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

Date: **26 June 2015**

TRIAL CHAMBER VII

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

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

Confidential

**Narcisse Arido's Request for an Order to the Prosecution to Re-File its First Bar
Table Motion (ICC-01/05-01/13-1013-Conf)**

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 16 June 2015, the Prosecution filed a motion seeking the admission of 345 documents into evidence through the bar table (hereinafter 'Prosecution's Request').¹

2. The Arido Defence submits that the Prosecution's Request fails to provide the minimum information required for a bar table motion, which prevents the Arido Defence from exercising its right to make submissions on the admissibility of the documents. As a result, the Arido Defence respectfully requests the Trial Chamber to order the Prosecution to re-file its Request in accordance with the established practice.

II. CLASSIFICATION

3. Pursuant to Regulation 23*bis* of the Regulations of the Court ('RoC'), this request is submitted as confidential as it refers to a filing of the same classification. However, in light of the fact that the present request does not contain any reference to the actual documents the Prosecution seeks to have admitted, the Arido Defence submits that it can be reclassified as public.

III. SUBMISSIONS

4. The Prosecution classifies the documents it seeks to have admitted into three categories:

- i. Intercepted communications and their corresponding phone logs and transcripts/translations (Category I);
- ii. Call data records from independent private carriers (Category II); and,
- iii. Financial records from commercial money transfer companies (Category III).

5. Annex A to the Prosecution's Request contains a table listing the 345 documents which the Prosecution requests the Trial Chamber to admit into evidence from the bar table.²

¹ ICC-01/05-01/13-1013-Conf.

² ICC-01/05-01/13-1013-Conf-AnxA.

6. The parts of the table related to the items in categories I³ and III⁴ contain five columns:

- i. The Doc ID;
- ii. The date of the document;
- iii. The title of the document;
- iv. The identity of the source of the document; and,
- v. The reference to the disclosure package where the document is contained.

7. The part of the table related to Category II items contains six columns:

- i. The Doc ID;
- ii. The date of the document;
- iii. The title of the document;
- iv. The identity of the source of the document;
- v. The reference to the disclosure package where the document is contained; and,
- vi. A column entitled "Description".⁵

8. The Arido Defence submits that the Prosecution's Annex does not contain the information required by the jurisprudence for the submission of documents into evidence through the bar table. While the Trial Chamber is yet to issue a decision on the modalities for trial in accordance with Rule 140 of the RPE,⁶ which usually addresses such requirements, the Arido Defence submits that the jurisprudence unequivocally requires that the party seeking to have documents admitted into evidence *via* a bar table must provide a minimum of information for each individual document.

9. The Court has consistently held that the tendering party must submit a table providing ***for each document:***

- i. A short description of its content,
- ii. An index of the most relevant portions of the document, as well as

³ ICC-01/05-01/13-1013-Conf-AnxA, pp. 2 to 23.

⁴ *Ibid.*, pp. 33 to 36.

⁵ *Ibid.*, pp. 24-32.

⁶ See the joint defence observations on this issue, ICC-01/05-01/13-899, paras 107-120; The Prosecution's position is contained in ICC-01/05-01/13-859-AnxD, paras 45-47.

iii. A demonstration of its relevance and probative value.⁷

10. In addition, in the *Kenyatta* and *Ruto and Sang* cases, the Trial Chamber requested the tendering party to submit, for each document, an averment and explanation of its authenticity (as an additional category from the “demonstration of relevance and probative value”), and an indication of the reason for not tendering the document through a witness.⁸

11. The Prosecution’s Annex, its convenient “incorporation by reference” of the Independent Counsel’s reports into its Request,⁹ its reliance on the Single Judge’s findings regarding the items selected by the Independent Counsel,¹⁰ and its selected examples of the “relevance” of the materials sought to be admitted,¹¹ fall short of the requisite threshold of specificity for a bar table submission. To the contrary, the use of examples throughout the Prosecution’s Request, such as for instance those contained in paragraphs 42, footnote 111, and paragraph 43, footnote 119, shows that it is able to provide information regarding the relevance of the documents on an item-by-item basis. The Arido Defence submits that this approach must be adopted for the entirety of the items the Prosecution seeks to have admitted.

12. The absence of the requisite information on an item-by-item basis prevents the Arido Defence from addressing the established criteria for the admissibility of evidence, namely the relevance, probative value and possible prejudice of each document the Prosecution seeks to tender.¹² In effect, Mr. Arido is preventing from exercising his right to submit a response, as protected by Rule 134 (1) of the Rules of Procedure and Evidence (‘RPE’), and his right to raise issues regarding the relevance or admissibility of evidence in accordance with Rule 64 (1) of the RPE.

13. Furthermore, the lack of information in the Prosecution’s Request prevents the Trial Chamber from exercising its duty under Articles 69 (4) and (7) and Rule 71 of the RPE to assess the relevance or admissibility of evidence on the basis of an item-by-item evaluation.¹³

⁷ ICC-01/04-01/07-1665, para. 101; ICC-01/09-02/11-847-corr, para. 27; ICC-01/09-01/11-1353, para. 3; ICC-01/09-02/11-867, para. 34. (emphasis added)

⁸ ICC-01/09-02/11-867, para. 34; ICC-01/09-02/11-847-corr, para. 27; ICC-01/09-01/11-1353, para. 3.

⁹ ICC-01/05-01/13-1013-Conf, para. 15.

¹⁰ *Ibid.*, para. 17.

¹¹ *See Ibid.*, paras 18, 19, 20, 21, 27, 32, 33, 34, 38, 42, 43, 44.

¹² ICC-01/04-01/07-2635, para. 14; ICC-01/05-01/08-2012-Red, paras 13-16; ICC-01/05-01/08-2793, para. 9; ICC-01/05-01/08-2299-Red, para. 7.

¹³ ICC-01/05-01/08-1386 (OA5, OA6), paras 2, 53, 57.

The Prosecution's statement that "the specific nature of the categories of evidence concerned here warrants their admission from the bar table in their entirety"¹⁴ is unsubstantiated, contravenes the unequivocal Appeals Chamber's jurisprudence,¹⁵ and therefore must simply be ignored.

14. The Arido Defence submits that the practice adopted in the Kenya cases constitutes the current legal standard, and that as a result, the Annex to the Prosecution's bar table request should include, for each document:

- i. A short description of its content;
- ii. An index of the most relevant portions of the document;
- iii. An averment and explanation of its authenticity;
- iv. An indication of the reason for not tendering the document through a witness; and,
- v. A description of its relevance and intended probative value.

15. In addition, in light of the Rule 136 (2) RPE requirements that, in joint trials, each accused shall be accorded the same rights as if such accused were being tried separately, the Arido Defence requests that the column to the table attached to the revisited Prosecution's first bar table motion which will contain information regarding the relevance and intended probative value of the item, include the name(s) of the specific accused(s) to which it relates.

16. The Arido Defence recalls that the Prosecution was ordered to re-file its bar table motion in the *Ruto and Sang* case, in the format requested by the Trial Chamber in its Rule 140 decision.¹⁶ It submits that the Trial Chamber should follow the same procedure in the present case.

¹⁴ ICC-01/05-01/13-1013-Conf, para. 9.

¹⁵ ICC-01/05-01/08-1386 (OA5, OA6), paras 2, 53, 57.

¹⁶ ICC-01/09-02/11-847-corr, para. 27.

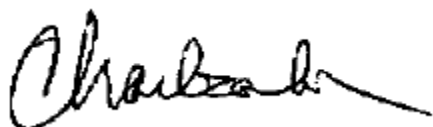
IV. CONCLUSION

17. As a result, the Arido Defence respectfully request the Trial Chamber to reject the Prosecution's Request, without prejudice, and to order the Prosecution to re-file its first bar table request with an annex containing a table including, for each document:

- i. A short description of its content;
- ii. An index of the most relevant portions of the document;
- iii. An averment and explanation of its authenticity;
- iv. An indication of the reason for not tendering the document through a witness; and,
- v. A description of its relevance and intended probative value, indicating specifically to which Accused(s) the document relates to.

18. In light of the 8 July 2015 deadline for the submission of responses to the Prosecution's First Bar Table, the Arido Defence respectfully requests the Trial Chamber to shorten the applicable time limit for any responses to the present motion.

Respectfully submitted,



Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 26th Day of June 2015

In The Hague, The Netherlands.