp?symbol=CCPR/C/82/D/903/1999

c. <u>The immediate resolution of the issue by the Appeals Chamber will materially advance the proceedings</u>

48. In light of these submissions, the immediate resolution of this issue will advance the proceedings as it will dispel doubt that Mr. Arido has been committed to trial on the basis of an unsettled interpretation of the offences for which he is charged. Resolving the issue at this stage will assist in definitively removing many uncertainties regarding how to proceed at the trial stage and will map out a way forward that provides greater legal coherence to subsequent trial decisions.

49. In addition, the arguments contained in paragraphs 28-29 above in relation to issue 1 apply *mutatis mutandis* to the present issue.

D. <u>Issues related to the standard of proof for the assessment of evidence under Article 61 (7) of the Statute</u>

1. Issue 4: Whether the standard of proof under Article 61 (7) of the Statute requires the Pre-Trial Chamber to draw conclusions from witnesses' evidence where there are ambiguities, contradictions, inconsistencies or doubts as to its credibility and therefore to provide a detailed reasoning as to its conclusion

a. <u>The issue arises from the Impugned Decision</u>

50. The Arido Defence dedicated a significant part of its confirmation of charges submissions to provide detailed analysis of D-2 and D-3's evidence and arguing that it could not be relied upon for numerous reasons.[57] In the Impugned Decision, the Pre-Trial Chamber noted that it was "mindful of its responsibility to determine, upon proper examination of the evidence, its relevance and probative value, including that pertaining to witnesses D-2 and D-3"[58] and that it would take "great care in finding that a witness is or is not credible."[59] Despite this statement, it ruled that D-2 and D-3's evidence was admissible and credible by stating that "having assessed Mr Arido's submissions, the Chamber is not persuaded that it cannot rely on the statements of D-2 and D-3."[60] Further in the Impugned Decision, the Pre-Trial Chamber held that "The Defence arguments and challenges to the Prosecutor's evidence have been considered throughout this assessment. Where necessary, the Chamber provides a separate response to the

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[57] ICC-01/05-01/13-598-Conf, paras 211- 262; ICC-01/05-01/13-673-Conf, paras 140-167.
[58] Impugned Decision, para. 16.
[59] *Ibid.*
[60] *Ibid.*

arguments and challenges raised."[61] This forms the totality of the Pre-Trial Chamber's reasoning regarding the admissibility and credibility of D-2 and D-3's evidence.

51. The Arido Defence submits that the Pre-Trial Chamber committed an error of law by failing to apply the correct legal standard under Article 61 (7) of the Statute to establish substantial grounds to believe. It submits that the Pre-Trial Chamber was required to evaluate whether the evidence was sufficient to establish substantial grounds to believe that Mr. Arido committed the charged offences, and in doing so, to draw conclusions from the evidence where there are ambiguities, contradictions, inconsistencies or doubts as to the credibility of the evidence, as stated by the Appeals Chamber, in order to determine whether the evidence provided by the Prosecution was sufficient.[62] The Arido Defence further submits that the Pre-Trial Chamber was obliged to analyse the alleged lack of credibility under Article 69 (4) of the Statute which requires the Court to take into account the probative value of the evidence as well as any prejudice such evidence may cause to a fair trial when ruling on the admissibility of any evidence.[63]

52. In addition, the Arido Defence submits that the Pre-Trial Chamber erred in law by failing to give reasons for its ruling on D-2 and D-3's credibility in light of the challenges made by the Arido Defence, as it was required to do pursuant to Rule 64 (2) of the RPE.

53. The evidence of D-2 and D-3 forms the factual basis for the totality of the charges against Mr. Arido regarding his conduct in their regards and with regards to D-4 and D-6.[64] This is clear when one looks at footnotes 123 to 135 and 137 to 141, which underline the Pre-Trial Chamber's reasoning regarding the factual allegations against Mr. Arido and which only refer to the statements of witnesses D-2 or D-3.[65]

54. The other evidence presented by the Prosecution and referred to by the Pre-Trial Chamber

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[61] *Ibid.*, para. 26.
[62] As stated by the Appeals Chamber in the Mbarushimana case, ICC-01/04-01/10-514, para. 39.
[63] See Rule 122 (9) RPE: Subject to the provisions of article 61, article 69 shall apply *mutatis mutandis* at the confirmation hearing.
[64] Impugned Decision, paras 88-92, 94.
[65] Footnotes 128 and 136 also includes a reference to Mr. Arido's statement to the French authorities, CAR-OTP-0074-1065-R01, which relates to Mr. Arido's alleged knowledge of the non-military background of D-2 and D-3. It therefore concerns the *Mens Rea*, only relevant if the *Actus Reus* is established, which the Arido Defence submits was not.

relate to Mr. Arido's relationship with the Bemba Defence team,[66] the money transfers **received** by Mr. Arido from Mr. Kilolo, Mr. Babala and Mr. Babala's chauffeur Mr. Nginamau,[67] and to D-2 and D-3 testimony in the main case, where they allegedly lied.[68] None of this evidence provides information regarding Mr. Arido's interactions with D-2, D-3, D-4 or D-6. As was made clear by the Arido Defence in its submissions on the confirmation of charges, D-2 and D-3's statements are the only pieces of evidence, which provide support for the Prosecution's allegations under Article 70.[69]

55. The issue therefore arises directly from the decision. As a result of its finding that D-2 and D-3 were credible witnesses, the Pre-Trial Chamber resolved key factual matters against Mr. Arido on the sole basis of D-2 and D-3's evidence, therefore making their evidence essential for the confirmation of charge decision. The issue is also part of the larger subject of the Pre-Trial Chamber's legal duties in evaluating evidence for the purposes of the confirmation of charges decision.

b. <u>The issue would significantly affect the fair and expeditious conduct of the proceedings and the outcome of the case</u>

i. Fairness

56. The Pre-Trial Chamber failed to use the proper standard of proof pursuant to Article 61 (7) of the Statute. The reasoning provided in paragraphs 20-24 above with regards to issue 1 applies *mutatis mutandis* to the present issue: had the Pre-Trial Chamber done the proper analysis in accordance with Article 61 (7) of the Statute and drawn the required conclusions from the ambiguities, contradictions and inconsistencies regarding D-2 and D-3's evidence, it may not have found that there existed substantial grounds to believe that Mr. Arido committed or aided and abetted or otherwise assisted the charged offences. The issue significantly affects the fairness of the trial since the charges against Mr. Arido were confirmed on the sole basis of D-2 and D-3's evidence despite the Pre-Trial Chamber having failed to undertake a detailed analysis of their credibility.

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[66] Impugned Decision, para. 86.
[67] *Ibid.*, paras 87, 93.
[68] *Ibid.*, para. 94.
[69] ICC-01/05-01/13-598-Conf, para. 198

57. Furthermore, the lack of reasoning on the part of the Pre-Trial Chamber makes it impossible for the Arido Defence to challenge its assessment of the witnesses, thereby effectively preventing it from exercising Mr. Arido's right to challenge the Impugned Decision. The Arido Defence recalls that requests for leave to appeal issues that identified implicit or poorly articulated reasoning by the Pre-Trial Chamber have been granted in other cases before the Court.[70]

ii. Expeditiousness

58. The reasoning contained in paragraphs 25 to 26 above in relation to issue 1 applies *mutatis mutandis* to the present issue. Since the D-2 and D-3's evidence formed the basis of the confirmation of the charges against Mr. Arido, the immediate resolution will assist in the efficiency of the proceedings as it would prevent the trial from going forward on the basis of a legal error made by the Pre-Trial Chamber, or, should the Appeals Chamber find that the Pre-Trial Chamber was correct, will ensure that the proceedings are properly continued against Mr. Arido.

iii. Outcome of the case

59. The Arido Defence requests the Pre-Trial Chamber to ponder the possible implications of a given issue being wrongly decided on the outcome of the case, and in doing so, to foresee the possible consequences of it having used an incorrect legal standard when rendering its decision pursuant to Article 61 (7).[71] Those are clear: should the Pre-Trial Chamber have erred in finding that D-2 and D-3 are credible, the use of the correct legal standard could have led to the charges against Mr. Arido not being confirmed.

c. <u>The immediate resolution of the issue by the Appeals Chamber will materially advance the proceedings</u>

60. A ruling by the Appeals Chamber would settle the issue[72] of whether the Pre-Trial Chamber is under an obligation, pursuant to Articles 61 (7) and 69 (4) and Rule 64 (2) of the RPE, to address in detail the alleged inconsistencies and other doubts in the evidence that is

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[70] ICC-02/11-01/11-464, para. 35; ICC-01/04-01/10-487, para. 38.
[71] ICC-01/04-168, para. 13.
[72] *Ibid.*, para. 14.

relied upon to confirm the charges, thereby preventing that the alleged legal error of the Pre-Trial Chamber continues to hinder the trial.[73]

2. Issue 5: whether the standard of proof under Article 61 (7) of the Statute allows the Pre-Trial Chamber to find that Mr. Arido encouraged the testimony of witnesses with money transfers in the absence of evidence of Mr. Arido transferring money to witnesses

a. <u>The issue arises from the Impugned Decision</u>

61. The issue arises directly from the Impugned Decision as the Pre-Trial Chamber confirmed the charges against Mr. Arido on the basis of a finding that he instructed, persuaded or otherwise influenced D-2, D-3, D-4 and D-6, including by way of transfers of money and the possibility of a relocation in Europe, to state false information or withhold true information before Trial Chamber III, under Article 25 (3) (c) of the Statute for the offences listed in Article 70 (1) (a), (b) and (c) of the Statute.[74]

62. When discussing the factual basis of the allegations against Mr. Arido, the Pre-Trial Chamber did not make any finding that Mr. Arido transferred money to D-2, D-3, D-4 or D-6. The extent of its finding regarding the provision of money to witnesses is limited to a finding that he paid for the accommodation of D-2 and D-3 and also "handed the prospective witnesses various amounts of money" for food and travel expenses, in cash.[75] The only finding regarding money transfers related to Mr. Arido is that Mr. Arido received money from some of the co-suspects, which served to pay him for writing an expert report.[76]

63. The Arido Defence submits that the Pre-Trial Chamber erred in finding that there existed substantial grounds to believe that Mr. Arido corruptly influenced witnesses or aided and abetted or otherwise assisted in the provision of false testimony/evidence before the Court through money transfers to Defence witnesses in the absence of a finding (and of evidence) that Mr. Arido ever transferred money to the said witnesses. The Arido Defence is not disputing the Pre-Trial Chamber's discretion to evaluate evidence, but rather submits that the issue arises where a Chamber arrives at a decision without stating any evidential basis for a fundamental premise of

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[73] ICC-01/04-168, para. 16
[74] Impugned Decision, pp. 53-54.
[75] *Ibid.*, para. 91.
[76] *Ibid.*, paras 87, 93.

that decision. The Arido Defence submits that the Pre-Trial Chamber's discretion in evaluating evidence must be construed within the ambit of the standard set by Article 61 (7) of the Statute for the confirmation of charges. In other words, its discretion is not unlimited and it must provide a reasoning when accepting or denying a piece of evidence and confirming the charges of its basis.

b. <u>The issue would significantly affect the fair and expeditious conduct of the proceedings</u>

i. Fairness

64. The issue significantly affects the fairness of the trial, as the charges against Mr. Arido were confirmed on the basis of three types of alleged participation by Mr. Arido: transferring money to witnesses, promising them asylum/stay in Europe, and liaising them with Mr. Kilolo. The Arido Defence submits that in the absence of the first type of participation, the Pre-Trial Chamber may not have found that the evidence met the threshold of substantial grounds to believe that Mr. Arido participated in the charged offences. This issue also implicates the rights of the accused under Article 67 (1) (a). Without a clear indication of the core factual basis, it is difficult to see how Mr. Arido can be said to be informed of the "contents" of the charges that have in fact been confirmed.

65. The arguments contained in paragraphs 20 and 23 to 24 above, in relation to issue 1, apply *mutatis mutandis* to the present issue.

ii. Expeditiousness

66. The arguments contained in paragraphs 25-26 above, in relation to issue 1, apply *mutatis mutandis* to the present issue.

67. In addition, the potential impact of the Pre-Trial Chamber's alleged error is that the charges against Mr. Arido may have been declined or diminished in number, should the Pre-Trial Chamber have only considered the alleged promises of asylum and the alleged liaison with Mr. Kilolo. As a result, no trial would take place in his regard, which undoubtedly would affect the expeditiousness of the proceedings since there would simply be no proceedings against Mr. Arido.

c. <u>The immediate resolution of the issue by the Appeals Chamber will materially advance the proceedings</u>

68. The immediate intervention of the Appeals Chamber would materially advance the proceedings, as it would set the record straight regarding the charges confirmed against Mr. Arido and his alleged participation in the offences. An intervention would avoid the case going to trial on the erroneous basis that Mr. Arido's participated in the alleged offences through transferring money to witnesses.

3. Issue 6: Whether the standard of proof under Article 61 (7) of the Statute permits the Pre-Trial Chamber to find that there were substantial grounds to believe that Mr. Arido committed the alleged offences related to false testimony in the absence of objective evidence that the witnesses lied under oath and on the sole basis of the witness' evidence

a. <u>The issue arises from the Impugned Decision</u>

69. As stated above, the confirmation of the charges against Mr. Arido is based solely on the evidence provided by D-2 and D-3.[77] Both witnesses admitted having lied under oath.[78] The Pre-Trial Chamber stated that it was "obviously not in a position to assess the reliability and truthfulness of the Witnesses' testimony on issues pertaining to the merits of the Main Case".[79] Notwithstanding this statement, it found that the witnesses lied under oath regarding, *inter alia*, "other substantive issues related to the charges against Mr. Bemba in the Main Case, such as the witnesses' membership of certain groups or entities, the structure of these groups or entities, their movements on the ground, and names of officials."[80]

70. The Arido Defence submits that the Pre-Trial Chamber erred in affirmatively finding that D-2, D-3, D-4 and D-6 lied under oath in the absence of objective evidence that they did so, in the absence of evidence that D-4 and D-6 lied under oath, and by relying solely on D-2 and D-3, who committed perjury, to confirm the charges.

71. The alleged issue arises directly from the impugned decision. As a result of its finding that D-2 and D-3 lied under oath, the Pre-Trial Chamber resolved key factual matters against

77 *Supra*, paras 53-55.
78 ICC-01/05-01/13-598-Conf, paras 239-240.
79 Impugned Decision, para. 64.
80 *Ibid.*

Mr. Arido on the sole basis of their evidence, therefore making their evidence decisive for the confirmation of charge decision. The issue is not whether a witness is credible, but rather whether the Pre-Trial Chamber correctly applied the legal standard by choosing between dramatically conflicting statements from the same witness while not providing any articulated or objective basis for its Decision.

b. <u>The issue would significantly affect the fair and expeditious conduct of the proceedings and the outcome of the case</u>

72. The arguments contained in paragraphs 20 to 23 above in relation to issue 1, and in paragraphs 56 to 57 in relation to issue 4 apply *mutatis mutandis* to the present issue regarding the impact of the issue on the fairness of the trial.

73. In addition, the arguments contained in paragraphs 25 to 26 above in relation to issue 1, and in paragraph 58 in relation to issue 4 apply *mutatis mutandis* to the present issue regarding the impact of the issue on the expeditiousness of the trial.

74. Finally, the arguments contained in paragraph 59 above in relation to issue 4 also apply *mutatis mutandis* to the present issue.

c. <u>The immediate resolution of the issue by the Appeals Chamber will materially advance the proceedings</u>

75. The arguments contained in paragraph 60 above in relation to issue 4 also apply *mutatis mutandis* to the present issue.

4. Issue 7: Whether the standard of proof under Article 61 (7) of the Statute permits the Pre-Trial Chamber to confirm three separate charges based on the exact same set of facts (cumulative charging)

a. <u>The issues arises from the Impugned Decision</u>

76. In the Impugned Decision, the Pre-Trial Chamber confirmed three charges against Mr Arido, as explained in paragraph 3 above.[81] All three charges are based on the finding that Mr. Arido recruited and instructed D-2, D-3, D-4 and D-6 to either provide false information or

[81] Impugned Decision, pp. 53-54.

withhold true information during their testimony in Court. Furthermore, the charges are based on the finding that he encouraged their testimony with money transfers and the possibility of a relocation in Europe, and also introduced them to Mr. Kilolo.[82]

77. The Arido Defence submits that the Pre-Trial Chamber erred in considering identical and overlapping acts as constituting three separate charges. In a previous decision, the Pre-Trial Chamber has stated that "as a matter of fairness and expeditiousness of the proceedings, **only distinct crimes** may justify a cumulative charging approach and, ultimately, be confirmed as charges. This is only possible if each statutory provision allegedly breached in relation to one and the same conduct requires at least one additional material element not contained in the other".[83] It defined cumulative charging is as a situation "where the Prosecutor relied on the same evidence […] to substantiate two or more legal characterisations".[84]

78. The legal issue arises out of the decision where the Pre-Trial Chamber discusses its reasons for confirming the charges against Mr. Arido.[85] For instance, in the Impugned Decision, the Pre-Trial Chamber also found that the offence of presenting evidence that the party knows is false or forged under Article 70 (1) (b) of the Statute includes "all types of evidence, namely documents, material and tangible objects, as well as oral evidence".[86] As a result, it found that there existed substantial grounds to believe that Mr. Arido aided and abetted or otherwise assisted in the commission of the offence of "presenting evidence that the party knows is false or forged".[87] In the same time, the Pre-Trial Chamber found that Mr. Arido also aided, abetted or otherwise assisted in the offence of giving false testimony when under an obligation to tell the truth.[88] However, the Pre-Trial Chamber failed to explain the distinction between aiding and abetting or otherwise assisting the presentation of false oral evidence and aiding and abetting or otherwise assisting a false testimony. The Arido Defence submits that these two charges, as set by the Pre-Trial Chamber, in fact cover the exact same action: influencing witnesses to provide false evidence during testimony.

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[82] Impugned Decision, pp. 53-54.
[83] ICC-01/05-01/08-424, para. 202 (emphasis added).
[84] ICC-01/05-01/08-532, para. 53
[85] Impugned Decision at pp. 53-53; *see also* paras 87-96.
[86] *Ibid.*, para. 29.
[87] *Ibid.,* para. 96 and p. 53.
[88] *Ibid.*,.

79. Further, the relevant material elements considered by the Pre-Trial Chamber appear to be the various alleged acts of persuasion and instruction combined with an alleged role of coordinating their participation. The limited reasoning in the Impugned Decision means that these assignments of acts to Article 70 offences are essential to the confirmation of charges in the Impugned Decision.

b. The issue significantly affects the fairness and expeditiousness of the proceedings and the outcome of the trial

i. Fairness

80. The issue impacts upon the fairness of the proceedings by charging Mr. Arido under three different offences based on the exact same set of facts. In addition the Arido Defence emphasises that the apparent significant, if not total, overlap of the confirmed charges places Mr. Arido in an unfair position. Firstly, the challenge of mounting an effective Defence is unduly intensified where confusion surrounds the elements of the offence and how the Suspect's alleged acts match these elements, and as a result, the issue places an undue burden on the Defence.[89]

81. Secondly, the effect of unjustified cumulative charge is to inflate the potential sentence by counting the same alleged acts as different offences. While the Arido Defence's position is that cumulative sentencing is not possible in the case of Article 70 offences,[90] it seems likely that should Mr. Arido be convicted of three charges instead of one, the sentence might be higher - while still being within the maximum penalty of five years as set by Article 70 - than if Mr. Arido were to be convicted under one single charge.

82. The issue also relates to Mr. Arido's right to know the nature, cause and content of the charges against him in detail, as protected by Article 67 (1) (a) of the Statute, as the error of the Pre-Trial Chamber currently prevents him from knowing the distinct factual basis of the three charges against him. As a result, Mr. Arido is not in an effective position to properly prepare his

[89] *See e.g.* ICC-01/05-01/08-532, para. 30.
[90] ICC-01/05-01/13-739, paras 33-37.

Defence within the framework of admissible and reliable evidence.[91] It also has the result that he is not informed of each legal requirement behind the crimes charged.[92]

83. In addition, it also affects his right to be tried without undue delay as the issue has the potential to delay the proceedings unjustifiably, as discussed in the following paragraph.

ii. Expeditiousness

84. The issue also affects the expeditious conduct of the proceedings, since as a result of the Pre-Trial Chamber's alleged error, the trial is to proceed on the basis of three different charges under Article 70 (1) (a), (b) and (c), which would require the parties and the Trial Chamber to separately address each charge.

85. The issue is also relevant to the expeditious conduct of the proceedings in light of the fact that Article 70 offences have not yet been defined by the Court, and that an intervention of the Appeals Chamber, clarifying the constitutive elements of the offence, would assist in saving time during the trial by avoiding the unnecessary presentation of evidence during the trial.

86. Finally, the alleged legal error may lead to both the Prosecution and the Defence pursuing unnecessary procedural avenues and arguments in a bid to squarely address ill-articulated charges. All other things being equal, defending multiple charges necessarily extends the length of trial and accompanying period of legal limbo for Mr. Arido. This is particularly important to keep in mind given that this is the first Article 70 case proceeding to trial, and also the first large "multi-accused" trial.

iii. Outcome of the proceedings

87. In addition, the issue of cumulative charging in the Impugned Decision affects the outcome for at least two reasons. Firstly, if several of these charges are not sound, then the resolution of this issue may lead to Mr. Arido facing a lesser sentence. Secondly, the unfolding of a trial based upon charges of a tangled character may ultimately lead to a subsequent Appeal precisely on many of the issues raised in this request.

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[91] ICC-01/05-01/08-424, paras 206-209, 299-300, 311-312.
[92] *Ibid.*

c. The immediate resolution of the issue by the Appeals Chamber will materially advance the proceedings

88. The immediate resolution of this issue by the Appeals Chamber will materially advance the proceedings, as it will dispel doubt that Mr. Arido has been committed to trial on the basis of an incorrect interpretation and application of Article 70 of the Statute. Guidance from the Appeals Chamber on this issue can assist in clarifying the trial issues by providing greater logical coherence to the charges, and will remove unnecessary disputes over the law, which may be raised on interim appeal in any case. Finally, addressing this issue now will assist in dispelling doubt regarding the committal of an individual to trial for multiple charges based on the same set of facts.

V. CONCLUSION

89. In light of the above, the Arido Defence respectfully requests the Pre-Trial Chamber to grant it leave to appeal the seven issues listed in paragraph 14 of the present request.

Göran Sluiter, Counsel for Mr. Arido

Dated this 1st day of December 2014

At Amsterdam, The Netherlands