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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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO

Public Redacted Document
with
Public Annex A

**Public redacted version of “Prosecution’s Consolidated Response to Defence
Motions Seeking Exclusion of Evidence under Article 69(7) of the Rome Statute”,
22 April 2016, ICC-01/05-01/13-1833-conf**

Source: The Office of the Prosecutor

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

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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) opposes the Defence motions seeking the exclusion of evidence under article 69(7) of the Statute.¹ The Motions fail to meet the Defence’s burden of persuasion, and improperly require Trial Chamber VII (“Chamber”) to make determinations of domestic law, expressly proscribed by article 69(8) of the Statute and rule 63(5) of the Rules of Procedure and Evidence (“Rules”). Further, the Motions fail to identify any violation of the Statute or internationally recognised human right. Even assuming such breach occurred – which it has not – the Defence does not demonstrate that this casts substantial doubt on the reliability of the relevant evidence, or that its admission would be “antithetical to and would seriously damage the integrity of the proceedings.” Trial Chamber VII (“Chamber”) should dismiss the Motions.

II. Confidentiality

2. This filing is classified as “*Confidential*” as it responds to filings of the same designation. A “*Public Redacted*” version will be filed following the Defence’s filing of the same.

III. Submissions

A. The Defence bears the Burden of Persuasion under Article 69(7)

3. As Parties challenging the admissibility of evidence, the Defence bears the burden of persuasion to show that the elements of article 69(7) are met, namely that: (a) the Statute or an internationally recognised human right has been violated; and

¹ ICC-01/05-01/13-1799-Conf (“Bemba Motion”); ICC-01/05-01/13-1796-Conf (“Kilolo Motion”); ICC-01/05-01/13-1791-Conf-Corr (“Mangenda Motion”); ICC-01/05-01/13-1795-Conf (“Arido Motion”); ICC-01/05-01/13-1785-Conf (“Babala Motion”) (collectively “Motions”).

(b) the admission of the evidence casts substantial doubt on its reliability or would be “antithetical to and would seriously damage the integrity of the proceedings”.² To the extent the Defence relies on an alleged violation of national law to establish that a violation of the Statute or an internationally recognised human right has occurred – as they appear to do³ – they bear the burden to prove both of those violations.

4. That the evidential burden of an article 69(7) application rests with the Defence is consistent with the findings of other Chambers. In *Mbarushimana*, Pre-Trial Chamber I confirmed that:

[I]t may be presumed that the investigative activities carried out by national judicial and executive authorities in pursuance of domestic investigations or further to a request for co-operation by the Court have been carried out in accordance with the legal provisions applicable in that State.⁴

Based on this presumption, the Chamber concluded that “there is no burden on the Prosecution to prove that the impugned procedures were legal and that the evidence in question was not obtained in violation of the Statute or internationally recognised human rights.”⁵ Similarly, in *Katanga and Chui*, in relation to the admissibility of a *procès-verbal* taken in accordance with the law of the Democratic Republic of the Congo, Pre-Trial Chamber I dismissed a Defence challenge under article 69(7) “[b]ecause *it has not been shown* that this particular procedure amounted to a violation of internationally recognised human rights”.⁶

5. In many of their arguments, the Defence misapprehend the fact that they – not the Prosecution – bear this burden. The Kilolo Defence conflates two distinct concepts: the presumption of innocence and the burdens of proof and persuasion for

² Rome Statute, art. 69(7).

³ See Bemba Motion, paras. 7, 15-17; Kilolo Motion, paras. 14-20; Mangenda Motion, paras. 22, 31-32; Babala Motion, paras. 31, 35.

⁴ ICC-01/04-01/10-465-Red, para. 58.

⁵ ICC-01/04-01/10-465-Red, para. 60.

⁶ ICC-01/04-01/07-717, para. 98 (emphasis added).

questions other than guilt.⁷ As the Motions concern the latter, the burden is on the Defence.⁸

6. The Defence also make spurious allegations that the Dutch and ICC Prosecutors “appear to have liaised” to circumvent Dutch law;⁹ the Prosecution “wilful[ly]”, “knowing[ly]”, and “deliberate[ly]” violated Austrian law;¹⁰ the Independent Counsel was “acting as a substitute for the ICC Prosecution”;¹¹ and that there were “short comings” in the manner the call data records (“CDRs”) were obtained.¹² These serious allegations are both factually insupportable and untrue. As such, they do not even begin to approach the Defence’s evidentiary burden, warranting the summary dismissal of their respective Requests.

B. Determinations of National Law are Prohibited Under Article 69(8) and Rule 63(5)

7. The majority of the arguments advanced by the Defence require this Chamber to exercise a function that it lacks: to make determinations of national law.¹³ In challenging the admissibility of the Western Union records, arguments by Mangenda,¹⁴ Kilolo,¹⁵ and Babala¹⁶ are entirely predicated on a determination that Austrian or Irish law was violated in the collection of those records. Kilolo’s¹⁷ and

⁷ Kilolo Motion, paras. 72-74.

⁸ This differs in the case of an Accused’s statement. There, as the right to remain silent gives rise to a rebuttable presumption that such a statement is involuntary, the evidential onus is on the Prosecution to prove voluntariness and thus, lawfulness beyond a reasonable doubt. *See Prosecutor v. Delalić et al.*, Decision on Zdravko Mucić’s Motion for the Exclusion of Evidence, Case No. IT-96-21-T, 2 September 1997, para. 42. Where the evidence in question is not in conflict with an express fair trial right, the evidential burden to prove a violation – in this case, of the Statute or an international human right – lies squarely with the Defence.

⁹ Bemba Motion, para. 29. *See also* para. 34.

¹⁰ Mangenda Motion, paras. 43, 47.

¹¹ Bemba Motion, para. 64.

¹² Kilolo Motion, para. 76.

¹³ *See* Bemba Motion, paras. 15-21; Kilolo Motion, paras. 35-45; Mangenda Motion, paras. 25, 32, 34; Babala Motion, paras. 35, 37, 40-41.

¹⁴ *See e.g.* Mangenda Motion, paras. 25, 32.

¹⁵ *See e.g.* Kilolo Motion, para. 45.

¹⁶ *See e.g.* Babala Motion, paras. 37, 40-41.

¹⁷ *See e.g.* Kilolo Motion, paras. 61-67.

Bemba's¹⁸ challenges to the admissibility of intercepted communications ("Intercepts") similarly depend upon a determination of Dutch law. They request this Chamber to effectively overturn a decision by a Dutch District Court upholding the legality of the wiretaps and their transmission to the Court.¹⁹

8. As the Prosecution has previously argued, incorporated by reference herein,²⁰ determinations of national law are expressly and categorically prohibited under article 69(8) and rule 63(5). Thus, when determining whether evidence collected by a State is relevant or admissible (*i.e.* that acquired through State cooperation), the Court may not make determinations on whether that State or the Prosecution investigators complied with domestic substantive or procedural law.

9. The Statute's legislative history confirms that article 69(8) and rule 63(5) were designed to preclude exactly the type of evaluation the Defence seeks here. The Statute's drafters debated whether the Court should be empowered to decide if evidence was gathered in accordance with national laws when making determinations under article 69(7).²¹ However, that notion was expressly rejected. The prevailing view was that "the Court should not get involved in intricate inquiries about domestic laws and procedures",²² as this would also interfere with state sovereignty.²³ Instead, the Court should only "apply international law".²⁴ Indeed, at the Rome Conference the text of article 69(8), namely that "the Court shall not rule on [, but may have regard to,] the application of the State's national law", was revised,

¹⁸ See *e.g.* Bemba Motion, paras. 23-39, 42-44, 48.

¹⁹ See Bemba Motion, para. 77.

²⁰ See ICC-01/05-01/13-1605, paras. 8-15.

²¹ See Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. 1, *Proceedings of the Preparatory Committee during March-April and August 1996*, UN Doc. A/51/22 (13 September 1996) ("Report of Preparatory Committee (1996)"), pp. 60-61. These debates concerned article 44(5) of the draft Statute, which is now article 69(7). See D. Piragoff and P. Clarke, "Article 69: Evidence", in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Beck et al., 3rd ed., 2016) ("Triffterer and Ambos Commentary"), p. 1721.

²² Report of Preparatory Committee (1996), pp. 60-61. See also Triffterer and Ambos Commentary, p. 1722.

²³ Triffterer and Ambos Commentary, pp. 1722, 1749-1750.

²⁴ Report of Preparatory Committee (1996), p. 61.

and the bracketed language deliberately removed²⁵ to effectuate the prevailing view noted above.²⁶

10. This case highlights the drafters' concerns. Bemba concedes "the complexity of Dutch law and procedures",²⁷ and the intricacies of Austrian law were demonstrated during Professor Otto Lagodny's testimony.²⁸ Any pronouncement by this Chamber on Dutch or Austrian law would necessarily interfere with State sovereignty, particularly given that the Dutch courts have already pronounced on the legality of the Intercepts.²⁹ Finally, there is the unnatural character of the Defence's request — for this Chamber to effectively disregard the determinations of national courts and substitute them with its own determinations.

11. While Bemba and Mangenda attempt to address article 69(8) and, in Bemba's case, an acknowledgement of rule 63(5) as well,³⁰ their arguments lack merit. Contrary to Bemba's assertion, there is no exception under either provision for "instances in which national authorities have collected evidence independently, and when they have done so pursuant to an ICC request for assistance."³¹ Article 69(8) and rule 63(5) apply whether the evidence was collected by the State on its own initiative or at the Prosecution's request.³² Article 69(8) is categorical and unequivocal. The only exception to rule 63(5) is where reliance on national law is

²⁵ Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN GAOR, 53rd Sess., UN Doc. A/CONF.183/2 (1998). See also Triffterer and Ambos *Commentary*, p. 1722.

²⁶ See Triffterer and Ambos *Commentary*, p. 1722.

²⁷ Bemba Motion, fn. 2.

²⁸ See e.g. ICC-01/05-01/13-T-44-ENG ET, pp. 41-43, Ins. 20-18.

²⁹ See ICC-01/05-01/13-424-Anx1.

³⁰ Bemba Motion, paras. 7-9; Mangenda Motion, para. 37.

³¹ Bemba Motion, para. 9.

³² *Contra* Mangenda Motion, para. 37; Bemba Motion, para. 9. See Triffterer and Ambos *Commentary*, p. 1749 (noting with respect to the phrase "collected by a State" that "[g]iven the historical background to paragraph 8, it is likely that no distinction exists dependant on whether the evidence was collected by a State on its own initiative or at the request of the Prosecutor under Part 9 of the Statute.").

necessary to ascertain a principle of international law in accordance with article 21. This, thus, excludes any unenumerated exception.³³

12. Bemba's plea for this Chamber to fill what it considers to be gaps in the Dutch legal framework are also unwarranted.³⁴ The decision as to who should be afforded standing to appeal matters before Dutch courts is one reserved to the national authorities. Nor is this Court entitled or mandated to fill supposed "gaps" within national laws.³⁵ Indeed, should Bemba have an issue regarding his purported inability to assert standing before the Dutch courts, his recourse, if any, lies in other fora – not this Court.³⁶

13. Mangenda's focus on article 69(8) ignores the broader prohibition under rule 63(5), which states that the Chamber "shall not apply national laws governing evidence" and is not circumscribed to situations where the evidence is collected by the State.³⁷ Further, as Mangenda concedes, whether a determination of national law is "relevant" is entirely different from whether it can be adjudicated.³⁸ It is the latter that is sought by the Defence and expressly precluded by the Statute and the Rules. Finally, article 69(8) and rule 63(5) do not render investigators immune,³⁹ as they are always bound by principles of international human rights law and to the Statute's detailed provisions under Part 5, particularly article 54(1)(c), which requires

³³ This accords with the maxim of *expressio unius est exclusio alterius*. See *Prosecutor v. Delalić et al*, Judgement, Case No. IT-96-21-T, 16 November 1998, para. 166; *Prosecutor v. Kupreškić et al.*, Judgement, Case No. IT-95-16-T, 14 January 2000, para. 623.

³⁴ Bemba Motion, paras. 11-14, 38, 74.

³⁵ *Contra* Bemba Motion, para. 14.

³⁶ *Contra* Bemba Motion, paras. 12-13. Indeed, Bemba cites to the very cases supporting his standing before the European Court of Human Rights. See Bemba Motion, para. 16. Generally, "[a]ny person may rely on the protections of the [European Convention on Human Rights] against a State Party when the alleged violation [takes] place within the jurisdiction of the State concerned [...] regardless of nationality, place of residence, civil status, situation or legal capacity." European Court of Human Rights, Practical Guide on Admissibility Criteria, 2014, available at http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf (last accessed on 22 April 2016), para. 9 (citations omitted).

³⁷ Mangenda Motion, para. 37.

³⁸ *Contra* Mangenda Motion, para. 37.

³⁹ *Contra* Mangenda Motion, para. 37.

investigators to “[f]ully respect the rights of persons arising under this Statute.”⁴⁰ The Defence adduces absolutely nothing to the contrary.

C. The Defence Fails to Show that the Evidence was Obtained in Violation of the Statute or Internationally Recognised Human Rights

14. Even assuming the Chamber had the authority to determine matters of domestic law, the Defence fails to show that the four categories of evidence challenged were obtained in violation of the Statute or internationally recognised human rights: (i) records obtained from Western Union; (ii) the Intercepts and the CDRs; (iii) Arido’s statements to the French authorities; and (iv) emails obtained from Arido’s email address (“Emails”).

i. Western Union Records

15. The Defence fails to demonstrate that the Western Union records at issue (*i.e.* those deemed “formally submitted” in this case) were obtained in violation of the Statute or the right to privacy. On this preliminary issue, there appears to be a fundamental confusion by Kilolo, Mangenda, and Babala. The Western Union records deemed “formally submitted”⁴¹ were those obtained in execution of an Austrian court order, issued pursuant to a Request for Assistance (“RFA”). They were *not* those records the Prosecution screened prior to an Austrian court order.⁴² Challenges to the screened documents are irrelevant, since article 69(7) only concerns documents tendered for admission. Equally, the Prosecution’s request to intercept communications⁴³ occurred after that Austrian court order had been issued.⁴⁴

⁴⁰ OTP investigators are also bound by the code of conduct for investigators as well as the general code of conduct and other OTP regulations.

⁴¹ See ICC-01/05-01/13-1285, p. 11. See also ICC-01/05-01/13-1013-Conf, para. 47.

⁴² *Contra* Kilolo Motion, paras. 2-3, 21; Mangenda Motion, para. 4; Babala Motion, para. 1. See also Mangenda Motion, paras. 23-27; 49.

⁴³ See ICC-01/05-51-Conf.

Mangenda draws no link between the screened documents and those Western Union records identified in the Prosecution's request.⁴⁵

16. To the extent the Defence allege that the Western Union records "formally submitted" were impacted by those screened by the Prosecution, and it is not clear if they are, then the entire Defence argument depends on five unproven assumptions. The first, is that the "formally submitted" Western Union records are derivative of other information or records of money transfer transactions the Prosecution acquired from Western Union in advance of an authorisation by an Austrian judicial body for the transfer of the formally submitted Western Union records, pursuant to a RFA. This, in turn, relies on four subsidiary assumptions: (a) authorisation from a national judicial body was required before the Prosecution could obtain information about money transfer transactions from Western Union; (b) the relevant national law is Austrian law; (c) Austrian law was breached; and (d) in the case of Arido, financial records were sought and obtained before any reasonable ground to believe he had committed any offence.⁴⁶ None of these assumptions have been proven.

17. In this instance, Western Union senders and receivers expressly consented to the transmission of their personal data to the Prosecution. As confirmed by Western Union's Associate General Counsel:

Both senders and receivers [of Western Union] are required to waive certain aspects of data privacy to avail themselves of the service. The waiver allows Western Union to share data collected about the individuals with Western Union group companies, its agents and representatives, and third parties, including where there is a reasonable need to help prevent and detect crime, to prosecute offenders, or for national security or other reasons.⁴⁷

⁴⁴ See e.g. CAR-D20-0003-0016.

⁴⁵ Mangenda Motion, para. 49.

⁴⁶ See Kilolo Motion, paras. 33-37; Mangenda Motion, paras. 23-30; Arido Motion, paras. 41-44; Babala Motion, paras. 33-36.

⁴⁷ CAR-OTP-0093-0217, at 0218.

True to this statement, the express consent provided by Western Union senders and receivers is set out in the terms and conditions of *all* Western Union forms.⁴⁸ The transmission of the Western Union information to the Prosecution fell within the contours of this consent. The Prosecution sought Western Union records to prevent and detect the transmission of illicit funds between the accused and co-conspirators and Defence witnesses in the Main Case, or their proxy – a fact not contested by the Defence. The information was, thus, reasonably needed to help prevent and detect crime and to prosecute offenders.

18. None of the Defence's arguments undermine the express consent provided by Western Union clients authorising the transmission of their private information to Third Parties (i.e., the Prosecution). Rather, Kilolo "begs the question" why Austrian authorities became involved,⁴⁹ as opposed to demonstrating that their involvement was required under international human rights law even given the express consent of their client. Babala's reliance on Professor Lagodny's speculative statement that the consent and express waivers contained in every Western Union form may not "match [...] with the whole theory of public law as far as I've understood it"⁵⁰ is misguided and erroneous. Babala fails to demonstrate why under *international human rights law*, not Austrian law, such terms and conditions are insufficient expressions of consent. In quoting Professor Lagodny, Babala also deliberately omits the most salient component of his testimony: that the issue is a matter of administrative law, in which Professor Lagodny conceded that he was not an expert.⁵¹ Mangenda does the same,⁵² ignoring international human rights law while deliberately manipulating Professor Lagodny's passing comment that he "*think[s]*" the consent exception may not apply

⁴⁸ See e.g. CAR-OTP-0093-0219; CAR-OTP-0093-0220; CAR-OTP-0093-0221; CAR-OTP-0093-0222; CAR-OTP-0093-0223; CAR-OTP-0093-0224; CAR-OTP-0093-0225; CAR-OTP-0093-0226; CAR-OTP-0093-0227; CAR-OTP-0093-0229; CAR-OTP-0093-0232; CAR-OTP-0093-0234; CAR-OTP-0093-0237; CAR-OTP-0093-0240; CAR-OTP-0093-0243; CAR-OTP-0093-0246; CAR-OTP-0093-0250; CAR-OTP-0093-0253.

⁴⁹ Kilolo Motion, paras. 40, 42.

⁵⁰ Babala Motion, para. 36 (*quoting* the French version of ICC-01/05-01/13-T-44-ENG ET p. 47, lns. 3-7).

⁵¹ See ICC-01/05-01/13-T-44-ENG ET, p. 47, lns. 3-8.

⁵² Mangenda Motion, para. 29.

under Austrian law, without acknowledging the witness' concession that he is "not an expert" on the matter and has not "consulted any legal books [or] any court decisions" on the issue.⁵³ To the contrary, Lagodny's report states that the express consent of the data subject constitutes an exception to the application of Austrian law – to the extent it may apply⁵⁴ – a fact that Lagodny also conceded he was uncertain.⁵⁵

19. Mangenda's interpretation of the express waivers in Western Union forms is also unpersuasive. Contrary to his suggestion that the language is "ambiguous" and does not dispense of the "usual modalities and procedures for disclosing information to law enforcement agencies",⁵⁶ the language contained in these forms is clear, direct and, as confirmed by Western Union legal representatives,⁵⁷ intended as an express waiver of domestic data privacy laws. These terms and conditions warn Western Union users that by availing themselves of in-person Western Union money transfer services that "personally identifiable information, contact details and information relating to the money transfer, transaction history, and any other information supplied by you" may be provided to "Third Parties, where there is a reasonable need, to help prevent and detect crime, to prosecute offenders, national security or other legal reasons".⁵⁸ This standard language was purposefully designed as consent to process, disclose and transfer information to Third Parties.⁵⁹

20. Even if Austrian law and the Austrian Banking Act do apply, Professor Lagodny admits that Western Union could release customer information to Third Parties absent any judicial order so long as the customer grants his or her express written consent⁶⁰ – article 38(2)(5) of the Austrian Banking Act (*Bankwesengesetz*).⁶¹

⁵³ ICC-01/05-01/13-T-44-ENG ET, p. 46, lns. 17-20 (emphasis added).

⁵⁴ See CAR-D23-0006-0001, at 0018. See also ICC-01/05-01/13-T-44-ENG ET, p. 43, lns. 2-10.

⁵⁵ ICC-01/05-01/13-T-44-ENG ET, p. 32, lns. 21-25.

⁵⁶ Mangenda Motion, para. 29.

⁵⁷ CAR-OTP-0093-0217, at 0218.

⁵⁸ See e.g. CAR-OTP-0093-0219.

⁵⁹ CAR-OTP-0093-0217, at 0218.

⁶⁰ See ICC-01/05-01/13-T-44-ENG ET, p. 43, lns. 2-10.

⁶¹ See CAR-D23-0006-0001, at 0018.

Importantly, Professor Lagodny admits that he discounted the application of consent contained in Western Union forms “because [he] had no information about these documents” as they were never provided to him by the Mangenda Defence.⁶² Indeed, as demonstrated throughout his examination, Professor Lagodny’s report was prepared without access to material from Western Union, the Austrian Prosecutor’s Office, or “any documents related to this particular case”.⁶³

21. *Second*, assuming the absence of a valid consent by Western Union users, the Defence fails to demonstrate that the applicable law is the Austrian Banking Act. For this, the Defence rely on two facts: that the Prosecution itself submitted a RFA to the Austrian authorities, and that an Austrian judicial authorisation was subsequently obtained. The Defence do not affirmatively demonstrate, as required by their burden, that the Austrian Banking Act was indeed the controlling legal regime. As a result, Professor Lagodny also assumed the application of Austrian law⁶⁴ – a matter contested by Western Union’s Associate General Counsel who notes that “Austrian law does not apply to transfers performed by [Western Union], unless those transactions are performed in Austria itself”;⁶⁵ a fact also clearly stipulated in Western Union forms.⁶⁶

22. Professor Lagodny also assumed that the Austrian Banking Act applied to Western Union transactions,⁶⁷ despite admitting that “the Austrian Banking Act is administrative law [which] is not my speciality, not at all.”⁶⁸ On this issue, Western Union’s Associate General Counsel also confirms that when money transfers are conducted “in the countries of Cameroun, the Democratic Republic of Congo and the

⁶² ICC-01/05-01/13-T-44-ENG ET, p. 32, lns. 21-25.

⁶³ ICC-01/05-01/13-T-44-ENG ET, p. 19, ln. 14-p. 20, ln.11. *See also* p. 30, lns. 20-22.

⁶⁴ *See* CAR-D23-0006-0001, at 0001.

⁶⁵ CAR-OTP-0093-0217, at 0217-0218.

⁶⁶ *See e.g.* CAR-OTP-0093-0253; CAR-OTP-0093-0250; CAR-OTP-0093-0239.

⁶⁷ *See* CAR-D23-0006-0001, at 0001.

⁶⁸ ICC-01/05-01/13-T-44-ENG ET, p. 42, lns. 1-3. *See also* pp. 42, ln. 9 (“I’m not a specialist for administrative, international administrative law”) 44, ln. 16 (“without being an expert to international administrative law”), 47, lns. 7-8 (“But to be honest, I’m not here for administrative law.”).

Republic of Congo [...] Austrian law does not apply”.⁶⁹ In effect, there is no clear indication, and the Defence point to none, that the Austrian legal regime is applicable. The Defence also advance no argument that the laws of those countries in which the transactions actually occurred were breached by Western Union’s transmission of consumer information to the Prosecution.

23. *Third*, even if Austrian law does apply and assuming the absence of any valid consent by Western Union providers, the Defence also fails to show that the Austrian court orders were “tainted” by the Prosecution’s screening of Western Union records. When requesting assistance from the Austrian courts, the Prosecution informed them of the fact that the Prosecution had conducted a “screening of documents” from Western Union and through that screening “has identified a number of transactions and movements of large sums of money in connection with a number of individuals which appear to be of relevance to the ongoing investigations.”⁷⁰ That Austrian authorities authorised the production of those records with full knowledge of the screenings confirms not only the legality of the Prosecution’s request, but the legality of the subsequent production of Western Union records. The Defence Motions manifestly fail to prove the contrary.

24. The Defence also fail to demonstrate that a mistake contained in the Austrian judicial order vitiates its legality.⁷¹ The Defence ignores that the Austrian court order attaches the initial RFA, which indicates that “the OTP is aware of money transfers that have taken place and which could involve funds under the control of our suspects or persons associated with him” and “that these money transfers could be linked to the commission of crimes under the jurisdiction of the Court *such as offences against the administration of justice*.”⁷² The Austrian authorities were thus fully aware

⁶⁹ CAR-OTP-0093-0217, at 0218.

⁷⁰ CAR-OTP-0092-0867, at 0877.

⁷¹ *Contra* Kilolo Motion, para. 43; Arido Motion, para. 43.

⁷² CAR-D21-0002-1349, at 1359 (emphasis added).

that the basis for the RFA concerned money transfers relating to the commission of article 70 offences in Bemba's trial for war crimes and crimes against humanity – and not genocide. Even still, the Motions fail to show whether the error was anything more than clerical, or had any impact on the determination of the Austrian authorities to approve the RFA.

25. *Finally*, Arido's argument that the review of "Mr. Arido's financial records began prior to any reasonable grounds to believe that he committed any offence"⁷³ is simply wrong. The records identified by Arido himself state explicitly that *other* information led the Prosecution to believe that Arido was "involved in suspect transactions via [Western Union]".⁷⁴

ii. Intercepted Communications

26. The arguments that the Bemba,⁷⁵ Kilolo,⁷⁶ and Mangenda⁷⁷ Defence teams advance to exclude the Intercepts under article 69(7) should also be rejected.

a. Article 69(7) does not provide for exclusion of derivative evidence

27. As explained above, the Defence arguments regarding the purported illegal collection of Western Union records is without merit.⁷⁸ However, even if the Chamber were to find, *arguendo*, that the Western Union records were obtained in violation of article 69(7), this does not require the exclusion of evidence otherwise lawfully obtained as a result of information gleaned from them.⁷⁹ Such a request has

⁷³ Arido Motion, para. 42.

⁷⁴ CAR-OTP-0092-0021-R01. *See also* CAR-OTP-0092-0022-R01.

⁷⁵ *See generally* Bemba Motion.

⁷⁶ Kilolo Motion, paras. 55-76. Kilolo also advances a limited argument in relation to the CDRs, which are addressed separately where applicable.

⁷⁷ Mangenda Motion, paras. 49-51, 53.

⁷⁸ *See above* paras. 15-25.

⁷⁹ *Contra* Kilolo Motion, paras. 58-60; Mangenda Motion, paras. 49-51 *See also* para. 53; Bemba Motion, para. 94 c.

no basis in the procedural framework of this Court, and as applied here, would be antithetical to the Statute itself.

28. *First*, article 69(7) is silent on the admissibility of evidence derived from illegally collected evidence. The Defence has the burden to show that each item of evidence it challenges was obtained illegally and that such illegality casts doubt on either the integrity of the proceedings or the reliability of the evidence.⁸⁰ The mere assertion that the manner of acquisition of the Western Union records “casts a shadow over all evidence and material subsequently obtained”⁸¹ is insufficient to reach the high threshold set by article 69(7), and thus justify the extreme remedy of excluding all derivative evidence.⁸²

29. *Second*, the Statute’s provisions on evidence are flexible and designed to allow the Chambers of the Court to freely assess all relevant evidence required for the determination of the truth in accordance with article 69(3). The expansive interpretation of article 69(7) the Defence suggests would unduly restrict this ability and contravene the spirit of the Statute.

30. *Third*, the Defence position fails even on the basis of an article 69(4) analysis. Other than resorting to generic platitudes,⁸³ the Defence fails to show how the fact that the Intercepts were obtained on the basis of, *inter alia*, Western Union records, should affect the Chamber’s analysis of factors under article 69(4), and how the admission of this evidence would cause unfair prejudice.

⁸⁰ See *above* paras. 3-7; ICC-01/04-01/10-465-Red, para. 58; ICC-01/04-01/10-465-Red, para. 60; ICC-01/04-01/07-717, para. 98.

⁸¹ Kilolo Motion, para. 59.

⁸² As has been observed, during the drafting of the Statute, “some delegations wanted to exclude evidence by means of a violation of human rights, but this formulation was regarded as too broad”. Hans-Jörg Behrens, “The Trial Proceedings”, in Roy S. Lee (ed.), *The International Criminal Court: the Making of the Rome Statute: Issues, Negotiations and Results* (Kluwer Law International, The Hague, 1999), pp. 238–246.

⁸³ See Kilolo Motion, para. 59; Mangenda Motion, para. 51.

31. Furthermore, Mangenda's contention, echoed by Kilolo,⁸⁴ that the intercepted evidence should be excluded because the Prosecution requested the interception on the basis of the Western Union records as "[t]he only concrete information",⁸⁵ is factually incorrect, which Mangenda effectively acknowledges several lines later in the same paragraph.⁸⁶ Mangenda disregards that the basis for the interception was the outcome of the analysis and cross-referencing of the Western Union records, with all the logs and partial recordings of Bemba's conversations from the Detention Centre,⁸⁷ Babala's mobile phone records,⁸⁸ as well as the information received from the Anonymous Informant, as submitted *via* two of the Prosecution's requests for judicial authorisation.⁸⁹ The analysis of all this evidence, taken together, provided a clearly reasonable basis for the Pre-Trial Judge to authorise the Prosecution to seize the Dutch authorities with a request for interception.⁹⁰

32. Additionally, the issue of the propriety of the Prosecution's request to obtain this evidence has already been litigated. The Chamber ruled on Mangenda's previous request to declare the telephone intercepts inadmissible,⁹¹ finding that "[i]n fact, the need to fully understand the alleged bribery scheme was advanced by the Prosecution as a reason why the interception of telephone calls should be granted and ultimately taken up by the Single Judge in his Decision on the Request to Obtain Evidence."⁹² The Trial Chamber found that sufficient circumstantial evidence supported the Prosecution's request.⁹³ In light of this procedural history, Mangenda's assertion that the admission of this evidence would "be just as antithetical to, and

⁸⁴ Kilolo Motion, para. 58.

⁸⁵ Mangenda Motion, para. 49.

⁸⁶ Mangenda Motion, para. 49.

⁸⁷ ICC-01/05-51-Conf, para. 14.

⁸⁸ ICC-01/05-51-Conf, para. 15.

⁸⁹ See ICC-01/05-51-Conf and ICC-01/05-44-Conf-Red2.

⁹⁰ See ICC-01/05-52-Red2, paras. 3, 5.

⁹¹ ICC-01/05-01/13-1136-Conf.-Corr.

⁹² ICC-01/05-01/13-1284, para. 22 (*citing* ICC-01/05-51-Conf, para. 20; ICC-01/05-52-Conf, para. 1. (footnotes omitted)).

⁹³ ICC-01/05-01/13-1284, para. 23.

damage just as much the integrity of the proceedings as would the admission of the Western Union records themselves”, is baseless.

b. A valid legal basis existed to intercept the telecommunications of Kilolo and Mangenda

33. The Bemba Defence’s arguments regarding the lack of a legal basis to intercept the telecommunications of Kilolo and Mangenda should be rejected. They are legally unsubstantiated and predicated on an inaccurate representation of the facts. Consequently, the Defence fails to demonstrate any violation of Bemba’s international human rights or the Statute.

34. The collection of the Intercepts was judicially authorised by this Court⁹⁴ and also on the national level.⁹⁵ Moreover, the validity of the Pre-Trial Judge’s authorisation has already been litigated.⁹⁶ The Bemba Defence’s argument regarding the purported lack of a legal basis for the interception of Kilolo’s “+918” number appears to be primarily predicated on the absence of this number in a RFA before the interception was initiated.⁹⁷ The Defence continuous reliance on this argument⁹⁸ is concerning, given the totality of the *final* RFAs and the email correspondence between the Prosecution and the Dutch authorities that the Bemba Defence has received, disproving this contention.

35. As these records show, the Prosecution sent the first RFA for interception of all Kilolo’s and Mangenda’s telecommunications on “all SIM cards registered in their

⁹⁴ ICC-01/05-52-Red2.

⁹⁵ ICC-01/05-01-13-6-Conf-AnxA-Red; ICC-01/05-01/13-6-Conf-AnxB-Red; ICC-01/05-01/13-400-Anx; pp. 24-32; ICC-01/05-01/13-424-Anx1.

⁹⁶ See ICC-01/05-01/13-1284.

⁹⁷ See Bemba Motion, paras. 26-37. See also ICC-01/05-01/13-1525-Red, para. 19.

⁹⁸ *Contra* Bemba Motion, paras. 26-28.

names” on 6 August 2013.⁹⁹ This RFA effectively encompassed the interception of any number that would become known – or suspected – in the course of the investigation. On 29 August, the Dutch prosecutor suggested the interception of the “+918” number, pursuant to the email from the Prosecution sent on 28 August, and the Prosecution accepted it.¹⁰⁰ This email exchange, as well as the one that took place a few days later show, *inter alia*, that the Dutch prosecutor considered sufficient the level of suspicion that the “+918” number belonged to Kilolo to justify the initial request for its interception. That no formal Prosecution request was necessary for the Dutch prosecutor to obtain the Dutch Investigative Magistrate’s approval for the interception is a matter of national law and irrelevant to the Defence’s claim under article 69(7). In any case, that approval was made by the Investigative Magistrate fully aware of the relevant facts and with the primary purpose of establishing whether the number belonged to Kilolo.¹⁰¹ Subsequent extensions of the interception of all numbers were approved pursuant to timely requests made by the Dutch prosecutors, and on the basis of further RFAs.¹⁰² Finally, this sequence of events, and the timing of the 11 October 2013 RFA make clear that the purpose of that RFA was not to satisfy, *post-facto*, any domestic requirements for initiating interception, but for the purpose of the transmission of the Intercepts to the Court.¹⁰³

36. The draft RFAs are not dispositive. Rather, they represent working versions, some of which were never formally transmitted.¹⁰⁴ That the request for the interception of the “+918” number” was not sent out in the form of an RFA, but instead, by email, does not change the fact that it was sent out in accordance with the Statute and Dutch law.¹⁰⁵ In claiming that no timely request was sent, the Defence

⁹⁹ CAR-D21-0005-0001, at 0005, para. 9.

¹⁰⁰ CAR-OTP-0092-0799, at 0799.

¹⁰¹ CAR-OTP-0092-0799, at 0799, CAR-OTP-0092-0804, at 0804.

¹⁰² See ICC-01/05-01/13-6-Conf-AnxA-Red; ICC-01/05-01/13-6-Conf-AnxB-Red; CAR-OTP-0092-0807; CAR-OTP-0090-1937.

¹⁰³ See CAR-OTP-0090-1941; CAR-OTP-0092-0819. See also ICC-01/05-01/13-6-Conf-AnxA-Red, the decisions of the Dutch Magistrate regarding the disposition of the Intercepts, dated 15 October 2013.

¹⁰⁴ *Contra* Bemba Motion, paras. 30-31.

¹⁰⁵ *Contra* Bemba Motion, paras. 35-36.

cannot deliberately ignore the relevant email correspondence showing the contrary, and at the same time rely on the draft RFAs that were attached to some of these emails to allege that the Prosecution and the Dutch authorities worked together to conceal the alleged absence of a request.¹⁰⁶ However, this email correspondence¹⁰⁷ undermines the Defence's far-fetched argument that adverse inferences must be drawn from the alleged "failure" to disclose any contemporaneous records showing that a request was made.

37. Bemba's ultimate contention that the Intercepts would have been declared inadmissible had he been granted standing before the Dutch courts is therefore factually baseless, as well as speculative.¹⁰⁸ To support its position, the Bemba Defence attaches a legal opinion¹⁰⁹ rendered in apparent ignorance of any of the corresponding emails, resulting in patently erroneous conclusions in obvious contradiction with the actual events.¹¹⁰ In any case, as explained above, article 69(8) bars the Chamber's determination of the sufficiency of Dutch domestic procedures as concerns the question of Bemba's standing before Dutch courts.¹¹¹ Bemba thus fails to show any violation of the Statue or an international human right.

¹⁰⁶ Bemba Motion, para. 32.

¹⁰⁷ Bemba Motion, paras. 34-35.

¹⁰⁸ Bemba Motion, para. 38.

¹⁰⁹ See ICC-01/05-01/13-1799-Conf-AnxC. When considering the weight to be attached to this opinion, the Chamber should take into consideration that the opinion is submitted by Mr Michiel Pestman, the attorney who represented Bemba, as well as Bemba's counsel Peter Haynes, in the early stages of the case before Dutch courts, and who works for Prakken Oliveira, the law firm one of whose other attorneys, Mr Göran Sluiter, previously represented Arido in this case at the time that Mr Pestman was representing Bemba and Mr Haynes. The Bemba Defence does not openly acknowledge any of this in its submissions. Furthermore, the Prosecution has not had any opportunity to examine Mr Pestman on the assertions and conclusions he makes in his opinion, including the alleged lack of standing of Bemba before Dutch courts.

¹¹⁰ See ICC-01/05-01/13-1799-Conf-AnxC, p. 7, *inter alia*: "The ICC Prosecutor clearly did not wish the Dutch authorities to intercept the actual telephone conversations"; p. 8, *inter alia*: "It is my opinion that the intercepts of this number are unlawful, as there was no basis for it in the request for legal assistance from the ICC". The document does not mention any emails on 28-29 August 2013 or any other dates.

¹¹¹ See *above* paras. 7-13.

c. Adequate safeguards were implemented to vet the Intercepts

38. Bemba, Kilolo, and Mangenda all argue that a failure to follow Dutch national procedures resulted in inadequate safeguards in vetting the Intercepts.¹¹² In addition, Bemba asserts that the Independent Counsel's role was not adequate or appropriate to safeguard privileged information¹¹³ – again, an issue that the Defence has repeatedly and unsuccessfully litigated. Even still, the Bemba and Kilolo defences fail to show that any violations of international human rights or the Statute took place, let alone that these would have had an impact on the integrity of the proceedings or reliability of the evidence.

39. Bemba, in particular, attempts to show that the division of different tasks by the different bodies involved in collecting the Intercepts – as well as Trial Chamber III – colluded to violate Bemba's rights.¹¹⁴ The assertion however, rests on Bemba's distortion of the facts and the law, as well as his erroneous conflation of otherwise clear legal frameworks and their purposes. As emphasised above, this Court is neither well-placed nor permitted to make determinations regarding the applicability of the Dutch procedural safeguards for vetting privileged information. The approach taken by the Defence here underscores the reasons why the Statute expressly prohibits the Court's Chambers from engaging in determinations and analyses concerning domestic law and evaluating either the relevance or admissibility of evidence on that basis.

40. On 28 April 2014, the Dutch District Court ruled on the legality of the last batch of the Intercepts obtained through 23 November 2013, and authorised their transmission to the ICC. In the Decision, the District Court clearly referred to other

¹¹² See Bemba Motion, paras. 40-84; Kilolo Motion, paras. 61-67; Mangenda Motion, para. 53.

¹¹³ Bemba Motion, paras. 50-59, 62-68.

¹¹⁴ See Bemba Motion, para. 84.

previous decisions authorising the transmission of Intercepts.¹¹⁵ Furthermore, procedural safeguards for the interception, vetting and transmission of the Intercepts were not only addressed by that Court, but also by the Investigating Magistrate.¹¹⁶ The Bemba Defence attempts to circumvent the clear final determinations of the domestic courts, effectively seeking improperly to appeal their decisions before this Court. Further, the arguments advanced are based on an inaccurate and incomplete discussion of the relevant procedure, and the selective construction of the statements of individuals not directly involved in the process.¹¹⁷

41. Whereas these attempts at analysing whether the proper domestic procedure was followed should be rejected as such, the information already on the record further weakens the Defence's position. [REDACTED], whose statement the Defence relies on in alleging an article 69(7) violation, provided a different and more complete picture of the relevant procedure when interviewed by the Prosecution.¹¹⁸ In particular, [REDACTED] affirmed, *inter alia*, that: (a) he had no experience dealing with the provision of evidence to international organisations or other countries;¹¹⁹ (b) the seizure of materials from the Accused Kilolo and Mangenda was done in accordance with Dutch law;¹²⁰ (c) he had no direct knowledge of the propriety of the interception process in this case as he took no direct part in it;¹²¹ (d) under Dutch law, an investigative judge has the discretion whether to give lawyers or the dean of The Hague Bar an opportunity to review Intercepts, and [REDACTED] was not legally binding on the judge;¹²² (e) the investigative judge may transfer the Intercepts to the public prosecutor without granting the lawyers an opportunity to review the

¹¹⁵ ICC-01/05-01/13-424-Anx1, p. 4.

¹¹⁶ ICC-01/05-01/13-6-Conf-AnxA-Red, ICC-01/05-01/13-6-Conf-AnxB-Red.

¹¹⁷ CAR-D20-0006-1316; ICC-01/05-01/13-1799-Conf-AnxC.

¹¹⁸ ICC-01/05-01/13-1737-Conf-Corr.

¹¹⁹ CAR-OTP-0094-0359, at 0360, lns. 26-36.

¹²⁰ CAR-OTP-0094-0359, at 0364, lns. 161-172 (relating to CAR-D20-0006-1316, at 1320-1321).

¹²¹ CAR-OTP-0094-0359, at 0362-0364, lns. 112-159, 175-178 (relating to CAR-D20-0006-1316, at 1320-1322).

¹²² CAR-OTP-0094-0359, at 0364-0366, lns. 189-194, 220-232 (relating to CAR-D20-0006-1316, at 1318-1319), *Contra Kilolo Motion*, para. 67.

intercepts, particularly where such review would jeopardise the investigations;¹²³ (f) the Accused could have challenged the legality of the intercepts under Dutch law before Dutch courts, but did not file an appeal, rendering the decisions final;¹²⁴ and (g) under Dutch law, the attorney-client privilege does not extend to communications between an attorney and his client involving the commission of a crime.¹²⁵

42. The appointment and work of the Independent Counsel also did not breach any international human right or the Statute, and the Defence fails to identify any such violation. Here, the manner in which the Independent Counsel was appointed and supervised is decisive. As the Pre-Trial and Trial Chambers in this case have reiterated several times, the Independent Counsel did not act as a substitute for the Prosecution,¹²⁶ but rather was appointed by the Single Judge of Pre-Trial Chamber II (“Single Judge”) as a safeguard against the transmission of privileged information to the Prosecution, acting under the Single Judge’s mandate and supervision.¹²⁷ Furthermore, the Prosecution’s interactions with the Independent Counsel were strictly delimited and consisted of transferring to him the French translations of certain documents and search terms for aid in his analysis.¹²⁸

43. Whether the Independent Counsel’s approach to his review of privileged information was compatible with Dutch law is irrelevant to an article 69(7) determination.¹²⁹ What is relevant is that his appointment and the manner of his review, including the criteria therefore, were compatible with the Statute and the

¹²³ CAR-OTP-0094-0359, at 0374-0375, lns. 558-576 (relating to CAR-D20-0006-1316, at 1318).

¹²⁴ CAR-OTP-0094-0359, at 0368-0371, lns. 320-471. See also ICC-01/05-01/13-424-Anx1, p. 4.

¹²⁵ CAR-OTP-0094-0359, at 0373-0374, 0384-0385, lns. 520-542, 914-936.

¹²⁶ *Contra* Bemba Motion, para. 57.

¹²⁷ ICC-01/05-52-Red; ICC-01/05-01/13-41-Red; ICC-01/05-01/13-362-Red; ICC-01/05-01/13-366-Red, p. 8; ICC-01/05-01/13-893-Red, paras. 13-15. The Chambers have also repeatedly addressed the argument raised again by the Bemba Defence, that the Independent Counsel’s prior working relationship with a Prosecution counsel affected his independence and impartiality: see ICC-01/05-01/13-362-Red; ICC-01/05-01/13-457; ICC-01/05-01/13-893-Red, para. 15.

¹²⁸ ICC-01/05-58-Red2; ICC-01/05-63-Red.

¹²⁹ *Contra* Bemba Motion, paras. 56-60.

Rules and scrutinised by this Court.¹³⁰ Further, even if the Chamber were to consider the compatibility of the Independent Counsel's approach under Dutch law, contrary to the Defence's contentions, it shows that his work for the Investigative Magistrate provided a level of scrutiny not otherwise available under Dutch law, and which [REDACTED] would have been incapable of providing.¹³¹ And, even if the Independent Counsel's approach was in any way "irregular" – which it was not – the Defence fail to show that anything that the Independent Counsel did effectively led breached article 69(7).

44. Likewise, Bemba's right to an effective remedy under international human rights law has not been affected.¹³² *First*, the Defence's claim that Bemba's rights to be informed of the [interception] process and to make a complaint to the Presidency were "denied" because the recording of his privileged communications in the Detention Centre - in accordance with the Regulations of the Court, and for his protection – was not envisaged, is contrary to common sense and unjustified.¹³³ *Second*, as stated above, Bemba's dissatisfaction with his alleged lack of standing before Dutch courts does not make the process illegal.¹³⁴ *Third*, the decisions of the Single Judge denying Bemba leave to appeal any of the decisions concerning the review and transmission of the Intercepts to the Prosecution, were issued within his discretion.¹³⁵ *Fourth*, the alleged prejudice suffered in the Main Case is irrelevant to any consideration of whether evidence should be excluded in this case.¹³⁶

¹³⁰ See above fn. 127.

¹³¹ Even the legal opinion attached to the Bemba Motion acknowledges that the decision of the Dutch Magistrate to "marginalise" the Dutch prosecutor in the process does not constitute a violation of Bemba's rights, and arguably, could have afforded even more protections that normally given under Dutch law. See ICC-01/05-01/13-1799-Conf-AnxC, p. 9.

¹³² *Contra* Bemba Motion, paras. 72-84.

¹³³ *Contra* Bemba Motion, para. 73.

¹³⁴ *Contra* Bemba Motion, paras. 74-75.

¹³⁵ *Contra* Bemba Motion, paras. 78-82.

¹³⁶ *Contra* Bemba Motion, paras. 69-70, 83.

d. Alleged failure to call a proper witness to authenticate the Intercepts and the CDRs does not amount to a violation of article 69(7)

45. Not calling a certain type of witness to authenticate an item of evidence does not amount to a violation of article 69(7) either.¹³⁷ Nor is there such a requirement under the Statute. In any event, the burden lies with the Defence to demonstrate the same – which they fail to do. And, if relevant at all, these can only constitute factors for the Chamber’s consideration of the relevant evidence under article 69(4).

iii. Arido’s statement to the French authorities

46. Arido’s attempt to exclude his 23 November 2013¹³⁸ and 17 January 2014¹³⁹ statements to the French authorities¹⁴⁰ pursuant to article 69(7) should be summarily dismissed.

47. *First*, the Chamber has already decided the issue during the course of this case. In its 30 October 2015 “Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible” (“Inadmissibility Decision”),¹⁴¹ the Chamber found that Arido’s statements to the French authorities on 23 November 2013 and 17 January 2014 “were not obtained by means of a violation of the Statute or internationally recognised human rights.”¹⁴² Notably, the Chamber’s findings rejected, *inter alia*, Arido’s argument that “the statements were taken in violation of Mr. Arido’s fundamental to remain silent [*sic*].”¹⁴³

¹³⁷ *Contra* Kilolo Motion, paras. 68-73.

¹³⁸ CAR-OTP-0074-1065-R02 (“23 November 2013 Statement” given pursuant to a “*Garde à Vue*” procedure).

¹³⁹ CAR-OTP-0077-0169 (“17 January 2014 Statement” given pursuant to an “*Enquête Préliminaire*” procedure).

¹⁴⁰ Arido Motion, paras. 10-23. Insofar as Arido alludes to the exclusion of his further 17 January 2014 statement to the French authorities (*see* para. 20), the same arguments advanced in this response apply equally.

¹⁴¹ ICC-01/05-01/13-1432, para. 4 (noting the Arido’s argument that the statements are “inadmissible under article 69(7) of the Statute”).

¹⁴² ICC-01/05-01/13-1432, para. 28.

¹⁴³ ICC-01/05-01/13-1241-Conf, para. 34. *See also* ICC-01/05-01/13-1432, para. 26.

48. Having previously sought¹⁴⁴ and been denied¹⁴⁵ the exclusion of his prior statements to the French authorities on article 69(7) grounds, Arido cannot simply re-litigate the matter as of right. Nonetheless, and inappropriately, the Arido Defence seeks to do just that, recycling verbatim the arguments it advanced in response to the Prosecution's Third Bar Table Motion¹⁴⁶ seeking the exclusion of the two statements.

49. Arido's Motion does not set out any plausible new argument for the exclusion sought, and further does not explain either Arido's failure to timely seek leave to appeal the Inadmissibility Decision, or to advance any justification for reconsideration at this stage.

50. *Second*, even if the Chamber were to consider Arido's arguments *de novo*, they would still fail on the merits for the reasons the Chamber previously found, namely that (1) the statements were taken by French authorities "on French territory and in compliance with French law";¹⁴⁷ (2) Arido was properly informed of the charges against him concerning, *inter alia*, corruptly influencing witnesses and knowingly presenting 14 items of false or forged evidence in violation of the Statute;¹⁴⁸ and (3) his French counsel's qualifications or lack of access to the case record did not necessarily render their assistance ineffective.¹⁴⁹ Nothing in Arido's motion calls the Chamber's prior dispositive findings into question.

¹⁴⁴ ICC-01/05-01/13-1241-Conf, paras. 33-56.

¹⁴⁵ ICC-01/05-01/13-1432, para. 28.

¹⁴⁶ Compare e.g. Arido Motion, para. 13 with ICC-01/05-01/13-1241-Conf, para. 51 (setting out verbatim extracts of prior arguments).

¹⁴⁷ See ICC-01/05-01/13-1432, para. 24. *Contra* Arido's Motion, para. 15 (arguing that Arido's counsel Géraud Gellée "had no experience in ... international criminal law"). Notably, the Defence adduce nothing to show that Gellée had no such experience. The fact that he specialised in other fields of law does not substantiate either this sweeping claim, or Arido's contention that "Gellée could not provide adequate and effective legal advice in the areas required by Mr. Arido – international criminal law and procedure." See Arido's Motion, para. 15.

¹⁴⁸ See ICC-01/05-01/13-1432, para. 25. *Contra* Arido's Motion, paras. 12-17.

¹⁴⁹ See ICC-01/05-01/13-1432, para. 26. *Contra* Arido's Motion, paras. 15-17. See also ICC-01/05-01/13-1241-Conf, paras. 40-44 (arguing, *inter alia*, a suspect's right to be assisted by Registry appointed counsel), 46 (arguing that counsel Gellée lacked knowledge in international criminal law, ICC procedures, and noting his specialty in French labour law – all arguments rehashed in Arido Motion, paras. 15-17).

51. *Third*, although Arido now contends that his counsel's failure to sign his statements at their taking in November 2013 and January 2014 violated rule 111 of the Rules,¹⁵⁰ this technicality in no way precludes their admissibility pursuant to article 69(7).

52. Such a technicality has no impact on the reliability of the processes through which Arido's statements were obtained, or their unquestionable voluntariness in the circumstances.¹⁵¹ This is not only clearly discernible from the statements themselves,¹⁵² but underscored by Arido's signed acknowledgements of his rights under the Statute and under French law.¹⁵³ Arido had the opportunity to consult with his assigned counsel before providing his statements to the French authorities.¹⁵⁴ Moreover, his statements reflect the presence of his counsel throughout the respective processes, and specifically – per French procedures – show their opportunity to intercede during the process and to pose additional questions.¹⁵⁵

iv. Arido's emails

53. Arido fails to articulate any cogent ground establishing that the Emails were obtained in violation of the Statute or internationally recognised human rights.

¹⁵⁰ Arido Motion, paras. 18-20.

¹⁵¹ See e.g. CAR-OTP-0077-0169, at 0170 (reflecting Arido's response to the administration of his article 55(2) and rule 112 rights in the presence of his counsel Moncef Kdhir, «*Je suis vraiment très heureux de pouvoir avoir la possibilité de m'exprimer aujourd'hui*» and, furthermore, reflecting the voluntary nature of the interview, in particular that «*Cet entretien s'inscrit dans une démarche volontaire et fait suite à votre demande ainsi que celle de votre avocat, Me KDHIR, d'être interrogé par des représentants du Bureau du Procureur de la Cour Pénale Internationale*»).

¹⁵² See CAR-OTP-0074-1065-R02, at 1065 (expressly noting the presence of counsel Gellée), 1070, (inquiring whether he wished to pose any supplementary questions before closing the *Garde à Vue* procedure). See also 17 CAR-OTP-0077-0169, at 0176 (reflecting counsel Khdir's intervention in the proceeding, adding his observations regarding Arido's interview).

¹⁵³ See CAR-OTP-0074-1065-R02; CAR-OTP-0074-1060. See also CAR-OTP-0077-0169, at 0169-0170.

¹⁵⁴ See CAR-OTP-0074-1061, at 1064 (noting Arido's interview with counsel Gellée prior to giving his statement); CAR-OTP-0077-0169, at 0170 (showing that Arido's interview was conducted at his instance).

¹⁵⁵ See CAR-OTP-0074-1065-R02, at 1070; CAR-OTP-0077-0169, at 0176; CAR-OTP-0077-0164 (noting, «*Narcisse ARIDO insiste sur le caractère volontaire de son audition et son intention de collaborer avec les services de la CPI*»). See also, CAR-OTP-0078-0125 (documenting counsel Khdir's interventions in respect of the 17 January 2014 Statement).

Instead, his claim rests on the sole assertion that the Prosecution commenced its review of the Emails “without having taken any precaution in order to prevent access to irrelevant, private, prejudicial or privileged material”.¹⁵⁶ As set out below, this argument is unfounded.

a. The Emails were lawfully obtained

54. The Prosecution’s collection of the Emails was lawful and necessitated by the specific features of the proceedings, and did not unduly infringe Arido’s rights. As Arido concedes,¹⁵⁷ the Prosecution obtained the Emails *via* two sources. *First*, pursuant to an arrest warrant issued by the Single Judge,¹⁵⁸ Arido was arrested on 23 November 2013 and his personal computer seized. On 29 January 2014, after the unsealing and forensic acquisition of the contents of Arido’s computer, a copy thereof¹⁵⁹ containing his Yahoo emails was transmitted to the Prosecution by the Registry¹⁶⁰ on the instruction of the Single Judge.¹⁶¹ *Second*, on 23 January 2014, the Prosecution also obtained the contents of Arido’s Yahoo email accounts pursuant to RFAs to the French authorities in accordance with the Statute and national laws.¹⁶²

55. The collection of this evidence was necessary for investigating the crimes for which Arido was arrested; a permissible interference with the right to privacy under international human rights law.¹⁶³ In his decision issuing the arrest warrant, the Single Judge found that “there are reasonable grounds to believe that [Arido]

¹⁵⁶ Arido Motion, para. 33.

¹⁵⁷ Arido Motion, para. 30.

¹⁵⁸ See ICC-01/05-01/13-1-Red2-tENG.

¹⁵⁹ See ICC-01/05-01/13-299-Conf-Anx6.

¹⁶⁰ See CAR-OTP-0075-0122.

¹⁶¹ See ICC-01/05-01/13-243-Conf-Corr, para. 6.

¹⁶² See ICC-01/05-01/13-140-Conf, paras. 11, 18; ICC-01/05-01/13-234-Conf, paras. 9, 30-31; CAR-OTP-0075-0022; CAR-OTP-0091-0546; CAR-OTP-0091-0551; CAR-OTP-0075-0027, at 0027.

¹⁶³ For instance while noting the importance of protecting personal data, the European Court of Human Rights held that: “the interests of a patient and the community as a whole in protecting the confidentiality of medical data may be outweighed by the interest of investigating and prosecuting crime and in the publicity of court proceedings, where such interests are shown to be of even greater importance.” See *Avilkina and others v. Russia*, Judgment, ECHR, Application No. 1585/09, 6 June 2013, para. 45.

provided false or forged evidence [...] which the Defence attempted to tender into the record of the Case”.¹⁶⁴ Even prior to the issuance of the arrest warrant, the Prosecution had reasonable grounds to believe that the Emails were instrumental to supplying the Defence in the Main Case with allegedly false evidence for which Arido was listed as the source.¹⁶⁵ These grounds established a sufficient basis for the collection of the Emails to further investigate Arido’s alleged involvement in the commission of the crimes. Indeed, the review of the Emails revealed that Arido forwarded to Kilolo an email on 1 May 2012 attaching seven of the allegedly forged documents subject to the Arrest Warrant issued by the Single Judge.¹⁶⁶

56. The Prosecution’s collection of Emails from the French authorities was thus warranted and proportionate. In particular, in its request,¹⁶⁷ the Prosecution limited the emails sought to the time-frame relevant to the case.¹⁶⁸ The French authorities furnished the Emails, in accordance with the national laws.¹⁶⁹

b. The Prosecution’s review of the Emails did not infringe Arido’s rights

57. Contrary to his submissions,¹⁷⁰ Arido’s right to privileged communications was never violated. Arido’s only nexus with the Main Case was his potential status as a *witness*, which ultimately did not materialize due to his decision not to testify. In any event, this potential status does not, in any way, bestow on him any Client-Counsel privilege. While such privilege may be considered for Kilolo with respect to his communications with Bemba in the Main Case, it does not extend to Arido as he never represented Bemba as Counsel. Unlike Kilolo’s communications with Bemba, the communications of Arido and Babala do not trigger the Client-Counsel privilege.

¹⁶⁴ ICC-01/05-01/13-1-Red2-tENG, para. 19.

¹⁶⁵ See ICC-01/05-01/13-749, para. 41.

¹⁶⁶ CAR-OTP-0075-0259. See also ICC-01/05-01/13-749, para. 41.

¹⁶⁷ See ICC-01/05-01/13-140-Conf, para. 11.

¹⁶⁸ See CAR-OTP-0091-0546, at 0549; CAR-OTP-0091-0551, at 0554.

¹⁶⁹ See CAR-OTP-0075-0027, at 0027.

¹⁷⁰ See Arido Motion, paras. 33-35.

58. With this in mind, the Prosecution sought and obtained Arido's emails from the French authorities, duly informing the Single Judge and the Parties of this fact on several occasions during the pendency of these proceedings.¹⁷¹ The Prosecution's understanding of the non-privileged status of Arido's emails was further confirmed by the Single Judge who accepted this practice and did not prohibit or limit the Prosecution's access to Arido's emails. On the contrary, and consistent with the Prosecution's position, the Single Judge instructed the Registry to provide the Prosecution with the material seized from Arido and Babala – including Arido's computer containing his emails – without subjecting these materials to any vetting by the Independent Counsel, because, as the Single Judge determined, they “were not of a privileged nature.”¹⁷²

59. Arido's Motion omits mention of the Single Judge's clear qualification of the material seized from Arido, including his emails, as non-privileged. Instead, the Arido Defence only refers to the Single Judge's 25 April 2014 “Decision on the Prosecution's Request to Refer Potentially Privileged Materials to Independent Counsel” (“25 April 2014 Decision”),¹⁷³ arguing that the Single Judge “appointed an independent counsel to review the emails in order to make sure emails made available to the Prosecution were relevant and not of a privileged nature”,¹⁷⁴ and that the Prosecution should have followed such procedure when it obtained the emails in question.¹⁷⁵ Arido's argument is misplaced, when the 25 April 2014 Decision is considered in its proper context. *First*, the 25 April 2014 Decision concerns the review of two sealed DVDs containing commingled materials for Kilolo, Mangenda, Arido and Babala that could not be viewed or separated without accessing the potentially privileged materials of Kilolo and Mangenda. *Second*, contrary to Arido's suggestion,

¹⁷¹ See ICC-01/05-01/13-140-Conf, paras. 11, 18, ICC-01/05-01/13-234-Conf, paras. 9, 30-31.

¹⁷² ICC-01/05-01/13-243-Conf-Corr, para. 6.

¹⁷³ ICC-01/05-01/13-366-Conf.

¹⁷⁴ Arido Motion, para. 34.

¹⁷⁵ Arido Motion, para. 35.

the 25 April 2014 Decision never qualified or singled out his emails as privileged. *Third*, Arido's reading of the 25 April 2014 Decision contradicts the Single Judge's previous qualification of the same material as non-privileged.¹⁷⁶

60. The Prosecution's access to the Emails was also warranted by the specific features of the proceedings and did not unduly infringe Arido's rights. In particular, the Prosecution's review of the Emails was both warranted and proportionate, balancing the Prosecution's duties to investigate the crimes against Arido's rights. In its review of the Emails, the Prosecution employed key-words search to limit its review to only those emails relevant - in the broader sense - to salient issues in the case.¹⁷⁷ The Prosecution's targeted review excluded the majority of the Emails and only yielded those emails that are relevant to the case - approximately 10% of the Emails.¹⁷⁸ Further, the Prosecution ensured that any confidential information contained in the Emails was protected from the Public.

61. As to the private emails referred to in Arido's Motion,¹⁷⁹ consistent with its targeted review of the Emails, the Prosecution's initial assessment was that these private emails were irrelevant.¹⁸⁰ For this reason, they were not disclosed until matters put at issue by the Arido Defence concerning Witnesses D24-0001 and D24-0013 rendered them of obvious relevance.¹⁸¹ Deciding on Arido's request to preclude the Prosecution from relying on the private emails at trial, the Chamber rejected the request and concluded that the Prosecution's disclosure of the private emails "was 'strictly necessary by the specific features of the proceedings' and did not unduly infringe upon Mr Arido's dignity or privacy."¹⁸²

¹⁷⁶ See ICC-01/05-01/13-243-Conf-Corr, para. 6.

¹⁷⁷ See e.g. CAR-OTP-0082-0429, at 0432.

¹⁷⁸ The Prosecution disclosed approximately 575 items out of 5,000 messages containing approximately 2,000 attachments and corresponding metadata.

¹⁷⁹ See Arido Motion, paras. 24-28.

¹⁸⁰ See ICC-01/05-01/13-1711, para. 4 (*citing* ICC-01/05-01/13-1702-Conf, para. 3).

¹⁸¹ See ICC-01/05-01/13-1711, para. 5 (*citing* ICC-01/05-01/13-1702-Conf, paras. 3-6).

¹⁸² ICC-01/05-01/13-1711, para. 6 (footnote omitted).

D. The Defence Fails to Show that Any Purported Violation Casts Doubt on the Reliability of the Evidence or Would be Antithetical to and Would Seriously Damage the Integrity of the Proceedings

62. Even assuming any of the purported infringements to the Statute or the international human rights implicated by the Defence, the Defence fails to show that this casts doubt on the reliability of the evidence or that its admission would be antithetical to and would seriously damage the integrity of the proceedings.

i. None of the purported infringements undermine the reliability of the evidence

63. The Defence fails to demonstrate that the purported violations, even if assumed true, affect the reliability of the evidence. In particular, none demonstrate that the contents of the seized documents could have been any different.¹⁸³

64. *First*, with regards to the Western Union records, Arido's argument that the Prosecution's allegedly unlawful collection of that evidence "casts substantial doubt on the reliability of the evidence"¹⁸⁴ is unexplained. His reliance on P-0267's statements that "human mistakes may appear when [Western Union agents or contractors] enter the data" goes to the weight of the evidence generally;¹⁸⁵ not whether the reliability of the evidence was affected by any alleged human right or statutory violation.

¹⁸³ See ICC-01/04-01/06-803-tEN, para. 85 (rejecting the Defence's 69(7) argument on the basis that the "infringement of the principle of proportionality did not affect the reliability of the evidence seized from [REDACTED]'s home on the ground that had the search and seizure been conducted in full adherence to the principle of proportionality, the content of the Items Seized would not have been different.").

¹⁸⁴ Arido Motion, para. 49.

¹⁸⁵ Arido Motion, para. 46.

65. *Second*, Bemba's and Kilolo's arguments that the Intercepts (and, in Kilolo's case, the CDRs) should be excluded because their reliability is affected by (a) the Prosecution's failure to call a witness who was involved in the interception process (or any other "informed person"¹⁸⁶),¹⁸⁷ and (b) the fact that at least Kilolo and Mangenda were informed of the article 70 investigation,¹⁸⁸ fail on their face. These arguments do not establish any link between the first prong of the test required by article 69(7), namely, a violation of an international human right or of the Statute, and the reliability of the collected evidence.

66. Further, Kilolo's arguments that the "shortcomings" he lists in relation to the CDR and Intercepts resulted in serious doubt as to their reliability appear to be based on the fallacious premise that Mr Pluijmers had to be "sure" about their reliability and provenance.¹⁸⁹ Even if these alleged shortcomings amounted to violations under 69(7) – and they do not come close – standards for evaluating evidence before this Court do not require the Chamber to be satisfied "beyond reasonable doubt"¹⁹⁰ as to the reliability of evidence in order to admit it.

67. Contrary to Bemba's contentions,¹⁹¹ it was open to him to challenge the reliability and authenticity of the Intercepts in response to the Prosecution's First Request for the Admission of the Evidence from the Bar Table,¹⁹² and when cross-examining P-0366, Rene Pluijmers. At best, these arguments only raise issues for the Chamber's consideration of the relevant evidence under article 69(4) – and then, should be rejected as unfounded in any case.

¹⁸⁶ Bemba Motion, para. 94 e.

¹⁸⁷ Bemba Motion, paras. 94 e-99, Kilolo Motion, paras. 68-74.

¹⁸⁸ Bemba Motion, paras. 97-98.

¹⁸⁹ Kilolo Motion, para. 75.

¹⁹⁰ Kilolo Motion, para. 75.

¹⁹¹ Bemba Motion, para. 96.

¹⁹² ICC-01/05-01/13-1074-Conf.

68. Arido advances no argument as to why the reliability of his statement to the French authorities or his Emails is affected by the violations he alleges.

ii. None of the purported infringements undermine the integrity of the proceedings

69. None of the Defence's arguments demonstrate a human rights violation so egregious as to warrant the exclusion of evidence.¹⁹³

70. *First*, with respect to the Western Union records, Mangenda's self-serving list of factors for assessing whether the purported infringements undermine the integrity of the proceedings¹⁹⁴ are not only unnecessary and incomplete, but undermine his position. Kilolo, Mangenda, and Babala omit the fact that the discussions concerning the screenings were held with Western Union representatives and in the presence of representatives from the Austrian Prosecutor's Office.¹⁹⁵ While Prosecution personnel were involved, Western Union, not the Prosecution, controlled the search as only they had direct access to the information;¹⁹⁶ a fact found by the *Lubanga* Chamber to mitigate the seriousness of the offence.¹⁹⁷ Further, there is no evidence that the Prosecution "wilful[ly] and knowing[ly]" violated Austrian law.¹⁹⁸ Mangenda's argument, conspicuously devoid of any reference to the factual record, is undermined by a fact buried in a footnote; namely that the Austrian authorities had advised the Prosecution that it could engage in such informal screenings.¹⁹⁹ Thus, *arguendo* if there was a breach, there is no indication other than inadvertence and in

¹⁹³ See ICC-01/04-01/06-803-tEN, para. 86 ("only a *serious* human rights violation can lead to the exclusion of evidence.") (emphasis added).

¹⁹⁴ Mangenda Motion, para. 40.

¹⁹⁵ See ICC-01/05-01/13-T-35-CONF-ENG ET, pp. 51-53, lns. 3-18; ICC-01/05-01/13-T-34-CONF-ENG CT, pp. 33-36, lns. 4-23.

¹⁹⁶ *Contra* Kilolo Motion, para. 49; Mangenda Motion, para. 42.

¹⁹⁷ ICC-01/04-01/06-1981, para. 47.

¹⁹⁸ *Contra* Mangenda Motion, para. 43; Kilolo Motion, para. 51.

¹⁹⁹ See Mangenda Motion, fn. 60. See also CAR-OTP-0092-0018.

good faith.²⁰⁰ Furthermore, any potential breach of Austrian law was mitigated by a judicial order subsequently issued by the Austrian judicial authorities.²⁰¹ That order, as noted above, was made in full disclosure by the Prosecution of the fact that the screenings had occurred. This fact also highlights that the breach was “not of a particularly grave kind” as it was ultimately permitted by the Austrian authorities notwithstanding its knowledge of the screenings.²⁰² Finally, the Defence also ignore other salient factors. For instance, as in *Lubanga*,²⁰³ there is no indication that the Prosecution used force or any other coercive means or threat thereof to obtain the Western Union records.

71. *Second* the Bemba Defence’s arguments in support of the claim that the integrity of the proceedings or reliability of the evidence was affected by the manner in which the Intercepts were obtained merely restate the law, or repeat the recitations of alleged violations of rights that are rebutted elsewhere in this response.²⁰⁴ The sole argument concerning the impact on the integrity of the proceedings that the Defence adduces concerns the claim that Bemba was not informed of the interception or article 70 investigation.²⁰⁵ Even if true,²⁰⁶ Bemba cannot claim that he reasonably expected to benefit from the protection of privilege in committing crimes through its abuse.²⁰⁷ The Bemba Defence seems to further argue that any reliance on intercepted evidence where lawyer-client privilege was implicated would automatically lead to an exclusion of the evidence just because the suspect was not informed of the interception²⁰⁸ – which is contradicted by the plain language of article 69(7). Finally,

²⁰⁰ See *Prosecutor v. Haraqija and Morina*, Decision on Haraqija and Morina’s Second Request for a Declaration of Inadmissibility and Exclusion of Evidence, Case No. IT-04-84-R77.4, 27 November 2008, paras. 20, 26; *Prosecutor v. Brđanin*, Decision on the Defence “Objection to Intercept Evidence”, Case No. IT-99-36-T, 3 October 2003, para. 63.

²⁰¹ *Contra* Mangenda Motion, para. 45; Kilolo Motion, para. 52; Babala Motion, paras. 43-58.

²⁰² ICC-01/04-01/06-1981, para. 47.

²⁰³ ICC-01/04-01/06-803-tEN, para. 77.

²⁰⁴ *Contra* Bemba Motion, paras. 85-94.

²⁰⁵ Bemba Motion, para. 93.

²⁰⁶ The Prosecution has alleged that Bemba was in fact informed of the article 70 investigation by Kilolo and Mangenda, causing him to take remedial measures. See ICC-01/05-01/13-1110-Conf, paras. 56-57.

²⁰⁷ ICC-01/05-52-Red2, paras. 3-4; ICC-01/05-01/13-947, para. 14. *Contra* Bemba Motion, paras. 91-94.

²⁰⁸ Bemba Motion, para. 93.

even if some ostensibly privileged information was transmitted to the Prosecution, the Defence fails to demonstrate any unfair prejudice in its use.

72. Kilolo's argument that the impact of the alleged violations in relation to the CDRs and the Intercepts is "a breach of the right to privacy and admission antithetical to the integrity of the proceedings"²⁰⁹ is as unsubstantiated as the similar argument he makes in relation to the impact on reliability of this evidence.²¹⁰ And, Mangenda's argument that the "deviations from the procedures", even if *not* constituting independent violations, should be deemed as factors in assessing how the integrity of the proceedings would be affected by their admission because they were procured on the basis of a previous violation of rights, is specious. As elaborated above, the Statute does not provide for the exclusion of derivative evidence. His argument fails both because it does not establish that the first prong of article 69(7) is met in relation to this evidence, or substantiate why integrity of the proceedings would be affected by its admission.

73. *Third*, the technicality identified by the Arido Defence in no way shows that the admission of his 23 November 2013 and 17 January 2014 statements could in any way be antithetical to, or seriously damage the integrity of the proceedings.²¹¹ To the contrary, the facts and circumstances surrounding the two statements demonstrate beyond a reasonable doubt that Arido voluntarily gave them in full knowledge of his rights under both national law and the Statute, in the presence of, and on the advice of his counsel.

74. *Fourth*, Arido fails to substantiate his argument that "the admissibility of [the Emails] would be antithetical to and would seriously damage the integrity of the

²⁰⁹ Kilolo Motion, para. 76.

²¹⁰ *See above*, paras. 66-67.

²¹¹ *Contra* Arido Motion, para. 23.

proceedings”.²¹² His mere assertion to that effect is wholly unsubstantiated and warrants its summary dismissal.

IV. Relief Requested

75. For the foregoing reasons, the Chamber should dismiss the Motions.



Fatou Bensouda, Prosecutor

Dated this 1st day of June, 2016
At The Hague, The Netherlands

²¹² Arido Motion, para. 37.