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**International
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Date: **23 April 2015**

TRIAL CHAMBER VII

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

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

**Public Document
with Public Annex A**

**Prosecution's Application for Notice to be given under Regulation 55(2) on the
Accused's Individual Criminal Responsibility**

Source: The Office of the Prosecutor

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

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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) requests that the Trial Chamber VII (“Chamber”) provide notice, pursuant to regulation 55(2) of the Regulations of the Court (“RoC”), of the possibility that the facts described in the charges may be re-characterised to accord with other forms of the Accused’s participation under article 25 of the Rome Statute (“Statute”). In particular, the Prosecution requests the Chamber to give notice as follows:

(a) the charges against Accused Fidèle Babala Wandu (“Babala”) and Narcisse Arido (“Arido”) for the crimes under articles 70(1)(b) and (c) may be re-characterised pursuant to article 25(3)(a) (direct co-perpetration); and

(b) the charges against the Accused Jean-Pierre Bemba Gombo (“Bemba”), Aimé Kilolo Musamba (“Kilolo”), Jean-Jacques Mangenda Kabongo (“Mangenda”), Babala and Arido (collectively, “the Accused”) for all crimes under articles 70(1)(a), (b) and (c) may be re-characterised pursuant to article 25(3)(d).

2. The record before the Chamber and in particular the decision confirming the charges (“Confirmation Decision”) ¹ readily demonstrate that the Accused’s participation in the charged crimes supports multiple legal characterisations. This inheres in the scope of the Accused’s contributions to the charged offences, and in the overlap between the forms of criminal responsibility under the Statute. The Confirmation Decision alone establishes a sufficient basis for the requested notice. Thus, to facilitate the efficient disposition of this application, the Prosecution relies solely on the Pre-Trial Chamber’s factual findings.²

3. The Appeals Chamber holds that “it is preferable that notice under regulation 55(2) of the RoC should always be given as early as possible”.³ Providing early notice

¹ ICC-01/05-01/13-749.

² The Prosecution reserves its right to rely on factual allegations contained in the Document Containing the Charges (“DCC”) that were not rejected in the Confirmation Decision, should it consider it necessary.

³ ICC-01/04-01/07-3363, para.24.

here will ensure that the trial is fair,⁴ and will enable the Parties adequately to prepare for the range of legal characterisations of the evidence open to the Chamber. Such notice is fully consonant with article 67(1)(a), which requires that an Accused be informed “*promptly* and in detail of the nature, cause and content of the charge[s]”.⁵ It will further avoid delays and adjournments, diminish the prospect of recalling witnesses,⁶ and remove any risk of surprise to the Parties late in the case or at the end of trial due to a change in the legal framework.⁷

II. Submissions

A. Direct co-perpetration under article 25(3)(a) for Babala and Arido

i. The elements of direct co-perpetration

4. The elements of this mode of liability are: (a) the existence of an agreement or common plan between an accused and at least one co-perpetrator to commit crimes or to engage in conduct which, in the ordinary course of events, will result in the commission of crimes;⁸ (b) the accused must provide an essential contribution to the common plan which results in the commission of the crimes;⁹ and (c) the accused must hold the requisite intent and knowledge with respect to the crimes charged.¹⁰

5. According to the Appeals Chamber, an agreement or common plan between co-perpetrators may be express or implied, previously arranged, or materialise extemporaneously.¹¹ A common plan need not be specifically directed at the commission of a crime. It is sufficient that it involves a “critical element of criminality”, such that the accused is aware that its implementation will result in the commission of a crime in the ordinary course of events.¹² Although the co-

⁴ ICC-01/04-01/06-2205, para.85; ICC-01/04-01/07-3363, para.1.

⁵ ICC-01/09-01/11-1122, para.27.

⁶ ICC-01/09-01/11-1122, para.42.

⁷ ICC-01/09-01/11-1122, para.27.

⁸ ICC-01/04-01/06-2842, para.1018; ICC-02/11-02/11-186, para.137; ICC-02/11-01/11-656-Red, para.230.

⁹ ICC-01/04-01/06-2842, para.1018; ICC-02/11-02/11-186, para.137.

¹⁰ ICC-02/11-02/11-186, para.137; ICC-02/11-01/11-656-Red, para.230.

¹¹ ICC-01/04-01/06-3121-Red, para.445.

¹² *Ibid.*, para.446.

perpetrators must intend a particular offence or range of offences (or be aware that they will occur in the ordinary course of events), they need not intend or know the specific instances in which those offences will be carried out.¹³

6. The accused and their co-perpetrator(s) must each “[provide] an essential contribution to the *common plan* that resulted in the commission of the relevant crime[s]”.¹⁴ This means that the contribution must be such that some or all of the crimes resulting from the implementation of the common plan “would not have been committed or would have been committed in a significantly different way”.¹⁵

7. Co-perpetration “requires that the offence [is] the result of the combined and coordinated contributions of those involved”.¹⁶ Consequently, “the prosecution does not need to demonstrate that the contribution of the accused, taken alone, caused the crime; rather, the responsibility of the co-perpetrators for the crimes resulting from the execution of the common plan arises from mutual attribution, based on the joint agreement or common plan.”¹⁷ The Appeals Chamber has endorsed this finding that an “agreement between [the] perpetrators, which [leads] to the commission of one or more crimes [...] ties the co-perpetrators together and [...] justifies the reciprocal imputation of their respective acts”.¹⁸ The mutual attribution of the respective conduct of co-perpetrators who share a common plan means that an individual co-perpetrator who provides an essential contribution to the common plan resulting in certain crimes can be held responsible for other crime(s) to which he did not directly contribute, as long as these latter crimes were committed by his co-perpetrators in the implementation of the common plan.¹⁹ Accordingly, a co-perpetrator may be held

¹³ See below para.9. See also ICTY, *Prosecutor v. Br anin*, IT-99-36-A, Judgment, 3 April 2007, paras.418; 420-425; SCSL, *Prosecutor v. Brima et al*, SCSL-2004-16-A, Judgment, 22 February 2008, para.76.

¹⁴ ICC-01/04-01/06-2842, paras.1006, 1018(ii) (emphasis added). See also ICC-01/04-01/06-3121, para.469. At paras.488 and 491, the Appeals Chamber refers to the “essential nature of his contribution to the common plan” and “Mr Lubanga’s [essential role] to the implementation of the common plan”. In addition, at paras.455 and 499, the Appeals Chamber endorsed the findings and the approach of the Trial Chamber on this issue. See further, ICC-02/11-02/11-186, paras.135-136.

¹⁵ ICC-02/11-01/11-656-Red, para.230; ICC-02/11-02/11-186, para.135; As to the assessment of the essential nature of a contribution, see, ICC-01/04-01/06-2842, paras.1000-1001.

¹⁶ ICC-01/04-01/06-2842, para.994.

¹⁷ *Ibid.*

¹⁸ ICC-01/04-01/06-3121-Red, para.445.

¹⁹ ICC-01/04-01/06-2842, paras.1000, 1004.

responsible for the crimes committed by other co-perpetrators pursuant to the common plan, even if, because of a division of tasks, they directly perpetrated only some, or a portion of those crimes.

8. This is consistent with the Court's jurisprudence, which holds that "[n]one of the participants [in a common plan] exercises, individually, control over the crime as a whole but, instead, the control over the crime falls in the hands of a collective as such."²⁰ Joint control over crimes carried out in implementing the common plan can occur in situations where (a) the co-perpetrators distribute the functions necessary to implement the common plan *vertically*, for instance, where some co-perpetrators contribute to the "planning or preparation stage, including when the common plan is conceived",²¹ while other co-perpetrators execute the crime; and (b) the co-perpetrators distribute functions *horizontally* at the execution stage of the crimes, for instance, where each co-perpetrator executes certain crimes or portions thereof.²²

9. To establish intent, an accused must mean to engage in the relevant conduct.²³ In relation to a consequence, they must either (a) mean to cause the consequence; or (b) be aware that it will occur in the ordinary course of events.²⁴ In this case, it is sufficient that each of the Accused were aware that the implementation of their common plan would, in the ordinary course of events, result in the commission of a crime or crimes within its scope.²⁵ They need not have been aware of the *specific* crimes that resulted from the implementation of their common plan. Instead, the Accused need only have been aware that the implementation of their common plan

²⁰ ICC-01/04-01/06-2842, para.994; ICC-02/11-02/11-186, para.136; ICC-01/04-01/07-717, paras.524 and 488(b), referring to "joint control over the crime" and control "together with others".

²¹ ICC-01/04-01/06-3121 A5, para.469.

²² The ICTY Appeals Chamber applied the theory of joint criminal enterprise in the *Tadi* case where the accused has been convicted of participating, together with a group of armed men, in the attack of a village, which resulted in the killing of five persons. The Appeals Chamber found that the killing was a foreseeable part of the common plan and that the accused "actively took part in this attack [by] rounding up and severely beating some of the men". See *Prosecutor v. Tadi*, IT-94-1-A, Judgment, 15 July 1999, paras.230-234. Accordingly, the Appeals Chamber reversed the acquittal entered by the Trial Chamber, which had found the accused played no role in the killing of any of the five men. See *Prosecutor v. Tadi*, IT-94-1-T, Trial Judgment, 7 May 1997, paras.373 and 761.

²³ Article 30(2)(a).

²⁴ Article 30(2)(b). See also, ICC-01/09-01/11-373, para.335; ICC-01/04-01/06-803, paras.350-352.

²⁵ ICC-01/04-01/07-717, para.533.

would, in the ordinary course of events, have resulted in the commission of article 70 offences in the Main Case by one or more of the co-perpetrators who shared the common plan. Again, in the context of co-perpetration, the “consequence” of which the person needs to be aware (according to article 30(2)(b)) is the *nature* of the crime(s) (e.g. the provision of false testimony, the presentation of false evidence, etc.), not each specific instance in which those crimes will be committed or exactly by whom.²⁶

10. To establish knowledge, an accused must be aware (a) that the common plan or agreement involves an element of criminality;²⁷ and (b) of the factual circumstances that enable him or her, together with other co-perpetrators, to jointly exercise functional control over at least one of the crimes.²⁸

ii. Facts establishing each of the elements of direct co-perpetration for Babala and Arido

11. The following lays out the facts confirmed by the Pre-Trial Chamber regarding each element of direct co-perpetration under article 25(3)(a).

Agreement or common plan

12. The Pre-Trial Chamber’s finding that the Accused were involved in an “overall strategy” differs from the “common plan” alleged by the Prosecution in name only. There is no substantive variation. Specifically, the Pre-Trial Chamber found that each Accused played a “role [...] in the purported overall strategy of defending Mr Bemba against the charges in the Main Case by means which included the commission of offences against the administration of justice”.²⁹

13. Whereas, the Prosecution alleged that those roles, *inter alia*, comprised the commission of crimes or contributions thereto, in that each Accused acted “pursuant to a common plan to defend BEMBA against charges of crimes against humanity and war crimes in the Main Case by means which included the commission of offences

²⁶ This view, albeit in the context of joint criminal enterprise, is supported by the jurisprudence of the Appeals Chamber of the ICTY. See, e.g., *Prosecutor v. Šainović et al.*, IT-05-87-A, Judgement, 23 January 2014, para.1491; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, para.276.

²⁷ ICC-01/04-01/06-803, paras.361-365.

²⁸ ICC-01/04-01/06-803, paras.366-367; ICC-01/04-01/07-717, para.538.

²⁹ Confirmation Decision, para.52 (emphasis added).

against the administration of justice."³⁰

14. The difference in the terminology used in the Confirmation Decision is merely semantic. Indeed, the Confirmation Decision essentially re-labels as an "overall strategy" the scheme that the Prosecution had pleaded as a "common plan". Nothing in the Pre-Trial Chamber's factual findings precludes Babala's and Arido's participation in, and contributions to, the common plan - rather, they affirmatively demonstrate this.

Babala's and Arido's essential contributions to the crimes

15. Babala essentially contributed to crimes carried out pursuant to the common plan (or overall strategy) by "assisting the other [Accused] in handling the financial aspects of the witness corruption [...] pursuant to and in furtherance of Mr Bemba's instructions".³¹ For instance, the Pre-Trial Chamber found that there were "several transfers of money from Mr Babala to Mr Kilolo and Mr Mangenda [and] Mr Babala also transferred USD 4,744 to Mr Arido on 25 May 2012".³² The Pre-Trial Chamber also concluded that Babala made payments to at least two different witnesses.³³

16. Arido essentially contributed to crimes carried out pursuant to the common plan or (overall strategy) by directly and personally recruiting and corruptly influencing nearly one third of the witnesses at the core of all the confirmed incidents, namely Witnesses D-2, D-3, D-4 and D-6.³⁴ The Pre-Trial Chamber found, for example, that Arido told D-2 and D-3 that he was "recruiting members of the CAR armed forces [...] who would be willing to testify in favour of Mr Bemba",³⁵ and that "[n]otwithstanding the fact that D-3 and D-2 did not have any military experience, Mr Arido maintained that this circumstance did not constitute an issue, since he

³⁰ ICC-01/05-01/13-526-AnxB1-Red, para.20 (emphasis added).

³¹ Confirmation Decision, para.83.

³² Confirmation Decision, para.81.

³³ Confirmation Decision, paras.77, 84.

³⁴ Confirmation Decision, para.95.

³⁵ Confirmation Decision, para.88.

could brief them on what to say”.³⁶ Arido gave D-3 and D-2 false military identities, characterising them as “a ‘caporal’ and ‘sous-lieutenant ... qui supervis[ait] les éléments sur le terrain’, ‘un des éléments, un des jeunes du parti à l’époque ... le MLPC étant au pouvoir à l’époque’”.³⁷

17. Arido escorted prospective witnesses, including D-2, D-3, D-4 and D-6 “to the Douala Meeting with Mr Kilolo [...] [where] D-2, D-3, D-4 and D-6 were also instructed on what to say to Mr Kilolo, in particular as regards their military status and some events that took place in Bangui”.³⁸ As the Confirmation Decision notes, “[a]ccording to Mr Arido’s statement to the French authorities, none of the witnesses participating in this meeting was a member of the CAR armed forces”.³⁹

18. The Pre-Trial Chamber also found that Arido “handed to the prospective witnesses various amounts of money”,⁴⁰ and told D-3 “entre autres, qu’une fois que nous ayons témoigné, nous aurons la possibilité de rester là-bas, parce que même si nous mentons dans notre déposition, nous serons assistés d’un avocat qui va nous défendre.”⁴¹ The Pre-Trial Chamber found substantial grounds to believe that D-2, D-3, D-4 and D-6 subsequently testified falsely at trial about, *inter alia*, their military identities.⁴²

Babala’s and Arido’s intent and knowledge

19. In addition to the above, the Confirmation Decision demonstrates that both Babala and Arido possessed the requisite intent and knowledge to be characterised as direct co-perpetrators.

20. Babala’s fulfilment of the *mens rea* is most clearly evinced by the Pre-Trial Chamber finding that he “knew about the steps taken for the commission of the charged offences, on the basis of the conversations held on a regular basis with Mr Bemba about the payments to be made to the Witnesses”.⁴³ The Pre-Trial Chamber

³⁶ Confirmation Decision, para.89.

³⁷ Confirmation Decision, para.89.

³⁸ Confirmation Decision, para.90.

³⁹ Confirmation Decision, para.90.

⁴⁰ Confirmation Decision, para.91.

⁴¹ Confirmation Decision, para.88.

⁴² Confirmation Decision, para.95.

⁴³ Confirmation Decision, para.84.

further found that Babala “intended to contribute to the charged offences and did so by transferring money, in some instances considerable amounts, throughout the period relevant to the charges, to Witnesses or Mr Arido, Mr Kilolo and Mr Mangenda.”⁴⁴ In its findings, the Pre-Trial Chamber cited an intercepted conversation in which Kilolo and Babala refer to the case of Walter Barasa before the Court⁴⁵ and “the fact that he is being targeted by a warrant of arrest ‘*tout simplement parce que ...il est soupçonné d’avoir fait pression sur des témoins*’”.⁴⁶ Babala subsequently tells Kilolo that “he will transfer to Mr Kilolo about EUR 2,000 and notes with regret that they failed to ensure ‘*le service après-vente*’, which resulted in ‘them’ (i.e., the Witnesses) being vulnerable and therefore, ‘*à la merci de ... tous les vautours*’”.⁴⁷ The Pre-Trial Chamber noted that Babala “also encouraged Mr Kilolo to take care of ‘*le service après-vente*’, irrespective of Mr Bemba’s instructions [...]”, which Babala considered he was entitled to do, “also in light of the fact that ‘*en tant que financier, c’est moi qui prends des risques*’”.⁴⁸

21. Babala knew of the centrality of his role in the bribery scheme, which was key to implementing the common plan. Babala also knew of the involvement of the other main figures in the common plan, given his “convers[ing] on a regular basis (in some instances, more than once a day)” with Bemba,⁴⁹ communications which took place “throughout the period relevant to the charges”,⁵⁰ and during which “there is recurrent reference to other [Accused] of the present case, as well as to transfers of various amounts of money that were made (or that had to be made) to their benefit”.⁵¹

22. In finding that Babala aided and abetted the commission of crimes which resulted from the implementation of the “overall strategy”,⁵² the Pre-Trial Chamber

⁴⁴ Confirmation Decision, para.84.

⁴⁵ See ICC-01/09-01/13-1-Red2.

⁴⁶ Confirmation Decision, para.82.

⁴⁷ Confirmation Decision, para.82.

⁴⁸ Confirmation Decision, para.82.

⁴⁹ Confirmation Decision, para.79.

⁵⁰ Confirmation Decision, para.79.

⁵¹ Confirmation Decision, para.79.

⁵² Confirmation Decision, paras.77, 83-85.

considered that Babala's "contribution [...] [was] made with the purpose of facilitating [the] commission" of such offences.⁵³ Patently, therefore, Babala meant to engage in conduct which the Pre-Trial Chamber found affected the commission of article 70 offences, underscoring his intentional participation in the common plan (or overall strategy).⁵⁴

23. Similarly, Arido's direct perpetration of the illicit coaching and bribing of almost one third of the witnesses in relation to whom the charges were confirmed demonstrates his espousal of the criminal element of the common plan. The Pre-Trial Chamber found in this respect that Arido was involved in the overall strategy to defend Bemba in the Main Case by "recruiting and corruptly influencing witnesses D-2, D-3, D-4 and D-6, all of whom subsequently falsely testified in the Main Case".⁵⁵ The fact that Arido "liaised between the abovementioned witnesses and Mr Kilolo and exploited the precarious personal situations of these witnesses [...] with a view to leading them to falsely testify under the illusion that this would result in a better future for them"⁵⁶ also demonstrates his commitment to the implementation and furtherance of the common plan. These findings unambiguously show that Arido meant to corruptly influence witnesses and meant, or at a minimum, knew, that such offences within the scope of the common plan would be committed in the ordinary course of events.

24. Arido knew of the importance of his role in the corruption scheme. As noted, his actions account for a substantial number of crimes carried out under the common plan. On this basis alone, his acts considerably advanced the implementation of the common plan as a whole. Arido also knew of the role and involvement of at least one other member of the common plan. The Pre-Trial Chamber confirmed that Arido escorted Witnesses D-2, D-3, D-4 and D-6 to a February meeting in Douala with

⁵³ Confirmation Decision, para.35.

⁵⁴ See Confirmation Decision, paras.83, 102-103.

⁵⁵ Confirmation Decision, para.95.

⁵⁶ Confirmation Decision, para.95.

Kilolo,⁵⁷ that he “recruit[ed] and corruptly influenc[ed] [them]”,⁵⁸ and “[...] liaised between [these] witnesses and Mr Kilolo”.⁵⁹ It further found that Arido received money from Kilolo and Babala,⁶⁰ including around the time that he presented the above-mentioned witnesses to Kilolo.⁶¹

B. Liability under article 25(3)(d) for all Accused

25. The Prosecution charged all five Accused in the alternative for their responsibility pursuant to article 25(3)(d). While the Pre-Trial Chamber confirmed the underlying facts, it did “not find it necessary to consider the residual form of criminal liability under article 25(3)(d)” on the basis that the Accused’s conduct “is more appropriately captured under the modes of liability” contained in articles 25(3)(b) and 25(3)(c).⁶²

26. However, the Pre-Trial Chamber’s characterisation of the modes of liability that it found to be “more appropriate”, implicitly accepts that the other modes of liability alleged in the DCC are also “appropriate” in the circumstances of the case. More pertinently, as set out below, the facts as found in the Confirmation Decision fully establish the Accused’s liability under article 25(3)(d).

i. The elements for liability under article 25(3)(d)

27. Individual criminal responsibility pursuant to article 25(3)(d) entails the following elements: (a) a crime within the jurisdiction of the Court was attempted or committed; (b) a group of persons acting with a common purpose attempted to commit or committed this crime; (c) the accused contributed to the crime or its attempted commission in any way other than those set out in article 25(3)(a)-(c); (d) the contribution was intentional; and (e) the contribution was made either with the aim of furthering the criminal activity or criminal purpose of the group, or in the

⁵⁷ Confirmation Decision, para.90.

⁵⁸ Confirmation Decision, para.95.

⁵⁹ Confirmation Decision, para.95.

⁶⁰ Confirmation Decision, para.87.

⁶¹ Confirmation Decision, para.93.

⁶² Confirmation Decision, para.51.

knowledge of the intention of the group to commit the crime.⁶³ For this application, the Prosecution makes only two points of law on article 25(3)(d).

28. *First*, the legal requirement that the group of persons holding a common purpose *commit* or *attempt to commit* a crime does not entail that any given member directly perpetrate its material elements.⁶⁴ Nor, is the term “commit” used in the provision limited only to situations where a crime can be imputed to a member of the group under article 25(3)(a).⁶⁵ The term “commit” in this context must be interpreted broadly and in accordance with article 25(2), in the sense that it may entail other forms of liability under article 25. Accordingly, a suspect may be criminally responsible under article 25(3)(d) for contributing to a crime directly perpetrated by persons who do not share the common purpose. Criminal liability under article 25(3)(d) will attach as long as the crime forms part of the common purpose and can be imputed (pursuant to *any* mode of liability under article 25) to at least one other member of the group acting in accordance with the common purpose in using such a direct perpetrator.

29. Further support for this interpretation of “commit” in article 25(3)(d) is apparent from the provision’s language. As noted, article 25(3)(d) extends accessorial liability to a suspect who contributes to a group of persons acting with a common purpose in *attempting* to commit a crime. Thus, liability does not depend on whether a member of the group perpetrates the material elements of a resultant crime. All that is required is a relationship between the actions of the group pursuant to a common purpose, and the crime.⁶⁶

30. Alternatively, even if *arguendo*, that relationship amounts to attribution of the resultant crime(s) to a member of the group acting with a common purpose under article 25(3)(a), this requirement is met in this case. In particular, for each of the

⁶³ ICC-01/09-01/11-373, para.351; ICC-01/09-01/11-1, para.51; ICC-01/09-02/11-1, para.47; ICC-01/04-01/10-465-Red, paras.268-289.

⁶⁴ *Contra*, ICC-02/11-01/11-656-Anx, Diss.Op Van den Wyngaert, paras.8-9.

⁶⁵ *Contra*, ICC-01/04-01/07-3436, para.1628, *citing* ICC-01/04-01/10-465-Red, Diss.Op Monageng, para.55. The Prosecution notes that Judge Monageng’s Diss.Op relies on ICTY jurisprudence which stands for the opposite proposition (*Prosecutor v. Brdanin*, IT-99-36-A, Judgement, 3 April 2007, paras.410, 413, 430).

⁶⁶ For the relevant facts in this case, see paras.35-36 below.

crimes committed by persons outside the group of individuals involved in the overall strategy (*i.e.*, all Accused), namely, the witnesses testifying falsely before Trial Chamber III, there was a separate common plan within the meaning of article 25(3)(a) involving the witnesses and at least one Accused. In addition, at least one of the members of the group may also be responsible for committing these crimes through each witness, pursuant to the theory of indirect perpetration under article 25(3)(a).⁶⁷ The findings that the witnesses falsely testified in respect of several matters on which they were coached by Kilolo and/or Arido substantiates this position.⁶⁸

31. *Second*, despite some jurisprudence to the contrary,⁶⁹ the Prosecution submits that under article 25(3)(d), *any* contribution to the crime is sufficient to establish criminal responsibility.⁷⁰ Qualifying the level of contribution, such as requiring that it be “significant”, is inconsistent with the plain reading of the provision.⁷¹ Accordingly, article 25(3)(d) merely requires the existence of a link or *nexus* between the acts and conduct of an accused and the commission or attempted commission of a crime by a group of persons acting with a common purpose.⁷²

ii. Facts that establish each of the elements under article 25(3)(d) for all Accused

32. The following lays out the facts as confirmed by the Pre-Trial Chamber with respect to each of the elements of liability under article 25(3)(d).

A crime within the jurisdiction of the Court was attempted or committed

33. The Confirmation Decision sets out the multiple charged offences under article 70 confirmed against the Accused.⁷³

A group of persons acting with a common purpose committed the crime

34. As noted above, the Pre-Trial Chamber found that a group of persons,

⁶⁷ ICC-01/04-01/06-3121-Red, para.465; ICC-01/04-01/06-2842, para.1001.

⁶⁸ Confirmation Decision, paras.64, 72 and 95.

⁶⁹ ICC-01/04-01/10-465-Red, paras.276-285; ICC-01/04-01/07-3436, paras.1632-1636.

⁷⁰ ICC-01/09-01/11-373, para.354; ICC-02/11-02/11-186, para.172; ICC-01/04-01/10-514, Diss.Op Fernandez, paras.8-15.

⁷¹ ICC-01/04-01/06-803-tEN, para.337; ICC-01/04-01/07-1497, para.79; ICC-01/04-01/06-2205, para.77.

⁷² ICC-01/04-01/10-514, Diss.Op. Fernandez, para.12.

⁷³ Confirmation Decision, pp.47-54.

comprising the Accused, acted pursuant to an “overall strategy” (*i.e.*, the common plan). Additionally however, the Confirmation Decision demonstrates that the 14 witnesses comprising the charged incidents committed crimes within the scope of the “overall strategy” – the article 70(1)(a) offences.⁷⁴ The Pre-Trial Chamber found that these witnesses falsely testified on common topics such as their “(a) previous contacts with the Defence; (b) their meetings with other prospective witnesses; (c) their acquaintance with some of the Suspects, or other persons associated with them; (d) the fact that promises had been made to them in exchange for their testimony; the fact that they had received reimbursements or transfers by Mr Bemba or on his behalf, regardless of their purpose; and (e) other substantive issues related to the charges against Mr Bemba in the Main Case”.⁷⁵ This false testimony was propounded at the behest of at least one Accused.⁷⁶ As such, the witnesses acted with a common purpose shared with a participant in the overall strategy, and in furtherance of its criminal objective.

35. Although neither the DCC nor the Confirmation Decision expressly names the testifying witnesses as sharing a common purpose with Accused involved in the overall strategy, article 25(3)(d) does not require the identification of the members of the group.⁷⁷ As elaborated below, the Confirmation Decision findings⁷⁸ sufficiently (a) establish that the 14 witnesses shared a common purpose with Accused involved in the overall strategy, namely: to provide false evidence before Trial Chamber III during the course of the Main Case, and (b) satisfy the requirement that the members of this group (*i.e.*, the witnesses and the Accused) acted concertedly.⁷⁹

36. Alternatively, even if the witnesses are not considered within the group acting with a common purpose under article 25(3)(d), their commission of article 70(1)(a) crimes are factually and legally attributable to the conduct of Accused acting with a

⁷⁴ Confirmation Decision, pp.47-54 (confirming charges against all the Accused under articles 70(1)(a) and (b) pursuant to various modes of liability).

⁷⁵ Confirmation Decision, para.64.

⁷⁶ Confirmation Decision, paras.62-64, 95.

⁷⁷ ICC-01/04-01/07-3436, para.1626; ICC-02/11-01/11-656-Anx, Diss.Op. Van den Wyngaert, para.9.

⁷⁸ Section entitled “The Accused contributed to the crime”, *infra*.

⁷⁹ ICC-01/04-01/07-3436, para.1630.

common purpose in accordance with the overall strategy.⁸⁰ As such, liability attaches to a contributor to such group in any event.

The Accused contributed to the crime

37. The Confirmation Decision is replete with findings on contributions – other than those which can be characterised under article 25(3)(a)-(c) – made by the Accused individually to the commission or attempted commission of crimes by the group acting with a common purpose.

38. Moreover, the Pre-Trial Chamber’s factual findings regarding each Accused surpass the standard of “any” contribution to the crime and, indeed would meet a higher standard, if required. Moreover, the Pre-Trial Chamber’s finding that the Accused’s involvement in the criminality amounted, at a minimum, to aiding and abetting, demonstrates that the Accused’s contributions had “an effect on the commission of the offence[s]”,⁸¹ which fulfils the requisite objective threshold of article 25(3)(d). Additionally, the following Confirmation Decision findings establish the requisite contributions of each of the Accused.

39. Bemba, “as the ultimate beneficiary of the strategy to defend him in the Main Case”⁸² – a strategy which “included the commission of offences against the administration of justice”⁸³ – was “the overall planner and coordinator whose actions led to the commission of the charged offences”.⁸⁴ He “discussed with Mr Kilolo the content of the [witnesses] testimonies and gave specific instructions as to the content of the testimony to be given; instructed Mr Babala to make transfers of money, including to other suspects; [and] directed Mr Kilolo to liaise with Mr Babala in respect of transfers of money”.⁸⁵

⁸⁰ Confirmation Decision, pp.47-54 (finding the Accused’s criminal responsibility for article 70(1)(a) offences under articles 25(3)(b) and 25(3)(c), reflecting the nexus between the Accused’s acts and the commission of the resultant crimes).

⁸¹ Confirmation Decision, para.35.

⁸² Confirmation Decision, para.105

⁸³ Confirmation Decision, para.52.

⁸⁴ Confirmation Decision, paras.105,52, 97-106.

⁸⁵ Confirmation Decision, para.102.

40. Kilolo “was mainly in charge of the implementation of the overall strategy”.⁸⁶ He “made a series of money transfers of varying amounts to some of the Witnesses”;⁸⁷ and gave a “vast set of instructions and directives [...] to Witnesses”,⁸⁸ which included “contacting some of the Witnesses shortly in advance of their testimony, or even during the breaks between courtroom sessions, in order to instruct them on the answers to be provided in [the] courtroom”,⁸⁹ with his instructions varying from “answers to be given on a number of substantive topics which might be related to the merits of the charges”,⁹⁰ to “deny[ing] any recent contact or interaction with the Defence, as well as any transfer or reimbursement received”.⁹¹

41. Mangenda “pursued his role in the overall strategy to defend Mr Bemba [...] including through the commission of offences against the administration of justice”;⁹² as “the liaison person between Mr Bemba and Mr Kilolo, coordinat[ing] with them about the money transfers made or to be made to the Witnesses and discuss[ing] with Mr Bemba and Mr Kilolo the instructions to be given to the Witnesses in advance of their testimony.”⁹³ “Mr Mangenda was present [...] when Mr Kilolo explicitly instructed D-3, D-2, D-4 and D-6 on the content of their testimony [and] handed over to all of the witnesses who were present cell phones to be used [to remain in contact with the Defence] once their own phones would be collected by the VWU before their testimony.”⁹⁴

42. Babala “assist[ed] the other suspects in handling the financial aspects of the witness corruption [...] pursuant to and in furtherance of Mr Bemba’s instructions”,⁹⁵ “contribut[ing] to the charged offences [...] by transferring money, in some instances

⁸⁶ Confirmation Decision, para.52.

⁸⁷ Confirmation Decision, para.53.

⁸⁸ Confirmation Decision, para.71.

⁸⁹ Confirmation Decision, para.60.

⁹⁰ Confirmation Decision, para.62.

⁹¹ Confirmation Decision, para.63; *See also*, Confirmation Decision, paras.52-72.

⁹² Confirmation Decision, para.75.

⁹³ Confirmation Decision, para.75.

⁹⁴ Confirmation Decision, para.74. *See also*, Confirmation Decision, paras.52, 73-76.

⁹⁵ Confirmation Decision, para.83.

considerable amounts, throughout the period relevant to the charges, to Witnesses or Mr Arido, Mr Kilolo and Mr Mangenda.”⁹⁶

43. Arido’s “involvement in the overall strategy” entailed “recruiting and corruptly influencing witnesses”, as well as liaising between the witnesses and Kilolo and “exploit[ing] the precarious personal situations of these witnesses [...] with a view to leading them to falsely testify under the illusion that this would result in a better future for them.”⁹⁷ Arido “handed to the prospective witnesses various amounts of money”,⁹⁸ telling them “*entre autres, qu’une fois que nous ayons témoigné, nous aurons la possibilité de rester là-bas, parce que même si nous mentons dans notre déposition, nous serons assistés d’un avocat qui va nous défendre.*”⁹⁹

The Accused acted with the requisite intent and knowledge

44. The findings demonstrate that when contributing to the commission or attempted commission of the group’s crimes, each Accused did so either to further the criminal activity or criminal purpose of the group (*i.e.*, to provide false evidence and corruptly influence witnesses before Trial Chamber III), or with knowledge of the intention of the group to commit crimes of such nature. Additional to the above-referenced findings, the following examples from the Confirmation Decision establish the Accused’s *mens rea*.

45. Bemba’s “direct personal involvement” in the “overall planning and coordination” of the “overall strategy” related “to all the activities concerning the corruption of the Witnesses and their ensuing false testimonies”.¹⁰⁰ He “instructed Mr Kilolo to contact witnesses; [...] contacts with witnesses made by Mr Kilolo were relayed to Mr Bemba; and [...] Mr Bemba gave Mr Kilolo specific instructions as to the maximum amounts of money which could be given [to witnesses].”¹⁰¹

46. Kilolo made “repeated attempts [...] to convince D-55 to testify falsely in favour

⁹⁶ Confirmation Decision, para.84. *See also*, Confirmation Decision, paras.77-85.

⁹⁷ Confirmation Decision, para.95.

⁹⁸ Confirmation Decision, para.91.

⁹⁹ Confirmation Decision, para.88. *See also*, Confirmation Decision, paras.86-96.

¹⁰⁰ Confirmation Decision, para.97.

¹⁰¹ Confirmation Decision, para.104.

of Mr Bemba” including by transferring money to the Witness;¹⁰² and intercepted conversations “show that Mr Kilolo was aware of, and explicitly stressed, the importance of talking to the witnesses one or two days before the scheduled testimony, in order to avoid them ‘forgetting’ the information to state in the courtroom.”¹⁰³

47. When discussing D-29’s testimony, Kilolo and Mangenda noted that, “unlike other Defence witnesses, D-29 did not abide to what he had been instructed to state,” and that “co-counsel Peter Haynes [...] must be ‘content’ that at least one witness stated the truth”.¹⁰⁴ In addition, Kilolo and Mangenda “discuss[ed] the consequences of a possible investigation under article 70 of the Statute and the measures that they could take to prevent such an investigation from being opened [...] including by way of paying those witnesses who might possibly have talked to representatives of the Office of the Prosecutor”.¹⁰⁵

48. Mangenda was “fully aware of the existence of contact between Mr Kilolo and the Witnesses, as well as of Mr Kilolo’s corrupt influence on the content of their testimonies. He was likewise aware of the practice of instructing the Witnesses to deny that they had met, or otherwise been in contact with, members of Mr Bemba’s Defence team [...] and he insisted with Mr Kilolo that this practice be always complied with.”¹⁰⁶ Indeed, Mangenda was “fully aware of the conduct of Mr Bemba and Mr Kilolo towards the commission of the charged offences, the professional risks they were taking and the possible legal consequences which might arise”.¹⁰⁷

49. Babala “intended to contribute to the charged offences and did so”.¹⁰⁸ When speaking to Kilolo about money transfers, Babala “encouraged Mr Kilolo to take care of ‘le service après-vente’” for witnesses.¹⁰⁹ Further, Babala “knew about the steps taken

¹⁰² Confirmation Decision, para.58.

¹⁰³ Confirmation Decision, para.60.

¹⁰⁴ Confirmation Decision, para.67.

¹⁰⁵ Confirmation Decision, para.69.

¹⁰⁶ Confirmation Decision, para.73.

¹⁰⁷ Confirmation Decision, para.75.

¹⁰⁸ Confirmation Decision, para.84.

¹⁰⁹ Confirmation Decision, para.82.

for the commission of the charged offences, on the basis of the conversations held on a regular basis with Mr Bemba about the payments to be made to the Witnesses.”¹¹⁰

50. Arido “intentionally corruptly influenc[ed]”¹¹¹ several witnesses. He knew that “D-3 and D-2 did not have any military experience [yet] maintained that this circumstance did not constitute an issue, since he could brief them on what to say to Mr Kilolo.”¹¹² He told witnesses “that they could ask up to 10 million CFA in exchange for their testimony”,¹¹³ and seek asylum.¹¹⁴

III. Conclusion

51. For the reasons above, the Prosecution requests the Chamber to provide notice of the possibility that the facts described in the charges may be subject to re-characterisation to accord with the participation of Babala and Arido under article 25(3)(a) and of all Accused under article 25(3)(d), pursuant to regulation 55(2).



Fatou Bensouda, Prosecutor

Dated this 23rd Day of April 2015

At The Hague, The Netherlands

¹¹⁰ Confirmation Decision, para.84.

¹¹¹ Confirmation Decision, para.96.

¹¹² Confirmation Decision, para.89.

¹¹³ Confirmation Decision, para.90.

¹¹⁴ Confirmation Decision, para.88.