

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



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No.: **ICC-01/05-01/13**

Date: **8 January 2017**

**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 Annex**

**Public Redacted Version of  
‘Corrigendum of  
“Narcisse Arido’s Submissions on the Additional Evidence Presented  
and Appropriate Sentence to be Imposed” (ICC-01/05-01/13-2086-Conf),  
filed 8 December 2016**

**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 19 October 2016, Mr Narcisse Arido was convicted under Article 70(1)(c) in conjunction with Article 25(3)(a) of the Rome Statute (“Statute”), of having corruptly influenced witnesses D-2, D-3, D-4 and D-6. He was acquitted of charges under Article 70(1)(a) and (b) of the Statute.<sup>1</sup> Pursuant to Trial Chamber VII’s (“Trial Chamber”) Sentencing Calendar<sup>2</sup> of 20 October 2016, the Trial Chamber permitted written submissions on the additional evidence presented and appropriate sentences to be imposed by 7 December 2016. The Arido Defence hereby presents its submissions.

2. Mr Arido stands before you to be sentenced on a single offence, not a crime – which took place over a very short time period. He has no prior criminal record, and has made significant contributions both in his home country – Central African Republic (“CAR”) – and in his country of refuge (Cameroon). He is currently unemployed in France and a decision on his asylum application is pending.

3. Mr Arido also stands before you having served 11 months in detention (in France<sup>3</sup> and ICC-DC<sup>4</sup>) with a spotless record. He was released by the Trial Chamber from detention<sup>5</sup> and has appeared and participated in every phase of his trial.

4. For the reasons stated below, the Defence is requesting that the Trial Chamber impose a sentence of “time served” with no fine. This penalty is proportionate to the offence, and reflects Mr Arido’s continuing integration and contribution to the community and his family.

## **II. CONFIDENTIALITY**

5. Pursuant to Regulation 23*bis* of the Regulations of the Court (“RoC”) and Regulation 24 of the Regulations of the Registry (“RoR”), this request is submitted confidential as it refers to confidential evidence. A public redacted version will be filed forthwith.

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<sup>1</sup> ICC-01/05-01/13-1989-Conf (‘Judgment’), p. 457.

<sup>2</sup> ICC-01/05-01/13-1990.

<sup>3</sup> Mr Arido was arrested on 23 November 2013 in France pursuant to an arrest warrant issue by Pre-Trial Chamber II (ICC-01/05-01/13-1-Red2-tENG) and incarcerated in France until 18 March 2014.

<sup>4</sup> Mr Arido was transferred to the ICC Detention Centre on 18 March 2014 (ICC-01/05-01/13-274) and appeared before the Single Judge on 20 March 2014 (ICC-01/05-01/13-T-4-Red2-ENG).

<sup>5</sup> ICC-01/05-01/13-703.

### III. APPLICABLE LAW AND PRINCIPLES

6. In determining the sentence, the Chamber shall take into account, *inter alia*, Articles 23, 76, 77 and 78 of the Statute and Rule 145 of the Rules of Procedure and Evidence ('RPE' or 'Rules'). In this regard, the Appeals Chamber in *Lubanga* case found that, when read together with the underlying objectives set out in the Preamble of the Statute, the relevant provisions establish a comprehensive scheme for the determination of a proportionate sentence.<sup>6</sup>

7. The Defence avers that the Chamber shall first identify and assess the relevant factors in Article 78(1) of the Statute and Rule 145(1)(c) and (2) of the RPE.<sup>7</sup> Paramount in the Statute is Article 78(1) which contains two factors: the *gravity of the crime* but also the *individual circumstances* of the convicted person. The sentence, following from Article 78(1) of the Statute, must be in accordance with the Rules which thus cross-reference Rule 145 of the RPE.

8. Second, the Trial Chamber shall balance all these factors in accordance with Rule 145(1)(b) and pronounce a sentence that is proportionate to the instant conviction, an offence under Article 70(1)(c) of the Statute.<sup>8</sup> That the sentence must be *proportionate* to the crime and the culpability of the convicted person is evident from the text of Article 81(2)(a) of the Statute<sup>9</sup> and Rule 145(1) of the RPE. This has been explicitly emphasized by the Appeals Chamber in *Lubanga* case,<sup>10</sup> Trial Chamber III in the *Bemba* case,<sup>11</sup> and Trial Chamber VIII in the *Al-Mahdi* case.<sup>12</sup>

9. Once the sentence has been imposed, Article 78(2) of the Statute requires deduction of the time the convicted person has spent in detention.<sup>13</sup>

10. Finally, in considering all relevant factors, the Chamber cannot 'double-count' any factors assessed in relation to the gravity of the crime as aggravating circumstances and *vice versa*. A legal element of the crimes or mode of liability cannot be considered as an aggravating circumstance either.<sup>14</sup>

<sup>6</sup> ICC-01/04-01/06-3122, paras 34, 40; ICC-01/05-01/08-3399, paras 8, 11; ICC-01/12-01/15-171, paras 67, 68.

<sup>7</sup> ICC-01/04-01/06-3122, para. 32; ICC-01/05-01/08-3399, para. 12; ICC-01/12-01/15-171, para. 68.

<sup>8</sup> *Ibid.*

<sup>9</sup> Article 81(2)(a) refers to an issue being appealable where there is "disproportion between the crime and the sentence" thus indicating that a proper assessment involves this criterion.

<sup>10</sup> ICC-01/04-01/06-3122, paras 39-40.

<sup>11</sup> ICC-01/05-01/13-3399, para. 11.

<sup>12</sup> ICC-01/12-01/15-171, para. 67.

<sup>13</sup> ICC-01/04-01/06-3122, para. 35; ICC-01/05-01/08-3399, para. 12; ICC-01/12-01/15-171, para. 68.

<sup>14</sup> ICC-01/05-01/08-3399, para. 14; ICC-01/04-01/06-2901, para. 35.

11. The Trial Chamber in *Al Mahdi* case noted that Articles 77 and 78 of the Statute do not specify the purpose of criminal punishment.<sup>15</sup> However, it noted that the Preamble of the Statute declares its concern that “the most serious concern to the international community as a whole must not go unpunished”.<sup>16</sup> Thus, the Chamber considered that the Preamble of the Statute establishes *retribution* and *deterrence* as the primary objectives of punishment at the ICC.<sup>17</sup> Notwithstanding this, the case-law of the *ad-hoc* tribunals has made reference to other goals such as *rehabilitation*.<sup>18</sup>

12. Under Article 78(1) of the Statute, when determining the sentence, the Chamber shall consider such factors as the gravity of the crime and the individual circumstances of the convicted person.<sup>19</sup> The Appeals Chamber in *Lubanga* case held that the factors of “gravity of the crimes” and “the individual circumstances of the convicted person” set out in Article 78(1) of the Statute may be seen as separate from those listed in Rule 145(1)(c) of the RPE.<sup>20</sup>

13. The Defence submits that the Statute distinguishes between crimes and offences, a distinction which is evidenced by the separate penalty regimes for the core ‘Article 5’ crimes in Article 77 of the Statute, and for the offences against the administration of justice, under Article 70(3) of the Statute and in Rule 66 of the RPE.<sup>21</sup>

14. The difference in penalties reflects the position of the core ‘Article 5’ crimes as the ‘most serious crimes of concern to international community’, as stated in the Preamble of the Statute.<sup>22</sup> Furthermore, in establishing the ICC, the State Parties were “[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”.<sup>23</sup>

15. At the same time, the Statute penalty regime recognises that there are some offences which undermine the legitimacy and integrity of the Court, but for which it would be grossly disproportionate to impose punishments reserved for core ‘Article 5’ crimes.

<sup>15</sup> ICC-01/12-01/15-171, para. 66.

<sup>16</sup> *Ibid.*, para. 66.

<sup>17</sup> *Ibid.*, para. 67.

<sup>18</sup> *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić, and Esad Landžo* (Čelebići case), IT-96–21, Trial Chamber Judgement, 16 Nov. 1998, at paras 1230 and 1233, available at: [http://www.icty.org/x/cases/mucic/tjug/en/981116\\_judg\\_en.pdf](http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf).

<sup>19</sup> ICC-01/04-01/07-3484-tENG-Corr, para. 40; Article 78(1) of the Statute.

<sup>20</sup> ICC-01/04-01/06-3122, paras 61, 64, 66; see also ICC-01/12-01/15-171, paras 68, 69; ICC-01/05-01/08-3399, para. 13.

<sup>21</sup> William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford Commentaries on International Law, 2010, p. 856. See Annex A.

<sup>22</sup> Preamble of the Statute, para. 4.

<sup>23</sup> *Ibid.*, para. 5.

16. In this regard, the Defence avers that in assessing the ‘gravity of the crime’, the principle of proportionality compels the Chamber to tailor the penalty to fit the gravity particular to the instant conviction, an offence under Article 70(1)(c) of the Statute.<sup>24</sup>

17. Furthermore, as emphasised by the Appeals Chamber in *Lubanga* case, and the Trial Chamber III in the *Bemba* case, “the sentence must be proportionate to the crime and the culpability of the convicted person.”<sup>25</sup>

#### IV. SENTENCING SUBMISSIONS

##### A. The Conviction

18. Mr Arido has been convicted of a single offence, under Article 70(1)(c) of the Statute in conjunction with Article 25(3)(a) of the Statute, of having corruptly influenced witnesses D-2, D-3, D-4, and D-6.<sup>26</sup>

##### B. Mitigating circumstances

###### 1. *The Law*

19. The Trial Chamber must be convinced of the existence of mitigating circumstances on a balance of probabilities.<sup>27</sup> Mitigating circumstances need not be directly related to the crimes and are not limited by the scope of the charges or Judgment.<sup>28</sup> They must, however, relate directly to the convicted person.<sup>29</sup>

20. The Trial Chamber in the *Lubanga* case accepted that the mitigating factors are not limited to the facts and circumstances described in the Confirmation Decision. This conclusion was

<sup>24</sup> ICC-01/04-01/07-3484-tENG-Corr, para. 39; see also ICC-01/04-01/07-3484-tENG-Corr, para. 32; Article 78(1) of the Statute; Rule 145(1)(a) of the Rules; see also ICL 1994 Final Report, p. 60.

<sup>25</sup> ICC-01/04-01/06-3122, paras 39-40; ICC-01/05-01/08-3399, para. 11.

<sup>26</sup> Judgment, p. 457.

<sup>27</sup> ICC-01/12-01/05-171, para. 74; ICC-01/05-01/08-3399, para. 19; ICC-01/04-01/06-2901, para. 34; ICC-01/04-01/07-3484-tENG, para 34; see also *Prosecutor v. Babic*, IT-03-72-A, Judgement on Sentence Appeal, 18 July 2015, para. 43, available at: <http://www.icty.org/x/cases/babic/acjug/en/bab-aj050718e.pdf>; *Prosecutor v. Stakic*, IT-97-24-A, Judgement, 22 March 2016, para. 406, available at: <http://www.icty.org/x/cases/stakic/acjug/en/sta-aj060322e.pdf>.

<sup>28</sup> ICC-01/12-01/15-171, para. 74; ICC-01/05-01/08-3399, para. 19; ICC-01/04-01/06-2901, para. 34; ICC-01/04-01/07-3484-tENG, para. 32.

<sup>29</sup> ICC-0112-01/15-171, para. 74; ICC-01/05-01/08-3399, para. 19; see also *Gacumbitsi v. Prosecutor*, ICTR-2001-64-A, Judgement, 7 July 2006, para. 198, available at: [http://hrlibrary.umn.edu/instreet/ICTR/GACUMBITSI\\_ICTR-01-64/GACUMBITSI\\_ICTR-2001-64-A\\_appeals.pdf](http://hrlibrary.umn.edu/instreet/ICTR/GACUMBITSI_ICTR-01-64/GACUMBITSI_ICTR-2001-64-A_appeals.pdf).

arrived at particularly given Rule 145(2)(a)(ii)'s reference to "the convicted person's conduct after the act" in this context.<sup>30</sup> Thus, the Trial Chamber has a considerable degree of discretion, in light of the particular circumstances of a case, in determining what constitutes a mitigating circumstance and the weight, if any, to be accorded thereto.<sup>31</sup>

21. While the Chamber must consider any mitigating circumstances, it need not do so under any particular heading or according to any particular rubric.<sup>32</sup> For example, the Chamber may consider certain factors as being relevant to its assessment of gravity, instead of considering them in mitigation or aggravation of the overall sentence.<sup>33</sup>

## 2. *The individual circumstances of the convicted person support mitigation in sentencing*

### ***Mr Arido has no prior criminal record***

22. The instant offence is Mr Arido's first conviction; he has no prior criminal conviction. Absence of a criminal record is generally considered as a mitigating factor in both national and international jurisdictions. In *Niyiramasubuko et al.*, the ICTR Appeals Chamber held that the Trial Chamber erred in failing to consider an Accused's good conduct in detention.<sup>34</sup> In *Fofana*,<sup>35</sup> the SCSL Trial Chamber considered Fofana and Kondewa's lack of prior criminal charges or conviction as evidence of their exemplary behaviour to be considered as a mitigating circumstance.<sup>36</sup> In *Ruggiu*, the ICTR Trial Chamber considered that "the accused has no previous criminal record. [...] The above factors constitute mitigating circumstances to be considered by the Chamber."<sup>37</sup> In *Rugambarara*, "[t]he Chamber accepted the unchallenged assertion that [the Accused] had no previous criminal record. It stated: "[t]he Chamber accepts th[is as a] mitigating

<sup>30</sup> ICC-01/04-01/06-2901, para. 34.

<sup>31</sup> ICC-01/12-01/15-171, para. 74; ICC-01/05-01/08-3399, para. 19; see also *Prosecutor v. Tolimir*, IT-05-88/2-A, Judgment, 8 April 2015, para. 644, available at: [http://www.icty.org/x/cases/tolimir/acjug/en/150408\\_judgement.pdf](http://www.icty.org/x/cases/tolimir/acjug/en/150408_judgement.pdf); *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Judgment, 28 May 2008 ('CDF Appeals Judgment'), para. 499, available at: <http://www.rscsl.org/Documents/Decisions/CDF/Appeal/829/SCSL-04-14-A-829.pdf>.

<sup>32</sup> ICC-01/05-01/08-3399.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Prosecutor v. Niyiramasubuko et al.*, ICTR-98-42-A, Judgment (14 December 2015) at para. 3476, available at: <http://www.unmict.unict.org/sites/unict.org/files/case-documents/ict-98-42/trial-judgements/en/110624.pdf>.

<sup>35</sup> *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa, 9 October 2007 ('CDF Judgment'), para. 68, available at: <http://www.rscsl.org/Documents/Decisions/CDF/796/SCSL-04-14-T-796.pdf>.

<sup>36</sup> CDF Judgment, para. 68; upheld in on appeal, para. 511 "good character with no previous convictions can be considered as a mitigating factor", available at: [http://www.legal-tools.org/uploads/tx\\_ltpdb/Fofana\\_et\\_al\\_SCSL\\_AC\\_Judgment.pdf](http://www.legal-tools.org/uploads/tx_ltpdb/Fofana_et_al_SCSL_AC_Judgment.pdf).

<sup>37</sup> *Prosecutor v. Ruggiu*, ICTR-97-32-I, Judgment and Sentence, 18th December 2000, paras. 59-60, available at: [http://hrlibrary.umn.edu/instree/ICTR/RUGGIU\\_ICTR-97-32/RUGGIU\\_ICTR-97-32-I.htm](http://hrlibrary.umn.edu/instree/ICTR/RUGGIU_ICTR-97-32/RUGGIU_ICTR-97-32-I.htm).

factor.”<sup>38</sup> Finally, in *Nikolić*, the ICTY Trial Chamber took into account in mitigation the fact that the Accused had no previous criminal record.<sup>39</sup>

***Mr Arido has demonstrated good behaviour in detention and full compliance with temporary release conditions***

23. On 24 October 2014, during the pendency of this case and approximately one year before the start of trial, Pre-Trial Chamber II granted Mr Arido interim release.<sup>40</sup>

24. On 29 May 2015, the Appeals Chamber declined to order Mr Arido to be detained based on interests of justice following its finding that he had been released in error. It stated:

However, given the specific situation of the suspects in this case, i.e, that they were ordered to be released on 21 October 2014, to which suspensive effect was not granted by the Appeals Chamber, and the length of time that passed since their release, the Appeal Chamber finds that it would not be in the interests of justice for the suspects to be re-arrested because of the reversal of the Impugned Decision.<sup>41</sup>

Accordingly, despite reversing the Impugned Decision, the Appeals Chamber decided in view of the exceptional circumstances, to maintain the relief ordered therein, in other words the release of the suspects, pending the Chamber determination on the matter.

25. On 17 August 2015,<sup>42</sup> following the delivery of a diplomatic note indicating that Mr Arido had not caused any problems,<sup>43</sup> on 17 August 2015,<sup>44</sup> the Trial Chamber maintained the Accused’s liberty stating:

In relation to the ‘good conduct’ argument made by the Four Accused, the Chamber considers that the length of time the Four Accused have been released - nearly ten months - without incident demonstrates that the expectation connected with the interim release previously ordered has been fulfilled. The Prosecution presents no evidence, beyond mere speculation, that any of the Four Accused has done anything while released to suggest they may constitute a flight risk, obstruct investigations, or continue to commit further crimes. The Chamber has only been presented with supporting materials to the contrary, and specifically notes that three

<sup>38</sup> *Prosecutor v. Rugambarara*, ICTR-00-59-T, Sentencing Judgement, November 16, 2007, para. 43, available at: <http://hrlibrary.umn.edu/instrree/ICTR/RUGAMBARARA ICTR-00-59/RUGAMBARARA ICTR-00-59-T.pdf>.

<sup>39</sup> *Prosecutor v. Dragan Nikolić*, IT-94-2-S, Sentencing Judgement, 18 December 2003, para. 265, available at: [http://www.icty.org/x/cases/dragan\\_nikolic/tjug/en/nik-sj031218e.pdf](http://www.icty.org/x/cases/dragan_nikolic/tjug/en/nik-sj031218e.pdf).

<sup>40</sup> ICC-01/05-01/13-703.

<sup>41</sup> ICC-01/05-01/13-969 (OA5, OA6, OA7, OA8, OA9), para. 57.

<sup>42</sup> ICC-01/05-01/13-1151.

<sup>43</sup> ICC-01/05-01/13-1122-Anx1.

<sup>44</sup> ICC-01/05-01/13-1151.



of the Four Accused wished to attend the first trial status conference despite not being required to attend, with two ultimately attending.<sup>45</sup>

26. Finally, on 19 October 2016, the Trial Chamber seriously considered the arguments made by the Prosecution for Mr Arido to be returned to the Detention Centre to await sentencing and rejected the invitation to do so.<sup>46</sup>

27. The judicial decisions confirm Mr Arido's good behaviour and compliance with the Court's regulations.

28. The Defence also points out that the judicial decisions considered various factors, including the potential penalty for the offences confirmed and length of time already in detention.<sup>47</sup> Thus, implicitly, these decisions reflect the application of the criterion of proportionality, when weighing all the factors.

29. Mr Arido has already served 11 months in detention pursuant to an Arrest Warrant of this Court.<sup>48</sup> This included roughly 4 months in France and 7 months at the ICC-DC. This is sufficient time for a person who had no criminal record to both understand and feel the consequences of the seriousness of the charges, and the potential punitive powers of the Court.

30. Certificates of good conduct from persons in charge of detention centres has long been recognized as a mitigation factor. For example, the ICTR Trial Chamber considered a certificate issued by the Commander of the ICTR Detention Centre to Mr Bisengimana as a mitigating factor. The Certificate indicated that between the Accused's transfer to the UNDF on 11 March 2002 and the date of the Certificate (22 December 2005), the Accused was never the subject of any disciplinary action and conducted himself well at all times."<sup>49</sup> Similarly in *Fofana et al*, the SCSL Trial Chamber noted the contents of the certificate of good conduct filed by the Officer in charge of the SCSL Detention Facility, attesting to Fofana's exemplary behaviour whilst in custody during the course of the trial.<sup>50</sup>

31. Here, the evidence is that Mr Arido's record at ICC Detention Centre ('ICC-DC') was exemplary. No problems are recorded and no disciplinary actions were taken.

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<sup>45</sup> ICC-01/05-01/13-1151, para. 19.

<sup>46</sup> ICC-01/05-01/13-T-51-ENG, p. 32, line 21 *et seq.*

<sup>47</sup> ICC-01/05-01/13-1151, para. 16 citing ICC-01/05-01/13-969, para. 45.

<sup>48</sup> Bemba et al. OA 5-9 Judgment, ICC-01/05-01/13-969 (OA5-9), para. 45.

<sup>49</sup> ICC-01/05-01/13-1-Red2-tENG.

<sup>49</sup> *The Prosecutor v Bisengimana*, ICTR-00-60-T, Judgement and Sentence, 13 April 2006, para. 164, available at: [http://www.legal-tools.org/uploads/tx\\_ltpdb/Bisengimana\\_ICTRTCJudgement\\_13-04-2006\\_E\\_02.pdf](http://www.legal-tools.org/uploads/tx_ltpdb/Bisengimana_ICTRTCJudgement_13-04-2006_E_02.pdf).

<sup>50</sup> CDF Judgment, dated para. 67.

32. The report issued by the Detention Centre authorities states:

During the brief seven month period that Mr Arido was in the ICC Detention Centre (DC) discussions and relationships between the management, custody officers and staff of the DC and Mr Arido were cordial, polite and respectful.<sup>51</sup>

33. The Arido Defence invites the Chamber to consider Mr Arido's conduct at the ICC-DC and his conduct during the period of temporary release in mitigation of his sentence. Provision for consideration of whether this factor is appropriate is set out in Rule 145(2)(a)(ii) of the RPE which prompts the Trial Chamber to consider "[t]he convicted person's conduct after the act".

34. Mr Arido's good conduct, upon his temporary release from the Detention Centre, by the Trial Chamber, is further documented by the Registry.

35. Upon being granted interim release in November 2014, the Pre-Trial Chamber ordered Mr Arido to sign a declaration of honour<sup>52</sup> stating that he would *inter alia* (1) indicate his residence address and not to change his address without first obtaining the permission of the Court and (2) be available by phone at any time, while in the case of missed call, to call the officer of Court within two hours.

36. These conditions were amended by the Trial Chamber on 17 August 2015<sup>53</sup> to include such conditions as: (3) ensure that the Accused indicate most recent addresses and contact information are provided to the Court and the State authorities where they are released, (4) that they do not change their address without prior notice to the Court, considering that a change in address may amount to a material change in circumstances of continuing interim release and (5) the Accused must provide advance notice to the Court of any overnight travel from the locations where they presently reside, including the destination, contact information, and duration of such travel.

37. For nearly a two-year period Mr Arido was bound by the Court's conditions and he complied fully with his obligations. The Director of the Division of Judicial Services of the Registry in charge of administering these particular conditions stated in his Report that:

From this perspective, and since the release of Mr Arido and until the present day, the Registry has not met any difficulties in terms of interaction with or availability of Mr Arido. As far as the Registry is aware, Mr Arido has always observed the relevant conditions and can confirm that Registry officials have always been able to

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<sup>51</sup> CAR-D24-0006-0092.

<sup>52</sup> ICC-01/05-01/13-722-Conf-Anx8.

<sup>53</sup> ICC-01/05-01/13-1151, para. 8.

reach Mr Arido who has cooperated very well with the Registry ahead of any court sessions he was required to attend.<sup>54</sup>

38. In sum, Mr Arido demonstrated respect for the Court's procedures and the seriousness of the offences which were charged against him.

***Mr Arido's continued support of his family, despite extremely difficult circumstances***

39. Mr Arido is a former CAR soldier and military expert.<sup>55</sup> He obtained a diploma from the University of Yaoundé in Defence, Security and Conflicts and Disaster Management.<sup>56</sup> He left CAR in 2001 because of the political situation, and sought and was granted refugee status in neighbouring Cameroon. He currently resides in [REDACTED], France. While his asylum application – first filed on 26 September 2012<sup>57</sup> – in France is pending, he has been a refugee for 15 years, in both Cameroon and France.

40. To support himself and his family while in Cameroon, Mr Arido was a trader and had a business, *Arc-en-Ciel*.<sup>58</sup> At the same time, he pursued higher education<sup>59</sup> and self-improvement.

41. In France, Mr Arido has pursued his asylum claim and is seeking a way to make ends meet for himself and his family.

42. Following the threats to his security in relation to his participation with the *Bemba* Main Case, with material aid from Cameroonian authorities,<sup>60</sup> he fled to France. There he sought asylum.<sup>61</sup>

43. Mr Arido – throughout his exile in Cameroon, then France and during his incarceration - has also [REDACTED].<sup>62</sup> He is married<sup>63</sup> and [REDACTED].<sup>64</sup> [REDACTED].

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<sup>54</sup> CAR-D24-0006-0093.

<sup>55</sup> 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.

<sup>56</sup> CAR-OTP-0075-0246.

<sup>57</sup> CAR-D24-0004-0013.

<sup>58</sup> CAR-D24-0004-0017; *see also* ICC-01/05-01/13-T-46-CONF-ENG ET, p. 10, lines 19-20.

<sup>59</sup> CAR-D24-0004-0005, CAR-D24-0004-0006, and CAR-D24-0004-0015.

<sup>60</sup> CAR-D24-0004-0016 and CAR-D24-0001-0020.

<sup>61</sup> CAR-OTP-0073-0551; CAR-D24-0001-0032; CAR-OTP-0075-0173-R01; CAR-OTP-0075-0189-R02; CAR-OTP-0075-2330-R01; CAR-OTP-0075-2334-R01; and CAR-OTP-0075-3166, *see also*: ICC-01/05-01/13-477-Conf.

<sup>62</sup> CAR-D24-0006-0001.

<sup>63</sup> CAR-D24-0006-0002.

<sup>64</sup> CAR-OTP-0075-0856-R01, CAR-OTP-0075-0858-R01, CAR-OTP-0075-1523-R01, CAR-OTP-0075-1573-R01, CAR-OTP-0075-1574-R01, CAR-OTP-0075-1575-R01, CAR-OTP-0075-1576-R01, CAR-OTP-0075-1579-R01, CAR-OTP-0075-1796-R01, and CAR-OTP-0075-1797-R01.

44. Mr. Arido's family circumstances are relevant to mitigation and should be considered as exceptional circumstances.

45. In *Katanga*, the Trial Chamber considered his familial responsibilities and relationships with his community as relevant factors in mitigation which "may be taken into account in sentencing."<sup>65</sup>

46. In *Bemba*, the Trial Chamber held that while family circumstances, generally, are not a mitigating factor, there may be exceptional circumstances which would result in a different conclusion.<sup>66</sup>

47. Here, the violations to Mr. Arido[REDACTED],<sup>67</sup> illegal search of documents and records<sup>68</sup> provide the grounds to support family circumstances as a mitigating factor.

48. When he was arrested, Mr Arido was found to be indigent by the Court Legal Aid administrators.<sup>69</sup> The recent Registry report on his assets indicates that at this time - in 2013 - he was not a wealthy man.<sup>70</sup> Because his means are extremely modest, he requested an increased daily supplement during the trial.<sup>71</sup> Mr Arido continues to live on modest means.

49. While the economic situation of a refugee is not within the Court's control, Mr Arido's conduct in this situation should be considered as a mitigating circumstance. Despite the overwhelming odds against him and the attendant difficulties, he still struggles – out of commitment and respect for his familial obligations – to provide what support he can.

***Mr Arido has already suffered the hardships of incarceration***

50. The Defence invites the Chamber to consider the time Mr Arido was detained in France, as well as his very constraining conditions of detention in France that included solitary confinement, restricted communications with his family and his lawyer, in mitigation of his sentence.<sup>72</sup>

<sup>65</sup> ICC-01/04-01/07-3484-tENG-Corr, para. 88.

<sup>66</sup> See ICC-01/05-01/08-3399, para. 78.

<sup>67</sup> Monetary records seized go back as far as 2005 *see for example* CAR-OTP-0070-0005 and CAR-OTP-0092-0024.

<sup>68</sup> ICC-01/05-01/13-1948, para. 28: ("In view of the Austrian Rulings, the Chamber considers that any further assessment whether there was manifestly unlawful conduct is not necessary and concludes that the internationally recognised right to privacy has been violated.").

<sup>69</sup> ICC-01/05-01/13-396-Conf-Exp-AnxA and ICC-01/05-01/13-415-Conf-Exp.

<sup>70</sup> ICC-01/05-01/13-2081-Conf-Exp-AnxV-B.

<sup>71</sup> ICC-01/05-01/13-1482-Conf-Exp-AnxA; ICC-01/05-01/13-1482-Conf-Exp-AnxC; ICC-01/05-01/13-1482-Conf-Exp-AnxB.

<sup>72</sup> See CAR-D24-0001-0001 and CAR-D24-0004-0011.

51. In particular, the order of the Court in [REDACTED], France “Incarceration immediate, aucune communication entre Narcisse Arido et des tiers à exception de son conseil pendant 72” imposed by the Judge on telephone communication by Mr Arido with his wife and children was not respected or executed. This resulted in Mr Arido, who was in solitary confinement, being deprived of the opportunity to communicate with his wife and children, even after he wrote a petition to the Registrar of the Prison in which he was detained.<sup>73</sup>

***Additional incarceration, particularly in a foreign country and/or a fine would adversely impact upon family life***

52. Mr Arido has already served 11 months in incarceration.<sup>74</sup> This has already caused an excessive hardship to him personally, and to his family members. To impose additional incarceration and/or a fine would only increase this hardship, and remove him from his place as a contributing member to his family and to his new community in France. As the Court is well aware, the family continues to struggle with the consequences of his prior incarceration,<sup>75</sup> exile and trial, including [REDACTED].<sup>76</sup>

53. If additional incarceration were imposed by the Court, it is likely the custodial sentence would be served in a country away from Mr Arido’s family. By itself, this would create an additional hardship as communications would become even more difficult.<sup>77</sup> Secondly, due to Mr Arido’s financial situation and legal situation as an asylum seeker, a custodial sentence would place an additional hardship on a family [REDACTED].<sup>78</sup>

54. Because of Mr Arido’s personal circumstances a number of judicially recognised mitigating factors are relevant.<sup>79</sup>

<sup>73</sup> See CAR-D24-0001-0001; CAR-D24-0001-0002; See also Décision of the Tribunal de Grande Instance de [REDACTED] Ordre d’Incarcération en vertu d’une demande d’arrestation aux fins de remise donné par la cour pénale internationale. Vu les réquisitions du Procureur de la République près le Tribunal de Grande Instance de [REDACTED] en date du 23 Novembre 2013 sollicitant qu’il lui soit fait interdiction de toute communication avec des tiers à l’exception de son conseil de qu’il soit ordonné son placement à l’isolement dans l’éventualité de son incarceration CAR-D24-0004-0011 Narcisse Arido a Mr le Greffier de la Maison d’Arrêt, Paris La Sante, Décembre 02 2013 Objet : Suite de l’autorisation téléphonique.

<sup>74</sup> Mr Arido was arrested on 23 November 2013 in France pursuant to an arrest warrant issue by Pre-Trial Chamber II (ICC-01/05-01/13-1-Red2-tENG). He was transferred to the ICC Detention Centre on 18 March 2014 (ICC-01/05-01/13-274) and appeared before the Single Judge on 20 March 2014 (ICC-01/05-01/13-T-4-Red2-ENG) and release on 23 October 2014 (ICC-01/05-01/13-703).

<sup>75</sup> ICC-01/05-01/13-T-46-ENG ET, p. 18. See also ICC-01/05-01/13-1716-Conf, ICC-01/05-01/13-1716-Conf-AnxA, and ICC-01/05-01/13-1716-Conf-AnxB.

<sup>76</sup> See CAR-D24-0003-0034; See also ICC-01/05-01/13-T-46-ENG ET, p. 18.

<sup>77</sup> See *The Prosecutor v. Erdemović*, IT-96-22-T, Sentencing Judgment, 29 November 1996, para. 111. Available at: <http://www.icty.org/x/cases/erdemovic/tjud/en/erd-tsj961129e.pdf>.

<sup>78</sup> See CAR-D24-0003-0034.

<sup>79</sup> ICC-01/05-01/08-3399, para. 19; ICC-01/12-01/15-171, para. 74.

55. *Firstly*, a recognised mitigating factor is the hardship placed upon family relations of serving a custodial sentence in a country different than the one in which the person's family resides. Mr Arido has fled his home country of CAR, and sought refuge with his family in Cameroon. Since Cameroon is not a State Party to the ICC, any custodial sentence will, in all likelihood, not be served in Cameroon, but in a country away from his family. This makes communications with family more difficult and family visits highly unlikely. Thus, a sentence served in a country away from Mr Arido's family will be more punitive than the same amount of time served in the same country as his family.<sup>80</sup> These more severe circumstances of detention would also make re-integration of Mr Arido into society when he has completed his sentence more difficult.

56. *Secondly*, due to Mr Arido's financial and legal situation as an asylum seeker, a custodial sentence would place an additional hardship on his family. Mr Arido's family is still [REDACTED].<sup>81</sup> The severe limitations on communication imposed through custody would, at a minimum, diminish Mr Arido's capacity to [REDACTED].

### 3. *Mr Arido's Good Character and Respect within the Central African regional community supports mitigation*

#### ***Promoting peace and reconciliation***

57. International courts and tribunals have recognized previous good character and community service as mitigating factors.<sup>82</sup> In *Fofana et al.* the SCSL Trial Chamber commended Fofana's subsequent conduct in fostering peace process, and recognized it as a factor of mitigation for his sentence.<sup>83</sup>

58. Here, Mr Arido has demonstrated a long record of service in the furtherance of peace, democracy and the individual and collective good of his country.

<sup>80</sup> See *The Prosecutor v. Erdemović*, IT-96-22-T, Sentencing Judgment, 29 November 1996, para. 111. Available at: <http://www.icty.org/x/cases/erdemovic/tjug/en/erd-ts961129e.pdf>.

<sup>81</sup> See CAR-D24-0003-0034.

<sup>82</sup> *Semanza v Prosecutor*, ICTR-97-20-A, Judgment (20 May 2005) at para. 398 ("The Appeals Chamber is of the view that it was within the Trial Chamber's discretion to take into account as mitigation in sentencing the Appellant's previous good character and accomplishments as bourgmestre."), available at:

[http://www.legal-tools.org/uploads/tx\\_ltpdb/Semanza\\_Appeals\\_Judgement\\_01.pdf](http://www.legal-tools.org/uploads/tx_ltpdb/Semanza_Appeals_Judgement_01.pdf);

*Prosecutor v Nzabirinda*, ICTR-2001-77-T, Judgment (23 February 2007) at para. 92, available at: [http://www.legal-tools.org/uploads/tx\\_ltpdb/Nzabirinda-ICTRTCSentencingJudgement\\_23-02-2007\\_E\\_03.pdf](http://www.legal-tools.org/uploads/tx_ltpdb/Nzabirinda-ICTRTCSentencingJudgement_23-02-2007_E_03.pdf).

<sup>83</sup> CDF Judgment, dated para. 67.

59. Prior to<sup>84</sup> and after the unfortunate period<sup>85</sup> of conduct for which he has been tried and found guilty, Mr Arido continued his efforts and publicized appeals for peace and justice in his beloved country CAR. For example, before his arrest, on 11 February 2013, Mr Arido produced an article in *Green Vert* in France calling for peace in CAR.<sup>86</sup>

60. The Defence urges the Trial Chamber to consider the peace, justice and reconciliation advocacy initiated by Mr Arido for the benefit of his war-torn country CAR and the Central Africa sub-region as a mitigating factor

61. The ICC Prosecution has been conducting investigation in CAR for several years. The peace, justice, and reconciliation campaign led by Mr Arido under these circumstances mitigates the harm caused by his conduct to the administration of justice at the ICC and furthers the objectives of the Rome Statute for which Mr Arido is firmly committed.<sup>87</sup> Given the opportunity of a non-custodial sentence, Mr Arido will continue to make a greater contribution towards the development and promotion of the role of law, justice, peace, and development within his country.

62. The refugee status of Mr Arido notwithstanding, Mr Arido, was highly regarded by the Government of Cameroon. Mr Arido was accredited by the Government as an election observer<sup>88</sup> in a crucial Presidential election in Cameroon. This was a remarkable recognition of Mr Arido's contribution to a democratic option in Cameroon and the Central Africa Sub-region and a demonstration of the integrity which others saw in him.

63. In addition, the Government of Cameroon, when it became aware of the security threats to Mr Arido in connection with his status as an expert in *Bemba* Main Case, [REDACTED].<sup>89</sup>

64. With the exception of the 7 months in the ICC Detention Centre, Mr Arido has spent 4 years residing in France. There he has made efforts to integrate himself into French society and his local community.

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<sup>84</sup> In 2008: CAR-D24-0006-0018 at 0026 and the papers constituting the organisation CAR-D24-0006-0017; In 2011: CAR-D24-0006-0070 at 0088.

<sup>85</sup> CAR-D24-0001-0040, Europe Ecologie Les Verts No 8/Février : Pour une résolution multilatérale du conflit en République Centrafricaine (Analyse de propositions de sortie pacifique de crises en RCA) Par Claude Yabanda et Narcisse Arido avec le Groupe EELV, published 13 February 2013.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> CAR-OTP-0075-0222 Ministry of territorial administration : Attestation No 0000819/A/MINATD/SG/DAJ Portant accréditation des observateurs pour l'élection présidentielle du Octobre 2011 Région du Littoral.

<sup>89</sup> CAR-D24-0004-0016.

65. Imposing further incarceration on Mr Arido obviously means risking the stability and safety he has been able to achieve and feel in France, which is essential to any rehabilitation.

***Mr Arido's generosity to help other countrypersons in need demonstrates his integral connection to his community***

66. Mr Arido has demonstrated a quality of using his generosity to help his countrymen and persons in need. The evidence indicates that once Mr Arido saw the risk to himself in *Bemba* Main Case, and received no response from the ICC regarding the breach of confidentiality and his insecure situation, he pulled out of the affair and advised witness D-2 to do the same.<sup>90</sup> In an email of 9 October 2012, Mr Arido stated:

[REDACTED]<sup>91</sup> (emphasis added)

67. The Prosecution's own investigative reports illustrate Mr Arido's good character. When witness P-0007 in the *Bemba* Main Case was asked to comment upon Mr Arido, he is reported to have said that Mr Arido is "a very kind, helpful and respectful guy".<sup>92</sup>

68. Mr Arido's openness to reach out and assist his countrymen struggling to survive under the harsh conditions of life in exile is demonstrated by emails sent to Mr Arido by D-2 either seeking financial assistance, or seeking his intervention to help him to obtain higher education opportunities or for him to intervene with [REDACTED] to assist with his needs. In one email of 22 March 2013 to Mr Arido, D-2 wrote :

[REDACTED].<sup>93</sup>

*4. The circumstances of the offence demonstrate that Mr Arido's role is both limited in time and scope*

69. From the inception of this case, with the Confirmation of Charges, the Pre-Trial Chamber noted that Mr Arido's culpability was limited. The Pre-Trial Chamber explicitly noted: "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."<sup>94</sup>

<sup>90</sup> CAR-OTP-0075-0567-R02, *See* also D-2 testimony at trial: ICC-01/05-01/13-T-21-Conf-Eng, p. 5, Lines 12-18 .

<sup>91</sup> CAR-OTP-0075-0567.

<sup>92</sup> CAR-OTP-0072-0486-R01 at 0487.

<sup>93</sup> CAR-OTP-0075-0785.

<sup>94</sup> ICC-01/05-01/13-749, para. 52.



70. Within this context, Mr Arido's role in the offence for which he was convicted is extremely limited. First, the conduct covers a few day period during the month of February 2012, which is focussed on the very initial contacts with D-2, D-3, D-4 and D-6, prior to them being turned over to the *Bemba* team.

71. Secondly, the Defence maintains, as it argued in its Closing Brief, that the person calling the shots in these events was [REDACTED], who was never indicted or prosecuted.<sup>95</sup>

72. The Trial Chamber, however, found that Mr Arido's involvement in the culpable conduct was pursuant to a request by [REDACTED],<sup>96</sup> who was present at the most critical moments when the offense was committed and supervised it.<sup>97</sup>

73. The Trial Chamber, in the Judgment, repeatedly makes findings that Mr Arido was a "go-between."<sup>98</sup> A "go-between," by definition, acts subject to the direction of another party.

74. Mr Arido was acting on the orders of, or at the behest of, another, namely [REDACTED].

75. The Defence submits that [REDACTED] was person who exercised the authority, and had the influence over Mr Arido and the persons who were involved in the offence.

76. [REDACTED] was a well-known, well-respected senior [REDACTED] with considerable influence within the Central African region (and outside). Mr Arido, as well as the persons involved, such as D-2, accorded deference to him.

77. The witnesses had prior varying levels of familiarity, respect and deference for [REDACTED]. His overwhelming influence over the witnesses ensured they remained on the case long after Mr Arido left and encouraged some of them to do the same.

78. The Chamber found that shortly afterward, [REDACTED] joined Mr Arido and the group of prospective witnesses. The witnesses raised the issues of payment and possible relocation to Europe. [REDACTED] reassured them that they would receive money and would be able to go to Europe.<sup>99</sup> In the transcript of his interview disclosed by the Prosecution, D-4 stated:

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<sup>95</sup> ICC-01/05-01/13-1904, paras 292-299.

<sup>96</sup> Judgment, para. 125.

<sup>97</sup> Judgment, para. 331.

<sup>98</sup> For example, *see* Judgment at paras. 131, 341, 344, and 420.

<sup>99</sup> Judgment, para. 131.

[REDACTED].<sup>100</sup>

79. But, the main point remains: the culpable conduct was initiated by [REDACTED] who was a member of the *Bemba* Defence team who, like D-2, D-3, D-4 and D-6, was a witness who had a pseudonym of [REDACTED].<sup>101</sup>

80. Thus, Mr Arido's limited role in the limited offense should be considered as a mitigating factor, since it was found that he was acting subject to the direction of someone else.

81. The Chamber further found that on the 25 and 26 May 2013, when the witnesses were handed over to the VWU in Yaoundé, "At that point, Mr Arido who had arrived in France in the main time was no longer affiliated with Mr Kilolo and the Main Case Defence."<sup>102</sup>

82. The Defence is aware that no findings in the Trial Judgment were made about the culpability of [REDACTED].

83. However, at the Closing Arguments, Judge de Brichambaut asked about [REDACTED]'s role in the recruitment of Defence witnesses in the *Bemba* Main Case, noting that he was mentioned by the Defence, but had not been convicted and did not appear as a witness for either the Accused or the Prosecution.<sup>103</sup>

84. Both the Prosecution and Defence teams provided oral responses. The Prosecution, who has the legal burden in this proceeding, described [REDACTED] as a person who participated in implementing the overall strategy<sup>104</sup> and referred to his involvement in the coaching of witnesses in its Pre-Trial Brief.<sup>105</sup>

85. Given the significant role which the Prosecution ascribed to [REDACTED] in an overall strategy which it viewed as the heart of the offences in the Article 70 case, it would appear that at minimum, more clarification on [REDACTED]'s role is essential to finding the complete truth about the Article 70 offences.

86. The Arido Defence invites the Trial Chamber, within its Article 64 powers, to make further inquiries, which were initiated during the Oral Arguments. This is consistent with Article 64(10) of the Statute, to ensure that a complete and accurate record is made of the proceedings.

<sup>100</sup> CAR-OTP-0094-1781-R01, lines 114-117.

<sup>101</sup> CAR-OTP-0072-0476 at 0478.

<sup>102</sup> Judgment, para. 133.

<sup>103</sup> ICC-01/05-01/13-T-48-Conf-ENG, p. 5 (Judge Perrin Brichambaut's question).

<sup>104</sup> *Ibid.*, p. 42.

<sup>105</sup> *Ibid.*, p. 43.

87. Lastly, in terms of the ICC's objectives to fight impunity, [REDACTED] still remains unaccountable to the Court for his role in the Article 70 offence of corrupting witnesses.

***Mr Arido's commitment to participate in the ICC proceedings resulted in violations to himself and his family***

88. While there is not yet case law on whether an individual's demonstrated commitment to be part of the ICC process is a mitigating circumstance, the Defence submits that Mr Arido's conduct vis-à-vis the *Bemba* Main case should support mitigation.

89. The Defence submitted both testimonial and documentary evidence of the human rights violations suffered by Mr Arido and his family, prior to and during this trial, and originating with the *Bemba* expert witness status.<sup>106</sup> The Trial Chamber [REDACTED], and [REDACTED]. Similarly, the Trial Chamber was made aware of the violations of privacy and confidentiality.<sup>107</sup>

90. The Arido Defence invites the Trial Chamber to consider these violations suffered by Mr Arido in the course of the trial in mitigation of his sentence. The violations, including the overly broad and intrusive investigations led by the Prosecution, spanning nearly three continents, over a period of about five years are already a disproportionate penalty for the offence for which Mr Arido was convicted.<sup>108</sup>

91. The Chamber agreed "[...] that the Prosecution was involved in the process that lead to the illegally obtained material, inasmuch as it triggered, via requests for assistance to the Austrian authorities, the process of requesting the judicial orders."<sup>109</sup> that the Prosecution was involved in the process that lead to the illegally obtained material, inasmuch as it triggered, *via* requests for assistance to the Austrian authorities, the process of requesting the judicial orders.

92. As a result of this illegal conduct, Mr Arido was also wrongly labelled a "[REDACTED]" – a stigma which is worse than any type of punishment for the most heinous crime [REDACTED], although he was not charged with [REDACTED] and there was no investigation of any allegations of [REDACTED].<sup>110</sup>

<sup>106</sup> See ICC-01/05-01/13-1904-Conf, paras 382-406.

<sup>107</sup> ICC-01/04-01/13-1904, paras 189, 382-386.

<sup>108</sup> ICC-01/05-01/13-1948, paras 34 and 36.

<sup>109</sup> *Ibid.*, para. 36.

<sup>110</sup> See CAR-D24-0002-1349, CAR-D24-0002-1363.

93. Mr Arido, himself, suffered a series of violations.<sup>111</sup> The most significant was being the object of an attempt to kidnap him from Yaoundé. In a report to the French Minister of the Interior, the Préfet of Rhone wrote :

[REDACTED].<sup>112</sup>

Faced with the threat stated in the report, Mr Arido travelled to France.

94. The Prosecution invited the Trial Chamber to conclude that the cautioning expressed in an email dated 11 February 2013 to D2 against the using social media to communicate was intended to conceal Mr Arido's illicit instructions to D-2. However, the Trial Chamber relied on the recurrent submission that Mr Arido had security concerns as a result of his involvement in the Main Case at the time relevant to the charges to reject this.<sup>113</sup>

95. Despite all of this, Mr Arido has demonstrated respect for these proceedings, although a number of unanswered questions regarding the ICC and security remain. This conduct shows Mr. Arido's fundamental commitment to the rule of law.

### C. Aggravating factors

#### 1. *The law*

96. The Prosecution must prove aggravating circumstances beyond a reasonable doubt.<sup>114</sup>

97. Further well established rules exist within the jurisprudence of the *ad-hoc* tribunals. Some of these rules may be of assistance to the Trial Chamber, while others it is submitted, reflect customary law and thus should be applied. These rules include that aggravating circumstances must relate to the crimes upon which a person was convicted and to the convicted person himself;<sup>115</sup> the absence of a mitigating circumstance can never serve as an aggravating

<sup>111</sup> See CAR-D24-0002-1349; CAR-D24-0002-1364.

<sup>112</sup> See CAR-OTP-0073-0552; [REDACTED]; See also CAR-OTP-0073-0551, at CAR-OTP-0073-0553: [REDACTED]. 11 Février 2013.

<sup>113</sup> Judgment, para. 675.

<sup>114</sup> ICC-01/05-01/08-3399, para. 18. *Prosecutor v. Brima et al.*, SCSL-04-16-T, Sentencing Judgement, 19 July 2007, para. 9, available at: <http://www.rscsl.org/Documents/Decisions/AFRC/624/SCSL-04-16-T-624.pdf>.

<sup>115</sup> *Prosecutor v. Deronjic*, IT-02-61-S, Sentencing Judgement, 30 March 2004, para. 124, available at: <http://www.icty.org/x/cases/deronjic/tjug/en/sj-040330e.pdf>; *Prosecutor v. Sesay et al.*, SCSL-04-15-A, Judgment, 26 October 2009, para. 1276, available at: [https://www.unodc.org/tldb/pdf/International\\_Jurisprudence/Adhoc\\_Tribunals/SCSL\\_Sesay\\_Kallon\\_Gbao\\_App\\_eal\\_Judgement.pdf](https://www.unodc.org/tldb/pdf/International_Jurisprudence/Adhoc_Tribunals/SCSL_Sesay_Kallon_Gbao_App_eal_Judgement.pdf).

circumstance;<sup>116</sup> and finally, there can be no double counting of gravity as an aggravating circumstances.<sup>117</sup>

98. As regards specific statutory rules, Rule 145(2)(b) lists additional aggravating circumstances.

*2. Any alleged aggravating circumstances are not applicable in this case*

99. Simultaneous filings in this case mean that the Defence cannot fully address what the Prosecution will submit for aggravating circumstances in this Sentencing Submission. Therefore, the Defence requests the right to respond, if necessary, after it has reviewed the Prosecution's pleadings.

***Gravity cannot be double-counted***

100. The Prosecution may suggest that the gravity of the offence is an aggravating factor. The Trial Chamber already took the element of gravity into account in convicting Mr Arido,<sup>118</sup> so that it cannot be "double counted" also as an aggravating factor.<sup>119</sup>

101. In the Trial Judgment, the Chamber recalled its earlier position, in its Decision rejecting the Arido Defence request to withdraw the charges,<sup>120</sup> where it stated that: "there is an intrinsic gravity to conducts, that, if established, may amount to the offence of obstruction of justice (with which the accused is charged)."<sup>121</sup>

102. Based on this, it is clear that the Trial Chamber considered gravity as a legal element in its conviction of Mr Arido under Article 70(1)(c) of the Statute.<sup>122</sup>

***Harm in the Bemba Main Case is not an aggravating factor***

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<sup>116</sup> ICC-01/12-01/15-171, para. 73; ICC-01/05-01/08-3399, para. 19; ICC-01/04-01/07-3484-tENG, para. 34; ICC-01/04-01/06-2901, para. 33.

<sup>117</sup> ICC-01/04-01/06-3122, para.17.

<sup>118</sup> ICC-01/05-01/13-T-50-ENG, p. 3, line 16 to p. 4, line 5.

<sup>119</sup> ICC-01/12-01/15-171, para. 87.

<sup>120</sup> ICC-01/05-01/13-876, para. 9.

<sup>121</sup> Judgment, para. 15.

<sup>122</sup> In rendering the Trial Judgment, the Chamber underscored the significance and seriousness of offences against the administration of justice to provide the context in which it discussed "gravity" in the Trial Judgment. At paragraph 15 of the Judgment, the Chamber reviewed its position that gravity considerations cannot be invoked in Article 70 proceedings, and noted that Rule 163(2) precludes the application, of Article 17, which articulates a criterion of "sufficient gravity" for admissibility under Article 17(d), to Article 70 cases.

103. The Prosecution may point as an aggravating factor to the potential harm that Mr Arido's conduct caused on the administration of justice and the loss incurred by the Court in bringing the witnesses interfered with to testify in the *Bemba* Main Case.

104. The Arido Defence invites the Chamber to reject this factor on the grounds that the *Bemba* Main Case is on appeal, and its consideration of this factor against Mr Arido will interfere with Mr Bemba's presumption of innocence. Moreover, considering this factor will require an evaluation of the evidence and decisions made in the Main Case which the Trial Chamber has decided it will not make.<sup>123</sup>

***Mr Arido's background is not supported as an aggravating factor, based on the Trial Judgment***

105. The Prosecution may point to Mr Arido's educational profile and his military background and argue that he knew the potential harm to the administration of justice his conduct was going to cause.

106. The factual findings in the Trial Judgment make clear, however, that this is an improper argument. The Trial Chamber stated:

Further, the Prosecution maintains that Mr Arido knew of Mr Kilolo's role as Mr Bemba's counsel in the main case, and that his military background enable him to "appreciate the importance of the information given as false testimony by the witnesses." The Chamber reiterates that it will not make any findings regarding the truth or falsity of testimonial evidence regarding the merits of the main case. *Additionally the Chamber does not find the argument that Mr Arido was able to appreciate the importance of the testimonies for the main case defence sufficient to further demonstrate Mr Arido's intent to corruptly influence the witnesses.*"<sup>124</sup> (emphasis added)

107. On this basis alone, the Trial Chamber is urged to reject any Prosecution argument concerning Mr Arido's awareness of the possible impacts of his conduct. The Trial Chamber, moreover, stated that:

[...] Mr Arido arranged a meeting between the witnesses with Mr Kilolo and Mr Kilolo illegally coached them on what to say in court and paid them in exchange for their testimony. The Chamber found that Mr Arido knew that Mr Kilolo would pay the witnesses for their services as witnesses in the Main Case. *The Chamber found no evidence that Mr Arido knew at the time of the meeting of 2012 in Donala that Mr Kilolo would illicitly coach them on what to say in court in 2013.*<sup>125</sup> (emphasis added)

<sup>123</sup> ICC-01/05-01/13-T-10-CONF-ENG, p. 4, lines 9-10.

<sup>124</sup> Judgment, para. 676.

<sup>125</sup> Judgment, para. 674.

To summarise, the Trial Chamber rejected the argument that Mr Arido appreciated the impact that his conduct would have on the Main Case and could not find any evidence that Mr Arido knew that the witnesses for which he is convicted would be further coached.

***Allegations of concealment and monies cannot be aggravating factors***

108. The Prosecution may also point to particular communications as measures taken by Mr Arido to conceal the offense as an aggravating factor. In this regards, the Judgment, rejecting this premise, states the following:

The Chamber rejected the Prosecution submission about Mr Arido cautioning witnesses about the use of social media relying on an email of 11 February 2013 to D2 to communicate with him outside facebook. *“However, reading the email, in the context of Mr Arido’s recurring submission that he had security concerns as a result of his involvement in the Main Case at the time relevant to the charges, the Chamber cannot conclude to the requisite evidentiary standard that the cautioning as expressed in the email is connected with Mr Arido’s illicit instructions to D-2.”*<sup>126</sup> (emphasis added)

109. The Prosecution may argue that Mr Arido sought to conceal receiving money from Mr Kilolo in his Article 55(2) statement as evidence of an aggravating factor. However, the Trial Chamber found that Mr Arido admitted receiving money as remuneration for his expert report. It particularly noted that Mr Arido said “[...] je me reserve le droit de m’en expliquer ultérieurement.”<sup>127</sup> Thus, Mr Arido did not conceal this from the investigators and it cannot be used as an aggravating factor.

***Mr Arido should not financially compensate the Court***

110. The Prosecution may also argue that Mr Arido should compensate the Court for the financial harm caused by his offence.<sup>128</sup>

111. The Defence submits that to attach a “price tag” to this offence is disproportionate and unfair to Mr Arido. Mr Arido’s role was very limited, and the Confirmation of Charges Decision rejected any common purpose liability.<sup>129</sup> The Trial Judgment made no finding that Mr Arido was part of a common plan.<sup>130</sup>

112. Rather, it would appear to be more appropriate, if the Prosecution were seriously interested in curbing “wasted resources” and “deficient witness testimony,” that the persons who are

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<sup>126</sup> Judgment, para. 675.

<sup>127</sup> Judgment, para. 677.

<sup>128</sup> ICC-01/05-01/13-2007.

<sup>129</sup> ICC-01/05-01/13-749, para. 52.

<sup>130</sup> Judgment, para. 878.

alleged to have given false testimony be investigated, prosecuted and if found guilty, be appropriately penalized.

113. Instead, those individuals – D-2, D-3, D-4, D-6, and indeed those witnesses who are unconnected to the charges against Mr Arido – have been rewarded with the protection of immunity agreements.

114. D-2, D-3 D-4, D-6 are not victims, but are, in fact, accomplice/perpetrators of the Article 70 offences. As the testimony indicated, at least from two who testified, they were directly involved to gain a personal and economic benefit.

115. This situation does not support the principle of fairness and application of the rule of law to all. The Defence submits that it sends the wrong message to potential witnesses in ICC trials, and de-legitimizes the Court and causes great harm to its functioning and standing in the international justice arena.

## **V. REMEDY**

116. For the reasons stated above, the Defence respectfully requests that:

- a. Mr Arido be sentenced to “time served,” where he is credited for the total incarceration on this case both in France and in The Netherlands (from 23 November 2013 to the date of his release on the 24 October 2014) and that no fine be imposed.
- b. That the Trial Chamber provides him with a document indicating that his sentence has been successfully completed.
- c. Grant the Arido Defence the right to respond to any issues raised in the Prosecution Sentencing Brief.



Chief Charles Achaleke Taku, Counsel for Mr Arido

Dated this 8<sup>th</sup> Day of January 2017

The Hague, The Netherlands