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TRIAL CHAMBER VII

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

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

Public with Public Annex A

**Narcisse Arido's Response to the "Prosecution's Application for Notice to be Given
under Regulation 55 (2) on the Accused's Individual Criminal Responsibility"
(ICC-01/05-01/13-922)**

Source: Counsel for Narcisse Arido

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

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I. INTRODUCTION

1. On 23 April 2015, the Prosecution requested the Trial Chamber to give notice to the parties that the individual criminal responsibility of the five Accused may be subject to recharacterisation pursuant to Regulation 55 (2) of the Regulations of the Court (hereinafter 'Prosecution's Request').¹ The Arido Defence opposes the Prosecution's Request for the reasons stated below.

II. SUBMISSIONS

2. The Arido Defence submits that the Prosecution's Request should be rejected for four reasons. Firstly, it is inadmissible as the Prosecution is in fact attempting to obtain a revision of the Pre-Trial Chamber's decision on the Confirmation of the Charges; Secondly, the modes of liability proposed by the Prosecution have been explicitly rejected by the Pre-Trial Chamber; Thirdly, the Prosecution's Proposed re-characterisation does not meet the goals of Regulation 55; And finally, the use of Regulation 55 would violate the rights of the Accused to know the charges in detail and their right to an expeditious trial. The Arido Defence will not enter into details regarding the elements of the modes of liability discussed by the Prosecution or respond to the Prosecution's arguments that the facts as confirmed by the Pre-Trial Chamber support the Prosecution's proposed re-characterisation, as the purpose of the request is not for the Trial Chamber to actually re-characterise the facts now, but to provide notice to the parties that it may do so.

A. The Prosecution's Request is in fact a disguised appeal of the Confirmation of Charges Decision and is therefore inadmissible

3. The Arido Defence submits that the Prosecution's Request is a disguised attempt to obtain the Trial Chamber to reconsider the Pre-Trial Chamber's decision on the Confirmation of the Charges, since it is seeking the re-characterisation of the modes of liability which the Pre-Trial Chamber declined to confirm.

¹ ICC-01/05-01/13-922, para. 1.

1. The Prosecution is attempting to reinstate modes of liability which the Pre-Trial Chamber rejected

4. In its Request, the Prosecution requests the Trial Chamber to provide notice to the parties of the possibility that the facts, as described in the Decision on the Confirmation of the Charges, may be re-characterised “to accord with other forms of the Accused’s participation” under Article 25 of the Statute.² In particular, regarding Mr. Arido, the Prosecution’s requests the Trial Chamber to give notice of the possibility that the charges brought under Articles 70 (1) (b) and (c) may be re-characterised pursuant to Article 25 (3) (a), direct co-perpetration.³ It also requests that the charges for all offences under Article 70 (1) (a), (b) and (c) be re-characterised pursuant to Article 25 (3) (d).⁴

5. The Prosecution further submits that “the decision confirming the charges [...] readily demonstrate that the Accused’s participation in the charged crimes supports multiple legal characterisation.”⁵ It further asserts that the “Confirmation Decision alone establishes a sufficient basis for the requested notice”.⁶ The Arido Defence submits that the Prosecution is incorrect since the Pre-Trial Chamber explicitly rejected the modes of liability proposed by the Prosecution.

a. *The Pre-Trial Chamber explicitly rejected the Prosecution’s legal characterisation of the facts under Article 25 (3) (a) and under Article 25 (3) (d)*

6. In the Document Containing the Charges (‘DCC’), the Prosecution charged Mr. Arido under Article 25 (3) (a) as a direct or indirect co-perpetrator, for offences under Article 70 (1) (b) and (c) of the Statute. In addition, it charged Mr. Arido for soliciting pursuant to Article 25 (3) (b) of the Statute, for offences related to D2, D3, D4 and D6. It also charged Mr. Arido under Articles 25 (3) (c) and (d) for offences under Article 70 (1) (a), (b) and (c).⁷ The Prosecution’s submissions on the confirmation of charges clarified that the main mode of liability charged was direct or indirect co-perpetration pursuant to Article 25 (3) (a) pursuant to a common plan.⁸ Liability under Articles 25 (3) (b), (c) and (d) were all pleaded in the alternative.⁹

² *Ibid.*

³ *Ibid.*, para. 1.

⁴ *Ibid.*

⁵ *Ibid.*, para. 2.

⁶ *Ibid.*

⁷ ICC-01/05-01/13-526-AnxB1, pp. 74-79.

⁸ ICC-01/05-01/13-597-Conf-AnxB, paras 408 to 427.

⁹ *Ibid.*, paras 428, 429-430, 431-432; *see also* ICC-01/05-01/13-749, para. 31.

7. On 11 November 2014, the Pre-Trial Chamber confirmed part of the charges against Mr. Arido as a perpetrator (commission) under Article 25 (3) (a) or, alternatively, aiding, abetting or otherwise assisting in the commission of the offence, under Article 70 (1) (c) of the Statute.¹⁰ It also found that there were reasonable grounds to believe that Mr. Arido could be held liable for aiding, abetting or otherwise assisting in the commission of the offence of presenting false evidence by Bemba, Kilolo and Mangenda, according to Article 70 (1) (b), pursuant to Article 25 (3) (c) of the Statute,¹¹ and aiding, abetting or otherwise assisting in the commission of the offence of giving false testimony under Article 70 (1) (a) pursuant to Article 25 (3) (c) of the Statute.¹²

8. The Pre-Trial Chamber did not accept the Prosecutor's legal characterisation of the facts concerning the role of the Suspects under article 25 (3) (a) (indirect co-perpetration) and article 25 (3) (d). As such the Pre-Trial Chamber does not consider the modes of liability of "indirect co-perpetration" and the "contribution in any other way" as set out in article 25 (3) (a) and (d) of the Statute respectively applicable to the present case.¹³ More specifically, the Pre-Trial Chamber did not accept "the Prosecutor's view that the Suspects participated in a Common Plan as indirect co-perpetrators to defend Mr Bemba in the Main Case". It further held that "[d]ue to the specific nature of the offences in the present case, where some of the Suspects are directly involved in the commission of such offences, the Chamber is of the view that the mode of liability of co-perpetration, rather than *indirect* co-perpetration, captures their conduct more appropriately."¹⁴

9. Regarding Article 25 (3) (d), the Pre-Trial Chamber did "not find it necessary to consider the residual form of criminal liability under article 25 (3) (d) of the Statute for the Suspects as their conduct is more appropriately captured under the modes of liability foreseen in article 25 (3) (b)-(c) of the Statute."¹⁵

b. The Pre-Trial Chamber explicitly excluded Mr. Arido from any alleged common plan

10. When discussing 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

¹⁰ ICC-01/05-01/13-749, para. 96 and page 53.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*, para. 36.

¹⁴ ICC-01/05-01/13-749, para. 51.

¹⁵ *Ibid.*

administration of justice”, the Pre-Trial Chamber noted that “while Mr Bemba, Mr Kilolo and Mr Mangenda played an essential role in the design and implementation of the overall strategy as referred to above, the involvement of Mr Babala and Mr Arido is more limited”.¹⁶ It explicitly excluded Mr. Arido (as well as Mr. Babala) from the participation in this “strategy”, stating that “Mr Bemba, as the ultimate beneficiary, was the coordinator of the offences; Mr Kilolo, as lead counsel in the Main Case, was mainly in charge of the implementation of the overall strategy, while Mr Mangenda, as case manager, was liaising between Mr Kilolo and Mr Bemba.”¹⁷

c. The Pre-Trial Chamber rejected the application of Article 25 (3) (a) to Article 70 (1) (b) offences

11. With regard to the offence pursuant to article 70 (1) (b) of the Statute, the Chamber stated that Mr. Arido could not be considered as a “party” to the proceedings in the Main Case and, as a result, could not incur responsibility as a perpetrator under article 25 (3) (a) of the Statute.¹⁸ As a result, it elected to confirm the charges in his regard pursuant to Article 25 (3) (c).¹⁹

d. Conclusion

12. Under Article 61 (7) of the Statute, the Pre-Trial Chamber shall not confirm the charges unless the Prosecution has shown that there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.²⁰ As a result, by declining to confirm the Prosecution’s alleged modes of liability of indirect co-perpetration under Article 25 (3) (a) and of Article 25 (3) (d) for Mr. Arido, the Pre-Trial Chamber implicitly found that the Prosecution failed to establish substantial grounds to believe that Mr. Arido participated in the charged offences as a direct or indirect co-perpetrator as well as a contributor to the commission or attempted commission of such a crime by a group of persons acting with a common purpose pursuant to Article 25 (3) (d). Therefore, re-characterising the facts under modes of liability explicitly rejected by the Pre-Trial Chamber would amount to circumventing the process set out in Article 61 (9). The Prosecution fails to provide explanations as to why, despite this explicit rejection by the Pre-Trial Chamber, the Trial Chamber should consider replacing the charged modes of liability as confirmed by the Pre-Trial Chamber with these two modes of responsibility.

¹⁶ *Ibid.*, para. 52.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, para. 96.

¹⁹ *Ibid.*

²⁰ Article 61 (7) of the Statute.

2. The Prosecution mischaracterises the findings of the Pre-Trial Chamber in order to support its Request

13. The Arido Defence wishes to point out a number of misrepresentations of the Pre-Trial Chamber's Decision on the Confirmation of the Charges contained in the Prosecution's request.

a. *The Prosecution misrepresents the Pre-Trial Chamber's findings regarding Article 25 (3) (a)*

14. At paragraph 12 of its Request, the Prosecution argues that the Pre-Trial Chamber did accept the Prosecution's alleged common plan, stating that there is "no substantive variation" between the Trial Chamber's reference to an "overall strategy" and the Prosecution's alleged common plan. It states that "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"". A bit later, it states that "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."²¹

15. The Prosecution misrepresents the findings of the Pre-Trial Chamber, and takes them out of context. First of all, the Pre-Trial Chamber unequivocally stated that "[t]he Chamber does not accept the Prosecutor's view that the Suspects participated in a Common Plan as indirect co-perpetrators to defend Mr Bemba in the Main Case."²² The Arido Defence submits that the Pre-Trial Chamber rejected the question of the alleged "common plan". Further, the Pre-Trial Chamber's definition of co-perpetration made no mention of any "common plan". It stated that "Co-perpetration within the meaning of article 25(3)(a) of the Statute requires two or more persons to agree to contribute to the commission of the offence and to act accordingly."²³ It did not discuss any agreement/plan between the Accused for whom charges of direct co-perpetration were confirmed, namely Mr. Bemba, Mr. Kilolo and Mr. Mangenda.

16. In addition, when discussing 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", the Pre-Trial Chamber clearly distinguished between the

²¹ ICC-01/05-01/13-922, para. 14.

²² ICC-01/05-01/13-749, para. 51.

²³ *Ibid.*, para. 33.

roles of Mr. Arido and Mr. Babala and that of the others. It noted that “while Mr Bemba, Mr Kilolo and Mr Mangenda played an essential role in the design and implementation of the overall strategy as referred to above, the involvement of Mr Babala and Mr Arido is more limited”.²⁴ It explicitly excluded Mr. Arido (as well as Mr. Babala) from the participation in this “strategy”, stating that “Mr Bemba, as the ultimate beneficiary, was the coordinator of the offences; Mr Kilolo, as lead counsel in the Main Case, was mainly in charge of the implementation of the overall strategy, while Mr Mangenda, as case manager, was liaising between Mr Kilolo and Mr Bemba.”²⁵

17. Finally and most importantly, the Pre-Trial Chamber declined to confirm the alleged mode of liability of direct co-perpetration against Mr. Arido (and Mr. Babala). The Prosecution fails to demonstrate why the Trial Chamber should now do otherwise.

b. Article 25 (3) (d)

18. Recognising that the Trial Chamber’s declined to consider the charges brought under Article 25 (3) (d) of the Statute, the Prosecution nonetheless states that “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.”²⁶

19. The Prosecution provides its own interpretation of the Pre-Trial Chamber’s finding, and ignores the elephant in the room: the Pre-Trial Chamber decided that Article 25 (3) (d) was not an appropriate mode of liability in the present case. The Prosecution’s Request fails to demonstrate why such mode of liability would be better suited to represent the alleged participation of Mr. Arido at this stage.

3. The Prosecution should have sought leave to appeal or attempted to amend the charges

20. The Arido Defence submits that the Prosecution’s Request should be rejected as it amounts to an unacceptable attempt to circumvent the procedure set out in Article 82 (1) (d) of the Statute. Indeed, the Prosecution expresses his disagreement with the way the Pre-Trial

²⁴ *Ibid.*, para. 52.

²⁵ *Ibid.*

²⁶ ICC-01/05-01/13-922, para. 26.

Chamber has characterised the charges, and is requesting the Trial Chamber to use Regulation 55 as a vehicle to reconsider the findings of the Pre-Trial Chamber and reverse them. The Arido Defence submits that the Trial Chamber should not sanction such attempt.

21. In light of the fact that the time limit to seek leave to appeal of the Decision on the Confirmation of the Charges has long expired, the Prosecution should apply for a variation of the time limit set out in Rule 155 of the RPE, pursuant to Regulation 35 (2) of the RoC. However in doing so, the Prosecution must demonstrate that it was “unable to file the application within the time limit for reasons outside his or her control”. It is apparent that the Prosecution is unable to justify its failure to seek leave to appeal, which is why it is now attempting to reach the same result through its Request.

22. Since the delay for seeking leave to appeal pursuant to Rule 155 of the RPE and Article 82 (1) (d) of the Statute has expired, what the Prosecutor is doing in reality is seeking new additional charges. In the case of Mr. Arido, the Prosecutor is trying to substitute a more serious charge. Inasmuch as the Prosecutor seemingly argues that Mr. Arido would have a more important role “in the overall strategy” than that retained by the Pre-Trial Chamber, this can have consequences of the utmost importance as far as trial preparation and strategy are concerned. Therefore, at this juncture, if the Prosecutor intends to follow that avenue, he should be seeking a permission to do so from the Pre-Trial Chamber (Article 61 (11)).

23. Indeed, as things stand, and in the absence of an updated DCC, the charges against the Accused are contained in the Decision on the Confirmation of Charges. As such, the only modes of liability charged against Mr. Arido are direct commission under Article 25 (3) (a) and aiding, abetting or otherwise assisting in the commission of offences, pursuant to Article 25 (3) (c). As a result, the situation would appear to fall under the scope of Article 61 (9) of the Statute and the Prosecution should request the permission from the Pre-Trial Chamber to amend the charges, and provide notice to the Accused that it intends to do so. Since the Prosecution is attempted to include more serious modes of liability, a new hearing on the confirmation of the charges will have to be held.

24. It is therefore submitted that the Prosecution is also attempting to bypass the procedure set out in Article 61 (9) of the Statute, which states that between the confirmation of charges and the beginning of the trial, the Prosecutor may, with the permission of the Pre-Trial Chamber and

notice to the Accused, amend the charges. The Arido Defence takes the position that, for the purposes of Article 61 (9), the commencement of the trial means the opening statement of the Prosecution.²⁷

25. Alternatively, since the modes of liability which the Prosecution now attempts to reinstate were rejected by the Pre-Trial Chamber, paragraph 8 of Article 61 can also apply, and the Prosecution can request the confirmation of the charges pursuant to the modes of liability proposed in its Request, upon provision of additional evidence.

26. Since the Prosecution is revisiting issues which were settled in the Decision on the Confirmation of the Charges, the Defence recalls that it argued in its submissions on charges that the modes of liability listed in Article 25 are not intended to apply to Article 70 cases.²⁸ Although the Pre-Trial Chamber has not accepted the arguments of the Defence, if the Trial Chamber allows the disguised motion to appeal of the Prosecution, then the Defence for Mr. Arido requests to be allowed to provide further submissions on the issue of the joint operation of Articles 25 and Article 70.

B. The modes of liability proposed by the Prosecution do not fall within the scope of Article 70

27. The Arido Defence submits that Regulation 55 was adopted with the situation of war crimes and crimes against humanity in mind, and that the modes of responsibility listed therein cannot all apply to Article 70 cases, which are of a very distinct character and of a lower complexity level. The Arido Defence submits that the “extended” modes of responsibility listed in Article 25, such as those that the Prosecution is seeking to reinstate, are not applicable to Article 70 proceedings.

28. First of all, the explicit reference to offences “committed intentionally” in paragraph 1 of Article 70 clearly limits the scope of the possible modes of participation to be used in connection with the offences listed therein. It is submitted that only the “simple” modes of participation, namely commission and accomplice liability, apply to Article 70 offences. More specifically, the

²⁷ The phrase “before the trial has begun” has been interpreted by Chambers as “the true opening of the trial when the opening statements, if any, are made prior to the calling of witnesses” *see* ICC-01/04-01/06-1084, para. 39; ICC-01/05-01/08-802, para. 210; ICC-01/04-01/07-1213-tENG, para. 42. Though less direct, the Appeals Chambers appears to accept that the trial has not begun until the opening statements, see the logical implication of the Appeal Chamber's commentary on the dates that it mentions in paras. 27 and 29 in ICC-01/09-01/11-1123 OA 6.

²⁸ ICC-01/05-01/13-673-Conf, Part VII.

Arido Defence submits that common plan liability, or other extended forms of co-perpetration, cannot be used in respect of Article 70-offences. As far as Article 25 is concerned, its definition has been inspired by the unique characteristics of international crimes.²⁹ Even if one were to justify expanded notions of responsibility, such as JCE or common plan-liability, such a justification is inevitably rooted in the unique characteristics of international crimes.³⁰ Among these unique characteristics one can mention the extreme gravity of the crimes, the magnitude and systematic nature of criminal conduct, and the high number of individuals involved in its commission. None of these apply to the commission of Article 70-offences.

29. Secondly, the fact that only certain modes of liability as contained in Article 25 apply to Article 70 offences is supported by the approach taken by the Pre-Trial Chamber, which explicitly rejected the theories of “indirect co-perpetration” or “common plan” put forward by the Prosecution. The findings of the Pre-Trial Chamber are discussed in more details in paragraphs 6 to 19 above.

30. Last but not least, the practice of the *ad hoc* tribunals further support the argument that the modes of liability applicable to the so-called “core crimes” do not extend to offences against the administration of justice. In respect of offences against the administration of justice (‘contempt’), Rule 77 of the ICTY and ICTR RPE and Rule 60 of the STL RPE restrict the modes of liability to commission, incitement and attempt. It must be noted that both the ICTY and ICTR have conducted and finalised several ‘contempt cases’, including cases in which the allegations are similar to the ones in the present case.³¹ In none of these cases have the competent Chambers expanded the scope of individual responsibility beyond what was explicitly provided for in the rules of procedure and evidence.

31. As a result, the Arido Defence submits that the modes of liability proposed by the Prosecution cannot apply in the present case. The Prosecution’s Request must be rejected as a result.

²⁹ See K. Ambos, Article 25: Individual Criminal Responsibility, p. 743.

³⁰ See in this respect Van Sliedregt who explains the distinctive features of international criminal responsibility on account of the intrinsic features which go to the nature of international crimes, in E. Van Sliedregt, ‘The Curious Case of International Criminal Liability’, pp. 1171 – 1175.

³¹ ICTY: *Rašić* Written Reasons for Oral Sentencing Judgement; *see also*, *Rašić* Appeal Judgement; *Prosecutor v. Beqaj*, Judgement on Contempt Allegations; *Haraqna & Morina* Judgement on Allegations of Contempt; *Prosecutor v. Tabaković*, Sentencing Judgement; ICTR: *Nshogoza* Trial Judgement; SCSL: *Brima Samura* Judgement in Contempt Proceedings; *Senesie* Judgement in Contempt Proceedings; *Bangura et al.* Judgement in Contempt Proceedings; *Prince Taylor* Judgement in Contempt Proceedings; *Brima et al.*, Sentencing Judgement in Contempt Proceedings.

C. Assuming it is applicable, the Prosecution’s proposed re-characterisation does not fit the goals of Regulation 55

32. The Arido Defence notes that the Prosecution fails to provide any justification as to why Regulation 55 should (tentatively) be used in the present case. The Prosecution’s Request contains no argument as to why the modes of liability as confirmed by the Pre-Trial Chamber would not match the facts of the case or why there is a risk that the evidence does not support the modes of liability confirmed by the Pre-Trial Chamber. The Arido wishes to express its concern regarding the apparent lack of “trust” of the Prosecution into its own case.

33. The Arido Defence submits that Regulation 55 is a procedure to be used only in exceptional cases.³² It serves two purposes: the first is to that certain crimes go unpunished for purely technical reasons.³³ The second is to allow more focused trials on clearly delineated charges, therefore promoting efficiently and judicial economy.³⁴ According to the Arido Defence, the use of Regulation 55 in the present case would serve neither.

1. There is no need to “close impunity gaps”

34. One of the rationales underlying the adoption of Regulation 55 was to develop a mechanism in order to close impunity gaps that might arise throughout a trial, thereby lessening the chances of *technical acquittals*.³⁵ Regulation 55 is supposed to avoid the risk of “acquittals that are merely the result of legal qualifications confirmed in the pre-trial phase that turn out to be incorrect”.³⁶ It is meant to prevent situations where an Accused is acquitted even though there is proof beyond a reasonable doubt that s/he has committed a crime within the jurisdiction of the court.³⁷

35. The Appeals Chamber has already made it clear that Article 70-offences are of less gravity than Article 5-crimes.³⁸ This implies that modes of liability which are in significant part rooted in the gravity of Article 5-crimes cannot be applied to Article 70-offences. The Arido Defence notes

³² ICC-01/04-01/07-3363, Dissenting Opinion of Judge Tarfusser, Part A, paras 5-9.

³³ ICC-01/04-01/06-2205, para. 77; ICC-01/04-01/07-3319-tENG/FRA, Dissenting Opinion of Judge Van Den Wyngaert, para. 7, *citing to* ICC-01/04-01/06-2205, par. 77; *see also* A Closer Look at Regulation 55 at the ICC, Jennifer Easterday, in International Justice Monitor, 28 May 2013 (‘Easterday’s Article’).

³⁴ ICC-01/04-01/07-3319-tENG/FRA, Dissenting Opinion of Judge Van Den Wyngaert, para. 7; *see also*: Carsten Stahn, Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55, p. 28.

³⁵ ICC-01/04-01/07-3319, para 12; ICC-01/04-01/06-2205, para. 77; ICC-01/04-01/07-3363, paras 21, 22; ICC-01/04-01/07-3319-tENG/FRA, Dissenting Opinion of Judge Van Den Wyngaert, para.10.

³⁶ ICC-01/04-01/06-2205, para. 77.

³⁷ *See* Easterday’s Article, *see supra*, fn. 33.

³⁸ ICC-01/05-01/13-558, para. 64.

that the present case - while extremely complex for a number of reasons - is of a more limited factual scope than other cases before the Court. Unlike most charges under the qualification of war crimes or crimes against humanity before the Court, the alleged offences took place in a limited number of locations and over a limited period of time and involve a limited number of individuals.

36. In the present case, the Prosecution has indicated, during the first trial status conference, that it has already disclosed 90 to 95 per cent of the core of the case collection.³⁹ Trial Chambers of the Court have consistently held that the Prosecution's investigation should largely be completed at the stage of the confirmation of charges hearing.⁴⁰ The Prosecution has been investigating the present case since June 2012.⁴¹ During its investigations, it shall "ensure that all necessary and reasonable enquiries are made [...] whether they point to the guilt or the innocence of the suspect".⁴² As stated by the ICTY Appeals Chamber "the Prosecution is expected to know its case before it goes to trial. It is not acceptable for the Prosecution to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds."⁴³ The Prosecution failed to demonstrate why or how it has any additional evidence which was not presented at the pre-trial stage which could permit a finding of liability under Article 25 (3) (a) or (d) beyond any reasonable doubt. As a result, the Arido Defence submits that there is no reason to depart from the Pre-Trial Chamber's conclusion regarding the applicable modes of liability to prevent "impunity gap".

2. The use of Regulation 55 would not promote judicial efficiency

37. As stated above, Regulation 55 was adopted in order to promote efficiency and judicial economy.⁴⁴ Regulation 55 was to allow more focused trials on clearly delineated charges, avoiding overburdening the judges with cases involving cumulative or alternative charges, allowing for more efficient, timely trials.⁴⁵ The Arido Defence submits that, in the specific circumstances of the case, granting the Prosecution's Request would do exactly the opposite.

³⁹ ICC-01/05-01/13-T-8-CONF-ENG, p. 9, l. 8-11, p. 10, l. 8-11.

⁴⁰ ICC-02/11-01/11-432, para 25; ICC-01/09-02/11-728, para. 119.

⁴¹ ICC-01/05-01/13-597-Conf-AnxB, paras 22-27.

⁴² Code of Conduct for the Office of the Prosecution, N. OTP2013/024322, Article 48 (c).

⁴³ ICTY, *Kupreškić et al.*, Appeal Judgement, para. 92.

⁴⁴ ICC-01/04-01/07-3319-tENG/FRA, Dissenting Opinion of Judge Van Den Wyngaert, para. 7.

⁴⁵ ICC-01/04-01/06-2205, para. 77; ICC-01/04-01/07-3319-tENG/FRA, Dissenting Opinion of Judge Van Den Wyngaert, para. 7; *see also* Easterday's Article, *see supra*, fn. 33.

38. Mr. Arido is currently being charged under Article 25 (3) (a), as a direct perpetrator, and alternatively as an aider and abettor under Article 25 (3) (c) for offences pursuant to Article 70 (1) (c), and only as an aider and abettor under Article 25 (3) (c) for the offences charged pursuant to Articles 70 (1) (a) and (b).⁴⁶ The Prosecution is now proposing that the Trial Chamber put Mr. Arido on notice that the modes of liability may be re-characterised pursuant to direct co-perpetration under Article 25 (3) (a) and Article 25 (3) (d). Should this be put into effect, Mr. Arido would have to defend against four different modes of responsibility, namely as a direct perpetrator (commission as an individual) and a direct co-perpetrator (commission jointly with another) pursuant to Article 25 (3) (a), as an aider and abettor pursuant to Article 25 (3) (c), and as a contributor to the commission or attempted commission of a crime by a group of persons acting with a common purpose pursuant to Article 25 (3) (d).

39. Clearly, instead of defending against two modes of liability for Article 70 (1) (c) and one mode of liability for the offences charged under paragraphs (a), (b) and (c) of the same Article, Mr. Arido would have to defend against four potential modes of responsibility – this clearly runs against the requisite intent of the drafters of Regulation 55 to avoid “cumulative charging”. The Prosecution fails to explain how this would promote judicial efficiency, and how this would not impact Mr. Arido’s right to know the case against him and his right to be tried without undue delay. The impact of the Prosecution’s Request on Mr. Arido’s fundamental rights is discussed in more details in paragraphs 43 to 53 below.

3. Regulation 55 is not intended to substitute more serious modes of liability

40. A logical approach to Regulation 55 would be that re-characterisation could only take place only towards a “lesser” mode of liability. In other words, if the evidence presented during the trial do not support the mode of liability charged, but could possibly support another mode of liability with less stringent elements, Regulation 55 could be used. While the Appeals Chamber has declined to address the question as to whether Regulation 55 permits the re-characterisation as more serious offences/modes of liability, or whether it was limited to lesser offences/modes of liability, it held that “in any event, that the particular circumstances of the case will have to be taken into account. In addition, as stated above, the modification of the legal characterisation is limited by the facts and circumstances described in the charges or any amendment thereto.

⁴⁶ See *supra*, paras 7-9.

Furthermore, Regulation 55 (2) and (3) must be respected in order to safeguard the rights of the accused, and the change in the re-characterisation must not lead to an unfair trial.”⁴⁷

41. In the present case, the Prosecution is, *inter alia*, attempting to direct the Trial Chamber in considering re-characterising the charges from accomplice liability under Article 25 (3) (c) of the Statute, to one of direct co-perpetration under Article 25 (3) (a). The Arido Defence submits that such approach would go against the established goals and purposes of Regulation 55. In addition, in proposing a re-characterisation to a more complex mode of liability, the risk that the Trial Chamber reverses back to a mode of accomplice liability is high. Indeed, it is nearly impossible that the evidence would be considered insufficient to convict the Accused for accomplice liability pursuant to Article 25 (3) (c) and yet be considered enough to support a finding of liability pursuant to Article 25 (3) (a) as a direct co-perpetrator.

4. The application of Regulation 55 would exceed the scope of the charges as confirmed by the Pre-Trial Chamber

42. The Appeals Chamber held that Regulation 55 may not be used to exceed the facts and circumstances described in the charges.⁴⁸ The Pre-Trial Chamber explicitly rejected the modes of liability proposed by the Prosecution in its Request, finding that the evidence presented by the Prosecution did not permit to demonstrate that Mr. Arido contributed to the charged offences under these modes of liability. As a result, the Arido Defence submits that their re-inclusion would violate Regulation 55 (1), as it would exceed the scope of the charges. In addition, it would also defeat the purpose of Regulation 55, namely to have a more accurate legal characterisation of the facts underlying the alleged participation of Mr. Arido. This exercise was already undertaken by the Pre-Trial Chamber, who decided that the better suited modes of liability were direct commission under Article 25 (3) (a) or alternatively aiding, abetting or otherwise assisting in the commission or attempted commission of the offence, for Article 70 (1) (c), and aiding, abetting or otherwise assisting in the commission or attempted commission of the offence for Article 70 (a) and (b).⁴⁹

⁴⁷ ICC-01/04-01/06-2205, para. 100.

⁴⁸ *Ibid.*, paras 1, 93.

⁴⁹ ICC-01/05-01/13-749, para. 51.

D. The use of Regulation 55 would violate Mr. Arido's fair trial rights

43. It is the understanding of the Arido Defence that, while the parties should be put on notice of the possible use of legal re-characterisation under Regulation 55 as soon as possible, the actual re-characterisation can only take place during the final judgement. The wording of Regulation 55 (1) is clear: “[i]n its decision under article 74, the Chamber may change the legal characterisation of facts”.⁵⁰ As a result, while Mr. Arido would be put on notice that the legal re-characterisation may occur, he would not know whether it would in fact occur until the final judgement. The judicial uncertainty and the risk of delay that occur as a result cannot be overstated.

44. The Prosecution argues that the proposed notice is “fully consonant” with the Accused’s right to be informed promptly and in detail of the nature, cause and content of the charges.⁵¹ It further submits that it would “avoid delays and adjournments”, diminish the prospect of recalling witnesses, and would “remove any risk of surprise to the Parties late in the case or at the end of the trial due to a change in the legal framework”.⁵² The Arido Defence submits that the Prosecution is incorrect in stating so, and further fails to substantiate its claims.

45. The Arido Defence recalls that the modification of the legal characterisation of the facts in the course of the trial must not render the trial unfair,⁵³ and submits that the mere possibility of re-characterisation would render the trial unfair and violate a number of fundamental rights of Mr. Arido and his co-Accused.

1. The use of Regulation 55 would violate Mr. Arido's right to know the contents of the charges in detail

46. The Prosecution’s statement that the issuance of a notice would “remove any risk of surprise to the parties late in the case or at the end of trial”⁵⁴ is simply incorrect. The Arido Defence submits that issuing a notice pursuant to Regulation 55 would negatively impact Mr. Arido’s (and Mr. Babala’s) right to be properly informed of the charges. As the Prosecution pointed out, the right to know the charges as contained in Article 67 (1) (a) of the Statute includes the right to know them “in detail” and encompasses both the nature, the cause and

⁵⁰ See also, ICC-01/04-01/06-2205, paras 88-93; ICC-01/04-01/07-3363, para. 45; ICC-01/04-01/07-3319-tENG/FRA, para. 17.

⁵¹ ICC-01/05-01/13-922, para. 3.

⁵² *Ibid.*

⁵³ *Ibid.*, para. 85.

⁵⁴ *Ibid.*

content of the charges. A charge is defined as a statement of the facts and circumstances *including* the time and place of the alleged crimes and a legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 of the Statute **and the precise form of participation** under articles 25 and 28 of the Statute.⁵⁵ Human rights case law further supports the fact that the alleged mode of liability forms part of the charges.⁵⁶ Finally, the ICTY has held that a new mode of liability constituted a new charge.⁵⁷

47. Through the Prosecution's proposed change of modes of liability, the specificity of the charges will be less, not more. Indeed, as stated in paragraphs 37 to 39 above, one of the result of granting the Prosecution's Request and put the parties on notice of a possible re-characterisation of the modes of liability charged would have for result that Mr. Arido would be charged with four different modes of liability with significantly different constitutive elements, and would not know specifically which mode of liability will be used. As a result, Mr. Arido's right to know the charges in detail would be impaired.

2. The use of Regulation 55 would violate Mr. Arido's right to be tried without undue delay

48. As stated by Judge Tarfusser in his dissenting opinion to the Appeals Chamber's decision on Regulation 55 in the *Katanga* case: "[i]t is beyond controversy that the triggering of regulation 55 of the Regulations of the Court and of the subsequent procedural steps mentioned in its sub-regulations (2) and (3) will result in delaying the proceedings".⁵⁸ While the Appeals Chamber, in the *Lubanga* case, did not consider that a change of the legal characterisation of the facts pursuant to Regulation 55 will *automatically* lead to undue delay, it did not exclude that delay could occur as a result of its application.⁵⁹ The Arido Defence submits that as part of its duty to ensure that the trial is fair and expeditious pursuant to Article 64 (2) of the Statute, the Trial Chamber must consider the impact that the issuance of a notice under Regulation 55 (2) could have on the expeditiousness of the proceedings and the right of Mr. Arido to be tried without undue delay.

⁵⁵ ICC-01/04-01/07-1547-tENG, para. 10. (*emphasis added*).

⁵⁶ UN Human Rights Committee, General Comment 13, para. 8.

⁵⁷ ICTY, *Lukić & Lukić* Decision on Prosecution Motion Seeking Leave to Amend the Second Amended Indictment and on Prosecution Motion to Include UN Security Council Resolution 1820 (2008) as Additional Supporting Material to Proposed Third Amended Indictment as Well as on Milan Lukić's Request for Reconsideration or Certification of the Pre-Trial Judge's Order of 19 June 2008, para. 49; *see also* ICTR, *Bagaragaza* Decision on the Prosecutor's Application for Leave to Amend the Indictment, para. 10: "Charges in the alternative or additional legal theories of liability, "even in the absence of new factual or evidentiary material, are considered new charges".

⁵⁸ ICC-01/04-01/07-3363, Dissenting Opinion of Judge Tarfusser, para. 6.

⁵⁹ ICC-01/04-01/06-2205, para. 86.

49. The Arido Defence recalls that the Prosecution started investigating the case in June 2012, that the arrest warrant was issued in November 2013, that the confirmation of charges procedure lasted about a year, most of which was spent in pre-trial detention by the Accused, and that the Trial is not expected to start until September 2015 at the very best. Clearly, the present proceedings - which are, again, supposed to be of “less complexity” than core crimes - have shown a propensity for lasting a very long time. The Arido Defence submits that, rather than saving time and promoting efficiency, the use of Regulation 55 would in fact lead to even more delay.

50. The Arido Defence submits, as stated above in paragraphs 37 to 39, that one of the result of granting the Prosecution’s Request and put the parties on notice of a possible recharacterisation of the modes of liability charged would have for result that Mr. Arido would have to defend against four different modes of responsibility with significantly different constitutive elements, for each alleged offence, as opposed to two for Article 70 (1) (c) and one for Article 70 (1) (a) and (b). Obviously, this will create more work since cross-examination, investigations and examinations in chief would have to address each mode of participation to ensure that Mr. Arido is effectively defended. Particularly, the introduction of indirect co-perpetration would necessitate the Arido Defence to challenge the evidence related to the participation of the other accused, as well as the existence of the alleged “common plan”. The Arido Defence submits that this will cause significant delays during trial.

51. In addition, because Regulation 55 permits the use of facts and circumstances as listed in the Decision on the Confirmation of Charges to support the proposed new modes of liability, the Arido Defence is left facing legal uncertainty as to which facts or circumstances could be used by the Trial Chamber. This creates concerns regarding the procedure of agreed facts pursuant to Rule 69 of the RPE, or regarding the question of testimony by the Accused, as in the absence of a clear indication as to which facts/circumstances will be used, the risk of agreed/conceding certain facts which are, in light of the present charges, not considered to be incriminatory, could lead to self-incrimination issues. In other words, “the defence cannot safely ignore or concede *any* facts in favor of challenging the prosecution’s legal argument, because those facts could end up being legally recharacterized to support uncharged crimes or uncharged modes of participation during or after trial.”⁶⁰

⁶⁰ ‘A Stick to Hit the Accused With’: The Legal Recharacteriuation of Facts Under Regulation 55, Kevin Jon Heller.

52. Further, unlike what the Prosecution states, the issuance of a notice does not diminish the prospect of recalling witnesses, which is a fundamental right of the Defence once re-characterisation takes place. Regulation 55 (2) is clear: the Trial Chamber shall give an opportunity to the participants to make oral or written submissions “having heard the evidence”. It is clear from the structure of Regulation 55 that the possibility of re-calling witnesses only occurs once the Trial Chamber has received and reviewed all the evidence and provided the participants with the opportunity to be heard.

53. In light of the fact that the suggested re-characterisation would neither promote judicial efficiency and instead create further delays in the proceedings and violate Mr. Arido’s rights, the Arido Defence submits that the Trial Chamber should reject the Prosecution’s Request.

E. Observations on the procedure to be followed should the Trial Chamber decide to grant the Prosecution’s Request

54. Should the Trial Chamber consider issuing a notice under Regulation 55 (2), the Arido Defence submits that, according to the Appeals Chamber, such notice should contain precise references to the facts and circumstances of the Confirmation of Charges Decision that the Trial Chamber would take into account for the change in the characterisation, as well as provide details as to the elements of the offences the inclusion of which it contemplated. It should further indicate how these elements are covered by the facts and circumstances described in the Decision on the Confirmation of the Charges.⁶¹

55. Further, Regulation 55 (3) (a) of the Regulations of the Court requires the accused to have adequate time and facilities for the effective preparation of his defence and that the Trial Chamber has given the Accused the opportunity to make submissions.⁶² Such submissions can address the scope of the “new” modes of liability, and the measures the Defence believes are necessary to safeguard the Article 67’s rights of the Accused.⁶³

56. The Trial Chamber will then have to assess whether it remains possible for the Accused to effectively to prepare their defence in light of both the manner in which the trial has been conducted to date and the re-characterisation that is proposed.⁶⁴ The Trial Chamber will also

⁶¹ ICC-01/04-01/06-2205, para. 109.

⁶² ICC-01/04-01/07-3363, para. 95.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

need to consider what measures may need to be implemented to ensure that the trial as a whole remains fair. Such consideration could include an assessment by the Trial Chamber of whether the Accused have, in fact, been prejudiced by a re-characterisation made at this stage.⁶⁵

III. CONCLUSION

57. In light of the above, the Arido Defence respectfully requests the Trial Chamber to reject the Prosecution's Request and order that Regulation 55 of the RoC does not apply in the present case.

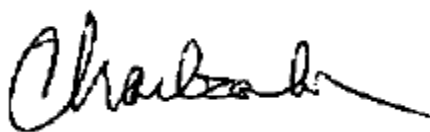
58. Alternatively, should the Trial Chamber grant the Prosecution's Request, the Arido Defence requests to be permitted to present submissions regarding the elements of the modes of liability proposed by the Prosecution, and to present arguments regarding the facts allegedly supporting the proposed re-characterisation prior to the Trial Chamber's issuance of the notice.

59. Further, the Arido Defence requests that the Trial Chamber include the following information in the notice:

- i. Precise references to the facts and circumstances of the Confirmation of Charges Decision that the Trial Chamber would take into account for the change in the characterisation;
- ii. Details as to the elements of the offences the inclusion of which it contemplated; and,
- iii. A clear indication as to how the Trial Chamber considers how these elements were covered by the facts and circumstances described in the Decision on the Confirmation of the Charges.

60. In addition, the Arido Defence respectfully requests the Trial Chamber to provide the Defence with the opportunity to make submissions once the notice is issued.

Respectfully submitted,



Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 15th Day of May 2015, in The Hague, The Netherlands.

⁶⁵ *Ibid.*