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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 First Bar
Table Motion (ICC-01/05-01/13-1013-Conf)” (ICC-01/05-01/13-1077-Conf)**

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I. INTRODUCTION

1. On 16 June 2015, the Prosecution filed its first motion for the admission of 345 documents into evidence through the bar table (hereinafter ‘Bar Table Motion’).¹ 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).

2. On 26 June 2015, the Arido Defence requested the Trial Chamber to order the Prosecution to refile its bar table motion on the basis that it did not contain the information required by the Court’s jurisprudence.² The Trial Chamber informed the parties that it considered it to be a response to the Prosecution’s first bar table motion, but exceptionally permitted the Arido Defence to file further submissions in response.³

3. The Arido Defence hereby files its response, with the caveat that the lack of information in the Prosecution’s Motion - as described in its 26 June motion - prevented it from effectively addressing it. It opposes the Prosecution’s Request for the reasons below. Confidential Annex A contains the Arido Defence’s position on an item-by-item basis, a position which is made without prejudice to the possibility of complementing this response once the Prosecutor has provided the Trial Chamber and the parties with a Bar Table Motion that conforms with the Rules of this Court.

II. CLASSIFICATION

4. 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.

¹ ICC-01/05-01/13-1013-Conf. (‘Prosecution’s Request’)

² ICC-01/05-01/13-1038-Conf.

³ Trial Chamber’s email entitled “RE: responses to filing ICC-01/05-01/13-1038-Conf”, dated 3 July 2015.

III. SUBMISSIONS

A. The Prosecution's Request is premature

5. The Arido Defence recalls that the general principle at the Court is the the admission of evidence should be through a witness during a hearing.⁴ This is because a witness can speak about the document and answers questions in relation thereto.⁵ 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.⁶ 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.⁷

6. In the present case, the Prosecution is attempting to have 345 documents admitted into evidence, most of which appear to directly relate to the core of the Prosecution's case. The Prosecution fails to justify why the use of a bar table should take precedence over the tendering of the documents through a witness. To the contrary, a review of the documents contained in Annex A to the Prosecution's Request shows that most of them are not self-explanatory and require to be discussed in court with a witness. The Prosecution itself recognises this, as it is instructing an expert witness [REDACTED].⁸ Similarly, [REDACTED]. The Arido Defence submits that all the documents which the Prosecution seeks to tender should first be discussed in court with the relevant witness.

7. As a result, the Arido Defence submits that the Prosecution's Motion is premature. Further, unlike what the Prosecution purports, the admission into evidence of the 345 documents would not promote the expeditiousness of the trial since, in light of their complexity and their sometimes directly incriminating nature, they would have to be

⁴ ICC-01/04-01/07-1665, para. 95; ICC-01/09-02/11-867, para. 33; ICC-01/09-02/11-847-corr, para. 26.

⁵ ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on the Prosecution's First Bar Table Motion, 13 April 2010, para. 9, at: <http://www.icty.org/x/cases/karadzic/tdec/en/100413.pdf> ('Karadžić First Bar Table Decision of 13 April 2010'); *ibid.*, Decision on Accused's Bar Table Motion (Karadžić Statement), 2 April 2014, para. 6, at: <http://www.icty.org/x/cases/karadzic/tdec/en/140402.pdf>; *ibid.*, Decision on Accused's Motion to Admit Documents Relevant to Witnesses KDZ490 and KDZ492 from the Bar Table, 9 January 2012, para. 6, at: <http://www.icty.org/x/cases/karadzic/tdec/en/120109a.pdf>.

⁶ ICTY, *Prosecutor v. Stanišić et 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 et Župljanin 1 February 2011 Bar Table Decision'); Karadžić First Bar Table Decision of 13 April 2010, para. 8.

⁷ See e.g. ICC-01/04-01/07-1665, para. 98; ICC-01/04-01/07-1665, para. 99.

⁸ See paras 33-34 and 41 below.

discussed in court in any case. There is therefore little benefit to having them admitted into evidence prior to the start of the trial. The Arido Defence suggests that the approach of the ICTY be adopted, namely that a bar table motion be filed by the Prosecution at the end of its case, as a “safety clause designed to ensure that documents, which for one reason or another could not be tendered through a witness, can still be included in the trial record”.⁹

B. Relevant factors for the determination on a bar table motion

8. 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.¹⁰ 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.¹¹ The Appeals Chamber has ruled that a Trial Chamber must rule on requests for admission of evidence only after an item-by-item evaluation of the documents.¹²

9. 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

⁹ ICTY, *Stanišić et Župljanin* 1 February 2011 Bar Table Decision, para. 12.

¹⁰ ICC-01/04-01/07-2635, para. 12.

¹¹ ICC-01/05-01/08-1386 (AC), para. 52; ICC-01/04-01/07-2635, para. 14.

¹² ICC-01/05-01/08-1386 (AC), paras 2, 53, 57; see also ICC-01/09-01/11-1353, para. 19.

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.¹³

10. The Arido Defence respectfully requests the Trial Chamber to be guided by this same approach. Finally, to support its position that the documents are *prima facie* reliable and probative, the Prosecution makes multiple references to the fact that, at the confirmation stage, the Defence made references to the documents which form part of the first bar table request, and challenged their contents as opposed to their occurrence.¹⁴ The Arido Defence strongly opposes any conclusion being drawn from this, recalling that the standard of proof at the confirmation of charges is significantly lower to that at trial. In any event, the Arido Defence recalls that the burden to establishing the relevance and probative value rests on the party seeking to introduce the evidence.¹⁵

C. Relevance

1. The Prosecution fails to provide sufficient information to establish relevance

11. As previously stated,¹⁶ the Prosecution's Request fails to provide individualised information as to the relevance of each item. The present response therefore only addresses the general comments on relevance that the Prosecution included in its request, which clearly do not permit the assessment of the relevance of the documents on an item-by-item basis. The Arido Defence also wishes to emphasise that the fact that a document may be referring to or emanate from an Accused or a witness does not make it *prima facie* relevant. It has to be related to the charges, an exercise which the Prosecution failed to undertake.

¹³ ICC-01/04-01/07-1665, para. 100.

¹⁴ Prosecution's Request, para. 50.

¹⁵ ICC-01/04-01/06-1399, para. 25; ICC-01/05-01/08-2299-Red, para. 10.

¹⁶ ICC-01/05-01/13-1038-Conf, para. 8.

12. Further, the Arido Defence submits that the Prosecution's Request shortcomings are exacerbated by the lack of notice of the charges against Mr. Arido. The Prosecution fails to explain which document relates to which Accused and which charge, and Mr. Arido is only mentioned at paragraphs 42-43 of the Prosecution's Request, in relation to the financial documents. In addition, all but 11 of the documents the Prosecution seeks to tender make no reference whatsoever to Mr. Arido.

13. When the Arido Defence requested further information regarding the relevance of the materials for which the Prosecution was seeking to obtain its views regarding authenticity,¹⁷ the Prosecution responded that "[REDACTED]".¹⁸ The Arido Defence submits that this fails to meet the requirements of relevance, and further compels the Trial Chamber to undertake a fishing expedition to determine the relevance of the documents.

14. The Prosecution cannot hide behind the fact that this is a multi-accused trial to dispense with a demonstration of relevance that would allow each accused to know precisely which documents are alleged against him, and for what purpose. Absent that demonstration, submissions on the relevance and the issue of whether each document concerns the acts and conduct of the accused are no more than secondguessing the Prosecution's theory. The absence of that demonstration is compounded by the fact that the Prosecution has yet to notify the accused as to the precise nature and contour of the criminal project alleged against them, which has been rejected in the form presented for confirmation.

15. The Prosecution's first bar table motion, in its current form - i.e. a constellation of documents with no individualised demonstration of their relevance for each accused - does not allow the Defence to go beyond mere speculation as far as submissions on relevance is concerned.

2. Relevance of category I items

16. The Prosecution submits that the material "substantiates and contextualizes the Accused's alleged illicit coaching and bribing of witnesses"¹⁹ and that they constitute "contemporaneous records and recorded conversations/text messages between the Accused,

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ Prosecution's Request, para. 16.

and between the accused and witnesses involved in the incidents charged.²⁰ They cover a period between 20 August and 12 November 2013.²¹ To support this general assertion, the Prosecution uses the Independent Counsel's reports, the Single Judge's assessment of the materials, and the fact that some were referred to in the Decision confirming the charges as "sufficiently establish[ing] their *prima facie* relevance to the case".²² The Arido Defence submits that this does not amount to establishing the link between the intercepts and SMS it seeks to have admitted with the charges.

17. Further, the Arido Defence notes that the information provided on the cover page of the transcriptions and translations of the intercepted conversations, such as the date of the conversation and the participants, is not found in the actual audio file or transcription. The Prosecution fails to explain how it gathered this information, without which the relevance of the audio files to the case cannot be established. As discussed in further details below regarding the reliability of the intercepts, the cover pages of the transcriptions and translations of the audio intercepts do not constitute part of the evidence but instead amounts to the Prosecution's work product, and therefore cannot be admitted into evidence. Similarly, most of the SMS do not contain any information regarding the sender or recipient or the date. The Prosecution fails to explain how they are therefore relevant to the case.

18. Regarding the phone logs, the Prosecution argues that they complement the intercepts, providing date, time, duration, and names of interlocutors for each conversation and SMS.²³ The Arido Defence submits that firstly, the majority of the phone logs are not linked with the relevant intercepts or SMS, and that it is therefore impossible for the Defence or the Chamber to assert their relevance. Secondly, half of the phone logs originate from annexes to Independent Counsel's reports and appear to be a work-product of the Independent counsel. No information is provided regarding the creation of such documents, or their relevance.

19. Last but not least, some of the individuals who are allegedly involved in the communications or mentioned in it - such as [REDACTED], [REDACTED] and [REDACTED] - [REDACTED].²⁴ Without their evidence, the relevance of the intercepts, SMS and call logs cannot be established and therefore they should not be admitted into

²⁰ *Ibid.*, para. 11.

²¹ *Ibid.*, para. 11.

²² *Ibid.*, paras 15, 17.

²³ *Ibid.*, para. 22.

²⁴ See ICC-01/05-01/13-1048-Conf-AnxA-Red.

evidence. The Arido Defence submits that the Prosecution's failure to demonstrate the relevance of the material it seeks to have admitted is not acceptable, and the admission of the intercepts, SMS and call logs should be denied on this basis alone.

3. Relevance of category II items

20. The Prosecution argues that the CDRs “reflect communication among the Accused, and between the Accused and witnesses involved in confirmed incidents in the case” and identify the date, time, duration, and type of call (Voice, SMS or data) on which the Prosecution relies, for the period between 1 January 2010 to 12 October 2013.²⁵

21. The Arido Defence submits that the technical nature of the CDR inherently requires that the Prosecution explains their relevance. It fails to do so. In addition, it does not link the CDRs with the corresponding SMS or intercepts. A proper demonstration of relevance should allow the Defence to situate any call or SMS in proper context and to know what particular aspect of the Prosecution's case they support, something which the Bar Table Motion, in its current state, does not allow the Defence to do. Further, as discussed in details below, the relevance of the CDRs is dependent upon their reliability, which can only be established through the evidence of an expert witness and the submission of additional documents regarding their provenance and authenticity.

22. Last but not least, [REDACTED].²⁶ Without their evidence, the relevance of the CDRs cannot be established and they must therefore not be admitted into evidence.

4. Relevance of category III items

23. The Prosecution states that the financial records identify financial translations between the Accused and co-perpetrators²⁷ and show financial transactions between the Accused/co-perpetrators and at least 9 Defence witnesses (directly or through their family members or associates).²⁸ In addition, the Prosecution states that the financial records provide the date and time of “highly relevant” money transfers, which is relevant to the veracity of some of the

²⁵ Prosecution's Request, para. 31.

²⁶ See ICC-01/05-01/13-1048-Conf-AnxA-Red.

²⁷ Prosecution's Request, para. 42.

²⁸ *Ibid.*, para. 43.

defence witnesses' testimonies in the main case.²⁹ Finally, it argues that they also contains additional information such as the telephone number, addresses, occupation, and biographical data of its customer, which allow for the determination of telephone attributions, the confirmation or corroboration of individuals' identities, and addresses, which "further demonstrate the extend of the scheme and the places involved in carrying it out".³⁰

24. The Arido Defence does not oppose the relevance of some of the western union and express union transfers, but disagrees with the Prosecution's characterisation of the individuals mentioned therein as "co-perpetrators" or "witnesses". As previously submitted, the fact that a money transfer may have taken place does not establish that it was done in relation to a scheme of witness corruption or that it was even related to the Main case. This can only be established through witness testimony, and the Arido Defence submits that the documents should be tendered through [REDACTED].³¹

D. Probative value

25. 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."³² 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.³³ Under no circumstances can the Chamber admit unauthenticated documentary evidence since, by definition, such evidence has no probative value.³⁴

26. The Arido Defence submits that the Prosecution fails to provide evidence supporting the authenticity and provenance of the documents it seeks to tender. While it makes a number of general assertions regarding the manner in which it obtained them, an item-by-item indication

²⁹ *Ibid.*, para. 44.

³⁰ *Ibid.*, para. 45.

³¹ *See e.g.* [REDACTED].

³² ICC-01/05-01/08-2299-Red, para. 8.

³³ ICC-01/04-01/06-1399, para. 30; ICC-01/04-01/07-2635, para. 26.

³⁴ ICC-01/04-01/07-2635, paras 22, 23.

of the provenance and authenticity of the documents and supportive evidence are missing. 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.”³⁵ The Arido Defence submits that, for each document the Prosecution seeks to tender, it must provide the request for assistance (or any other similar document) through which it requested the document, as well as the correspondence which accompanied the deliverance of the document.

1. Probative value of category I items

27. The Prosecution seeks the admission of 96 intercepted voice calls, 35 intercepted SMS messages, 96 transcripts, 67 translations, and 8 phone logs.³⁶ To demonstrate the reliability of the intercepts and call logs, the Prosecution states that it has obtained the material related to Mr. Kilolo and Mr. Mangenda’s conversations from the Dutch authorities, in accordance with a decision from the Single Judge authorising the interception of such communications.³⁷ The Prosecution submits that the intercepts, SMS and their corresponding phone logs bear sufficient indicia of reliability and authenticity.³⁸

28. However, the Prosecution fails to submit the requisite judicial documents related to the interception of the phone calls, as well as those related to the manner in which the intercepts, SMS and call logs were provided to it.³⁹ The Prosecution refers to only two documents from the Dutch authorities to support the authenticity of the intercepts and SMS, [REDACTED].⁴⁰ First of all, simple mathematic shows that similar information is not provided for 76 of the intercepted conversations and 15 SMSs. Second, the list included in document CAR-OTP-0085-0596⁴¹ does not permit any identification of the actual intercepts or SMS obtained through this process. As a result, it is impossible for the Defence (and the Trial Chamber) to verify whether the intercepts and SMS which the Prosecution seeks to have admitted have in fact been obtained through this judicial assistance process. Regarding the phone logs, the Prosecution provides no information. It further fails to link the call logs to the relevant

³⁵ ICC-01/04-01/07-2635, para. 23.

³⁶ Prosecution’s Request, para. 10.

³⁷ Prosecution’s Request, para. 12.

³⁸ Prosecution’s Request, paras 25-26.

³⁹ Prosecution’s Request, paras 23-27.

⁴⁰ See table in CAR-OTP-0085-0596, at 0603 and following; CAR-OTP-0085-0606.

⁴¹ At 0603 and following.

intercepts and SMS. As a result, it is impossible for the Trial Chamber to assess the authenticity of the intercepts and therefore for the requirements of Article 69 (4) to be met.

29. Generally speaking, the Arido Defence notes that nearly all the intercepts do not contain an indication of the place of recording, and that many contain several parts listed as “incomprehensible”.⁴² The Arido Defence particularly wishes to emphasise that the actual audio files do not contain any indication regarding the date of the conversations. Further, in most cases, the speakers do not introduce themselves - or refer to each other with nicknames. 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. Yet, despite the absence of this crucial information within the intercepts themselves, the cover pages to the intercepts transcriptions contain the date and the names of participants. The Arido Defence submits that the cover pages do not form part of the intercepts themselves, since the information contained therein do not appear in the intercepts, and appear to rather be the work product of the Prosecution. As a result, absent information regarding how the Prosecution’s reached that conclusion and linkage with other evidence, the cover pages for the transcriptions and translations cannot be admitted into evidence.

30. In this case, the authenticity of the intercepts also cannot be established. In the *Katanga and Ngudjolo* case, the Trial Chamber II has held that “[b]efore video or audio material can be admitted, the Chamber will require evidence of originality and integrity”⁴³ 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.”⁴⁴ 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.

31. Regarding the SMS, the Arido Defence notes that 20 of the alleged SMS which the Prosecution seeks to have admitted into are simply blank sheets of paper with a line or two. There is no information as to the date, time, source and recipient of the SMS.⁴⁵ It submits that,

⁴² For item-by-item comments, *see* Confidential Annex A.

⁴³ ICC-01/04-01/07-2635, para. 24.

⁴⁴ ICC-01/04-01/07-2635, para. 24.

⁴⁵ CAR-OTP-0077-0180; CAR-OTP-0077-0181; CAR-OTP-0077-0182; CAR-OTP-0077-0183; CAR-OTP-0077-0184; CAR-OTP-0077-0185; CAR-OTP-0077-0186; CAR-OTP-0077-0187; CAR-OTP-0077-0188; CAR-OTP-0077-0191; CAR-OTP-0077-0192; CAR-OTP-0077-0193; CAR-OTP-0077-0194; CAR-OTP-0077-0195;

absent specific information from the Prosecution linking the SMS with call logs as well as relevant judicial documents, any *prima facie* reliability of the SMS is simply non-existent. Regarding the other 15 SMSs, the Arido Defence notes that while information such as the phone number and date are provided, the document bears no stamp or any official identification mark permitting to assess its authenticity. The Prosecution also fails to link these SMS to the phone logs.

32. Regarding the phone logs, the Prosecution does not provide any information regarding the manner in which they were obtained. They are tables, in Dutch, which bear no *prima facie* indications of reliability as they contain no stamps or any other identifying information.

33. The Prosecution itself recognises the lack of *prima facie* authenticity of the intercepts, SMS and phone logs since it is going to instruct an expert witness, Mr. Pluijmers, in order to provide evidence regarding [REDACTED].⁴⁶ In particular, it indicated that Mr. Pluijmer would provide the following evidence:

- i. [REDACTED];
- ii. [REDACTED];
- iii. [REDACTED]. [REDACTED].⁴⁷

34. [REDACTED]. As a result, the Arido Defence submits that it would be premature for the intercepts and the call logs to be admitted into evidence pending the expert witness's evidence. The Arido Defence further notes that since the location of the intercepts is unknown, it is unclear whether Mr. Pluijmer's evidence would cover the totality of the intercepts the Prosecution seeks to tender.

35. In light of the Prosecution's failure to provide evidence that the Category I documents are *prima facie* reliable, the Arido Defence submits that they cannot be admitted into evidence.

CAR-OTP-0077-0199; CAR-OTP-0077-0200; CAR-OTP-0079-1510; CAR-OTP-0079-1511; CAR-OTP-0079-1512; CAR-OTP-0079-1513.

⁴⁶ ICC-01/05-01/13-989-Conf-AnxA, p. 3; *see also* [REDACTED].

⁴⁷ ICC-01/05-01/13-989-Conf-AnxA.

2. Probative value of category II items

36. The Prosecution seeks the admission into evidence of 20 CDRs which it obtained from the authorities in [REDACTED], and [REDACTED].⁴⁸ The Arido Defence notes that the Prosecution failed to provide evidence attesting that the documents it seeks to have admitted were in fact obtained in this manner.⁴⁹ In the absence of evidence regarding their provenance or authenticity, they should not be admitted into evidence.

37. In addition, while the Prosecution argues that the CDRs “originate from independent private telephone carriers such as [REDACTED]”⁵⁰ and that “ [t]he compilation and maintenance of accurate and complete records is undertaken by such companies in the regular course of business and in accordance with domestic laws”,⁵¹ the Prosecution provides no evidence to support these statements.⁵² It is therefore cannot be said that the Prosecution established the authenticity and reliability of the CDRs.

38. The Arido Defence further notes that the format into which the CDRs are provided - other than the ones emanating from [REDACTED] - is one that can easily be modified (excel or csv). In the absence of information regarding the provenance and authenticity of the CDRs, the Arido Defence submits that they do not meet the minimum standards under Article 69 (4) and cannot be admitted into evidence.⁵³

39. Further, while the Prosecution submits that the attribution of the phone numbers to the Accused or other individuals relates to the charges,⁵⁴ the Arido Defence recalls that those are not part of the bar table and that in any event, have no connection whatsoever with the authenticity of the CDRs. It is well-established that corroboration does not establish authenticity. In addition, a number of the individuals about whom the Prosecution purports the

⁴⁸ ICC-01/05-01/13-1013-Conf-AnxA, pp. 24-33; *see also* Prosecution’s Request, para. 36.

⁴⁹ Prosecution’s Request para. 36.

⁵⁰ Prosecution’s Request, para. 36.

⁵¹ Prosecution’s Request, para. 36.

⁵² Prosecution’s Request, para. 36.

⁵³ On the admissibility of CDRs through the bar table, *see* STL, *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 UNIIC and STL’s Prosecution, 6 May 2015, para. 113, available at: <http://www.stl-tsl.org/en/the-cases/stl-11-01/case-law/3996-f1937>.

⁵⁴ Prosecution’s Request, para. 37.

phone numbers belong to [REDACTED].⁵⁵ The Arido Defence submits that the relevant CDRs should be submitted [REDACTED]

40. Finally, the Prosecution argues that the reliability, veracity, and weight of the CDRs are independently corroborated by other evidence, but instead of providing specifics, simply provides one example.⁵⁶

41. In sum, the Prosecution fails to provide any evidence for its statement that the CDRs have probative value. The Arido Defence notes that the Prosecution is aware that this is an issue, since it decided to instruct [REDACTED]. In particular, the Prosecution indicated that [REDACTED].⁵⁷ The Arido Defence submits that the CDRs should not be admitted into evidence prior to the testimony of [REDACTED]. It is in fact rather paradoxical that the Prosecution is attempting to have that evidence admitted through a Bar Table Motion whilst at the same time instructing an expert on their authenticity and reliability. The opinion of the expert on these issues will necessarily have a bearing on their probative value, an issue which must be demonstrated before they are admitted. For that reason, the admission of that material should be delayed up until the moment where a satisfactory demonstration of its probative value has been offered to the Trial Chamber.

3. Probative value of category III items

42. The Prosecution states that the Western Union financial records were obtained with the assistance of the authorities of [REDACTED] and [REDACTED],⁵⁸ and those of Express Union with the assistance from [REDACTED].⁵⁹ Unlike for the items under Categories I and II, the Prosecution here provides documents attesting of the provenance of the Western Union records.⁶⁰ As a result, the Arido Defence does not object to the provenance of the documents obtained from the [REDACTED]⁶¹ and [REDACTED].⁶²

⁵⁵ ICC-01/05-01/13-1048-Conf-AnxA-Red.

⁵⁶ Prosecution's Request, para. 38.

⁵⁷ ICC-01/05-01/13-989-Conf-AnxA, p. 2.

⁵⁸ Prosecution's Request, para. 47.

⁵⁹ Prosecution's Request, para. 47.

⁶⁰ Prosecution's Request, fn. 128-130.

⁶¹ CAR-OTP-0070-0004; CAR-OTP-0070-0005; CAR-OTP-0070-0006; CAR-OTP-0070-0007; CAR-OTP-0073-0273; CAR-OTP-0073-0274; CAR-OTP-0073-0275; CAR-OTP-0074-0854; CAR-OTP-0074-0855; CAR-OTP-0074-0856; CAR-OTP-0085-0856, *see* Prosecution's Request, fn. 128.

⁶² CAR-OTP-0077-1696; CAR-OTP-0077-1697; CAR-OTP-0077-1698; CAR-OTP-0077-1699, *see* Prosecution's Request, fn. 129.

43. Regarding the Express Union records, the Arido Defence notes that the Prosecution fails to provide the relevant evidence in support of its claim that the items were obtained with the assistance from [REDACTED].⁶³ Despite the provision of the letter from the [REDACTED],⁶⁴ the Arido Defence submits that the Prosecution should be required to provide documents attesting of the procedure through which it obtained the Express Union records.⁶⁵

44. While the Prosecution notes that the records are from “independent private commercial money transfer agencies, which compile and maintain complete records in the regular course of business and in accordance with domestic law⁶⁶ and argues that “because the business’ competitiveness and survival requires that such records are characterised by regularity, continuity and accuracy, they are implicitly imbued with indicia of reliability sufficient for their admission”,⁶⁷ the Prosecution provides not evidence in support of its statement. Finally, the Prosecution takes the position that the financial records’s reliability, veracity and weight are “independently corroborated by other evidence in the case” but also only provides one example.⁶⁸

45. The Arido Defence further submits that since [REDACTED],⁶⁹ the Arido Defence submits that those should be introduced into evidence in Court [REDACTED]. Since [REDACTED].

46. In addition, the Arido Defence challenges the reliability of the financial records, in the sense that the information contained therein cannot be considered as necessarily true. For instance, the fact that an individual’s name is listed as the sender or recipient of a money transfer does not mean that this person in fact sent or went to collect the money. The Arido Defence submits that this can only be established through witness’s evidence. In particular, [REDACTED].⁷⁰ As a result, the Arido Defence submits that the admission into evidence of the financial records should be delayed until the relevant individuals have provided sufficient indications regarding their reliability.

⁶³ Prosecution’s Request, fn. 130.

⁶⁴ CAR-OTP-0073-0042.

⁶⁵ CAR-OTP-0073-0031; CAR-OTP-0073-0033; CAR-OTP-0073-0036; CAR-OTP-0073-0039; CAR-OTP-0073-0044; CAR-OTP-0073-0046; CAR-OTP-0073-0048; CAR-OTP-0073-0050.

⁶⁶ Prosecution’s Request, para. 47.

⁶⁷ Prosecution’s Request, para. 47.

⁶⁸ Prosecution’s Request, para. 50.

⁶⁹ Prosecution’s Request, para. 48; see [REDACTED].

⁷⁰ ICC-01/05-01/13-1048-Conf-AnxA-Red.

E. The prejudice which would result from the admission into evidence of the Prosecution's document outweighs their probative value

47. The Arido Defence submits that the admission into evidence of all the documents contained in Annex A of the Prosecution's Request would seriously prejudice the Defence. In particular, the Arido Defence submits that the fact that the documents the Prosecution seeks to have admitted *may* go directly to the acts and conduct of the Accused and the fact that it would not expedite the proceedings weigh against the admission into evidence of the documents.

1. The proposed evidence may go to the acts and conduct of the Accused

48. The Prosecution's heavy reliance on these items in the confirmation of charges submissions shows clearly that – together with witness's evidence – the intercepts and the money transfers constitute the core of the Prosecution's case and under their version of events go to the acts and conduct of the Accused.⁷¹ If – as the Prosecution maintains throughout its Bar Table Motion – these documents were relied upon heavily in the Confirmation Decision, then on the Prosecution's own terms, the Arido Defence submits that the importance of these documents is too high to be admitted through a Bar Table Motion. Substantial prejudice is created where the Defence is not given the opportunity to challenge them in Court and discuss them through the relevant witnesses. Further, this danger is enhanced by the fact that their authenticity has not been established precisely by the Prosecution. Thus, if the documents go to the acts or conduct of the Accused then they should not be admitted through a Bar Table Motion. If they do not go to the acts or conduct of the accused, they could be admitted if the Prosecution had demonstrated their relevance.

49. Notwithstanding the contradiction in the Prosecution's position, while as submitted above, the Prosecution fails to explain the individual relevance of the documents, should it be established that the intercepts include [REDACTED], then the documents could be going directly to the acts and conducts of the Accused as charged. Similarly, the payment records may relate directly to the actions of the Accused in relation to the charges of corruptly influencing witnesses.

⁷¹ ICC-01/05/01/13-749, paras 21, 79, 80, and 8.

50. In any case, the fact that the documents sought to be admitted may go directly to the acts and conduct (including mens rea) of the Accused outweighs their probative value.⁷² This is particularly true since there will be witnesses testifying before the Chamber on these very documents (or the contents thereof), which, in the view of the Arido Defence, would be a better venue for the documents to be tendered.

2. The admission of the bar table would not ensure an expeditious trial

51. The Arido Defence recalls that the scope of the Prosecution's Request is unprecedented.⁷³ In all the other cases before the Court, the number of documents the Prosecution sought to have admitted into evidence through the bar table was limited and did not relate directly to the core of the charges but rather provided context to the Prosecution's case.⁷⁴

52. Further, a large number of the documents that the Prosecution requests the Trial Chamber to admit into evidence from the bar table are technical documents, which are not self-explanatory and which can only be understood when explained by a witness or when put in relation to other documents. As a result, the Arido Defence submits that notwithstanding the outcome of the Prosecution's Request, the documents will have to be discussed in Court with the relevant witnesses. [REDACTED]. As a result, there is little to no benefit from the *en-masse* admission of the documents. *A minima*, their admission should be delayed until sufficient evidence on their probative value has been adduced before the Trial Chamber.

53. The underlying rationale for submitting evidence through the bar table, expediency of the proceedings, is simply not obtained in the present case. To the contrary, it will lead into

⁷² ICC-01/09-01/11-1353, paras 23 to 25.

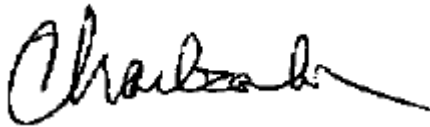
⁷³ See e.g. ICC-01/04-01/06-2662: The Prosecution sought to have four documents admitted into evidence, in the *Prosecutor v. Thomas Lubanga Dyilo* case; see e.g. ICC-01/04-01/06-2379: The Prosecution sought to have eight documents admitted into evidence, in the *Prosecutor v. Thomas Lubanga Dyilo* case; see e.g. ICC-01/09-01/11-1121: The Prosecution sought to have 45 documents admitted into evidence, in the *Prosecutor v. William Samoei Ruto and Joshua Arap Sang* case; see e.g. ICC-01/09-01/11-819: The Prosecution sought to have 49 documents admitted into evidence, in the *Prosecutor v. William Samoei Ruto and Joshua Arap Sang* case; see e.g. ICC-01/05-01/08-2854: The Prosecution sought to have 21 documents and one audio/video recording admitted into evidence, in the *Prosecutor v. Jean-Pierre Bemba Gombo* case;

⁷⁴ See e.g. ICC-01/04-01/06-2456-Red: The Prosecution sought to have one forensic report admitted into evidence, in the *Prosecutor v. Thomas Lubanga Dyilo* case; see e.g. ICC-01/05-01/08-2868: The Prosecution sought to have seven documents, used during the testimony of the witness, admitted into evidence, in the *Prosecutor v. Jean-Pierre Bemba Gombo* case;

extensive court discussions. As a result, the Arido Defence submits that this outweighs any probative value of the items the Prosecution seeks to have admitted.

IV. CONCLUSION

54. In view of the paucity of details provided on the relevance and probative value of the documents and the fact that the documents should be tendered through witnesses rather than through a *Bar Table Motion*, the Arido Defence respectfully requests the Trial Chamber to reject the Prosecution's Request in its entirety. In the alternative, the Arido Defence requests the Trial Chamber to delay the admission into evidence of the documents contained in the Prosecution's Request until after the relevant witnesses have.



Charles Achaleke Taku, Counsel for Mr. Arido

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