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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 Annexes A and B

**Narcisse Arido's Submissions on the Elements of Article 70 Offences and the
Applicable Modes of Liability (ICC-01/05-01/13-T-8-CONF-ENG)**

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I. INTRODUCTION

1. On 24 April 2015, during the first trial status conference, the Trial Chamber requested the parties to make full submissions on the elements of Article 70 offences and the modes of responsibility applicable thereto by 31 May 2015.¹
2. The Arido Defence hereby presents its submissions.

II. SUBMISSIONS

3. The Arido Defence notes that the present submissions are limited to the charges as confirmed by the Pre-Trial Chamber, and not those for which the Prosecution requested the Trial Chamber to issue a notice under Regulation 55 (2) of the RoC.²

A. Preliminary observations regarding the rules of interpretation

4. The constitutive elements of the offences are not included in Article 70. This case being the first of this type before the Court to be prosecuted, there is no previous jurisprudence on which the Trial Chamber can rely. Similarly, the preparatory work of the ICC Statute and Rules of Procedure and Evidence ('RPE') contains very limited information regarding what the drafters intended to be the elements of the offences.³ The Working Group on Procedural Issues, which was tasked with the drafting of Article 70, had held that "the Rules of Procedure and Evidence will need to include provisions governing such issues as general principles of criminal law, procedures for investigating, prosecuting, and enforcing sentences with respect to, such crimes."⁴ Notwithstanding this fact, the RPE do not include any specification regarding the elements to be proved for a finding of guilt under Article 70.⁵
5. The Pre-Trial Chamber provided limited guidance on the interpretation of the subsections of Article 70.⁶ As a result, the Trial Chamber is left to use the sources of law listed in

¹ ICC-01/05-01/13-T-8-CONF-ENG, p. 6, l. 10-18.

² See ICC-01/05-01/13-951, paras 55, 58.

³ See, ICC Conference Report from the Working Group on Procedural Matters, p. 288, fn. 149; ICC Conference Report Vol. 3, and Working paper on article 70, p. 299.

⁴ *Ibid.*

⁵ See, ICC RPE, Chapter 9, Section I 'Offences against the administration of justice under article 70'.

⁶ ICC-01/05-01/13-749, paras 28-30.

Article 21 (1) (b) and (c) of the Statute, namely the applicable treaties, principles and rules of international law, as well as general principles of law derived by the Court from national laws of legal systems of the world. Further, pursuant to Article 21 (3) of the Statute, the Trial Chamber must interpret and apply the Statute in accordance with internationally recognised human rights.

6. Last but not least, the Trial Chamber shall also be guided by the provision of Article 22 (2) of the Statute, which provides that the definition of a crime shall be strictly construed and shall not be extended by analogy, and that in case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

7. When undertaking the exercise of defining the constitutive elements of the Article 70 offences, the Trial Chamber shall also be guided by the Vienna Convention on the Law of Treaties.⁷ As a result, Article 70 must be interpreted “in good faith” and “in accordance **with the ordinary meaning** to be given to the terms of the treaty in their context and in the light of its object and purpose”.⁸

B. Elements of the offences

1. Article 70 (1) (a)

8. Article 70 (1) (a) of the Statute creates the offence of “giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth”. Article 69 (1) of the statute relates to the duty of “each witness” to give an undertaking as to the truthfulness of the evidence to be given.

9. The Pre-Trial Chamber stated that the offence of false testimony occurs “when a witness intentionally provides a Chamber with information that is false, or otherwise withholds information that is true”.⁹ It specified that it relates to “any type of information” provided under oath.¹⁰ Further, the Pre-Trial Chamber held that “any third person may be prosecuted as an accessory under Article 25 (3) (b) to (d) of the Statute, provided that the

⁷ ICC-01/04-168, para. 33.

⁸ VCLT, Art. 31 (1) (emphasis added),

⁹ ICC-01/05-01/13-749, para. 28.

¹⁰ ICC-01/05-01/13-749, para. 28.

witness's testimony was objectively false".¹¹ Finally, it held that Article 70 (1) (a) applied irrespective of whether the witness was charged.¹²

a. Actus Reus

10. In the *ad hoc* tribunals, presenting false testimony is a separate offence, qualified as "perjury" and regulated by Rule 91 of the RPE. The rule applicable to perjury in the *ad hoc* tribunals refers to "knowingly and wilfully given false testimony".¹³ There has been a few cases of prosecution of witnesses for perjury before the *ad hoc* tribunals, however no judgement was rendered so far in a contested case, there is therefore limited guidance as to the interpretation of its constitutive elements.¹⁴

11. The ICTR has held that the constitutive elements of the offence of *actus reus* of perjury were as follow:

- i. The witness must have made a solemn declaration;
- ii. The false statement must be contrary to the solemn declaration;
- iii. There must be a relevant connection between the statement and a material issue in the case.¹⁵

12. In light of the Pre-Trial Chamber's findings that firstly, withholding true information could amount to false testimony, and secondly, that the false testimony could relate to "any type of information", and in light of the limited case law regarding perjury in the *ad hoc* tribunals, it is necessary to look into domestic law for guidance.

A witness

13. It is non controversial that the offence must be committed by a witness who is under oath pursuant to Article 69 (1) of the Statute and who has presented evidence before the Court.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Rule 91 ICTR RPE; Rule 91 ICTY RPE; Rule 108 MICT RPE; Rule 91 SCSL RPE; Rule 152 STL RPE.

¹⁴ The only conviction is in the *GAA* Trial Judgement and Sentence.

¹⁵ *Bizimungu et al.* 23 July 2008 Decision on GFA, GAP and GKB, para. 5; *Nyiramasuhuko et al.* 19 March 2009 Decision on QY and SJ, para.11; *Ntahobali* 7 November 2008 Decision on contempt, para. 20.

The term “testimony” requires an actual statement

14. The meaning of the Pre-Trial Chamber’s finding that the “withholding of true information” can constitute false testimony is unclear. The Arido Defence stresses that it should not be construed to encompass withholding of information that a witness has not been asked to prompt.

15. First of all, the wording of Article 70 (1) (a) must, as required by the VCLT, be interpreted in accordance with its ordinary meaning. The reference to “giving false testimony” shows clearly that a positive action is required on the part of the witness. Testimony is defined as “a formal written or spoken statement, especially one given in a court of law”.¹⁶ A statement is a “definite or clear expression of something in speech or writing”.¹⁷ Clearly, a positive action - the witness saying something - is required, or else there would not be a testimony.¹⁸ As a result, a plain reading of Article 70 (1) (a) shows clearly that it only includes an actual statement. The ICTR also defined giving false testimony as a positive action, namely “asserting a fact which the witness knows not to be true, or denying of a fact which the witness knows to be true”.¹⁹

16. As a result, the Arido Defence submits that only positive actions, that is asserting a fact which the witness knows not to be true, or denying of a fact which the witness knows to be true,²⁰ amount to “false testimony” with the meaning of Article 70 (1) (a).

Establishment of the “false” character of the testimony

17. Finally, the Arido Defence submits there must be an objective way to determine that the evidence presented by the witness was false. In other words, the sole evidence of the witness

¹⁶ Oxford dictionary, <http://www.oxforddictionaries.com/definition/english/testimony>.

¹⁷ Oxford dictionary, <http://www.oxforddictionaries.com/definition/english/statement>.

¹⁸ See also: In the UK, the offence of perjury is defined as “[i]f any person lawfully sworn as a witness or as an interpreter in a judicial proceeding willfully **makes a statement** material in that proceeding, which he knows to be false or does not believe to be true, he shall be guilty of perjury”, UK Perjury Act 1911, Section 1; The Canadian criminal code also refers to “every one commits perjury who, with intent to mislead, makes before a person who is authorized by law to permit it to be made before him **a false statement** under oath or solemn affirmation, by affidavit, solemn declaration or deposition or orally, knowing that the statement is false.”, Article 131 of the Canadian Criminal Code.

¹⁹ *Akayesu* 9 March 1998 Decision on Witness “R”, p. 3; *Bizimungu et al.* 23 July 2008 Decision on GFA, GAP and GKB, para. 5.

²⁰ *Ibid.*

who alleges having lied under oath does not suffice to establish beyond reasonable doubt the false character of the evidence. In the United Kingdom, Canada, Nigeria and in the United States, a person shall not be convicted of perjury solely on the evidence of one witness and that corroboration is needed.²¹ The Arido Defence respectfully submits that the standard of proof of beyond reasonable doubt requires the Trial Chamber to take the same approach.

The false aspect of the testimony must relate to a material fact

18. Finally, the Arido Defence submits that the false testimony must relate to a material fact. This was the approach taken by the ICTR,²² and it also a requirement in Canada, Nigeria, and in the US.²³

b. Mens Rea

19. The *mens rea* of article 70 (1) (a) is established if the witness knowingly and willfully provides the false evidence. More specifically, the Arido Defence submits that the Trial Chamber should adopt the *mens rea* requirement decided by the ICTR, namely that:

- i. The witness must have believed the statement was false at the time that the statement was made;
- ii. The witness acted deliberately, that is, willingly and knowingly gave false testimony;
- iii. The witness acted with the intent to mislead the judge and thereby to cause harm.²⁴

²¹ UK: “a person shall not be liable to be convicted of any offence for perjury or subornation of perjury solely upon the evidence of one witness as to the falsity of any statement alleged to be false”, UK Perjury Act 1911, Section 13; Canada: No person shall be convicted of an offence under section 132 on the evidence of only one witness unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused.”; Section 133 of Canadian criminal code; Nigeria: “A person cannot be convicted of committing perjury, or of counselling or procuring the commission of perjury, upon the uncorroborated testimony of one witness.” Section 119 of Criminal Code Act of Nigeria; US: the uncorroborated oath of one witness is not sufficient to establish the falsity of the testimony of the accused, in *Hammer v. United States* (1926); *Weiler v. United States* (1945); *United States v. Stewart* (2006); *United States v. Chaplin* (1994).

²² *Infra*. footnote 19.

²³ UK Perjury Act 1911, Section 1; Section 117 of Criminal Code Act of Nigeria; Section 18 of US criminal code.

²⁴ *Bizimungu et al.* 23 July 2008 Decision on GFA, GAP and GKB, paras 5 and 6; *Nyiramasuhuko et al.* 19 March 2009 Decision on QY and SJ, para.11; *Ntahobali* 7 November 2008 Decision on contempt, para. 20.

c. Constitutive elements of Article 70 (1) (a)

20. The elements required to establish an offence under Article 70 (1) (a) are:

- i. A witness testified before the Court under oath pursuant to Article 69 (1) of the Statute;
- ii. The witness asserted a fact which s/he knows not to be true, or denied of a fact which s/he knows to be true;
- iii. The false character of the fact is established objectively;
- iv. The false testimony relates to a fact that is material to the case;
- iv. The witness must have believed the statement was false at the time that the statement was made;
- v. The witness acted deliberately, that is, willingly and knowingly gave false testimony;
- vi. The witness acted with the intent to mislead the judge and thereby to cause harm.²⁵

2. Article 70 (1) (b)

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

22. The Pre-Trial Chamber has stated that Article 70 (1) (b) included “all types of evidence, namely documents, material and tangible objects, as well as oral evidence”.²⁶ It further held that such evidence was deemed presented “when it is introduced in the proceedings, thereby being made available to the parties, the participants and the Chamber”.²⁷ In addition, the Pre-Trial Chamber considered that the reference to a “party” meant “those who have the right to present evidence to a Chamber”, covering members of the Defence team and the Accused.²⁸

23. In its submissions on the confirmation of charges, the Arido Defence submitted that Article 70 (1) (b) does not relate to oral evidence.²⁹ In the context of the charges confirmed

²⁵ *Ibid.*

²⁶ ICC-01/05-01/13-749, para. 29.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ ICC-01/05-01/13-598-Red, paras 101-104.

against Mr. Arido, the Pre-Trial Chamber's finding that Article 70 (1) (b) includes oral evidence creates confusion since such behaviour would also fall under aiding and abetting or otherwise assisting in the offence of false testimony.

24. Should the Trial Chamber find that Article 70 (1) (b) includes oral testimony, the Arido Defence submits that since the present case relates to the presentation of false evidence through presenting a witness who testified falsely, the constitutive elements of the offence of perjury as listed in paragraph 20 above apply equally to Article 70 (1) (b).

25. In addition, it must be established beyond reasonable doubt that the evidence must be presented by a party before the Court. The reference to a "party" is clearly aimed to limit the ambit of application to the Accused and to those who appear before the Court with an official function of representation, namely the Prosecution or the Defence, as stated by the Pre-Trial Chamber. Additionally, the term "presentation of evidence before the court" means that the evidence must be brought to the attention of the court with the intention of relying on it.

26. Finally, the following elements are required to establish the *mens rea* under Article 70 (1) (b):

- i. The party presenting the evidence has knowledge that the evidence is false or forged;³⁰
- ii. The party presenting the evidence has the intention that false evidence be presented.³¹

27. As a result, should the Chamber agree that the Article 70(1)(b) includes oral evidence, then the constitutive elements of the offence under Article 70 (1) (b) are as follow:

- i. A witness testified before the Court under oath pursuant to Article 69 (1) of the Statute and asserted a fact which s/he knows not to be true, or denied of a fact which s/he knows to be true;
- ii. The false character of the evidence is established objectively;
- iii. The false testimony relates to a fact that is material to the case;
- iv. The witness must have believed the statement was false at the time that the statement was made;

³⁰ See "that the party knows is false or forged", Article 70 (1) (b); see also *Nshogoza* Trial judgment, para. 102.

³¹ Chapeau of Article 70: "when committed intentionally".

- v. The witness acted deliberately, that is, willingly and knowingly gave false testimony;
- vi. The party presenting the evidence has knowledge that the evidence is false or forged; and,
- vii. The party presenting the evidence has the intention that false evidence be presented.

3. Article 70 (1) (c) (corruptly influencing a witness)

28. The Pre-Trial Chamber confirmed the charges against Mr. Arido regarding the action of corruptly influencing witnesses.³² It found that there were reasonable grounds to believe that Mr. Arido committed or alternatively, aided, abetted or otherwise assisted in the offence of corruptly influencing witnesses through: instructing D2, D3, D4 and D6 to either provide false information or withhold true information during their testimony in Court, and encouraging D2, D3, D4 and D6's testimony with money transfers and the possibility of a relocation in Europe.³³ Therefore, the Arido Defence will only address the constitutive elements of the action of "corruptly influencing witnesses".

29. The Pre-Trial Chamber stated that Article 70 (1) (c) proscribes "any conduct that may have (or is expected by the perpetrator to have) an impact or influence on the testimony to be given by a witness, inducing the witness to falsely testify or withhold information before the Court".³⁴ It added that the conduct is "aimed at contaminating the witness's [*sic*] testimony".³⁵ Finally, it held that the offence of corruptly influencing a witness is constituted "independently from whether the pursued impact or influence is actually achieved", concluding that it was a "conduct crime, not a result crime".³⁶

30. It must be noted that the offence of "corruptly influencing witnesses" is not expressly provided for in the *ad hoc* rules. The relevant *ad hoc* rules applicable to contempt refer to "witness bribing" and "otherwise interfering with the administration of justice".³⁷ The alleged actions of Mr. Arido that the Pre-Trial Chamber qualified as showing reasonable grounds to

³² ICC-01/05-01/13-749, p. 53.

³³ *Ibid.*

³⁴ ICC-01/05-01/13-749, para. 30.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Rule 91 ICTR RPE; Rule 91 ICTY RPE; Rule 91 SCSL RPE.

believe that Mr. Arido corruptly influenced witnesses would fall under “witness bribing” for “encouraging D2, D3, D4 and D6’s testimony with money transfers and the possibility of a relocation in Europe” and “otherwise interfering with the administration of justice, for “instructing D2, D3, D4 and D6 to either provide false information or withhold true information during their testimony in Court.” The elements for each are discussed below where relevant.

a. Ad hoc case law

31. The ICTY and ICTR have stated that “the word bribe is liberally construed as an inducement offered to procure illegal or dishonest action or decision in favour of the giver. It is also defined as a price, reward, gift or favour bestowed or promised with a view to pervert the judgement of or influence the action of a person in a position of trust.”³⁸ The *mens rea* that must be established for bribing is that the payments or other actions have to be made with the intent to influence the nature of the witness’ evidence/to pervert the judgment or influence the person.³⁹ In addition, there must be a clear intent and knowledge that the actions could change a Court’s decision and therefore interfere with the administration of justice.⁴⁰

32. The offence of “otherwise interfering with witnesses” was defined as “any conduct that is intended to disturb the administration of justice by deterring a witness or a potential witness evidence, or in any way to influence the nature of the witness’ or potential witness’ evidence.”⁴¹ More specifically, the ICTY has held that the *actus reus* of otherwise interfering with a witness “encompasses acts or omissions, other than threatening, intimidating, causing injury or offering a bribe, capable of and likely to deter a witness from giving full and truthful testimony or in any other way influence the nature of the witness’s evidence.”⁴² The alleged actions must be “likely to dissuade a witness or a potential witness from giving evidence, or to influence the nature of the witness’ or potential witness’ evidence”.⁴³

³⁸ *Beqaj* Trial Contempt Judgement, para. 18; *Nshogoza* Trial Judgment, para. 192.

³⁹ *Nshogoza* Trial judgment, para. 199; SCSL: *Prince Taylor* Appeal Judgment, para. 45; *Senessie* Trial Judgement on Contempt, para. 20.

⁴⁰ SCSL: *Bangura et al.* Trial Judgement on Contempt, para. 664; *Senessie* Trial Judgement on Contempt, para. 20.

⁴¹ ICTY: *Beqaj* Trial Judgement on Contempt, para. 21; *Margetić* Trial Judgement on Contempt, para. 64; *Haraqija & Morina* Trial Judgement on Contempt, para. 18; ICTR: *Nshogoza* Trial judgment, paras 158, 193.

⁴² ICTY: *Haraqija & Morina* Trial Judgement on Contempt, para. 18; *Margetić* Trial Judgement on Contempt, paras 64, 68; *Maglov* Judgement on 98 bis, paras 27-28.

⁴³ *Ibid.*

b. Actus Reus

33. The Arido Defence submits that the elements required to establish the actus reus of “corruptly influencing witnesses” under Article 70 (1) (c) are as follow:

- i. An action which is objectively capable and likely to influence the nature of the witness’ testimony;
- ii. The witness or potential witness was in a position of trust towards the perpetrator;
- iii. The actions are aimed at influencing the nature of the testimony from the witness or potential witness. For the corrupt influence through bribing to be established, the Prosecution must prove beyond reasonable doubt that the Accused promised the witness payment in exchange of his/her action.⁴⁴

Objectively demonstrable ability to influence

34. The Arido Defence submits that it must be demonstrated that the perpetrator is in a position to influence the witness for the *actus reus* to be established beyond reasonable doubt. For example, the perpetrator could be in a position of trust towards the witness.⁴⁵ The SCSL, when examining the question of interference with a witness, took into account the relationship of “authority” between the perpetrator and the witness.⁴⁶

Corrupt character of the influence

35. The Arido Defence submits that the “corrupt” nature of the influence is core to Article 70 (1) (c). The ICTR has specified that only “undue interference with a witness” would constitute contempt.⁴⁷

36. First, the influence must be corrupt, that is, it must aim to interfere with the administration of justice, such as trying to have a witness change their testimony, to provide certain specific information, with a “view to pervert the judgement of or influence the action

⁴⁴ *Nshogoza* Trial judgment, para. 198.

⁴⁵ *Ibid.*

⁴⁶ SCSL: *Bangura et al.* Trial Judgement on Contempt, paras. 669, 681, 683.

⁴⁷ *Nyiramasuhuko et al.* 30 November 2001 Decision on Contempt, para. 20; *Kajelijeli* 15 November 2002 Decision on Contempt, para. 9.

of a person in a position of trust”.⁴⁸ Further, it must also be established that there is an objectively demonstrated link between the corrupt influence and the testimony of the witness before the Court.⁴⁹

37. It must also be objectively demonstrated that the alleged conduct is likely to dissuade a witness from giving evidence, or to influence the nature of the witness’ or potential witness’ evidence.⁵⁰

c. Mens Rea

38. Firstly, the perpetrator must be aware that the person is a witness or a prospective witness.⁵¹ It is clear from the use of “knowingly” in the chapeau of Article 70 (1). Secondly, it must be demonstrated that the perpetrator acted willfully, that is, that s/he intended to influence the nature of the witness or potential witness’ evidence.⁵²

39. In addition, the Prosecution must prove the accused’s specific intent to interfere with the Tribunal’s due administration of justice.⁵³ In other words, it must be shown that the perpetrator sought to influence the outcome of a pending case by interfering with a witness.⁵⁴

d. Constitutive elements

40. In light of the above, the Arido Defence submits that the elements required to establish the offence of “corruptly influencing witnesses” beyond any reasonable doubt are:

⁴⁸ Beqaj Trial Contempt Judgement, para. 18.

⁴⁹ Beqaj Trial Contempt Judgement, para. 21; Nshogoza Trial Judgement, para.158.

⁵⁰ Haraqija Trial Judgement on Contempt, para. 18; Margetić Trial Judgement on Contempt, paras 64, 68; Maglov Judgement on 98 bis, paras 27-28.

⁵¹ Haraqija Trial Judgement on Contempt, para. 55.

⁵² ICTY: Brdjanin 19 March 2004 98bis Decision, para. 16; Haraqija Trial Judgement on Contempt, cf. paras 19: “the *mens rea* requires proof that the Accused acted willingly and with the knowledge that his conduct was likely to deter or influence the witness” and 55; Margetić Trial Judgement on Contempt, para. 66; Beqaj Trial Judgement, para. 21; Maglov Judgement on 98bis, para. 29; ICTR: Nshogoza Trial Judgment, para. 155; Nshogoza Trial Judgement, para. 158.

⁵³ ICTY: Maglov Judgement on 98bis, para. 29; see also Beqaj Trial Contempt Judgement, para.22; Brdjanin 19 March 2004 98bis Decision, para. 16; Beqaj Trial Judgement on Contempt, para. 22; Bulatović Trial Judgement on Contempt, para.11; Pektović Trial Judgment on Contempt, paras 54-57. SCSL: Samura Trial Judgment on Contempt, paras 18, 19.

⁵⁴ ICTY: Maglov Judgement on 98bis, para. 28; SCSL: Bangura et al. Trial Judgement on Contempt, para. 680.

- i. An action which is objectively capable and likely to influence the nature of the witness' testimony;
- ii. The witness or potential witness was in a position of trust towards the perpetrator;
- iii. The actions are aimed at influencing the nature of the testimony from the witness or potential witness. For the corrupt influence through bribing to be established, the Prosecution must prove beyond reasonable doubt that the Accused promised the witness payment in exchange of his/her action;⁵⁵
- iv. The perpetrator's knowledge that of the individual's quality as a witness or potential witness;
- v. The perpetrator's intention to influence the witness in an improper manner; and,
- vi. The intention to interfere with the administration of justice.

C. Elements of the modes of responsibility

41. As previously stated,⁵⁶ the Arido Defence submits that the modes of liability applicable to Article 70 offences are limited and that the extended modes of liability, such as co-perpetration or the so-called "common plan" liability do not apply to contempt offences. A review of the totality of the contempt cases before the *ad hoc* tribunals shows clearly that the modes of liability applicable to such offences are contained within the rule applicable to contempt, namely: commission, attempted commission, and incitement.⁵⁷ Accomplice liability, co-perpetration, or superior responsibility have never been charged for contempt or perjury cases.⁵⁸

42. Relating the mental elements, Article 30 of the Statute states that a person shall be criminally responsible only if the material elements are committed with intent and knowledge. As a result, for each offence, it must be established beyond reasonable doubt that: i) The

⁵⁵ *Nshogoza* Trial judgment, para. 198.

⁵⁶ ICC-01/05-01/13-598-Red, para. 116; ICC-01/05-01/13-951, paras 27-31.

⁵⁷ ICTY: *Beqaj* Trial Contempt Judgement; *Bulatović* Trial Contempt Judgement; *Haraqija and Morina* Trial Contempt Judgement; *Jović* Trial Contempt Judgement; *Margetić* Trial Contempt Judgement; *Marijajić and Rebić* Trial Contempt Judgement; *Petković* Trial Contempt Judgement; *Hartmann* Appeal Contempt Judgement; *Šešelj* First Appeal Contempt Judgement; *Vujin* Trial Contempt Judgement; *Tupajić* Trial Contempt Judgement; *Pećanac* Trial Contempt Judgement; ICTR: *GAA* Trial Contempt Judgement and Sentence; *Nshogoza* Contempt Trial Judgment; *Nyiramasuhuko et al.* Decision on Prosecutor's Contempt Allegations; SCSL: *Bangura et al.* Trial Contempt Judgement; *AFRC* Trial Judgment; *Charles Taylor* Trial Contempt Judgement; *Samura* Trial Judgment on contempt; *Senessie et al.* Trial Contempt Judgement.

⁵⁸ *Ibid.*

accused meant to engage in the prohibited conduct; and, ii) the accused meant to cause the result of the prohibited conduct.⁵⁹

1. Article 25 (1) (a) - Direct Commission (only for Article 70 (1) (c))

43. The Arido Defence submits that Article 25 (1) (a) contains three modes of liability: perpetration (direct commission), direct co-perpetration and indirect co-perpetration.⁶⁰ The Pre-Trial Chamber confirmed the charges against Mr. Arido for Article 70 (1) (c) as direct perpetration.⁶¹ The Pre-Trial Chamber did not provide a definition of the constitutive elements of direct perpetration in the Confirmation of Charges Decision. It only held that “perpetration is subsumed under the mode of liability of co-perpetration”.⁶²

44. Regarding the objective element of perpetration, the Prosecution must prove beyond reasonable doubt that the Accused’s conduct constitutes the commission of the crime *per se*.⁶³ As to the subjective element, the Prosecution must established beyond reasonable doubt that the Accused meant to engage in the prohibited conduct. In addition, it must be established that s/he meant to cause the result of the possible conduct.

2. Article 25 (1) (c)

45. The Pre-Trial Chamber held that the elements of Article 25 (3) (c) were met “insofar as the accessory’s contribution has an effect on the commission of the offence” and “is made with the purpose of facilitating such commission”.⁶⁴ The Arido Defence submits that, in addition, the accessory’s conduct must have a substantial effect on the commission of the offence, especially in the context of Article 70 crimes.

⁵⁹ The expression ‘or was aware that it would occur in the ordinary course of events’ does not apply in light of Article 70’s chapeau element which states that each offence must be “committed intentionally”.

⁶⁰ Werle - Article 25, p. 957.

⁶¹ ICC-01/05-01/13-749, p. 53.

⁶² ICC-01/05-01/13-749, para. 33.

⁶³ ICC-01/04-01/07-3436-tENG, para. 1384.

⁶⁴ ICC-01/05-01/13-749, para. 35.

a. Objective elements

46. The ICTY and ICTR defined aiding and abetting as “providing assistance, encouragement or practical moral support to the crime.”⁶⁵ The ICTR has defined aiding as “giving assistance to someone”⁶⁶ and abetting as “facilitating the commission of an act by being sympathetic thereto”.⁶⁷

Substantial contribution

47. The Arido Defence submits that it must be established beyond reasonable doubt that the accomplice’s conduct has a substantial effect on the specific offence charged, in order to establish individual criminal responsibility under Article 25 (3) (c). This constitutive element is widely accepted across the international criminal justice system⁶⁸ as well as in domestic law.⁶⁹ Substantial effect means that the actions must have enabled, or at least, facilitated the commission of the crime.⁷⁰

The conduct must be specifically directed to the commission of a specific offence

48. The expression “for the purpose of facilitating the commission of a crime” makes clear that the accomplice’s acts must be specifically directed to the commission of the specific offence under Article 70. This departure from the *ad hoc* (controversial)⁷¹ jurisprudence shows the intent of the drafter that the mode of liability of aiding and abetting be construed

⁶⁵ *Tadić* Appeal Judgement, para 229; *Čelebići* Appeal Judgement, para. 352; *Kvočka et al.* Appeal Judgement, para. 89; *Furundjiza* TC Judgement, para. 235; ICTR: *Ntagerura* Appeal Judgment, para. 370; *Muhimana* Appeal Judgment, para. 189; *Seromba* Appeal Judgement, para. 44; *Mrškić* Appeal Judgement, para. 81.

⁶⁶ ICTR: *Akayesu* Trial Judgement, para. 484; *Ntakirutimana* Trial Judgement, para. 787; *Semanza* Trial Judgement, para. 384.

⁶⁷ ICTR: *Akayesu* Trial Judgement, para. 484

⁶⁸ ICTY: *Beqaj* Trial Judgement on Contempt, para. 24; *Aleksovski* Appeal Judgement, paras 162-164; *Blaškić* Appeal Judgement, paras 45, 48; *Simić et al.* Appeal Judgement, paras 85, 86; *Brdanin* Appeal Judgement, paras 151, 273, 277, 348; *Blagojević* Appeal Judgement, paras 127, 187; *Mrškić* Appeal Judgement, para. 81; *Tadić* Appeal Judgement, para. 229; *Krnjelac* Appeal Judgement, paras 33, 37; *Kvočka* Appeal Judgement, paras 89, 90; *Lukić & Lukić* Appeal Judgement, para. 437; *Čelebići* Appeal Judgement, para. 352; ICTR: *Kayishema* Appeal Judgement, para. 201; *Ntagerura* Appeal Judgement, para. 370; *Ndindabahizi* Appeal Judgement, para. 117; *Muhimana* Appeal Judgement, para. 189; *Nahimana* Appeal Judgement, paras 482, 672; *Seromba* Appeal Judgement, para. 44; Appeal Judgement, para. 321; *Kalimanzira* Appeal Judgement, paras 74, 86; SCSL: RUF Trial Judgement, paras 276-278; AFRC Trial Judgement, para. 775; CDF Appeal Judgement, para. 71; *Taylor* Trial Transcript 98T, p. 24200, l.13; see also Werle’s article, p. 968.

⁶⁹ See ICTY: Annex I at p. 987 of *Stanišić* Response Brief, which contains an overview of all the constitutive elements of aiding and abetting across the world.

⁷⁰ *Orić* Trial Judgement, para. 284.

⁷¹ See the discussion of the ICTY case law as well as domestic case law in *Šainović* Appeal Judgement, paras 1618-1651.

strictly. In such circumstances, in order to enter a conviction for aiding and abetting, evidence establishing a direct link between the aid provided by an accused individual and the relevant crimes committed by principal perpetrators is necessary.⁷²

49. Further, the accomplice's conduct must be made for the purpose of facilitating the specific crime charged. In the present case, for a finding of guilt, the Trial Chamber must be satisfied beyond any reasonable doubt that Mr. Arido intended to specifically assist each of the specific offences charged under Article 70.

b. Subjective elements

50. Article 25 (3) (c) requires that the contribution of the aider and abettor must be carried out “for the purpose of facilitating the commission of [the] crime”. Under Article 25 (3) (c) of the Statute “intent is always required”.⁷³ Unlike the jurisprudence of the *ad hoc* tribunals, article 25 (3) (c) of the Statute requires that the person act with the purpose to facilitate the crime; knowledge is not enough for responsibility under this article.⁷⁴

51. The expression “for the purpose of” also implies that the accomplice must share the intent of the main perpetrator, and intend the main elements of the offence to occur. Regarding shared intent, albeit in a different context, the ICTY Appeals Chamber has held that when a Chamber is confronted with the task of determining whether it can infer from the acts of an accused that he or she shared the intent to commit a crime, special attention must be paid to whether these acts are ambiguous, allowing for several reasonable inferences.⁷⁵ For offences under Article 70 (1) (a), it must be established that the accomplice knew that the individual is going to testify before the Court under oath and that he intended that the witness provide false evidence.⁷⁶ For Article 70 (1) (b), the accomplice must know that the evidence is false or forged and that he intended it to be presented in Court by a party.⁷⁷ Finally, for Article

⁷² *Perišić* Appeal Judgment, para. 44.

⁷³ ICC-01/04-01/10-465-Red, para. 289; see also ICC-01/04-01/06-803-tEN, para. 337.

⁷⁴ ICC-01/04-01/10-465-Red, para. 274.

⁷⁵ *Vasiljević* Appeal Judgment, para. 131.

⁷⁶ See the wording of the offence of false testimony in the *ad hoc* tribunals, in ICTR: Rule 91 IRPE; ICTY: Rule 91 RPE; MICT: Rule 108 RPE; SCSL: Rule 91 RPE; STL: Rule 152 RPE.

⁷⁷ See the wording of the offence of false testimony in the *ad hoc* tribunals: The rules applicable to perjury in the *ad hoc* tribunals also make an offence of false testimony when “a person who knowingly and willingly makes a false statement in a written statement taken, which the person **knows or has reason to know may be used as evidence in proceedings before the Tribunal.**” ICTR: Rule 91 RPE; ICTY: Rule 91RPE; MICT: Rule 108 RPE; SCSL: Rule 91 RPE; STL: Rule 152 RPE (emphasis added).

70 (1) (c), it must be established that the Accused knew the quality of the individual as a witness, knew that he/she was being corruptly influenced, and that he shared the intent of the main perpetrator to corruptly influence the witness.

52. Finally, in cases where specific intent is required for the main offence, the aider and abettor must know of the principal perpetrator's specific intent.⁷⁸ This is the case for all of Article 70 offences, which require the specific intent to interfere with the administration of justice.

c. Constitutive elements

53. In sum, the constitutive elements of Article 25 (3) (c) are:

- i. The accused did an act which assisted, encouraged or morally supported the offence;
- ii. The principal perpetrator fulfilled, or attempted to fulfil, the material and mental elements of an Article 70 offence;
- iii. The act of the accused was committed for the purpose of facilitating the commission of the crime by the principal perpetrator;
- iv. The conduct of the accused had a substantial effect on the occurrence of the offence;
- v. The Accused intended to interfere with the administration of justice.⁷⁹

⁷⁸ ICTY: *Blagojević & Jokić* Appeal Judgement, para. 127; *Simić et al.* Appeal Judgement, para. 86; *Krnjelac* Appeal Judgement, para. 52; *Krstić* Appeal Judgement, paras 140; *Blagojević* Appeal Judgement, para. 127; ICTR: *Ntakirutimana* Appeal Judgement, paras 500-501; *Kalimanzira* Appeal Judgement, para. 86; *Ntawukulilyayo* Appeal Judgement, para. 222.

⁷⁹ Elements of Accessorial Modes of Liability (2012). Excerpts of the text are included in Annex B. The Arido Defence would be happy to convey further excerpts, or the full text, should the Prosecution or Trial Chamber find it of assistance.

III. CONCLUSION

54. The Arido Defence respectfully request the Trial Chamber to find that the constitutive elements of the offences and applicable modes of liability are as listed in paragraphs 20, 27, 40, 44, and 53 of the present submissions.

Respectfully submitted,

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 1st Day of June 2015

In The Hague, The Netherlands.