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TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

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 Confidential Annexes A and B

**Public Redacted Version of
‘Corrigendum of “Narcisse Arido’s Closing Submissions”, filed 24 May 2016’
(ICC-01/05-01/13-1904-Conf-Corr), filed 15 June 2016**

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I. INTRODUCTION

1. The Arido Defence (hereinafter, “Defence”) will highlight the core arguments of its case, within the parameters of the Confirmation of Charges Decision¹ (hereinafter, “CoC”), and the evidence presented, as prescribed by the “Further Directions on the Conduct of the Proceedings in 2016,”² 9 December 2015. The present filing is marked confidential pursuant to Regulation 23*bis* of the Regulations of the Court (‘RoC’) due to the extensive references to confidential information and filings.

2. The Defence re-iterates that it is still baffled as to why this case was brought by the Prosecution against its client, Mr. Narcisse Arido. There was no link between the anonymous tip which “sparked” an investigation which resulted in this Prosecution,³ and Mr. Arido.

3. To the contrary, it is clear that since 2007, the Prosecution has been pursuing, and is continuing to pursue, multiple investigations related to the Central African Republic. It is also true that the Prosecution initiated collateral investigations related to CAR based on this case.⁴

4. The Defence submits that this Article 70 case is as much about the investigations which led to the case, and including the anonymous tip referred to as the “spark” by the Prosecution in its Opening Statement on 29 September 2015, as it is about the evidence presented by the Prosecution in respect to the charges and modes of liability confirmed in the Confirmation of Charges Decision.

5. But for the Prosecution’s investigations into the Central African Republic (‘CAR’), and its strategy to use the *Bemba* Main Case as an anchor for these, there would be no case against Mr. Arido.

6. The Defence notes that Mr. Arido is the first, and only CAR citizen to date to be prosecuted in this Court.

7. Yet, none of this answers the question: why is Mr. Arido on trial?

¹ ICC-01/05-01/13-749.

² ICC-01/05-01/13-1518.

³ ICC-01/05-01/13-T-39-CONF-ENG ET, p. 34, lines 20-21; ICC-01/05-01/13-T-10-CONF-ENG ET, p. 24, lines 18-22.

⁴ See Prosecution’s Disclosure of 4 March 2016 (Rule 77 Package 43).

8. Mr. Arido remains the “accidental” defendant.

A. Confirmation of Charges Decision⁵

9. On 11 November 2014, the Pre-Trial Chamber confirmed the charges against Mr. Arido in its CoC, pursuant to Article 61(7)(a) and (b), based on the legal standard of sufficiency, finding that there was “sufficient evidence to establish substantial grounds to believe that the person committed the crime charged.”

10. The Trial Chamber confirmed its factual findings in respect to Mr. Arido in paragraphs 86-95.

11. The Trial Chamber, based on the available evidence, confirmed charges and modes of liability against Mr. Arido in paragraph 96 and in its decision in section (v) on page 53. In section (b)(iii) on page 54, the Trial Chamber declined to confirm certain charges against Mr. Arido.

12. In respect to Mr. Arido, the salient decisions of the CoC are:

- a. The allegations for Article 70 offences are limited to four witnesses – D2, D3, D4 and D6.
- b. The alleged offenses are Article 70(1)(a), (b) and (c) in respect to D2, D3, D4 and D6.⁶
- c. The temporal context of the offenses is limited to one month of February 2012.
- d. The alleged modes of liability are
 - i. for Article 70(1)(a) – Article 25(3)(c): criminal responsibility as an accessory for aiding and abetting, or otherwise assisting in commission of the offence by D2, D3, D4, and D6;

⁵ ICC-01/05-01/13-749 (‘CoC’).

⁶ CoC, para. 96.

- ii. for Article 70(1)(b) – Article 25(3)(c): aiding and abetting, or otherwise assisting in commission of the offence by Mr. Bemba, Mr. Kilolo of introducing the testimony of the witnesses; and
 - iii. for Article 70(1)(c) – Article 25(3)(a): criminal responsibility as a perpetrator, or in the alternative, under Article 25(3)(c), as an accessory for aiding and abetting or otherwise assisting for corruptly influencing witnesses.
- e. The confirmed alleged criminal conduct in support of the offence of corruptly influencing under Article 70(1)(c) includes a) instructing witnesses to provide false testimony, or withholding true information during their testimony, and b) encouraging their testimony with money transfers and possibility of relocation in Europe
 - f. The confirmed alleged criminal conduct in support of the offence of presenting false testimony under Article 70(1)(b) includes a) instructing witnesses on the false information to provide in Court, and b) introducing them to Mr. Kilolo.
 - g. The confirmed alleged criminal conduct in support of giving false information when under an Article 69 obligation to tell the truth pursuant to Article 70(1)(a) includes a) recruiting witnesses D2, D3, D4, and D6, and b) instructing, persuading or otherwise influencing them including by way of money transfers and the possibility of relocation in Europe.
 - h. The CoC declined to confirm co-perpetration (either direct or indirect) or common purpose modes liability.⁷

13. In summary, the CoC concluded that:

Mr Arido's involvement in the overall strategy to defend Mr Bemba in the Main Case was confined to recruiting and corruptly influencing witnesses D-2, D-3, D-4, and D-6, all of whom subsequently falsely testified in the Main Case. The Chamber considers that Mr Arido liaised between the abovementioned witnesses and Mr Kilolo⁸ and exploited the precarious personal situations of these witnesses ("*tu sais, mon frère, en ce moment, nous souffrons trop*")⁹ with a view

⁷ CoC, para. 96; see also Article 25(3)(a) of the Statute.

⁸ CAR-OTP-0080-0043, at 0058.

⁹ CAR-OTP-0078-0184-R01, at 0189, lines 159-160.

to leading them to falsely testify under the illusion that this would result in a better future for them.¹⁰

B. Mr. Arido's Work as a Bemba Defence military expert

1. Introduction

14. In its factual findings in respect to Mr. Arido, the CoC states that in 2012 Mr. Arido was in contact with Mr. Kilolo in respect to providing expertise on military operations in CAR and being an expert witness. During the same year, he received money transfers, from individuals associated with the Bemba team, for a total of approximately USD 7707. The timing was 1 payment in January (#1), 3 payments in February (#2, #3, and #4), 1 payment in April (#5), 1 payment in May (#6), and 1 payment in September (#7) – totalling 7 separate payments.¹¹

15. Based on the timing, both the CoC and Prosecution's theory link the February payments to the Article 70(1)(c) offense of corrupting witnesses. This is an inference based solely on circumstantial evidence, since there was no proof beyond a reasonable doubt adduced that any of the payments were related to corrupting witnesses.

16. For the Trial Chamber to make an inference on an element of the offence charged, that inference must be the only reasonable conclusion from the evidence.¹² In respect to the payments confirmed, it is reasonable to infer that these were payments by the Bemba team to Mr. Arido in connection with his work as a military expert, including for his expert report. Moreover, as indicated below, this position is supported by e-mails exchanged between Mr. Arido and Mr. Kilolo.

2. Mr. Arido's background

¹⁰ CAR-OTP-0080-0021, at 0040, lines 675-677: "Si jamais KILOLO vient, voyez comment on veut faire. C'est de votre vie, vous jouez comme vous devez faire, et surtout, pensez a ce que votre avenir depend de ca".

¹¹ CoC, paras 86-87.

¹² ICC-01/05-01/08-3343, para.192, citing to *Prosecutor v. Vasiljević*, IT-98-32-A, Appeal Judgment, 25 February 2004, para. 120, available at: <http://www.icty.org/x/cases/vasiljevic/acjug/en/val-aj040225e.pdf>; See also ICC-02-05-01/09-73, para. 33; SCSL: *Prosecutor v. Charles Taylor*, SCSL-03-01-A, Judgment, para. 182, available at: <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf>.

17. Mr. Arido was a former CAR soldier and military expert.¹³ He obtained a diploma from [REDACTED].¹⁴ He left CAR in 2001 because of the political situation, and sought refuge in neighbouring [REDACTED]. He currently resides in [REDACTED], France.

18. To support himself and his family while in Cameroon, Mr. Arido was a trader and had a business, [REDACTED].¹⁵ As described by witness CAR-D24-P-0001 ('D24-1'), the business was a [REDACTED] business. The headquarters was in [REDACTED], but the work often took Mr. Arido to [REDACTED] to deal with the transport of goods by truck from [REDACTED] to [REDACTED].¹⁶

19. In mid-February 2012, Mr. Arido travelled to Gabon (from Douala) and on 14 February, returned to [REDACTED].¹⁷ Mr. Arido remained in [REDACTED] for a few days, preparing his goods for delivery.¹⁸

3. *Mr. Arido's mandate and terms of reference*

20. In early 2012, the Bemba Defence team Lead Counsel, Mr. Kilolo had contacted Mr. Arido, and requested his services as a military expert.

21. Mr. Arido's mandate was to prepare a report on military operations between 2002 and 2003 in CAR, and he understood that he would also be asked to testify in his expert capacity as a witness in the case.

22. Mr. Arido prepared the expert report as requested, and submitted the same to Mr. Kilolo on 11 June 2012. The Report was entitled: 'ANALYSE DE LA PLANIFICATION STRATEGIQUE DES OPERATIONS MILITAIRES (Interalliées) DU NOVEMBRE 2002-MARS 2003 EN RÉPUBLIQUE CENTRAFRICAINE'.¹⁹ Mr. Arido also liaised with other

¹³ CAR-OTP-0075-0246, CAR-D24-0004-0015, CAR-D24-0004-0006, CAR-D24-0004-0005, CAR-D24-0004-0001, and CAR-D24-0004-0007.

¹⁴ CAR-OTP-0075-0246.

¹⁵ CAR-D24-0004-0017; *see also* ICC-01/05-01/13-T-46-CONF-ENG ET, p. 10, lines 19-20.

¹⁶ ICC-01/05-01/13-T-46-CONF-ENG ET, p. 10, lines 19-20, and p. 11, lines 13-15.

¹⁷ *Ibid.*, p. 10, lines 2-13.

¹⁸ *Ibid.*, p. 10, lines 22-23.

¹⁹ CAR-OTP-0075-0421-R01, and CAR-OTP-0075-0276.

experts [REDACTED] and [REDACTED] – D53 and D59 in the Main Case respectively – in the case starting around July 2012.²⁰

23. On one occasion while in Douala in February, Mr. Kilolo, similar to his use of another expert in the case, [REDACTED],²¹ requested that Mr. Arido, as a military consultant on the events in CAR in 2001,²² provide his expertise and assist him regarding analysis of interviews Mr. Kilolo had conducted of potential witnesses.²³ Mr. Kilolo, was in Douala to conduct his work of interviewing and screening individuals who could be potential witnesses for the *Bemba case*. He had scheduled his meeting with Mr. Arido on the expert report, during the same time period.

4. *Timeline for the work on the report*

- a. Mr. Arido and Mr. Kilolo met in Douala in or around 20 February 2012.
- b. Mr. Arido e-mailed an outline to Mr. Kilolo on 18 April 2012.²⁴
- c. Mr. Arido submitted the completed report to Mr. Kilolo on 11 June 2012.²⁵

5. *Bemba Defence team payments to Mr. Arido for his expertise*

24. Mr. Arido initially provided an estimate of 2 million FCFA for the expert report,²⁶ but – in the end – was paid 3 million²⁷. Mr. Arido received a total of USD 6028.31 for his expert report, but was not paid in one lump sum; he received instalments over a nine-month period and negotiations over payment continued in this period.

²⁰ CAR-OTP-0074-1065-R02, at 1067, and CAR-OTP-0075-0421-R01.

²¹ ICC-01/05-01/13-T-15-CONF-ENG ET, pp. 19-21: Defence witness P-261 testified that Mr. Kilolo arranged for [REDACTED] to interview him.

²² ICC-01/05-01/13-600-Conf.

²³ CAR-OTP-0074-1065-R01, at 1066, 1070.

²⁴ Mr. Arido sent the outline of his report to Mr. Kilolo on 18 April 2012 (CAR-OTP-0075-0246).

²⁵ On 25 May, Mr. Arido informed Mr. Kilolo about problems in completing the report (CAR-OTP-0075-0276); Afterwards, Mr. Arido submitted the full report to Mr. Kilolo on 11 June 2012 (CAR-OTP-0075-0334); Mr. Kilolo forwarded him the ICC requirements for formatting (CAR-OTP-0084-0813).

²⁶ CAR-OTP-0077-0169, at 0170, and CAR-OTP-0078-0117, at 0118.

²⁷ Calculated based on the exchange rate in 2012.

25. The total amount of USD 6028.31 is consistent with, although in some cases, less than those payments received by other expert witnesses who worked for the *Bemba* Defence team. [REDACTED] was to be paid 6000 Euro,²⁸ [REDACTED] 10,000 Euro,²⁹ and [REDACTED] USD 10,000.³⁰

26. **Payment #1:** the initial instalment, \$100 was received in January, before Mr. Arido even met face-to-face with Mr. Kilolo, and it was likely a minimal ‘down payment’ for the Bemba team to assure Mr. Arido that it was seriously interested in his services and willing to pay for his travel to Douala to discuss the potential report with Mr. Kilolo.

27. **Payments #2, #3, #4:** In February, Mr. Kilolo transferred two small amounts to cover Mr. Arido’s expenses, and one larger amount closer to the date of the meeting, where the mandate and its parameters would be discussed, and, hopefully, finalized. On 2 February 2012, Mr. Kilolo transferred to Mr. Arido an amount of USD 157.77. On 14 February 2012, Mr. Kilolo transferred USD 157.11 to Mr. Arido. On 18 February 2012, Mr. Kilolo paid to Mr. Arido the first instalment of USD 834.32³¹ in advance for the expert report he was to produce.

28. **Payment #5:** On 20 April 2012, after Mr. Arido e-mailed the outline of his expert report to Mr. Kilolo.³² Mr. Kilolo paid Mr. Arido the second instalment for the report, which was USD 450.³³

29. **Payment #6:** On 25 May 2012, a few days before Mr. Arido sent the final version of the report to the Bemba Defence,³⁴ Mr. Babala paid Mr. Arido the final amount due of USD 4774.³⁵ This was the third instalment for the expert report.

30. **Payment #7:** On 22 September, [REDACTED] made the last money transfer to Mr. Arido of USD 1264. This transfer was intended to cover Mr. Arido’s expenses and loss of

²⁸ CAR-D21-0003-0004 and CAR-D21-0003-0006; see also CAR-D21-0003-0193.

²⁹ CAR-D21-0003-0047; CAR-D21-0003-0150; CAR-D21-0003-0186; see also CAR-D21-0003-0189; CAR-D21-0004-0052.

³⁰ CAR-D21-0003-0004 and CAR-D21-0003-0006.

³¹ CAR-OTP-0070-0005, tab (1 Narcisse Arido), row 75; see also Prosecution’s summary of Western Union payments, CAR-OTP-0072-0168, p. 1 (0168), entry N. 4.

³² Mr. Arido sent the outline of his report to Mr. Kilolo on 18 April 2012 (CAR-OTP-0075-0246).

³³ CAR-OTP-0070-0005, tab (1 Narcisse Arido), row 77.

³⁴ Mr. Arido submitted the full report to Mr. Kilolo on 11 June 2012 (CAR-OTP-0075-0334).

³⁵ CAR-OTP-0070-0005, tab (1 Narcisse Arido), row 78.

earnings as a Bemba Defence expert witness.³⁶ The 22nd of September was the day when Mr. Arido was scheduled to travel to The Hague to testify for the Bemba Defence,³⁷ and the money covered his lost earnings for his business, where he and his wife were the sole employees.³⁸

31. From the three February payments (#2, #3, #4), dated 2, 14, and 18 February, for the overall amount of USD 1149.20, it is reasonable to infer that some agreement on the expert report had been reached between Mr. Arido and Mr. Kilolo, and that #1 was money sent – in advance of the February meeting – to cover transportation and accommodation costs for Mr. Arido. For the remaining payments, it is reasonable to infer that each is for a different phase of the expert report and his expert testimony.

Table 1 - Money Transfers to Mr. Arido in the context of his expert report for Bemba Defence

<i>Date</i>	<i>Amount</i>	<i>From - To</i>	<i>Purpose</i>
27 Jan 2012	USD 100	[REDACTED] – Mr. Arido	Money for meeting with Mr. Kilolo in Douala
2 Feb 2012	USD 157.77	Mr. Kilolo – Mr. Arido	Money for meeting with Mr. Kilolo in Douala
14 Feb 2012	USD 157.11	Mr. Kilolo – Mr. Arido	Money for meeting with Mr. Kilolo in Douala
18 Feb 2012	USD 834.32	Mr. Kilolo – Mr. Arido	Money (in advance) for Expert Report
20 April 2012	USD 450	Mr. Kilolo – Mr. Arido	Money for Expert Report
25 May 2012	USD 4744	Mr. Babala – Mr. Arido	Money for Expert Report
22 Sept 2012	USD 1264	[REDACTED] – Mr. Arido	Money for Lost Earnings and Expenses
In total	USD 7707.20		

6. *Mr. Arido as an expert witness*

32. Over the early summer of 2012, the Bemba team requested that the ICC make arrangements for Mr. Arido to go to the Hague to testify at the end of September.

³⁶ *Ibid.*, row 80.

³⁷ Mr. Arido was scheduled to travel to The Hague on 22 September 2012 and leave on 1 October 2012, or a total stay of 9 days. See CAR-OTP-0075-1496-R01; *see also* CAR-OTP-0075-1476-R01 (12 September 2012, Mr. Arido sends his travel document to the VWU representative, attaching CAR-OTP-0075-1477); CAR-OTP-0075-1481-R01 (12 September 2012, Email from VWU representative acknowledging receipt of the travel document).

³⁸ ICC-01/05-01/13-T-46-CONF-ENG ET, p. 10, lines 19-20, and p. 11, lines 13-15.

33. Mr. Arido understood that his work relationship with the Bemba team was confidential, as was his status as a witness for the case.

34. However, on 22 July 2012, two months before he was scheduled to testify, he was approached by [REDACTED] in Cameroon about his upcoming trip to the Hague. [REDACTED] had no proper identification as [REDACTED], and Mr. Arido feared for his safety.³⁹ He reported the incident to [REDACTED] of Cameroon, and [REDACTED] was arrested.⁴⁰

35. Following the 22 July [REDACTED], there were other threats to Mr. Arido [REDACTED].⁴¹

36. From this timing of the threats in relation to his impending trip, Mr. Arido concluded that the confidential information about his potential testimony was leaked, and his security was breached by the ICC.

37. Mr. Arido immediately contacted the ICC to apprise them of the security situation,⁴² but received – including up to this date in 2016 – no response.

38. Still intending to fulfil his commitment to testify, he also continued to evaluate the situation. Mr. Arido discussed his situation with UNHCR and the DST, which reacted immediately based on the dangers to him that it assessed. The DST purchased a ticket to France for Mr. Arido, so that when he left Cameroon, he would be able to go to a place of safety and seek asylum.

39. Mr. Arido, who had been given a visa through the ICC for his testimony, fearing for his safety, travelled to France on 26 September 2012 and applied for asylum.⁴³

40. On 23 November 2013, he was arrested in this case.

³⁹ See ICC-01/05-01/13-2261-Conf-Exp-Red3.

⁴⁰ See “Violation’s of Mr. Arido and His Family’s Civil, Political and Human Rights” section, *infra*.

⁴¹ ICC-01/05-01/13-T-46-CONF-ENG, p. 17, lines 9-13.

⁴² See D21-0002-0059; D-21-0002-0062; D21-0002-0063; CAR-OTP-0075-1454-R01; see also ICC-01/05-01/13-2261-Conf-Exp-Red3, para. 19.

⁴³ CAR-D24-0004-0013.

II. FAIR TRIAL VIOLATIONS

A. Introduction

1. *The Confirmation of Charges Decision as an indictment*

41. In its Decision on the Submission of Auxiliary Documents, the Trial Chamber VII held that the CoC constitutes “the authoritative document informing the accused of the charges ‘as confirmed’”⁴⁴ and the Trial Chamber “is bound by the actual description of the charges” as confirmed by the Pre-Trial Chamber in the CoC.⁴⁵

42. Judge Eboe-Osuji has argued that the Prosecution “is the charging authority and remains so for all purposes,”⁴⁶ and that the exercise of a Chamber’s discretion to order an updated Document Containing the Charges (‘updated DCC’) is both consistent with the provisions of the Rome Statute and the fair trial right to notice to the Accused, which has been affirmed throughout the international justice court and tribunal systems.

43. Here, after the CoC, the Arido Defence requested an updated document in 13 April 2015.⁴⁷ But neither the Pre-Trial nor Trial Chamber ordered an updated DCC from the Prosecution, although the Prosecution had no objection to providing one.⁴⁸

44. The Defence has no choice but to treat the CoC as if it were an indictment, which provides notice of the offenses and modes of liability charged against the defendant. Therefore, without waiving any legal objections, the Arido Defence requests the Trial Chamber to be bound by the “four corners” of the CoC, as if it were an indictment.

⁴⁴ ICC-01/05-01/13-992, para. 11.

⁴⁵ *Ibid.*, para. 15.

⁴⁶ Partly Dissenting Opinion of Judge Eboe-Osuji, ICC-01/05-01/13-992-Anx-Corr, para. 69.

⁴⁷ ICC-01/05-01/13-901.

⁴⁸ ICC-01/05-01/13-831, para. 1.

B. The Trial Chamber's failure to order an updated DCC violated Mr. Arido's fair trial right to notice, pursuant to Article 67(1)(a)

45. The Defence submits that the failure to order the Prosecution to produce an updated DCC, based on the CoC, violates the defendant's right to notice of the offences and modes of liability charged, pursuant to the minimum guarantees under Article 67(1)(a).⁴⁹

46. It is a fundamental, common principle within the international courts and tribunals that an Accused has the "right to be informed promptly and in detail of the nature, cause and content of the charge[...]".

47. This provision, in the Statutes for the ICC, ICTY, ICTR, and other judicial entities, mirrors the language of the ICCPR, and other international instruments.

48. Appellate jurisprudence from the *ad hoc* tribunals affirms that the indictment suffers from a material defect if it does not plead the Prosecution's case with sufficient detail.⁵⁰ The legal standard for sufficiency is whether an Accused is informed clearly of the charges, so that he can prepare his defence. An indictment is defective if it fails to plead required material facts.⁵¹

⁴⁹ See Arido Submissions cited in fn. 6, at ICC-01/05-01/13-992.

⁵⁰ ICTY: *Prosecutor v. Kupreškić*, IT-95-16-A, Appeal Judgment, 23 October 2001, paras 114, 124, 246 available at: <http://www.icty.org/x/cases/kupreskic/acjug/en/kup-aj011023e.pdf>; see also Rule 47 (c), ICTR Rules of Procedure and Evidence and ICTY Statute, Article 18(4).

⁵¹ ICTY: *Prosecutor v. Kvočka*, IT-98-30/1-A, Appeal Judgment, 28 February 2005, para. 28, available at: <http://www.icty.org/x/cases/kvočka/acjug/en/kvo-aj050228e.pdf>; *Prosecutor v. Kupreškić*, IT-95-16-A, Appeal Judgment, 23 October 2001, paras 88, 114 available at: <http://www.icty.org/x/cases/kupreskic/acjug/en/kup-aj011023e.pdf>; ICTR: *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T, Judgement and Sentence, Separate Opinion of Judge Dolenc, 25 February 2004, para. 21: "In practical terms, the material facts of the crime answer the following seven questions, which guide any criminal investigation, prosecution and judgment: Who (is the alleged perpetrator); Where; When; What (was committed or omitted); Whom to (victim); What mean; and Why (motive). Answers to these seven questions are necessary in order to individualize the Accused, the alleged crime, the mode of the Accused's participation, and the form of his criminal responsibility", available at: https://www1.umn.edu/humanrts/instree/ICTR/IMANISHIMWE_ICTR-97-36/IMANISHIMWE_ICTR-99-46-T.pdf.

1. *The charge of accessory for aiding and abetting in the CoC as a mode of liability is unclear and fails to provide notice*

49. In the CoC, Mr. Arido is charged as an

- a. accessory for aiding or abetting under Article 25(3)(c) for Article 70 (1) (a);
- b. as an aider and abettor for Article 70 (1) (b); and
- c. as a perpetrator under Article 25(3)(a), or, in the alternative, as an accessory under Article 25(3)(c) for Article 70 (1) (c)

50. Article 25(3)(c) require that aiding, abetting or otherwise assisting must be for the purpose of facilitating the commission of a crime or attempt.

51. The elements of aiding and abetting, while always contentious and litigated, have been addressed by international courts and tribunals. For example, under the jurisprudence of the *ad hoc* tribunals, the *mens rea* for aiding and abetting requires knowledge that acts performed by the aider and abettor assist in the commission of the crime by the principal. For specific intent crimes, this means that aider and abettor must know of principal's specific intent, but does not need to possess the specific intent himself; and, the aider and abettor must also be aware of essential elements of the principal's crime, including *mens rea*.

52. In respect to the notice/fair trial issue, this means that there must be factual allegations in support of the element of knowledge, on the part of the aider and abettor and there must be a factual allegation of a nexus between the acts and the crime charged.⁵²

53. In this case, the CoC fails to provide either of these factual allegations to support the offence of aiding and abetting.

54. In fact, the legal term "accessory" has been applied in ICC cases where there are modes of liability charged involving a plurality of persons, such as in the *Lubanga* and *Katanga* cases and the mode of liability of 25(3)(d), and where common purpose is also found.⁵³

⁵² ICTY: *Prosecutor v. Perišić*, IT-04-81-A, Judgement, 28 February 2013, para. 44: "the Appeals Chamber holds that to order 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", available at: http://www.icty.org/x/cases/perisic/acjug/en/130228_judgement.pdf.

⁵³ ICC-01/04-01/07-3436, para. 1635.

55. In case at bar, common purpose mode of liability was clearly rejected by the CoC.⁵⁴ Thus, to charge accessory liability for aiding and abetting in this case is a legal oxymoron.

56. Accessory liability for aiding and abetting is vague and undefined, and simply adds confusion as to what the charges are against which Mr. Arido must defend himself. This violates Mr. Arido's fair trial right to notice, and prejudiced his right to present a defence.

57. An updated DCC, perhaps, could have cured this defect in the CoC. But, at this point, the only remedy would be dismissal of the accessory for aiding and abetting charge.

2. *The Confirmation Decision confirmed a mode of liability not found in the DCC*

58. The Pre-Trial Chamber confirmed direct perpetration as one of the modes of liability charged for the Article 70(1)(c) offense.

59. While the Pre-Trial Chamber held that that "perpetration is subsumed under the mode of liability of co-perpetration,"⁵⁵ this ruling – in the absence of an order for an amended or updated DCC – simply muddled the waters of notice.

60. Since the Prosecution never charged this mode of liability, based in Article 25(3)(a),⁵⁶ none of its submissions provided notice of direct perpetration. Moreover, this mode of liability was not contested by the Defence since it was not put forward by the Prosecution.

61. Hence, the Defence was not provided with notice of the allegations supporting this mode of liability.

62. However, neither the CoC nor the Prosecution's DCC provided the specific factual allegations in support of this mode of liability.

63. The DCC, based on a theory of co-perpetration, articulated factual allegations it believed supported this form of liability. The mode of liability of Article 25(3)(a) is listed as "direct and or indirect co-perpetrator" in the chart on the counts at the end of the DCC in respect to Mr. Arido and the four potential witnesses, but nowhere in the document are any factual allegations in support of direct perpetration discussed.

⁵⁴ CoC, paras 51-52.

⁵⁵ CoC, para. 33.

⁵⁶ See the Document Containing the Charges, ICC-01/05-01/13-526-CONF-AnxB ('DCC'), pp. 76-81.

64. The Pre-Trial Chamber rejected the indirect co-perpetrator mode and replaced it with direct perpetration as a charged mode of liability.

65. The Trial Chamber never requested an updated DCC, nor did it request an amended pre-trial brief, to adequately provide notice of the confirmed direct perpetration mode of liability.

66. The issue is whether the Pre-Trial Chamber, *sua sponte*, could re-characterize the mode of liability charged absent an amended, or updated DCC, and/or whether this change or substitution in the mode of liability in the CoC exceeded its authority.

67. The Defence concedes that argumentation on this issue would exceed the 100 page limit for these submissions, but submits that it needs to be considered by the Trial Chamber in the context of the notice and fair trial arguments. Even if this Trial Chamber is of the view that the Pre-Trial Chamber did not act “*ultra vires*” in regard to changing the mode of liability charged, the issue remains: was adequate notice of the factual allegations underlying this mode of liability provided to Mr. Arido?

68. The Defence submits that answer is “no.” Mr. Arido is left to “guess” as to what the specific factual allegations to support perpetration would be, since there is no elaboration in the DCC, the Prosecution’s submissions on the DCC, or CoC.

69. Hence, the lack of an updated DCC violated Mr. Arido’s fair trial rights to notice.

3. *There are no allegations in support of the mens rea required for direct perpetration in the Confirmation Decision*

70. The Rome Statute defines the elements for *mens rea* for a crime in Article 30 as intent and knowledge, and these requirements are applied to Article 70 offences, pursuant to Rule 163.

71. Mr. Arido is charged with offenses, under Article 70, against the administration of justice. Each sub-provision of Article 70 – whether (a), (b) or (c) – requires the legal element of intent to commit the offense.

72. Mr. Arido was not informed of the allegations in support the elements of the *mens rea* charged. Although the CoC contains a section on factual findings, it is not clear which factual findings support which elements of the forms of liability charged.

73. Therefore, there was no notice of the modes of liability charged, including direct perpetration.

C. The acceptance of evidence through Bar-Table Motions violates Mr. Arido's right to examine witnesses pursuant to Article 67(1)(e)

74. At the commencement of this trial, the Chamber stated that it would uphold the principle of orality which it described as a precondition of a fair trial and a guarantee that the trial is not a succession of written submissions and decisions.⁵⁷

75. The Arido Defence reiterates, as expressed in its Opening Statement, its understanding of this decision to mean that this case will not be decided on the basis of documentary evidence submitted through bar tables motions by the Prosecution in the place of oral evidence of witnesses who although available and compellable were not called by the Prosecution to testify and be cross-examined before the Trial Chamber.⁵⁸

76. The right to cross-examination is a fair trial right of the Accused. The ICTY Appeals Chamber recognized that the principle of cross-examination had to be assessed through the prism of fairness to the Accused. In its judgment in *Haraqija & Morina*, it stated

The right to cross-examination is not absolute. The Appeals Chamber has held that 'as a matter of principle nothing bars the admission of evidence that is not tested or might not be tested through cross-examination.' Nevertheless, the Appeals Chamber has recognized that '[u]nacceptable infringements of the rights of the defence [...] occur when a conviction is based solely, or in a decisive manner, on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial.' Therefore, '[i]t would run counter to the principles of fairness [...] to allow a conviction based on evidence of this kind without sufficient corroboration.'⁵⁹

77. In sum, the Defence submits that the use of the vehicle of the Motions violated Mr. Arido's right under Article 67(1)(e), since evidence was admitted which deprived the Defence from cross-examining the author of the evidence, and its contents.

⁵⁷ ICC-01/05-01/13-T-29-CONF-ENG ET, p. 7; ICC-01/05-01/13-T-10-CONF-ENG ET, p. 7, lines 21-22.

⁵⁸ *Ibid.*, p. 4, lines 1-6.

⁵⁹ ICTY: *Prosecutor v. Haraqija and Morina*, IT-04-84-R77.4-A, Judgement, 23 July 2009, para. 61, available at: http://www.icty.org/x/cases/contempt_haraqija_morina/acjug/en/090723_judgement.pdf.

D. The Prosecution's Fair Trial Violations

1. *The Prosecution violated Mr. Arido's fair trial right to notice, as per Article 67(1)(a)*

a) *The Prosecution pursued two different theories of the case*

78. As a general matter, the Prosecution is expected to know its case before it goes to trial and cannot expect to mould the case against the Accused in the course of the trial depending on how the evidence unfolds.⁶⁰

79. Here, the Prosecution presented two different theories:

a. Mr. Arido was acting as the agent of [REDACTED]; and

b. Mr. Arido was acting as the agent of Mr. Kilolo.

80. In respect to (a), [REDACTED] is placed as being in charge of the recruitment, coaching and providing inducements to the witnesses with Mr. Arido acting merely as his agent.⁶¹ The Prosecution documents refer to Mr. Arido, acting on instructions from [REDACTED]. References to [REDACTED] are found in the initial Application for Warrant of Arrest.⁶² Examples of this are that Mr. Arido acting on [REDACTED] instructions, contacted D-3 to recruit him to testify in the case, in or around January 2012;⁶³ that [REDACTED] instructed Arido to identify false witnesses;⁶⁴ and that Mr. Arido illicitly coaching witnesses on [REDACTED] instructions.⁶⁵

⁶⁰ ICTR: *Prosecutor v. Ntakirutimana*, No. ICTR-96-10-A, Judgement (13 December 2004), at para. 26, available at: http://www.haguejusticeportal.net/Docs/ICTR/Ntakirutimana_Appeals-judgement_13-12-2004.pdf; *Prosecutor v. Niyitegeka*, No. ICTR-96-14-A, Judgement (9 July 2004), at para. 194, available at: <https://www1.umn.edu/humanrts/instree/ICTR/NIYITEGEKA ICTR-96-14/NIYITEGEKA ICTR-96-14-A.html>; *Prosecutor v. Rwamakuba*, No. ICTR-98-44C-PT, Decision on Defects in the Form of the Indictment (26 May 2005) at para. 19, available at: http://www.worldcourts.com/ict/eng/decisions/2005.05.26_Prosecutor_v_Rwamakuba_1.pdf; *Prosecutor v. Muhimana*, No. ICTR-95-1B-T, Judgement (28 April 2005), at para. 451, available at: <https://www1.umn.edu/humanrts/instree/ICTR/MUHIMANA ICTR-95-1B/MUHIMANA ICTR-95-1B-T.html>; *Prosecutor v. Muhimana*, No. ICTR-95-1B-T, Judgement (28 April 2005) at para.451, available at <https://www1.umn.edu/humanrts/instree/ICTR/MUHIMANA ICTR-95-1B/MUHIMANA ICTR-95-1B-T.html>.

⁶¹ See "The Mystery of [REDACTED]" section, *infra*.

⁶² ICC-01/05-01/13-19, para.98 ('Request for Warrant of Arrest'). [REDACTED] is [REDACTED], who is [REDACTED] who paid bribes to other witnesses in exchange for false testimony.

⁶³ DCC, para. 66.

⁶⁴ *Ibid.*, para. 28.

⁶⁵ *Ibid.*, para. 117.

81. In respect to (b), Mr. Arido was acting as an agent of Mr. Kilolo. Mr. Kilolo was the first person with whom Mr. Arido put D2 and D3 in contact. According to D2, when Mr. Arido met him, he called Mr. Kilolo on the spot to introduce him, while with them in [REDACTED].⁶⁶ According to D3, Mr. Kilolo was the first person with whom Arido had put him in touch.⁶⁷

b) *The chameleon Prosecution theory regarding monies paid to Mr. Arido*

82. The Prosecution theory against Mr. Arido in this case has changed between its initial Application for Warrant of Arrest, 19 November 2013⁶⁸ and its case presented at trial.

83. In its Application, the Prosecution claimed that Mr. Arido provided the false documents that were subsequently presented to the Chamber by the Defence⁶⁹ and that payments he received were for doing this.⁷⁰

84. These payments to Mr. Arido were received from individuals close to the Bemba team – Mr. Kilolo, Mr. Babala and [REDACTED] – totalling USD 8451.61, and from [REDACTED] – identified [REDACTED].⁷¹

85. Fast forward to the CoC, based on the Prosecution’s DCC, which confirm monies received by Arido in 2012⁷² as totalling USD 7707 from Kilolo, Babala, and [REDACTED].

86. There has been a change of USD 744 in the total amount, but the theory of the purpose of the monies has been changed by the Prosecution to adjust to the CoC, from payment for false documents to corrupting witnesses.

87. Significantly, Mr. Arido is not charged with bribing witnesses in the Warrant of Arrest; it is only added later. [REDACTED] is [REDACTED], who from the very beginning of the

⁶⁶ ICC-01/05-01/13-T-18-CONF-ENG ET, p. 68, lines 15-17.

⁶⁷ ICC-01/05-01/13-T-22-CONF-ENG ET, p. 38, lines 2-3.

⁶⁸ In the Warrant for Arrest, the Single Judge was satisfied that reasonable grounds existed to believe that Mr. Arido had provided false or forged evidence, and had transferred sums of money to Defence witnesses, see para. 91. The Warrant for Arrest was signed on 20 November 2013, and on 22 November, the Prosecution sent a “demande d’entraide judiciaire” to the French Ambassador in the Hague for execution of the warrant, citing Article 70(1)(c) as its basis. Arido was arrested in France on 23 November 2013.

⁶⁹ Request for Warrant of Arrest, para. 90.

⁷⁰ *Ibid.*, para. 99.

⁷¹ *Ibid.*, para. 98.

⁷² CoC, para.87, footnote 122.

case was alleged to have bribed witnesses, and later, while included in the Prosecution Pre-Trial Brief ('PTB'), was not named in the DCC because he has never been charged.

88. In sum, since the CoC declined to confirm the allegations of false documents, the Prosecution "adjusted" its theory and is now attributing these payments to the offence of corrupting witnesses, under 70(1) (c), and alleging that Arido committed this offence.

89. The Prosecution's facile "accommodation" certainly raises questions about the integrity of its initial investigations in this case, as well as whether it satisfied its notice obligations.

c) *The different Prosecution theories regarding Mr. Arido's flight to France*

90. In its Request for an Arrest Warrant, the Prosecution links Mr. Arido's failure to board the plane to the Hague to testify at the end of September as conduct in response to the Prosecution and LRV disputing the authenticity of the documents he gave the Defence.⁷³

91. With the false documents charge removed, the Prosecution has reformulated its theory that Mr. Arido's flight is evidence of a) guilt for the offence, and b) wanting to pursue his own personal agenda for his career and education.⁷⁴

2. Conclusion

92. In sum, the Prosecution violated Mr. Arido's right to notice by the changing, multiple theories discussed *supra*.

93. But, some things have not changed: the Prosecution has never given up its original theory of co-perpetration and a common plan. Between the DCC and the PTB, the CoC intervened. As a result, the language of the Prosecution's Theory changed slightly: the Common Plan was replaced in the PTB with the 'Overall Strategy', but was defined in the same way.⁷⁵ This, no doubt, was in response to the CoC rejection of the idea of a common purpose liability.

⁷³ Request for Warrant of Arrest, para. 90.

⁷⁴ ICC-01/05-01/13-T-47-CONF-ENG ET, p. 14, lines 24-25 to p. 15, lines 1-2.

⁷⁵ Pre-Trial Brief, para. 1

94. But the Prosecution has attempted to resuscitate its common purpose liability (underlying its plan theory), despite this having been rejected by the Trial Chamber.⁷⁶

E. The Prosecution's Violations in Respect to Investigations (Article 54)

1. The Prosecution's investigations violated its obligations under Article 54

95. Under Article 54(a) and (b) of Rome Statute, the Prosecution has the duty to investigate incriminating and exonerating circumstances equally, and to ensure that all measures are taken to conduct effective investigations of crimes within the jurisdiction of the Court.

96. In the case at bar, the Prosecution failed to fulfil its duties by (a) conducting a one-sided investigation targeting Mr. Arido and his family members, who were not parties the case; and (b) by refusing to investigate key targets and leads which, if properly investigated, would have significantly undermined its case against Mr. Arido.

2. The Prosecution's interviews of its own witnesses were incomplete and biased and not aimed at getting to the truth

97. The Prosecution did not investigate the military background or supposed civilian background of witnesses P-245 (D2) and P-260 (D3). There were no investigations made in CAR, and the Prosecution ignored references in some e-mails between D2 and Mr. Arido, which established the military experience of the Prosecution witness. For example, there was no investigation conducted to verify D2's military experience, as evidenced by the celebratory email sent by D2 to Mr. Arido dated 24 March 2016⁷⁷, where he wrote, "[REDACTED]". The Prosecution did not conduct investigations to verify the assertions made by D2 that he was [REDACTED], some 600 kilometres from [REDACTED], [REDACTED]. Further the Prosecution failed to conduct investigations in respect to [REDACTED]. This information was material to this case, yet the Prosecution neglected it.

98. The Prosecution's interviews of D3 and D2 were biased and ignored investigating the background, acts and conduct of D2 and D3. The Prosecution interviews were skewed to elicit evidence against Mr. Arido, rather than to search for the truth. The Prosecution investigators

⁷⁶ ICC-01/05-01/13-922, ICC-01/05-01/13-1250, ICC-01/05-01/13-1538, and ICC-01/05-01/13-1553.

⁷⁷ CAR-OTP-0075-0786.

asked leading questions aimed at securing predetermined answers incriminating Mr. Arido.⁷⁸
For example:

Q: [REDACTED]..?⁷⁹

Q: [REDACTED]..?⁸⁰

3. [REDACTED] ([REDACTED])

99. The Prosecution never investigated the role played by [REDACTED] in this case, even though the Prosecution's own evidence placed him at the centre of the alleged events and conduct for which Mr. Arido has been wrongly charged.⁸¹ Although the Defence bears no burden of proof, in order to assist the Trial Chamber in its duty to do justice, it made efforts to call [REDACTED] as a witness, in order to establish the innocence of Mr. Arido. Similarly, the Defence originally planned to call D4 as a witness.

100. Both [REDACTED] and D4 agreed to speak with the Prosecution, which is their right.

101. However, the Prosecution turned this willingness to talk with them into investigative interviews of [REDACTED] and D4 as suspects. Wielding their investigative powers, and holding criminal prosecutions over the heads of [REDACTED] and D4, the Prosecution objectively intimidated these witnesses, to abandon their intention to testify before the Court. This tactic obstructed the Defence, and made it impossible for them to be called as witnesses. This violated Mr. Arido's right to present a defence, pursuant to Article 67(1)(e).

102. In its Application to withdraw these witnesses, the Defence expressed that it had serious concerns with respect to fundamental issues of fair trial and process, especially in respect of the manner in which the investigations have been conducted. The Defence provided four main reasons for dropping its witnesses: (1) the Defence could not approach these witnesses to prepare for Defence presentation while the Prosecution investigation persisted; (2) the Prosecution had impermissibly expanded the scope of this case, by its request for information [REDACTED]; (3) the Prosecution's manner of investigation had placed undue pressure on

⁷⁸ CAR-OTP-0080-0043 at 0051.

⁷⁹ *Ibid.*, lines 261-262.

⁸⁰ *Ibid.*, lines 264-268.

⁸¹ See, for example, [REDACTED], citing CAR-OTP-0078-0184 at 0189; CAR-OTP-0078-0206 at 0210; CAR-OTP-0078-0218 at 0226, 0229, and 0233-0235; CAR-OTP-0075-0537; and CAR-OTP-0075-0848.

these witnesses; and (4) the Prosecution's disclosure unveiled new information which would require further investigation by the Arido Defence.⁸²

4. *Prosecutorial misconduct*

103. The Prosecution has the duty of objective truth-seeking and effective investigation and prosecution.⁸³ But, unfortunately, the Prosecution's investigative methods in this case rise to the level of prosecutorial misconduct.

104. The Defence submits that the Prosecution's investigations were conducted in violation of Regulation 39(1) of the Regulations of the Office of the Prosecutor⁸⁴ because the environment – in the police office – where the questioning of D2 and D3 was conducted, was not safe and agreeable for witnesses [REDACTED].

105. The evidence in the court records shows that D3 and D2 were called to a police office without giving them prior notice that they were going to meet with the Prosecution investigators. Once they arrived at the police station, they were informed that Mr. Arido was incarcerated, suspected of offences under Article 70 in the Bemba case; and, that they, being witnesses of Bemba, were also subjects of investigations.⁸⁵ It is obvious that, witness D2 due to [REDACTED] was psychologically influenced by the mere fact that he was summoned to the police office.

106. The Defence submits that the possibility of these witnesses finding themselves in the same predicament of Mr. Arido likely weighed significantly on their minds, and they proceeded to incriminate Mr. Arido. In exchange, they were offered immunity by the Prosecution. But this situation was coercive: D2 and D3 did not have a "choice," but had to say what they thought the Prosecution wanted to hear, to ensure the immunity part of the deal.

⁸² ICC-01/05-01/13-1705-Conf, paras 16-19.

⁸³ Code of Conduct for the Office of the Prosecutor, sections 1 and 2, p. 14.

⁸⁴ ICC-BD/05-01/09.

⁸⁵ For D2 see CAR-OTP-0080-0007 at 0010, lines 104 to 162; for D3 see CAR-OTP-0078-0155-R02 at 0162, lines 239 to 264, and at 0163, lines 276 to 239.

107. Similarly, D4 and D6 declared in their statements submitted before Pre-trial Chamber that they resisted attempts by the Prosecution investigators to secure their cooperation through undue influence of [REDACTED].⁸⁶

108. For the foregoing reasons, the Defence concludes that the Prosecution abused its power, for failing to conduct investigations in an appropriate manner.

F. The Prosecution violated its disclosure obligations under Rule 77

109. Through its selective, incomplete, and late disclosure of materials which were material to the preparation of the Defence, the Prosecution violated Mr. Arido's right to present a defence, pursuant to Article 67(1) (e).

110. The Prosecution, from 20 December 2013 until 26 February 2016, delayed the disclosure of crucial Rule 77 materials. Further, it selectively disclosed the materials, in response to multiple requests from the Defence.⁸⁷ This practice continued until after the first day testimony of [REDACTED], who was called by the Prosecution to present his report on Call Data Records ("CDRs"). This unprecedented delay of disclosure was raised and strongly opposed by the Arido Defence on the first day of the trial proceedings.⁸⁸

111. On 20 December 2013, the Defence received a considerable amount of Call Data Records pertaining to the Accused Mr. Arido, Mr. Kilolo, Mr. Babala, Mr. Mangenda and to some of the Bemba Defence witnesses from the Main case.⁸⁹ In particular, the CDRs contained detailed and sensitive information about Mr. Arido's incoming and outgoing calls, for his Cameroonian personal phone number '[REDACTED]'. Mr. Arido's CDRs covered the period from 1 May 2012 to 24 April 2013.⁹⁰

⁸⁶ CAR-D21-0004-0310, at 0325, lines 531-537 and CAR-D21-0004-0354, at 0366, lines 430-432 and at 0370 at l. 576.

⁸⁷ See for example the Arido Defence Letters of May 2015 (ICC-01/05-01/13-1141-Conf-AnxA) and 20 July 2015 (ICC-01/05-01/13-1141-Conf-AnxC), and ICC-01/05-01/13-1156-Conf and ICC-01/05-01/13-1637-Conf.

⁸⁸ ICC-01/05-01/13-T-10-CONF-ENG, p. 12-13.

⁸⁹ The Arido Defence received CDRs of Bemba Defence Witnesses, such as [REDACTED] (D-7), [REDACTED] (D-52), and [REDACTED] or [REDACTED] (D-57).

⁹⁰ CAR-OTP-0073-0190, and CAR-OTP-0073-0269.

112. After its review of these CDR materials, the Defence found several indications in already disclosed materials⁹¹ that the Prosecution's disclosure was selective and incomplete. The Prosecution did not disclose to the Defence a number of requests for assistance ('RFAs'), which were in their possession at that time.

113. The RFA's were material to the preparation of the Defence because they provided information about the investigations concerning the case against Mr. Arido. Thus, the Defence was precluded from making any assessment of the legality of evidence which the Prosecution intended to rely upon at trial, in violation of the overriding principle of full disclosure.⁹² This not only violated Mr. Arido's right to present a defence, but prejudiced him because he could not examine all of the evidence against him. In sum, the Prosecution's conduct violated Mr. Arido's fair trial rights.

1. Repeated Defence requests for disclosure of the Cameroonian Evidence

114. On 5 May 2015, the Defence contacted the Prosecution, requesting the disclosure of any official communications and related material between the Prosecution and Cameroonian authorities including the RFAs and responses thereto.⁹³

115. On 3 June 2015, the Prosecution denied the Defence request because "communications with national authorities concerning its investigations" were not disclose-able, and "do not relate to the substance of the case, but rather to practical arrangements regarding the conduct of investigations."⁹⁴

2. The struggle for disclosure of the Cameroonian RFA's

116. On 20 July 2015, the Arido Defence specifically requested the undisclosed RFAs and related materials from investigations in Cameroon. In consideration of the Trial Chamber's 31

⁹¹ See the Letter from [REDACTED] from 28 May 2013 (CAR-OTP-0073-0020). See also the Letter from [REDACTED] refers to a RFA from the ICC Prosecution (CAR-OTP-0073-0189).

⁹² ICC-01/04-01/06-3031 (OA5, OA6), p. 10.

⁹³ ICC-01/05-01/13-1141-Conf-AnxA.

⁹⁴ ICC-01/05-01/13-1141-Conf-AnxB.

July 2015 deadline for the completion of all requests to be resolved prior to trial, the Defence requested the Prosecution to respond by 27 July 2015.⁹⁵

117. The Prosecution responded on 27 July 2015, and repeatedly refused the Defence request and prematurely reiterated that the Defence failed to satisfy the requirements of a “specific and clear basis” for the disclosure of physical and other tangible items under Rule 77 of the RPE.⁹⁶

118. Following this, the Defence requested the Trial Chamber to order the Prosecution to disclose its RFAs directed to the Cameroonian authorities.⁹⁷

119. Meanwhile, on 14 August 2015, the Trial Chamber ordered the Prosecution to disclose all material related to the assessment of the legality of the telephone surveillance of Mr. Mangenda. Notably, the Trial Chamber held that:

material which enables the defence to assess the legality of evidence which the Prosecution intends to rely upon at trial is relevant to the preparation of the defence. It therefore falls under the Prosecution’s obligations as set out in Rule 77 of the Rules.⁹⁸

The Trial Chamber added that “it is not necessary for the defence to demonstrate the illegality of the proposed evidence, since this is precisely the reason why the material is sought.”⁹⁹

120. The Defence wishes to emphasise that before, during, and after the Trial Chamber clearly established that the Prosecution has obligations under Rule 77 of the RPE to disclose any materials which enable the Defence to assess the legality of evidence which the Prosecution intends to rely upon at trial – which it in fact did¹⁰⁰ – is relevant to the preparation of the Defence. The Prosecution was indeed in possession of several materials which clearly fell within the scope of the Rule 77 materials to be disclosed.

121. In particular, as evidenced in Table 2 below¹⁰¹, the Defence found that the Prosecution was in possession of **seven** undisclosed RFAs to Cameroonian authorities,¹⁰² **four** undisclosed

⁹⁵ ICC-01/05-01/13-1141-Conf-AnxC.

⁹⁶ ICC-01/05-01/13-1141-Conf-AnxD.

⁹⁷ ICC-01/05-01/13-1129-Conf.

⁹⁸ ICC-01/05-01/13-1148-Conf, para. 10.

⁹⁹ ICC-01/05-01/13-1148-Conf, para. 10.

¹⁰⁰ CAR-OTP-0090-0612, CAR-OTP-0090-0630, CAR-OTP-0090-0724, and CAR-OTP-0090-0831; and ICC-01/05-01/13-T-11-CONF-ENG ET and ICC-01/05-01/13-T-12-CONF-ENG.

¹⁰¹ See “Table 2 - Prosecution’s Delayed Disclosure” at page 38, *infra*.

official responses from Cameroonian authorities,¹⁰³ **two** undisclosed [REDACTED],¹⁰⁴ and **three** undisclosed emails between the ICC Prosecution investigators and the Cameroonian authorities.¹⁰⁵

122. Even though all these materials were immensely relevant to the preparation of the Defence, the Prosecution not only continued to disregard its obligations under Rule 77, but it also refused to follow the Single Judge's order to disclose the requested materials, and thus violated its duties under of the Statute. The Prosecution disclosed the seven RFAs on 30 September 2015,¹⁰⁶ and the rest of the documents only in late February 2016.¹⁰⁷

123. On 10 September 2015, following the defence teams' requests, the Single Judge issued the 'Decision on Defence Requests for Prosecution Requests for Assistance, Domestic Records and Audio Recordings of Interviews',¹⁰⁸ in which he ordered the Prosecution to disclose to the defence teams, within five days of notification of the decision, the RFAs directed to a number of national authorities.

124. Despite the Single Judge's decision which clearly ordered the Prosecution to disclose all the requested materials – in particular RFAs – the Prosecution still refused to disclose the RFAs to the Arido Defence.¹⁰⁹

125. The Prosecution's reluctant approach towards the disclosure of Rule 77 materials resulted in the Single Judge's second decision with respect to the disclosure of RFAs from various State authorities. On 28 September 2015, the Single Judge ordered that all RFAs be disclosed to the Defence, and added that "the Prosecution is to discharge its disclosure obligations without any delay so that the trial proceedings are not further disrupted."¹¹⁰

¹⁰² CAR-OTP-0091-0317, CAR-OTP-0091-0333, CAR-OTP-0091-0320, CAR-OTP-0091-0326, CAR-OTP-0091-0331, CAR-OTP-0091-0307, and CAR-OTP-0091-0312.

¹⁰³ CAR-OTP-0073-0007, CAR-OTP-0073-0008, CAR-OTP-0073-0009, and CAR-OTP-0073-0010.

¹⁰⁴ CAR-OTP-0092-5497 (5 Feb 2013) and CAR-OTP-0092-5498 (27 Nov 2012).

¹⁰⁵ CAR-OTP-0093-0004, CAR-OTP-0093-0011, and CAR-OTP-0093-0053.

¹⁰⁶ Prosecution's Disclosure of 30 September 2015 (Rule 77 - Package 30), ICC-01/05-01/13-1323.

¹⁰⁷ Prosecution's Disclosure of 23 February 2016 (Rule 77 - Package 41), ICC-01/05-01/13-1652; Prosecution's Courtesy Disclosure of 24 February 2016; and Prosecution's Disclosure of 26 February 2016 (Rule 77 - Package 42), ICC-01/05-01/13-1670.

¹⁰⁸ ICC-01/05-01/13-1234-Conf.

¹⁰⁹ ICC-01/05-01/13-1239.

¹¹⁰ ICC-01/05-01/13-1308-Conf.

126. On 30 September 2015, after five months, several Defence requests, and two decisions, the Prosecution finally disclosed to the Arido Defence seven RFAs sent by the Prosecution to the Cameroonian authorities, while which some of them – as outlined in the table below – were in the Prosecution’s possession since May 2013.¹¹¹

127. However, following their review of the disclosed materials, the Arido Defence and the Bemba Defence¹¹² found that the Prosecution was still in the possession of several other documents, which should have been disclosed pursuant to Single Judge’s decision on the application of Rule 77 of the RPE.¹¹³ The Prosecution – yet again – had failed to disclose several Rule 77 materials, among others, from an investigative point of view, an important [REDACTED].¹¹⁴ Whether intentional or not, the Prosecution’s obstructive attitude towards the disclosure of crucial materials for the Defence trial preparation, has caused undue prejudice to Mr. Arido’s ability to investigate the charges against him, and to prepare his defence, thus violating Mr. Arido’s right to a fair trial.

128. On 19 February 2016, after its review of the disclosed materials from 30 September, the Defence filed its request for the remaining Rule 77 materials that the Prosecution failed to disclose.¹¹⁵

129. Finally, after almost 10 months since the first Arido Defence request was filed,¹¹⁶ the Prosecution disclosed the remaining **four** official responses from Cameroonian authorities,¹¹⁷ **three** emails between the Prosecution investigators,¹¹⁸ and **two** [REDACTED],¹¹⁹ allowing the ICC Prosecution to investigate on its territory. The Prosecution was in possession of the majority of these documents since 2013.

¹¹¹ CAR-OTP-0091-0317 (sent on 8 May 2013), CAR-OTP-0091-0333 (sent on 20 May 2013), CAR-OTP-0091-0320 (sent on 27 May 2013), and CAR-OTP-0091-0326 (sent on 13 December 2013). All disclosed on 30 September 2015 (ICC-01/05-01/13-1323).

¹¹² ICC-01/05-01/13-1525-Conf and ICC-01/05-01/13-1532-Conf.

¹¹³ ICC-01/05-01/13-1148-Conf, ICC-01/05-01/13-1234-Conf, ICC-01/05-01/13-1308-Conf, and ICC-01/05-01/13-1542-Red.

¹¹⁴ CAR-OTP-0092-5497 and CAR-OTP-0092-5498.

¹¹⁵ ICC-01/05-01/13-1637.

¹¹⁶ ICC-01/05-01/13-1141-Conf-AnxA.

¹¹⁷ CAR-OTP-0073-0007, CAR-OTP-0073-0008, CAR-OTP-0073-0009, and CAR-OTP-0073-0010 from Prosecution’s Disclosure of 24 February 2016 (Rule 77 - Package 41), ICC-01/05-01/13-1652.

¹¹⁸ CAR-OTP-0093-0004, CAR-OTP-0093-0011, and CAR-OTP-0093-0052 from Prosecution’s Disclosure of 26 February 2016 (Rule 77 - Package 42), ICC-01/05-01/13-1670.

¹¹⁹ CAR-OTP-0092-5497 and CAR-OTP-0092-5498 from Prosecution’s Disclosure of 26 February 2016 (Rule 77 - Package 42), ICC-01/05-01/13-1670.

130. Even though the Trial Chamber and the Single Judge’s decisions on Rule 77¹²⁰ and the principles laid out therein were clear on the fact that “it is imperative that the Defence be able to test the reliability employed in collecting the evidence against them,”¹²¹ the Prosecution repeatedly refused to comply with its obligations under Article 54(1)(a) of the Statute and Rule 77 of the RPE.

131. In addition, the Prosecution’s “piecemeal” disclosure of the Rule 77 material in separate batches, with several intervening months between transmission, had the effect of obstructing a complete forensic picture. For example, the seven RFAs should not have been separated from the responses containing the CDRs, which were disclosed to the Arido Defence as incriminatory evidence. Like a search warrant in a domestic system, the RFAs complete the forensic picture. In other words, the RFA provides the complete explanation for the disclosed information. It is important to emphasise that how the telephone numbers and bank accounts were requested and obtained impacts strongly upon how the information can be used to support the allegations against Mr. Arido and whether it is legal to do so. The Defence had not been allowed to do so, which undermined the overriding principle of full disclosure,¹²² and therefore fairness to Mr. Arido.

3. *The Significance of the [REDACTED] evidence for Mr. Arido*

132. There is no question that the Cameroonian materials and the CDRs were relevant for the preparation for the testimony and expert report of the Prosecution witness [REDACTED]. Regrettably, the seven crucial RFAs to Cameroonian authorities were sent to the Defence only at the end of the first day of [REDACTED]s’ testimony.¹²³

133. There was no information in [REDACTED]’s report about CDRs for Mr. Arido during the month of February 2012, the key period in the CoC. Mr. Arido’s CDRs covered the period from 1 May 2012 to 24 April 2013.¹²⁴

¹²⁰ ICC-01/05-01/13-1166-Conf (21 August 2015), ICC-01/05-01/13-1172 (24 August 2015), ICC-01/05-01/13-1234 (10 September 2015), and ICC-01/05-01/13-1542-Red (12 January 2016).

¹²¹ ICC-01/05-01/13-1234-Conf, para.13; and ICC-01/05-01/13-1542-Red, para. 11.

¹²² ICC-01/04-01/06-3031 (OA5, OA6), p. 10.

¹²³ Prosecution’s Disclosure of 30 September 2015 (Rule 77 - Package 30), ICC-01/05-01/13-1323.

¹²⁴ CAR-OTP-0073-0190, CAR-OTP-0073-0239, CAR-OTP-0073-0266, and CAR-OTP-0073-0269.

134. The [REDACTED] report did not support D2's and D3's allegations¹²⁵ that Mr. Kilolo contacted them via his mobile phone during the cut off period of their testimony.¹²⁶ Thus, the Prosecution's own expert witness provided reasonable doubt as to the credibility of D2's and D3's accounts.

4. *The Prosecution's partial disclosure of the materials related to Western Union*

135. The Western Union money transfer records are a part of the Prosecution's evidence supporting the allegations against Mr. Arido et al. However, the Prosecution's procedural treatment of such crucial evidence not only violated its duty to disclose Rule 77 materials, but the Prosecution also violated the overriding principle of full disclosure,¹²⁷ and therefore fairness to the Accused. Without the testimony of [REDACTED], the Defence would not have known about and obtained the responses to the RFAs.

136. The Trial Chamber will recall that in November 2015, the Prosecution Expert Witness, [REDACTED]¹²⁸ testified about Western Union money transfer records. During his testimony, [REDACTED] unexpectedly provided the Defence teams with two judicial orders from the Austrian Authorities.¹²⁹ The Defence submits that the timely limited review of the Austrian documents – for several months withheld by the Prosecution – revealed and caused several fair trial violations against, *inter alia*, Mr. Arido.

137. First, [REDACTED] unexpected disclosure raises a question of whether the Prosecution ever intended to disclose such important Rule 77 materials to the Defence. Similar to the situation with the Prosecution's RFAs to Cameroon, the Prosecution refused to comply with its obligations under Article 54(1)(a) of the Statute and Rule 77 of the RPE. Moreover, the Trial Chamber and Single Judge's decisions on Rule 77¹³⁰ and the principles laid out therein

¹²⁵ ICC-01/05-01/13-T-19, pages 25-26; ICC-011/05-01/13-T-23, pages 28-29.

¹²⁶ See ICC-01/05-01/13-T-11-CONF-ENG, p.74, lines 19-24.

¹²⁷ ICC-01/04-01/06-3031 (OA5, OA6), p. 10.

¹²⁸ P-267.

¹²⁹ [REDACTED] handed over to the Defence: Austrian Judicial Authorization of 15 November 2012 - 312 HSt 226/12h (CAR-D24-0002-1349), and Austrian Judicial Authorization of 5 November 2013 - 314 HSt 159/13x (CAR-D23-0002-0024).

¹³⁰ ICC-01/05-01/13-1166-Conf, ICC-01/05-01/13-1172, ICC-01/05-01/13-1234; ICC-01/05-01/13-1542.

were clear on the fact that “it is imperative that the Defence be able to test the reliability employed in collecting the evidence against them.”¹³¹

138. In addition, not only did the Prosecution refuse to comply with its obligations under Article 54(1)(a) of the Statute and Rule 77 of the RPE and disclose the above-mentioned materials, but it also delayed the disclosure of another crucial piece of evidence related to the Western Union money transfers. Specifically, the Prosecution disclosed another two reports about the Prosecution’s mission to Austria on 23 February 2016,¹³² and three email communications discussing the RFAs to be sent to Austria on 26 February 2016.¹³³ The Prosecution was in possession of these materials since 2012 and 2013. But some of these materials were withheld for almost four years, and only disclosed in the middle of the Defence case.

139. Second, the Arido Defence wishes to emphasise that the review of the Austrian documents handed over to the Defence by [REDACTED] during his testimony revealed several sensitive issues. Both judicial orders were written in the German language. The official translation was never provided. One of the Arido Defence members made a free translation into English, which was presented and used during the second day of [REDACTED]’s testimony.

5. The prejudicial “[REDACTED]” label violated Mr. Arido’s human rights

140. Following the review of the translated judicial order from 15 November 2012, the Arido Defence found that the subject of the Austrian judicial order referred to a “criminal matter of the International Criminal Court Against: Narcisse Arido, Subject/Because of: [REDACTED]”.¹³⁴ In that regard, the Arido Defence reiterates that Mr. Arido has never been a suspect, nor has he ever been investigated for [REDACTED].¹³⁵ The Prosecution has never corrected this highly prejudicial error, nor has it submitted any evidence that it took any curative action to show Mr. Arido was a suspect in an investigation of offences against the administration of justice.

¹³¹ ICC-01/05-01/13-1543-Conf, para. 11.

¹³² See Prosecution’s Disclosure of 23 February 2016 (Rule 77 Package 41).

¹³³ See Prosecution’s Disclosure of 24 February 2016 (Rule 77 Package 42).

¹³⁴ CAR-D24-0002-1363, at 1363.

¹³⁵ ICC-01/05-01/13-1795-Conf, paras 43-44.

141. The Arido Defence submits that this document and the failure of the Prosecution to take action constitute a violation of Mr. Arido's right not to be subjected to arbitrary or unlawful interference with his privacy, and unlawful attacks on his honour and reputation, guaranteed by to Article 17 of the International Covenant on Civil and Political Rights (ICCPR).¹³⁶ Moreover, the Arido Defence submits that the Prosecution breached its duties under Article 54(1)(c) of the Statute by not advising the Austrian authorities about the misrepresentation that Mr. Arido was suspected of genocide, according to the title of the first order of the Austrian authorities.

6. *The Prosecution never disclosed the basis of the request for the pre-screening of Mr. Arido*

142. In the context of the disclosure of Western Union materials, the Arido Defence also wishes to highlight the email which the Prosecution refers to as giving a legitimate basis for its pre-screening request directed to [REDACTED].¹³⁷ The email which was sent on 28 September 2012 specifically names Mr. Arido and connects him to "suspect transactions". The underlying material which the Prosecution alleges provides reasonable grounds was never disclosed to the Arido Defence, and based on information and belief, was never scrutinised by the Trial Chamber.

143. The Anonymous Informant emails are dated initially on 14 June 2012.¹³⁸ Mr. Arido is not named in any of the emails. With the exception of those emails, the Arido Defence is not aware of any other investigative basis prior to 28 September 2012 which specifically identifies Mr. Arido and forms a basis for a reasonable ground that he committed any offence.

144. This leads to the conclusion that there is either (a) relevant undisclosed material or (b) that the sole basis for accessing Mr. Arido's financial records was the Anonymous Informant's communications and a hunch that Mr. Arido was involved. If the situation is (a), then the material should have been disclosed to the Arido Defence as it may contain exculpatory information. If the situation is (b), then there was clearly no legitimate basis for the pre-screening.

¹³⁶ ICCPR, Article 17; UDHR, Article 12.

¹³⁷ CAR-OTP-0092-0021-R01.

¹³⁸ Prosecution's Disclosure of 20 December 2013 (INCRIM Package 1).

145. In sum, the Defence submits, as with the CDRs, that the Prosecution's selective approach towards disclosing certain parts of the Austrian materials, had the effect of obstructing the forensic picture. For example, the impugned responses from Austrian authorities or the Prosecution emails should not have been separated from the RFAs and the resulting Western Union money transfers, which were disclosed to the Arido Defence as incriminatory evidence.¹³⁹ In other words, the RFA and the respective response provide the complete explanation for the disclosed information. It is important to emphasise that how the money transfers were requested and obtained impact strongly upon how the information can be used to support the allegations against Mr. Arido and whether it is legal to do so. The Arido Defence has not been allowed to do so, which undermines the principle of full disclosure,¹⁴⁰ and violates the fair trial rights of Mr. Arido.

G. Conclusion

146. The Defence submits that both individually, and in the aggregate, the aforementioned conduct violated Mr. Arido's fair trial rights. This included his right to notice under Article 61(1)(a), which materially affected his right to present a defence pursuant to Article 67(1)(e). Being informed of the charges against him is the prerequisite to preparing and presenting a defence.

147. The Prosecution's Rule 77 violations, and its investigative failures under Article 54(1) which violated the presumption of innocence directly impacted on Mr. Arido's ability to prepare his defence and were prejudicial to him. To this day, Mr. Arido bears the indelible label in the international community [REDACTED], simply because the ICC Prosecution never corrected an error in the paperwork of a State Party from whom it requested assistance in its investigations in this case.

¹³⁹ Prosecution's Disclosure of 20 December 2013 (INCRIM Package 1).

¹⁴⁰ ICC-01/04-01/06-3031, p. 10.

Table 2 – Prosecution’s Delayed Disclosure

Prosecution’s RFA	Sent to Cameroon on	Disclosed to Defence on	Fair Trial Violations
No. 1 CAR-OTP-0091-0317	8 May 2013	30 Sept 2015 (Rule 77 - Pack 30)	Disclosed after <u>five months</u> since the first request was sent on 5 May 2015 - Disclosed <u>only after the first day</u> of the Prosecution witness on CDRs, [REDACTED]
No. 2 CAR-OTP-0091-0333	20 May 2013	30 Sept 2015 (Rule 77 - Pack 30)	Disclosed after <u>five months</u> since the first request was sent on 5 May 2015 - Disclosed <u>only after the first day</u> of the Prosecution witness on CDRs, [REDACTED]
No. 3 CAR-OTP-0091-0320	27 May 2013	30 Sept 2015 (Rule 77 - Pack 30)	Disclosed after <u>five months</u> since the first request was sent on 5 May 2015 - Disclosed <u>only after the first day</u> of the Prosecution witness on CDRs, [REDACTED]
No. 4 CAR-OTP-0091-0326	13 Dec 2013	30 Sept 2015 (Rule 77 - Pack 30)	Disclosed after <u>five months</u> since the first request was sent on 5 May 2015 - Disclosed <u>only after the first day</u> of the Prosecution witness on CDRs, [REDACTED]
No. 5 CAR-OTP-0091-0331	20 Nov 2014	30 Sept 2015 (Rule 77 - Pack 30)	Disclosed after <u>five months</u> since the first request was sent on 5 May 2015 - Disclosed <u>only after the first day</u> of the Prosecution witness on CDRs, [REDACTED]
No. 6 CAR-OTP-0091-0307	5 Feb 2015	30 Sept 2015 (Rule 77 - Pack 30)	Disclosed after <u>five months</u> since the first request was sent on 5 May 2015 - Disclosed <u>only after the first day</u> of the Prosecution witness on CDRs, [REDACTED]
No. 7 CAR-OTP-0091-0312	18 June 2015	30 Sept 2015 (Rule 77 - Pack 30)	Disclosed after <u>five months</u> since the first request was sent on 5 May 2015 - Disclosed <u>only after the first day</u> of the Prosecution witness on CDRs, [REDACTED]

III. EVIDENTIARY ISSUES

A. Introduction

148. This Article 70 case is an evidentiary laboratory for the Prosecution, to test non-witness forms of evidence. In its Strategic Plan, 2016-2018, it concluded that there were “positive results” from its new strategy by “using alternative (non-witness) forms of evidence in the Article 70 cases (Central African Republic).¹⁴¹

149. Perhaps the Prosecution was referring to the amount of documentary evidence it submitted in this case, including the roughly one thousand items submitted through the Bar Table Motions.

150. In any case, none of this changes the fundamental principle that under Article 66, everyone is presumed innocent.

151. Fundamental fairness and due process require that throughout the trial, Mr. Arido, is presumed innocent, and mandate that he can only be found guilty if the Prosecution proves each and every element of the offences and modes of liability charged beyond a reasonable doubt.

152. Due process requires that no person be made to suffer the onus of a criminal conviction except upon sufficient proof, defines as evidence necessary to convince a trier of fact beyond reasonable doubt of the existence of every element of the offence.¹⁴² A “reasonable doubt,” at a minimum, is one based upon “reason.”¹⁴³ This means that the presumption of innocence cloaks an Accused until the Prosecution has proved each and every element of the crime charged beyond a reasonable doubt.

153. In the case at bar, there is a dearth of direct evidence, and it is rife with inconsistencies, incoherence, and contradictions. There was oral testimony from only two of the four witnesses – D2 and D3 – with whom Mr. Arido allegedly committed the offences under Article 70. Both of them were motivated by their own immunity agreements and

¹⁴¹ Strategic Plan, 2016-2018, OTP, 6 July 2015, p. 10, para. 16, p. 41, para. 6.

¹⁴² U.S.C.A.. Const. Amend. 14, available at: <https://www.law.cornell.edu/constitution/amendmentxiv>; *Jackson v. Virginia*, 443 U.S. 307 (1979), available at: <https://supreme.justia.com/cases/federal/us/443/307/>; *In re Winship*, 397 U.S. 358 (1970), available at: <https://supreme.justia.com/cases/federal/us/397/358/case.html>.

¹⁴³ *Jackson v. Virginia*, supra., at 317, available at: <https://supreme.justia.com/cases/federal/us/443/307/>.

suspect status, signalling – as a threshold issue – whether they were credible. Also, there was no testimony adduced from D4 and D6, the missing witnesses, as discussed below.

154. Should the Prosecution rely on circumstantial evidence, the Arido Defence notes a recent decision at the Special Court for Lebanon, where the Appeals Panel recalled

[...] the well-established principle that, when the Prosecution relies upon circumstantial evidence to prove the facts constituting the elements of an offence by inference, that inference must be the only reasonable conclusion available from the evidence.¹⁴⁴

155. In addition, while an inference can be drawn from direct or circumstantial evidence, it must be reasonable and narrowly construed. Inferences based on a series of inferences were rejected.¹⁴⁵

B. D2, D3, D4, and D6 were not “witnesses” within the meaning of Article 70(1)(c)

156. The CoC charged Mr. Arido with the offence of corrupting witnesses, under Article 70(1) (c). The Defence understands this to mean that the status of D2, D3, D4, and D6 – whether they were witnesses or not – is a fundamental element of this offence.

157. This Trial Chamber has defined “witness” as a:

person whom a party intends to call to testify or on whose statement the party intends to rely upon, provided that such intention has been conveyed to the non-calling party, by means that establish a clear intention on behalf of the calling party to rely upon the individual as a witness.¹⁴⁶

158. The Defence submits that the Prosecution presented no proof beyond a reasonable doubt that, D2, D3, D4, and D6 were, in fact, “witnesses” within the definition of the Protocol in February 2012.

159. Therefore, as a matter of law, the Prosecution did not meet its burden to prove the element of “witness,” required for Article 70(1)(c).

¹⁴⁴ STL: *Prosecutor v. Al Jadeed* [Co.] S.A.L./New T.V.S.A.L. (N.T.V.) and Karma Mohamed Tahsin Al Khayat, STL-14-05/A/AP, Public Redacted Version of Judgment on Appeal, 8 March 2016, para. 104, available at: <http://www.stl-tsl.org/en/the-appeals-panel-judgment-in-contempt-case-stl-14-05>.

¹⁴⁵ ICC-01/05-01/13-1858, para. 42: (“...The event which prompted the renewed investigation appears to be the Arido Defence’s choice to call D-4, D-6 and D-8 during its defence case, but the Prosecution was clearly well aware of the importance of these witnesses at a much earlier time”).

¹⁴⁶ Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party and Witnesses of the Other Parties, ICC-01/05-01/13-1093-Anx.

160. In addition, as a matter of fact, the Prosecution adduced no evidence to support that D2, D3, D4 and D6 were “witnesses.”

161. Thus, based on law and on fact, the offence against Mr. Arido of 70(1) (c) should be dismissed.

C. D4 and D6 – The “Missing” Witnesses

162. The CoC confirmed the Article 70 allegations against Mr. Arido in respect to four persons who gave testimony in the Bemba Main Case – D2, D3, D4, and D6.

163. The Prosecution adduced direct testimony from D2 and D3, but did not call D4 or D6.

164. The Defence submits that, as a matter of law, the allegations against Mr. Arido should be dismissed because no direct evidence was adduced, and – where the Prosecution had access to both D4 and D6 – a conviction based solely on documentary evidence is illegal and against the interests of justice.

165. On 21 February 2016, eight days prior to the start of the Article 70 Defence case, the Prosecution was interviewing D4 as a suspect and he was represented by a duty counsel. The Prosecution believed that D4 (a) had information material to the case; and (b) knew how to contact him and meet him. The fact that D4 had consented to meet with the Prosecution while he was on the Arido Defence witness list is irrelevant.

166. On 25 February 2016, four days before the start of the Article 70 Defence case, the Prosecution sent a request to [REDACTED], requesting information on the military status of D4 and D6.

167. Yet, despite its active interest in both, and knowledge of their importance,¹⁴⁷ and contact with D4, the Prosecution failed to call them as witnesses. Both D4 and D6 were available, and at least one was talking with the Prosecution in February 2016, so no exceptions apply as to why D2’s and D3’s testimony should substitute for the testimony of live witnesses, whose demeanour can be observed by judges.

¹⁴⁷ See, ICC-01/05-01/13-1858, para. 42 (“[...].The event which prompted the renewed investigation appears to be the Arido Defence’s choice to call D-4, D-6 and D-8 during its defence case, but the Prosecution was clearly well aware of the importance of these witnesses at a much earlier time”).

168. Conviction of Mr. Arido for offences in respect to D4 and D6, who were not called to testify by the Prosecution and could not, therefore, be cross-examined, based on documentary evidence submitted through the Bar Table Motion or hearsay would constitute a violation of his rights.

169. If this had occurred in some common-law jurisdictions in a jury trial, the Defence would have requested a “missing witness” charge to the jury. The argument would be: given that the uncalled witness clearly had information material to the issues in the case, and was within the control of, or available to the Prosecution but had not been called to testify by it, the jury would be permitted to draw an “adverse inference” that the testimony – if it had been adduced – would not have been favourable or supportive to the Prosecution.

170. The Defence respects that this case is being judged by professional judges, and is not requesting that the Bench give itself an “adverse inference” charge. But, it does request that – as a matter of law – the Bench dismiss all allegations in respect to D4 and D6 because no evidence was adduced from them during the Prosecution’s case.

D. The Mens Rea Labyrinth

171. The CoC confirmed charges against Mr. Arido for offenses under Article 70. Each offence – Article 70(a), (b), and (c) – requires the legal element of intent to commit the offense.

172. As to what constitutes *mens rea*, the Defence relies on the elements of Article 30, and its previous submissions.¹⁴⁸ This requires that the material elements of the offence are “committed with intent and knowledge.”¹⁴⁹ Thus, the Prosecution must prove beyond a reasonable doubt that Mr. Arido possessed the requisite *mens rea* to support intentional conduct.

173. But, Article 70(a) and (b) require a second intent. Article 70 (a) and (b) refer to a witness’s conduct. Hence, a double *mens rea* must be proved to satisfy the mental element of the offence: (1) the *mens rea* of the underlying offence – that the person intentionally gave

¹⁴⁸ ICC-01/05-01/13-978, paras 28-40; see also ICC-01/05-01/13-T-8-CONF-ENG ET.

¹⁴⁹ While Article 30 specifically refers to “crimes,” there is no other provision in the Rome Statute for the mental element for offences, so it is fair to conclude that Article 30 also applies to offences.

false testimony and presented evidence s/he knew to be false, and (2) the *mens rea* of Mr. Arido, that he intended to commit the offence.

174. In respect to the mode of liability for each of the offenses, Mr. Arido is charged with the CoC confirmed the following:

- a. as an accessory for aiding or abetting under Article 25(3)(C) for Article 70 (1) (a);
- b. as an aider and abettor for Article 70 (1) (b); and
- c. as a perpetrator under Article 25(3)(a), or, in the alternative, as an accessory under Article 25(3)(C) for Article 70 (1) (c).¹⁵⁰

1. *Mens Rea requirement for Aiding and Abetting*

175. The elements of Article 25(3)(c) require that aiding, abetting or otherwise assisting must be for the purpose of facilitating the commission of a crime or attempt.

176. Under the jurisprudence of the *ad hoc* tribunals, the *mens rea* for aiding and abetting requires knowledge that acts performed by the aider and abettor assist in the commission of the crime by the principal. For example, for specific intent crimes, this means that aider and abettor must know of the principal's specific intent, but does not need to possess the specific intent himself; must also be aware of essential elements of the principal's crime, including *mens rea*.¹⁵¹

177. As to the *mens rea* requirements for an accessory for aiding and abetting, it is unclear whether the legal standard applied is the same as for "accomplice liability" in the *ad hocs*. Without waiving our objections on notice and illegality of the mode of liability as charged because there is no common purpose liability, discussed elsewhere in these submissions,¹⁵²

¹⁵⁰ CoC, para. 96.

¹⁵¹ *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, Judgement (13 December 2004) at para. 364, available at: <http://m.unictr.org/sites/unictr.org/files/case-documents/ict9-96-17/appeals-chamber-judgements/en/041213.pdf>; *Prosecutor v Seromba*, No. ICTR-2001-66-A, Judgement (12 March 2008) at para. 56, available at: https://www1.umn.edu/humanrts/instree/ICTR/SEROMBA_ICTR-2001-66/SEROMBA_ICTR-2001-66-A.pdf; *Ndahimana v Prosecutor*, No. ICTR-01-68-A, Judgement (16 December 2013) at para. 157, available at: <http://curia.unictr.org/sites/unictr.org/files/case-documents/ict9-01-68/appeals-chamber-judgements/en/131216.pdf>.

¹⁵² See "The Prosecution violated Mr. Arido's fair trial right to notice, as per Article 67(1)(a)" section, *supra*.

the Defence is treating accessory as synonymous with accomplice liability. Accomplice liability, under the charge of aiding and abetting requires knowledge of the perpetrators intent, but does not require – for crimes such as genocide – that the accomplice share the same specific intent.¹⁵³

178. In sum, the Prosecution must prove the *mens rea* for each offense and each mode of liability beyond a reasonable doubt.

2. *There was no proof beyond a reasonable doubt that Mr. Arido intended to commit any Article 70 offences*

179. The Prosecution failed to prove any intent on the part of Mr. Arido, or adduce any motivation to establish why Mr. Arido would have an interest or benefit in corrupting witnesses for the Bemba defence team, or assisting them in the alleged false testimony.

180. To the contrary, the evidence supports that Mr. Arido had an independent relationship with the Bemba Defence team as a military expert, for which he was remunerated in 2012.¹⁵⁴

181. Mr. Arido produced an expert report which he submitted to the Bemba team in 2012. The team made arrangements for him to testify in late September 2012, and the logistics were handled by VWU.¹⁵⁵

182. Mr. Arido also had a business in Cameroon which was flourishing. In 2012, it produced an annual income was 30 million FCFA.¹⁵⁶

183. As to the individual persons who allegedly gave false testimony – D2, D3, D4, and D6 – there was no proof beyond a reasonable doubt as to why Mr. Arido would want to involve himself in activities with them, especially activities which could be construed as offenses.

184. Mr. Arido did not “owe” anything to D2, and had no reason to assist him. The e-mails of D2 attest to their inimical relationship, and the testimony of [REDACTED] supports this.¹⁵⁷

¹⁵³ ICTR: *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, Judgement (13 December 2004) at para. 499, available at: https://www1.umn.edu/humanrts/instree/ICTR/NTAKIRUTIMANA_1-ICTR-96-10_2-ICTR-96-17/NTAKIRUTIMANA_ICTR-96-10-A_&_ICTR-96-17-A.htm.

¹⁵⁴ See “Mr. Arido’s mandate and terms of reference” section, *supra*.

¹⁵⁵ See, for example, CAR-OTP-0075-0208-R01.

¹⁵⁶ [REDACTED].

185. In respect to D3, Mr. Arido did not know D3, had no prior relationship with him, and there was reason adduced as to why Arido would engage in an offence to “help out” D3.

186. The same argument applies to D4 and D6, for whom no evidence was adduced by the Prosecution as to what would motivate Arido to engage in the conduct charged.

187. The theory advanced by the Prosecution, through its cross-examination of [REDACTED], that Mr. Arido planned all along to use the Bemba ticket to escape his life in Cameroon, and pursue his studies and career in France, was contradicted by the evidence. Mr. Arido’s correspondence, until the very end, indicated he had every intention of testifying in the Hague, and it was not until the Cameroonian [REDACTED] intervened in a situation where his pleas to the ICC were ignored¹⁵⁸ that he decided to accept the ticket the [REDACTED] purchased for him to go to France.

188. Mr. Arido’s concerns were for his own safety and security. The Prosecution offered no proof beyond a reasonable doubt that he had an intention to mislead the Court or cause harm.

189. It is true that Mr. Arido had lost confidence in the ICC’s capability and commitment to his security after he believed his confidentiality was breached and his identity as an expert witness was exposed and unprotected. Yet, Mr. Arido persisted in trying to get the Court to address his concerns, but to no avail.

190. Even, *arguendo*, if the Prosecution had proof beyond a reasonable that conduct supporting the Article 70 (c) took place, there still was no proof that Mr. Arido had any knowledge of it. The final decision as to who would be a witness was made by the Bemba team, a long time after Mr. Arido had withdrawn his involvement in the Bemba case.

191. For perpetration, Mr. Arido had to have both intent and knowledge; for accomplice liability, knowledge and awareness that his conduct was to further an offence was required. To satisfy the mental element of *mens rea*, the principle of “strict liability” and construct of “guilt by association” do not apply.

¹⁵⁷ ICC-01/05-01/13-T-46-CONF-ENG ET, pages 22 and 25.

¹⁵⁸ See D21-0002-0059, D-21-0002-0062, D21-0002-0063, CAR-OTP-0075-1454-R01, CAR-D24-0004-0013; see also ICC-01/05-01/13-2261-Conf-Exp-Red3, para. 19.

192. There is no proof beyond a reasonable that Arido, charged with aiding and abetting, had any knowledge that the work he did with the Bemba team was in commission of the offence of corrupting (c) , nor is there any reasonable doubt that D2 and others intended to give false testimony (a, b).

193. Therefore, based on the Prosecution's failure to prove Mr. Arido's *mens rea* for either form of liability, the offences should be dismissed and Mr. Arido should be acquitted.

E. The Prosecution failed to prove the elements of the crimes and modes of liability charged beyond a reasonable doubt.

1. The Prosecution failed to prove the element of false testimony beyond a reasonable doubt

a) The Trial Chamber's Decision in respect to false testimony

194. On the opening day of this trial, the Trial Chamber ruled that it would not judge the substance or content of the alleged false testimony. The Trial Chamber stated that:

[It] cannot assess the truth or falsity of these statements without command over the evidence in the Main Case, which would necessitate a partial rehearing of the evidence before this Chamber. The result of such a course would be to litigate an Article 70 case and re-litigate part of an Article 5 case before another Chamber in the course of this hearing. The Chamber considers this result to be untenable.¹⁵⁹

195. The Trial Chamber went on to identify the issues and procedures it would address:

Rather, whether or not the witness falsely testified can be ascertained in relation to other information given. [...] So, when the Chamber says that this case is not about re-litigating the main case, what this means is that this case is about alleged false testimony of witnesses in respect of issues like: First, their previous contacts with the Defence, including those where witnesses were coached before testifying; their meetings with other prospective witnesses; their acquaintance with some of the accused or other persons associated with them; the fact that promises had been made to them in exchange for their testimony; and the fact that they had received reimbursements or transferred by Mr. Bemba on his behalf for the purpose of unduly influencing the witness. Statements pertaining to the merits of the main case could perhaps have some relevance in some contexts, such as to show if alleged pre-testimony witness coaching was in fact repeated during testimony. However, these statements will not be considered for their truth or falsity, and evidence submitted solely for the purpose of proving

¹⁵⁹ ICC-01/05-01/13-T-10-CONF-ENG ET, p. 4, lines 24 to p. 5 line 4.

the truth or falsity of such statements at trial will not be considered by the Chamber in its judgment.¹⁶⁰

196. The Trial Chamber's position presents a legal quagmire: how can the Trial Chamber make a judgment about whether the Prosecution has fulfilled its duty to present evidence beyond a reasonable doubt on a fundamental element of the offence charged – false testimony – where the Trial Chamber will not hear evidence on the substance or content of the element?

197. The Trial Chamber, under its Article 64 functions and powers, has the obligation to “ensure that a trial is fair and expeditious and conducted with full respect for the rights of the accused.” and to “ensure that a complete record of the trial which accurately reflects the proceedings is made.”¹⁶¹

198. The Defence submits that, stemming from these obligations, the Trial Chamber has a duty to ensure that the element of false testimony is judicially handled through a process which clearly defines the scope of the alleged false testimony and makes a complete record of the witness's renunciation or recantation of the alleged false testimony.

199. It is undisputed that such a process is not found in the Rome Statute, although it is clearly articulated and has been implemented at the *ad hoc* Tribunals.¹⁶² The rule concerning false testimony include provisions for a Trial Chamber to direct the Prosecution to investigate and prosecute allegations of false testimony under specific circumstances, or the Trial Chamber may appoint *amicus* parties to act where there is a conflict of interest.¹⁶³

200. At the *ad hoc* Tribunals, for example, there are separate rules which penalize contempt of court and false testimony.¹⁶⁴ At the ICC, these offences are merged within the offences against the administration of justice under Article 70. The fact that there is no offence or rule regarding contempt of court does not mean that there should be no judicial processes or provisions to address contempt of court.

¹⁶⁰ ICC-01/05-01/13-T-10-CONF-ENG ET, p. 5 line 9 to p. 6 line 4.

¹⁶¹ See Rome Statute, Article 64(2) and (10).

¹⁶² See ICTR and ICTY Statutes – Rules 77 and 91 of the respective RPEs – which provide for the Trial Chamber and Office of the Prosecution/Amici Prosecution to initiate investigations and proceedings for both false testimony and contempt of court. These are separate offenses at the *ad hoc* tribunals. ICTR RPE available at: <http://unictr.unmict.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf>, and ICTY RPE available at: http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf.

¹⁶³ Rule 91(B)(ii) of the ICTY RPE.

¹⁶⁴ See footnote 162.

201. Thus, the Rome Statute's silence on the processes for alleged false testimony under Article 70 does not mean that there should be no procedures. The Rome Statute's powers given to the Trial Chamber implicitly entrust it to adopt processes necessary to implement fair trial safeguards and other principles of international human rights law.

b) *There is no proof of false testimony*

202. The Prosecution has the burden to prove each and every element of the offence(s) and modes of liability charged.¹⁶⁵

203. In respect to two of the offences confirmed in the CoC – Article 70(1)(a) and Article 70(1)(b) – false testimony is a fundamental element – *the sine qua non* – which must be proved beyond a reasonable doubt in order to convict. Article 70(1)(a) refers to “giving false testimony” and Article 70(1)(b) requires that the presenting party knows that the testimony is false. Hence, absent proof beyond a reasonable doubt of the element of false testimony, there cannot be a conviction for either of these offenses.

204. False testimony is a deliberate offence which requires wilful intent on the part of the perpetrator to mislead the Judge and thus to cause harm.¹⁶⁶ This means that the presentation of the false testimony must be wilful and intentional, with the object of misleading the Court.¹⁶⁷

205. To prove the offence of false testimony, it is not sufficient to establish that a statement of the witness was false. It must also be shown that the false statement was a deliberate act, made wilfully and knowingly.¹⁶⁸

¹⁶⁵ *Lubanga Judgement* (ICC-01/04-01/06-2842), para. 92 (“For a conviction, each element of the particular offence charged must be established “beyond reasonable doubt”); repeated in the *Katanga Judgement* at para. 68 (ICC-01/04-01/07-3436-tENG).

¹⁶⁶ ICTR: *Prosecutor v. Simba*, ICTR-01-76-A, Judgment, 27 November 2007, para. 31, fn. 68, available at: https://www1.umn.edu/humanrts/instree/ICTR/SIMBA_ICTR-01-76/SIMBA_ICTR-01-76-A.pdf.

¹⁶⁷ SCSL: *Prosecutor v. Sesay et al.*, SCSL-04-15-T, 25 July 2006, para. 28: available at: <http://www.rscsl.org/Documents/Decisions/RUF/610/SCSL-04-15-T-610.pdf>: “the ingredients of false testimony are (i) making a false statement under oath or solemn declaration to tell the truth, (ii) knowing that the statement was false and (iii) wilfully making the statement with the intention to mislead the Court and cause harm. The first ingredient is the actus reus and the second and third ingredients constitute the mens rea.” See also ICTR: *Prosecutor v. Simba*, ICTR-01-76-A, Judgment, 27 November 2007, para. 31, fn. 68, available at: https://www1.umn.edu/humanrts/instree/ICTR/SIMBA_ICTR-01-76/SIMBA_ICTR-01-76-A.pdf.

¹⁶⁸ SCSL: *Prosecutor v. Sesay et al.*, SCSL-04-15-T, 25 July 2006, para. 28: available at: <http://www.rscsl.org/Documents/Decisions/RUF/610/SCSL-04-15-T-610.pdf>.

206. “A credibility determination may be based, but does not necessarily depend, on a judicial finding that a witness has given false testimony. The testimony of a witness may lack credibility even if it does not amount to false testimony.”¹⁶⁹

[t]he demonstration of inconsistencies, inaccuracies or contradictions in the evidence of a witness that raise doubts as to his or her credibility is not enough to establish that he or she has made a false statement. We opine that such factors are issues to be considered by the Court in its assessment of the credibility and the reliability of the witness’ evidence, but something further is required to establish the required *mens rea* of the offence of false testimony.¹⁷⁰

207. The onus lies on the party pleading a case of false testimony to prove that it was given knowingly and wilfully.¹⁷¹

208. In the case at bar, in respect to D2 and D3, the Prosecution did not adduce evidence that either witness intended to mislead the Court.¹⁷² Hence, as a matter of law, the allegations in respect to D2 and D3 should be dismissed.

209. In addition, in respect to D4 and D6, the Prosecution adduced no evidence from them since they were not called by the Prosecution to testify. Hence, as a matter of law, the allegations in respect to D4 and D6 should be dismissed.

c) *D2’s admissions that he lied do not constitute false testimony*

210. The only purported evidence of false testimony is admissions from D2 that he gave false testimony in the Bemba Main Case. However, the scope or extent of the alleged false testimony is completely unknown. D2 testified on 12-13 June 2013 in that case, and the transcript covers 164 pages.

¹⁶⁹ ICTR: *Prosecutor v. Rutaganda*, ICTR 96-3-A, Decision, Appeals Chamber, 8 June 1998, para. 28, available at: <http://www.ictrcaselaw.org/docs/doc5371.pdf>.

¹⁷⁰ SCSL: *Prosecutor v. Sesay et al.*, SCSL-04-15-T, 25 July 2006, available at: <http://www.rscsl.org/Documents/Decisions/RUF/610/SCSL-04-15-T-610.pdf>, para. 29.

¹⁷¹ ICTR: *Prosecutor v. Nahimana*, ICTR-96-11-I, Decision on the Defence Motion to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness “AEN” in terms of Rule 91(B), 27 February 2001, available at: <http://ictr-archive09.library.cornell.edu/ENGLISH/cases/Nahimana/decisions/270201.html>; *Prosecutor v. Akayesu*, ICTR-96-4-T, Decision on the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness “R”, 9 March 1998, available at: <http://ictr-archive09.library.cornell.edu/ENGLISH/cases/Akayesu/decisions/FALSR090398.html>.

¹⁷² In addition, as discussed in Section “XX” of this brief, the Prosecution did not investigate the substance of the alleged false testimony, and presented no findings to the Court.

211. Yet, in this Article 70 case, D2 gave evidence on only two issues (a) that he was not a soldier, and not a sub-lieutenant between October 2002 and March 2003 and had never received training as a soldier; and (b) he was not in Bangui during 2002-2003 but [REDACTED], [REDACTED], during this period, working as [REDACTED].¹⁷³

212. But, at the same time, D2 also made the statement that “*everything* I had said was false testimony”. (emphasis added)¹⁷⁴ At the end of his direct examination, he repeated that “*everything* I said were lies. It was false.” (emphasis added)¹⁷⁵

213. But there is no antecedent to “everything” Did D2 mean that all of his testimony in 2013 was false, or simply sections of it?

214. The Prosecution took no steps, as the moving party, to show exactly what was the substance of the alleged false testimony in the Bemba Main Case. It did not clarify the scope or extent of the alleged lies. In fact, when D2 could not remember his answer as to whether he knew who Mr. Arido, [REDACTED] and [REDACTED] were – the Prosecution refreshed his recollection.¹⁷⁶

215. But at no point during his testimony, when D2 said that he had lied about being a soldier, for example, did the Prosecution confront the witness with the alleged false testimony in the Bemba Main Case, read it into the record, and ask the witness whether this was still his testimony.

216. The Prosecution dealt with D2’s self-proclaimed “lies” as prior inconsistent statements, but this does not make them “false testimony.”

217. In fact, the standard for “false testimony” is a high standard, and “the mere existence of discrepancies between a witness’s testimony and his or her earlier statements do not

¹⁷³ ICC-01/05-01/13-T-18-CONF-ENG ET, p. 35, line 14: “In my entire life, I have never received any training as a soldier”; p. 36, lines 22-25 - p. 37, lines 1-3; p. 37, lines 22-25: “Q: It refers to your prior testimony about being a sub-lieutenant in the support battalion and the question is: Is that the role that you had between October 2002 and March 2003?”; p. 38, lines 1-11: “A: That statement is not true”, “A: I would like to say to this Court that I have never received any military training, I have never been a soldier. [REDACTED]”; p. 76, lines 14 - 20: “A: I have great respect for this august Chamber. A few moments ago when I was talking here, I gave you my identity. I’m not a soldier”.

¹⁷⁴ ICC-01/05-01/13-T-19-CONF-ENG ET, p. 4. l. 17.

¹⁷⁵ ICC-01/05-01/13-T-19-CONF-ENG ET, p. 40, lines 12-13.

¹⁷⁶ ICC-01/05-01/13-T-19-CONF-ENG ET, p. 40, line 20 - p. 41, line 7.

constitute strong grounds for believing that the witness may have knowingly and wilfully given false testimony.”¹⁷⁷

218. What earmarks false testimony is the intent to mislead the Court. But the Prosecution, adduced no proof that D2 intended to mislead the Court with the alleged false testimony, and that his actions were deliberate and intended to harm the proceedings.

219. At trial, in its closing query, the Prosecution asked D2: “And, to your mind, did you testify in accordance with the plan or the agreement that you had signed up for? A: of course”.¹⁷⁸ Notably, the Prosecution never asked D2 if he wilfully gave false testimony to mislead the Court.

d) *D3’s admissions that he lied do not constitute false testimony*

220. The only evidence of false testimony is admissions from D3 that he gave false testimony in the Bemba Main Case. D3 testified in the Bemba case for three days – 18-19 June, 25 June 2013 – under direct examination by the Defence and cross-examination by the two Victims’ Lawyers and the Prosecution.

221. Yet, in the Article 70 case, there are references to alleged lies in only a few lines.¹⁷⁹ Given the length of his testimony over a three-day period, and the multiple topics covered, it is highly unlikely the D3’s alleged lies were limited only to joining the army to support President Patassé and not knowing Mr. Arido or [REDACTED].¹⁸⁰ He testified he mentioned Bozizé in the alleged false testimony, but there was no indication what exactly the alleged lie

¹⁷⁷ ICTR: *Prosecutor v. Aloys Simba*, ICTR-01-76-A, Judgment, 27 November 2007, para. 32, available at: https://www1.umn.edu/humanrts/instree/ICTR/SIMBA_ICTR-01-76/SIMBA_ICTR-01-76-A.pdf; The difficulties in discerning what constitutes perjury, in the context of the ICTR, for example, should not be underestimated, especially given the high percentage of cases which feature serious discrepancies (see Annex A, Nancy Amoury Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions*, 2010, p. 120. The problem of the judicial apathy in reference to pursuing false testimony cases is discussed in in Annex B, “The Problem of False Testimony at the ICTR,” by Alexander Zahar, Griffith Law School, Australia.

¹⁷⁸ ICC-01/05-01/13-T-19-CONF-ENG ET, p. 41, lines 15.16.

¹⁷⁹ ICC-01/05-01/13-T-22-CONF-ENG ET, p. 30, lines 20-21: “Q: Are you now or have you ever been a soldier? A: No. I’ve never been a soldier”; p. 33, lines 15 - 16: “Q: I told the judges the following in June 2003: I told them that I was a soldier, that I had volunteered to join the army to support President Patasse”; p. 34, line 1: “A No. I lied”.

¹⁸⁰ ICC-01/05-01/13-T-23-CONF-ENG ET, pp. 12, l. 10 to 13, l. 6.

was.¹⁸¹ But, as with D2, the Prosecution adduced no evidence as to the scope of the alleged false testimony.

222. For the reasons argued above in respect to D2, the Defence submits that this hardly constitutes “false testimony,” and falls more into the category of a prior inconsistent statement or a contradiction.

e) *There was no proof beyond a reasonable doubt that D2 and D3 intended to mislead the Court*

i. D2’s intent was use the testimony “topo” to make money and not to mislead the Court.

223. The Prosecution adduced no evidence that D2 intended to mislead the Trial Chamber. On the contrary, D2 was motivated by economics, and testified that he “had signed up for” a “topo” to make money.¹⁸² He never professed any intention to mislead the Court, and no evidence was adduced by the Prosecution to infer otherwise.

224. D2’s interest was in his own situation – he wanted the 10 million FCFA and the promise of re-location. He repeatedly had said this was his motivation, and when he learned that Mr. Arido was in France, this information triggered a well of animosity.¹⁸³ He articulated no motivation about wilfully or deliberately intending to mislead the Court, or violate his oath to tell the truth. In March 2013, he had already known that Mr. Arido was in France. This was before his testimony in the *Bemba* case in June 2013.

225. The CoC confirmed that Mr. Arido “exploited the precarious personal situations” of the persons.¹⁸⁴ First, exploiting a person’s situation is not an offence or crime, unless it is linked to a purpose which constitutes an offence or crime. Second, in respect to D2, there is reasonable doubt that he was in a precarious economic situation. D2 described himself as [REACTED] at least since 2009, and was highly educated,¹⁸⁵ and made no complaints about his economic status to the Tribunal in his evidence. In fact, [REDACTED] testified that

¹⁸¹ ICC-01/05-01/13-T-23-CONF-ENG ET, p. 43, lines 5-7.

¹⁸² ICC-01/05-01/13-T-18-CONF-ENG ET, p. 67, lines 10-13.

¹⁸³ Email from D-2 to Mr. Kilolo, 21 June 2013 (CAR-OTP-0088-0504, at 0509).

¹⁸⁴ CoC, para. 95.

¹⁸⁵ ICC-01/05-01/13-T-20-CONF-ENG ET, p. 3, lines 1-8.

[REDACTED] and, for this reason, [REDACTED].¹⁸⁶ Thus, it is unlikely that [REDACTED] would find himself in a “precarious” economic situation.

ii. D3’s intent was to make money, not to mislead the Court

226. D3 viewed the commitment to come and give testimony as a contract, a deal.¹⁸⁷

227. D3, like D2, testified in the Article 70, that Mr. Arido had presented him an opportunity, a deal to make money and perhaps, even get to the West, and “if possible, stay there.”¹⁸⁸ D3’s objectives completely involved himself; he never articulated any intent to mislead the Court as the reason for allegedly giving false testimony.

228. D3 also approached this situation as a business deal. Although less formally educated than D2, D3 possessed considerable skills and held respected jobs.¹⁸⁹ D3, nevertheless, realized that this money making scheme posed risks and wanted assurances about the money.¹⁹⁰ He sought these assurances from [REDACTED] when [REDACTED] first arrived.¹⁹¹ This conduct was consistent with someone whose objective was to make some money, if the risks in doing so were manageable.

229. Thus, the Prosecution adduced no proof beyond a reasonable doubt that D3 intended to give false testimony to mislead the Court.

230. In addition, there was no proof beyond a reasonable doubt that D3 was in a “precarious” financial situation. To the contrary, in August 2012, he started to work as [REDACTED]. While at [REDACTED], he also “moonlighted” [REDACTED].¹⁹² Prior to [REDACTED], he worked as [REDACTED].¹⁹³ Witness [REDACTED] testified that D3 worked for [REDACTED] between 2008 and 2009, before [REDACTED].¹⁹⁴

¹⁸⁶ ICC-01/05-01/13-T-45-CONF-ENG ET, p. 38, lines 9-22.

¹⁸⁷ ICC-01/05-01/13-T-23-CONF-ENG ET, p. 17, lines 10-11.

¹⁸⁸ ICC-01/05-01/13-T-22-CONF-ENG ET, p. 37, lines 12-14 and p. 27 l. 24 to p. 38, l. 1.

¹⁸⁹ [REDACTED] (see e.g. ICC-01/05-01/13-T-26-ENG-CONF ET, pages 9 and 11).

¹⁹⁰ ICC-01/05-01/13-T-22-CONF-ENG ET, p. 39, lines 18-20.

¹⁹¹ *Ibid.*, p. 39, lines 18-20.

¹⁹² ICC-01/05-01/13-T-26-CONF-ENG ET, p. 24, line 25 - p. 25, line 17.

¹⁹³ ICC-01/05-01/13-T-27-CONF-ENG ET, p. 39, lines 13-21.

¹⁹⁴ ICC-01/05-01/13-T-46-CONF-ENG ET, page 26.

231. Yet, D3 told the Prosecution in his early interviews that “it is thanks to the Court that I can make ends meet.”¹⁹⁵ At this trial, the evidence he gave suggests that he spent a significant amount of time living [REDACTED] for being a witness, and received other benefits.¹⁹⁶

232. Clearly, by his own admission, D3 also had a parasitic relationship with the ICC. Based on the evidence, the obvious question is: why would D3, who recognized the ICC as a critical economic component of his existence, want to do anything to risk that relationship?

233. It makes no sense, then, that D3 would “bite the hand which was [literally] feeding him.” It was definitely against his interests to jeopardize this.

234. To infer otherwise, is incongruous and unreasonable.¹⁹⁷

f) *Conclusion*

235. In conclusion, the Prosecution failed to establish the element of false testimony. Even accepting, *arguendo*, the D2 and D3 admissions that they lied, this is not enough. “It must also be shown that the false testimony was a deliberate act, made wilfully and knowingly.”¹⁹⁸ This was not done by the Prosecution. No evidence was adduced on this point, and the offences should be dismissed.

236. The Trial Chamber failed to make a complete record on this point, and to ascertain the parameters of the alleged false testimony, thus causing prejudice to Mr. Arido, and violated his fair trial rights. The Defence team requested access to the complete Bemba Main Case file¹⁹⁹ in order to prepare its Defence, but this was rejected. Absent the Trial Chamber directing the Prosecution to directly confront D2 and D3 with each one’s alleged false testimony, it was impossible for the Defence to know the breadth and depth of the allegations, and to defend its client fully against the allegations.

¹⁹⁵ ICC-01/05-01/13-T-27-CONF-ENG ET, p. 18, lines 15-19.

¹⁹⁶ D3 testified in June 2013, and in September 2014, D3 indicates that [REDACTED]. See ICC-01/05-01/13-T-27-CONF-ENG ET, p. 19, lines 20-21.

¹⁹⁷ The ICC as a “cottage industry” for witnesses, or – more -perjoratively – a “gravy train” for witnesses is not an unknown phenomenon at the international tribunals and is based, in part, on the exchange mechanism: witnesses testify and in exchange, are housed, clothed, perhaps re-located, given medical attention, provided with DSA depending on security conditions, etc.

¹⁹⁸ SCSL: *Prosecutor v. Sesay et al.*, SCSL-04-15-T, 25 July 2006, para. 28: available at: <http://www.rscsl.org/Documents/Decisions/RUF/610/SCSL-04-15-T-610.pdf>.

¹⁹⁹ ICC-01/05-01/13-1141-Corr-Red, see inter alia para. 23: “Put otherwise, the investigation of this case should have taken place not in the jungle of Congo, but rather under the thick canopy of the main case proceedings”.

2. *The evidence adduced from Prosecution witnesses D2 and D3 was not credible*

a) *D2 is not a Credible Witness*

i. Introduction

237. Even accepting, *arguendo*, D2's admissions that he lied satisfy the element of false testimony, D2's credibility is at least, suspect and most likely compromised, by the fact that he was motivated to tell the Prosecution what it wanted to hear in order to protect himself and maintain his immunity.

ii. D2's legal status in this case is an accomplice/perpetrator

238. For the offences of 70(1)(a) and (b), a plain reading of the Rome Statute supports the conclusion that the person who gives false testimony is criminally culpable for the offence.

239. Under many national and international legal systems, it is likely that D2 would have been investigated by the Trial Chamber and/or the Prosecution and subsequently prosecuted for perjury or contempt, if the findings supported this course of action.

240. D2, who was well-educated with [REDACTED] and [REDACTED] who [REDACTED], understood that when he was first approached by the Prosecution, "they wanted me to cooperate with them and tell the truth."²⁰⁰ He was fully cognizant, during the interviews in 2013 with the Prosecution leading up to his Article 70 testimony in the instant case, that he was a suspect,²⁰¹ and requested counsel to advise and assist him during each of the four interviews. At trial, he was subsequently given immunity through a Rule 74 agreement.

241. While removing the threat of potential prosecution can be viewed as an incentive, it is not a foregone conclusion that this means the person will tell the truth. It is as likely the

²⁰⁰ ICC-01/05-01/13-T-20-CONF-ENG ET, p. 24, lines 14-15.

²⁰¹ ICC-01/05-01/13-T-18-CONF-ENG ET, p. 41, lines 20-25, and p. 41, lines 13-25: 'A: He told me that the Court was aware of the fact that I am not a genuine witness, as such, but that I'm a suspect and, therefore, I either had to accept to continue lying or choose to tell the truth in order to assist the Court'; ICC-01/05-01/13-T-20-CONF-ENG ET, p. 24, lines 8-11: 'A: The OTP realised that there were witnesses who had been encouraged to give false testimony. And everyone knows that, even on the net people know that. So they conducted their investigations and they realised that I was amongst the people who had given false testimony. So, you see, I was suspected and –'; ICC-01/05-01/13-T-21-CONF-ENG ET, p. 55, lines 20-25.

person, who does not want to lose the promised immunity, will provide the information which s/he thinks the Prosecution wants to hear. This is in, fact, what D2, appeared to do.

- iii. There was no proof beyond a reasonable doubt that D2 had no military experience in 2002-2003.

242. The Prosecution's theory, that D2 was simply a civilian, is not proved beyond a reasonable doubt, and D2's own testimony raises reasonable doubt.

243. First, D2 testified that he was [REDACTED], and that [REDACTED] in Cameroon, he stated that [REDACTED], because of this position.²⁰² He repeated his concern that he would be harmed by agents of Bozizé in an e-mail to Mr. Kilolo dated 21 June 2013.²⁰³

244. While the exact nature of the position's "job description" may be unclear, it is evident that – in the context of the CAR events in 2002-2003, this position had a combat/military dimension.

245. Ange-Felix Patassé represented one of the parties to the armed conflict that took place in CAR in 2002-2003 while Bozizé represented the other party. As [REDACTED], it is likely that D2 caught the attention of the Bozizé forces, resulting in the situation where D2 "fled the war and reprisals from Bozizé."

246. D2's testimony relating to his relationship with [REDACTED] also clearly established that D2 had knowledge of military affairs, and a familiarity, in particular with the war in CAR. He volunteered evidence at trial that he knew [REDACTED] who was [REDACTED], as one of the soldiers involved in the struggle for power in CAR. D2 knew that "Seleka" meant Alliance. D2 testified that there was a whole variety of different armed groups which were vying for power in CAR, and [REDACTED] had soldiers behind him.²⁰⁴

247. D2 explained that his relationship to [REDACTED] pre-dated the Bemba case, when [REDACTED] asked [REDACTED], and also to [REDACTED].²⁰⁵ This meant that D2 would be [REDACTED], but D2 intended to do this as a civilian.²⁰⁶

²⁰² ICC-01/05-01/13-T-20-CONF-ENG ET, p. 48, lines 12-14.

²⁰³ CAR-D24-0002-0739, and CAR-OTP-0088-0504, at 0509.

²⁰⁴ ICC-01/05-01/13-T-20-CONF-ENG ET, pp. 59-68.

²⁰⁵ *Ibid.*, pp. 64-65.

248. In response to the Presiding Judge's question regarding being [REDACTED], D2 volunteered that in the CAR rebellion, civilians go into the bush, take up arms and assume any military rank they want.²⁰⁷

249. When D2 was asked if he remembered telling anyone that he was [REDACTED], he testified that he remembered testifying about that before the Court and also telling Mr. Kilolo about his relations with [REDACTED]. D2 added that if [REDACTED] succeeded in his rebellion and formed a government, "[REDACTED]"²⁰⁸

250. It could be inferred from this evidence that the "line" between civilians who joined the rebel groups in the bush and soldiers within a military structure was quite fluid and blurred. In addition, this is information that only a person involved in, or very close to the military struggle, could have known.

251. D2 also adopted the "habits" of the military: he used military language, referring to Mr. Arido as "mon cadet."²⁰⁹

252. In sum, D2 offered testimony that supported background and experience that was stamped with the word, "military" – and the Prosecution produced no evidence to refute this.

253. Yet, in the Article 70 case, D2 claimed that he was never a soldier, never had any military training and was not in Bangui in 2002-2003. He asserted that he was in [REDACTED], in [REDACTED].

254. However, when asked direct, simple question about his "new" allegedly truthful claims of what he was doing in 2002-2003, D2 was evasive and never answered the question.²¹⁰

255. Counsel asked about whether he knew a [REDACTED] during the 2002-2003 period. Instead, he testified that he qualified for the position due to his prior experience

²⁰⁶ *Ibid.*, pp. 64-67.

²⁰⁷ *Ibid.*, p. 68, lines 2-8.

²⁰⁸ *Ibid.*, p. 71, lines 20-23.

²⁰⁹ CAR-OTP-0075-0738 (27 December 2013), CAR-OTP-0075-0785 (22 March 2013), CAR-OTP-0075-0567 (9 October 2012), and CAR-OTP-0075-0761 (9 February 2013).

²¹⁰ ICC-01/05-01/13-T-20-CONF-ENG ET, p. 55.

[REDACTED], [REDACTED].²¹¹ Then, D2 immediately contradicted his own allegation that he was appointed on the basis of the experience he gained from [REDACTED].²¹²

256. Clearly, this circuitous and rambling non-response to a simple question raises reasonable doubt as the veracity of D2's underlying claim that he was [REDACTED] in the 2002-2003 period.

iv. D2's memory was not reliable

257. When D2 was questioned, on direct examination by the Prosecution, about the name of [REDACTED] he could not remember her name.²¹³ It was not until cross-examination the next day that he finally recalled her name.²¹⁴

258. Perhaps D2 temporarily "forgot" [REDACTED]²¹⁵ and anger at [REDACTED].²¹⁶

259. But, regardless of the reason for this temporary "memory lapse," the fact that it happened raises an issue of whether what D2 represents as what he remembered, is, in fact credible and accurate.

260. In addition, D2 appeared – for some events – to remember more details – as the time span lengthened between the event and the statement he gave to the Prosecution in 2014 or testimony to this Trial Chamber in 2015.

261. In his first statement to the Prosecution in April 2014, D2 made no reference to notes he allegedly took in the meeting. Then, in May 2014, D2 brought the notes. But the story about Mr. Arido telling him to dip the papers in tea to make them look old did not surface until the November 2014 interview – about seven months after D2 produced the notes.

262. In addition, he testified that he took no notes in Douala in relation to his discussion with Mr. Kilolo in February.²¹⁷

²¹¹ *Ibid.*, p. 56.

²¹² *Ibid.*, p. 56, lines 1-8.

²¹³ ICC-01/05-01/13-T-18-CONF-ENG ET, p. 9, lines 13-23.

²¹⁴ ICC-01/05-01/13-T-20-CONF-ENG ET, p. 63.

²¹⁵ CAR-OTP-0088-0504, at 0509 (Email of 21 June 2013).

²¹⁶ ICC-01/05-01/13-T-46-CONF-ENG ET, p. 22.

²¹⁷ ICC-01/05-01/13-T-20-CONF-ENG ET, p. 36.

263. During his four interviews with the Prosecution in the presence of his attorney over the course of 2014, D2 never mentioned that he had received a call from Mr. Arido after D2's testimony in the Bemba case. For the first time, during his testimony in October 2015, D2 asserted that Mr. Arido called to congratulate him right after his testimony in the Bemba Main case (more than two years earlier).²¹⁸

264. Yet, no documentary evidence was adduced to corroborate and support D2's "latent" memory of being called by Mr. Arido after his testimony in June 2013. There was no CDR provided by the Cameroonian authorities for Mr. Arido or D2 for this period; the last CDR for Mr. Arido was for April 2013.

265. In addition, D2's claim that Mr. Kilolo called him during his testimony in the Main Case is discredited by the Prosecution's own evidence.²¹⁹

b) *D3 is not a Credible Witness*

266. Like D2, D3's status in this case is as an accomplice/perpetrator. He testified that he knew he was a suspect, and had agreed to cooperate with the Prosecution and had discussed receiving protection from them.²²⁰

267. Like D2, D3 was in the same position as a "suspect" being investigated by the Prosecution of the ICC and requested the assistance of counsel.²²¹

268. D3's credibility is compromised by his status as an accomplice/perpetrator, and this is illustrated by the shift in the course of his testimony – from identifying [REDACTED] to identifying Arido as the person who made promises to him for this deal.

269. On 19 October 2015, at first, on direct examination, D2 discussed [REDACTED] as if he were the person "running the show" – that he was the person with whom to negotiate the terms and conditions, and that

[REDACTED] asked us to write down exactly what we wanted and where we were planning to go. He advised us to tell Mr. Kilolo that we were members of

²¹⁸ ICC-01/05-01/13-T-21-CONF-ENG ET, pp. 44, l. 23 to 45, l. 4.

²¹⁹ See "The Prosecution's Fair Trial Violations" section, *supra*.

²²⁰ ICC-01/05-01/13-T-23-CONF-ENG ET, p. 45, l. 17 to 47, l. 11.

²²¹ ICC-01/05-01/13-T-22-CONF-ENG ET, pp. 36 and 47-48.

[REDACTED] [...] When [REDACTED] got there [...] [REDACTED] We were taking a risk. [REDACTED]²²²

270. Then Prosecution questioned him about the circumstances of his interview with the Prosecution, and reminded him that he was informed by the Prosecution that he was a suspect.²²³ The Prosecution elicited evidence that D3 was informed by the OTP that he was involved in the Article 70 violation, and he was voluntarily meeting with the Prosecution.²²⁴

271. From that point in D3's testimony, his story changed. In response to questions, D3's story no longer involved [REDACTED] and his deal anymore, but D3 references Mr. Arido, who now makes the proposals to him for money and relocation.²²⁵

272. D3 now describes Mr. Arido as the "go-between" with Mr. Kilolo and claimed that Mr. Arido was responsible for reporting any concerns or complaints that he and the others had to Mr. Kilolo.²²⁶ Here, the story line is: "Arido told him to tell Kilolo that he, with [REDACTED], [REDACTED]."²²⁷

273. The only problem is D3 also testified that in 2005– which was before meeting Mr. Arido and [REDACTED] in 2012 – he was stopped [REDACTED]. [REDACTED] told them that they had received information that he was [REDACTED] and was selling things in [REDACTED]. [REDACTED].²²⁸

274. Based on this testimony, there is reasonable doubt as to the claim that D3 had no military experience, since he was viewed by the authorities as [REDACTED]. It was also not credible that D3, who was working with [REDACTED], "needed" to be coached or instructed by Mr. Arido and [REDACTED] in the first place because of his military experience.

275. Lastly, D3's credibility is undermined by his claim that [REDACTED] picked Mr. Kilolo up at the airport when he arrived for the Douala meeting,²²⁹ yet Mr. Kilolo, in his accounting to himself, in an e-mail dated 1 March, indicated that he had taken a taxi from the

²²² *Ibid.*, p. 39.

²²³ *Ibid.*, pp. 47-48.

²²⁴ *Ibid.*, p. 48.

²²⁵ *Ibid.*, p. 55.

²²⁶ ICC-01/05-01/13-T-22-CONF-ENG ET, p. 65, lines 11-16.

²²⁷ *Ibid.*, p. 63, lines 18-22.

²²⁸ ICC-01/05-01/13-T-26-CONF-ENG-ET, pp. 58-59.

²²⁹ ICC-01/05-01/13-T-22-CONF-ENG ET, p. 39, line 25 - p. 40, line 1.

airport when he arrived on 20 February 2012.²³⁰ Moreover, D2, who allegedly was present during the meeting in Douala, did not testify on this fact.

c) *D2's and D3's accounts of the alleged "re-location" promise are not credible*

276. Both D2 and D3 testified that re-location was part of the deal. D2 specifically mentioned re-location to Europe²³¹ and, in addition to the money, was the reason he agreed to the deal.²³² But, D2's plans were clearly focused on [REDACTED].²³³ Therefore, his averment that he wanted to re-locate to Europe was hardly credible.

277. As to D3, he was always interested in re-locating to another African country.²³⁴

d) *D2's and D3's change of positions on access to [REDACTED]*

278. At the end of the day, although D2 and D3 agreed to give the Defence access to [REDACTED] to verify and corroborate elements of their testimony, both withdrew their permissions.

279. This withdrawal objectively undermines the credibility of D2 and D3 because it removed from the record a potentially important source of information to test their assertions.

280. Especially given the inconsistencies in each of their testimonies, a reasonable inference can be drawn that the information [REDACTED] would not have provided corroboration for the claims D2 and D3 made in their evidence.

e) *D2's and D3's claimed "motivations" to come forward to the Court are not credible*

281. D2's claims that for reasons of his conscience he decided not to continue lying, but to tell the truth. But the veracity of these claims is obliterated by his deep-seated animosity and

²³⁰ See CAR-D21-0001-0007.

²³¹ ICC-01/05-01/13-T-18-CONF-ENG ET, pp. 71-72; ICC-01/05-01/13-T-20, pp. 3-4; ICC-01/05-01/13-T-21-CONF-ENG ET, pp. 14, 24.

²³² ICC-01/05-01/13-T-20-CONF-ENG ET, p.4, lines 4-5: "And that is why I had agreed to give testimony, testimony to earn the 10 million and 10 million to have this travel to Europe".

²³³ ICC-01/05-01/13-T-20-CONF-ENG ET, page 71.

²³⁴ ICC-01/05-01/13-T-26-CONF-ENG ET, pages 48-49.

jealousy towards Mr. Arido.²³⁵ D2 was not happy when he learned from others and the lawyer of Mr. Arido's presence in France.²³⁶

282. Although these feelings may have been deep-rooted and beyond the scope of this case, it is clear that D2 learned, from both Mr. Arido and other parties, that he had left the country and was in France in September 2012. This was about nine months prior to D2's testimony in the Bemba case in June 2013. The fact is that the 10 million FCFA deal had not been consummated, and – based on his view of the situation – he blamed Mr. Arido. But Mr. Arido was physically out of the picture – he was already in France.

283. Nowhere in his testimony does D2 raise the issue of payment for testimonies with the person who made the original promise – [REDACTED] – nor does D2 discuss this problem with Mr. Arido.

284. D2's silence on the 10 million, after its prominence in his account of the alleged Douala briefing, is suspect and raises reasonable doubt. D2 had his own agenda all along: he was an individual who was motivated by his avaricious interest – in the “topo” and in all of his endeavours. However, absent the 10 million FCFA and relocation, went through with his testimony in June 2013. These factors lead to reasonable doubt as to whether there ever was a promise of 10 million FCFA and relocation.

285. A second argument which raises reasonable doubt is this: if there were such a promise, why had D2 not raised the failure to follow through with [REDACTED] in a timely manner? [REDACTED] was hardly unknown to D2. When they first met – prior to the *Bemba* case, [REDACTED] had suggested that D2 [REDACTED]. [REDACTED] indicated that D2 was [REDACTED], with at least [REDACTED].²³⁷ [REDACTED],²³⁸ but this hardly deterred D2 in his career path. D2's name and signature appear on [REDACTED].²³⁹ And, D2 had hopes of [REDACTED].²⁴⁰

²³⁵ CAR-OTP-0088-0504, at 0509 (Email of 21 June 2013); see also ICC-01/05-01/13-T-20-CONF-ENG ET, pages 84-88.

²³⁶ ICC-01/05-01/13-T-19-CONF-ENG ET, pages 35-36.

²³⁷ ICC-01/05-01/13-T-20-CONF-ENG ET, pp. 64-68: D-2 admits that he know [REDACTED] previously to situation in February 2012, before case request to testify, when [REDACTED].

²³⁸ ICC-01/05-01/13-T-21-CONF-ENG ET, pages 12-13.

²³⁹ [REDACTED], CAR-D24-0002-0003.

²⁴⁰ CAR-OTP-0075-0786.

286. Moreover, D2 repeatedly testified that the deal was with [REDACTED].²⁴¹

287. Despite the fact that the 10 million FCFA promise and relocation was not materializing, this hardly deterred D2 from seeing [REDACTED] as a possible opportunity to be exploited. Through Arido, he continued to jockey for a position with [REDACTED].²⁴² Thus, when D2 denied participating [REDACTED] meeting organized by [REDACTED], this is hardly credible.²⁴³ More importantly, no proof was adduced by the Prosecution to rebut this evidence.

288. D3 tried to portray himself as a victim, or a “sheep” to the Court,²⁴⁴ who was betrayed by Mr. Arido and blamed the situation on him,²⁴⁵ but there was no proof beyond a reasonable doubt that D3 was a victim of Mr. Arido, or a “sheep.”

289. It should not be forgotten that, at the end of the day, D3 was the only person who ended up [REDACTED].²⁴⁶

290. For a long period of time, he lived off the ICC “gravy train” – where his housing, food and other needs were provided by the Court.

291. Based on this conduct, to portray D3 as anything less than a shrewd opportunist – working on his agenda like D2 – is to underestimate him.

3. *The Mystery of [REDACTED]*

292. [REDACTED]’s presence is ubiquitous at each stage of this case: [REDACTED], his name appears as an individual involved in implementing the Common Plan, or, alternatively, as being used in furtherance of the plan.²⁴⁷

293. [REDACTED] is identified as the person who is alleged to have instructed Arido in various aspects of the Common Plan/Overall Strategy.²⁴⁸

²⁴¹ICC-01/05-01/13-T-20-CONF-ENG ET, p. 36, lines 17-18: Mr. Arido “informed that Mr. [REDACTED] had a deal [...]”; ICC-01/05-01/13-T-19-CONF-ENG ET, p. 64, lines 3-4: [REDACTED] “hatched” the deal.

²⁴²CAR-OTP-0075-0761.

²⁴³CAR-D24-0002-0003.

²⁴⁴ICC-01/05-01/13-T-27-CONF-ENG ET, p. 56, l. 18-19.

²⁴⁵*Ibid.*, p. 47, lines 3-17.

²⁴⁶*Ibid.*, p. 52, ll. 21-23.

²⁴⁷[REDACTED], para. 21.

294. [REDACTED] is likely the unidentified “[REDACTED]” in thee-mails of the “anonymous informant”, whose tip triggered this case against Mr. Arido and the others. There is publicly available material from which to infer that the “[REDACTED]” referred to in the Anonymous Informant, was, in fact, [REDACTED].²⁴⁹

295. [REDACTED] was relied upon by the Bemba defence, as far back as December 2010, to identify potential witnesses for its case²⁵⁰ and, over the years, as an intermediary to identify and deal with witnesses.²⁵¹ His work with potential witnesses continued at least throughout early 2012, based on correspondences with Mr. Kilolo in references to potential witnesses. This is made clear, particularly, with regards to the reimbursements for [REDACTED]’s Mission to Cameroon 20-28 February 2012, which coincided with the alleged meeting in Douala.²⁵²

296. [REDACTED]’s personal involvement in the recruitment of potential witnesses is evident in his email to Mr. Kilolo, dated 20 July 2011. Here, he indicates that his activities included purchasing tickets for transportation and requesting permission from their employers. There is no indication that he delegated these tasks to anyone else.²⁵³

297. And, in the Article 70 case against Mr. Arido, it is [REDACTED] who is identified by Prosecution witnesses D2 and D3 as the deal maker of the “topo.”[REDACTED] was the one

²⁴⁸ [REDACTED], para. 28, (“[REDACTED]”).

²⁴⁹ ICC-01/05-01/13-292-Conf-AnxA-Red (“[REDACTED]”). This description is in line with an article referring to [REDACTED] at [REDACTED].

The Defence requested an unredacted copy of the disclosed anonymous informant e-mails (ICC-01/05-01/13-1793-Conf) which was rejected. The Defence pointed out at paragraphs 3 and 6, that the evidence revealed potentially exculpatory material to Mr. Arido vis-à-vis the role of this “[REDACTED]”, who was clearly the object of the Prosecution’s investigations throughout.

²⁵⁰ [REDACTED] sent a list, with accompanying descriptions of their background, of FACA military members. He indicated that they were important witnesses. See CAR-D21-0003-0223, at 0225.

²⁵¹ ICC-01/05-01/13-600-Conf-Corr2, paras 436-439, 710; Kilolo Submissions on the COC indicate that Mr. Arido was a consultant in military matters to the Bemba team, and [REDACTED] was an intermediary who left in January 2012, who had been designated by the prior Bemba team Lead Counsel Me. Nkwebe Liriss. He had designated [REDACTED] as an intermediary to identify and put him in contact with CAR persons who were involved in the events of 2002-2003; see also 9 December 2012 - Mr. [REDACTED] confirmed these persons.

²⁵² CAR-D21-0001-0007, and CAR-D21-0003-0223, at 0224, 0225, 0226, 0227, 0228, 0229, 0230, 0231, and 0232.

²⁵³ CAR-D21-0001-0007, and CAR-D21-0003-0223, at 0224, 0225, 0226, 0227, 0228, 0229, 0230, 0231, and 0232.

who promised the 10 million FCFA and re-location in Europe²⁵⁴ and [REDACTED] was the one who “hatched” the deal and set the terms and conditions of the deal.²⁵⁵

298. The Prosecution’s evidence was that [REDACTED]’s agenda was not financial – contrary to D2 and D3, but political. According to D3, [REDACTED] wanted [REDACTED].²⁵⁶ The same was echoed by D2.²⁵⁷

299. Yet, [REDACTED], who is in the role of an unindicted perpetrator in the alleged events, especially the February 2012 alleged witness “briefing” in Douala, is legally unscathed – when, in reality, he could be viewed as an unindicted perpetrator and a key “missing link” in finding the truth about the February 2012 events.

4. *There is no proof beyond a reasonable doubt that Mr. Arido was involved in Article 70 offences in respect to a Douala meeting in February 2012*

a) *Introduction*

300. The heart of the CoC’s decision in respect to Mr. Arido are offences centred on a meeting in Douala in or around 19 or 20 February 2012, between potential witnesses D2, D3, D4, and D6 and Mr. Kilolo and [REDACTED].

301. The allegations against Mr. Arido are that he introduced these persons to Mr. Kilolo, escorted them from Yaoundé to Douala for the meeting and held a “briefing” with them prior to the meeting where he made promises to encourage their false testimony, and instructed them about what to say.

302. The question is: Did the Prosecution prove these allegations beyond a reasonable doubt?

303. Based on both the (a) absence of proof and (b) the deficiencies in proof which was presented, the answer is: “No.”

²⁵⁴ ICC-01/05-01/13-T-18-CONF-ENG ET, pp. 71-72 (D-2 testimony that [REDACTED] talked about the money and the possibility to emigrate to Europe); see also ICC-01/05-01/13-T-19-CONF-ENG ET, pp. 5-6.

²⁵⁵ ICC-01/05-01/13-T-19-CONF-ENG ET, p. 64; ICC-01/05-01/13-T-22-CONF-ENG ET, p. 39: “[REDACTED]”.

²⁵⁶ ICC-01/05-01/13-T-22-CONF-ENG ET, p. 61, lines 7-10: [REDACTED].

²⁵⁷ ICC-01/05-01/13-T-18-CONF-ENG ET, p. 71, lines 9-11.

- b) *There was no proof beyond a reasonable doubt that Mr. Arido recruited potential witnesses for the Douala Mission*

304. First, the Prosecution’s own evidence – the testimony of D2 and D3 – was that the source of the idea of recruiting potential witnesses was [REDACTED].²⁵⁸

305. Second, the Prosecution adduced no evidence to support its theory that Mr. Arido was Bemba’s “man on the ground” in the alleged false testimony scheme to defend him.

306. There was no evidence adduced as to why Mr. Arido, who had an independent relationship to Mr. Kilolo and the Bemba team as an expert on military affairs, would be involved in the first place. There was no evidence produced to show that Mr. Arido had anything to gain. Even the Prosecution’s erroneous theory that Mr. Arido “benefited” from the ICC ticket because it furthered his professional agenda,²⁵⁹ was connected to Mr. Arido, the expert witness, not Mr. Arido, Bemba’s “man on the ground.”

307. There are no records to show that Mr. Arido provided any monies to the potential witnesses for Douala – for transport, for food, for expenses, or for accommodations, and no receipts that anyone received these monies from Mr. Arido.

308. In fact, it was [REDACTED] and [REDACTED] who were responsible for organizing the Douala Mission. The Bemba team provided expenses to each of them for food and lodging in Douala. This is illustrated in Mr. Kilolo’s email containing the expenses of the Bemba Defence where notes that “[REDACTED]”.²⁶⁰ It is clear that ‘[REDACTED]’ Mr. [REDACTED] and [REDACTED] were those being responsible for bringing potential witnesses to Douala, and not Mr. Arido. This is also supported by the exchange of a number of emails between Mr. Kilolo and Mr. [REDACTED].²⁶¹

309. There was no proof beyond a reasonable doubt – even if the Bemba team provided transport or food costs to potential witnesses, which are a legitimate expense – that this was done for the purpose of committing an Article 70 offense, and that Mr. Arido had knowledge of this purpose.

²⁵⁸ ICC-01/05-01/13-T-18-CONF-ENG ET, pages 67-68; ICC-01/05-01/13-T-22-CONF-ENG ET, p. 39.

²⁵⁹ ICC-01/05-01/13-T-47-CONF-ENG ET, page 14, lines 24-25 to page 15, lines 1-2.

²⁶⁰ CAR-D21-0003-0176, at 0177.

²⁶¹ See e.g. CAR-D21-0003-0057.

310. There is evidence that Mr. Kilolo was in Douala for a Mission in February to investigate and screen potential witnesses for the Bemba Main Case, in which he was Lead Counsel. The e-mails to himself, keeping an account of the expenses of the Mission, support this.²⁶²

311. It is possible that D2 was part of the larger group in Douala in February to meet with Mr. Kilolo. In fact, in his interview with the Prosecution, he refers, “to other people being there and they were eliminated”²⁶³

312. But, there was no proof beyond a reasonable that D2 got to Douala via Mr. Arido’s assistance and introduction to Me. Kilolo. To the contrary, D2 told the Prosecution investigators that he initiated contact with Mr. Kilolo

[REDACTED]²⁶⁴

313. The sole activity for which Mr. Kilolo enlisted the assistance of Mr. Arido in Douala after they had discussed the expert report and payment for it,²⁶⁵ was to evaluate taped interviews with some potential witnesses – who were not identified – based on Mr. Arido’s military expertise. Mr. Arido concluded that none were former CAR military.²⁶⁶

- c) *There is no proof beyond a reasonable doubt that Mr. Arido instructed potential witnesses*

314. The focal point of this allegation is D2’s elaborate chronology and other notes he claimed to have taken, based on Mr. Arido’s instructions. According to him, the purpose was to remind him of the details of his potential testimony.

315. But D2 failed to mentions these “notes” when he first met with the Prosecution in April 2014. It was not until May 2014 that the “notes” materialized – three months after the alleged Douala “briefing.” For someone who claimed he wanted to remember all the details of the “instructions,” D2 conveniently forgot this in his first Prosecution interview.

²⁶²CAR-D21-0001-0007.

²⁶³ ICC-01/05-01/13-T-21-CONF-ENG ET, pages 15-16, lines 12-17: “[REDACTED].”

²⁶⁴ CAR-OTP-0084-0412, at 0418.

²⁶⁵ See “Mr. Arido’s mandate and terms of reference” section, *supra*.

²⁶⁶ CAR-OTP-0074-1065-R01, at 1066: “[REDACTED].”

316. In addition, D2 and D3 have different memories of the “note-taking.” D3 recalls during the meeting he was asked to write down how much money he wanted and where he wanted to re-locate to, but there is no testimony, as there is with D2, that Mr. Arido had a chronology, had notes, and that everyone in the room was taking notes.²⁶⁷

317. Also, D3’s evidence did not support the allegation that Mr. Arido instructed him: he gave evidence that it was [REDACTED] who coached him.²⁶⁸

318. The Defence also submits that when confronted during testimony with his interview to the Prosecution investigators, D3 admitted that he told the investigators that D2 introduced himself as an intelligence officer, whereas in his prior testimony, D3 testified that Mr. Arido introduced him.²⁶⁹

319. Witness D2 and D3 provided significantly inconsistent accounts relating to the alleged coaching relating to the military status of D2 in Douala. While D2 alleged that Mr. Arido coached him to say that he was a Sub Lieutenant, D3 testified that Mr. Arido only introduced D3 as a Lieutenant without specifying the army from which he acquired the rank.²⁷⁰

- d) *There was no proof beyond a reasonable doubt as why D2 or D3 (the only witnesses who testified) would have needed to be instructed or coached by anyone in the first place.*

320. Each witness, by his own account, held significant positions of influence which required a commanding knowledge of events, persons, and places that included the war in CAR between 2002- 2003.

321. D2 testified that he was [REDACTED],²⁷¹ [REDACTED]²⁷² and [REDACTED], who [REDACTED].²⁷³ In this professional capacity, he persuaded [REDACTED]. D2 had been travelling to Cameroon since 1999, and knew the country.²⁷⁴ [REDACTED].²⁷⁵ He had

²⁶⁷ ICC-01/05-01/13-T-21, pages 68-69.

²⁶⁸ ICC-01/05/13-T-26-CONF-ENG ET, p. 64, lines 20-23.

²⁶⁹ ICC-01/05-01/13-T-26-CONF-ENG ET, p. 67, lines 1-4: “[REDACTED].”

²⁷⁰ ICC-01/05-01/05-01/13-T-26-CONF-ENG ET, p. 66.

²⁷¹ ICC-01/05-01/13-T-20-CONF-ENG ET, p. 55, lines 20-22.

²⁷² *Ibid.*, p. 41, lines 16-25.

²⁷³ *Ibid.*, p. 41, lines 18-25; p. 42, lines 8-9, and p. 45, line 25.

²⁷⁴ *Ibid.*, p. 41, lines 18-25.

²⁷⁵ ICC-01/05-01/13-T-46-CONF-ENG ET, pages 22 and 24.

obtained [REDACTED], had diplomas, and was [REDACTED].²⁷⁶ Thus, based on his professional and personal history, D2 needed no “instructions” about the events in CAR in 2002-2003.

322. D2’s allegation that Mr. Arido instructed him to lie are not credible, based on the fact that [REDACTED], who was the key person recruiting potential witnesses for Mr. Kilolo, knew D2 previously. In fact, D2 presented to the Court that [REDACTED] had enough confidence in him to request that he [REDACTED], and to [REDACTED]. Therefore (a) there was nothing for D2 to lie about it, and (b) even, *arguendo*, there was an instruction to lie about something, [REDACTED] would have identified this immediately and questioned D2, whom he knew very well. D2 would have risked his position of confidence with [REDACTED], and any future plans he had [REDACTED].

323. Similarly, D3 was very familiar with the CAR events, based on his own experiences.

324. D3 held a permanent position as [REDACTED].²⁷⁷ D3 testified that he was arrested and [REDACTED], who accused him of [REDACTED].²⁷⁸ D3 testified that he felt threatened by Bozizé and [REDACTED].²⁷⁹

325. D3 experienced very dramatic events in connection with the war: [REDACTED]. It is, therefore, preposterous to allege that D3, six years later, needed coaching about the elements of a war which resulted in such life-threatening danger to him.

- e) *There was no proof beyond a reasonable doubt that a Douala “briefing” involving Mr. Arido even took place*

326. D2 claimed that the four persons, travelled as a group, organized by Mr. Arido, from Yaoundé to meet Mr. Kilolo but the Prosecution adduced no evidence of tickets or other documentation to support this claim.

327. D2 claimed that he stayed in [REDACTED], and in the same bed as Mr. Arido;²⁸⁰ but, the Prosecution adduced no documentary proof of these hotel reservations.

²⁷⁶ ICC-01/05-01/13-T-20-CONF-ENG ET, p. 42, lines 17-18.

²⁷⁷ ICC-01/05-01/13-T-27-CONF-ENG ET, page 39, lines 13-21.

²⁷⁸ ICC-01-13-T-26-CONF-ENG ET, pages 58-59.

²⁷⁹ ICC-01/05-01/13-T-23-CONF-ENG ET, p. 43.

328. To the contrary, the Defence produced CAR-24-0002-0001, from [REDACTED] of the national Cameroonian police, stating that there is no record of D2 or Mr. Arido staying at the hotel in the month of February 2012. This statement provides reasonable doubt that D2's account is, in fact, truthful.

329. Moreover, it is highly unlikely that any meeting, as described by D2, could have taken place, unnoticed by the police, especially at [REDACTED]. First, all the persons alleged to be at the meeting were [REDACTED]. Meetings of foreigners would hardly go unnoticed. Secondly, there is a police presence in the area of [REDACTED], which is located in a "red light district." For this reason, the veracity of the police record should be underscored.

i. There is no agreement as to location of the "briefing,"²⁸¹

330. D2 testified the alleged briefing took place in the [REDACTED], in D3 and [REDACTED]'s room.²⁸²

331. D3 testified that it took place in the room which D2 and Mr. Arido shared at the same hotel.²⁸³

332. D2 and D3 would have been unlikely to "forget" the exact venue of the alleged "briefing," since the occasion had such potential economic significance to their futures – money and a way to re-locate.

333. Hence, there is reasonable doubt that the "alleged" briefing took place in anyone's room.

ii. The two sole Prosecution witnesses who claimed they were present gave inconsistent and contradictory testimony.

334. There was direct evidence from only two witnesses who alleged that they were recruited by Mr. Arido, and introduced by him to Mr. Kilolo – D2 and D3.

²⁸⁰ ICC-01/05-01/13-T-21-CONF-ENG ET, p. 7, lines 24-25.

²⁸¹ See para. 328, *supra*.

²⁸² ICC-01/05-01/13-T-21-CONF-ENG ET, p. 32.

²⁸³ ICC-01/05-01/13-T-26-CONF-ENG ET, p. 48, lines 22-25.

335. Both gave evidence that they talked regularly to each other and discussed the situation with their testimony and Mr. Arido's role, as well as meeting with the Prosecution in February 2014.²⁸⁴

336. But D2 and D3 gave different evidence as to the 10 Million FCFA promise and the substance of the "briefing." It appears that D2 and D3 were not at the same place, at the same time, as claimed.

337. These discrepancies on two key points raise reasonable doubt that the alleged "briefing" even took place.

iii. The alleged 10 million FCFA promise

338. D2's testimony has numerous references to the promise of 10 million FCFA to each person as the deal from [REDACTED],²⁸⁵ yet nowhere in D3's version is there even a whisper of the 10 million figure. In fact, when asked specifically about whether D3 wrote this amount down on a piece of paper, he did not remember.²⁸⁶

339. D3's economic situation certainly was not better than D2's, and – it could be argued – was probably considerably worse. If the 10 million FCFA promise were made, it is highly likely that D3 would have remembered it clearly, and paid attention to whatever amount he had written on the paper.

340. D3's evidence was that he understood there was a risk with this deal, and confronted [REDACTED] about this. In response, according to him, [REDACTED] warned Mr. Arido

²⁸⁴ ICC-01/05-01/13-T-22-CONF-ENG ET, p. 50, lines 4-5: "After I met with people from the OTP [February 2014], the only person I have been in contact with is [REDACTED]"; ICC-01/05-01/13-T-22-CONF-ENG ET, p. 51, lines 12-19: "[REDACTED] Before I met with the OTP, [REDACTED]"; ICC-01/05-01/13-T-23-CONF-ENG ET, p. 31, lines 7-8: " [REDACTED]"; ICC-01/05-01/13-T-26-CONF-ENG ET, pages 8-9: "After meeting with the OTP team, [REDACTED] called me and told me that he had been summoned, that he had been summoned by the [REDACTED]"; ICC-01/05-01/13-T-20-CONF-ENG ET, p. 14, lines 7-16: "D2 testimony re contacts with D3: Q. Have you been in contact with [REDACTED] in advance of these proceedings, in the lead-up to these proceedings about your testimony? A. Yes. [REDACTED] was in contact with me."

²⁸⁵ ICC-01/05-01/13-T-18-CONF-ENG ET, pages 71, 72; ICC-01/05-01/13-T-19-CONF-ENG ET, p. 34; ICC-01/05-01/13-T-21-CONF-ENG ET, p. 24; ICC-01/05-01/13-T-20-CONF-ENG, pages 3-4; ICC-01/05-01/13-T-21-CONF-ENG ET, p. 14; *see also* ICC-01/05-01/13-T-22-CONF-ENG ET, p. 37; ICC-01/05-01/13-T-22-CONF-ENG ET, p. 55; ICC-01/05-01/13-T-22-CONF-ENG ET, p. 39.

²⁸⁶ ICC-01/05-01/13-T-22-CONF-ENG ET, p. 31.

that D3 was “capricious” and should not be recruited.²⁸⁷ It is not believable that D3 would “forget” terms and conditions of the deal promised.

341. Thus, there is reasonable doubt about the promise of 10 million FCFA from [REDACTED], Arido or anyone else because even the two sole Prosecution witnesses do not concur on this point.

iv. D3 changed his story during his testimony as to who made the promises

342. D3’s testimony about who allegedly made the promises was internally inconsistent. Initially, D3 asserted that the promise was given by [REDACTED], but in cross-examination, he changed his story and claimed it was Mr. Arido.²⁸⁸ As discussed above, this change was in directly correlation to his suspect status.²⁸⁹

343. Thus, D3’s inconsistent testimony raised reasonable doubt about who – and if anyone– made any promises.

v. D2 and D3 gave inconsistent accounts as to the substance of the alleged “briefing” and note-taking

344. As a preliminary matter, nowhere does D2 or D3 detail the alleged content of the “briefing” meeting in respect to what the prospective testimonies would include – that is, what elements of the events in CAR in 2002-2003. According to the Prosecution’s theory, the instructing of witnesses took place at the “briefing,” but there is no proof beyond a reasonable doubt.

345. There were serious inconsistencies between D2 and D3 as to the “note-taking” at the alleged “briefing.” D2 asserted that, at the “briefing,” Mr. Arido had some papers, with notes on it, including a chronology of events and that everyone took notes before meeting Mr.

²⁸⁷ ICC-01/05-01/13-T-26-CONF-ENG ET, p.50.

²⁸⁸ ICC-01/05-01/13-T-22-CONF-ENG ET, p. 39: “[REDACTED]”

²⁸⁹ See “D3 is not a Credible Witness” section, *supra*.

Kilolo. But D3 made no mention of Mr. Arido's alleged notes, and did not mention any note taking by other people.²⁹⁰

346. In addition, D2's notes first surfaced in his May 2014 statement and in his testimony in the Article 70 case, but was not part of his initial April 2014 statement to the Prosecution. It is logical that he would have remembered the "notes" closest in time to the February 2012 events, and that they would have been part of his April 2014 Statement. But, perhaps, this is another example, of D2's "latent" memory, or D2's note-taking was produced at a different time and different place.²⁹¹

347. In sum, these inconsistencies raise reasonable doubt that (a) the "briefing" even took place; (b) that 10 million FCFA promise was ever made; and (c) that Arido had any involvement in the alleged "briefing."

5. *The alleged promises and monies in connection with the February meeting*

- i. There was no proof beyond a reasonable doubt that Mr. Arido made any promises to D2, D3, D4, and D6

348. There was no proof beyond a reasonable doubt that the source of this "topo" was Mr. Arido, or that any promises were made by the Mr. Arido. To the contrary, [REDACTED], not Mr. Arido, is the person identified by Prosecution witnesses D2 and D3 as the deal maker of the "topo."²⁹² [REDACTED] was the one who promised the 10 million FCFA and re-location in Europe²⁹³ and [REDACTED] was the one who "hatched" the deal and set the terms and conditions of the deal.²⁹⁴ D2 also testified that [REDACTED] suggested that they not focus too much on money; [REDACTED]'s interest was in [REDACTED]. From this, it can be

²⁹⁰ ICC-01/05-01/13-T-21-CONF-ENG ET, p. 32; ICC-01/05-01/13-T-21-CONF-ENG ET, pages 68-69; *see also* ICC-01/05-01/13-T-26-CONF-ENG ET, p. 48; ICC-01/05-01/13-T-26-CONF-ENG ET, p. 50.

²⁹¹ *See* "D2 is not a Credible Witness" section, *supra*.

²⁹² ICC-01/05-01/13-T-18-CONF-ENG ET, p. 72: Mr. [REDACTED] made promises of money "...you have an opportunity [...] opportunity to ask for the money"; ICC-01/05-01/13-T-19-CONF-ENG ET, p. 71; ICC-01/05-01/13-T-20-CONF-ENG ET, p. 36: "Mr. Arido informed that Mr. [REDACTED] had a deal and he explained the deal to me".

²⁹³ ICC-01/05-01/13-T-18-CONF-ENG ET, pages 71-72; *see also* ICC-01/05-01/13-T-19-CONF-ENG ET, pages 5-6.

²⁹⁴ ICC-01/05-01/13-T-22-CONF-ENG ET, p. 39: "[REDACTED]".

concluded that D2 understood [REDACTED] to be interested in the politics of the situation, more than the money involved.²⁹⁵

349. D2 was directly asked:

Q: You claimed that Arido promised Europe and 10 million FCFA for you if you agreed to do what he requested; is that correct?

A: *Arido did not make me the offer.* Arido gave me to understand that for testifying it would be necessary for me to receive 10 million and travel to Europe. That was part of the clauses. He knew that I could not testify for nothing.²⁹⁶ (emphasis added)

350. In fact, as discussed *supra.*, [REDACTED] and [REDACTED] were responsible for organizing the Douala Mission.

- ii. There is no proof beyond a reasonable doubt that Mr. Arido transferred monies to potential witnesses for the purpose of committing an Article 70 offence

351. As to monies given to the potential witnesses by Mr. Arido, D2 claimed that, in connection with this meeting, the only monies he received which were passed through Mr. Arido were 10,000 francs. D2 made different claims about the reasons for this money: (a) Mr. Arido gave it to him, from the lawyer, for his transportation back home;²⁹⁷ (b) this was money being given to D2 and others from the lawyer for an evening meal, and it came from Arido and [REDACTED].²⁹⁸

352. D3 also testified to receiving 10,000 FCFA from [REDACTED], after [REDACTED] had dropped Mr. Kilolo off at [REDACTED]. Each person received 10,000 FCFA and had to sign a log for the money, to show Mr. Kilolo that he has been paid the money.²⁹⁹

353. The CoC confirmed factual findings that each witness received 10,000FCFA, and that D2 and D3 had stated to the Prosecution investigators that they had each signed a document which acknowledged they received the money.³⁰⁰

²⁹⁵ ICC-01/05-01/13-T-22-CONF-ENG ET, p. 61.

²⁹⁶ ICC-01/05-01/13-T-21-CONF-ENG ET, p. 14.

²⁹⁷ ICC-01/05-01/13-T-19-CONF-ENG ET, p. 33.

²⁹⁸ ICC-01/05-01/13-T-18-CONF-ENG ET, p. 70.

²⁹⁹ ICC-01/05-01/13-T-22-CONF-ENG ET, p. 40, lines 4-6.

354. D3, at trial, testified that it was [REDACTED], not Mr. Arido, who gave him the monies. But no signed receipt or log entry for either D2 or D3 was ever produced by the Prosecution.

355. These allegations, in respect to Mr. Arido, were not proved beyond a reasonable doubt.

356. However, assuming *arguendo* that small amounts of money were provided for the potential witnesses, monies for food and transport are legitimate witness expenses, it is most likely that these were approved and issued by the one person who represented the Bemba team, Mr. Kilolo.³⁰¹

iii. Alleged payment of taxi fare

357. The Arido Defence submits that documentary and oral evidence presented during the trial contradict the allegation contained in the CoC against Mr Arido³⁰² that in the context of the alleged Douala meeting, Mr. Arido gave to witnesses D2 and D3 10,000 FCFA to refund their travel expenses back home and for food for which they signed receipts in acknowledgement.³⁰³

358. The Defence submits that the impugned witnesses D3 and D2 did not testify during trial that they signed receipts in acknowledgement of the 10,000 FCFA allegedly paid to them by Mr. Arido as described in the CoC. Throughout the trial, the Prosecutor did not produce or tender into evidence the alleged receipts. The failure of the Prosecution to produce or tender the said receipts as evidence to prove the alleged payments raises reasonable doubts that the said payments were made by Mr Arido.

359. Contrary to the allegation contained in the CoC, the Prosecution elicited evidence of documented payments for the transportation of D3alleging that Mr.[REDACTED] gave each witness present in Douala, 10,000 FCFA and each acknowledged receipt of payment by signing in a log book, which Mr [REDACTED] said he would present to Mr. Kilolo to justify

³⁰⁰ CoC, para. 91.

³⁰¹ ICC-01/05-01/13-T-22-CONF-ENG ET, p. 40, lines 1-9.

³⁰² CoC, para. 91.

³⁰³ See e.g. CAR-OTP-0078-0184, at 0190, CAR-OTP-0080-0069 at 0084, CAR-OTP-0080-0021, at 0036, and CAR-OTP-0080-0069, at 0077.

the expenses .³⁰⁴ In that regard, the Defence submits that the Prosecution failed to provide any reasonable explanation as to why Mr. Kilolo would pay for the transportation of the witnesses twice, through two different individuals.

360. Furthermore, and relating to payment for transportation in the first mission in Douala, the Prosecution again elicited evidence of documented payment through witness D3 who during his testimony of 20 October 2015 stated that Mr Kilolo gave him 50 euro for their transportation and for taxi fare following the first meeting in Douala.³⁰⁵ The witness identified a receipt supporting the alleged payment.³⁰⁶

361. The Defence submits that as evidenced by Mr. Kilolo's email, [REDACTED] and [REDACTED] were responsible for the transportation and lodging of the impugned witnesses, and not Mr. Arido. In particular, Mr. Kilolo paid them for this purpose 660 euro.³⁰⁷ The Prosecution clearly fails to present any such evidence, which would determine otherwise.

362. Prosecution evidence demonstrates that payments made by the Bemba Defence were documented for the purposes of accountability. Yet, the Prosecution failed to explain why Mr Kilolo would direct that payments be made to the same individuals and for the same purposes, despite his demonstrated meticulous attempts to keep documented records for the purposes of accountability and possible reimbursement of the expenses incurred during his Douala mission.³⁰⁸

363. In sum, the Prosecution failed to prove beyond a reasonable doubt any of the payments alleged to have been made by Mr. Arido.

6. *There is no proof beyond a reasonable doubt that Arido acted as a "go-between" for D3 with Me. Kilolo*

364. The Prosecution's theory, that Mr. Arido was Mr. Bemba's "man on the ground," and the theory that he liaised on behalf of the potential witnesses with Mr. Kilolo is dispelled by evidence that both D3 had established an independent relationship with him.

³⁰⁴ICC-01/05-01/13-T-22-CONF-ENG ET, p. 40, lines 1-9.

³⁰⁵*Ibid.*, pages 14-15.

³⁰⁶*Ibid.*, pages 14-15.

³⁰⁷See CAR-D21-0003-0176, at 0177.

³⁰⁸See CAR-D21-0001-0007: Email dated March 1, 2012 titled "Fwd: bemba-demande de remboursement mission cameroun".

365. But, D3 claimed that Mr. Arido was the “go-between” with Mr. Kilolo.³⁰⁹

366. D3, for example, responded to an e-mail which Mr. Kilolo had sent him in late January 2012 - prior to the Douala meeting, in which Mr. Kilolo directly confirmed with D3 that he would arrive in Douala about 15 February. On 27 February, D3 wrote directly to Mr. Kilolo, inquiring if he had arrived safely.³¹⁰

367. Hence, the credibility of D3 claim that Mr. Arido was a “go-between” is unsupported.

7. *There was no proof beyond a reasonable doubt as to the Article 70 allegations in respect to D4 and D6.*

368. Although the CoC confirmed offences involving D4 and D6, there was no evidence adduced by the Prosecution from them.³¹¹

369. Since neither testified in the Article 70 case, there was no proof beyond a reasonable doubt that D4 or D6 (a) gave false testimony which was (b) intended to mislead the Court and cause harm. Thus, the elements of 70(a) and (b), the two offences which must be committed by a witness, are not satisfied.

370. In the CoC, the few factual allegations confirmed in respect to D-4 and D-6 are based solely on interviews conducted by the Prosecution with D2 and D3, both of whom were suspects at the time of the interviews and assisted by counsel.

371. Hence, this confirmation was based on hearsay. There were no statements from either D4 or D6, and no interviews submitted to the Pre-Trial Chamber on which the factual allegations were confirmed.

372. The factual findings in the CoC in respect to D4 and D-6 are, based on interviews provided to the Prosecution by D2 and D3 are:

- a. Mr. Arido escorted D4 and D6 to Douala meeting;³¹²

³⁰⁹ ICC-01/05-01/13-T-22-CONF-ENG ET, p.65, lines 13-14.

³¹⁰ CAR-D20-0005-0633: e-mails dated 29 January 2013 and 27 February 2012.

³¹¹ See “D4 and D-6 - The ‘Missing’ Witnesses” section, *supra*.

³¹² CoC, para.90, fn. 133, and 134.

- b. Mr. Arido instructed D4 and D6 on what to say to Mr. Kilolo, as regards military status and some event in Bangui;³¹³ and
- c. Mr. Arido liaised between the witnesses and Mr. Kilolo and “exploited the precarious personal situations” of these witnesses.³¹⁴

373. The CoC confirmed two factual findings, based on the testimony provided by D-4 and D-6 in the Bemba Main Case, in 2013.

- a. D6 testified that he did not meet any other prospective witness in Cameroon;³¹⁵ and
- b. D4 testified that in October 2002 he was “in the USP forces” as “a chief sergeant” and that he did not know Mr. Arido.³¹⁶

374. Given that D-4 and D-6 could have been called by the Prosecution, but were not, any reliance on hearsay from D2 or D3 about D4 and D6 violates the fair trial rights of Mr. Arido.

375. While hearsay evidence has been held to be admissible at the CoC stage, for hearsay evidence to form the basis of a conviction, and for the Prosecution to discharge its burden of proof beyond on a reasonable doubt, would violate fair trial because the Defence has no way to test the credibility of the evidence.

376. The Defence cannot cross-examine a piece of paper, where “X” says something about “Y” but “Y” is not available to be questioned.

377. Moreover, where there are credibility issues attached to “X” – as we have argued in respect to D2 and D3 – the fair trial violations are magnified.

378. At trial, the only evidence presented was about D4 and D6 and was through D2 and D3 as D2 and D3 testified that D4 and D6 were present in Douala³¹⁷

³¹³ CoC, para.90, fn. 135.

³¹⁴ *Ibid.*, para. 95, fn. 153 and 154.

³¹⁵ *Ibid.*, para. 94, fn. 150.

³¹⁶ *Ibid.*, para. 94, fn. 151 and 152.

³¹⁷ ICC-01/05-01/13-T-19-CONF-ENG ET, pp. 7, 9; ICC-01/05-01/13-T-21-CONF-ENG ET, pp. 15-16; ICC-01/05-01/13-T-22-CONF-ENG ET, p. 39.

379. The Prosecution adduced no evidence about the alleged “precarious personal situations” of D4 and D6.

380. In addition, the Prosecution did not prove beyond a reasonable doubt that D4 and D6 were “witnesses” for the purposes of Article 70(1) (c).

381. For the above reasons, all charges against Mr. Arido in respect to D4 and D6 should be dismissed.

IV. VIOLATIONS OF MR. ARIDO’S AND HIS FAMILY’S CIVIL, POLITICAL AND HUMAN RIGHTS

382. Mr. Narcisse Arido and his family suffered egregious violations of their rights, stemming from his participation as an expert witness in the Bemba Main Case. These included violations of Article 12, Universal Declaration of Human Rights (UDHR) and Article 17 of the International Covenant on Civil and Political Rights (ICCPR) – the right to privacy, family life, and to be free from attacks on honour and reputation, Article 23, UDHR - the right to work and to a livelihood, and Article 3, UDHR and Article 6, ICCPR - the right to life and security.³¹⁸

383. In addition, the Prosecution abused its power of investigation in this case, to seek information about telephone communications and financial records which went years beyond the brief time period of the charged allegations.³¹⁹ This “fishing expedition” targeted members of Mr. Arido’s family that included his wife and others, who were neither under investigation, subjects of specific court orders, or participants in the case as suspects or witnesses and cast an arbitrary and unjustified net of suspicion, scrutiny and presumption of guilt on them.

A. Abduction Attempt (violation of Article 3, UDHR and Article 6, ICCPR)

384. As a witness who agreed to appear before the ICC for the Defence in the Bemba case, Mr. Arido was entitled to the protections afforded to witnesses appearing at the ICC. The ICC must bear responsibility for any breach of these protections.

³¹⁸ ICC-01/05-01/13-T-39-CONF-ENG ET, pages 4-5, 9, 13, 23, and 33-34.

³¹⁹ Western Union Records date back to 2005: CAR-OTP-0092-0024, and CAR-OTP-0070-0005.

385. On 22 July 2012, about two months before he was supposed to testify in the Hague and after he had submitted his expert report to the Bemba team, there was an event which Mr. Arido perceived as an attempt to abduct him in Cameroon, and he had a reasonable apprehension of a threat to his safety. An individual named [REDACTED] called Mr Arido using his phone number and introduced himself as [REDACTED]. He arranged a meeting during which he informed Mr Arido that he came to organize his trip to the seat of ICC in The Hague for purpose of testimony.

386. On 24 July 2012, this same individual, whom Mr. Arido identified as [REDACTED] origin, met Mr Arido but failed to produce his identification papers, mission authorization documents or a *note verbale* from the ICC Registrar addressed to the Cameroonian authorities to justify his claim that he was [REDACTED] or was on a mission for the ICC VWU to organize Mr. Arido's trip to the seat of the court at The Hague. Fearing an abduction, Mr. Arido alerted [REDACTED] and the Cameroon [REDACTED] who promptly intervened, [REDACTED] and placed Mr Arido under their protection.³²⁰

387. As detailed in the email of 24 July 2012³²¹ from Mr. Arido to the ICC Bemba Trial Chamber and to Mr. Kilolo, Counsel for Bemba, [REDACTED] mission in Cameroon was suspicious and should be questioned and investigated: (1) on their first contact on 23rd July 2012, he lied to Mr. Arido that he was coming from The Hague while he was coming directly from Bangui; (2) he had a UN badge which had expired since March 2012, with a UN travel document; and (3) he did not have any mission letter or a *note verbale* which is mandatory for all staff on official mission.

388. Mr. Arido feared for his security and safety subsequent to the incident with [REDACTED], and immediately contacted the VWU Unit³²² and the ICC Judge,³²³ as well as the Bemba Defence team.³²⁴

389. Mr. Arido's security concerns are also detailed in a letter from [REDACTED], which is the extract of the information in [REDACTED]³²⁵: (1) according to the information received

³²⁰ ICC-01/05-01/08-2261-Conf-Red, para. 15.

³²¹ CAR-D21-0002-0059.

³²² ICC-01/05-01/13-2261-Conf-Exp-Red3, para. 19 (Letter of 26 July 2012).

³²³ See D21-0002-0059, D-21-0002-0062, CAR-OTP-0075-1454-R01; see also ICC-01/05-01/13-2261-Conf-Exp-Red3, para. 19.

³²⁴ A call on 22 July 2012: CAR-OTP-0073-0190 at 0231; various calls on 24 July 2012: CAR-OTP-0073-0190 at 0233; a call on 25 July 2012: CAR-OTP-0073-0190, at 0234.

from Mr. Arido and another person, [REDACTED] with view to facilitating his testimony at the court. However, they were concerned about being approached [REDACTED] whom they knew well. They informed [REDACTED], and consequently, [REDACTED] was arrested;(2) [REDACTED] was found to be in possession of four documents:

- a. A document stating that he was an expert consultant in [REDACTED];
- b. [REDACTED] Passport³²⁶ in which he was presented as a [REDACTED], issued on 7th March 2012 in [REDACTED];
- c. A United Nations Laissez-Passer [REDACTED], issued on [REDACTED] and expired on [REDACTED], extended until [REDACTED], stating his name as [REDACTED], [REDACTED]; and
- d. A badge of the International Criminal Court, expired since March 2012, starting his title as “[REDACTED]”.

390. The above information was also confirmed by Cameroonian authorities through a letter from the Embassy of Cameroon in The Hague dated 25 November 2015³²⁷ which indicates that:

[REDACTED].³²⁸

B. [REDACTED]’s status as [REDACTED] is doubtful

391. The fundamental issue is why [REDACTED] himself and the Court were unable to justify that [REDACTED] was indeed ICC staff.

392. The ICC Registrar failed to provide a mission letter or a *note verbale* to prove that [REDACTED] was a staff member and seek the assistance of Cameroon in the alleged [REDACTED] mission.³²⁹ Although Cameroon is not a state party of the ICC, it has provided assistance to the ICC with its staff conducting ICC missions in Cameroon. Therefore, if the [REDACTED] mission was indeed an official mission of the ICC, there should have been the

³²⁵ CAR-D24-0002-0942.

³²⁶ [REDACTED].

³²⁷ CAR-D24-0004-0278.

³²⁸ *Ibid.*

³²⁹ ICC-01/05-01/08-2261-Conf-Red, paras 9-11.

required documents from the Registrar to prove and validate the mission of its staff. But instead, the Registrar arranged for another staff to go to Cameroon and carry out the mission.³³⁰

393. The VWU wrote to the Bemba defence team on 25 July 2012³³¹, asking it to contact Mr. Arido in order to reassure him that [REDACTED] was [REDACTED]. However, there is no evidence that such an assurance was done and in any case, prior to the [REDACTED] threat, the VWU was aware of Mr. Arido's complaints and requests for protection against persistent threats he received from [REDACTED] from the Defence request for protective measure request in his favour.³³² The ICC VWU was grossly indifferent to the Defence request for protective measures for Mr. Arido and the security concerns expressed by him. Disclosing his identity to a person who Mr. Arido believed was [REDACTED] and sending the said individual to Cameroon, a non-state party of the ICC, allegedly to organize the travel of Mr Arido to The Hague without following due ICC procedures and international cooperation protocols which had hitherto worked well in the present case, aggravated the security breach of Mr. Arido and put his life in harm's way. Without complying with ICC cooperation protocol and procedures, short of the smuggling or abducting Mr Arido, there was no way [REDACTED] would have successfully taken Mr. Arido out of Cameroon legally without being identified and arrested by Cameroon security forces.

394. Lastly, Mr. Arido has never received any reply to his urgent letters to VWU or to the ICC Judge in response to the 22 July incident with [REDACTED].

395. The Defence urges the Trial Chamber to find – absent a reasonable explanation why the VWU failed to respond to the urgent complaint from Mr Arido – that the Registrar's [REDACTED]. First, the Report states that "[REDACTED]"³³³

396. Second, the Registry stated that it would "[REDACTED]"³³⁴ This is clearly an admission that something was awry with the [REDACTED] event, and that, in fact, the [REDACTED] "Mission" was not conducted in compliance with local authorities.

³³⁰ *Ibid.*, para. 12.

³³¹ *Ibid.*, para. 17.

³³² *Ibid.*, para. 13.

³³³ ICC-01/05-01/08-2261-Conf-Red, para.37.

³³⁴ *Ibid.*

C. The prejudicial consequences of [REDACTED] threat to Mr. Arido

397. In 2012,³³⁵ the security breach and threats suffered by Mr. Arido were significant. He was forced to flee the country in which he had been living since 2001,³³⁶ and where he developed his family business since 2006 which had a worth of 30 million FCFA (or 45,800 euro) per year. This business permitted the family to live in a dignified manner and in comfort.³³⁷

398. Mr. Arido had to seek asylum in France, following the advice and assistance of [REDACTED], who bought him a one way air ticket to France³³⁸ and [REDACTED].³³⁹ They were unable to ensure his security and safety in Cameroon.

399. As a result, Mr. Arido had to leave behind his wife and family of [REDACTED] children, among them, very young children.³⁴⁰

400. Thus, Mr. Arido's involvement in the Bemba case created an uncertain precarious and risk-filled situation arising for Mr. Arido and his family.

D. [REDACTED]

401. [REDACTED]³⁴¹ [REDACTED]³⁴² [REDACTED]³⁴³ and [REDACTED].³⁴⁴ [REDACTED].³⁴⁵ [REDACTED].³⁴⁶ [REDACTED].³⁴⁷ [REDACTED].³⁴⁸ [REDACTED]³⁴⁹ and [REDACTED].³⁵⁰

³³⁵ [REDACTED].

³³⁶ [REDACTED].

³³⁷ [REDACTED].

³³⁸ CAR-D24-0004-0016.

³³⁹ ICC-01/05-01/13-T-47-CONF-ENG ET, pages 15-16.

³⁴⁰ ICC-01/05-01/13-T-46-CONF-ENG ET, p. 30.

³⁴¹ CAR-D24-0004-0016.

³⁴² ICC-01/05-01/13-T-46-CONF-ENG ET, p. 15.

³⁴³ *Ibid.*, p. 15.

³⁴⁴ *Ibid.*, p. 18.

³⁴⁵ CAR-D24-0004-0016.

³⁴⁶ ICC-01/05-01/13-T-46-CONF-ENG ET, p. 16.

³⁴⁷ *Ibid.*, p. 16.

³⁴⁸ *Ibid.*, p. 17.

³⁴⁹ CAR-D24-0004-0106.

1. The Prosecution's intrusion into Mr. Arido's and his family's life

402. The Defence submits that further evidence of the violation of the sanctity of family and married life of Mr. Arido was [REDACTED].³⁵¹

403. Furthermore, the ICC Prosecutor illegally sought and obtained protected identification information from [REDACTED],³⁵² in violation of [REDACTED]. [REDACTED].³⁵³

2. Arido's financial records, emails, and CDR's

404. During the investigation process, the Prosecution obtained from the Single Judge of the Pre-trial Chamber an order for telephone records (CDRs) and email correspondence of Mr. Arido and others, as well as the information in relation to his financial records. It abused the order to seek the financial records of Mr. Arido, those of his family, and business associates dating to back to 2005.³⁵⁴ These were far outside the temporal jurisdiction of this case. The Single Judge who gave the order failed to put in place a mechanism to audit the Prosecution's implementation of the overly broad order. The Single Trial Judge decided that the emails which were irrelevant to the case should be returned to the client, but the CDRs and financial records remained in the custody of the Prosecution. This situation created the possibility of potential further abuse, if the material were to be used for purposes unrelated to the case.

405. In addition, the Prosecution's investigation conducted in Vienna, Austria relating to the Western Union financial records of Mr. Arido, established that Mr. Arido was the focus of pre-screening in violation of his privacy the security of his financial records, the sanctity and dignity of his family life, prior to judicial authorization.³⁵⁵

406. Furthermore, the Austrian court order authorizing access to the financial records of Mr. Arido which was abused to seek records spanning several years' far outside of the temporal jurisdiction of the case was obtained based on the defamation and false representation of Mr.

³⁵⁰ CAR-D24-0004-0107.

³⁵¹ ICC-01/05-01/13-T-46-CONF-ENG ET, p. 40.

³⁵² CAR-OTP-0073-0023: "[REDACTED]".

³⁵³ ICC-01/05-01/13-1137-Conf-Anx3.

³⁵⁴ CAR-OTP-0070-0005.

³⁵⁵ See CAR-OTP-0092-0021-R01.

Arido as a “[REDACTED].”³⁵⁶ This false and defamatory representation has tainted the integrity of the ICC proceedings and the judicial process in this case. The ICC Prosecution’s position to ignore the false representation has irreparably harmed Mr. Arido’s reputation, in violation of his human rights. He will continue to carry the stigma of being a “[REDACTED]” based on the continuing misrepresentations in this case.

V. REMEDY REQUESTED

407. For the reasons stated above, the Defence requests that the Trial Chamber acquit Mr. Arido of all offences charged under Article 70.

408. In addition, the Defence requests that in respect to the [REDACTED], the Trial Chamber find:

- a. That Mr. Arido had a reasonable apprehension for his safety in respect to the [REDACTED];
- b. Order a further investigation as to whether the ICC fulfilled its responsibilities to protect Mr. Arido, an expert witness, and
- c. Order the Registrar to determine why there has been no official response to date to Mr. Arido for the security concerns he communicated in July 2012 to the ICC and the ICC Judge.

409. In addition, the Defence requests that

- a. The information obtained about Mr. Arido’s family members and business associates which is unconnected to this case be expunged from all official records, and be excluded as evidence in this case, including but not limited to the Western Union records; and
- b. The Prosecution should be prohibited from using this information, in relation to this case, as well as other ICC cases, including the future CAR II cases.

410. In addition, the Defence requests that the Trial Chamber

³⁵⁶ CAR-D24-0002-1349: The subject matter in the Austrian request states “[REDACTED]”; see “The prejudicial “[REDACTED]” label violated Mr. Arido’s human rights” section, *supra*.

- a. Declare that the investigations by the Prosecution to obtain confidential protected identification information about [REDACTED].
- b. Declare that characterization of Mr. Arido as a “[REDACTED]” in the Austrian request defamed his character and reputation, and caused irreparable harm and prejudice to him within his community, and the international community.

411. Lastly, the Defence requests that the Trial Chamber, in light of the human rights violations identified in this case, determine a process within the ICC structure for re-dress, including the awarding of reparations.



Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 1st Day of August 2016

The Hague, The Netherlands

The Arido Team – Marie Abanga, Tibor Bajnovič, Tharcisse Gatarama, Raphaël Gonçalves, Lea Kulinowski, Beth Lyons, Michael Rowse, Kiel Walker – contributed to these submissions and other work on the Defence case.