

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: **ICC-01/05-01/13**
Date: **5 December 2014**

PRE-TRIAL CHAMBER II

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR

***v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO MUSAMBA, JEAN-JACQUES
MANGENDA KABONGO, FIDELE BABALA WANDU AND NARCISSE ARIDO***

Public

**Prosecution Response to Narcisse Arido's Request for Leave to Appeal the
"Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute"**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
James Stewart
Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Nicholas Kaufman

Counsel for Aimé Kilolo Musamba

Paul Djunga Mudimbi

Counsel for Jean-Jacques Mangenda Kabongo

Jean Flamme

Counsel for Fidèle Babala Wandu

Jean Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Göran Sluiter

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Other Section

Introduction

1. The Arido Defence's request¹ for leave to appeal the decision confirming the charges against him² should be dismissed. The Motion seeks certification of seven issues which fail to meet the necessary standard in Article 82(1)(d) of the Rome Statute ("Statute") and reflect no more than a disagreement with the Decision. None of those seven issues constitutes an appealable issue arising from the Decision, nor in any event will any of them significantly affect the fair and expeditious conduct of these proceedings or the outcome of the trial. Their immediate resolution by the Appeals Chamber will not materially advance these proceedings.

2. The Motion generally mistakes the nature of the Decision, treating it like a judgement on the merits of the case as opposed to a procedural step towards Arido's future trial. That trial will be free and fair, and will accord Arido ample opportunity to raise relevant issues before the Trial Chamber. Appellate intervention at this time is thus neither necessary nor desirable. It is not the purpose of confirmation proceedings or the Pre-Trial Chamber to conduct a trial before the trial.

Submissions

3. There is no basis for the Pre-Trial Chamber to grant leave to appeal any of the seven issues presented in the Motion.³

4. Throughout the Motion, the Defence strains to characterise its arguments as relating to the standard of proof under Article 61(7) of the Statute. This effort to re-frame the plain terms of the Decision is artificial, unhelpful, and a plainly tactical device to increase the prospects of obtaining leave to appeal. Arido fails to explain

¹ ICC-01/05-01/13-772 ("Motion").

² ICC-01/05-01/13-749 ("Decision").

³ See Motion, para.14 (listing seven issues, described herein as "First Issue" to "Seventh Issue", respectively).

in any coherent or convincing way how the standard of proof is genuinely relevant to the issues addressed in the Motion, when in reality the connection is remote and tangential.

5. Further, implicit in the Motion seems to be Arido's disagreement with the Pre-Trial Chamber's preference for a "succinct[]" legal analysis,⁴ which addresses all matters "necessary",⁵ and is consistent with the object and purpose of a confirmation decision as required by Article 61(7). Neither the Statute nor the practice of this Court requires confirmation decisions to depart from the principle of judicial economy—and indeed unnecessarily verbose decisions may tend to undermine the expeditious proceedings guaranteed by Article 67(1)(c).

(i) The First Issue is not an appealable issue and does not meet the criteria for leave to appeal

6. The First Issue, concerning "the standard of proof under Article 25(3)(c) of the Statute",⁶ is merely a cloaked disagreement with the Pre-Trial Chamber's interpretation of the legal elements of aiding and abetting. It does not merit leave to appeal. It not only fails to characterise the Pre-Trial Chamber's reasoning accurately, but in any event would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Immediate resolution by the Appeals Chamber will not materially advance these proceedings.

7. The Defence confuses the standard of proof with the Pre-Trial Chamber's interpretation of the applicable legal requirements to be satisfied. The former controls the nature and extent of the evidence deemed sufficient to confirm the charges; the latter defines the legal elements to which that evidence must be directed. Consistent with this common sense distinction, the Pre-Trial Chamber first

⁴ Decision, paras.27, 32.

⁵ Decision, paras.27, 32.

⁶ See Motion, para.14 ("Whether the standard of proof under Article 25 (3) (c) of the Statute requires that the Suspect's act(s) have only 'an effect' on the commission or attempted commission of the offence").

properly directed itself to the correct standard of proof (“sufficient evidence to establish substantial grounds to believe” that the Suspect(s) committed the offence(s) as charged).⁷ It then applied this correct standard of proof to the evidence,⁸ on the basis of its interpretation of the elements of Article 25(3)(c).⁹ The Defence’s arguments for certifying the First Issue for appeal are misdirected and irrelevant, as they arise from a clearly erroneous premise concerning the standard of proof.

8. The Defence further argues that the mode of liability under Article 25(3)(c) requires that the conduct of the accused must have a “substantial effect” on the commission of the crime.¹⁰ However, the Motion does not concretely demonstrate how this standard would be different from or higher than the one applied by the Pre-Trial Chamber in its legal finding,¹¹ or why it would have an impact on the factual conclusions of the Chamber.¹² The result is a failure by the Defence to identify an appealable issue in this context.

9. In any event, the Motion fails to demonstrate that the First Issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The Defence submissions are predicated on the erroneous assumptions that the Pre-Trial Chamber applied an incorrect standard of proof and that the First Issue had any impact on the Pre-Trial Chamber’s conclusion that Arido’s conduct had “an effect” on the commission of the crimes.¹³ As demonstrated above, these claims are purely speculative. Other Chambers have found that a mere hypothetical impact of an issue is insufficient to meet the criteria for leave to appeal.¹⁴

⁷ Decision, para.25.

⁸ Decision, paras.86-96.

⁹ Decision, para.35.

¹⁰ Motion, para.18.

¹¹ Decision, para.35.

¹² Decision, paras.86-96.

¹³ Motion, para.20-27.

¹⁴ ICC-01/04-01/07-1958, para.20; ICC-02/04-01/05-367, paras.21-22.

10. Immediate intervention by the Appeals Chamber regarding the First Issue is not necessary or desirable because the Motion fails even to identify the matter on which Arido claims the Appeals Chamber should provide clarification. In particular, the Defence confuses matters concerning the applicable standard of proof with the interpretation of the elements of the mode of liability under Article 25(3)(c). As a result, it fails to explain any issue with respect to the Pre-Trial Chamber's legal findings regarding the applicable standard of proof under Article 61(7).¹⁵ The Defence also fails to demonstrate any difference between the terms "effect" and "substantial effect" and how this alleged difference impacted on the factual findings and legal conclusions of the Pre-Trial Chamber.

(ii) The Second Issue is not an appealable issue and does not meet the criteria for leave to appeal

11. The Second Issue, purporting to challenge whether a person can ever aid and abet 'conduct' offences proscribed by Article 70(1)(c),¹⁶ is speculative and obscure, and fails to disclose an appealable issue. It should be rejected. There is no jurisdiction to certify an ill-defined issue for the Appeals Chamber with a grant of leave "to develop th[e] issue further in an appeal".¹⁷

12. As the Appeals Chamber has held, an appealable issue must be "an *identifiable* subject or topic"¹⁸ arising from the Decision. The Second Issue, however, is vague and hypothetical, and not clearly related to the Decision. Asserting that the Pre-Trial Chamber erred by "applying an accessory mode of individual responsibility to a conduct offence",¹⁹ the Defence can only explain this issue by referring generally to "difficult questions of causation", which were "not articulated by the Pre-Trial

¹⁵ Decision, para.25.

¹⁶ See Motion, para.14 ("Whether a correct interpretation of Article 70 (1) (c) and Article 25 (3) (c) of the Statute permits the application of an accessory mode of liability to a conduct offence").

¹⁷ *Contra* Motion, para.34.

¹⁸ See Motion, para.10 (citing ICC-01/04-168, para.9, emphasis added).

¹⁹ Motion, para.32.

Chamber”.²⁰ The Defence speculates that a causal contribution is possible for “some conduct offences” and not others,²¹ but fails to specify whether or how his theoretical concerns apply to the charge (aiding and abetting the corrupt influencing of witnesses) in this case. The relevance and logic of the further argument, questioning whether offences under Article 70(1)(c) are in fact necessarily all ‘conduct’ offences, is equally obscure.

13. Since the Motion fails to explain with any cogency how the Second Issue may actually entail “a non-legal founded charge” (*sic*) in the Decision, such a concern cannot significantly affect the fairness of the proceedings,²² or unduly lengthen them, or impact the outcome of the trial.²³ Nor will the proceedings be materially advanced by the Appeals Chamber’s immediate resolution of this vague issue.²⁴ Further, the Trial Chamber is fully competent to address such matters. It is not the function of the Appeals Chamber in interlocutory proceedings to provide advisory opinions on matters of theoretical interest to the parties.²⁵

(iii) *The Third Issue does not arise from the Decision and does not meet the criteria for leave to appeal*

14. The Third Issue, contending that the Decision was inadequately reasoned in its legal characterisation of the offences under Article 70,²⁶ is based on an incorrect premise, and therefore does not arise from the Decision. As such, it should not be certified for appeal. The Decision was adequately reasoned. The Defence’s disagreement with the Pre-Trial Chamber’s conclusions demonstrates nothing to the contrary.

²⁰ Motion, para.32.

²¹ Motion, para.32.

²² *Contra* Motion, para.35.

²³ *Contra* Motion, para.36.

²⁴ *Contra* Motion, paras.37-38.

²⁵ See e.g. ICC-01/04-503 OA4 OA5 OA6, para.30 (“If the Appeals Chamber were to answer such a request, it would have to assume the role of an advisory body, which it considers to be beyond and outside the scope of its authority”).

²⁶ See Motion, paras.14 (“Whether the standard of proof under Article 61 (7) of the Statute requires the Pre-Trial Chamber to provide a reasoning for its legal interpretation of Article 70 offences”), 40.

15. Clearly, a Chamber must indicate “with sufficient clarity the basis of the decision” and “the extent of the reasoning” required “will depend on the circumstances of the case”.²⁷ In particular, a decision must “identify which *facts* it found to be relevant in coming to its conclusion.”²⁸ The reasoning provided by the Pre-Trial Chamber in the Decision is fully consistent with the Appeals Chamber’s requirements. The Decision carefully sets out the facts pertinent to its conclusion that Arido should be committed for trial.²⁹ This is consistent with the very nature of confirmation proceedings, which examine the existence of sufficient evidence to establish substantial grounds to believe that a suspect committed the crimes alleged, and in which the Pre-Trial Chamber is therefore primarily concerned with issues of fact.³⁰ It suffices for the Pre-Trial Chamber simply to make clear the legal elements which it considers must be satisfied.

16. The disagreement of the Defence with the Pre-Trial Chamber concerning the extent to which its *legal analysis* required detailed reasoning is, once again, speculative. First, the duty to provide a reasoned decision does not require a Chamber to identify the sources that informed its legal findings. Second, the Pre-Trial Chamber nevertheless provided a clear basis for its legal findings. It construed the provisions of Article 70 of the Statute—the primary source of law at this Court, which has not previously been adjudicated and which has no direct analogue. As a result, there was no need for it to consider Article 21 of the Statute, or indeed to provide “positive justification” for its understanding of plain statutory language.³¹ Nothing in the Decision provides any basis to conclude that the offences in Article 70 have not been strictly construed, as required by Article 22(2). The absence of a

²⁷ See Motion, para.41 (citing ICC-01/04-01/06-773, para.2; ICC-02/11-01/11-278-Red, para.47).

²⁸ See Motion, para.41 (citing ICC-01/04-01/06-773, para.2; ICC-02/11-01/11-278-Red, para.47, emphasis added).

²⁹ Decision, paras.86-96.

³⁰ See e.g. ICC-01/04-01/10-514, para.47 (“the confirmation of charges hearing is not an end in itself but rather serves the purpose of filtering out those cases and charges for which *the evidence* is insufficient to justify a trial”, emphasis added).

³¹ *Contra* Motion, para.40.

reference to Articles 21 and 22 expressly does not establish any inadequacy of the Pre-Trial Chamber's reasoning.

17. Contrary to the Defence's claim, the reasoning in the Decision is not insufficient, so that it prevents the parties from seeking leave to appeal relevant issues under Article 82(1)(d).³² Not only is there no basis to say that the fair conduct of the proceedings will be affected³³ but, indeed, the Defence has already made such applications in the Motion. Likewise, the extent of reasoning in the Decision will not adversely affect the expeditious conduct of the proceedings.³⁴ Neither the Pre-Trial Chamber nor the Appeals Chamber has the role to provide the Trial Chamber with an advisory opinion on legal matters upon which it must later decide—nor indeed can a Trial Chamber dispense with its duty to decide such matters for itself, as they are raised by the parties. Such arguments do not justify certification under Article 82(1)(d).

18. Even the Defence's apparent assumption that Arido will ultimately be convicted, prompting "an almost inevitable appeal" on the merits, is no justification to consider that the outcome of the trial will be affected by the Third Issue.³⁵ The Decision does not bind the Trial Chamber, except to Arido's advantage insofar as he is given notice of the factual allegations he must answer.³⁶

³² *Contra* Motion, para.44.

³³ *Contra* Motion, para.44.*Contra* Motion, para.45.

³⁴ *Contra* Motion, para.44.

³⁵ *Contra* Motion, para.47.

³⁶ See e.g. ICC-01/04-01/06-2842, para.630 (concluding, "Regardless of whether sexual violence may properly be included within the scope of 'using [children under the age of 15] to participate actively in hostilities' as a matter of law, because facts relating to sexual violence were not included in the Decision on the Confirmation of Charges, it would be impermissible for the Chamber to base its Decision pursuant to Article 74(2) on the evidence introduced during the trial that is relevant to this issue").

(iv) The Fourth Issue does not arise from the Decision and does not meet the criteria for leave to appeal

19. The Fourth Issue, concerning the extent to which the Pre-Trial Chamber was required to weigh the evidence before it,³⁷ does not arise from the Decision. The Fourth Issue is predicated on the assumption that the Pre-Trial Chamber failed to properly evaluate the totality of the evidence before it and that it did not properly weigh ambiguities, contradictions or inconsistencies in the evidence.³⁸ This is manifestly incorrect. The Pre-Trial Chamber stated that it conducted its “own assessment of the Prosecutor’s allegations in light of the entirety of the evidence presented by the parties”, and that it considered the Defence arguments and challenges to the Prosecutor’s evidence throughout this assessment.³⁹ The Fourth Issue thus does not arise from the Decision and merely reflects the Defence’s disagreement.

20. To the extent the Defence means to challenge the degree of reasoning provided by the Pre-Trial Chamber for its factual conclusions, this issue does not arise from the Decision. As long as the Pre-Trial Chamber took into consideration the entirety of the evidence and all the arguments submitted by the parties, it was not required to expressly mention or to reject specific arguments or contentions. Consistent with the jurisprudence of the Appeals Chamber, the extent of the reasoning which must be provided by the Pre-Trial Chamber does “not necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion.”⁴⁰ The Decision properly complies with this requirement

³⁷ See Motion, para.14 (“Whether the standard of proof under Article 61 (7) of the Statute requires the Pre-Trial Chamber to draw conclusions from witnesses’ evidence where there are ambiguities, contradictions, inconsistencies or doubts as to their credibility and therefore provide detailed reasoning as to its conclusion”).

³⁸ Motion, para.51.

³⁹ Decision, para.26.

⁴⁰ ICC-02/11-01/11-278-Red OA, para.46, ICC-01/04-01/06-773 OA5, para.20; ICC-02/11-01/11-278-Red OA, para.10. Diss. Op.

as it “indicates with sufficient clarity the basis of the decision”.⁴¹ The Motion establishes nothing to the contrary.

21. The assertion that the Decision breached Rule 64(2) of the Rules of Procedure and Evidence, requiring a Chamber to give reasons for its rulings on evidentiary matters, is mistaken.⁴² Again, therefore, this concern—which is not squarely within the terms of the Fourth Issue as framed—does not arise from the Decision. To any extent that a decision on the confirmation of charges amounts to a ‘procedure on the relevance or admissibility of evidence’ as governed by Rule 64(2), the Decision provided sufficient reasons with respect to the relevance of the evidence of witnesses D-2 and D-3.⁴³ Moreover, Arido is incorrect to assert that the evidence of D-2 and D-3 forms “the factual basis for the totality of the charges” against him.⁴⁴ To the contrary, analysis of the evidence referred to in footnotes 121-152 reveals that the Pre-Trial Chamber relied on multiple additional sources of evidence as well.⁴⁵

22. The Fourth Issue does not, in any event, meet the requirements for leave to appeal under Article 82(1)(d). The Motion recycles the submissions advanced regarding the First Issue to demonstrate that the Fourth Issue significantly impacts the fair and expeditious conduct of the proceedings and the outcome of the trial.⁴⁶ However, as explained above, these submissions are predicated on the erroneous assumption that the Pre-Trial Chamber applied an incorrect standard of proof and on the speculative assertions that the Pre-Trial Chamber would have come to a different conclusion had it applied some other unspecified standard of proof.⁴⁷ As argued above, these submissions must be rejected. Likewise, the Defence’s claim that the extent of the reasoning prevents seeking an appeal of the Decision with

⁴¹ *Ibid.*

⁴² *Contra* Motion, para.52.

⁴³ *See* Decision, paras.15-16.

⁴⁴ *Contra* Motion, para.53. *See also* para.56.

⁴⁵ *Contra* Motion, para.53 (referring only to footnotes 123-135, 137-141).

⁴⁶ Motion, paras.56-59.

⁴⁷ Motion, para.56.

regard to the Pre-Trial Chamber's "assessment of the witnesses" is incorrect in light of the content of the Motion itself and the particular nature of a decision under Article 61(7).⁴⁸

23. Furthermore, immediate resolution of the Fourth Issue would not materially advance the proceedings. There is no need to seek the direction of the Appeals Chamber,⁴⁹ as it has already pronounced both on the need of a Pre-Trial Chamber to give reasoned decisions and to weigh evidence to the extent necessary to avert "the risk of cases proceeding to trial although the evidence is so riddled with ambiguities, inconsistencies, contradictions or doubts as to credibility that it is insufficient to establish substantial grounds to believe the person committed the crimes charged".⁵⁰ This is just what the Pre-Trial Chamber did in this case.

(v) *The Fifth Issue does not arise from the Decision and does not meet the criteria for leave to appeal*

24. The Fifth Issue concerns the alleged lack of a finding (and sufficient underlying evidence) that Arido transferred money to witnesses D-2, D-3, D-4 or D-6.⁵¹ Again, this is predicated on an erroneous understanding of the Decision and therefore does not arise from it. In fact, the Pre-Trial Chamber made several findings to that effect, especially at paragraph 91 of the Decision, where the Chamber lists a number of occasions where Arido made such money transfers, and at paragraphs 95 and 96 where the Chamber concluded that Arido "corruptly influenced" these witnesses. The Motion expressly acknowledges these findings and fails to explain any distinction between "the provision of money" and

⁴⁸ See above, e.g., para.15.

⁴⁹ Contra Motion, para.60 (suggesting a need to "settle the issue" of the extent of the Pre-Trial Chamber's obligations).

⁵⁰ ICC-01/04-01/10-514, para.46. See further para.47 ("This is not to say that the Pre-Trial Chamber's ability to evaluate the evidence is unlimited or that its function in evaluating the evidence is identical to that of the Trial Chamber. The Appeals Chamber recalls that the confirmation of charges hearing is not an end in itself but rather serves the purpose of filtering out those cases and charges for which the evidence is insufficient to justify a trial").

⁵¹ See Motion, paras.14 ("Whether the standard of proof under Article 61 (7) of the Statute allows the Pre-Trial Chamber to find that Mr. Arido encouraged the testimony of witnesses with money transfers in the absence of evidence of Mr. Arido transferring money to witnesses"), 62-63.

“transferr[ing] money”.⁵² Any distinction is no more than semantic. In addition, the Chamber made repeated findings that Arido promised money to witnesses for their false evidence.⁵³

25. The Defence further argues that the Pre-Trial Chamber erred in finding that there are substantial grounds to believe that Arido corruptly influenced witnesses or aided and abetted or otherwise assisted in the provision of false testimony through money transfers.⁵⁴ This submission is nothing more than a disagreement with the Chamber’s conclusion. Again, it is predicated on the erroneous assumption that the Chamber made no finding that Arido “ever transferred money to the said witnesses”.⁵⁵

26. Because the entire basis of the Fifth Issue is predicated on an erroneous assumption and interpretation of the Decision, it does not meet the criteria for leave to appeal.⁵⁶ The Defence’s suggestion that the Pre-Trial Chamber *could* not have found that Arido participated in the crimes absent evidence of money transfer is not only speculative but ignores the other factual grounds on which the Pre-Trial Chamber linked Arido to the crimes.⁵⁷

27. Finally, immediate resolution of the Fifth Issue would not materially advance the proceedings. Since the Fifth Issue amounts to a mere disagreement with the Chamber’s assessment of the evidence and its factual findings, Arido may challenge the evidence at trial and make relevant legal and factual submissions before the Trial Chamber.

⁵² See Motion, para.62.

⁵³ Decision, paras.88, 90.

⁵⁴ Motion, para.63.

⁵⁵ Motion, para.63.

⁵⁶ *Contra* Motion, paras.64-67. Arido also relies on his arguments advanced in relation to the First Issue, which are equally speculative and based on erroneous assumptions.

⁵⁷ Decision, paras.95-96.

(vi) *The Sixth Issue does not arise from the Decision and does not meet the criteria for leave to appeal*

28. The Sixth Issue questions whether relevant Article 70 charges may be confirmed under Article 61(7) of the Statute without “objective” evidence that witnesses lied under oath.⁵⁸ To the contrary, there is ample objective evidence demonstrating that witnesses falsely testified. Nevertheless, the Sixth Issue does not arise from the Decision because it is nothing more than a disagreement with the findings of the Pre-Trial Chamber, predicated on an erroneous interpretation of the Decision.

29. First, as previously noted, the charges confirmed against Arido are not based solely on the evidence provided by D-2 and D-3.⁵⁹ A thorough analysis of the evidence referred to in footnotes 121-152 reveals that the Pre-Trial Chamber additionally relied on other sources of evidence.

30. Second, the Defence misrepresents the Decision when claiming that the Pre-Trial Chamber found “the witnesses lied under oath”.⁶⁰ The Pre-Trial Chamber made no such finding. It merely referred to “*evidence* that the Witnesses falsely testified before TCIII” in respect to a number of issues.⁶¹ Moreover, the Chamber’s finding that it cannot assess the reliability and truthfulness of the witnesses’ testimony on issues pertaining to the merits of the Main Case⁶² is not inconsistent with its conclusion that there is evidence that they falsely testified before Trial

⁵⁸ See Motion, paras.14 (“Whether the standard of proof under Article 61 (7) of the Statute permits the Pre-Trial Chamber to find that there were substantial grounds to believe that Mr. Arido committed the alleged offences related to false testimony in the absence of objective evidence that the witnesses lied under oath and on the sole basis of the witness[es]’ evidence”), 70.

⁵⁹ *Contra* Motion, para.69.

⁶⁰ Motion, paras.69-71.

⁶¹ Decision, para.64 (emphasis added). The Pre-Trial’s subsequent recollection that “all of [the witnesses] subsequently falsely testified in the Main Case” must be read in this light: see Decision, para.95.

⁶² Decision, para.64.

Chamber III.⁶³ This finding is overwhelmingly based on the testimony of the witnesses that goes to matters other than the merits of the Main Case.⁶⁴

31. The Defence fails to advance any argument as to how the Sixth Issue meets the criteria for leave to appeal, other than referring to previous submissions made with respect to the First Issue.⁶⁵ As demonstrated above, those arguments are predicated upon erroneous and hypothetical assumptions and must be dismissed.

(vii) The Seventh Issue does not arise from the Decision and does not meet the criteria for leave to appeal

32. The Seventh Issue, alleging that multiple charges in respect of “identical and overlapping acts” were confirmed by the Pre-Trial Chamber, is speculative and does not arise from the Decision.⁶⁶ Nor does the Motion demonstrate that the Seventh Issue satisfies the criteria for granting leave to appeal under Article 82(1)(d).

33. The Defence contends that Arido has been charged cumulatively based on the Pre-Trial Chamber’s conclusion that there is both sufficient evidence to establish substantial grounds to believe that Arido aided and abetted the presentation of false evidence by Bemba, Kilolo, and Mangenda (proscribed by Article 70(1)(b)), and that he aided and abetted the false testimony given by witnesses D-2, D-3, D-4, and D-6 (proscribed by Article 70(1)(a)).⁶⁷ Yet these charges do not necessarily turn upon the same evidence—Arido’s relevant conduct in assisting the different perpetrators may be different⁶⁸—and the two offences each contain “at least one additional material element not contained in the other”, which in any event would justify

⁶³ Decision, para.64.

⁶⁴ Decision, para.64, (i)-(v).

⁶⁵ Motion, paras.72-75.

⁶⁶ *Contra* Motion, paras.14 (“Whether the standard of proof under Article 61 (7) of the Statute permits the Pre-Trial Chamber to confirm three separate charges based on the exact same set of facts (cumulative charging)”), 77.

⁶⁷ See Motion, para.78.

⁶⁸ *Contra* Motion, para.79.

cumulative charging.⁶⁹ The essence of the Article 70(1)(a) offence is that the witness testifies falsely;⁷⁰ the essence of the Article 70(1)(b) offence is that a party presents false evidence, in the sense that they “introduce” it “in the proceedings”.⁷¹ The Seventh Issue is thus based on a misreading of the Decision, or a misunderstanding of the law, and therefore does not constitute an appealable issue arising from the Decision.

34. In any event, the Seventh Issue does not satisfy the criteria for granting leave to appeal. The Defence’s apparent confusion about the Decision does not make it so, and therefore unfair.⁷² To the contrary, the Decision adequately establishes the charges against Arido.⁷³ There is no unfairness to either the conduct of the proceedings or the outcome of the trial in the event that Arido is convicted and sentenced cumulatively for these different offences, given the distinct nature of the legal elements and the conduct involved.⁷⁴ Since each charge is adequately grounded in the law and facts, there is likewise nothing improper in any extent to which the proceedings may be somewhat lengthier in order to hear evidence on the full range of Arido’s criminal conduct.⁷⁵ Finally, immediate resolution of the Seventh Issue by the Appeals Chamber is unnecessary because the Defence raises no more than a phantom concern, unrelated to the reasoning of the Decision. The charges are logically coherent, and there is no scope or justification for “unnecessary dispute over the law” in the future conduct of the trial.⁷⁶

⁶⁹ See ICC-01/05-01/08-424, para.202. Nor in any event does the Defence’s reference to this Pre-Trial Chamber decision, together with a related decision, necessarily suffice to show that cumulative charging is wrong in law: *contra* Motion, para.77 (citing ICC-01/05-01/08-424, para.202; ICC-01/05-01/08-532, para.53 [sic]). Indeed, it has been noted that cumulative charging is allowed by “national courts, and international tribunals under certain conditions”: ICC-01/05-01/08-424, para.200.

⁷⁰ See Decision, para.28.

⁷¹ See Decision, para.29.

⁷² *Contra* Motion, para.80.

⁷³ *Contra* Motion, para.82.

⁷⁴ *Contra* Motion, paras.81, 87.

⁷⁵ *Contra* Motion, paras.83-84, 86.

⁷⁶ *Contra* Motion, para.88.

Relief Sought

35. For the reasons above, the Motion should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 5th day of December 2014

At The Hague, The Netherlands