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Date: **13 April 2015**

TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

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 with Public Annex A

**Arido Defence's Submissions in Advance of First Status Conference Pursuant to Trial
Chamber's Order of 1 April 2015 (ICC-01/05-01/13-824)**

Source: Counsel for Narcisse Arido

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

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I. INTRODUCTION

1. In accordance with the Trial Chamber's order of 24 February 2015, the Arido Defence hereby provides its observation on the potential agenda items listed therein, and informs the Chamber and the parties of the items it wishes to have added to the Agenda.

2. In light of the recent change of lead counsel and the limited time made available to the new counsel regarding the preparation of the submissions covered by the above-mentioned order, the Arido Defence informs the Trial Chamber and the parties that all submissions have been made to the best of its abilities and keeping Mr. Arido's bests interest in mind, but that it reserves the right to propose any further submission amending or adding to the positions taken during the Status Conference.

II. PROCEDURAL HISTORY

3. On 24 February 2015, the Trial Chamber filed an order seeking submissions in advance of the first status conference,¹ requiring the parties to submit their written observations on a number of potential agenda items listed therein, and ordering them to inform the Chamber of any items they wish to have added to the agenda, by 20 March 2015.²

4. On 4 March 2015, the Defence teams jointly requested an extension of time to file their observations.³ The Trial Chamber granted the request on 10 March 2015 and ordered that the Defence's submissions be filed by Monday 13 April 2015 at 16h.⁴

5. On 20 March 2015, the Prosecution submitted its observations on the agenda of the first status conference,⁵ including a proposed protocol on witness familiarisation in Annex A,⁶ a proposed protocol on the conduct of the proceedings in Annex D,⁷ and a list of proposed agreed facts it sent

¹ ICC-01/05-01/13-824.

² ICC-01/05-01/13-824, p. 4.

³ ICC-01/05-01/13-831.

⁴ Email entitled "Ruling on ICC-01/05-01/13-831" from Trial Chamber to the parties, dated 10 March 2015.

⁵ ICC-01/05-01/13-859-Conf.

⁶ ICC-01/05-01/13-859-AnxA.

⁷ ICC-01/05-01/13-859-AnxD.

to the Defence.⁸ The Prosecution had also filed proposed protocols on redactions on 25 February 2015,⁹ on witness preparation on 19 March 2015,¹⁰ and on witness approach on 20 March 2015.¹¹

6. On 20 March 2015, the Registry submitted its observations as well.¹² In particular, it recommended that the Trial Chamber adopt the protocol on witness familiarisation from the Gbagbo case,¹³ and the vulnerable witnesses protocol adopted in the other cases before the Court.¹⁴ It also brought to the Chamber's attention the proposed mechanism for exchange of information of individuals enjoying dual status adopted in the Ntaganda case.¹⁵

7. On 26 March 2015, Mr. Arido informed his lead counsel of his intention to terminate his mandate and to appoint a new lead counsel. Mr. Arido's counsel, Mr. Sluiter, sought leave to withdraw from the case on that same day.¹⁶ The Trial Chamber granted the request on the following day, noting that the withdrawal of counsel shall only take effect once a new Defence counsel has been appointed.¹⁷

8. On 30 March 2015, in light of the upcoming change of lead counsel, the Arido Defence filed a further request for extension of the 13 April deadline.¹⁸ It submitted that in light of the importance of the issues covered by the Trial Chamber's 24 February 2015 order, the new counsel should be permitted to provide his/her views on the matter. In addition, it also requested that, in light of the number of matters which would benefit from the presentation of a joint Defence position, it would be appropriate to also grant additional time for the filing of the observations in order to permit the other Defence teams to discuss any joint position with the new counsel(s). The Babala Defence supported the Arido Defence's request.¹⁹

⁸ ICC-01/05-01/13-859-Conf-AnxC.

⁹ ICC-01/05-01/13-825.

¹⁰ ICC-01/05-01/13-856.

¹¹ ICC-01/05-01/13-858.

¹² ICC-01/05-01/13-860.

¹³ *Ibid.*, para. 2.

¹⁴ *Ibid.*, para. 3.

¹⁵ *Ibid.*, para. 4.

¹⁶ ICC-01/05-01/13-875.

¹⁷ ICC-01/05-01/13-878, para. 3.

¹⁸ ICC-01/05-01/13-881.

¹⁹ ICC-01/05-01/13-884.

9. On 1 April 2015, the Trial Chamber rejected the request.²⁰ Noting that Mr. Arido was still being represented by his now-former counsel, Mr. Sluiter, the Trial Chamber noted that it was incumbent on him to maintain all necessary preparations for the defence of Mr. Arido until the appointment of a new counsel.²¹ Taking into account the work already undertaken by the Arido Defence in its now-former composition (including the preparation of joint submissions with the other Defence teams), the Trial Chamber held that the new counsel would be able to rely on the preparation and work of Mr. Sluiter.²² It further noted that once a new counsel would be appointed, he or she may make additional oral submissions during the status conference, in case he or she considers it necessary to clarify or modify the Arido Defence's position.²³

10. On 8 April 2015, the Babala Defence filed its observations on the first status conference's agenda.²⁴

11. On 9 April 2015, the Counsel Support Section informed the then lead counsel, Mr. Sluiter, that Mr. Arido had appointed Mr. Achaleke Taku as lead counsel, and that as a result, his mandate as lead counsel for Mr. Arido, as well as that of his legal team, was terminated.²⁵

III. SUBMISSIONS

12. The Arido Defence wishes to underline that, in its view, two fundamental principles should underline any decision by the Trial Chamber regarding the conduct of the trial. Firstly, the fact that in joint trials, each accused shall be accorded the same rights as if such accused were being tried separately, including the rights listed in Articles 66 and 67 of the Statute. In particular, the presumption of innocence, the right to know the charges against them, and the right to an effective Defence must be given due consideration. Secondly, the fundamental differences between Article 5 and Article 70 proceedings must be kept in mind at all times.

²⁰ ICC-01/05-01/13-886.

²¹ *Ibid.*, para. 7.

²² *Ibid.*, para. 9.

²³ *Ibid.*, para. 10.

²⁴ ICC-01/05-01/13-890.

²⁵ CSS/2015/246.

13. The Arido Defence hereby submits its observations on the items listed by the Trial Chamber in its 1 April 2015 order, and suggests a number of items to be added to the agenda.

A. Timing, volume and modalities of disclosure

14. From the outset, the Arido Defence would like to emphasise that the Prosecution should largely be done with its investigations at the present stage,²⁶ that the Prosecution has been investigating the present case since June 2012.²⁷ In particular, the Prosecution should not continue investigating post-confirmation for the purpose of collecting evidence which it could reasonably have been expected to have collected prior to confirmation.²⁸ As a result, the amount of disclosure, and particularly of witness related materials, should be limited. As stated by the Trial Chamber in the Ntaganda case, re-establishing contact with some witnesses and identifying new witnesses appear to be the sort of ordinary investigative steps that ought to have been actively underway since at least the confirmation of charges stage.²⁹

15. The Arido Defence submits that any further investigation by the Prosecution following the confirmation of the charges should be subject to strict limitations and may be appropriate only when it relates to evidence which the Prosecution could not have discovered or obtained prior to confirmation with reasonable diligence.³⁰

16. The Defence teams of all Defendants have prepared joint observations regarding the modalities of disclosure, including applicable deadlines, and therefore, the Arido Defence refers the Trial Chamber to this filing for its position regarding disclosure related matters.

17. Finally, the Arido Defence wishes to express its concern with the fact that the Prosecution has indicated its inability to provide a “realistic time-line for the completion of disclosure” and its lack of knowledge regarding the amount of possible future disclosure.³¹ The Arido Defence wishes to

²⁶ ICC-02/11-01/11-432, para 25; ICC-01/09-02/11-728, para. 119.

²⁷ ICC-01/05-01/13-597-Conf-AnxB, paras 22-27.

²⁸ ICC-01/09-02/11-728, para. 121.

²⁹ ICC-01/04-02/06-T-13-ENG, p. 13, l. 9-12.

³⁰ ICC-01/09-02/11-728, para. 120.

³¹ ICC-01/05-01/13-859-Conf, para. 12.

express its concern that the Defendants' right to an expeditious trial appears to be endangered and reserves the right to make additional submissions during the Status Conference.

B. Protocols to be adopted on specific issues

1. Redactions, handling of confidential information and contacting opposing party witnesses, and witness preparation

18. The Prosecution submitted a proposed protocol on redactions on 25 February 2015,³² on witness preparation on 19 March 2015,³³ and one on witness approach on 20 March 2015.³⁴ The Defence teams of all Defendants have prepared joint observations on these issues and comments to the Prosecution's proposed protocols. In particular, the Defence teams oppose the use of standard redactions and the general use of witness preparation. The Arido Defence directs the Trial Chamber and the parties to the relevant joint filings.

2. Witness preparation

19. The Prosecution proposes a protocol that permits and regulates the practice of witness preparation or 'proofing' ('Witness Preparation Protocol').³⁵ The Arido Defence joins the other co-accused in this case in arguing for a case-by-case assessment of the need for witness preparation. In particular, the Arido Defence strongly feels that witness preparation should be strictly prohibited for those Prosecution witnesses, if any, who have already testified in the Main Case. Their credibility being at the centre of the case, it is of the utmost importance that the possibilities for the witnesses to "repeat" and/or better structure their evidence be as limited as possible. It is submitted that permitting their preparation would be detrimental to the Accused's rights as well as to the general interest of justice in obtaining the truth. The Arido Defence reserves the right to make further submissions on this question during the Status Conference.

³² ICC-01/05-01/13-825.

³³ ICC-01/05-01/13-856.

³⁴ ICC-01/05-01/13-858.

³⁵ ICC-01/05-01/13-856 and annexes thereto.

20. Should the Trial Chamber decide to adopt the practice of witness preparation, the Arido Defence hereby provides separate observations on the proposal and suggest textual modifications to remedy the most critical identified problems.

a. Witness memories and the truth

21. Before turning to specific observations, the Arido Defence notes that the Prosecution has not provided a satisfying explanation for the need for adopting a Witness Preparation Protocol. The Prosecution only states that the protocol will enhance the efficiency, fairness, and expeditiousness of the trial and is necessary because: “Considering that this is the first case before the Court prosecuting article 70 crimes, the Prosecution believes that it is particularly important that witnesses are fully apprised of the factual and the legal issues.”³⁶

22. This premise, that the novelty of this Article 70 case justifies witness preparation, could easily be reversed – it is precisely because the charges are the first of their kind that witness preparation should be prohibited or limited. Indeed, the practice of the Court in its early cases – where it was interpreting the Statute for the first time – prohibited witness preparation. More importantly, the nature of the charges against the co-accused, when set against the search for the truth and the rights of the accused, militate against adopting a general practice of witness preparation.

23. While documentary evidence forms part of the basis of the charges against the accused, the essence of the offence of improperly influencing witnesses and the specific facts of this case concern questions regarding: what precisely was said, to whom, at what time, who was present, how was what was said perceived by the witness, and so on.

24. As is generally demonstrated throughout the practice of domestic criminal litigation in most domestic and international legal systems, the memories that provide the answers to questions such as these contain subtle details that can be easily influenced by the passage of time. Moreover, when the factual disputes at issue are so highly specific, even an unintentional good faith appraisal of all the “factual and legal issues” could easily colour the witness’s memory.

³⁶ ICC-01/05-01/13-856, para. 6.

25. It is also speculative to state that preparation in this case could enhance efficiency and expeditiousness. While focused testimony may assist, testimony and deliberations could progress equally as quickly if a witness can be speedily dismissed as having a faulty memory as demonstrated through the unfolding of substantial testimonial inconsistencies. This dynamic may be partially obscured if a witness has an expectation of what is required from them, in part provided through preparation.

26. While the Prosecution does not believe that proposed protocol is in conflict with the rights of the accused³⁷, with regards to the observations on witness memories above, it suffices to say that, if the Chamber were to find that the practice of witness preparation – as proposed – was likely to result in an alteration of the memories of the witnesses called by the Prosecution against Mr. Arido, then it is difficult to see how this could result in a “fair hearing” as stipulated in Article 67(1).

b. The protocol expands the scope of witness preparation to the point of contradicting its own provisions and purpose

27. Far from conceiving of preparation in a restrained manner, the Prosecution proposes that preparation be more expansive than any protocol adopted to date. The Arido Defence opposes this expansion; the conduct that the Prosecution seeks to undertake is best saved for the courtroom.

28. General principle 2 of the proposed protocol states: “witness preparation should not be conducted for the purpose of seeking new evidence or continuing the calling party's investigations.”³⁸ Yet the Prosecution's changes, when taken together, will amount to permitting a form of re-interviewing and investigation.

29. The proposed protocol permits follow-up where new information is volunteered by the witness.³⁹ The Arido Defence observes that no definition of follow-up is provided to limit the scope of inquiry. Similarly, the bright line between new information, and merely new angles upon old information, is also not clear. From the changes provided in the protocol, and from the discussion of

³⁷ ICC-01/05-01/13-856, para. 8.

³⁸ ICC-01/05-01/13-856-AnxA, para. 2.

³⁹ *Ibid.*, para. 2.

this change in its observations⁴⁰, it appears that the Prosecution envisions an interview on the subject of the information volunteered. However, follow-up, once in progress, may lead to further ‘new’ information and questions. As it stands, without a controlling legal condition, there is very little to stop the Prosecution from continuing to investigate the case in some cases days⁴¹ before testimony.

30. The proposed protocol contains two substantial other changes that interact with the change to Principle 2 and which create conditions for the greater likelihood that new information is volunteered.

31. Firstly, the proposed protocol has modified the text from that which permits the calling party to ask witness to comment on exhibits for the “purpose of determining the utility of using the exhibits in court” to showing “the witness potential exhibits and ask him or her to comment”.⁴² This change in language is an expansion of the scope of this permissive rule. The text has moved from a partially closed question, to a much more open one.

32. Secondly, the protocol has changed the prohibition on informing the witness of “the evidence of other witnesses (including oral testimony and prior recorded statements of other witnesses)” to merely prohibiting “the identity of the source of evidence obtained from other witnesses”⁴³.

33. In explaining the proposed change the Prosecution states that “The Prosecution takes the position that the parties should be allowed to refer to evidence which may have been obtained from other witnesses during the course of witness preparation, but without revealing its source, for instance, when asking clarifying questions”.⁴⁴

34. From this explanation, it should be clear that the Prosecution envisions a form of “mini” cross-examination. It is human nature to want to justify ones own account, when confronted with information that contradicts ones own account of an event. Thus, between open questions and potentially being confronted with conflicting accounts, it seems quite probable that what can be considered ‘new’ information may be volunteered.

⁴⁰ ICC-01/05-01/13-856, paras 11-13.

⁴¹ ICC-01/05-01/13-856-AnxA, para. 9.

⁴² *Ibid.*, para. 21.

⁴³ *Ibid.*, para. 27.

⁴⁴ ICC-01/05-01/13-856, para. 18

35. In sum, the potential to follow-up and the interaction of other changes to the protocol creates a wide discretion to re-interview witnesses. In addition to the changes contradicting the stated purpose of the protocol, the Arido Defence firstly notes that it has previously highlighted the courts jurisprudence that in principle prevents ongoing investigations during trial.⁴⁵ At an extreme, where an investigation simply continues throughout the trial, the effect of this is procedural unfairness.

c. Proposed changes to the Prosecution's proposed protocol

36. In the event of adopting the Witness Preparation Protocol, the Arido Defence would not oppose the wider scope of prohibited influence as found in Principle 3.⁴⁶ The Arido Defence would also not oppose the loosening of the requirements of the person accompanying the lawyer conducting the preparation session.⁴⁷ Given the demands placed upon defence teams, two qualified lawyers may not be available. Also unopposed would be the presumed site of preparation being the seat of the Court,⁴⁸ the requirement of noting the time of preparation,⁴⁹ the necessity of explaining the subjects of questioning in a neutral manner,⁵⁰ or explaining that the witness might not be questioned upon every subject.⁵¹

37. However, for these reasons in the section above, the Arido Defence cannot agree with the amendment to Principle 2. If follow-up is permitted, then the restrictions contained in paragraph 24 of Annex A are suggested. This proposal seeks to provide a balance to the proposed expansion.

38. In addition to fundamental questions of procedural fairness, unrestrained ongoing investigations place a burden upon the Defence. Permitting follow-up places upon the defence the prospect of attempting to hit a moving target. Whether the information is a red-herring or has credibility, the possibility of having to respond in the midst of a busy trial places a burden upon the defence by shifting its focus.

⁴⁵ ICC-01/05-01/13-838-Conf, paras. 11-14.

⁴⁶ ICC-01/05-01/13-856-AnxA, para. 3.

⁴⁷ *Ibid.*, para. 6.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, para. 11.

⁵⁰ *Ibid.*, para. 18.

⁵¹ *Ibid.*, para. 20.

39. While the requirement of disclosure after any follow-up is important, the Arido Defence submits that judicial authorisation is necessary to ensure fairness. In particular since the protocol permits preparation up until 24 hours prior to testimony, the possibility cannot be excluded of a small defence team being provided with hours of new recorded interviews to review at moments when effort needs to be devoted to other trial preparation.

40. Finally, while the Prosecution text does not contain reference to it, the Arido Defence presumes that the prohibition against exposing witnesses to other's testimony – as found in Rule 140(3) RPE – would also apply in spirit to witness preparation. In the interest of certainty, the Arido Defence proposes paragraph 29 of Annex A.

3. Witness familiarisation

41. The Registry recommended that the Trial Chamber adopt the protocol on witness familiarisation from the Gbagbo case.⁵² The Prosecution proposed a number of changes to this protocol.⁵³ The Arido Defence agrees with the Prosecution's Proposed changes.

4. Vulnerable Witnesses

42. The Registry recommended that the Trial Chamber adopt the vulnerable witnesses protocols adopted in the other cases before the Court.⁵⁴ In the absence of indication that any vulnerable witness will testify in the present case, the Arido Defence submits that the adoption of such protocol is not necessary. Should it become needed, it reserves the right to make further submissions.

5. Dual status witnesses

43. The Registry brought to the Trial Chamber's attention the proposed mechanism for exchange of information of individuals enjoying dual status adopted in the Ntaganda case.⁵⁵ In the absence of indication that any dual status witness will testify in the present case, the Arido Defence submits that

⁵² ICC-01/05-01/13-860, para. 2

⁵³ ICC-01/05-01/13-859-AnxA.

⁵⁴ ICC-01/05-01/13-860, para. 3.

⁵⁵ *Ibid.*, para. 4.

the adoption of such mechanism is not necessary. Should it become needed, it reserves the right to make further submissions.

C. Estimate number of witnesses and documentary and other non-testimonial evidence

44. The Arido Defence is not currently in a position to provide the Trial Chamber and the parties with information regarding Defence witnesses and documentary evidence.

45. It directs the Trial Chamber and the parties to the joint defence filing on the modalities for trial (Rule 140 of the RPE), which contains the position of the Defence teams.

D. Admission and/or agreements on evidence

46. On 20 February 2015, the Prosecution approached the Defence teams with its first proposal of agreed facts. The Arido Defence responded on 28 February 2015 and informed the Prosecution that it was not in a position to provide its views in light of the pending decision of the Trial Chamber on its motion to withdraw the charges. It also raised its concerns with the fact that the Prosecution sought to obtain agreed facts on matters related to Mr. Arido from other suspects.

47. In light of the recent change of counsel, the Arido Defence has not provided its views to the Prosecution. It will endeavour to do so at the earliest opportunity. In any event, the Arido Defence submits that in the case of a multiple suspects' trial, the co-suspects' agreement to a fact which relates to another co-suspect and which is directly relevant to the charges, cannot be deemed to prove that fact if the suspect concerned refuses to agree.

E. Languages to be used in the proceedings

48. The Arido Defence expects that the language of the witnesses would be French, Sango, English and Lingala. It agrees with the Registry's proposal that the period of notice should be no less than four weeks in advance of testimony, should the witnesses testify in a language other than

French or English.⁵⁶ It submits however that such period of notice may be amended in exceptional and unforeseen circumstances.

49. The Arido Defence informs the Trial Chamber that Mr. Arido is French speaking.

50. Article 67(1)(f) states that an accused shall have, free of any cost, the assistance of a competent interpreter and such translations as necessary to meet the requirements of fairness. In order to ensure that this fundamental right is respected, the Arido Defence requests that information on the qualifications of the proposed court interpreters, particularly those translating Sango or Lingala, be provided to the Defence, to ensure that they are properly conversant with these languages.

F. Conduct of the proceedings (Rule 140 RPE)

51. The Prosecution submitted a proposed protocol on the conduct of the proceedings in Annex D thereof.⁵⁷ The Defence teams of all Defendants have prepared joint observations on questions covered by Rule 140 RPE, and therefore, the Arido Defence refers the Trial Chamber to this filing.

G. Commencement date of the trial

52. The Arido Defence notes that the Prosecution indicated that it was unable to offer a position on the date for the commencement of the trial.⁵⁸ It wishes the trial to start as soon as possible in light of the already lengthy proceedings, and of the negative impact that the trial has had and continues to have on Mr. Arido's personal and professional life. Any date setting the start of the trial should take into account the Defendants' right to sufficient time to prepare and respect the schedule proposed in the joint Defence submissions on disclosure and on redactions. In particular, it is of fundamental importance that all disclosure of materials to be used for trial be completed at the latest four months prior to the start of the trial.

⁵⁶ ICC-01/05-01/13-860, para. 10.

⁵⁷ ICC-01/05-01/13-859-AnxD.

⁵⁸ ICC-01/05-01/13-859-Conf, para. 25.

H. Proposed additions to the Agenda

1. Updated Document Containing the Charges ('DCC')

53. The Arido Defence submits that, in light of the practice at the Court,⁵⁹ the Trial Chamber should order the Prosecution to file an updated DCC, on the basis of the decision on the confirmation of the charges, within one month of the present filing. The Prosecution and the Defence should consult prior to the official filing of the updated DCC, and any issues that the parties could not agree upon should be raised in a jointly submitted Prosecution-Defence annex to the amended DCC.⁶⁰

54. Should the Trial Chamber find it necessary, the Arido Defence requests the permission to make further oral submissions on this matter during the status conference.

2. Prosecution's pre-trial brief

55. The Arido Defence submits that the Prosecution should be ordered to file a pre-trial brief (aka 'summary of its presentation of evidence' or 'summary of the charges') at the latest four months prior to the start of the trial. It should be a detailed document explaining its case with reference to the witness it intends to call and the other incriminating evidence it intends to rely on will, to ensure that the accused are informed of the charges against them.⁶¹

56. The Arido Defence insists on the importance to have a precise and exhaustive description of the charges and the evidence underpinning them, and requests to be permitted to make submissions on these charges to streamline the process, should it be necessary.

⁵⁹ *Lubanga* case ICC-01/04-01/06-1548; *Bemba* case ICC-01/05-01/08-T-14-ENG, page 13, lines 5 – 10 and ICC-01/05-01/08-836, para. 30; *Kenyatta and Muthaura* case ICC-01/09-02/11-450; *Ruto and Sang* case ICC-01/09-01/11-439; *Ntaganda* case ICC-01/04-02/06-390. In the *Katanga and Ngudjolo* case, Chamber did not consider it necessary for the OTP to provide an amended DCC. However, the Chamber later ordered the Prosecution to submit a 'Summary of the Charges', see ICC-01/04-01/07-956, para. 7; ICC-01/04-01/07-1547-tENG.

⁶⁰ ICC-01/09-02/11-450, para. 11; ICC-01/04-02/06-390, paras 5 and 7; and ICC-01/09-01/11-439, paras 7 and 10.

⁶¹ ICC-01/09-02/11-451, paras 11, 20; ICC-01/09-01/11-440, paras 6, 15.

3. Rule 134 (2) of the RPE

57. Pursuant to Rule 134 (2) of the RPE, at the commencement of the trial, the Trial Chamber shall ask the Prosecutor and the defence whether they have any objections or observations concerning the conduct of the proceedings which have arisen since the confirmation hearings. Such objections or observations may not be raised or made again on a subsequent occasion in the trial proceedings, without leave of the Trial Chamber in this proceeding.

58. The Arido Defence reserves the right to make submissions pursuant to Rule 134 (2) of the RPE, following the recent change of counsel.

4. Applicability of Regulation 55 of the Regulations of the Court (Re-characterisation of the modes of liability)

59. The Arido Defence would like to request the Trial Chamber to permit the parties to make submissions on whether or not Regulation 55 of the Regulations of the Court ('RoC') is applicable to Article 70 proceedings.⁶² The Prosecution should provide its submissions first, and the Defence should be given the right to respond in accordance with Regulation 34 (b) of the RoC.

5. Definition of the constitutive elements of Article 70 (1) (a) through (c) and modes of liability Article 25 (3) (a) (direct perpetrator) and (c)

60. The Arido Defence submits that, in light of the fact that the present proceedings are the first of this kind before the Court, and in view of the vague wording of Article 70, the Trial Chamber should provide guidance to the parties regarding the constitutive elements of the offences under Article 70 (1) (a) - (c), and of the constitutive elements of the modes of liability confirmed by the Trial Chamber. The Trial Chamber is permitted to make such determination pursuant to Article 64 (6) (f) of the Statute, and the Arido Defence submits that it is not bound by the definition adopted by the Pre-Trial Chamber in the Confirmation of Charges decision. It further notes that in light of the Pre-Trial Chamber's failure to undertake an in-depth analysis of the relevant legal provisions, and

⁶² See e.g. ICC-01/09-01/11-426.

its failure to provide any legal basis for the definitions it adopted,⁶³ it is the duty of the Trial Chamber to provide the parties with guidance regarding the constitutive elements of the charged offences and modes of liability.

61. The Arido Defence submits that this is necessary to permit the parties to adequately prepare for trial and for the Defence to effectively challenge the Prosecution's evidence. It is further submitted that the definition of the offences and modes of liability form an integral part of the charges against the Defendants, which they are entitled to know.

62. As a result, the Arido Defence requests the Trial Chamber to order the parties to file written submissions on the definition of the relevant Article 70 offences and the applicable modes of liability, with a view to provide the parties with a clear definition of their constitutive elements.⁶⁴

6. Practical modalities of the Defendants' attendance at trial

63. The Arido Defence would like to be permitted to make written or oral submissions regarding the Defendants' attendance at trial. The Arido Defence notes that the Defendants, other than Mr. Bemba, have been released. The Defence notes that the Accused, other than Mr. Bemba, have all been released from the ICC detention center following the Single Judge's 21 October 2014 decision.⁶⁵ The Decision unequivocally states that the Accused are released, not provisionally released.⁶⁶ As a result, the Arrest Warrant⁶⁷ is no longer valid. The Trial Chamber shall issue summons to appear to all the Accused.⁶⁸ The Defence further recalls that all Accused have formally committed to promptly appear before the Court whenever summoned. When a date for trial is set, the Defence requests the Trial Chamber to order the Registry to take the necessary measures to ensure that all Accused other than Mr. Bemba are given assistance in order to travel to the Netherlands and attend trial.

64. The Arido Defence submits that the conditions of such summons to appear, including any

⁶³ ICC-01/05-01/13-749, paras 28-36.

⁶⁴ See e.g. ICC-01/09-01/11-426 (*Ruto & Sang* order to the parties to make submissions on Article 25 (3) of the Statute)

⁶⁵ ICC-01/05-01/13-703.

⁶⁶ ICC-01/05-01/13-703, p. 5; see also the wording used by the Appeals Chamber in ICC-01/05-01/13-718.

⁶⁷ ICC-01/05-01/13-1-Red2-tENG.

⁶⁸ ICC-01/05-01/13-703, p. 5.

practical, financial and/or legal matter related to the Defendants' attendance at trial, including the modalities of their stay on the territory of the Host State during the trial, should be discussed in advance of the start of the trial to avoid any delay.⁶⁹ The Registry should also be instructed to make submissions on the question.

7. Translation

65. The Arido Defence requests the Trial Chamber to order that, should the Defence have documents or other materials that it intends to rely upon and that requires translation into English/French, the Registry must provide translations, as the Defence has no translation unit or budget. Should the translation service decline to provide such service then the matter should be resolved by the Trial Chamber.⁷⁰

8. Testimony via video link

66. In its observations on the agenda for the first status conference, the Registry points out to the “high possibility” that if the same or some of the witnesses who testified in the Main case are called in the present case, video link may be necessary.⁷¹ The Arido Defence strongly opposes the testimony of witnesses by video-link.

67. It is submitted that in the present circumstances of the case, the fact that certain individuals who allegedly falsely testified under oath may now be testifying as Prosecution or Defence witnesses necessitates their physical presence to permit the Trial Chamber but also the parties to assess their demeanour. Live testimony in The Hague would permit the Trial Chamber to observe the demeanour of the witness and have the best opportunity of judging the reliability and credibility of the evidence that may be in dispute.⁷² It further permits the Defendants to confront a witness whilst the trier of fact observes the witness during his or her testimony.

⁶⁹ See e.g. ICC-01/09-02/11-620.

⁷⁰ Argument made by Sang Defence. TC responded that the Defence should address these issues with the Registry, and that “there is any substantive questions which the Registry cannot deal with maybe the Registry can then address to the Chamber”, see ICC-01/09-01/11-T-15-ENG, p. 24, l. 25 to p. 25, l. 6.

⁷¹ ICC-01/05-01/13-860, para. 12.

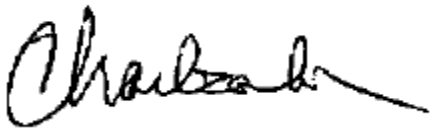
⁷² See e.g. (Dissenting opinion) ICC-01/05-01/08-1028, para. 7.

68. As a result, it is submitted that the testimony by video link would prejudice the Defendants' right to examine the witnesses against them,⁷³ and therefore be precluded by Article 69 (2) of the Statute.

69. If the Prosecution wishes to have some of its witness testify by video-link, it should submit such request as soon as possible and at the latest four months prior to the start of the trial. The Defence should be permitted to respond.

IV. CONCLUSION

70. The Arido Defence respectfully submits these observations in preparation for the first status conference before the Trial Chamber.

A handwritten signature in black ink, appearing to read 'Charles Achaleke Taku', with a long horizontal flourish extending to the right.

Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 13th Day of April 2015

In The Hague, The Netherlands

⁷³ Article 67 (1) (e) of the Statute.