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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 Response to the Prosecution Submission on the Confirmation of Charges (ICC-01/05-01/13-597-Conf-AnxB) and the Prosecution's Response to Defence Confirmation Submissions (ICC-01/05-01/13-646-Conf)" filed on 11 September 2014 (ICC-01/05-01/13-673-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. The Arido Defence hereby submits its response to the Prosecution Submission on the Confirmation of Charges of 30 July 2014[1] and the Prosecution's Response to Defence Confirmation Submissions of 21 August 2014.[2]

2. For the reasons presented below, the Prosecution's case should be dismissed in its entirety as the evidence presented by the Prosecution fails to meet the requisite standard for the confirmation of charges. Consequently, the Pre-Trial Chamber should decline to confirm any charge against Mr. Arido, and order his immediate release from custody.

3. The present response addresses both the Prosecution's 30 July submissions and its 21 August response. It is structured along - in essence - the same lines as the Arido Defence submissions of 30 July 2014,[3] with three major topics: the rules of interpretation and the elements of the offences (Part I), the alleged facts (Part II) and the alleged individual criminal liability (Part III). Firstly, however, a few preliminary observations are in order.

II. CLASSIFICATION

4. Pursuant to Regulation 23*bis* of the Regulations of the Court ('RoC'), this response is submitted as confidential as it refers to confidential filings, protected witnesses and confidential evidence.

III. PRELIMINARY OBSERVATIONS

1. The scheduling of the submissions resulted in the Arido Defence having to guess the Prosecution's arguments

5. The dialectical approach that normally applies to judicial decision-making following adversarial hearings has been somewhat distorted by the Single Judge's order to have simultaneous submissions on the Confirmation of Charges, from both Prosecution and the Defence teams, on 30 July 2014.[4] The result of this working method is that the Arido Defence was forced into guessing the Prosecution's case on the basis of the DCC when preparing its

[1] ICC-01/05-01/13-597-Conf-AnxB, hereinafter 'Prosecution Submissions'.
[2] ICC-01/05-01/13-646-Conf, ('Prosecution Response').
[3] ICC-01/05-01/13-598-Conf, ('Arido Defence Submissions').
[4] ICC-01/05-01/13-443.

submissions, and is now compelled to respond to two Prosecution documents in one single document, instead of having two opportunities to respond to the Prosecution Submissions.

6. The dialectical approach to decision-making is especially embraced in legal disputes, where it is difficult to determine by objective and scientific means where the truth lies.[5] Thus, to properly assist the Pre-Trial Chamber in its decision-making, the process should permit that the parties fully engage with each other's respective positions and arguments.

7. It is clear that the Prosecution was prevented from properly engaging with the Defence arguments in its 30 July Submissions. However, in its Response, the Prosecution - even after a significant extension of time was accorded - failed to seriously engage with, and respond to, the Arido Defence Submissions.

2. The Prosecution Response fails to address the majority of the Arido Defence arguments and it attempts to reverse the burden of proof

8. The vast majority of the points raised by the Arido Defence in its Submissions have not been responded to or even mentioned by the Prosecution. These include, but are not limited to:

i. The Prosecution's failure to prosecute or even investigate cases which fell under Article 70 when it related to its own investigations or the work of the VWU;[6]
ii. The irregularities in the conduct of the investigations;[7]
iii. The violations of Mr. Arido's right to be informed of the charges against him;[8]
iv. The fact that Mr. Arido's involvement with the Bemba Defence team, and the payments he received, were as a result of him working as an expert witness for them;[9]
v. That Mr. Arido's statements to the French authorities were not made in accordance with the proper procedure and, therefore, should not be relied upon;[10]
vi. That D-2 and D-3's evidence are not credible in light of the context in which they were taken, the leading questions used by the investigators, and their personal interests in providing incriminating information to the Prosecution [REDACTED];[11]

[5] Decision sciences: An integrative perspective, Paul R. Kleindorfer, Howard C. Kunreuther, and Paul J. H. Schoemaker, Cambridge University Press, 1993, p. 225.
[6] Arido Defence Submissions, Part IV-A.
[7] *Ibid.*, Part IV-B.
[8] *Ibid.*, Part IV-C.
[9] *Ibid.*, Part VI-A.
[10] *Ibid.*, Part VI-C-1-c.
[11] Arido Defence Submissions, Part VI-C-2.

vii. The substance of the Arido Defence's arguments related to the allegations of finding false witnesses, bribing witnesses, making promises in exchange for false testimony and illicit coaching;[12]

viii. The Arido Defence's arguments related to individual criminal responsibility, other than the one related to Article 25 not being applicable to Article 70 offences.[13]

9. In its Response, the Prosecution states that the Defence Submissions of 30 July are "[REDACTED]".[14] Reading such a bold statement, one would expect a thorough analysis of the arguments raised by the Arido Defence. However, as is clear from the list above, the Prosecution only responds to a small part of the Arido Defence Submissions. As will be later analysed throughout this response, the Prosecution Response is unconvincing. Furthermore, the Arido Defence - and also the Pre-Trial Chamber- remains unaware of the Prosecution's views in respect of many of the issues and arguments raised in the Arido Defence Submissions.

10. The Prosecution – despite its failure to address most of the Arido Defence arguments – is nevertheless attaching far-reaching conclusions to its limited Submissions. For example, the Prosecution raises a few issues - the discussion of which is nowhere near comprehensive - and then concludes that *all* legal submissions from the Defence should be disregarded. This is illustrated, for instance, by paragraphs 5 to 32 of the Prosecution Response which purports to respond to the Defence legal submissions, yet only addresses a small portion of the wide array of the Defence teams' legal submissions.

11. For instance, in paragraph 33 of its Response, the Prosecution states that the contradictions in the arguments advanced by the respective Defence teams readily demonstrate their unreliability. It then offers a few observations which it claims to be "exemplary".

3. The Prosecution impermissibly attempts to conflate all the suspects

12. The Prosecution has the tendency to refer to the Defence as a whole. By doing so, it fails not only to respond to the Arido Defence position in its own right, but also ignores Mr. Arido's right be given the same rights as if he were tried alone, as protected by Rule 136 (2) of the RPE.

[12] *Ibid.*, Part VI-C-3 to Part VI-C-6.
[13] *Ibid.*, Part VII.
[14] Prosecution Response, para. 2.

13. It is telling that Mr. Arido is associated by the Prosecution with alleged 'contradictions' which are supposed to be 'exemplary' and that yet, the most part these alleged contradictions do not concern him. In fact, Mr. Arido is not mentioned at all where the Prosecution discusses the use of coded language,[15] the payments,[16] the communications with witnesses,[17] the use of codes and covert communication,[18] or the cover up of the alleged Common Plan.[19] The Arido Defence Submissions are only addressed in paragraphs 10, 22, 29, 34-40, 53-55, 79-80, and 149-163 of the Prosecution Response.

14. This is not only illustrative of the Prosecution's biased association of Mr. Arido with the other suspects, but also demonstrates the fact the Prosecution does not have enough evidence on Mr. Arido as an individual and is therefore forced into trying to aggregate him with the co-suspects. It further shows that Mr. Arido's alleged role is at the very outer margins of the so-called Common Plan.

15. Another problematic element of the Prosecution's - by and large unsuccessful - endeavours to enlarge contradictions between co-suspects is that it distracts from the vital starting and stopping point: what is the quality of the Prosecution's evidence? Does it meet the standard required by Article 61 (5)?

16. The Prosecution's position in paragraph 76 is also instructive in this regard. It is stated that the Defence (apparently including the Arido Defence) failed to back up their arguments with evidence or to present reasoned arguments undermining the Prosecution's position. This is simply not true. All of the assertions in the Arido Defence Submissions are underpinned by the evidence, including detailed references to documents contained in the Prosecution's list of evidence and in that of the Arido Defence, and references to the relevant parts of the DCC. This will also be the approach in the present response.

4. The Prosecution attempts to reverse the burden of proof

17. The Arido Defence also objects to other aspects of the Prosecution's approach in its Response. Indeed, the Prosecution is attempting numerous times to reverse the burden of proof,

[15] Prosecution Response, paras 41-48.
[16] *Ibid.*, paras 49-52.
[17] *Ibid.*, paras 64-67.
[18] *Ibid.*, paras 68-69.
[19] *Ibid.*, para. 75.

or to convince the Pre-Trial Chamber to commit a weak case to trial by way of rhetorical subterfuge.

18. In paragraph 76 of its Response, the Prosecution claims that to the extent the Defence have elected to respond, they are bound "[REDACTED]". This assertion first and foremost implies that the Arido Defence has not offered comprehensive arguments and substantiated positions. This is not true - as evidenced by the references contained in the footnotes of its Submissions. Moreover, the Prosecution cannot credibly make this claim after having opted to refuse to respond to the large majority of the Arido Defence Submissions while it - and not the Defence - carries the burden of proof.

19. References to Defence duties to bring "substantiated positions" when reacting to the Prosecution evidence serves no other purpose than to undermine the vital rule that the suspect shall not have any reversal of the burden of proof or any onus of rebuttal imposed on him, as set out in Article 67 (1) (i) of the Statute. The matter is exacerbated by the fact that the case law the Prosecution refers to in footnote 198 ('Lubanga case') has nothing to do with the substance of confirmation hearing - and the burden of proof applicable in that context - but rather relates to the duty of a party seeking leave to appeal to specify and substantiate its position that the points it seeks to appeal fulfill the requirements of Article 82 (1) (d) of the Statute.[20]

20. It is not for the Arido Defence or the Pre-Trial Chamber to guess what the evidence is, but for the Prosecution. It must clearly and unequivocally demonstrate how the evidence shows that there exists substantial grounds to believe that Mr. Arido has committed the crimes with which he is charged. Article 61 (5) of the Statute states clearly that the "Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged". The Arido Defence submits that, even taken at its highest, the evidence adduced by the Prosecution fails to meet this standard in respect of Mr. Arido. Pointing out perceived contradictions between Defence teams, or to an alleged lack of evidence presented by the Defence cannot cure this fundamental defect. What is more, even assuming that the contradictions exist, it does not render the Prosecution's case more convincing.

[20] ICC-01/04-01/06-915, para. 62.

5. The Arido Defence agrees with the Prosecution that reasonable inference must be drawn from the evidence

21. The Arido Defence wishes to conclude by saying that it agrees in substance with the Prosecution's position that the Pre-Trial Chamber [REDACTED].[21]

22. However, as will be demonstrated below, there is no credible evidence implicating Mr. Arido in any of the offences charged. At a minimum, there are other reasonable inferences that can be accorded other than the guilt of Mr. Arido. These other inferences show that the evidence is insufficient to commit Mr. Arido to trial. It is submitted that it is also open to the Pre-Trial Chamber, when drawing its reasonable inferences from the evidence, to take full account of the Prosecution's failure to detail the constitutive elements of the offences and to show how the alleged facts fulfil them, and its failure to support the charged modes of liability with evidence; and, more generally, the Prosecution's failure to respond to the large majority of the challenges by the Arido Defence to the evidence as described in paragraph 8 above.

23. The Arido Defence recalls that the Prosecution has the duty to act with professional ethics and integrity[22] and that it must conduct investigations with the goal of establishing the truth,[23] considering all relevant circumstances when assessing evidence, "irrespective of whether they are to the advantage or the disadvantage of the Prosecution".[24] More importantly, the Prosecution shall "ensure that all necessary and reasonable enquiries are made […] whether they point to the guilt or the innocence of the suspect".[25]

24. The Arido Defence further recalls that the Prosecution is duty bound to "support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged",[26] and that it must offer "concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations"[27] going beyond mere theory or suspicion.[28] As is clear from the Arido Submissions and the present response, this is not the case here.

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[21] Prosecution Response, para. 6.
[22] Code of Conduct for the OTP, OTP2013/024322, Section 4.
[23] *Ibid.*, Art. 49 (a).
[24] *Ibid.*, Art. 49 (b).
[25] *Ibid.*, Art. 49 (c).
[26] Article 61 (5) of the Statute.
[27] ICC-01/04-01/06-803-tEN, para. 39.
[28] *Ibid.*, para. 37.

IV. PART I – RESPONSE TO THE PROSECUTION'S ARGUMENTS RELATED TO THE RULES OF INTERPRETATIONS AND THE ELEMENTS OF THE OFFENCES

25. In light of the Prosecution Submissions and its Response, it has become clear that the Prosecution and the Arido Defence hold diverging, almost diametrically opposed views as to the law that governs the Pre-Trial Chamber's exercise of its Article 61 functions in case of Article 70-offences. In essence, this divergence comes down to the Prosecution approaching Article 70-offences as if they were no different from the core crimes listed in Article 5 of the Statute, whereas the Arido Defence has argued that the inherently distinct nature of Article 70-offences calls for the non-applicability of - parts - of the ICC law ordinarily applicable in respect of the Court's core crimes.

26. Significant parts of the Arido Defence Submissions on the elements of the offences dealt with the non-applicability of Article 25 (3) to Article 70-offences.[29] However, it was also submitted that the scope and content of confirmation hearings in respect of Article 70-offences still need to be settled and that, on this basis, the Pre-Trial Chamber has a broad discretion to do what is necessary and in the interests of justice. It is submitted that this is so even if this would not be fully in line with the confirmation-jurisprudence as it stands today since it relates to Article 5-crimes and not Article 70-offences.

27. The Arido Defence is not alone in raising legitimate questions triggered by the specific nature and purpose of Article 70-offences. Appeals Chamber's Judge Ušacka has already pointed this out, emphasising the conceptually different nature of Article 70-crimes within the Court's legal framework.[30]

A. The Prosecution's interpretation of Article 70-offences is mistaken

28. The Arido Defence wishes to offer the following general observations on the Prosecution's views on the legal elements of Article 70-offences. It also refers the Pre-Trial Chamber to paragraphs 78 to 82 of its Submissions in this regard.

29. The Prosecution's interpretation fails to follow the obligatory methodology set out in Article 21, and is often arbitrary. It is notable that the Prosecution fails to make proper reference to and use of the cardinal rule of interpretation set out in Article 22 of the Statute in its

[29] Arido Submission, Part VII-B; *see also infra*, VI-A-1, paras 169-173.
[30] ICC-01/05-01/13-558-Anx2, paras 2-10.

Submissions; it referred to this essential provision sparsely, with regards to a minor issue in its Response.[31] The Prosecution ignores the fact that, ultimately, any interpretation of Article 70 must be in accordance with its ordinary meaning and that in case of doubt and/or ambiguity the interpretation must be made in favour of Mr. Arido.[32]

30. The Prosecution's disregard for Article 70's ordinary meaning and the cardinal rule of Article 22 is illustrated by paragraph 266 of its Submissions, where, when discussing Article 70 (1) (a), the Prosecution states that "[REDACTED]." The Prosecution's basis for such an interpretation is nothing more [REDACTED]. To repeat what the Prosecution asserted in paragraph 8 of its Response: "[REDACTED]."

31. It is submitted that there is, having regard to interpretative methodology set out in Article 21 of the Statute, no convincing law and practice on the basis of which withholding facts by a witness would amount to false testimony. In essence, it is the responsibility of the interrogating party - or judge - to put the necessary and relevant questions to the witness. Only when the witness answers falsely to the questions put to him can one speak of the crime of perjury. This is logical since Article 70 (1) (a) refers to the "giving [of] false testimony": clearly, there is no testimony if something is never said in Court.

32. Likewise, regarding the offence of "corruptly influencing a witness", there is no genuine effort on the part of the Prosecution to interpret the distinctive elements under Article 70 (1) (c) in accordance with their ordinary meaning. The Prosecution simply claims, without any substantiation, that the offence "[REDACTED]" and is "[REDACTED]".[33]

33. Most puzzling, the Prosecution asserts, without any basis or reference, that "[REDACTED]"[34] adding that "[REDACTED]."[35]

34. However, the meaning of the key requirement that any action must be "corruptly" undertaken remains totally undefined by the Prosecution, whereas the Arido Defence has sought to interpret this element by reference to the UN Convention against Corruption. Bearing in mind the ordinary meaning of the adverb "corruptly", and bearing in mind the rules of interpretation

31 Prosecution Submissions, paras 256-286; Prosecution Response, paras 7-10, 20-31.
32 *See* Arido Defence Submissions, paras 14, 15, 81, 324-326.
33 Prosecution Submissions, para. 277.
34 *Ibid.*
35 *Ibid.*

set out in Article 22 of the Statute, the interpretation of "corruptly" as meaning "undue advantage" is to be used instead of the Prosecution's unsubstantiated claims of an expanded scope of Article 70 (1) (c).

B. The Prosecution's arguments on the gravity threshold of Article 70 are unfounded

35. The Prosecution notes that "[REDACTED]",[36] emphasising the "preventative" role of Article 70[37] [REDACTED].[38]

36. The ICC's jurisdiction is by definition limited to the prosecution of the most serious crimes of concern to the international community as a whole.[39] To this extent, offences under Article 70 are by no means considered to be as grave as the core crimes under Article 5 of the Statute.[40] However, the exceptional and functional[41] character of offences under Article 70 does not involve an indefinite extension of the Court's jurisdiction. On the contrary, a contextual interpretation of the norm strongly points to the competence of the Court being limited to those acts which substantially and directly interfere with the proper administration of justice.[42]

37. This limited approach is also supported by the positions taken by States Parties in the *travaux préparatoires*. These, in fact, have not only underlined the limited scope of Article 70 in their statements,[43] but have also confirmed so by deciding that the competence of the Court regarding offences against the administration of justice would be residual through reserving "favourable consideration" for domestic jurisdiction.[44]

38. This residual aspect of Article 70 also has an effect on the substantial character of Article 70. Although the provision aims to include offences that are of conduct and not of consequence,

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36 *Ibid.*, para. 260.
37 *Ibid.*
38 *Ibid.*
39 Article 1 of the Statute: "[…] shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern".
40 *See* ICC-01/05-01/13-558 OA, para. 64; *see also* ICC-01/05-01/13-558-Anx.2, para. 6.
41 ICC-01/05-01/13-598-Conf, para. 83.
42 *See* Arido Defence Submissions, paras 83-90.
43 Report of the *Ad Hoc* Committe on the Establishment of an International Criminal Court A/50/2(SUP), 7 September 195, para 182-184, available at: http:/www.legal-tols.org/uploads/tx_ltpdb/doc2168.pdf; Declaration rendered by the representative of Ireland, 2nd meeting, 16 June 198, para. 63, available at: http:/legal.un.org/ic/rome/procedings/E/Rome%20Procedings_v2_e.pdf; Declaration rendered by the representative of Republic of Korea, 2nd meeting Tuesday, 16 June 198, para. 48, available at: http:/legal.un.org/ic/rome/procedings/E/Rome%20Procedings_v2_e.pdf.
44 Rule 162 (3) of the RPE.

proof is required that the characteristics of the act meet at least the potential to achieve the result. Such proof is unavailable in the present case.

39. The Arido Defence further directs the Pre-Trial Chamber to paragraphs 83 to 90 of its Submissions.

C. The Prosecution's interpretation of Article 70 (1) (b) of the Statute is unduly broad and goes against the object and purpose of Article 70

1. The application of Article 70 (1) (b) is limited to a party

40. While it recognises that the provision contained in Article 70 (1) (b) seems to limit the ambit of application to a "party" in the trial, the Prosecution argues that "[REDACTED]".[45] The Arido Defence notes that the Prosecution fails to present any legal basis for its position. It relies upon the [REDACTED].[46]

41. The Arido Defence submits that conflicting versions of the Statute in the different languages amount to ambiguity, which, in accordance with Article 22 (2) of the Statute, must be interpreted in favour of Mr. Arido.

42. It is further submitted that all versions of the Statute refer to the "presentation of evidence". It is a fact that only those individuals who engage in a direct activity before the Court can present evidence. Although the term "to present" is used interchangeably with "to rely on" with reference to evidence,[47] both these terms, especially in the context of the examples cited by the Prosecution,[48] are always connected with an act or behaviour implemented by a party. As a result, it also follows from a systematic interpretation of the Statute that Article 70 (1) (b) should be limited to a party.

2. Article 70 (1) (b) excludes testimonial evidence

43. The Arido Defence maintains its position that the presentation of evidence in the sense of Article 70 (1) (b) excludes testimonial evidence, as explained in paragraphs 101 to 104 of its

45 Prosecution Submissions, para. 270.
46 The Arabic version of the Statute which reads "(ب) تقديم أدلة يعرف الطرف أنها زائفة أو مزورة؛" translates as "present evidence that the party knows is false or forged" (Defence translation).
47 Prosecution submission, para. 271.
48 *Ibid.*

Submissions.[49] Additionally, it points out that a party presenting a witness is not able to know beforehand whether the testimony will be false, since each witness will ultimately have the choice to answer truthfully to questions put to him.

44. In addition, the Arido Defence is concerned about the broader implications of the Prosecution's position. In paragraph 30 of its Response, it claims [REDACTED]. Later on, the Prosecution seems to claim there is [REDACTED].[50] These are fundamental, but unsubstantiated assertions. One may wonder, to start with, whether the Prosecution has applied this asserted obligation to its own witnesses in proceedings conducted before the Court until this date. What is more, such an obligation could violate Defence Counsel's duty to act in the best interest of his/her client. Finally, it could amount to a *de facto* violation of any suspect's fundamental right against self-incrimination as protected by Article 67 (1) (g) as it would in fact compel a Defendant to confess guilt.

D. The Prosecution's interpretation of Article 70 (1) (c) is impermissibly broad and does not accord with its plain meaning

45. As recognised by the Prosecution in its Submissions, [REDACTED].[51] However, the Prosecution avoids exploring the concrete application of this adverb. The Arido Defence refers the Pre-Trial Chamber to paragraphs 105 to 115 of its Submissions in this regard.

1. An offence under Article 70 (1) (c) must result in the disruption of justice

46. In asserting the necessity to demonstrate that the individual must have intentionally and "corruptly" influenced a witness,[52] the Arido Defence did not intend to challenge the character and nature of the offence (offences of conduct or of result). The position of the Arido Defence is that the "result" of such offences resides in the disruption of justice, that is to say that the judicial decision-making should not be unduly influenced by unlawful conduct. However, the Arido Defence submits that with regard to an alleged accomplice of a crime, proof is required that his or her behaviour concretely contribute to the achievement of the criminal result or, in case of attempt, that the alleged criminal act meets at least the potential for the achievement of that result. While it characterises the Arido Submissions in this regard as being "unsubstantiated", the Prosecution fails to provide any arguments challenging the position of the Arido Defence.

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49 *See* Arido Defence Submissions, paras 101-104.
50 Prosecution Response, para. 59.
51 Prosecution Submissions, para. 277.
52 Arido Defence Submissions, para. 107; *see also* Prosecution Response, para. 20.

2. The Prosecution introduces a new charge

47. The Arido Defence notes that the Prosecution, in its Submissions, presents "[REDACTED][53] contrary to the charges presented in the DCC.[54] In fact, as emerging from the "relevant facts and circumstances and legal characterisation" included in DCC, in all the Counts under Article 70 (1) (c), no mention is made of "interfering" but only of "corruptly influencing witnesses".[55] The Arido Defence submits that including novel charges at this late stage in the process constitutes a violation of the basic rules governing the procedure before the Court and guaranteeing the right to a fair trial.[56]

48. Article 70 (1) (c) contains four different forms of criminal conduct, each of which has its own distinct legal elements. New legal qualification of the facts as such a late stage in the Confirmation of Charges proceedings, does not only affect the whole legal "strategy" of the Defence but, also, requires further factual analysis and investigations which are not suitable at this current stage of the trial. It substantially frustrates the right of the Arido Defence to object to the charges.[57]

3. Interfering is limited to actions aimed at preventing a witness from attending Court or from testifying about certain points

49. Should the Pre-Trial Chamber accept the re-characterisation advanced by the Prosecution in its Submissions, the Arido Defence wishes to advance some remarks related to the interpretation of the concept of "interfering" within the meaning of Article 70 (1) (c) of the Statute. The Arido Defence shares the view of the Prosecution that [REDACTED].[58] It submits however that the act of interfering should be interpreted restrictively, in accordance with Article 22 of the Statute.

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[53] Prosecution Submissions, para. 280.
[54] DCC, p. 76.
[55] *See,* in particular, DCC, p. 76, Counts 3, 6, 9, 12, 15, 18, 21, 24, 27, 30, 33, 36, 39, and 42.
[56] Rule 121 (3) of the RPE provides that the suspect must be provided with a "detailed description of the charges"; Article 67 (1) of the Statute enshrines the right of any suspect to be informed promptly and in detail of the nature, cause and content of the charge; Article 60 (7) also guarantees the right of the Defence to object to the charges, challenge the evidence presented by the Prosecution and present evidence at the confirmation of charges stage. In addition, the ICC Appeals Chamber has held that "[h]uman rights underpin the Statute" and that the latter must "be interpreted and more importantly applied in accordance with internationally recognized human rights", *see* ICC-01/04-01/06-772 OA4, para. 37.
[57] *See* Article 60 (7) of the Statute; Pursuant to Article 60 (1) of the Statute, the Pre-Trial Chamber must satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed. Article 67 (1) provides for the right of the accused to have adequate time and facilities for the preparation of the Defence.
[58] Prosecution Submissions, para. 283.

50. The Arido Defence notes that the English version of the Statute presents "interfering" with the attendance or testimony of a witness as an alternative to "obstructing". In addition, the French version is more specific in that it refers to "*manoeuvres visant à empêcher un témoin de comparaître ou de déposer librement*".[59] The term "*empêcher*" (to prevent) is concerned with the attendance or appearance of the witness and not the content of his/her testimony.

51. In case of ambiguity, triggered by conflicting versions in the languages of the Statute, the Chamber is compelled, pursuant to Article 22 (2) of the Statute, to resort to the most favourable versions of the Statute, i.e. in this instance the Spanish and French versions. It is thus clear that according to all the versions of the Statute, Article 70 does not penalise the interference - in the sense of trying to change - the contents of the testimony.

52. This also accords with a systematic interpretation of Article 70 (1) (c) of the Statute, especially the demarcation of criminal conduct between the four forms set out in that provision. The criminal influencing of the content of testimony is covered by "corruptly influencing"; it is illogical - nor is there any proof of the drafters' intentions to that effect - that criminal influencing the contents of a witness' testimony is covered by any other language in Article 70 (1) (c) of the Statute.

53. In its Submissions, the Prosecution refers [REDACTED].[60] In particular, it states that [REDACTED]."[61] However, the Prosecution's efforts to expand the scope of Article 70 (1) (c) by analogy does not only ignore the wording and structure of Article 70 (1) (c), its object and purpose, but it also overlooks the requirement, provided for by Article 22 (2) of the Statute, that the definition of a crime be strictly construed and not be extended by analogy, and that any ambiguity be resolved in favour of the Accused.

54. Further, the Prosecution fails to provide an honest and even-handed account of the ICTY's law and practice since, in fact, Rule 77 penalises 'otherwise interfering with a witness' only when

[59] *See also*, in this regard, the Spanish version of Article 70 (1) (c) which reads: "Corromper a un testigo, obstruir su comparecencia o testimonio o interferir en ellos, tomar represalias contra un testigo por su declaración, destruir o alterar pruebas o interferir en las diligencias de prueba"; *see also* the Russian version which reads "противоправное оказание воздействия на свидетеля, создание помех или препятствий присутствию свидетеля или даче им показаний, воздействие на свидетеля в качестве возмездия за дачу им показаний или уничтожение доказательств, их фальсифи-кация или препятствие их сбору."
[60] Prosecution Submissions, para. 276.
[61] *Ibid.*, para. 281.

an ICTY witness is giving, has given, or is about to give evidence in proceedings. Clearly, as far as the accusations against Mr Arido go, [REDACTED].[62]

55. In short, in accordance with the rules of interpretation applicable to crimes within the ICC Statute, in order for an individual to be found responsible under Article 70 (1) (c) they must act "corruptly" in influencing witnesses or, alternatively, must interfere with a witness in the sense of seeking to prevent that witness from testifying. This latter understanding while not necessarily requiring the use of physical force, clearly requires at least some form of coercion.

V. PART II – RESPONSE TO THE PROSECUTION'S ARGUMENTS RELATED TO THE ALLEGED FACTS

A. The Prosecution fails to establish substantial grounds to believe that Mr. Arido was involved in the presentation of documentary evidence that the party knows is false or forged - Article 70 (1) (b)

56. The Arido Defence notes that the majority of the Prosecution's arguments have already been addressed in the Arido Defence's Submissions on the confirmation of charges, and therefore directs the Pre-Trial Chamber to paragraphs 130 to 187 thereof. It further recalls that, with regards to the alleged production of the false/forged documents, the Prosecution only charges Mr. Arido under Article 70 (1) (b) of the Statute.[63]

57. In addition, the Arido Defence reiterates that Mr. Arido cannot be found liable under Article 70 (1) (b) since this offence is limited to actions undertaken by the parties to the proceedings and the presentation of "real" evidence (excluding testimony).[64] Since Mr. Arido is only charged with providing contested documents under this Article, the Pre-Trial Chamber is requested to disregard the totality of the Prosecution Submissions in relation thereto. The Submissions below are therefore of a subsidiary character.

1. The Prosecution Submissions and Response regarding the alleged lack of authenticity of the contested documents are not convincing

58. The Arido Defenec rejects the Prosecution's argument that the contested documents are clearly falsified. This is not only a vital element of the *actus reus* of the crime (the documents have to be false or forged), but also of its *mens rea* (knowledge that the documents are false or forged).

[62] *Ibid.*, paras 138, 157.
[63] DCC, p. 82, count 43.
[64] See *supra*, paras 43-44; *see also* Arido Defence Submissions, paras 97-100.

Without clear and compelling proof that the documents are false/forged, there is no criminal conduct and there can be no knowledge on the part of the suspect that the documents are false. What is more, even when documents are false or forged, certainly when containing sufficient indicia of reliability, the average individual will generally not be capable to know that documents that they may provide are false or forged.

59. In its assertion that 14 contested documents are false, the Prosecution relies solely on the evidence provided by [REDACTED].[65] The Prosecution has not addressed the Arido Defence's argument that the Prosecution failed to take a number of elementary steps to assess the authenticity of the documents, namely undertaking a forensic examination or contacting of the relevant official services of the CAR army.[66] It also failed to address the Arido Defence assertion that [REDACTED] evidence does not meet the requisite threshold for the confirmation of charges.[67]

a. *The Prosecution fails to demonstrate that the evidence of [REDACTED] was credible and sufficient to establish substantial grounds to believe that the documents are not authentic*

60. This lack of important and self-evident investigative steps is a factor that the Pre-Trial Chamber should, in the view of the Arido Defence, take into account when assessing the persuasiveness of the evidence adduced by the Prosecution.

61. In response to the Arido Defence's argument that [REDACTED] had a personal interest in stating that the documents were false or forged, [REDACTED],[68] the Prosecution states that this is amounts to "[REDACTED]".[69] The Arido Defence notes that [REDACTED].[70] The Arido Defence submits that the fact that [REDACTED][71] have an interest [REDACTED]. This assertion amounts to reasonable inference from verifiable facts; there is nothing speculative about it. To the contrary, when taking into consideration the history and political context of the CAR, such inference is justifiable [REDACTED].

62. In addition, after having dismissed the Arido Defence's argument regarding the personal interest of [REDACTED], a dozen of pages later, the Prosecution simply states [REDACTED].[72]

[65] Prosecution Submissions, paras 58-59, 65; Prosecution Response, paras 159-162.
[66] Arido Defence Submissions, paras 161- 162.
[67] *Ibid.*, para. 165.
[68] *Ibid.*, para. 164.
[69] Prosecution Response, para. 79.
[70] ICC-01/05-01/08-T-356-CONF-ENG, pp. 50-51.
[71] Prosecution Submissions, para. 51.
[72] Prosecution Response, para. 163.

No further is provided by the Prosecution to substantiate this assertion, nor is there a justification provided for drawing this inference.

63. In any event, the position of the Arido Defence is that - in absence of a forensic examination of the documents, or other investigative action - testimony from persons who have an interest in [REDACTED] is not sufficient to establish substantial grounds to believe that the documents are false or forged. This is more so in light of the fact that a number of [REDACTED] provided contrary evidence and stated that the documents were authentic.

64. Similarly, the Prosecution's argument that the documents [REDACTED] is insufficient to establish that the documents are not authentic, particularly since this argument is also solely based on [REDACTED] evidence, contrarily to what the Prosecution attempts to present.[73]

b. *The relevance of the proceedings in the Main Case*

65. In the case of *Prosecutor v. Bemba* (hereinafter referred to as 'Main Case'), the Prosecution filed a motion asking for 11 of the 14 documents to be declared inadmissible on 6 September 2012.[74] It relied upon [REDACTED][75] to argue that the documents were "plainly inauthentic" and therefore had no probative value and that their admission into evidence would therefore be prejudicial.[76]

66. As the Bemba Defence pointed out, the Prosecution made clear that they were investigating the authenticity and credibility of the documents [REDACTED], thereby unduly influencing the contents of their evidence.[77] It also noted that the Prosecution failed to call them as live witnesses and therefore their evidence could not be tested.[78]

67. The Bemba Defence Submissions in the main case support the Arido Defence's position that [REDACTED] have a personal interest in claiming that the documents are forged or false.[79] In particular in relation to [REDACTED], it noted that:

> A live issue in the present case is whether the crimes in question were committed by the MLC

[73] *Ibid.*, para. 79, where the Prosecution states that "[REDACTED], *citing to* paragraphs 58-59 and 65 of its 30 July 2014 Submissions, which only relate to [REDACTED] evidence; *see also* Prosecution Response, para. 162.
[74] ICC-01/05-01/08-2301-Red.
[75] *Ibid.*, paras 10-12.
[76] *Ibid.*, para. 16.
[77] ICC-01/05-01/08-2326-Red, para. 23.
[78] *Ibid.*
[79] *Ibid.*, paras 22-24.

troops allegedly commanded by Mr. Bemba, or were committed by the rebels of President Bozizé, [REDACTED].[80]

68. Regarding [REDACTED], it noted that:

> [T]he Prosecution lawyer who took his statement made it clear that his statement could be provided to the regime in [REDACTED], specifying that that a state can request a copy of witness statements, "et la Court peut decider de transmettre cette declaration à l'État requérant, **y compris la [REDACTED]**." [REDACTED] at this point in the interview became demonstrably nervous, asking if he could say yes or no to such a request, and raising concerns with his statement being transmitted to certain states.[81]

69. It also noted that since the documents demonstrate that the MLC contingent was in fact subsumed into the command chain of the CAR army (FACA),[82] [REDACTED] . Finally, the Defence of Mr. Bemba in his main case pointed out a number of in-court testimonies by Prosecution witnesses which [REDACTED] the statements by [REDACTED] that the substance of the documents does not correspond to the situation at the time.[83] Similarly, it was noted that [REDACTED].[84] As a result, [REDACTED][85] should be rejected.

70. Finally, according to the Bemba Defence in the Main Case, one of the documents disclosed by the Prosecution in that case has "significant similarities" with the contested documents.[86] It is pointed out that the Prosecution does not argue that any of the documents it has adduced into evidence in the main case against Mr. Bemba is false.

71. The Arido Defence notes that it only has access to a public redacted version of the Bemba Defence response, and that it does not have access to the evidence or testimonies from the main case against Mr. Bemba - other than those disclosed by the Prosecution. As a result, it is in an unduly prejudicial and disadvantageous position compared to the parties in this case which are all - with the exceptions of Mr. Babala and Mr. Arido- supposed to be fully familiar with the totality of the evidence and filings in the Main Case.

72. In spite of this hampering the effective defence of Mr. Arido in the present case, it is pointed out that Trial Chamber III noted that "on their face, the documents, when submitted

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[80] *Ibid.*, para. 23.
[81] *Ibid.*, para. 26.
[82] *Ibid.*, para. 24.
[83] *Ibid.*, para. 30.
[84] *Ibid.*, paras 34-39.
[85] ICC-01/05-01/08-T-356-CONF-ENG, pp. 50-51.
[86] ICC-01/05-01/08-2326-Red, para. 44, *referring to* CAR-OTP-0042-0237.

and discussed, bore some indicia of authenticity - such as letter heads, dates, stamps and signatures - and appeared to have been produced in the ordinary course of operations within the CAR's Presidency and Defence Ministry".[87] Trial Chamber III further found that in view of their use in the proceedings and the reliance placed on them by D-53 and D-59, they "have relevance and probative value with respect to the Chamber's analysis of the testimonies of witnesses D-04-53 [D-53], D04-59 [D-59], and CHM-01 [REDACTED] and its overall determination of the truth with respect to the chain of command and control of the MLC troops in the CAR during the relevant time period."[88]

73. Trial Chamber III noted that it would "consider all submissions and testimonial evidence related to the authenticity of the Contested Documents".[89] In sum, the Trial Chamber stated that it "did not rule on the authenticity of the contested documents, and elected to consider all arguments and relevant testimonial evidence when making its judgement under Article 74 of the Statute".[90] The Arido Defence notes that Trial Chamber III has at its disposal a substantially more significant number of evidence permitting it to determine whether or not the documents are authentic. Its decision to wait until its delivery of the trial judgment to assess whether or not the contested documents false, is indicative that it would be premature for the Pre-Trial Chamber to decide that there are substantial grounds to believe that the said documents are false/forged.

74. In any event, the mere fact that Trial Chamber III - which is very familiar with the evidence in the Main Case - ruled that the documents bore indicia of authenticity makes it as good as impossible for anyone to know the documents are false. Unless the Prosecution brings specific evidence of Mr. Arido's alleged knowledge, there are no reasonable grounds to conclude that Mr. Arido knew these documents are false – if he would have provided the documents to start with, *quod non.*

75. Finally, it needs to be pointed out that the Prosecution is far from being consistent in its position that the relevant documents in the present case are all false. The Bemba Defence team in the main case noted that the Prosecution did not challenge the authenticity of 3 of the documents in the main case, namely CAR-D04-0003-0129, CAR-D04-0003-0134, CAR-D04-0003-0141.[91]

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[87] ICC-01/05-01/08-3123, para. 5, *citing to* ICC-01/05-01/08-3019-Red, para. 49.
[88] *Ibid.*, para. 5, *citing to* ICC-01/05-01/08-3019-Red, para. 50.
[89] *Ibid.*
[90] ICC-01/05-01/08-3123, para. 6.
[91] ICC-01/05-01/08-2301-Red, para. 4.

c. <u>*The Prosecution's challenges to the evidence presented by the Kilolo Defence regarding the authenticity of the documents must fail*</u>

76. The Prosecution's arguments challenging the credibility of the three witnesses who provided evidence that the documents were authentic are unconvincing. The Prosecution argues that [REDACTED].[92] [REDACTED].[93]

77. First of all, dismissing the evidence of [REDACTED] as irrelevant is unfounded. It is pointed out that [REDACTED].[94] Clearly, he is very well-placed to make determinations on the authenticity of documents.

78. Second, it is unclear [REDACTED]. To the contrary, it could be said that [REDACTED] further attests of the documents' reliability and authenticity.

79. Finally, it is unclear how the determinations made by [REDACTED] constitute "definitive" determinations on the authenticity of the documents. Not only is there a reasonable inference of self-interest in their denial of authenticity to be made, but [REDACTED]. Therefore, their evidence cannot be said to have more weight as that of [REDACTED], D-53 and D-59. As a result, the Arido Defence repeats that in absence of any forensic examination, or scientific evidence that the documents were forged, the Prosecution fails to establish substantial grounds to believe that the documents were false or forged.

d. <u>*The Prosecution's evidence regarding the authenticity of the documents is insufficient*</u>

80. The Arido Defence maintains that the sole reliance on [REDACTED] statements on the alleged authenticity of the documents is not sufficient to establish that the documents were false or forged. Additional investigations, for example within the CAR archives or involvement of an expert, may have tilted the scales in favour of the Prosecution. However, not only have such investigations not taken place, the totality of the evidence also includes contradictory information, statements supporting of the authenticity of the documents and which is not less credible than the incriminating evidence of [REDACTED].

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[92] Prosecution Response, para. 163.
[93] *Ibid.*
[94] Arido Defence Submissions, para. 168, *referring to* CAR-D21-0004-0068, p. 7 (0074).

81. In any event, neither of the Prosecution's witnesses provide evidence that Mr. Arido did forge/falsify the documents, nor that he could have had the ability to falsify/forge them. Similarly, it provides no evidence indicating that Mr. Arido would have somehow had access to these documents, particularly in light of the fact that Mr. Arido was no longer in the CAR army by the time the documents were made.[95] In short, the Prosecution's witnesses provide no support for the Prosecution's argument that Mr. Arido knew that the documents were not authentic.

2. The Prosecution fails to establish substantial grounds to believe that Mr. Arido provided the documents to the Bemba Defence team or was otherwise involved in their preparation

82. The Prosecution relies on an email from Mr. Arido dated 1 May 2012 and sent from Mr. Arido's [REDACTED] account, which forwarded an email from [REDACTED] dated 30 April 2012 (attaching seven of the contested documents),[96] on the e-court metadata[97] and on a 6 November 2013 telephone conversation between Mr. Kilolo and Mr. Mangenda.[98] Those are addressed in detail in the Arido Submissions.[99] As a result, the present response only addresses the Prosecution's arguments contained in its Submissions or Response where necessary.

a. *The Prosecution presents multiple versions as to how and through whom the contested documents were obtained*

83. In its Response, the Prosecution alleges that the Defence teams [REDACTED][100] and states that none is credible.[101] Despite this statement, the Prosecution substantiates its own position by [REDACTED].[102]

84. The Arido Defence notes that the Prosecution's position that Mr. Arido provided the documents to Mr. Kilolo in February 2012 is not supported by any evidence other than [REDACTED]. Putting aside the inherent lack of coherence in the Prosecution Submissions and its random use of the information submitted by the Article 70 Defence teams - who all state that the documents are authentic - the allegation that Mr. Arido provided the documents in question

[95] Arido Defence Submissions, para. 375; *see also* [REDACTED], CAR-OTP-0075-1790 (1/4), CAR-OTP-0075-1791 (2/4), CAR-OTP-0075-1792 (3/4), CAR-OTP-0075-1793 (4/4), CAR-OTP-0075-1791 [REDACTED].
[96] Prosecution Submissions, para. 409.
[97] *Ibid.*, para. 409.
[98] *Ibid.*.
[99] Arido Defence Submissions, paras 136-141 (1 May 2012 email), 142-148 (metadata) and 150-153 (6 November 2013 telephone conversation).
[100] Prosecution Response, paras 34-40.
[101] *Ibid.*, para. 34.
[102] *Ibid.*, paras 35, 151.

to the Bemba Defence team is directly contradicted by a conversation between Mr. Kilolo and Mr. Mangenda on 6 November 2013. During this conversation both men discuss in clear and unequivocal terms that their formal position will be to state that Mr. Arido provided them with the documents.

b. <u>*The Prosecution's argument that the Arido Defence "failed to account" for the 21 February 2012 meeting in Douala bears no weight in light of the Prosecution's failure to provide convincing evidence that Mr. Arido provided the contested documents*</u>

85. The Prosecution's statement that Mr. Arido fails to account for the 21 February 2012 Douala meeting with Mr. Kilolo[103] is simply irrelevant, since the Prosecution has not produced a single piece of evidence establishing substantial grounds to believe that Mr. Arido gave the documents to Mr. Kilolo then. Arguing otherwise would amount to a reversal of the burden of proof on Mr. Arido. Nonetheless, for the sake of the record, the Arido Defence recalls that Mr. Arido stated having met Mr. Kilolo in February 2012 in Doula [REDACTED] to discuss a possible collaboration with the Bemba Defence team as an expert witness. Only [REDACTED], and as discussed at length below and in the Arido Defence Submissions, they are not worthy of belief.[104]

86. In addition, a meeting with Mr. Kilolo in February 2012 in Douala cannot be said to support the allegation that Mr. Arido provided Mr. Kilolo with the said documents. To the contrary, this was the first meeting between Mr. Arido and Mr. Kilolo, where the possibility of Mr. Arido being an expert witness on military strategy for the Bemba Defence team was discussed. The Prosecution presents no evidence that Mr. Kilolo and Mr. Arido had agreed that Mr. Arido would provide certain information or documents to the Bemba Defence team, nor did the Prosecution provide evidence that Mr. Arido did in fact provide these documents to Mr. Kilolo in Douala.

c. <u>*The Prosecution's reliance on Mr. Arido's statements to the French police is misplaced*</u>

87. The Prosecution also argues that Mr. Arido's arguments are inconsistent with his statements to the French police, being that he only saw the documents for the first time when Kilolo sent them to him by email in 2012.[105] However, the Prosecution fails to explain what the inconsistency would be. To the contrary, the statements made to the French police support the

103 Prosecution Response, para. 36.
104 *Infra*, paras 127-131, 138-156; *see also* Arido Defence Submissions, paras 211-262.
105 Prosecution Response, para. 36.

Arido Defence's position that Mr. Arido did not provide the documents but merely appear to have forwarded an email to which some of the contested documents were attached. The Prosecution fails to even provide evidence that Mr. Arido did as much as open the attachments. Also, the statements made to the French authorities support the Arido Defence's position that it is highly unlikely that Mr. Kilolo would have contacted Mr. Arido on 12 September 2012 asking him to "analyse" the documents should Mr. Arido have been the provider of the documents.[106]

88. Therefore, the Arido Defence maintains its position that Mr. Arido never had knowledge of the existence of the documents until September 2012. Even then, the Prosecution provides no evidence that Mr. Arido downloaded and read the attachments. In fact, the Prosecution does not even present evidence that Mr. Arido confirmed receipt of the email.

d. <u>The Prosecution's reliance on co-suspects' Submissions is inapposite</u>

89. The Prosecution also refers to the Kilolo Defence's Submissions, wherein it states that Mr. Arido gave Mr. Kilolo the documents on 21 February 2012 in Douala, [REDACTED]. The Kilolo Defence writes that [REDACTED].[107] The Arido Defence further recalls the above arguments regarding the Prosecution's extensive use of statements made by the co-suspects against Mr. Arido in spite of the Prosecution's own assertions that these statements are incapable of belief.

e. <u>The Prosecution Submissions and Response ignore the basic distinction between forwarding an email and sending an email</u>

90. In its Response, the Prosecution argues that there is "no distinction" between forwarding an email which has documents already attached to it and sending documents to someone by email.[108] According to the Prosecution, [REDACTED], particularly in light of the fact that Mr. Arido's email (1 May 2012) stated [REDACTED].[109] The Arido Defence challenges this statement. Sending an email with documents attached involves a conduct different than simply forwarding one. An individual who forwards an email with documents attached to it simply shares that email, earlier received by him or her, with (an)other person(s), whilst an individual who sends an email with documents attached to it needs to have those documents on his/her computer, select them from the computer and upload them onto the email, and send the email.

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[106] Arido Defence Submissions, paras 156-158; *see also infra,* para. 106
[107] Prosecution Response, para. 151.
[108] *Ibid.*, para. 150.
[109] *Ibid.*

Sending documents implies that the person is in the possession of the documents. To the contrary, forwarding an email with attachments does not necessarily imply that the person has seen or knows about the type or contents of the attachments. The Prosecution has not provided any evidence that Mr. Arido was actually aware of what the documents were or of their content. It must be recalled that [REDACTED].[110] The Arido Defence further notes that Mr. Arido has [REDACTED].[111]

91. The fact that the email from Mr. Arido's account was simply transmitting an earlier email to Mr. Kilolo is further supported by the fact that the Prosecution has not provided any evidence that the contested documents were anywhere to be found on Mr. Arido's personal laptop or in his personal belongings.

92. What the Prosecution also fails to address is the fact that the 30 April 2012 email from [REDACTED] was sent to both Mr. Kilolo and Mr. Arido. That means that Mr. Kilolo was already in the possession of the contested documents by the time [REDACTED] email was forwarded to him via Mr. Arido's email address. Defining the terms "providing false/forged documents" and "source" by their textual meaning, this email cannot be said to be sufficient - even when the evidence is viewed as a whole - to constitute substantial grounds to believe that Mr. Arido provided the Bemba Defence team with the contested documents.

f. *<u>The Prosecution's argument that Mr. Arido had access to [REDACTED] email is fanciful</u>*

93. The Prosecution takes the position that [REDACTED].[112] To support this statement, the Prosecution refers to a [REDACTED].[113] However, anyone [REDACTED].

94. There is not sufficient evidence to support the Prosecution's argument that Mr. Arido had access to [REDACTED] email or that he was [REDACTED]. The Arido Defence notes that surely, the Prosecution should have investigated the email account of [REDACTED] in the same way as it did in respect of the email accounts of other suspects. The failure by the Prosecution to have done so is telling of the inconclusive nature of its investigations and constitutes an element that the Chamber should take into account in assessing the persuasiveness of the Prosecution's evidence - or rather the lack of such persuasiveness.

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110 CAR-OTP-0075-0259-R01.
111 *Ibid.*
112 Prosecution Response, para. 152.
113 *Ibid.*, para. 152, *referring to* CAR-OTP-0075-0255-R01 (attaching CAR-OTP-0075-0256).

g. *The Prosecution takes the 6 November 2013 conversation between Mr. Kilolo and Mr. Mangenda out of context*

95. The other evidence presented by the Prosecution related to the source of the contested documents is the 6 November 2013 telephone conversation between Mr. Kilolo and Mr. Mangenda,[114] The Prosecution states that this intercepted conversation confirms Mr. Arido's status as the source of the documents.[115] In response to the Arido Defence Submissions that this conversation shows clearly that it was [REDACTED] who provided the said documents to [REDACTED] and that Mr. Kilolo and Mr. Mangenda [REDACTED] that it was Mr. Arido who provided them,[116] the Prosecution asserts that [REDACTED].[117] In particular, the Prosecution relies on the statement by [REDACTED].[118] The Arido Defence refers the Pre-Trial Chamber to its original submissions where it quotes directly the wording used by both Mr. Kilolo and Mr. Mangenda and which shows clearly that Mr. Arido is not the actual source of the documents, [REDACTED].[119]

96. The Arido Defence further notes that this also appears to be the understanding of the Independent Counsel, who noted in his third report that "[REDACTED]."[120]

97. Furthermore, the Prosecution's arguments related to the 6 November 2013 conversation are contradictory. On the one hand, the Prosecution relies on a statement by [REDACTED].[121] On the other hand, it argues that, [REDACTED].[122] As a result, following the Prosecution's own logic, [REDACTED].[123] The Arido Defence submits that the conversation should be looked at as a whole, and submits that by doing so, it appears clearly that the documents were given by [REDACTED] and that [REDACTED].

98. The Prosecution itself interprets the 6 November 2013 conversation between Mr. Kilolo and Mr. Mangenda regarding the contested documents as showing that [REDACTED].[124] This

[114] CAR-OTP-0082-0924; *see also* Annex to the third report of the independent counsel, ICC-01/05-01/13-421-Conf-Anx/CAR-OTP-0080-1138, p. 118.
[115] Prosecution Response, paras 151, 153.
[116] Arido Defence Submissions, paras 150-153.
[117] Prosecution Response, para. 153.
[118] *Ibid.*, referring to CAR-OTP-0082-0924.
[119] Arido Defence Submissions, paras 150-153.
[120] ICC-01/05-01/13-421-Conf, pp. 9-10 (emphasis added).
[121] Prosecution Submission, para. 53; Prosecution Response, para. 151.
[122] *Ibid.*, para. 52.
[123] [REDACTED] CAR-OTP-0082-0924, p. 6 (0929). Defence translation: [REDACTED] (emphasis added).
[124] Prosecution Response, para. 155.

confirms that the Prosecution is leaving other possible suspects out of its investigations without providing reasons as to why it is doing so.

99. The Arido Defence recalls that the purpose of the Confirmation of Charges is to ensure that only persons against whom there are sufficiently compelling charges, going beyond mere theory or suspicion, are committed to trial.[125] In assessing the persuasiveness of the evidence against Mr. Arido the Pre-Trial Chamber should take the following into account. First, it must be born in mind that the actual source of the documents according to Mr. Kilolo and Mr. Mangenda, [REDACTED].[126] Formally nominating Mr. Arido, [REDACTED]. Second, [REDACTED].[127]

100. The Prosecution is, in addition, far from consistent in its position regarding who provided the contested documents. Only now in its Response, after having been confronted with the Arido Defence Submissions, the Prosecution states that [REDACTED].[128] This lack of consistency is further demonstrated by the fact that [REDACTED],[129] [REDACTED].[130] In its Response, referring to the 6 November 2013 conversation between Mr. Kilolo and Mr. Mangenda, the Prosecution claims that [REDACTED].[131] The truth of the matter is, of course, that the Prosecution does not know, as it has no evidence of who is truly at the origin of the documents, and that the documents came into the hands of the Bemba defence team, through [REDACTED], and not Mr. Arido.

h. *<u>The other evidence relied upon by the Prosecution is equally fallacious</u>*

101. The Prosecution also refers to some "other evidence" showing that Mr. Arido was the source of the documents, namely that:[132]

a. Mr. Arido was listed in the chain of custody;
b. Mr. Arido had access to [REDACTED];
c. Mr. Arido had some degree of military knowledge; and,
d. [REDACTED].

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[125] ICC-01/04-01/06-803, paras 29, 37.
[126] [REDACTED].
[127] ICC-01/05-01/13-600-Conf, para. 117 ('Kilolo Defence Submissions'); *see also* CAR-D21-0003-0057; CAR-D21-0001-0041 [REDACTED].
[128] Prosecution Response, para. 155.
[129] ICC-01/05-01/13-19-conf, paras 12, 94.
[130] DCC, para. 42.
[131] Prosecution Response, para. 155.
[132] Prosecution Submissions, para. 54; Prosecution Response, para. 156.

102. Regarding points (a) and (c), the Arido Defence reiterates the arguments contained in paragraphs 142-148 and 375 of its Submissions.

103. With regard to the alleged false [REDACTED] and the alleged false [REDACTED], the Prosecution's arguments are based on nothing but speculations, as the Prosecution did not conduct investigations into the context of the said documents or their authenticity. For instance, there is no evidence that the Prosecution contacted [REDACTED] to obtain information as to whether there was a mistake [REDACTED], or whether [REDACTED]. Similarly, the Prosecution has failed to provide actual evidence that [REDACTED] are the same and that one was falsified. Since the address in the email is redacted, it is unclear to whom it was sent. In any event, [REDACTED]. Again, in the absence of any investigation on the part of the Prosecution and of evidence supporting that one of the cards was forged or falsified, the Prosecution's assertions are unsubstantiated. Similarly, the Prosecution has not obtained any evidence regarding the alleged false [REDACTED], for example by contacting [REDACTED]. Claims and speculations by the Prosecution related to this allegedly false [REDACTED] are thus equally unsubstantiated.

104. This also applies to Mr. Arido's alleged access to [REDACTED]. The Prosecution refers to [REDACTED]. On this basis, the Prosecution speculates that Mr. Arido was able [REDACTED] to create/falsify the contested documents.[133] [REDACTED]. The Prosecution Submissions are simply fanciful.

i. *The Prosecution's statement that uploading on Ringtail enhances the quality of a document is easily defeated*

105. The Prosecution's argument in response to the Arido Defence's assertion that the difference in quality between the documents attached to [REDACTED] email and those put on e-court,[134] namely that [REDACTED],[135] does not stand scrutiny. It is a fact of common knowledge among practitioners that uploading documents on ringtail does not enhance the quality thereof but instead significantly lowers it. A comparison of the e-court version of CAR-D24-0001-0040 and its online version[136] clearly illustrates this point.

[133] Prosecution Response, para. 156.
[134] Arido Defence Submissions, para. 141.
[135] Prosecution Response, para. 158.
[136] Available at http://transnationale.eelv.fr/wp-content/blogs.dir/76/files/2013/02/Notes-Transnat-n%C2%B08_RCA.pdf.

j. *<u>The Prosecution ignores the September 2012 email from Mr. Kilolo asking Mr. Arido to analyse the documents</u>*

106. Despite expressly noting that Mr. Kilolo sent the 14 false docs to Mr. Arido by email late 2012, asking Mr. Arido to analyse them,[137] the Prosecution fails to explain how this support its argument that Mr. Arido was the source of the documents. As is the case with numerous other arguments raised by the Arido Defence, the Prosecution elects not to respond to the argument that this in fact shows that Mr. Arido was not the source of the documents, as explained in paragraphs 157-158 of the Arido Defence Submissions.

k. *<u>The Prosecution fails to provide evidence regarding how, when and where Mr. Arido would have had access to the contested documents</u>*

107. The Arido Defence notes that the Prosecution fails to provide evidence as to how, when and where Mr. Arido had access to the contested documents or how, as it appears to be the Prosecution's position, Mr. Arido was able to create such false/forged documents. Similarly, the Prosecution fails to provide evidence showing that Mr. Arido obtained and presented the documents knowing they were forged/falsified. In the absence of such crucial evidence, the Prosecution cannot be said to have met the threshold of substantial grounds to believe that Mr. Arido directly or indirectly "presented evidence that the party knew were false or forged". Its failure to do so is an essential factor which, in the view of the Arido Defence, must be taken into account by the Pre-Trial Chamber in assessing whether the Prosecution's evidence meet the requisite threshold for the confirmation of charges.

108. The Arido Defence thus requests the Pre-Trial Chamber to draw the necessary inference from the Prosecution's lack of investigation and the totality of the evidence, namely, that the Prosecution has failed to provide substantial grounds to believe that Mr. Arido did in fact provide the contested documents to the Bemba Defence team.

3. The evidence referred to in the Prosecution Submissions and Response to support Mr. Arido's alleged knowledge is insufficient to meet the substantial grounds to believe standard

a. *<u>The Prosecution fails to establish substantial grounds to believe that Mr. Arido knew that the documents were false/forged</u>*

109. Even if the Pre-Trial Chamber were to find that the Prosecution provided sufficient evidence that the documents were not authentic or that Mr. Arido gave them to Mr. Kilolo, the

[137] Prosecution Submissions, para. 60.

Prosecution fails to provide any evidence supporting the allegation that Mr. Arido knew that the documents were false/forged. While it is asserted that Mr. Arido "[REDACTED].[138] Despite this point being raised in the Arido Defence's Submissions, in paragraphs 171 - 184, the Prosecution stayed silent it in its Response.

110. In its Submissions, all the Prosecution states is that "[REDACTED]".[139] In the present case, the Prosecution's argument amounts to mere speculation and not concrete evidence.

111. In particular, the Prosecution provides no evidence that Mr. Arido had any knowledge of *messages portés*, or the structure and methods of the [REDACTED], or of the format of the documents. Similarly, the Prosecution shows no communication to or from Mr. Arido establishing substantial grounds to believe that he was ever informed of the fact that the documents were false or forged. The Prosecution also fails to provide evidence as to how Mr. Arido could have created/forged the documents himself. In fact, the Prosecution does not take a position as to who "created" the contested documents, when they were created and how Mr. Arido obtained them. The Arido Defence submits that the Prosecution fails to provide such evidence because it does not exist: Mr. Arido had nothing to do with the creation, distribution or use of these contested documents.

112. The Arido Defence further notes that Mr. Arido was removed from the CAR army on 16 July 2001.[140] He was therefore not in CAR at the time the controversial documents were supposedly created and is in no position to identify any irregularities they may have. Again, [REDACTED] such as D-53, D-59 and [REDACTED] all testified that the documents were authentic. *A fortiori*, it appears logical that a more junior military member who was outside of CAR at the time the documents were created is unable to identify any irregularities - if there are any to start with.

b. *The Prosecution's argument that Mr. Arido knew that the documents would be used as evidence is pure speculation*

113. The Prosecution argues that Mr. Arido knew that by providing the documents he was assisting Bemba's lead counsel Kilolo in the presentation of these documents as evidence, based

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[138] Prosecution Submissions, paras 409-410.
[139] *Ibid.*, para. 410.
[140] *See supra,* para. 81, fn. 95.

on the fact that [REDACTED].[141] This is unpersuasive, [REDACTED]. Moreover, Mr. Arido cannot and does not have knowledge about the defence strategy in the Bemba case and the - purely internal - decision as to what documents the Bemba defence team will present as evidence or not.

114. The Prosecution further argues that Mr. Arido knew that the documents would be used as evidence because he was involved in the Bemba Defence by locating false witnesses [REDACTED], knowing why he was doing so and because his 1 May 2012 email to Mr. Kilolo was [REDACTED], further demonstrating his knowledge of Mr. Kilolo as Mr. Bemba's counsel before the ICC.[142]

115. Similarly, the Prosecution refers to a [REDACTED] email from Mr. Arido to state that he knew that his involvement with Mr. Kilolo was for the purpose of producing evidence to be used in the Bemba case. In the view of the Prosecution, it is so because Mr. Arido allegedly wrote [REDACTED].[143] It is unclear how this shows that Mr. Arido knew that any document he would forward to Mr. Kilolo would be used as evidence in the Bemba case.

116. The Prosecution's argument is particularly unpersuasive in light of the fact that the list of evidence had not even been prepared at the time where Mr. Arido allegedly forwarded 7 of the contested documents to Mr. Kilolo. It is common knowledge that an assessment still has to be undertaken by the relevant team members in a Defence team as to which documents to include in the list of evidence and which not, as well as to which documents to present as evidence in Court and which not.[144] Knowing that Mr. Kilolo was the counsel for Mr. Bemba cannot be said to amount to knowledge that any document which may be sent to him will be used as evidence. Moreover, it must be borne in mind that Mr. Arido fully acknowledges having provided one document to the Bemba Defence and in that context he was fully aware of Mr. Kilolo's position as (lead) counsel. This document is his expert report.

117. There is no evidence showing that Mr. Arido and Mr. Kilolo discussed the production or presentation of the contested documents. To the contrary, the only communication between Mr. Arido and Mr. Kilolo on the contents of the controversial documents took place on 18 September 2012, where Mr. Kilolo asked Mr. Arido to urgently "analyse" the documents, as

[141] Prosecution Submissions, para. 409.
[142] *Ibid.*, para. 54.
[143] Prosecution Submissions, para. 409, *referring to* CAR-OTP-0075-0752.
[144] *See e.g.* Kilolo Defence Submissions, paras 127-133.

discussed in paragraphs 157-158 of the Arido Defence's Submissions. This contradicts the Prosecution's theory that Mr. Arido provided the documents to Mr. Kilolo and that he knew they were going to be used as evidence, or else Mr. Kilolo would not have contacted him. Similarly, Mr. Arido's statement to the French authorities (in the presence of Prosecution's representatives) makes clear that Mr. Arido never sent the documents to Mr. Kilolo but that instead Mr. Kilolo had sent them to him in 2012, [REDACTED]."[145]

4. The Prosecution fails to provide evidence showing how the provision of the contested documents was part of and made in furtherance of an alleged Common Plan

118. The Prosecution also fails to provide any evidence that the alleged provision of the contested documents was part of an alleged common plan to defend Mr. Bemba through the commission of Article 70 offences ('Common Plan'). There is no evidence demonstrating that Mr. Arido communicated or coordinated his alleged actions regarding the contested documents with Mr. Bemba, Mr. Babala or Mr. Mangenda. The communications with Mr. Kilolo in the context of the contested documents are limited to transmitting an email from [REDACTED] to Mr. Kilolo, which he had already received, without any proof that Mr. Arido knew what the content of the documents was, and a 2 September 2012 email from Mr. Kilolo asking Mr. Arido to analyse the documents for him.

119. The Prosecution fails to support its statement that the alleged provision of the controversial documents was part of the alleged Common Plan. At paragraph 51 of its Submissions, the Prosecution states that "[REDACTED]". The evidence cited are the e-court metadata,[146] which, in addition of not constituting credible evidence,[147] do not show in any way how there is a Common Plan between Mr. Arido and the co-suspects and how the provision of the documents was made in furtherance of it. Once again, the Prosecution fails to meet its evidentiary burden.

[145] CAR-OTP-0074-1065, p. 4 (1068), bottom.
[146] Prosecution Submissions, para. 51, fn. 92.
[147] *See* Arido Defence Submissions, paras 142-148.

B. The Prosecution fails to substantiate its allegations related to Mr. Arido's interactions with Defence witnesses

120. From the outset, the Arido Defence notes that the Prosecution Response fails to address most of the witness-related arguments presented by the Arido Defence in its Submissions. For instance, the Prosecution:

i. Does not address the fact that Mr. Arido was an expert witness/consultant for the Bemba Defence team and that the payments he received from them was for the preparation of his expert report;[148]

ii. Fails to explain why the Prosecution charges Mr. Arido regarding 14 witnesses while there is no evidence with regards to 11 of them;[149]

iii. Ignores the evidence that D-4 and D-6 provided to the Kilolo Defence team, and which directly contradict its position, as they both denied having been told what to say in Court or having being paid or made promises;[150]

iv. Does not address the Arido Defence's challenges regarding the two statements Mr. Arido made to the French authorities and upon which the Prosecution seeks to rely;[151]

v. Fails to respond to the argument that the Prosecution misled D-2 and D-3 [REDACTED],[152] did not act in accordance with prosecutorial duties of impartiality, and led the evidence of the witness, thereby depriving their statements of indicia of probative value;[153]

vi. Does not explain how the evidence of D-2 and D-3 are credible even though they admitted having lied under oath, they both had a personal interest in testifying in the case, [REDACTED], and that D-2 lied during his interview;[154]

vii. Omits to address the argument that D-2 and D-3 provided no evidence that Mr. Arido "bribed" them;[155] and,

148 Arido Defence Submissions, paras 121-129.
149 *Ibid.*, paras 194-202.
150 *Ibid.*, paras 203-205.
151 *Ibid.*, paras 207-210.
152 *Ibid.,* paras 213-222.
153 *Ibid.*, paras 223-238.
154 *Ibid.*, paras 239-253.

viii. Fails to address the arguments that the actions attributed to Mr. Arido - promising money and a future in Europe – are, under the circumstances, not inappropriate and do not amount to "corruptly influencing witnesses".[156]

121. None of these arguments have been discussed in the Prosecution Submissions or its Response. As a result, the Arido Defence Submissions and arguments on these matters are not contested. This is a factor to which the Pre-Trial Chamber is requested to attribute significant weight in its assessment of the Prosecution's evidence.

122. The Arido Defence - in addition to its present response to the arguments contained in the Prosecution Submissions and its Response - directs the Pre-Trial Chamber to paragraphs 188 to 318 of its Submissions.

1. Preliminary observations on the Prosecution Submissions and Response

a. The Prosecution does not provide any evidence to support the majority of its allegations

123. The Prosecution does not refer to Mr. Arido when discussing [REDACTED] in its Submissions or its Response.[157] This further supports the Arido Defence's position that the Prosecution's case regarding Mr. Arido is limited to D-2, D-3, D-4, and D-6.

124. In addition, there is no evidence of any plan, whether explicit or implicit, between Mr. Arido and Mr. Kilolo, and no evidence of Mr. Arido being in contact with any of the other co-suspects. The Arido Defence directs the Pre-Trial Chamber to paragraphs 189 to 203 below.

125. Finally, it is also important to recall that [REDACTED].[158]

b. The Prosecution continues to rely on Mr. Arido's statements to the French police while failing to address the admissibility challenges raised by the Arido Defence

126. In its Submissions, the Prosecution substantially relies on Mr. Arido's statements to the French police of November 2013 and January 2014[159] which were made in the presence of a

[155] Arido Defence Submissions, paras 274-287.
[156] *Ibid.*s, paras 288-297.
[157] Prosecution Submissions, paras 100-137, 179-221, 232-234.
[158] CAR-OTP-0078-0184, p. 9 (0192).

Prosecution's representative. As stated in paragraphs 207 to 210 of the Arido Defence Submissions, the statements are inadmissible as the Prosecution has violated the applicable law in obtaining them. Particularly, Mr. Arido was not provided with the assistance of counsel despite him demanding so,[160] and the interview was not recorded thereby making it impossible to verify the accuracy of the notes from the interview.

127. Nevertheless, the Prosecution uses Mr. Arido's 23 November 2013 statement as supporting its allegation that Mr. Arido was present at [REDACTED] in February 2012 together with D-2, D-3, [REDACTED], and D-6 and that Mr. Arido allegedly knew that these persons were not from the military.[161] However, an accurate reading of Mr. Arido's statement informs us that he met Mr. Kilolo in Douala in March 2012[162] and [REDACTED].[163] While Mr. Arido did state that he saw six prospective witnesses at that time, whom he stated were not part of the CAR army, [REDACTED].[164] To the question, "[REDACTED], Mr. Arido responded [REDACTED]."[165] Mr. Arido's January 2014 interview further clarifies the situation as he stated that he did not participate in meetings with witnesses, and that he does not know the witnesses who were at [REDACTED].[166]

2. The evidence does not support the allegation that Mr. Arido arranged a meeting to set prospective witnesses up with Mr. Kilolo, who allegedly subsequently paid them and instructed them to testify falsely

128. The Prosecution argues that Arido arranged a meeting in Douala, in or around February 2012, with D-3, D-2, and others, in preparation for meeting with Kilolo, which was attended by D-2, D-3, D-4, D-6, D-7, and D-9. It further states that before the meeting with Mr. Kilolo, Mr. Arido and [REDACTED] coached these witnesses on what to say to Mr. Kilolo.[167]

129. The Prosecution's case solely rests on D-2 and D-3's evidence. The Prosecution ignores the fact that D-4 and D-6 provided evidence to the Kilolo Defence, which contradicts the

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159 *See* the use of CAR-OTP-0074-1065 in the Prosecution Submissions, paras. 54, 60, 62, 143, 146, 161, 172, 174, 177, 223, 410 and 426, and in the Prosecution Response, paras 423, 426; *see also* the use of CAR-OTP-0077-0169 in Prosecution Submissions, paras 36, 40 53, 54, 156, and in the Prosecution Response, paras 36, 53.
160 CAR-OTP-0074-1060; CAR-OTP-0074-1065, top of the page listing the persons being present.
161 Prosecution Submissions, para. 54.
162 CAR-OTP-0074-1065, p. 2 (1066, middle of the page): [REDACTED].
163 CAR-OTP-0074-1065, p. 2 (1066, middle of the page): [REDACTED].
164 CAR-OTP-0074-1065, p. 5 (1069): [REDACTED]
165 CAR-OTP-0074-1065, p. 4 (1068, middle of the page) (emphasis added). [REDACTED]
166 CAR-OTP-0077-0169, p. 6 (0174): [REDACTED]
167 Prosecution Submissions, para. 420.

Prosecution's position, stating that they were not promised any money and were not told what to say.[168]

130. There is no reason to find D-4 and D-6's evidence less credible than D-2 and D-3's. To the contrary, the reasons why D-2 and D-3's evidence should not be relied upon have been discussed at length in paragraphs 211 to 262 of the Arido Defence Submissions and include the use of a controversial [REDACTED], the extensive use of leading questions by Prosecution's investigators, and the fact that D-2 lied in his interview. Also bearing in mind the fact that none of these Defence Submissions have been contested by the Prosecution, the Arido Defence repeats its request that the Pre-Trial Chamber reject the evidence of D-2 and D-3 in its entirety.

131. The Prosecution's allegation that Mr. Arido placed witnesses in contact with Mr. Kilolo knowing that they would be illicitly coached on what to say when testifying and paid in exchange for their false testimony is unsubstantiated.[169] There is no evidence of any communication between Mr. Arido and Mr. Kilolo regarding any such plan, nor was Mr. Arido present during the alleged coaching/payment by Mr. Kilolo.[170] As stated above, Mr. Arido was also not involved at all with the Bemba Defence after February 2012, besides his own role as expert witness.

3. The Prosecution presents no evidence that Mr. Arido bribed witnesses

132. In its Submissions, the Prosecution states that Mr. Arido received [REDACTED] from other co-perpetrators including Mr. Kilolo, Mr. Babala, Mr. Nginamau and [REDACTED].[171] According to the Prosecution, Mr. Arido used these funds to bribe at least 10 witnesses, namely D-64, D-57, D-55, D-29, D-25, D-23, D-6, D-4, D-3, and D-2.[172] The Prosecution notes that the details of the payments used to bribe witnesses are "[REDACTED]".[173] However, the Prosecution does not make any reference to the act of bribing witnesses when discussing the individual criminal liability of Mr. Arido in paragraphs 408-433 of its Submissions.

133. Moreover, Mr. Arido's name is not mentioned or referred to in regards to D-64, D-57, D-55, D-29, D-25, and D-23.[174] In fact, the Prosecution has not interviewed D-29, D-25, D-23,

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[168] CAR-D21-0004-0310, p. 10 (0320); CAR-D21-0004-0354, p. 11 (0364).
[169] Prosecution Submissions, paras 416-417.
[170] *See* **D-2:** CAR-OTP-0080-0021, p.16 (0036), l. 532-537; CAR-OTP-0080-0069, p. 3 (0071), l. 57-67; **D-3:** CAR-OTP-0078-0236, p. 4 (0239), l. 101-105.
[171] Prosecution Submissions, para. 33.
[172] *Ibid.*, para. 34.
[173] *Ibid.*
[174] Arido Defence Submissions, paras 194-205; *see also* the witness statements and transcriptions obtained by the Prosecution: **D-64:** Day 1: CAR-OTP-0074-1091 (Track 1); CAR-OTP-0074-1112 (Track 2); CAR-OTP-0074-1124

D-4 or D-6. The Kilolo Defence team, on the other hand, did interview D-4,[175] D-6,[176] D-25,[177] and D-29,[178] who all stated that they were not promised or paid money and did not lie when giving testimony.[179] With regards to D-2 and D-3, the Arido Defence directs the Pre-Trial Chamber to paragraphs 274 to 287 of its Submissions.

134. It is submitted that the Prosecution does not provide any evidence that the payments received by Mr. Arido were done with a view to contacting prospective Defence witnesses or that they were used to pay them. As stated in the Arido Defence Submissions, the payments received by Mr. Arido were made in relation to the provision of an expert report on military strategy by him.[180] The Prosecution does not provide evidence of communication between Mr. Arido and the co-suspects regarding the payments, or any evidence that the money was used to corruptly influence witnesses. The Arido Defence draws the Pre-Trial Chamber's attention to SCSL jurisprudence, which provides some guidance, that any payment regarding bribing witnesses must be accompanied with instructions to pay the witness.[181]

4. The Prosecution Submissions and Response fail to establish substantial grounds to believe that Mr. Arido made promises to prospective witnesses in exchange for false testimony

135. The Prosecution's allegations that Mr. Arido made improper promises to D-2 and D-3 in exchange for false testimony[182] are already extensively addressed in paragraphs 288 to 313 of the the Arido Defence Submissions and therefore need not be repeated here.

(track 3); CAR-OTP-0074-1155 (Track 4); CAR-OTP-0074-1169 (Track 5); CAR-OTP-0074-1189 (Track 6); CAR-OTP-0074-1201 (Track 7); Day 2: CAR-OTP-0074-1206 (track 1); CAR-OTP-0074-1229 (track 2); CAR-OTP-0074-1259 (track 3); **D-55**: CAR-OTP-0074-0872; **D-57**: Day 1: CAR-OTP-0077-0045 (tracks 1 & 2); CAR-OTP-0077-0052 (track 3); CAR-OTP-0077-0074 (track 4); CAR-OTP-0077-0088 (track 5); CAR-OTP-0077-0121 (track 6); CAR-OTP-0077-0149 (track 7); CAR-OTP-0077-0160 (track 8); Day 2: CAR-OTP-0077-0003 (Track 1); CAR-OTP-0077-0026 (track 2); [REDACTED]: CAR-OTP-0074-0806 (fr); CAR-OTP-0075-0002 (eng); CAR-OTP-0074-0814 (fr); CAR-OTP-005-0009 (eng).

175 CAR-D21-0004-0310.

176 CAR-D21-0004-0354.

177 CAR-D21-0004-0211.

178 CAR-D21-0004-0581.

179 **D-4**: CAR-D21-0004-0310, pp. 9-10 (0318-0319), l. 285-315, l. 333-337; **D-6**: CAR-D21-0004-0354, p. 11 (0364), l. 360-375; p. 12 (0365), l. 388-399; **D-25**: CAR-D21-0004-0211, pp 6-7 (0216-0217), l. 173-212; pp. 8-9 (0218-0219), l. 256-273; **D-29:** CAR-D21-0004-0581, pp. 7-8 (0587-0588), l. 199-232, 245-265; p. 10 (0591), l. 364-370.

180 Arido Defence Submissions, paras 121-129.

181 SCSL, *Independent Counsel v. Prince Taylor*, Case No. SCSL-12-02-T, Judgement in Contempt Proceedings, 25 January 2013, para. 211: "I have found as fact that there were various payments […] I find this evidence on this not to be corroborated and not to be credible. […] I find that if there had been such a promise, it was a promise of a payment to [the accused] personally and not to the witnesses. All the other payments were to [the accused] personally. There is no evidence that any payment was accompanied by an instruction to pay the witnesses", available at: http://www.scsldocs.org/documents/view/6937-6937.

182 Prosecution Submissions, paras 139-140.

136. Regarding D-4 and D-6, the Prosecution's only supporting evidence are the statements by D-2 and D-3 that they were present in the room where [REDACTED] and Mr. Arido allegedly promised money and the possibility of asylum.[183] As stated in the Arido Defence Submissions[184] and in paragraphs 140 to 156 below, D-2 and D-3's evidence lacks credibility, even for the limited purpose of the confirmation of charges. In addition, the Arido Defence recalls the recent statements of D-4[185] and D-6[186] who both deny having been made any promise or paid any money in exchange for false testimony.

137. The Arido Defence recalls that the Kilolo Defence requested the permission to call live witnesses in the present case,[187] which was rejected by the Single Judge who find that "the oral testimony of these witnesses […] is not necessary for the proper elucidation of the facts for the purpose of the Chamber's final decision under Article 61 (7) of the Statute".[188] The Arido Defence submits there is no ground to ignore the evidence provided by the Kilolo Defence witnesses (D-4 and D-6) while admitting that of the Prosecution. It is pointed out that –contrary to D-2 and D-3's statements- the statements of D-4 and D-6 remain uncontested. Other than the Prosecution's theory of this case, there is no reason to consider D-4 and D-6's statements less credible than D-2 and D-3's statements. To the credit of D-4 and D-6 it should also be taken into account that their evidence is more worthy of consideration since their respective statements in the present case, are consistent with the testimony they provided under oath in the Bemba main case. This is not the case with D-2 and D-3.

5. The Prosecution's allegations related to the illicit coaching of prospective Defence witnesses are not supported by the evidence

138. The Prosecution's case of 'illicit coaching' is solely based on the evidence provided by D-2 and D-3 (mostly by D-2). However, as discussed in the Arido Defence Submissions, this evidence should be dismissed for various reasons.[189]

139. Furthermore, the Arido Defence directs the Pre-Trial Chamber to paragraphs 298 to 313 of its Submissions, and particularly regarding the fact that the offence of illicit coaching can only be done by counsel shortly before the testimony of the witness, as per the definition of the

[183] *Ibid.*, para. 225.
[184] Arido Defence Submissions, paras 211-262.
[185] CAR-D21-0004-0310, pp. 9-10 (0318-0319), l. 285-315, l. 333-337.
[186] CAR-D21-0004-0354, p. 11 (0364), l. 360-375; p. 12 (0365), l. 388-399.
[187] ICC-01/05-01/13-339.
[188] ICC-01/05-01/13-363.
[189] Arido Defence Submissions, paras 212-262.

Prosecution.[190] The Arido Defence notes that the Prosecution provides no evidence of Mr. Arido and Mr. Kilolo having ever been in contact prior to February 2012, and certainly not of any contact regarding the illicit coaching of witnesses.

a. *D-2 and D-3's statements bear significant discrepancies*

140. The Arido Defence notes that the Prosecution presents D-2 and D-3's evidence as mutually corroborative.[191] However, their interviews suffer from significant discrepancies.

141. First of all, while D-3 states that the Douala meeting took place around [REDACTED], D-2 told the Prosecution that it took place [REDACTED].[192] During the second interview, after having had [REDACTED] to reflect on the content of his statement, D-2 [REDACTED].[193] No matter which version of the facts D-2 attempts to use, it is not compatible with the evidence of D-3.

142. Secondly, while D-3 says that [REDACTED], D-2 notes that [REDACTED].[194]

143. Finally, D-2 and D-3 provide radically different versions of the timing and detailed description of the alleged "briefing" [REDACTED] in Douala prior to the meeting with Mr. Kilolo. In fact, D-2 himself presents three different versions in his interviews alone, which increasingly, but also unconvincingly, implicate Mr. Arido.

144. The first day he met with the Prosecution, D-2 said that [REDACTED],[195] [REDACTED].[196] [REDACTED].[197] [REDACTED].[198] [REDACTED].[199]

145. On the second day of meeting with the Prosecution, D-2 gave his second version of the alleged briefing. [REDACTED].[200] [REDACTED].[201] [REDACTED].[202] [REDACTED],[203] [REDACTED].[204]

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190 *Ibid.*, paras 298-303.
191 Prosecution Submissions, paras 138-170; Prosecution Response, paras 107-110.
192 **D-2:** CAR-OTP-0080-0043, p. 3 (0045), l. 47-55; **D-3:** CAR-OTP-0078-0218, p. 4 (0221), l. 86; CAR-OTP-0078-0236, p. 6 (0241), l. 150.
193 CAR-OTP-0080-0494, p. 7 (0500), l. 200-207, 216, 224.
194 **D-2:** CAR-OTP-0080-0043, p. 17 (0059), l. 582-595; **D-3:** CAR-OTP-0078-0206, p. 6 (0211), l. 156-158.
195 CAR-OTP-0080-0043, p. 24 (0066), l. 847; CAR-OTP-0080-0021, p. 14 (0034), l. 450, 461-462.
196 CAR-OTP-0080-0021, pp. 14-15 (0034-0035), l. 461-474, 481-485.
197 *Ibid.*, pp. 16 (0036), l. 517-518.
198 *Ibid.*, l. 518-522.
199 *Ibid.*, l. 530-537.
200 CAR-OTP-0080-0043, pp. 21-22 (0063-0064), l. 742-766.
201 *Ibid.*, pp. 22-23 (0064-0065), l. 777-801.

146. The third time he met with the Prosecution, about [REDACTED] after his first interview, D-2 'found' [REDACTED],[205] stating that [REDACTED].[206]

147. While he stated that [REDACTED],[207] [REDACTED],[208] [REDACTED].[209] [REDACTED].[210] [REDACTED].[211] Had this been true, D-3 surely would have remembered it.

148. In addition being contradicted by D-3's evidence, D-2's evidence is inherently unreliable since he provided three significantly different versions of the 'briefing', each of which successively and increasingly incriminates Mr. Arido. In light of the fact that D-3 does not provide evidence of a "briefing" by Mr. Arido, D-2 is the sole witness providing evidence thereof. His interviews with the Prosecution being replete with contradictions and lies, it cannot be said to provide substantial grounds that Mr. Arido illicitly coached prospective Defence witnesses.

b. *D-2's [REDACTED]*

149. When he met the Prosecution for a second time, on [REDACTED] after their first meeting), D-2 brought [REDACTED].[212] According to D-2, [REDACTED][213] [REDACTED][214] [REDACTED].[215] [REDACTED].[216]

150. D-2 states that [REDACTED].[217] [REDACTED].[218] [REDACTED].[219] [REDACTED].[220] However, D-2 appeared to trust the Prosecution enough to admit having (allegedly) lied when under oath when testifying for Mr. Bemba and having (allegedly) received money from Mr. Kilolo. This is simply illogical.

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202 CAR-OTP-0080-0043, p. 25 (0066), l. 847-859.
203 CAR-OTP-0080-0043, p. 25 (0067), l. 870-881.
204 *Ibid.*, p. 25 (0067), l. 883-897.
205 CAR-OTP-0080-0494, p. 5 (0498), l. 130-136, p. 6 (0499), l. 166-170-175.
206 *Ibid.*, p. 9 (0502), l. 283, 307-308, p. 12 (0505), l. 395-396.
207 *Ibid.*, p. 9 (0502), l. 280-308.
208 CAR-OTP-0078-0184, p. 7 (0190), l. 205-209; CAR-OTP-0078-0218, p. 6 (0223), l. 166; p. 8 (0225), l. 233-234.
209 CAR-OTP-0078-0218, p. 8 (0225), l. 241-244).
210 *Ibid.*, p. 8 (0225), l. 246-247, p. 17 (0234), l. 551-561.
211 *Ibid.*, pp. 8-9 (0225-226), l. 222-275; p. 12 (0229), l. 356-373.
212 CAR-OTP-0080-0494, p. 5 (0498), l. 130-136, p. 6 (0499), l. 166-170-175.
213 *Ibid.*, p. 6 (0499), l. 172-175: [REDACTED].
214 CAR-OTP-0079-1522.
215 CAR-OTP-0080-0494, p. 6 (0499), l. 193-197.
216 *Ibid.*, p. 7 (0500), l. 209-210, 233.
217 *Ibid.*, p. 6 (0499), l. 163-170.
218 *Ibid.*.
219 *Ibid.*, p. 10 (0503), l. 341.
220 *Ibid.*, p. 11 (0504), l. 352-353, 355-359.

151. The Arido Defence notes that, first of all, as is the case with the contested Bemba Defence documents which the Prosecution alleges are false/forged, the Prosecution failed to conduct appropriate investigations into [REDACTED]. In fact, [REDACTED].[221] Further, [REDACTED].[222] This makes it more difficult to analyse in terms of details. The Prosecution shall not be permitted to rely on such [REDACTED] in the absence of a forensic examination. The Defence notes that it was precluded from requesting to see the original pursuant to Rule 77 of the RPE as a result of the late disclosure by the Prosecution.[223]

152. Secondly, while [REDACTED].[224]

153. Another, indeed compelling, reason to conclude that D-2's [REDACTED] cannot be authentic is the following. [REDACTED].[225] However, the Seleka rebellion movement was created in August 2012.[226] Therefore neither D-2, nor those who supposedly had coached him, could have known this fact had [REDACTED].

154. Finally, also the Prosecution seemed to wonder about the authenticity [REDACTED].[227] D-2's response is vague and unsatisfactory, stating that [REDACTED].[228]

155. The only reasonable inference in respect of [REDACTED] and all the circumstances surrounding their production by D-2 is that they lack the minimal indicia of reliability and cannot be relied upon for the purpose of confirming the charges against Mr. Arido.

156. It is finally pointed out that if in addition to being inherently unreliable at this stage, evidence also shows that [REDACTED] provided by D-2 are false, the witness - in addition to having allegedly already committed the crime under Article 70 (1) (a) of the Statute - would also liable for the crime under Article 70 (1) (b), if one were to follow the interpretation of that crime by the Prosecution (namely that it is not limited to parties).

[221] *Ibid.*, pp. 12-13 (0505-0506): [REDACTED].
[222] Compare CAR-OTP-0079-1522 with CAR-OTP-0079-1526 and CAR-OTP-0079-1530.
[223] Arido Defence Submissions, para. 198.
[224] *See supra*, para. 141.
[225] CAR-OTP-0079-1526, p. 4 (1529), last point.
[226] [REDACTED].
[227] CAR-OTP-0080-0494, p. 12 (0505), l. 389-394.
[228] *Ibid.*, l. 395-396: [REDACTED].

c. The Prosecution misrepresents D-2's evidence in an attempt to incriminate Mr. Arido

157. In addition, the Prosecution misrepresents D-2's evidence, stating that "[REDACTED].[229] However, it is obvious from D-2's (alleged) evidence that this was related to [REDACTED]. In the words of D-2, [REDACTED]. D-2 then adds that it was because [REDACTED].[230]

158. The Prosecution's misrepresentation is at best a linguistic error - worrisome in the present case where most of the evidence is in French - or, at worst, a calculated attempt to enhance D-2's evidence. Notwithstanding the cause, the fact remains that the Prosecution has misrepresented D-2's evidence.

159. Similarly, the Prosecution states unequivocally that [REDACTED].[231] The Prosecution's relies on D-2's evidence, but the latter only makes assumptions. He stated that [REDACTED][232] and [REDACTED].[233] Even after a clear leading question by the Prosecution [REDACTED],[234] D-2 fails to provide a justification for his assumptions and goes on about [REDACTED].[235] This does not constitute evidence that Mr. Arido and Mr. Kilolo were in contact about D-2's coaching; it is mere speculation and rambling on the part of D-2.

d. Mr. Arido's statement on the military background of prospective Defence witnesses must be viewed in context

160. The Prosecution argues that Mr. Arido developed "[REDACTED]".[236] In particular, it states that Mr. Arido's argument that there is no evidence that D-2 and D-3 lied under oath is contradicted by his November 2013 interview with the French police, where he stated that he knew that the persons present at [REDACTED] in Douala in February 2012 were not military.[237] The Prosecution takes the position that Mr. Arido's reference to his first meeting with Mr. Kilolo took place at the same time as the alleged meetings referred to by D-2 and D-3, and uses this to argue that there are substantial grounds to believe that Mr. Arido corruptly influenced witnesses by illicitly coaching them. The Prosecution's mischaracterisation and misrepresentation of the evidence must be corrected.

[229] Prosecution Submissions, para. 163 (emphasis added). Defence translation: "[REDACTED].
[230] CAR-OTP-0080-0043, p. 23 (0065), l. 807-820: "[REDACTED]" (emphasis added).
[231] Prosecution Submissions, para. 165.
[232] CAR-OTP-0080-0135, p. 16 (0150), l. 540-543: "[REDACTED]".
[233] CAR-OTP-0080-0135, p. 17 (0151), l. 573-575: "[REDACTED]" (emphasis added).
[234] CAR-OTP-0080-0135, p. 17 (0151), l. 576-577: "[REDACTED]?".
[235] CAR-OTP-0080-0135, p-. 17-18 (0151-0152), l. 578-638.
[236] Prosecution Response, para. 54.
[237] *Ibid.*.

161. First of all, the Arido Defence recalls the arguments made in its Submissions related to the inadmissibility of Mr. Arido's statements to the French police, contained in paragraphs 207 to 210. Secondly, it refers the Pre-Trial Chamber to paragraphs 126 to 128 above regarding the substance of the statement and the fact that, unlike what the Prosecution purports, it does not support its case.

e. *The evidence does not establish that D-4 was corruptly influenced*

162. The Prosecution relies upon D-2 and D-3's evidence to argue that in or around [REDACTED], Arido contacted D-4, who agreed to testify as a Defence witness,[238] and that D-4 was present at the Douala meeting in or around February 2012 with Mr. Arido and [REDACTED].[239] The Prosecution also uses Mr. Arido's 23 November 2013 statement, stating that it confirms that D-4 was present at the said meeting.[240] In its Response, the Prosecution argues that Mr. Arido's "[REDACTED]" on D-4 is "[REDACTED]", but fails to address the totality of the Arido Defence Submissions.[241]

163. The Arido Defence repeats that D-4's evidence contradicts this statement,[242] that D-2 and D-3's evidence is not credible,[243] and that the Prosecution misrepresents and speculates about the November 2013 statement of Mr. Arido.[244]

164. The Arido Defence argued that the totality and gist of D-4's statement to the Kilolo Defence does contradict the Prosecution's case, since, as is clear from paragraph 203 of the Arido Defence's Submissions, D-4 stated that it was Mr. Kilolo who contacted him in relation to the Bemba case and that he was not promised any money or told what to say in Court. Cherry-picking the testimony of D-4 by the Prosecution should not be permitted, as it denatures the essence of the statement.

165. The Prosecution uses the two statements made by Mr. Arido[245] in November 2013 and February 2014 to highlight the fact that Mr. Arido stated that [REDACTED] was not part of the

238 Prosecution Submissions, para. 173.
239 *Ibid.*, paras 111, 174.
240 *Ibid.*, para. 174.
241 Prosecution Response, para. 53.
242 **D-4**: CAR-D21-0004-0310, pp. 9-10 (0318-0319), l. 285-315, l. 333-337; **D-6**: CAR-D21-0004-0354, p. 11 (0364), l. 360-375; p. 12 (0365), l. 388-399.
243 *See supra*, paras 140-156; *see also* Arido Defence Submissions, paras 211-262.
244 *See supra*, paras 126-127; *see also* Arido Defence Submissions, paras 207-210.
245 Prosecution Response, para. 53.

CAR army (November 2013 Statement)[246] and later that he was a former military man (February 2014 Statement).[247] There is, however, no apparent discrepancy as it is perfectly possible to be a military man AND not to be a formal member of the CAR army. Not only can one be a soldier in rebel forces, but is also to be noted that the Presidential guard in CAR [REDACTED][248] are not part of the CAR army even though they can be considered military – as [REDACTED] explained when he testified before Trial Chamber III in the Main Case.[249] Instead of unjustifiably speculating about discrepancies in the statements of Mr. Arido, the Prosecution should have asked Mr. Arido for clarification when this came up during questioning.

f. *The evidence does not establish that D-6 was corruptly influenced*

166. The Prosecution's arguments regarding Mr. Arido's role in relation to D-6 are similar to that made with regards to D-4, namely, that he was contacted by Mr. Arido in relation to the Bemba case,[250] was present at the February 2012 meeting in Douala where he was promised money and asylum in Europe,[251] and coached on what to say to Mr. Kilolo by Mr. Arido and [REDACTED].[252] Again, these assertions are solely based on the interviews of D-2 and D-3.

167. The Arido Defence's arguments made with regards to D-4 are equally valid in respect of D-6,[253] and in particular it is to be recalled that D-6 provided a statement to the Kilolo Defence team where he stated that no promises were made to him and he was never told what to say.[254]

246 CAR-OTP-00074-1065, p. 4 (1068).
247 CAR-OTP-0077-0169, p. 5 (0173).
248 ICC-01/05-01/08-T-326bis-CONF-ENG, p. 25, l. 24.
249 ICC-01/05-01/08-T-356-CONF-ENG, p. 10, l. 18-p.11, l. 8.
250 Prosecution Submissions, para. 224.
251 *Ibid.*, para. 225.
252 *Ibid.*
253 *Supra*, paras 163-165.
254 CAR-D21-0004-0354, p. 11 (0364), l. 360-375; p. 12 (0365), l. 388-399.

VI. <u>Part III – Response to the Prosecution's Arguments Related to Individual Criminal Responsibility</u>

168. At the outset the Arido Defence reiterates its arguments in relation to individual criminal liability as contained in paragraphs 319 to 401 of its Submissions. In the present response, the Arido Defence will only address the Prosecution arguments that have not already been addressed, in anticipation, by the Arido Defence.

A. <u>Preliminary Arguments</u>

1. The Prosecution's position that Article 25 applies to Article 70-offences is flawed

169. In paragraph 10 of its Response, the Prosecution criticises the Arido Defence for [REDACTED]. This provision states that the Statute and Rules apply "*mutatis mutandis*" to Article 70-offences and lists the provisions specifically excluded from its application. The Prosecution further argues that as Part III of the Statute is not among the listed exceptions, all of the modes of liability under Article 25 (3) necessarily apply.

170. This reasoning is fundamentally flawed. The Prosecution, in its interpretation of Rule 163, either overlooks or misinterprets the words "*mutatis mutandis*". This Latin maxim means "changing those things which need to be changed".[255] It is used in legislation and in practice to make the law applicable as much as possible to a different legal situation or phenomenon, while maintaining sufficient flexibility not to apply the law when this would lead to unreasonable or undesirable results. It is self-evident that the words "*mutatis mutandis*" would not have been included if the drafters' starting point in respect of Article 70-offences would be that only the expressly mentioned provisions of the Statute and Rules listed in Rule 163 were excluded from being applicable to Article 70.

171. It appears that the Prosecution fails to contemplate the consequences of its position. If, as the Prosecution argues, Part III of the Statute would fully apply to Article 70-offences, this would amount to, among other things, the availability of command responsibility for Article 70-offences. The Prosecution does not claim the existence of this mode of liability in respect of Article-70 offences, and it is clear that this cannot be seriously envisaged. The '*mutatis mutandis*' qualifier precisely serves the purpose to pre-empt the Prosecution's detrimental position that everything in the Statute 'necessarily applies' to Article 70-offences.

[255] "Making necessary alterations while not affecting the main point at issue", Oxford Dictionary online, available at: http://www.oxforddictionaries.com/definition/english/mutatis-mutandis

172. As stated in its Submissions, and recalling in particular the arguments made in paragraphs 327 to 350 thereof, the Arido Defence submits that Article 25 does not apply and that offences under Article 70 are limited to direct commission.

173. As a result, the present section of this response is of a subsidiary nature only, in case the Pre-Trial Chamber would reject the Arido Defence's primary position that the modes of liability in respect of Article 70-offences are not governed by Article 25, but should be exclusively based on the 'intentional commission' set out in Article 70 itself.

2. The Prosecution's charging of Mr. Arido as a principal and as an accessory should not be permitted

174. The Prosecution argued in its Submissions that "[REDACTED]"[256] However, it is submitted that the Prosecution should not be permitted to prosecute a suspect as both a principal and an accessory for the same crime. As adjudicated by Pre-Trial Chamber II in the *Ruto, Kosgey and Sang* case, "[a]lthough the Prosecutor may generally charge in the alternative", "[a] person cannot be deemed concurrently as a principal and an accessory to the same crime."[257]

B. <u>Article 25 (3) (a)</u>

175. It must be noted that in the DCC, the Prosecution does not charge Mr. Arido under Article 25 (3) (a) for Article 70 (1) (a) offences.[258] Further, in the DCC, Mr. Arido is only charged under Article 25 (3) (b) for soliciting the offences under Article 70 (1) (a) with regards to witnesses D-2, D-3, D-4 and D-6.[259]

1. The Prosecution fails to discuss most of the constitutive elements of Article 25 (3) (a)

176. In its attempt to demonstrate that there are substantial grounds to believe that Mr. Arido is responsible for the alleged offences as a direct or indirect co-perpetrator under Article 25 (3) (a) of the Statute, the Prosecution argues that Mr. Arido was aware and accepted that implementing the Common Plan would lead to the realisation of the objective offences,[260] that he was aware of the factual circumstances enabling him to exercise joint control over the offences,[261] that he had

[256] Prosecution Submissions, para. 99.
[257] ICC-01/09-01/11-01, para. 36.
[258] DCC, pp. 76-81.
[259] *Ibid.*; *see also* Prosecution Submissions, para. 428.
[260] Prosecution Submissions, paras 421-422.
[261] *Ibid.*, para. 423.

control over the crimes committed by others,[262] and that his acts and conduct fulfil the subjective elements of Article 25 (3) (a).[263]

177. Alternatively, the Prosecution alleges that Mr. Arido can be held responsible for soliciting the giving of false testimony pursuant to Article 70 (1) (a)[264] and aiding and abetting or otherwise assisting in the commission of the offences under Article 70 (1) (a), (b) and (c) pursuant to Article 25 (3) (c).[265] In the alternative, it charges Mr. Arido for contributing to the commission or attempted commission of the offences under Article 70 (1) (a), (b) and (c) by a group of persons acting with a common purpose.[266]

178. The Arido Defence notes that the Prosecution's multiple cross-references to other parts of its Submissions to support its arguments regarding the modes of liability demonstrates that Mr. Arido's participation in and knowledge of the offences is to be deduced from the facts. When this is the adopted approach, caution is all the more so needed to ensure that there are substantial grounds to believe that participation in and knowledge of the offences is the only reasonable inference to be drawn from the totality of the evidence. The Arido Defence respectfully submits that this is far from being the case. The Prosecution provides no evidence that Mr. Arido has communicated or coordinated with Mr. Bemba, Mr. Babala or Mr. Mangenda.[267] The Prosecution also does not allege that Mr. Arido played any role in "concealing" the alleged Common Plan.[268]

179. The Arido Defence notes that the Prosecution does not address - in its Submissions or in its Response - a number of core Article 25 (3) (a) elements, notably that Mr. Arido is part of a Common Plan or agreement with one or more persons, that his alleged essential contributions were made in a coordinated manner, that the organisation consisted of an organised and hierarchical apparatus of power or that the execution of the crimes was secured by almost automatic compliance with his orders.[269]

180. In addition, in its Submissions, the Prosecution repeats what it had argued in paragraphs 20-29 of the DCC in relation to the alleged existence of the Common Plan and the co-

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262 *Ibid.*, para. 424.
263 *Ibid.*, paras 425-427.
264 *Ibid.*, para. 428.
265 *Ibid.*, paras 429-430.
266 *Ibid.*, paras 431-432.
267 *Ibid.*, paras 305-330 (Mr. Bemba), 357-383 (Mr. Mangenda), 384-407 (Mr. Babala); *see also* Prosecution Response, paras 68-69 (coded communications).
268 Prosecution Submissions, paras 66-98.
269 *See* Arido Defence Submissions, para. 355.

perpetrators.[270] However, it still fails to show that Mr. Arido was a part of, or implemented the alleged Common Plan, as has been elaborated upon by the Arido Defence in its Submissions.[271]

181. As a result, the Prosecution fails to establish the objective elements of Article 25 (3) (a). For this reason alone, the charges against Mr. Arido under this mode of liability should be not be confirmed.

182. Should the Pre-Trial Chamber nonetheless decide to assess whether Mr. Arido's alleged behaviour fulfils the requirements of Article 25 (3) (a), the Arido Defence submits that the Prosecution failed to provide evidence supporting the elements of this mode of liability.

2. Commission as a Co-perpetrator requires a Common Plan and an essential contribution to that plan

183. In its Response the Prosecution argues:
[REDACTED][272]

184. The Arido Defence submits that the Prosecution fails to meet its burden of proof if it only deems it necessary to bring evidence that a person's conduct contributed to the implementation of the Common Plan that led to the commission of the crimes charged. Besides the need to demonstrate that Mr. Arido contributed to offences against the administration of justice, the Prosecution also needs to provide evidence that there were "appropriate factual circumstances for exercising control over the crime" and of Mr. Arido's "awareness of such circumstances".[273] Only then can it be said that Mr. Arido decided "whether and how the offence will be committed".[274]

185. The Prosecution's position is incorrect as it needs to be established not only that Mr. Arido's conduct contributed to the commission of the alleged Common Plan, but also that he made an essential contribution, without which the commission of the crime would have been frustrated. The Arido Defence submits that in light of the interpretation of co-perpetratorship pursuant to Article 25(3)(a), the Prosecution needs to provide sufficient evidence for the two aforementioned elements; it has not done so.

[270] Prosecution Submissions, para. 28.
[271] Arido Defence Submissions, paras 354-385.
[272] Prosecution Response, para. 21.
[273] ICC-01/04-01/06-803-tEN, para. 331.
[274] *Ibid.*, para. 330; *see also ibid.,* para. 340.

186. In addition, the Arido Defence points out the fact that the Prosecution confuses the constitutive elements of Article 25 (3) (a) and (d). According to Pre-Trial Chamber II, the mode of liability set out in paragraph (d) is closely linked to the concept of Joint Criminal Enterprise (a judicial creation from the ICTY) and therefore, it would have been the basis for paragraph (a) of Article 25 (3) only if the drafters of the Rome Statute had opted for a subjective approach for distinguishing between principals and accessories, *quod non*.[275]

187. Moreover, the Arido Defence would like to draw the Pre-Trial Chamber's attention to the fact that the evidence relied upon by the Prosecution, namely D-2 and D-3's interviews, relate to Mr. Arido coaching them on what to say to Mr. Kilolo.[276] In its Response, the Prosecution fails to point to any evidence that Mr. Arido and Mr. Kilolo ever discussed prospective Defence witnesses together. To the contrary, it accepts that Mr. Arido and Mr. Kilolo did not coordinate the illicit coaching, as it states that "[REDACTED]."[277] It also notes that "[REDACTED]".[278] Clearly, had Mr. Arido and Mr. Kilolo be involved in the same Common Plan, Mr. Arido would not have "coached" witnesses without at least the knowledge of Mr. Kilolo.

188. The evidence the Prosecution relies on to substantiate its allegations, in itself contradicts the mode of liability argued in the DCC. Mr. Arido is in fact charged with committing crimes against the administration of justice 'jointly with another' in accordance with Article 25(3)(a). It is therefore required that the co-perpetrators coordinate their acts and conduct. The Arido Defence emphasises that participation in the implementation of the Common Plan "without coordination with one's co-perpetrators falls outside the scope of co-perpetration".[279]

3. The evidence, whether viewed individually or as a whole, shows that Mr. Arido was not part of alleged Common Plan and never coordinated actions

189. The Arido Defence notes that neither D-2 nor D-3 provide evidence that Mr. Arido or Mr. Kilolo were respectively aware of their alleged coaching. They furthermore do not provide evidence that Mr. Arido and Mr. Kilolo discussed the substance of the prospective witnesses' evidence. The only contact between Mr. Kilolo and Mr. Arido to which they refer is a phone call [REDACTED]. The Prosecution fails to provide evidence that there was any discussion on the provision of the false documents or on the illicit coaching of witnesses between Mr. Arido and

[275] ICC-01/04-01/06-803-tEN, para. 335.
[276] Prosecution Submissions, paras 145 ("[REDACTED]"), 163 ("[REDACTED]"), 414 ("[REDACTED]").
[277] Prosecution Response, para. 108.
[278] *Ibid.*, para. 109 (emphasis added).
[279] ICC-01/04-01/07-717, para. 522.

any of the co-suspects, neither does the Prosecution present evidence that they acted in coordination with each other.

190. The Arido Defence recalls that in addition, Mr. Babala[280] and Mr. Bemba[281] state that they had never had contact with or met Mr. Arido until his arrival at the ICC Detention Centre in March 2014, neither does the Prosecution provide evidence demonstrating that there has been any such contact. Similarly, the Prosecution fails to provide evidence that Mr. Mangenda and Mr. Arido ever met or were even in contact with each other. The lack of any contact or coordinated action between Mr. Arido and the co-suspects in this case is also clear from the three independent counsel's reports following his analysis of conversations between Mr. Bemba, Mr. Kilolo, Mr. Mangenda and Mr. Babala.[282]

191. Finally, the Arido Defence is aware of the Prosecution's argument that D-2 followed Mr. Arido's instructions when meeting with Mr. Kilolo, and that D-2 referred to [REDACTED].[283] However, it is pointed out that this assertion contradicts the Prosecution's previous statement that D-2 was hiding the fact that [REDACTED] when meeting Mr. Kilolo because it was "[REDACTED]".[284]

4. The Prosecution's arguments regarding Mr. Arido's awareness and acceptance that the implementation of Common Plan would result in the realisation of the elements of the offences are not supported by evidence

192. The Prosecution relies on a number of allegations to argue that Mr. Arido was aware that the implementation of the Common Plan would result in the realisation of the elements of the offences. However, these allegations are all based on witnesses D-2 and D-3's evidence, which, as stated above in paragraphs 140 to 156, are incapable of belief.

193. The Arido Defence points out that there is no evidence that Mr. Arido discussed the Common Plan with any of the alleged co-perpetrators, nor is there any proof that he was acting in coordination with any of the co-suspects in implementing it. As previously stated, there is no evidence that Mr. Arido ever met or communicated with Mr. Bemba, Mr. Babala or Mr. Mangenda or that he was even aware of their (alleged) involvement in the Common Plan. The

[280] Babala Defence Submissions, para. 149.
[281] Bemba Defence Submissions, paras 57, 150.
[282] ICC-01/05-64-Conf; ICC-01/05-66-Conf; ICC-01/05-01/13-421-Conf and confidential annexes thereto.
[283] Prosecution Submissions, para. 165.
[284] *Ibid.*, para. 412; *see also ibid,m* para. 147: "[REDACTED]".

evidence related to him interacting with Mr. Kilolo is limited to Mr. Arido allegedly introducing witnesses to the latter, without discussing that they were "false" witnesses.

194. The evidence brought by the Prosecution - although not credible for reasons already discussed - falls short of proving Mr. Arido's involvement in the Common Plan, even taken at its highest. According to D-2 and D-3, Mr. Arido's alleged coaching was made in preparation of the meeting with Mr. Kilolo, and there is no evidence that Mr. Arido had previously coordinated this with Mr. Kilolo, or else there would not be a reason to allegedly tell D-2 and D-3 to lie to Mr. Kilolo about their background as military.

195. The Prosecution also alleges that Mr. Arido knew that the other co-perpetrators included Mr. Bemba and Mr. Mangenda, that they espoused the Common Plan and were willing to implement it. However, none of the evidence cited by the Prosecution refers to Mr. Bemba or Mr. Mangenda but only mentions Mr. Kilolo.[285]

196. The Prosecution argues that "[REDACTED]".[286] However, the Prosecution provides no evidence supporting this assertion, as all the evidentiary citations do not refer to any of the alleged co-perpetrators other than Mr. Kilolo and [REDACTED]. Regarding these two individuals, there is no evidence that they discussed or coordinated actions. In sum, there is no evidence that Mr. Arido ever communicated with Mr. Bemba - the "beneficiary" of the alleged Common Plan[287] - Mr. Babala or Mr. Mangenda.

197. The Prosecution further states that Mr. Arido knew of the means the co-perpetrators had at their disposal to implement the Common Plan, particularly financial which they often obtained from each other. However, the Prosecution brings no evidence supporting this assertion. The evidence cited by the Prosecution does not refer to any of the co-perpetrators other than Mr. Kilolo, and they relate to payments that Mr. Kilolo allegedly made to witnesses outside of the presence of Mr. Arido.[288] It is illustrative of the weakness of the Prosecution's case that it resorts to events which took place without the knowledge of Mr. Arido in an attempt to establish Mr. Arido's knowledge of the alleged Common Plan.

[285] The Prosecution cross-referenced paragraphs 142-143, 145-147, 160, 410-411, 413-415, 417, 420, 421 of its Submissions.
[286] Prosecution Submissions, para. 422.
[287] DCC, paras 110, 135.
[288] *See e.g.* Prosecution Submissions, fn. 1083, *referring to* para. 156 of its Submissions.

198. Finally, the Arido Defence wishes to respond to the Prosecution's statement that Mr. Arido was aware that his respective contribution to the Common Plan furthered its implementation.[289] Even if one were to take the Prosecution evidence at its highest, notably the unreliable interviews of D-2 and D-3, there is no evidence of Mr. Arido being involved in the alleged Common Plan altogether after February 2012.[290]

5. The Prosecution fails to show that there are substantial grounds to believe that Mr. Arido was aware of the factual circumstances which enabled him to exercise joint control over the offences

199. The Prosecution's arguments in support of this element fail to establish that Mr. Arido had any control over the alleged offences.[291] The Arido Defence refers the Pre-Trial Chamber to the factual submissions and arguments contained in its Submissions and in the present response, showing that the facts as alleged by the Prosecution do not establish substantial grounds to believe that they actually took place.[292]

200. The Prosecution fails to show how Mr. Arido's alleged participation in the offences did in fact lead him to exercise control over the offences. Mr. Arido was never in contact with the co-suspects other than Mr. Kilolo nor is he even mentioned as a participant in the alleged Common Plan in their recorded conversations. Even taking the Prosecution's evidence at its highest, it is clear that Mr. Arido's alleged role and position were of minor significance in the overall alleged scheme of events. His alleged involvement is limited to allegedly providing false documents and to allegedly making improper promises to and illicitly coaching of D-2 and D-3. By comparison with the totality of the offences charged by the Prosecution under the Common Plan, it is clear that Mr. Arido was - if the evidence were to be found sufficient - an "outsider". This is evidenced by the fact that most of the Prosecution Submissions and Response do not even mention Mr. Arido.

201. In this respect, the Prosecution's statement regarding Mr. Arido's alleged knowledge that Mr. Kilolo and the other co-perpetrators were able to finance the scheme is unfounded. A verification of the paragraphs (and the evidence underlying them) cited by the Prosecution in support of this assertion confirms the absence of knowledge on the part of Mr. Arido of the alleged fact that Kilolo and others were able to finance the scheme. The evidence cited in this

[289] Prosecution Submissions, paras 421-422.
[290] *See supra*, para. 125.
[291] Prosecution submissions, para. 423.
[292] *Supra*, paras 123-125, 127, 128-167; Arido Defence Submissions, paras 135-187, 194-205, 263-318.

context refers to nothing more than that Mr. Arido allegedly promising money to D-2 and D-3, and paying for their transportation.

202. Similarly, the Prosecution's assertions that Mr. Arido knew that the other co-perpetrators espoused the Common Plan and were actively involved in its implementation are equally unpersuasive. On this point, the Arido Defence refers to paragraphs 178-179, 187-191 and 192-198 of the present response.

203. The Prosecution's arguments that Mr. Arido had the requisite intent and knowledge under Article 25 (3) (a) in its Submissions[293] are exactly the same as in its DCC[294] and have therefore already been addressed in paragraphs 371 to 379 of the Arido Defence Submissions and need not be repeated here.

C. <u>Article 25 (3) (b)</u>

1. The Prosecution brings a new charge of "inducing" individuals to testify falsely as witnesses in the Bemba case

204. In its Submissions, the Prosecution has added a new charge: that Mr. Arido induced individuals to testify falsely in the Bemba case.[295] The Arido Defence notes that this is not an offence under Article 70 but appears to be an application of Article 25 (3) (b) to Article 70 (1) (a).

205. However in the DCC, Mr. Arido is charged with Article 25 (3) (b) only in relation to Article 70 (1) (a) and solely with regards to D-3, D-2, D-4 and D-6.[296] Further, the mode of responsibility charged therein is "soliciting" (*solliciter*) and not inducing (*encourager*). While the Prosecution omits to provide a definition for inducing, it is defined as "an enticement or urging of another person to commit a crime".[297] Soliciting, on the other side, is defined as "the act or an instance of requesting or seeking to obtain something, and more precisely, as urging, advising, commanding, or otherwise inciting another to commit a crime".[298] The Prosecution should not be permitted to change its case at such a late stage of the confirmation of charges proceedings.

206. Notwithstanding this fact, the Arido Defence submits that the evidence presented by the Prosecution fails to meet the requisite threshold to find that there are substantial grounds that

[293] Prosecution Submissions, para. 426.
[294] DCC, para. 131.
[295] Prosecution Submissions, paras 418-419.
[296] DCC, p. 81.
[297] Black's Law Dictionary, Eight Edition, Bryan A. Garner, p. 790.
[298] *Ibid.*, p. 1427.

Mr. Arido induced individuals into testifying falsely. It refers to paragraphs 263 to 317 of its Submissions and to paragraphs 120 to 167 below.

2. The Prosecution is incorrect in stating that soliciting does not require a position of authority

207. The Prosecution argues in its Submissions that "[e]lements of ordering apply equally to soliciting and inducing, **with the exception of a requirement of a position of authority**".[299] The Arido Defence objects to this interpretation of Article 25(3)(a). According to the Pre-Trial Chamber "'ordering', 'soliciting' and 'inducing' in essence fall into a broader category of 'instigating' or 'prompting another person to commit a crime', in the sense that they refer to a conduct by which a person is influenced by another to commit a crime'.[300] An individual who orders, solicits or induces must be in a position where he or she can influence the acts or conduct of another person. This leads to the conclusion that soliciting requires a personal capacity, whether by formal, hierarchical or social means, to influence another person, i.e. a position of authority.

208. It is submitted that the Prosecution has brought no evidence enabling the Pre-Trial Chamber to conclude there is a substantial basis to believe that Mr. Arido enjoyed the required personal capacity to be held liable under Article 25 (3) (b) of the Statute.

3. The Prosecution fails to demonstrate substantial grounds to believe that Mr. Arido can be held liable for soliciting the commission of offences

209. The Prosecution's states that Mr. Arido should be held liable under Article 25 (3) (b) of the Statute for soliciting because he "instructed others, directly and/or indirectly, to commit acts leading to the commission of, or to commit, the charged offences against the administration of justice under Article 70 (1) (a)".[301]

210. The Arido Defence submits that instructing others to "commit acts leading to the commission of Article 70 (1) (a)" is not a mode of liability under Article 25 (3) (b) which reads "[o]rders, solicits or induces the commission of such a crime which in fact occurs or is attempted". Article 25 (3) (b) does not cover "acts leading to the commission of a crime" and

[299] Prosecution Submissions, para. 294.
[300] ICC-02/11-01/11-656-Red, para. 243.
[301] Prosecution Submissions, para. 428.

only relates to the commission or attempted commission of a crime, not to the assistance in the commission of a crime.

211. In addition, the Prosecution's statement is not supported by the evidence. According to witnesses D-2 and D-3, Mr. Arido's alleged "briefing" was in preparation of meeting with Mr. Kilolo, not regarding their testimony in Court, which occurred in June 2013.

212. The Prosecution thus fails to show how Mr. Arido's alleged actions had a direct effect on the alleged false testimony or that he was aware that the offences would be committed in the ordinary course of events as a result of the execution or implementation of their instruction. The Prosecution contents itself with a circular cross-reference to factual arguments regarding Mr. Arido. However, this in no way contributes to establishing why and how Mr. Arido was supposed to be aware that his instructions had a direct effect on the commission or attempted commission of these offences. To the contrary and as stated above, Mr. Arido's alleged involvement regarding the commission of offences came to an end in February 2012.[302]

D. Article 25 (3) (c)

1. The Prosecution is incorrect in its interpretation and application of Article 25 (3) (c)

213. The Prosecution submits, in paragraph 298 of its Submissions, that:
[REDACTED]

214. In respect of this assertion the Arido Defence points out that, while the contribution need not be essential, it must however be substantial.[303]

215. The Arido Defence disagrees with the Prosecution's Submission that:
[REDACTED][304]

216. In light of this submission, the Arido Defence submits that contrary to what the Prosecution argues, knowledge is not enough to meet the required threshold of Article 25 (3) (c). It further notes that the Prosecution appears to mix up Article 30 (2) and 30 (3) of the Statute. Indeed, the Prosecution argues that in order to prove the requirement "for the purpose of facilitating the commission of such crime", it is enough that "the person knows that their conduct will, in the ordinary course of events, facilitate the crime", however then refers to Article

[302] *Supra*, para. 125.
[303] *See* Arido Defence Submissions, para. 393.
[304] Prosecution Submissions, para. 300.

30 (2), i.e. the definition of intent. The Arido Defence submits that while Article 30 (2) defines intent as **meaning to engage** in certain conduct or to cause a certain consequence, Article 30 (3) defines knowledge as **awareness** that a circumstance exists or a consequence will occur in the ordinary course of events.

217. That knowledge is not enough to satisfy the required *mens rea* of Article 25 (3) (c) is supported by this Court's jurisprudence, to which the Prosecution also refers.[305] As stated in paragraph 393 of its Submissions, the Arido Defence recalls that "knowledge is not enough for responsibility under [Article 25 (3) (c) of the Statute]", the person must act with the purpose to facilitate the crime.[306]

2. The Prosecution fails to demonstrate substantial grounds to believe that Mr. Arido can be held liable for aiding and abetting the commission of offences

218. As far as liability under Article 25 (3) (c) is concerned, the Prosecution states that Mr. Arido "implement[ed] the instructions of other co-perpetrators in furtherance of the Common Plan".[307] However, the Prosecution fails to identify or refer to any instructions which would have been given with regards to the commission of the charged Article 70 offences.

219. The Arido Defence notes that the Prosecution failed to address the requirement in the context of Article 25 (3) (c) that the contribution of the suspect must be substantial.[308] The Chamber stated that "*easily exchangeable acts may not be considered substantial*".[309]

220. Even when the Prosecution's evidence is taken at its highest, D-2 and D-3 state that Mr. Arido, [REDACTED], and Mr. Kilolo all performed the alleged "coaching"; as a result, the alleged coaching sessions constitute easily exchangeable acts. The alleged contribution thereto by Mr. Arido cannot be regarded as substantial. Likewise, as far as the alleged providing of false/forged documents is concerned, the contested documents were originally given by [REDACTED], and part of them were also sent by [REDACTED]. At least, even taking the Prosecution's evidence at its highest, it is beyond controversy that there has been others involved in the production or provision of the contested documents. Therefore, the mere provision of the contested documents is thus an easily exchangeable act among individuals with an email account.

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305 *Ibid.*
306 ICC-01/04-01/10 119/150, para. 274.
307 Prosecution Submissions, para. 429.
308 *See* Arido Defence Submissions, para. 393.
309 *Ibid.*.

In this light, it cannot be said that Mr. Arido's alleged contribution to presenting knowingly false documents was substantial.

E. <u>The Prosecution fails to demonstrate substantial grounds to believe that Mr. Arido can be held liable pursuant to Article 25 (3) (d)</u>

221. Although it is generally recognised that the construction of Article 25 (3) (d) is modelled on the concept of *Joint Criminal Enterprise* adopted by the *ad hoc* tribunals, the jurisprudence has explicitly recognised the *sui generis* nature of this provision.[310] Representing a distinct and autonomous form of accessorial liability which, as such, cannot be characterised as ordering, soliciting, inducing, aiding, abetting or assisting within the meaning of article 25 (3) (b) and (c) of the Statute,[311] specific objective and subjective elements need to be fulfilled. In particular, the Prosecution must demonstrate that there was:

a) an attempted or committed crime within the jurisdiction of the Court;
b) a group of persons acting with a common purpose attempted to commit or committed the crime;
c) the individual contributed to the crime, in any way other than those set out in article 25(3)(a) to (c) of the Statute;
d) the said contribution was intentional; and
e) was made either (i) with the aim of furthering the criminal activity or criminal purpose of the group; or (ii) in the knowledge of the intention of the group to commit the crime".[312]

222. As for the *actus reus*, it is generally accepted that "the contribution to the commission of a crime under article 25(3)(d) of the Statute cannot be just any contribution [since] there is a threshold of significance below which responsibility under this provision does not arise".[313] With regard to the *mens rea*, the person must both: (i) mean to engage in the relevant conduct that allegedly contributes to the crime and (ii) be at least aware that his or her conduct contributes to the activities of the group of persons for whose crimes he or she is alleged to bear

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[310] ICC-01/04-01/06-803-tEN, para. 335.
[311] ICC-01/04-01/06-803-tEN, para. 337; *see also* ICC-01/09-01/11-373, paras 351, 354.
[312] ICC-01/04-02/06-309, para. 158.
[313] ICC-01/04-01/10-465-Red, para. 283.

responsibility.[314] In other words, the accused has to contribute to the commission of the crime with the aim of furthering the criminal activity and the criminal purpose of the group.[315]

223. In addition, it must be noted that the "collective" character of the crime is also fundamentally qualificative element of this mode of liability.[316]

224. The Prosecution claims that Mr. Arido shared the common purpose to "defend Bemba in the Bemba case through the commission of offences against the administration of justice under Article 70, by means including presenting false or forged evidence and/or corruptly influencing witnesses".[317] This assertion is unfounded. There is no evidence of any agreement, collaboration or even any discussion between Mr. Arido and the alleged co-perpetrators from which the existence of the common purpose could be inferred. Moreover, there is no evidence that Mr. Arido was aware of the alleged co-perpetrators' plan to defend Mr. Bemba through the commission of Article 70-offences.

VII. CONCLUSION

225. Having demonstrated that there are no substantial grounds to believe that Mr. Arido committed any of the charges in the DCC, the Chamber is respectfully requested to dismiss all of the Prosecution Submissions and to decline to confirm any of the charges against Mr. Arido.

226. In addition, the Pre-Trial Chamber is respectfully requested to order the immediate release of Mr. Arido.

Göran Sluiter, Counsel for Mr. Arido

Dated this 4th Day of December 2014

At Amsterdam, The Netherlands

[314] *Ibid.*, para. 288; *see also* ICC-02/11-01/11-656-Red, para. 252.
[315] ICC-01/09-01/11-373, para. 353; *see also* ICC-02/11-01/11-656-Red, para. 252.
[316] ICC-01/04-01/10-465-Red, para. 278.
[317] Prosecution Submissions, para. 432.