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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 Third Bar Table Motion”
(ICC-01/05-01/13-1170-Conf)
of 21 August 2015**

Source: Counsel for Narcisse Arido

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

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Melinda Taylor

Counsel for Aimé Kilolo Musamba

Paul Djunga Mudimbi

Steven Powles

Counsel for Jean-Jacques Mangenda Kabongo

Christopher Gosnell

Arthur Vercken

Counsel for Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Roland Azama Shalie Rodoma

Counsel for Narcisse Arido

Charles Achaleke Taku

Philippe Larochelle

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

**The Office of Public Counsel for
Victims**

The Office of Public Counsel for the Defence

Xavier-Jean Keïta

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and

Other

Reparations Section

I. INTRODUCTION

1. On 21 August 2015, the Prosecution filed its third bar table motion, asking for the admission of 104 items into evidence.¹ On 11 September 2015, the Trial Chamber granted the Arido Defence's request to be permitted to exceed the page limit and file a 25 pages response.²

2. The Arido Defence opposes the Prosecution's Request for the reasons stated below. Item-by-item observations on the 104 documents can be found in Confidential Annex A.

3. The Arido Defence wishes to emphasise that nothing in the present response or in confidential annex A should be understood as taking a position on the legality of items related to and/or seized from Mr. Arido's co-suspects.

II. CLASSIFICATION

4. 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 as confidential, as it refers to a filing of the same classification. A public redacted version will be filed shortly. Annex A is confidential as it refers to confidential documents.

III. APPLICABLE LAW

5. The Arido Defence incorporates by reference the relevant sections of its request for an order on the Prosecution to re-file its first bar table motion³ and of its responses to the Prosecution's first and second bar table motions.⁴

6. Further, it recalls that Article 69 (7) provides that "[e]vidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings".

¹ ICC-01/05-01/13-1170-Conf (hereinafter 'Prosecution's Request').

² Email from the Trial Chamber to the Parties, "RE: Request for a up-to 5 page extension for responses to the Prosecutions 3rd Bar-table motion (ICC-01/05-01/13-1170)", 11 September 2015.

³ ICC-01/05-01/13-1038-Conf, paras 9-10.

⁴ ICC-01/05-01/13-1077-Conf, paras 5, 8-9, 25-26, 30; ICC-01/05-01/13-1197-Conf, paras 4-6, 10, 17.

IV. SUBMISSIONS

A. General Observations

1. The Prosecution's abusive reliance on bar table motions

7. The Prosecution has filed three requests, totalling a number of 1028 items, for admission of documents into evidence through the bar table. This is nearly half of the items it intends to rely on at trial.⁵ The Arido Defence notes that attempting to admit half of its case through the bar table is unprecedented,⁶ and submits that this should not be permitted in light of the Accused's rights to publicly challenge evidence, and the prevailing principle of publicity applicable at the Court.⁷ Admission of evidence should be done through a witness during a hearing,⁸ since a witness can speak about the document and answers questions in relation thereto.⁹

8. While the practice of bar table motions is accepted at the ICC, the Arido Defence suggests that it should remain a supplementary method of introducing evidence.¹⁰ It also submits that its use should be limited to documents which cannot be tendered through a witness or to those about which there is little controversy, for instance those related to peripheral issues.¹¹ This is not the case here: most of the documents the Prosecution seeks to admit either directly relate to one

⁵ ICC-01/05-01/13-1196-Conf-AnxA.

⁶ See e.g. ICC-01/05-01/08-2299-Red; ICC-01/04-01/07-2635; ICC-01/09-01/11-1353; ICTY: *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Bar Table Motion: Municipality Component Documents, 14 April 2014, <http://www.icty.org/x/cases/karadzic/tdec/en/140414.pdf>; *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, <http://www.icty.org/x/cases/karadzic/tdec/en/120511.pdf>; *Prosecutor v. Tolimir*, IT-05-88/2-T, 14 May 2012, <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, at: <http://www.stl-tsl.org/en/the-cases/stl-11-01/case-law/2874-f1350>; *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, at: <https://www.stl-tsl.org/en/the-cases/stl-11-01/case-law/3678-f1781cor>; *ibid.*, 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, at: <http://www.stl-tsl.org/en/the-cases/stl-11-01/filings/main-case/orders-and-decisions/3996-f1937>; *ibid.*, Decision on Three Prosecution Motions for the Admission into Evidence of Mobile Telephone Documents, 6 March 2015, at: <https://www.stl-tsl.org/en/the-cases/stl-11-01/case-law/3844-f1876>.

⁷ Article 67 (1) of the Statute; see also Article 64 (7).

⁸ 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.

⁹ 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>.

¹⁰ 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; Karadžić First Bar Table Decision of 13 April 2010, para. 8.

¹¹ See e.g. ICC-01/04-01/07-1665, para. 98; ICC-01/04-01/07-1665, para. 99.

of their witnesses, go to the acts and conducts of the Accused, or constitute highly technical documents which contents must be explained. The Prosecution fails to justify why the use of a bar table should take precedence over the tendering of the documents through a witness. The Arido Defence argues - as indicated for each document in Confidential Annex A - that the documents should first be discussed in Court and tendered into evidence through the relevant witnesses.

9. While the Arido Defence is fully in favour of an expeditious trial, it submits that the application of this principle should not result in injustices towards the Accused. As discussed in further details below, permitting the admission into evidence of most of the items contained in the Prosecution's Request would violate the rights of the Accused to challenge evidence and to cross-examine witnesses, and overall negatively impact on the fairness of the trial.

2. The Prosecution attempts to circumvent the rules applicable to the admission of testimonial evidence

10. The Prosecution's Request contains a number of documents which are not admissible through the bar table. In addition to intercepted communications between some of the Accused, which the Arido Defence previously submitted should not be admitted through the bar table, the Request also contains judicial statements taken from Mr. Kilolo, Mr. Mangenda and Mr. Arido,¹² an expert report,¹³ as well as reports prepared by the Independent Counsel.¹⁴ The Arido Defence submits that these constitute testimonial evidence which must be tendered through Rule 68 of the RPE.¹⁵

11. Granting the Prosecution's Request to have such documents being admitted into evidence without them being discussed in Court would constitute an unprecedented and impermissible use of the bar table process. The Arido Defence requests the Trial Chamber to adopt the reasoning of the *Ruto and Sang* trial chamber which explicitly rejected the submission of a document which it

¹² Category II.

¹³ CAR-D04-0003-0342.

¹⁴ CAR-OTP-0074-0897, CAR-OTP-0088-0370, CAR-OTP-0088-0398, CAR-OTP-0088-0504.

¹⁵ 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.

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”.¹⁶

i. Intercepts

12. The Prosecution attempts to use intercepted, allegedly “coded”, communications to demonstrate the guilt of the Accused. This evidence does more than concerning the acts and conducts of the Accused, it constitutes the evidence of these acts and conduct themselves, according to the Prosecution’s Pre-Trial Brief. In essence, the Prosecution is trying to convict Mr. Arido with snatches of coded conversations to which he was not a party. There is absolutely no evidence that Mr. Arido was aware of any of these conversations, yet the Prosecution is attempting to adduce these coded conversations not through their authors, but through the bar table. This is unacceptable. The Prosecution should properly try to convince this Trial Chamber that this evidence is reliable, and has the signification it veils it with, rather than circumventing the normal rules of admission of evidence.

13. The Arido Defence further integrates paragraphs 8 to 13 of its response to the Prosecution’s second bar table motion by reference.¹⁷

ii. Suspect interviews of some of the Accused

14. The Arido Defence submits that the suspect interviews of Mr. Kilolo, Mr. Mangenda and Mr. Arido cannot be submitted through the bar table. They were obtained from the co-accused, and the allegations made by the Prosecution against the accused are discussed therein. The Prosecution clearly postulates that in its opinion, these statements are incriminating, and is attempting to have them admitted through a bar table motion, a procedure which purpose is to allow the admission, *en vac*, of background or peripheral evidence.¹⁸

15. If testimonial 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 attempting to get a conviction without a trial. The Arido Defence therefore strongly opposes the notion that a conviction could be

¹⁶ 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.

¹⁷ ICC-01/05-01/13-1197-Conf.

¹⁸ *Ibid.*, para. 10.

obtained via a bunch of bar table documents containing the statements of individuals he could not confront in Court.

16. The Arido Defence further submits that the admission into evidence of such documents 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,¹⁹ the other suspects cannot exercise their right to confront individuals who (allegedly) implicate them in an alleged criminal conduct,²⁰ should the statements 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.²¹

17. 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 it created “an overwhelming legal obstacle against its admission, as Mr. Ngudjolo cannot be compelled to submit to examination by, or on behalf of Katanga.”²² Regarding another statement by Mr. Ngudjolo which contained admissions made by Mr. Ngudjolo, the Trial Chamber admitted it into evidence for the sole purpose of the admissions made by Mr. Ngudjolo and rejected it for its allegations against Mr. Katanga.²³

18. To the extent that none of the Accused makes admissions of guilt or confessions in those statements,²⁴ they could not be admitted for the purpose of showing that any of the Accused admitted committing any of the crimes for which they are accused. In any event, to be admissible against its author, any admission of guilt must be made freely and voluntarily. The Prosecution has the burden to prove that these statements are probative and reliable. The bar table motion (or any of the evidence disclosed so far for that matter) fails to provide any indication in that regard. The Defence for Arido has still not received the identity of the French police officers who interviewed him, for example, and contrary to statute and the rules, Mr. Arido’s interviews were not even recorded.²⁵ Apart from the notable absence of confessions from the Accused, the statements only contain fragmented coded information. This material should be properly assessed before the Trial Chamber before it is admitted into the record of this case.

¹⁹ Article 67 (1) (g) of the Statute.

²⁰ 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 25-27.

²¹ For a discussion on their relevance and probative value, *see infra*, paras 14 to 27.

²² ICC-01/04-01/07-2635, para. 53.

²³ *ibid.*, para. 54.

²⁴ *See infra*, paras 25-27.

²⁵ *See infra*, paras 35-38.

iii. D-53's expert report

19. The Prosecution attempts to tender the expert report prepared by D-53, [REDACTED], in the Main Case on behalf of the Defence, in order to demonstrate that D-53 [REDACTED].²⁶ The very limited involvement of Mr. Arido in the main case does not allow him to take a meaningful position on this piece of evidence. However, the Arido Defence submits that the report is also relevant in the assessment of the veracity and technicality of P-260 and P-245's testimony in the Main Case, supporting the Arido Defence's position that their evidence could only have been given by individual with [REDACTED], which P-245 and P-260 possessed. If the Prosecution intends to use this report against Mr. Arido, it should state precisely how. In any event, this report constitutes a statement from D-53 about [REDACTED], and that as a result, it must be submitted through Rule 68. Failure to do so would violate the fundamental Accused's right to cross-examine witnesses against them and to challenge evidence.

iv. Independent Counsel's Reports

20. Last but not least, the Prosecution submits four reports prepared by the Independent Counsel.²⁷ They constitute his work product and contain summaries or excerpts of emails, SMS and phone conversations, which are selected, commented upon and interpreted by the Independent Counsel.²⁸ In other words, they constitute the analysis of the Independent Counsel on the various items seized from the Accused. The Arido Defence recalls that when discussing the Arido Defence objections to the reclassification of an annex of another Independent Counsel's report²⁹ in light of the prejudicial comments it contained,³⁰ containing the same type of comments from the Independent Counsel than, for instance, CAR-OTP-0074-0897 does, the Trial Chamber held that it "was never intended to be shared with all parties - it relates solely to the Independent Counsel's process in selecting the materials [...]".³¹ The same reasoning should apply here: the reports only relate to the selection of the materials and cannot be used as evidence.

21. Further, admitting the Independent Counsel's reports without permitting the Defence to test the evidence in Court would amount to a violation of the Accused's right to test the evidence against them and cross-examine witnesses.

²⁶ CAR-D04-0003-0342, *see* confidential annex A, entry 28, p. 26 and Prosecution's Request, para. 19.

²⁷ CAR-OTP-0074-0897, CAR-OTP-0088-0370, CAR-OTP-0088-0398, CAR-OTP-0088-0504.

²⁸ *See* in particular CAR-OTP-0074-0897 which contains the comments ("*remarques*") of the Independent Counsel.

²⁹ ICC-01/05-01/13-845-Conf-Exp-AnxA.

³⁰ ICC-01/05-01/13-918-Conf-Exp.

³¹ ICC-01/05-01/13-947, para. 29.

22. As a result, should the Prosecution wish to use the work product and analysis of the Independent Counsel to support its case, and since the reports contains the Independent Counsel's opinions - therefore making it inadmissible as an expert report - the Prosecution call him as a witness and submit his reports under Rule 68 of the RPE. In the alternative, as discussed in further details below in paragraphs 69 to 77, the Arido Defence further challenges the admissibility of the reports under Article 69.

3. The documents offer different inferences for Mr. Arido than those proposed by the Prosecution

23. Looking at the totality of the documents the Prosecution seeks to tender - in this bar table or the previous two – and which constitute the core of the Prosecution's case, one thing stands out clearly: the absence of link or reference to Mr. Arido in 99% of the documents. Be it what the Prosecution alleges are daily conversations between Mr. Bemba and Mr. Babala, phone calls, SMS or emails from Mr. Kilolo over the years covered by the charges, or the independent counsel's reports, the name of Mr. Arido is close to non-existent.

24. Among the documents which relate to Mr. Arido, none establishes what the Prosecution purports them to mean. The fact that Mr. Arido may have been in contact with Mr. Kilolo, [REDACTED], that he knew P-260 or that he received money through western union does not support the Prosecution's allegation that Mr. Arido was involved in the illicit coaching of witnesses. To the contrary, they show the lack of contact between Mr. Arido, the co-Accused, and the witnesses he is alleged to have illicitly coached. They show that Mr. Arido tried to [REDACTED],³² that [REDACTED],³³ and [REDACTED].³⁴ They show that [REDACTED],³⁵ and that Mr. Arido did not know of [REDACTED].³⁶ This evidence confirms the minor role, if any, of Mr. Arido in the grand scheme alleged by the Prosecution.

25. Similarly, Mr. Arido's November 2013 statement to the French police, which the Prosecution describes as constituting "admissions of the Accused in relation to the charged events"³⁷ and particularly "Arido's admission that he knows about the non-military status of

³² CAR-OTP-0075-0762-R01.

³³ *Ibid.*

³⁴ CAR-OTP-0088-0504, pp. 5-6, 10-12.

³⁵ CAR-OTP- 0075-1150.

³⁶ CAR-OTP- 0075-0245.

³⁷ Prosecution's Request, para. 25.

certain Main Case Defence witnesses comprising the charged incidents”,³⁸ further illustrates the Prosecution’s creativity in framing charges against Mr. Arido. In this statement, Mr. Arido stated that he met Mr. Kilolo in [REDACTED] in March 2012³⁹ and at the [REDACTED].⁴⁰ While Mr. Arido did state that he saw six prospective witnesses at that time, whom he stated were not part of the CAR army, he did not mention the names of these individuals, other than [REDACTED].⁴¹ To the question, “[REDACTED]”,⁴² The interviewer failed to follow up on these questions to identify with clarity who were the six persons in question, who precisely were seen by Mr. Arido in [REDACTED], and who he knew were not military persons. Mr. Arido does not state - unlike what the Prosecution purports to present - that the individuals he named were present at the time he met Mr. Kilolo; all he said he that he knew these individuals as being defence witnesses for Bemba.

26. Moreover, in the same interview, Mr. Arido denied knowing anyone related to Mr. Bemba other than Mr. Kilolo;⁴³ that he never got money from the Bemba Defence other than the payment for his expert report;⁴⁴ that he never paid the Bemba Defence witnesses;⁴⁵ and that he never provided false/forged documents to the Bemba Defence, but that he was approached by Mr. Kilolo to provide comments on these documents.⁴⁶ He also said that all he ever did for the Bemba Defence was to present his expert report⁴⁷ and never presented individuals to the Bemba Defence.⁴⁸ The Prosecution simply misrepresents the contents of Mr. Arido’s statement.

27. Further, Mr. Arido’s January 2014 interview further clarifies the situation as he stated that he did not participate in meetings with witnesses, and that he did not know the witnesses who were at [REDACTED].⁴⁹

28. To say the least, the evidence which the Prosecution attempts to tender against Mr. Arido is subject to different interpretations. A bar table is not a proper venue for the tendering of such items, which must be discussed in Court. Last but not least, Mr. Arido’s interviews are rippled

³⁸ *Ibid.*

³⁹ CAR-OTP-0074-1065, p. 2 (1066, middle of the page): “[REDACTED]”.

⁴⁰ CAR-OTP-0074-1065, p. 2 (1066, middle of the page): “[REDACTED]”.

⁴¹ CAR-OTP-0074-1065, p. 5 (1069): “[REDACTED]”

⁴² CAR-OTP-0074-1065, p. 4 (1068, middle of the page) (emphasis added). Original: “[REDACTED]”.

⁴³ *Ibid.*, p. 3 (1067).

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, p. 4 (1068).

⁴⁶ *Ibid.*, p. 4 (1068); p. 5 (1069).

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, p. 5 (1069): “[REDACTED]”.

⁴⁹ CAR-OTP-0077-0169, p. 6 (0174): “[REDACTED]”

with procedural errors which violate Mr. Arido's fair trial rights, and renders their admission into evidence through the bar table impossible.⁵⁰

29. It is now clear that the Prosecution's case against Mr. Arido rests solely on [REDACTED] evidence, whose interviews are rippled with inconsistencies, "*zones d'ombre*", and missing information.⁵¹ The Prosecution does very little to cast light on the evidence of these two witnesses, as demonstrated by its marked reluctance to disclose anything relating to them, as will be demonstrated elsewhere. Indeed, through yet to be completed disclosures, the Prosecution revealed a little more than two weeks before the scheduled beginning of the trial that [REDACTED].⁵²

B. Observations on Category I - Materials disclosed by the Defence

30. Under this category, the Prosecution seeks to tender 29 items disclosed by the Defence teams at the confirmation stage, and others disclosed by the Defence in the Main Case and tendered into the record of that case.⁵³

31. Regarding Mr. Arido's asylum request in France,⁵⁴ the Arido Defence does not oppose its admission into evidence. However, the record clearly does not support the Prosecutor's suggested interpretation, namely that it demonstrate Mr. Arido's familiarity with the immigration system, and therefore is relevant to support the Prosecution's allegations regarding Mr. Arido's promises to witnesses regarding their seeking of asylum if they testified for the Defence in the Main Case.⁵⁵ This proposed interpretation is ridiculous and baseless, since the alleged discussion between witnesses P-260[REDACTED] and P-245[REDACTED] regarding asylum took place in February 2012, a year and a half before Mr. Arido's asylum request, dated July 2013.

32. With respect to the remainder of the documents, the Arido Defence does not take a position on the admissibility of the documents as they are in no way related to the charges against Mr. Arido. For those authored by, related to or mentioning individuals who are listed in the Prosecution's list of witnesses, the Arido Defence submits that the Prosecution must tender them through the relevant witnesses.

⁵⁰ See *infra*, paras 33-58.

⁵¹ See ICC-01/05-01/13-598-Conf, paras 211-262; see also ICC-01/05-01/13-673-Conf, paras 140-156.

⁵² Prosecution's Rule 77 disclosure, packs 26 (ICC-01/05-01/13-1195-Conf-AnxB) and 27 (ICC-01/05-01/13-1229-Conf-AnxA).

⁵³ Prosecution's Request, para. 11.

⁵⁴ *Ibid.*, para. 12, referring to CAR-D24-0001-0032.

⁵⁵ Prosecution's Request, para. 13.

C. Observations on Category II - the Statements of Mr. Arido

33. The Prosecution argues that the statements constitute “admissions of the Accused in relation to the charged events”.⁵⁶ Regarding Mr. Arido, the Prosecution argues that the document supports “Arido’s admission that he knows about the non-military status of certain Main Case Defence witnesses comprising the charged incidents.”⁵⁷ As stated above, the Prosecution’s interpretation is misleading, as such “admission” is nowhere to be found in the statement. The Arido Defence refers to paragraphs 25 to 27 above for a discussion challenging the Prosecution’s interpretation of the statements.

34. Further, it is submitted that the representatives of the Prosecution who secured Mr. Arido’s statements through the French authorities utterly failed to abide by the Statute and the applicable Rules of the Court in doing so. As a result, the statements of Mr. Arido are not admissible. Finally, the Arido Defence submits that the statements were taken in violation of Mr. Arido’s fundamental to remain silent, and that as a result, their admission into evidence would violate Article 69 (4) and (7) of the Statute.

1. The Statements of Mr. Arido were not audio or video recorded

35. Neither the 23 November 2013 nor the 17 January 2014 interviews have been video or audio recorded, contrary to the requirements of Rule 112 of the RPE. Moreover, the Arido Defence has not been provided with any written statement explaining the reasons for not doing so, in contravention with Rule 112 of the RPE.⁵⁸ Additionally, Regulation 41 (1) of the Regulations of the Office of the Prosecutor is also very clear in stating that a suspect should be informed of the procedure for the recordings of the questioning established by Rule 112.

36. In answering the Defence on whether the 23 November 2013 interview had been recorded or not,⁵⁹ the Prosecution responded that such interview had not been recorded since French law did not permit it, but failed to substantiate its assertion.⁶⁰ Although the Defence is aware that the

⁵⁶ *Ibid.*, para. 25.

⁵⁷ *Ibid.*

⁵⁸ Rule 112 of the RPE provides that “1. Whenever the Prosecutor questions a person to whom article 55, paragraph 2, applies, or for whom a warrant of arrest or a summons to appear has been issued under article 58, paragraph 7, the questioning shall be audio- or video- recorded, in accordance with the following procedure:[...] 2. The Prosecutor shall make every reasonable effort to record the questioning in accordance with sub-rule 1. As an exception, a person may be questioned without the questioning being audio- or video- recorded where the circumstances prevent such recording taking place. In this case, the reasons for not recording the questioning shall be stated in writing and the procedure in rule 111 shall be followed”.

⁵⁹ Email from the Arido defence to the Prosecution sent on 19 August 2015, entitled “Statement of Arido”.

⁶⁰ Email from the Prosecution to the Arido Defence sent on 24 August 2015, entitled “Re: Statement of Arido”:

Chamber is not competent to interpret national law, it is clear that nothing in French law excludes the possibility to record a custodial interview, especially when such an interview is done in furtherance of a request for cooperation issued by the ICC. In any event, the Prosecution's investigators were present. Since the interrogation of Mr. Arido related to and was intended to be used for the case before the court, it was incumbent upon these investigators to guarantee the appropriate minimum guarantees of fair trial to Mr. Arido, and to ensure that the proper ICC procedures were followed.⁶¹

37. Further, contrary to the Prosecution's assertion, Article 64-1 of the French Criminal Procedure Code, which was applicable at the time of the interviews, makes recording of custodial interview **mandatory** when the individual is suspected of having committed a crime.⁶² It is therefore beyond dispute that the facilities to record the statement of Arido were available at the moment of the interviews. In any case, the Prosecution could have brought its own recording device. The Prosecution has offered no valid excuses for having failed to record Mr. Arido's statements.

38. In addition to violating the Court's procedure, the absence of audio or video recording does not permit the Defence or the Chamber to assess the reliability of Mr. Arido's statement. As a result, they cannot be admitted into evidence.

2. Mr. Arido was not properly informed of the charges against him

39. The Arido Defence submits that Mr. Arido was not properly informed of the offences he was suspected as having committed. Indeed, in both interviews of November 2013 and January 2014, emphasis is put on the provision of 14 false documents to the Court, a charge which is no longer pursued by the Prosecution, and do not contain references to the alleged corruption of witnesses. As a result, Mr. Arido was not properly informed of the charges against him, which violates Article 55 (2) (a) of the Statute.

“[REDACTED]”

⁶¹ See Article 69 of the code of conduct for the office of the Prosecutor which states that “In their relations with persons under investigation or accused persons, Members of the Office shall, inter alia: (a) respect their rights and ensure that proceedings are conducted in a fair manner; (b) inform them of their rights under article 55(2) [...]”

⁶² “*Les auditions des personnes placées en garde à vue pour crime, réalisées dans les locaux d'un service ou d'une unité de police ou de gendarmerie exerçant une mission de police judiciaire font l'objet d'un enregistrement audiovisuel*”, Article 64-1, Code de procédure pénale, at: http://www.legifrance.gouv.fr/affichCode.do?sessionId=C888E29515068A8009C819C2881F91E3.tpdila18v_2?idSectionTA=LEGISCTA000006151876&cidTexte=LEGITEXT000006071154&dateTexte=20150914.

3. The statements were taken in violation of Mr. Arido's right to obtain effective legal assistance and therefore violated his right to remain silent

i. The Prosecution failed to ensure that Mr. Arido was given proper legal assistance

40. There is no doubt that the interviews of Mr. Arido in November 2013 and January 2014 took place under Article 55 of the Statute.⁶³ Pursuant to paragraph (2) of this Article, a suspect who is about to being questioned has the right “to have legal assistance of the person’s choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it”. The suspect shall also be informed of this right prior to being questioned.

41. Further, Rules 21 (1) and 22 (1) of the RPE *inter alia*, are part of a complete regime for the provision of legal assistance to suspects being interrogated by, or on behalf of the Prosecution, such as Mr. Arido on 23 November 2013 and 17 January 2014. Regulations 40 and 41 (1) of the Regulations of the Office of the Prosecutor mandates that office to properly inform suspects of the full extent of their rights before making any statements to the Prosecution, including the right not to make such a statement.

42. The Arido Defence submits that before questioning a suspect, the combined application of the aforementioned Rules and Articles obliges the Prosecution to inform any suspect that they are entitled to obtain the assistance of a lawyer registered on the ICC list of counsels, that is a counsel sufficiently versed in the rules and procedure of this Court to provide that suspect with meaningful assistance.⁶⁴ Indeed, permitting a lawyer who does not have demonstrated knowledge of the Court’s functioning would simply render the suspect’s right to legal assistance ineffective as proper legal advice could not be provided.

43. However, the Arido Defence notes there is no evidence that Mr. Arido was informed, at any time, of the possibility to obtain assistance from a lawyer appointed by the Registry of this Court. Notably, the Prosecution respected this principle when interviewing P-245 and P-260, who were assisted by [REDACTED], a counsel registered before the Registry.⁶⁵ It is simply

⁶³ ICC-01/05-01/13-1-Red2-tENG; *see also* CAR-OTP-074-1048.

⁶⁴ *See* Rules 21 and 22 of the RPE which contain the requirements for lawyers to be included in the list of counsels allowed to practice before the Court.

⁶⁵ *See* the Registry’s list of counsels at http://www.icc-cpi.int/iccdocs/PIDS/other/Web_List_of_Counsel_31-05-2015_EN.pdf.

unacceptable that witnesses such as P-260 and P-245 were assisted by Registry chosen counsels, whereas Mr. Arido was not.

44. While the absence of audio/video recording - as discussed above - does not permit to establish exactly who asked the questions to Mr. Arido, the statements give the impression that Prosecution's investigators interrogated Mr. Arido themselves.⁶⁶ Only individuals with intimate knowledge of the case could have asked these questions. Therefore, the Prosecution has directed the interview, and could not ignore the particular requirements of the Statute in such circumstances. The fact that they delegated part of their functions to French Police Officers in no way excuses their failure to properly apply the standards of this Court aiming to protect a suspect's basic rights.

ii. *The lawyer who represented Mr. Arido during his first interview [REDACTED]*

45. The right to be assisted by a lawyer during a suspect interview shall be regarded as an effective and practical right. As the European Court for Human Rights clearly held, the mere assignment of a counsel "does not in itself ensure the effectiveness of the assistance he may afford an accused".⁶⁷ As stated above, the Arido Defence submits that [REDACTED] for the right to legal assistance to be given effect.

46. [REDACTED].⁶⁸ The Arido Defence points out that, notwithstanding what is surely an impeccable record, the lawyer who represented Mr. Arido during his suspect interview with the Prosecution in November 2013 was not on the list of the Counsels before the ICC, [REDACTED], and had not been appointed by the registry [REDACTED].⁶⁹ [REDACTED].

47. Moreover, at the time of the interviews, French Criminal law did not enable lawyer appointed for the purpose of advising a suspect in custody to have access to the criminal file, contrary to what should apply to ICC suspect interviews. Indeed such right of access has only been implemented since June 2014,⁷⁰ and there are still issues on its implementation in practice.⁷¹

⁶⁶ CAR-OTP-0074-1045, CAR-OTP-0074-1046, CAR-OTP-0074-1048, CAR-OTP-0077-0164, CAR-OTP-0077-0166, CAR-OTP-0077-0167, CAR-OTP-0078-0127, CAR-OTP-0078-0128.

⁶⁷ ECtHR: *Sannino v. Italy*, Application N. 30961/03, Judgment, 27 April 2006 para. 48, at: <http://hudoc.echr.coe.int/eng?i=001-75213>; *Imbrioscia v. Switzerland*, Application N. 13972/88, Judgment, 24 November 1993, para. 38, at: <http://hudoc.echr.coe.int/eng?i=001-57852>; *Artico v. Italy*, Application N. 6694/74, Judgment, 13 May 1980, para. 33, at: <http://hudoc.echr.coe.int/eng?i=001-57424>.

⁶⁸ [REDACTED].

⁶⁹ [REDACTED].

⁷⁰ See the "circulaire du 23 mai 2014 de présentation des dispositions de procédure pénale applicables le 2 juin 2014 de la loi portant transposition de la directive 2012/13/UE du Parlement européen et du Conseil, du 22 mai 2012 relative au droit à l'information dans le cadre des procédures pénales" at: http://www.textes.justice.gouv.fr/art_pix/JUSD1412016C.pdf.

In the case at hand, the lack of access to the criminal file was confirmed to the Arido Defence by [REDACTED] over the phone. The Arido Defence recalls that in the *Katanga* case, the Trial Chamber considered that: “as this was the accused’s first interview after he was detained and as he was unaware of the reasons for his detention, it is highly improbable that he would have obtained adequate legal advice from his lawyer prior to the interrogation. Indeed, even if he had been able to consult with his lawyer shortly before the interrogation, this advice would necessarily have been based on incomplete information. The Chamber considers, therefore, that, insofar as Mr. Katanga made self-incriminating statements on 20 January 2006, there are serious concerns that those statements were obtained from him in violation of his right to remain silent and of the privilege against self-incrimination”.⁷²

48. Taken together with the above-mentioned lack of proper notice to Mr. Arido regarding the charges against him, it shows clearly that the lawyer appointed to represent Mr. Arido’s interests during his suspect interview did not have the requisite information [REDACTED] to provide proper legal advice to Mr. Arido. To the contrary, the misleading emphasis on the provision of 14 false documents and the lack of access to the criminal file compounded the failure to provide Mr. Arido with [REDACTED]. For these reasons, Mr. Arido’s right to be advised by a lawyer was not given full effect.

49. His interview was therefore made in the absence of proper legal advice, which, as the Defence will demonstrate below, has led to a violation of Mr. Arido’s right to remain silent and not to incriminate himself.

iii. As a result of the ineffective assistance of counsel, Mr. Arido’s rights to remain silent and not to incriminate himself were violated

50. Article 67 (1) (g) of the Statute provides that the accused shall be entitled “not be compelled to testify or to confess guilt and to remain silent, without such silent being a consideration in the determination of guilt or innocence”.

51. Such right is not absolute, and is articulated around a proper information of the suspect. Indeed, a suspect can waive his right to remain silent and his right not to incriminate himself. What is fundamental is that this waiver is exercised freely and according to an adequate legal

⁷¹ See e.g.: <http://www.lefigaro.fr/actualite-france/2015/06/05/01016-20150605ARTFIG00156-acces-au-dossier-lors-de-la-garde-a-vue-les-avocats-se-mobilisent.php/>

⁷² ICC-01/04-01/07-2635, para. 63.

advice. As such, there is a clear link between the right to counsel and the right to remain silent (or to not incriminate oneself).⁷³ Such line has been clearly drawn by the *Katanga* Chamber: “The right to a counsel in the context of pre-trial interrogations is to protect the essence of the accused's right, which is to be presumed innocent, to remain silent and not to be forced to self-incriminate. Even if counsel is not physically present, these rights may, under certain conditions, be sufficiently protected if the accused obtained adequate legal advice prior to the interrogation”.⁷⁴

52. In such circumstances, and considering [REDACTED], Mr. Arido was not in a position to properly waive his right to remain silent and not to incriminate himself. As a result, his November 2013 statement was made in violation of his most basic rights as a suspect, and is therefore inadmissible under both Articles 69 (4) and (7).

4. Prejudice

53. The Arido Defence submits that the fairness of the trial would be prejudiced should a statement made by an Accused in violation of his right to remain silent be admitted into evidence, particularly through the bar table.

54. In addition, the Arido Defence submits that the first statement of Mr. Arido should also be excluded pursuant to Article 69 (7) of the Statute. It is well established that a suspect statements taken in violation of the fundamental right to the assistance of counsel and proper notice of the charges he is facing would necessarily be antithetical to, and would seriously damage, the integrity of the proceedings. Such view has been clearly taken in the *Delalić et al.*⁷⁵ and *Bagosora*⁷⁶ cases: “it is difficult to imagine a statement taken in violation of the fundamental right to the assistance of counsel which would not require its exclusion under Rule 95 as being “antithetical to, and would seriously damage, the integrity of the proceedings”.⁷⁷

⁷³ ICTY, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar table, 19 August 2005, para. 15, at <http://www.icty.org/x/cases/halilovic/acdec/en/050819.htm>.

⁷⁴ ICC-01/04-01/07-2635, para. 62.

⁷⁵ ICTY, *Prosecutor v. Delalić*, Decision On Zdravko Mucić's Motion For The Exclusion Of Evidence, 2 September 1997, para. 43, at: <http://www.icty.org/x/cases/mucic/tdec/en/70902732.htm>.

⁷⁶ ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision On The Prosecutor's Motion For The Admission Of Certain Materials Under Rule 89 (C), 14 October 2004, para. 21, at: <http://ictr-archive09.library.cornell.edu/ENGLISH/cases/Bagosora/decisions/141004.html>

⁷⁷ *Ibid.*

55. In addition, the Arido Defence reiterates its assertion as regards the implication of the investigators in the monitoring of the interview.⁷⁸ They were able to inform the French Police Officers of the necessity to call a Counsel assigned by the Registry, and were in a position to avoid such violation. The Arido Defence recalls that the Prosecution is bound to ensure the protection of the rights of the suspects.⁷⁹

56. For all these reasons, the Arido Defence submits that the admission into evidence of Mr. Arido's first statement should be excluded in accordance with Article 69 (7) of the Statute.

5. Alternative relief

57. The Defence reiterates its arguments as regards to Mr. Arido's right to be assisted by a lawyer and his right to stay silent. Indeed, in view of the importance of such rights, and even if the Trial Chamber does not consider at this stage that the violations of the Statute and those of Mr. Arido's right to a lawyer and to remain silent would sufficiently be antithetical to and seriously damage the proceedings, the Defence submits that the record is still incomplete and may reveal further reasons militating for the exclusion of that evidence. For example, the Defence is in the process of [REDACTED], to form a better opinion as to the procedure that was followed. It is crucial that the Defence be allowed to fully canvass the issue before the Trial Chamber rules on the admission of interviews of Mr. Arido which are presented by the Prosecution as incriminating.

58. As a result, the Arido Defence respectfully requests the Trial Chamber to delay the admission into evidence of Mr. Arido's statements until the Defence is able to terminate its investigations on the matter. It is submitted that this would not have any adverse impact to the Prosecution or the Chamber.

D. Observations on Category II - Statements of the Accused other than Mr. Arido

59. The Prosecution seeks to tender the statements that Mr. Kilolo, Mr. Mangenda and Mr. Arido gave to the national authorities upon their arrest.⁸⁰

⁷⁸ See *supra*, paras 34, 36, 41, 44.

⁷⁹ Article 69 of the code of conduct for the office of the Prosecutor which states that "In their relations with persons under investigation or accused persons, Members of the Office shall, *inter alia*: (a) respect their rights and ensure that proceedings are conducted in a fair manner; (b) inform them of their rights under article 55(2) [...]"; see also Regulations 40 and 41 of the Regulation of the Office of the Prosecutor.

⁸⁰ Prosecution's Request, para. 24.

60. The Arido Defence does not take a position regarding the statements of the other Accused, except for the fact that they constitute testimonial evidence which should not be submitted through the bar table, as discussed above in paragraphs 14 to 18.⁸¹

E. Observations on Category III - Materials obtained from the Accused

61. The Prosecution seeks to have 9 items admitted into evidence, which were seized from Mr. Bemba's cell at the ICC Detention Centre, emails obtained from Mr. Arido's email account through a RFA, and one email extracted from Mr. Babala's ipad.⁸²

62. The Arido Defence does not take a position on the items seized from Mr. Bemba's ICC Detention Cell⁸³ or Mr. Babala's emails,⁸⁴ other than neutral comments regarding the reliability and authenticity of the documents.

63. What sticks out from this material is the absence of contacts, or even reference to Mr. Arido. This is yet another confirmation that the purported role of Mr. Arido is far from being that which is alleged by the Prosecution.

64. The Arido Defence does not oppose the admission into evidence of the emails seized from Mr. Arido, and admits, in the limited context of the email exchanges between Mr. Arido and Mr. Kilolo, that the term "[REDACTED]" refers to [REDACTED], and that the term "[REDACTED]" also refers to him, in the context of emails exchanged with P-260[REDACTED]. The Arido Defence refers to confidential annex A for his email-by-email comments.

65. The Arido Defence maintain its position that the requests for assistance and the letters or other official communications related to the Prosecution's access to Mr. Arido's emails must be submitted into evidence as part of the Prosecution's Request in order to establish their authenticity and legality. It must also provide a copy of the DVD containing Mr. Arido's emails,⁸⁵ as well as indications regarding the method through which the emails were obtained, in order to assess their reliability and authenticity.

F. Observations on Category IV - [REDACTED]

⁸¹ See also confidential Annex A.

⁸² Prosecution's Request, para. 28.

⁸³ CAR-OTP-0082-0334; CAR-OTP-0082-0328; CAR-OTP-0082-0322; CAR-OTP-0082-0321.

⁸⁴ CAR-OTP-0075-2613.

⁸⁵ Referred to in CAR-OTP-0075-0022.

66. The Prosecution seeks to tender 6 items received from [REDACTED].⁸⁶ As stated in confidential annex A, the Arido Defence does not oppose their admission into evidence - except for CAR-OTP-0078-0290 and CAR-OTP-0072-0172 on which it does not take a position since it relates to the Main Case proceedings to which Mr. Arido is not privy.

67. However, the Arido Defence objects to the manner in which the Prosecution characterises their relevance. It submits that the Prosecution's interpretation goes to the weight of the document, which will be discussed during trial.

68. Regarding CAR-OTP-0088-2915, CAR-OTP-0088-2917 and CAR-OTP-0088-2936, the Arido Defence submits that since the authors of the documents will be testifying in court on behalf of the Prosecution, the documents should be tendered through them.

G. Observations on Category V – Independent Counsel's reports and related materials

69. The Prosecution tenders 6 items including reports of the Independent Counsel and their related materials.⁸⁷ It also tenders one additional intercepted conversation between Mr. Kilolo and Mr. Mangenda, even though a duplicate of this conversation is already included in the Prosecution's First Bar Table Motion, because "both versions are cited in the Pre-Trial Brief, and the transcript and translation of this version bear a corrected time stamp".⁸⁸

70. Regarding the intercept, the Arido Defence submits that the proper procedure would be for the Prosecution to submit a corrigendum to its first bar table motion.

71. Regarding the Independent Counsel's reports, as stated above, the Arido Defence submits that those constitute testimonial evidence which cannot be tendered through the bar table.⁸⁹ Should the Trial Chamber nonetheless consider the admissibility of the Reports, the Arido Defence argues that they do not meet Article 69 requirements. Indeed, they constitute work products from the Independent Counsel, contain his own comments, and are mere reproduction of evidence. In addition, no information is provided as to the method in which the reports were prepared.

72. The Arido Defence also wishes to reiterate the lack of information at the disposal of the Defence regarding the method used by the Independent Counsel during his work, which

⁸⁶ Prosecution's Request, para. 35.

⁸⁷ Prosecution's Request, para. 39.

⁸⁸ *Ibid.*, para. 40.

⁸⁹ *Supra*, paras 20-22.

prevents it from making meaningful submissions. The Arido Defence notes that the Independent counsel provides no reference to the DCC or the confirmation of charges decision. More specifically, the Arido Defence does not have any information regarding the following points:

- i. The manner in which the Independent Counsel established what he considered as relevant or irrelevant, in particular whether he used keywords, key names or key dates or which instructions, if any, he used;
- ii. Whether the Independent Counsel also included exculpatory information in his selection;
- iii. The list of documents on which the Independent Counsel relied in order to make a determination regarding the relevance of the documents, in particular, which filings relevant to the contents of the charges he relied on;
- iv. Whether the Independent Counsel reviewed the Defence teams' submissions on the confirmation of the charges, and whether it reviewed the emails keeping in mind the Defence's case;
- v. How the Independent Counsel defined what was privileged, and whether there are any "exceptions" to the privileged character of a document;
- vi. Which categories of information the Independent Counsel classified as privileged;
- vii. Whether a document which contains potentially exculpatory material but which is also covered by privilege would be included in his reports or be left out;
- viii. Whether the Prosecution, the other Defence teams and the Registry gave guidance to the Independent Counsel regarding the review of the materials, and if so, what the contents of these instructions was, at what frequency, and the name of such individuals;
- ix. Which method was used: word search, reading through everything, what softwares were used, what technical difficulties were met, ect...
- x. The role, if any, of the Independent counsel's assistant, and which instructions were given to him/her;
- xi. Whether the Independent Counsel had any contacts or sought instructions from the Prosecution, the Registry and/or the other Defence teams.⁹⁰

73. Indeed, the Prosecution's erroneous conception of what constitutes exculpatory or material evidence, brings into question the validity of the methods followed by the Independent Counsel.

⁹⁰ The Arido Defence notes that it has never been asked to submit any instructions regarding the work of the Independent Counsel.

If the assessment of the material was done with the wrong standards, there may be remaining information that has yet to be provided to the Defendants. Further, there may have been distortion in the proper application of what falls under the purview of privilege information or not, in view of the initial assessment of the evidence by the Prosecution and the Decision on the confirmation of charges, for example.

74. Further, in the context of a multi-accused case, the Arido Defence submits that these notions may vary for each of the Accused. In order to at least try to insure that there is no evidence which could be exculpatory or material for one of the defendant that was missed by the Independent Counsel, it is suggested that the Independent counsel should tender his reports before the Trial Chamber, and be submitted to cross-examination by the Defence.

75. Regarding CAR-OTP-0088-0504, the Prosecution only asserts that it is relevant to establish [REDACTED]. As a result, only the relevant excerpts of CAR-OTP-0088-0504 should be tendered into evidence. In addition, the Arido Defence notes that most of the emails reproduced therein are simply illegible.

76. The Arido Defence also submits that the admission of the report must be linked with the underlying emails/SMS/call logs. As a result, the Prosecution should be requested to file a new bar table containing the Reports as well as the underlying evidence, and permit the Defence to make individual submissions on the admissibility of each document.

77. Last but not least, the documents underlying the Reports which involve or relate to Prosecution's witnesses must be tendered in court through the relevant individuals who can attest to their authenticity and reliability.

H. Observations on Category VI - Detention Centre materials

78. The Prosecution tenders 13 items from the Detention Centre, including call logs, one recording, its log information, transcript and translation, and the log information, transcript and translation of a conversation which was tendered in the second bar table motion.⁹¹

79. The Arido Defence does not take a position on the documents, as they do not relate to Mr. Arido. In particular, regarding the use of codes, the Arido Defence refers to paragraphs 23 to 26 of its response to the Prosecution's second bar table motion.⁹²

⁹¹ Prosecution's Request, para. 42.

I. Observations on Category VII - Open Source materials

80. The Prosecution tenders 24 open source items.⁹³ As stated in confidential annex A, the Arido Defence does not take a position on the admissibility of these documents, as they are unrelated to the charges against Mr. Arido. However, the Arido Defence opposes the Prosecution's interpretation of the alleged "codes" and submits that the Prosecution should call a linguistic expert in order to establish the alleged meaning of the words.

J. Observations on Category VII - Photographs

81. The Prosecution tenders 4 photographs of individuals it submits are D-6 and [REDACTED].⁹⁴ The Arido Defence submits that since [REDACTED] is a Prosecution's witness, the documents should be tendered through [REDACTED] since [REDACTED] can authenticate them. Further, the Arido Defence opposes the Prosecution's interpretation of the photographs, namely that they support its allegations that improper wire transfers took place.⁹⁵ This is to be established through the testimony - in court - of [REDACTED] in order to permit the Accused to exercise their right to cross-examine witnesses against them.

K. Observations on Category IX - Other Materials

82. The Prosecution seeks the admission of 7 miscellaneous items. The Arido Defence does not take a position since they do not relate to Mr. Arido. However, it reiterates its position regarding the fanciful Prosecution's interpretations of the alleged "codes".⁹⁶ Last but not least, the Arido Defence maintains its position that RFAs and other documents relevant to establishing the legality of the documents the Prosecution seeks to tender must be tendered as well, particularly since the Prosecution fails to cite to the relevant material in its Request.⁹⁷

V. CONCLUSION

83. The Arido Defence does not object to the admission into evidence of CAR-D21-0003-0219, CAR-D21-0001-0041, CAR-D21-0001-0051, CAR-D21-0001-0065, CAR-D21-0001-0091, CAR-D21-0001-0102, CAR-D21-0003-0198, CAR-D21-0003-0187, CAR-D21-0004-0579, CAR-

⁹² ICC-01/05-01/13-1197-Conf.

⁹³ Prosecution's Request, para. 44.

⁹⁴ Prosecution's Request, para. 49.

⁹⁵ *Ibid.*, para. 50.

⁹⁶ ICC-01/05-01/13-1197-Conf, paras 23-26.

⁹⁷ Prosecution's Request, paras 56, 61, 67, 70, 73.

D24-0001-0032, CAR-D04-0003-0170, CAR-D04-0004-0060, CAR-D04-0003-0168, CAR-D04-0004-0057, CAR-OTP-0088-2911, CAR-OTP-0088-2915 (although it submits this should be tendered with P-260), CAR-OTP-0088-2917 (although it submits this should be tendered with P-245), CAR-OTP-0088-2936 (although this submits it should be tendered through P-245 and P-260), CAR-OTP-0087-4029. If the underlying RFAs and documents through which they were obtained are tendered as well, the Arido Defence does not oppose the admission into evidence of CAR-OTP-0075-0245, CAR-OTP-0075-0762, CAR-OTP-0075-0848 and CAR-OTP-0075-1150.

84. In addition, the Arido Defence does not take a position on CAR-D20-0001-0013, CAR-D20-0001-0021, CAR-D21-0003-0162, CAR-D21-0001-0106, CAR-D21-0001-0109, CAR-D21-0003-0056, CAR-D21-0003-0216, CAR-D21-0001-0001, CAR-OTP-0075-2613, CAR-OTP-0078-0290, CAR-OTP-0072-0172, CAR-OTP-0071-0049, CAR-OTP-0071-0057, CAR-OTP-0072-0091, CAR-OTP-0072-0102, CAR-OTP-0082-0377, CAR-OTP-0084-1230, CAR-OTP-0087-3992, CAR-OTP-0087-4017, CAR-OTP-0087-4018, CAR-OTP-0087-4019, CAR-OTP-0087-4021, CAR-OTP-0087-4023, CAR-OTP-0087-4025, CAR-OTP-0088-1619, CAR-OTP-0088-1620, CAR-OTP-0087-3981, CAR-OTP-0085-0202, CAR-OTP-0087-3985, CAR-OTP-0041-0048, CAR-OTP-0067-0384, CAR-OTP-0017-0363-R01. For CAR-OTP-0082-0266, CAR-OTP-0082-0267, CAR-OTP-0082-0288, CAR-OTP-0082-0292, the Arido Defence submits that they should be tendered through P-264.

85. In light of the above, the Arido Defence respectfully requests Trial Chamber VII to find that:

- i. Documents CAR-OTP-0074-1005, CAR-OTP-0074-0513, CAR-OTP-0079-0002, CAR-OTP-0074-1065; CAR-OTP-0077-0169, CAR-OTP-0072-0163, CAR-D04-0003-0342, CAR-OTP-0074-0897; CAR-OTP-0088-0370, CAR-OTP-0088-0398, CAR-OTP-0088-0504 constitute testimonial evidence and are not admissible through the bar table;
- ii. The documents which refer to or relate to individuals listed on the Prosecution's list of evidence must be tendered through these witnesses;
- iii. All the items contained in the Prosecution's Request save for those listed in paragraph 83 above do not meet the requirements of Article 69 (4) and cannot be admitted into evidence.

86. In the alternative, the Arido Defence requests the Trial Chamber to defer its decision on the admissibility of Mr. Arido's suspects interviews until the Arido Defence has been able to properly investigate the matter and provide a fully informed position.

A handwritten signature in black ink, appearing to read 'Charles', with a long horizontal flourish extending to the right.

Chief Charles Achaleke Taku, Counsel for Mr. Arido

Dated this 8th Day of October 2015, The Hague, The Netherlands.