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Date: **31 August 2015**

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 A

**Public Redacted Version of Narcisse Arido's Response to the Prosecution's Second
Bar Table Motion (ICC-01/05-01/13-1113-Conf)**

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

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I. INTRODUCTION

1. On 31 July 2015, the Prosecution filed its second motion for admission of evidence through the bar table (hereinafter ‘Prosecution’s Request’).¹ In light of the large number of documents covered by the Prosecution’s Request (579), the Trial Chamber granted an extension of time to the Defence teams for the filing of their responses, until Monday 31 August 2015.²

2. The Arido Defence notes that none of the documents the Prosecution seeks to tender relate to Mr. Arido. However, it opposes their admission into evidence as the Prosecution’s Request fails to meet the requirements of relevance and probative value required by Article 69 (4) of the Statute for the admission into evidence.

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. The Arido Defence will prepare a public redacted version at the earliest opportunity. Annex A should remain confidential as it refers to confidential documents.

III. APPLICABLE LAW

4. The burden to establish the relevance and probative value rests on the party seeking to introduce the evidence.³ The Arido Defence recalls that the use of a bar table motion does not entail a lower standard of relevance or admissibility and that Article 69 (4) of the Statute applies. To the contrary, as stated by the *Katanga and Ngudjolo* Trial Chamber: the fact that evidence is being tendered without authentication by a witness may be an important factor in the Chamber’s assessment of its admissibility.⁴ A three-part test has been established at the Court in relation to the assessment of the admissibility of documents. In short, the Trial Chamber must be convinced that the document tendered is relevant to the case and has probative value. It must further weigh its probative value against its potential prejudicial effect.⁵ The Appeals Chamber has ruled that a Trial Chamber must rule on requests for admission of evidence only after an item-by-item

¹ ICC-01/05-01/13-1113-Conf.

² ICC-01/05-01/13-1153.

³ ICC-01/04-01/06-1399, para. 25; ICC-01/05-01/08-2299-Red, para. 10.

⁴ ICC-01/04-01/07-2635, para. 12.

⁵ ICC-01/05-01/08-1386, para. 52; ICC-01/04-01/07-2635, para. 14.

evaluation of the documents.⁶

5. In the *Katanga and Ngudjolo* case, the Trial Chamber has noted that the following factors would be taken into account when making a determination on a bar table request:

- i. The nature and origin of the documentary evidence;
- ii. The relevance of the information contained in the document to matters at issue in the case;
- iii. Whether the content of the document is easily understandable or requires further explanation or interpretation;
- iv. If the information pertains exclusively to the historical background and/or contextual elements of the case, the nature and precision of the information contained in the document, as well as whether it is the only evidence on the matter or whether there are alternative sources of information on the same issue;
- v. The original purpose for which the document was created and to whom it was addressed. For example, whether a document was made in the context of legal proceedings or has a purely private character;
- vi. Whether it is possible to ascertain from the content of the document itself what its sources are and whether they can be easily verified;
- vii. Whether it is possible to ascertain the method used to compile and process the information contained in the document;
- viii. Whether there are any doubts as to the authenticity of the document.⁷

6. The assessment of the probative value will always be “a fact-specific inquiry and may take into account innumerable factors, including the indicia of reliability, trustworthiness, accuracy or voluntariness that inherent in the item of potential evidence, as well as the circumstances in which the evidence arose. It may also take into account the extent to which the item has been authenticated.”⁸ If it is impossible for the Chamber to conduct any independent evaluation of the evidence - if there are no adequate and available means of testing its reliability - then the court will need to consider carefully whether the party seeking to introduce it has met the test of demonstrating, *prima facie*, its probative value.⁹ Under no circumstances can the Chamber admit

⁶ ICC-01/05-01/08-1386, paras 2, 53, 57; *see also* ICC-01/09-01/11-1353, para. 19.

⁷ ICC-01/04-01/07-1665, para. 100.

⁸ ICC-01/05-01/08-2299-Red, para. 8.

⁹ ICC-01/04-01/06-1399, para. 30; ICC-01/04-01/07-2635, para. 26.

unauthenticated documentary evidence since, by definition, such evidence has no probative value.¹⁰

IV. SUBMISSIONS

A. None of the documents the Prosecution seeks to tender refer to Mr. Arido

7. While the 162 intercepts the Prosecution seeks to tender cover a time period between 12 January 2011 and 9 November 2013, none of them mention, refer to or otherwise relate to Mr. Arido. Nevertheless, inasmuch as the Prosecution seems to have taken the view that all the evidence is relevant against every Accused, the Arido Defence offers the following observations. In addition, item by item comments on the relevance, probative value and legality of the proposed evidence are contained in confidential Annex A.¹¹

B. Intercepts of conversations between the Accused are not admissible under the Bar Table

8. While the practice of bar table motions is accepted at the ICC, the Arido Defence submits that it should remain a supplementary method of introducing evidence.¹² It also submits that its use should be limited to the documents which cannot be tendered through a witness or to those about which there is little controversy.¹³ In the present case, the Prosecution attempts to have hundreds of intercepts of audio conversations which it submits emanate from two of the suspects, Mr. Bemba and Mr. Babala. While the Arido Defence contests the relevance of the intercepts, as stated below in paragraphs 22 to 27, the Prosecution argues that they constitute ‘direct evidence and corroborate other evidence in the case’.¹⁴ More specifically, according to the Prosecution, they touch upon the alleged *mens rea* of Mr. Bemba, Mr. Babala and Mr. Mangenda.¹⁵

9. The Arido Defence submits that the intercepts constitute a *sui generis* category of documents that are not easily qualified under the Court’s rules. They sit in between ‘testimonial

¹⁰ ICC-01/04-01/07-2635, paras 22, 23.

¹¹ Confidential Annex A was prepared in collaboration with the Kilolo and the Bemba Defence teams.

¹² ICTY, *Prosecutor v. Stanišić & Župljanin*, IT-08-91-T, Decision Granting in Part the Prosecution’s Bar Table Motion and Granting the Prosecution’s Supplemental Bar Table Motion, 1 February 2011, para. 12, at: http://www.icty.org/x/cases/zupljanin_stanisicm/tdec/en/110201a.pdf (*‘Stanišić & Župljanin 1 February 2011 Bar Table Decision’*); Karadžić First Bar Table Decision of 13 April 2010, para. 8.

¹³ See e.g. ICC-01/04-01/07-1665, para. 98; ICC-01/04-01/07-1665, para. 99.

¹⁴ Prosecution’s Request, para. 3.

¹⁵ *Ibid.*, paras 11-12.

evidence’ - which can only be admitted if the requirements of Rule 68 of the RPE are met -¹⁶ and ‘documentary evidence’,¹⁷ since they do contain statements attributed to Mr. Bemba, Mr. Mangenda and Mr. Babala, even if they do not have the formal qualities of a statement. The Arido Defence submits that fairness dictates that this ambiguity should be resolved in favour of the Accused. As such, they should be deemed to constitute declarations and therefore cannot form the subject of a bar table motion. Indeed, once admitted, these intercepts will be treated, for all intent and purposes, as statements of their authors, and for that reason should be treated as such with regards to their admission as well.

10. The Arido Defence submits that the Prosecution’s Request to have such declarations being admitted into evidence without them being discussed in Court would constitute an unprecedented and impermissible use of the bar table process. Bar table motions have been used at the Court and in the *ad hoc* tribunals to admit documents such as UN reports,¹⁸ NGO reports,¹⁹ military reports,²⁰ correspondence,²¹ military documents,²² press and other media articles,²³ intelligence and police reports,²⁴ hospital records and death reports,²⁵ maps,²⁶ Call Data Records

¹⁶ Rule 68 of the RPE; see also ICC-01/09-01/11, para. 27; ICC-01/09-01/11-1353, para. 83, about a “statement signed by an employee of a market research company with regard to the availability of copies of recordings of KASS FM Broadcasts”. The Trial Chamber “considers that the document is properly to be considered testimonial in nature”; see also para. 85 about a document from the High Court of Kenya: “The Chamber considers that certain of the material is testimonial in nature and notes that a “bar table” motion should not be used in a manner which would be duplicative of Rule 68 of the RPE”; see also *ibid.*, paras 86, 88.

¹⁷ “Documentary evidence that is not a written record of testimonial evidence of a witness may be tendered without being introduced by a witness. This is necessary to avoid the need of having to call large numbers of witnesses for the only purpose of introducing documents” ICC-01/04-01/07-1665, para. 98.

¹⁸ See e.g. ICC-01/05-01/08-2299-Red, paras 16-24; ICC-01/04-01/07-2635, para. 2.

¹⁹ See e.g. ICC-01/05-01/08-2299-Red, paras 43-52; ICC-01/09-01/11-1353, paras 29-46; ICC-01/04-01/07-2635, para. 2.

²⁰ See e.g. ICC-01/05-01/08-2299-Red; ICTY: *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused’s Bar Table Motion: Municipality Component Documents, 14 April 2014, para. 28, available at: <http://www.icty.org/x/cases/karadzic/tdec/en/140414.pdf>.

²¹ See e.g. ICC-01/05-01/08-2299-Red, paras 54-65, 75-77;

²² See e.g. ICC-01/05-01/08-2299-Red, paras 66-75, 78-79; ICC-01/04-01/07-2635, para. 2; ICTY: *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution’s Bar Table Motion for the Admission of Documents Related to the Sarajevo Component, 11 May 2012, para. 15, available at: <http://www.icty.org/x/cases/karadzic/tdec/en/120511.pdf>; *Prosecutor v. Tolimir*, IT-05-88/2-T, 14 May 2012, paras 9-11, 14, available at: <http://www.icty.org/x/cases/tolimir/tdec/en/120514.pdf>.

²³ See e.g. ICC-01/05-01/08-2299-Red, paras 85-128; ICC-01/09-01/11-1353, paras 76-82; ICC-01/04-01/07-2635, para. 2.

²⁴ See e.g. ICC-01/09-01/11-1353, paras 47- 65; ICTY: *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused’s Bar Table Motion: Municipality Component Documents, 14 April 2014, para. 26, available at: <http://www.icty.org/x/cases/karadzic/tdec/en/140414.pdf>; *Prosecutor v. Tolimir*, IT-05-88/2-T, 14 May 2012, para. 23, available at: <http://www.icty.org/x/cases/tolimir/tdec/en/120514.pdf>.

²⁵ See e.g. ICC-01/09-01/11-1353, paras 66-75; *Prosecutor v. Tolimir*, IT-05-88/2-T, 14 May 2012, paras 4, 7, available at: <http://www.icty.org/x/cases/tolimir/tdec/en/120514.pdf>; STL: *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Decision on Prosecution’s Motion to Admit Into Evidence Photographs, Questionnaires and Records of Victims, 28 January 2014, available at: <http://www.stl-tsl.org/en/the-cases/stl-11-01/case-law/2874-f1350>.

compilations,²⁷ or documents related to peace agreements,²⁸ or phone contracts.²⁹ They were admitted since they provided background to the charges,³⁰ the crimes committed on the ground,³¹ the role of armed groups,³² investigations of crimes,³³ providing context,³⁴ knowledge of the accused regarding allegations of commission of crimes,³⁵ identifies victims.³⁶ Insofar as the Arido Defence is aware, the admission into evidence from the bar table of intercepted communicated from the suspects in one case, going directly to their acts and conducts, has never taken place, and particularly not in the absence of information attesting of their authenticity.³⁷ To the contrary, the *Ruto and Sang* trial chamber explicitly rejected the submission of a document which it considered “testimonial in nature” through the bar table and held that a bar table motion “should not be used in a manner which would be duplicative of Rule 68 of the Rules”.³⁸

11. Likewise, the intercepts which admission is sought are testimonial in nature. These intercepts are statements which were obtained surreptitiously from the co-accused, where the allegations made by the Prosecution against the accused are discussed. The Prosecution clearly postulates that in his opinion, these statements are incriminating. Clearly, they would not meet the threshold be admitted under Rule 68 of the RPE. Therefore the Prosecution is attempting to have them admitted through a bar table motion, a procedure which purpose is to allow the admission, *en vrac*, of background or peripheral evidence. If incriminating evidence cannot be admitted with all the safeguards tailored into the procedure of Rule 68, surely it cannot either be admitted through a bar table motion. Ultimately, with this bar table motion, the Prosecution is

²⁶ See e.g. ICC-01/09-01/11-1353, para. 84; STL: *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Corrected Version of “Decision on Prosecution Motion to Admit into Evidence Geographic Documents” of 8 December 2014”, 10 December 2014, available at: <https://www.stl-tsl.org/en/the-cases/stl-11-01/case-law/3678-f1781cor>.

²⁷ SCSL: *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Decision on Five Prosecution Motions on Call Sequence tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNHCR and STL’s Prosecution, 6 May 2015, available at: <http://www.stl-tsl.org/en/the-cases/stl-11-01/filings/main-case/orders-and-decisions/3996-f1937>.

²⁸ ICTY: *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution’s Bar Table Motion for the Admission of Documents Related to the Sarajevo Component, 11 May 2012, para. 13, available at: <http://www.icty.org/x/cases/karadzic/tdec/en/120511.pdf>;

²⁹ SCSL: *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Decision on Three Prosecution Motions for the Admission into Evidence of Mobile Telephone Documents, 6 March 2015, available at: <https://www.stl-tsl.org/en/the-cases/stl-11-01/case-law/3844-f1876>.

³⁰ See e.g. ICC-01/05-01/08-2299-Red, paras 24, 32, 123, 138; ICC-01/09-01/11-1353, paras 39, 40, 46, 50, 51.

³¹ See e.g. ICC-01/05-01/08-2299-Red, para. 24, 33, 34, 40, 45.

³² See e.g. *ibid.*, paras 24, 40.

³³ See e.g. *ibid.*, para. 51.

³⁴ See e.g. *ibid.*, para. 51; see e.g. ICC-01/09-01/11-1353, para. 77.

³⁵ See e.g. ICC-01/05-01/08-2299-Red, paras 59, 81.

³⁶ See e.g. ICC-01/09-01/11-1353, paras 67-68, 70, 74.

³⁷ On this point, see *infra*, paras 14 to 21.

³⁸ See e.g. ICC-01/09-01/11-1353, para. 83, rejecting the statement signed by an employee of a market research company with regard to the availability of copies of recordings of KASS FM Broadcasts, and paras 85, 86, 88, rejecting statements made in the context of judicial proceedings and testimonies.

attempting to get a conviction without a trial. The Defence for Arido therefore strongly opposes the notion that his conviction could be obtained via a bunch of bar table documents containing the statements of individuals he could not confront in Court.

12. The Arido Defence submits that the admission into evidence of such conversations through the bar table would seriously prejudice the Accused and the fairness of the trial. Indeed, since it allegedly emanates from co-suspects in the present case, who are protected by the right against self-incrimination,³⁹ the other's suspects cannot exercise their right to confront individuals who implicate them in an alleged criminal conduct,⁴⁰ should the conversations be admitted through the bar table. This would be detrimental to the fair trial rights of the Accused and the overall fairness of the trial and the limited probative value of the conversations.⁴¹ In the *Katanga and Ngudjolo* case, the Trial Chamber refused to admit into evidence a statement made by Ngudjolo to the DRC judicial authorities since it implicated his co-Accused, Mr. Katanga, stating that "which creates "an overwhelming legal obstacle against its admission, as Mr. Ngudjolo cannot be compelled to submit to examination by, or on behalf of Katanga."⁴² Regarding another statement by Ngudjolo which contained admissions made by Ngudjolo, the Trial Chamber admitted it into evidence for the sole purpose of the admissions made by Ngudjolo. It rejected it for its allegations against Mr. Katanga.⁴³ In the present case, the same issue arises, but since all the conversations allegedly emanate from and implicate at least two of the Accused - Mr. Babala and Mr. Bemba - the distinction taken by the *Ngudjolo and Katanga* Trial Chamber (the selective admission of the evidence for limited purposes) is not possible. As a result, the conversations must be rejected as a whole.

13. Alternatively, the Prosecution should be required to present the conversations in Court, through a witness who can attest to their authenticity and reliability and identify the speakers. This would permit the Accused to exercise their right to challenge evidence.

³⁹ Article 67 (1) (g) of the Statute.

⁴⁰ Article 67 (1) (e) of the Statute; *see also* ICC-01/09-01/11-1353, paras 24-25, 54; ICC-01/04-01/07-2635, paras 44, 45. According to the Prosecution's interpretation of the conversations as incriminating. As stated below, the Arido Defence submits that the Prosecution's interpretation is misplaced, *see infra*, paras 22 to 27.

⁴¹ For a discussion on their relevance and probative value, *see infra*, paras 14 to 27.

⁴² ICC-01/04-01/07-2635, para. 53.

⁴³ *ibid.*, para. 54.

C. The Prosecution fails to demonstrate the probative value of the documents

1. The Prosecution fails to provide information and evidence regarding the method used to collect and process the call logs and audio files

14. The Arido Defence submits that the Prosecution fails to provide evidence supporting the authenticity and provenance of the documents it seeks to tender. The mere statement that the tendered items are “ICC Detention Centre recordings and call logs of the Accused, Jean-Pierre Bemba Gombo’s non-privileged phone line”⁴⁴ and that “[a]s the Registry - a Court organ - was responsible for having produced and provided the underlying audio material, it is sufficiently authentic and reliable to be admitted before the Court”⁴⁵ is not sufficient to establish their authenticity or reliability. Similarly, stating that they were obtained in accordance with judicial authorisation⁴⁶ does not provide information regarding the method used to collect the data.

15. Finally, the fact that other evidence may corroborate the reliability and accuracy of the recordings⁴⁷ is irrelevant since such evidence has not been admitted into evidence. In any event, corroboration does not establish authenticity since it does not provide information regarding the method used to gather, store and process the audio files and call logs data.

16. While the call logs provide information regarding the time and phone numbers used in the audio files, they themselves do not contain any indicia of authenticity. The Prosecution’s statement that “the compilation and maintenance of these records is undertaken by the Registry in the regular administration of the Detention Centre, in accordance with the Regulations of the Registry and the Court’s statutory framework”⁴⁸ does not constitute information regarding how the material was recorded, processed and saved. To the contrary, they are mere tables without any stamps or official sign.

17. As stated by the *Lubanga* Trial Chamber: “[a] mere general reference to the record of the trial is unsatisfactory since it is not for the Chamber to start its own investigations into material which may prove a document’s authenticity and reliability.”⁴⁹ The Arido Defence submits that,

⁴⁴ Prosecution’s Request, para. 2.

⁴⁵ *Ibid.*, para. 3.

⁴⁶ *Ibid.*, para. 18.

⁴⁷ *Ibid.*, para. 21.

⁴⁸ *Ibid.*, para. 25.

⁴⁹ ICC-01/04-01/07-2635, para. 23.

for each conversation the Prosecution seeks to tender, it must provide detailed information as to how the audio file was recorded, collected, stored, processed and transmitted to the Prosecution, and the same applies to the call logs. The Arido Defence recalls that the *Katanga & Ngudjolo* Trial Chamber found that the question of whether it was possible to ascertain the method used to compile and process the information contained in the document was an element to take into account when deciding on whether to grant a request for admission of evidence through the bar table.⁵⁰ Regarding audio files, it also specifically held that “[b]efore video or audio material can be admitted, the Chamber will require evidence of originality and integrity”⁵¹ and that “[s]ince the relevance of audio or video material depends on the date and/or location of recording, evidence must be provided in this regard.”⁵² This position was also that of the ICTY, which held that “intercepts are a special category of evidence as that they bear no prima facie indicia of authenticity or reliability, and these requirements must be fulfilled by hearing from the relevant intercept operators or the participants in the intercepted conversation.”⁵³

18. Mr. Arido is not a party to these conversations, and cannot be expected to take position on the identification of the voices, the value of the translations or the exact signification of the words used. Only the participants in these conversations can do that. If the Prosecution intends to use these conversations against Mr. Arido, it should state precisely which ones and for which purposes. One of the common features of documents admitted through bar table motion is the inherent reliability of documents admitted through that procedural vehicle. Whereas it is always possible to assess the probative value of business documents, background evidence, etc., it is not possible to do so with regards to conversations which only make sense for those having them.

19. The Prosecution failed to do so in the present case and for this reason alone, the intercepts must not be admitted into evidence through the bar table.

2. Technical issues

20. Further, the Arido Defence notes that the quality of the audio is very low for certain intercepts,⁵⁴ and that in several of them, the answers of one of the speakers do not appear to have

⁵⁰ ICC-01/04-01/07-1665, para. 100.

⁵¹ ICC-01/04-01/07-2635, para. 24.

⁵² *Ibid.*, para. 24.

⁵³ ICTY: *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on the Accused’s Bar Table Motion (Sarajevo Intercepts), 9 October 2012, para. 9, available at: <http://www.icty.org/x/cases/karadzic/tdec/en/121009.pdf>.

⁵⁴ See e.g. CAR-OTP-0074-0701, CAR-OTP-0077-0256, CAR-OTP-0074-0478, CAR-OTP-0074-0446, CAR-OTP-

been recorded.⁵⁵ This raises concerns regarding the process by which the audio was recorded, and only the ICC detention centre's staff who recorded and/or processed the audio can provide information in this regard.

21. Similarly, some of the transcriptions and translations contain the Prosecution's own comments and interpretations which do not exist in the audio file.⁵⁶ As a result, should the Trial Chamber consider admitting the intercepts into evidence, it must order the Prosecution to file an amended version of the transcriptions and translations without those comments.

D. The Prosecution fails to establish the relevance of the documents it seeks to tender

22. The Prosecution's Request is another example of the Prosecution's marked ability to "see evil everywhere". The vast majority of the communications contain no reference to the proceedings in the Main Case and relate instead to the political situation in Democratic Republic of Congo ('DRC'). Further, some intercepts are outside of the temporal scope of the charges.⁵⁷ Yet, the Prosecution makes no arguments whatsoever on the relevance of these documents to the charges against Mr. Arido.

23. Nothing in the tendered intercepts supports the Prosecution's interpretation of the alleged 'coded language' or hidden intentions of the speakers. The alleged relevance of the documents is in fact nothing more than the Prosecution's own invention of the meaning of certain words used. It fails to provide independent evidence - such as, for instance, the use of a language expert - to support its fanciful theory.

24. Further, the Prosecution's interpretation of the codes lacks coherence, further illustrating the arbitrary character of the Prosecution's interpretation. Some alleged "codes" are given several meanings by the Prosecution. In other cases, the Prosecution provides several "codes" for the

0074-0697, CAR-OTP-0074-0564, CAR-OTP-0074-0566, CAR-OTP-0074-0598, CAR-OTP-0074-0600, CAR-OTP-0074-1460, CAR-OTP-0074-1454, CAR-OTP-0074-1446, CAR-OTP-0074-0172.

⁵⁵ See e.g. CAR-OTP-0074-1464, CAR-OTP-0074-1462, CAR-OTP-0074-0600, CAR-OTP-0074-0630, CAR-OTP-0074-1446, CAR-OTP-0074-0692, CAR-OTP-0074-0106, CAR-OTP-0074-0152, CAR-OTP-0074-0182, CAR-OTP-0074-0206, CAR-OTP-0074-0202, CAR-OTP-0074-0194, CAR-OTP-0074-0616, CAR-OTP-0074-0504, CAR-OTP-0074-0502, CAR-OTP-0074-0496, CAR-OTP-0079-0410, CAR-OTP-0079-0593, CAR-OTP-0079-0753, CAR-OTP-0079-0903.

⁵⁶ See e.g. CAR-OTP-0080-1020, CAR-OTP-0087-3479, CAR-OTP-0082-2501, CAR-OTP-0086-1745, CAR-OTP-0086-1582, CAR-OTP-0089-0726, CAR-OTP-0082-1930.

⁵⁷ See e.g. CAR-OTP-0077-0216, CAR-OTP-0077-0214, CAR-OTP-0074-0701, CAR-OTP-0077-0208, CAR-OTP-0077-0206, CAR-OTP-0077-0256, CAR-OTP-0077-0240, CAR-OTP-0077-0284, CAR-OTP-0077-0384, CAR-OTP-0077-0504, CAR-OTP-0077-0490, CAR-OTP-0077-0484, CAR-OTP-0077-0476.

same individual/object. This goes against the very purpose of using coded language. Further, it shows that the meaning of the codes given by the Prosecution is simply imaginary. According to the Prosecution's interpretation:

- [REDACTED],⁵⁸ [REDACTED],⁵⁹ [REDACTED],⁶⁰ [REDACTED];⁶¹
- [REDACTED]⁶² [REDACTED]⁶³ [REDACTED];⁶⁴
- [REDACTED] means [REDACTED]⁶⁵ but also [REDACTED],⁶⁶ although [REDACTED] also refers to [REDACTED] according to the Prosecution,⁶⁷ and [REDACTED] is also referred to as [REDACTED];⁶⁸
- [REDACTED] means [REDACTED]⁶⁹ but in other cases, it refers to [REDACTED];⁷⁰
- [REDACTED] is identified as [REDACTED]⁷¹ or [REDACTED];⁷²
- [REDACTED] supposedly means [REDACTED]⁷³ although [REDACTED] allegedly refers to [REDACTED];⁷⁴
- [REDACTED] is [REDACTED]⁷⁵ and [REDACTED],⁷⁶ although [REDACTED] also means [REDACTED] according to the Prosecution;⁷⁷
- [REDACTED] means [REDACTED]⁷⁸ or [REDACTED];⁷⁹

⁵⁸ See ICC-01/05-01/13-1113-Conf-AnxA, entries No. 15, 17, 18, 20, 30, 41, 49, 50-51, 55, 64, 73, 76, 82, 86, 142.

⁵⁹ See ICC-01/05-01/13-1113-Conf-AnxA, entries No. 13, 33, 56, 57, 99.

⁶⁰ See ICC-01/05-01/13-1113-Conf-AnxA, entries No. 4, 5, 7, 8, 11, 12, 18, 20, 25, 36, 37, 40, 43, 45, 47, 51, 60, 64, 72-74, 79, 81-82, 86, 88, 94, 100, 106, 108, 114, 122, 127, 129-130, 133, 136, 138, 141, 143-144, 147-148, 149, 154, 159.

⁶¹ See ICC-01/05-01/13-1113-Conf-AnxA, entries No. 28, 31, 58, 61-62, 70.

⁶² See ICC-01/05-01/13-1113-Conf-AnxA, entries No. 17, 101, 107, 113, 124, 137, 141-142, 161.

⁶³ See ICC-01/05-01/13-1113-Conf-AnxA, entries No. 7, 9-10, 12-13, 15-16, 18, 19, 22, 25, 27, 29, 36-39, 42-45, 47, 49, 50-52, 54, 57, 63, 65, 67-68, 72-75, 78, 82, 84, 88-89, 90-91, 94, 98-99, 102, 105-106, 108-112, 114-117, 119, 122-123, 125-129, 131, 133, 135-136, 138-140, 145-146, 148-149, 151-153, 158.

⁶⁴ See ICC-01/05-01/13-1113-Conf-AnxA, entry No. 23.

⁶⁵ See ICC-01/05-01/13-1113-Conf-AnxA, entries No. 11, 17, 23, 25, 50, 74, 76-77, 82, 87, 89-91, 100, 108, 117, 123, 125, 129, 130, 132, 162.

⁶⁶ See ICC-01/05-01/13-1113-Conf-AnxA, entries No. 10, 33, 37, 53, 113, 136, 139, 140.

⁶⁷ See ICC-01/05-01/13-1113-Conf-AnxA, entries No. 9, 36, 50, 64.

⁶⁸ See ICC-01/05-01/13-1113-Conf-AnxA, entries No. 28, 54, 56, 59, 61, 62, 70, 162.

⁶⁹ See ICC-01/05-01/13-1113-Conf-AnxA, entries No. 10, 27, 34, 57, 66, 80, 87, 91, 97, 109, 113.

⁷⁰ See ICC-01/05-01/13-1113-Conf-AnxA, entries No. 74, 141-142; see also ICC-01/05-01/13-1072-Conf-AnxA, entry 370.

⁷¹ See ICC-01/05-01/13-1113-Conf-AnxA, entries No. 3, 6, 18, 33, 36-39, 41, 51, 54, 63, 83, 91, 99, 106-108, 111, 112, 114, 116, 121-123, 125, 126, 133, 135, 136, 142, 147-148, 153.

⁷² See ICC-01/05-01/13-1113-Conf-AnxA, entries No. 56, 58-59, 61, 62, 70.

⁷³ See ICC-01/05-01/13-1113-Conf-AnxA, entries No. 142, 155-157.

⁷⁴ See *supra*, fn. 60.

⁷⁵ See ICC-01/05-01/13-1113-Conf-AnxA, entries No. 6, 9, 36, 53, 60, 66, 76, 79, 102, 107, 141, 162.

⁷⁶ See ICC-01/05-01/13-1113-Conf-AnxA, entries No. 18, 25, 28, 32, 54-55, 57, 85, 87, 91, 95, 99, 104, 106, 108, 112, 113, 114, 115, 116, 119, 125, 127, 145, 146, 151, 153.

⁷⁷ See ICC-01/05-01/13-1113-Conf-AnxA, entries No. 10, 37, 80, 117, 124, 138, 152, 157; see also ICC-01/05-01/13-1072-Conf-AnxA, entry 371.

⁷⁸ See ICC-01/05-01/13-1113-Conf-AnxA, entries No. 3, 4, 10, 12, 17, 23, 25, 36, 42, 51, 57, 60, 79, 81, 95, 102, 104, 109, 115, 117, 127, 136, 141, 158.

- [REDACTED] refers to an individual⁸⁰ while in the past, the Prosecution argued that it meant [REDACTED].⁸¹

25. The Arido Defence recalls that the *Katanga & Ngudjolo* Trial Chamber found that the question of whether the contents of a document was easily understandable or required further explanations/interpretations was an element to take into account when deciding on whether to grant a request for admission of evidence through the bar table.⁸² This is clearly the case here, and the audio files should not be admitted without being explained by a witness.

26. Finally, the Arido Defence notes that the fact that a phone call may have been made or received from a certain phone number does not necessarily establish that it was the person who owns the phone number who was on the line. As a result, items 163 and 164 of the Prosecution's bar table cannot be said to establish that when a call was made to or from one of the phone numbers listed therein to/[REDACTED], the individual to whom the number belongs was the person actually on the line. Again, information is required as to how the numbers are attributed and as to whether the detention centre's staff verifies the identity of the person speaking on the line.

27. In light of the fact that none of the intercepts relate directly to the charges and that the Prosecution fails to provide independent evidence regarding the alleged coded language of the speakers, the relevance of the documents is not established and they therefore do not fulfil the requirements of Article 69 (4) of the Statute. Therefore, they cannot be admitted into evidence.

E. The admission of the intercepts through the bar table would prejudice the Defence

28. Unlike what the Prosecution states, the admission of the documents would not help "streamline the presentation of evidence" since - as it clear from the various cross-references contained in the Annex to the Prosecution's Request and from the lack of coherence in the Prosecution's interpretation of the 'codes', lengthy explanations are required by the Prosecution to explain why it gives a particular interpretation to a code.

⁷⁹ See ICC-01/05-01/13-1113-Conf-AnxA, entry No. 141.

⁸⁰ See ICC-01/05-01/13-1113-Conf-AnxA, entries No. 36, 37, 38, 42, 45, 47, 60, 64, 78, 88-91, 106, 115, 117, 120, 123, 125, 143, 147, 152, 155, 158, 159.

⁸¹ See e.g. ICC-01/05-01/13-1113-Conf-AnxA, entry No. 92; see also ICC-01/05-01/13-526-Conf-AnxB1, para. 31; ICC-01/05-01/13-597-Conf-AnxB, fn 184, para. 316; ICC-01/05-01/13-1072-Conf-AnxA, entry 371.

⁸² ICC-01/04-01/07-1665, para. 100.

29. Further, the Prosecution's argument that the admission into evidence of the audio files would avoid calling Registry staff to attest to the authenticity of the underlying recordings and logs bears no weight. The authenticity and reliability of each item of evidence must be established, or else it cannot be admitted into evidence. Expeditionness must not outweigh the Accused's right to challenge evidence against him, nor should it be permitted for the Prosecution to bypass the Article 69 (4)'s requirements of probative value. As stated above, the Prosecution has not provided any evidence regarding the collection, storage, processing and chain of custody of the said intercepts. Their probative value cannot be established in the absence of such information and they must be rejected. Admitting them in evidence without such information would prejudice the Accused and the interests of justice.

V. CONCLUSION

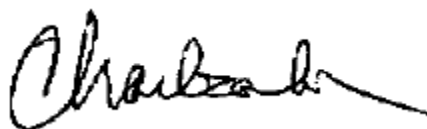
30. In light of the above, the Arido Defence respectfully requests Trial Chamber VII to reject the Prosecution's Request.

31. In the alternative, should the Trial Chamber consider admitting the intercepts into evidence, the Arido Defence requests that prior to doing so, it orders the Registry or a staff of the ICC detention centre to come and testify as to the manner in which the recordings were made, collected, stored, processed and to authenticate them and the call logs.

32. Further, should the Trial Chamber consider admitting the intercepts into evidence, it must order the Prosecution to file an amended version of the transcriptions and translations without those comments.

33. Finally, should the intercepts be admitted into evidence, they should be admitted for the sole purpose of establishing the alleged 'coded language' and not for the truth of their contents.

Respectfully submitted,



Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 31st Day of August 2015
The Hague, The Netherlands