Cour
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International
Criminal
Court

Original: **English**

No.: **ICC-01/05-01/13**
Date: **21/06/2016**

**TRIAL CHAMBER VII**

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

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC**

**IN THE CASE OF**

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

*Public*
**Public Redacted Version of "Defence Request for Disclosure Concerning Prosecution Requests for Assistance, Correspondence, and Domestic Records"**

**Source:** **Defence for Mr. Jean-Pierre Bemba Gombo**

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

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**Other**

## Introduction

1. The Defence for Jean-Pierre Bemba respectfully requests the Trial Chamber to order the Prosecution to disclose, in accordance with its obligations under Rule 77 and as specified in Annex A to this filing, its requests for assistance ("RFA" or "RFAs") and records on domestic proceedings pertaining to the execution of the RFAs ("domestic records", and collectively, "Requested Records").

2. The Requested Records relate to the Prosecution's acquisition of evidential materials such as telecommunication records, financial records, email correspondence, witness statements. In light of previously disclosed documents, the Prosecution appears to be in possession or control of the Requested Records.

3. The Requested Records shed light on:

   a. The timing and legality of the Prosecution's acquisition of confidential Defence information from the Main case;

   b. The domestic procedures employed to interview Defence witnesses, who are now being relied upon by the Prosecution; and

   c. The content of witness statements in which they are referenced.

4. The Defence requires access to the Requested Records in order to mount an effective and informed challenge to the admissibility of evidence that is produced by virtue of these records, the credibility of any witness testimony procured in accordance with domestic procedures, and the credibility and reliability of witnesses testifying in relation to such records.

5. The documents set out in Annex A should be considered to be an illustrative and not exhaustive account of the Requested Records. The Prosecution's duty to disclose information under Rule 77 exists independently of any specific request from the Defence.

6. Accordingly, should the Trial Chamber determine that the requested categories of materials fall within the Prosecution's disclosure obligations, the Prosecution should also disclose, *proprio motu,* any other records, correspondence, or documents in its custody of a similar nature.

**Confidentiality**

7. This request and its Annexes are classified as "Confidential", as they refer to filings and material of the same designation. A public redacted version will be filed forthwith.

**Procedural History**

8. On 10 July 2015, the Defence for Mr. Bemba ("the Defence" or "Bemba Defence") requested[1] the Prosecution to disclose, *inter alia*, the following information that is in custody of the Prosecution but not yet provided to the Defence:

i. original RFAs sent to national authorities;

ii. domestic judicial orders or decisions authorising the implementation of the RFA, and related correspondence or records; and

iii. information concerning the domestic authorities, who executed the RFAs.

9. The table annexed to the correspondence, albeit not exhaustive, identified a total of 31 items and specified the information relating to the sought records that was known to the Defence at that point in time.[2]

10. The Defence also clarified that the request encompassed information concerning D-55.

[1] See Annex B.
[2] See Annex C.

11. On 14 July 2015, the Defence sent an addendum to its 10 July letter, requesting the disclosure of any correspondence between the Prosecution and [REDACTED] authorities in relation to the modalities of the interview between the Prosecution and P-7, D-57 and D-64.[3]

12. On 28 July 2015, the Prosecution responded that they are "not in a position to properly address" the request due to the absence of "a specific and clear basis for the disclosure of each item sought".[4] Regarding the requested materials concerning RFAs, the Prosecution claimed that either they have been disclosed, or fall outside the scope of Rule 77.

13. The Prosecution also cited Article 87(3) of the Statute as a basis for their refusal to disclose the Requested Records.

14. On 20 July 2015, Arido Defence requested for the disclosure of RFAs to the Cameroonian authorities and relevant correspondence thereafter. The Prosecution rejected the request on 27 July 2015.[5]

15. On 3 August 2015, Mangenda Defence requested the disclosure of RFAs sent to the Austrian authorities pertaining to the collection of financial records. The Prosecution rejected their request on 4 August 2015 on the grounds that they did not consider them to be of material relevance to the preparation of the Defence.[6]

## Submissions

**<u>Requested Records</u>**

16. The Requested Records are comprised of two categories of documents.

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[3] See Annex D.
[4] See Annex E.
[5] This correspondence was submitted as Confidential Annex 5 to the Arido Defence Request for a Disclosure Order, dated 10 August 2015: ICC-01/05-01/13-1129-Conf-Anx5.
[6] See Annex F.

17. The first category consists of RFAs, which were addressed by the Prosecution to the national authorities of the Netherlands, Belgium, France, [REDACTED], Austria, Cameroon, Democratic Republic of Congo, Germany and Central African Republic.

18. In response to the RFAs, the national authorities provided the following types of material to the Prosecution:

i. Telecommunication records: intercepts, call data records ("CDR" or "CDRs"), customer information such as user identity and activation date, and phone movement surveillance results;
ii. Financial records: money transfer records, bank account information, and records of bill payment;
iii. Email: address, content of specific correspondence, and full access to account;
iv. Materials collected from search and seizure; and
v. Witness interview records and statements.

19. The second category relates to the records of domestic proceedings in relation to the execution of RFAs.

**<u>The Prosecution appears to be possession or control of the Requested Records</u>**

*The Requested Records appear to exist*

*Category 1*

20. As set out in Annex A, the requested RFA has either been referred to in disclosed documents, for example, witness statements,[7] or a letter from national

[7] For example, in CAR-OTP-0084-0039, Mr. Smetana refers to an Austrian Prosecution Office's request dated 5 November 2013, bearing the reference number of "314 Hst 159/13x".

authorities in response to the RFA,[8] or, it must exist by virtue of the fact that the Prosecution does not possess the legal or physical capacity to produce the evidence in question.[9]

*Category 2*

21. Regarding the requested domestic records, the "Source" listed in the E-Court system does not have the competence to produce the respective evidence.[10] As such, there either must be domestic judicial records concerning the acquisition of the evidence, or the evidence must have been obtained in an illegal manner. Either way, the Defence has the right to receive the documentation which would support the conclusion in question.

22. As an example, the Prosecution has indicated that the Austrian Embassy in the Netherlands is the source of money transfer records from Western Union.[11] The Austrian ICC Cooperation Act, however, requires ICC RFAs to be transferred to the competent public or private authorities to execute,[12] and further stipulates that all related records must be preserved.[13]

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[8] See for example. CAR-OTP-0070-0001-0001 in which the Austrian authorities note that the attached evidential materials are produced in accordance with the RFA on 2 November 2012, bearing the reference number of "OTP-CAR/AUT-1/ID-pt".

[9] See CAR-OTP-0073-0042, which is Express Union's reply to the Cameroonian authorities' request for information on its customers. Although no reference is made to an RFA from the ICC OTP, its existence is implied in the fact that the requested customer information has been provided to the OTP.

[10] See, for example, CAR-OTP-0073-0023, which is a letter from the [REDACTED], [REDACTED] [REDACTED]. The "Source" identified in the E-Court system is, however, [REDACTED], [REDACTED] [REDACTED].

[11] CAR-OTP-0070-0004, CAR-OTP-0070-0005, CAR-OTP-0070-0007, CAR-OTP-0070-0007.

[12] Article 8, Federal Law no 135: Cooperation with the International Criminal Court (Austria), 1 October 2002

[13] Federal Law no 135: Cooperation with the International Criminal Court (Austria), 1 October 2002, Article 14 (emphasis added)
Judicial assistance and procedural provisions for the execution of requests

1. Judicial assistance shall be provided to the International Criminal Court *in accordance with the legislation in force governing judicial assistance in criminal matters*.
2. Requests from the International Criminal Court for compliance with certain formal provisions shall be executed *when these are compatible with the principles of Austrian criminal procedure*. Audio and video recording and transmission of the assistance process shall be permitted whenever sought by the International Criminal Court.

*The Requested Records appear to be in possession of the Prosecution*

23. As the entity which requested the information and formulated the RFAs, the Prosecution obviously possesses the requested RFAs.

24. In terms of the requested domestic records, in many cases, their existence is mentioned by the respective national authorities in correspondence with the Prosecution.[14] The Prosecution has also not denied that it is in possession of such records; it has, rather, denied that they are disclosable.

25. Even if there are some materials which are not in the possession of the Prosecution, the Defence would be better placed to submit a targeted and substantiated request to national authorities <u>after</u> it has first received all information which is in the possession of the Prosecution. This includes both the RFAs and any undisclosed correspondence, which confirm the existence and dates of domestic judicial records.

26. In such circumstances, even if the Defence cannot compel the Prosecution to conduct specific investigations or to request specific judicial records from national authorities, the Defence can request the Prosecution to disclose information within its custody, which would facilitate the ability of the Defence to conduct its own investigations. The disclosure to the Defence of all undisclosed RFAs, correspondence and records would ensure that all relevant issues in this case are

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3. Members and investigators of the International Criminal Court and others involved in the proceedings and their legal representatives may be authorised, at the Court's request, to be present at and participate in the assistance process. To this end, they shall be informed of the time and place of the execution of assistance activities.
4. A request from the International Criminal Court for criminal police investigations or information may also be executed without any referral to national courts via the Federal Ministry of the Interior pursuant to Austrian law.

[14] See CAR-OTP-0073-0610 (*Procés verbal de requisition)* which refers to the transfer of domestic records from Cameroon to the OTP. See also correspondence from the French Embassy: CAR-OTP-0079-0246, CAR-OTP-0074-1044.

investigated, and would thus be consistent with the Prosecution's obligation under Article 54(1)(a) of the Statute to "establish the truth".[15]

**<u>The Requested Records are material to the Defence's preparations of the trial</u>**

*Materiality test*

27. Pursuant to Rule 77, the Prosecution has the obligation to disclose items that are *material* to the Defence's preparation of the trial.

28. To determine the materiality, the ICC and other international criminal courts and tribunals have consistently taken the following approach:[16]

i. The defence must demonstrate that the requested material is relevant to the preparation of the defence on a *prima facie* basis.[17]

ii. The test for "materiality" is whether the requested items are *relevant* to the preparation of the defence case.[18]

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[15] ICC-01/09-02/11-756, para. 10.

[16] STL-11-01/PT/AC/AR126.4, *Prosecutor v. Ayyash et al*, Decision on Appeal by Counsel for Mr Oneissi Against Pre-Trial Judge's 'Decision on Issues Related to the Inspection Room and Call Data Records', 19 September 2013 ("*Ayyash* Decision"), para 21.

[17] See *Prosecutor v. Ruto and Sang*, Public redacted version of Decision on Ruto Defence for the Appointment of a Disclosure Officer and/or the Imposition of Other Remedies for Disclosure Breaches of 9 January 2015 (ICC-01/09-01/11-1774-Conf), 16 February 2015, ICC-01/09-01/11-1774-Red; *Prosecutor v. Banda and Jerbo*, Decision on Application for Leave to Reply to Defence Observations on the Annexes to Prosecution Filing ICC-02/05-03/09-517-Red (ICC-02/05-03/09-529-Conf) and related matters, 10 February 2014, ICC-02/05-03/09-540, para. 9; *Prosecutor v. Banda and Jerbo*, Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor, 23 January 2013, ICC-02/05-03/09-443, para. 15.
See also, ICTY, *Prosecutor v. Mucic et al.*, IT-96-21-T, Decision on the Motion by the Accused Zejnil Delalic for the Disclosure of Evidence, 26 September 1996, para. 9; ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73.11, Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations, 23 January 2008 ("First *Karemera* Decision"), para. 12; ICTR, *Karemera et al. v. The Prosecutor*, ICTR-98-44-AR73.18, Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66 Violation, 17 May 2010 ("Second *Karemera* Decision"), paras 12-13; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Motion to Compel Inspection of Items Material to the Sarajevo Defence Case, 8 February 2012 ("*Karadžić* Decision"), paras 6-9; *Ayyash* Decision, para 21.

[18] See *Prosecutor v. Lubanga*, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433, para 77; *Prosecution v. Bemba*, Redacted Version of Decision on the "Defence Motion for Disclosure Pursuant to Rule 77", 29 July 2011, ICC-01/05-01/08-1594-Red, paras 17 and 21; ICC-02/05-03/09-443, para. 12. See also ICTR,

29. Following this approach, the Prosecution's disclosure obligations encompass, *inter alia*, any item that could "significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the case"[19], "undermine the prosecution case or support a line of argument of the defence"[20], "inform the defence's decision whether to call a particular witness", "assist in developing cross-examination strategy"[21], or for which access is "necessary to mount a challenge to the admissibility of evidence".[22]

30. In line with these standards, ICC Chambers have previously ordered the Prosecution to disclose, pursuant to Rule 77,

a. RFAs corresponding to information produced by national authorities, which is relied upon by the Prosecution in support of its case; [23]

b. Information and domestic decisions concerning the legality of search and seizures (including a breakdown as to what evidence was derived from the domestic search and seizure);[24] and

c. Information concerning the legality of intercept evidence, "including a list of the agencies allegedly involved in such intercepts, as well as dates and physical means by which such interception was performed".[25]

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*Prosecutor v. Bagosora et al.*, ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66 (B) of the Tribunal's Rules of Procedure and Evidence, 25 September 2006 ("*Bagosora* Decision"), para. 9; First *Karemera* Decision, para. 14; *Karadžić* Decision, para. 9; *Ayyash* Decision, para. 21.

[19] *Prosecution v. Lubanga*, Decision on the scope of the prosecution's disclosure obligations as regards defence witnesses, 12 November 2010, ICC-01/04-01/06-2624, para 16; ICC-01/05-01/08-1594-Red, para 21.

[20] ICC-01/04-01/06-2624, para. 16; ICC-01/05-01/08-1594-Red, para 21.

[21] *Prosecution v. Katanga and Ngudjolo*, Public Redacted Version of Decision on the Application by the Defence for Germain Katanga for Disclosure of the Audio Records of Interview of Witness P-219, 30 August 2010, ICC-01/04-01/07-2309-Red-tENG, para 4; ICC-01/05-01/08-1594-Red, para 20.

[22] See, *Ayyash* Decision.

[23] ICC-01/04-01/06-3017, para. 11.

[24] ICC-01/04-01/06-649, p. 4.

[25] ICC-01/04-01/10-47, p. 3, para. 16.

*The requested RFAs*

31. The requested RFAs are essential to the ability of the Defence to challenge the admissibility of evidence on the basis of reliability or legality. The RFAs also have a significant bearing on the Defence's preparation of cross-examination.

32. In terms of the first aspect, by virtue of Article 67(1)(e) of the Rome Statute, the Defence is entitled to explore issues such as reliability and legality of evidence. The Defence therefore has the corollary right to receive any information in the possession of the Prosecution which could assist it to advance arguments on such matters.

33. This line of argument, albeit self-evident, has been confirmed by both international human rights courts as well as international criminal tribunals.[26]

34. For example, the European Court of Human Rights has underscored that the right to challenge the authenticity of evidence is a fundamental component of the right to a fair trial: this includes the right to raise arguments concerning the circumstances in which the evidence was obtained.[27] In *Schenk v. Switzerland*, the Court's finding that the defendant's right to a fair trial had not been violated, notwithstanding the use of an unlawfully recorded conversation at trial, hinged on the fact that the defendant have been given the opportunity to challenge the authenticity of the recording and oppose its use, as well as to summon the police inspector responsible for the recording.[28]

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[26] See, e.g., ICC-01/04-01/06-649, p. 4 ; ECHR, *Bykov v. Russia*, App. No. 4378/02, 10 March 2009, para 90; ECHR, *Schenk v. Switzerland*, Series A No. 140, 12 July 1988, paras. 46 and 48; ECHR, *Khan v. UK*, App. No. 3539/97, 12 May 2000, para 35; ICTY, *Prosecutor v. Mucic et al.*, IT-96-21-T, Decision on the Motion by the Accused Zejnil Delalic for the Disclosure of Evidence, 26 September 1996, para. 9; See also, UN Basic Principles on the Role of Lawyers, A/Conf .144/28 Rev.1, 1990, Principle 21.

[27] See ECHR, *Bykov v. Russia*, App. No. 4378/02, 10 March 2009, para. 90: "In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence were respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy."

[28] ECHR, *Schenk v. Switzerland*, Series A No. 140, 12 July 1988, p. 29, paras. 46 and 48.

35. In the same vein, the Trial Chamber of Special Tribunal of Lebanon confirmed the right of the Defence to access materials, which would facilitate the ability of the Defence to challenge the admissibility of telecommunication data.[29] In particular, the Prosecution was ordered to disclose the Requests for Assistance concerning the collection of such data, on the basis that:

> The Defence is entitled to access the information necessary to frame their arguments for the exclusion of the evidence. Having access to the requests for information that resulted in the data being provided to the Prosecution may assist defence counsel in framing their application.[30]

36. In the current case, even if the domestic authorities technically complied with domestic procedures, the searches or intercepts might have been illegal in a substantive sense, if the searches/intercepts failed to comport with the principle of proportionality (which can be ascertained if the RFA was framed in an overly broad manner, or targeted persons, numbers or addresses who were not implicated in the charges),[31] or if the domestic procedures were initiated on the basis of incorrect or misleading information.

37. The Defence has concrete grounds to believe that this might have been the case as concerns at least some of the RFAs. For example, the Austrian authorities' response to the Prosecution request for money transfer records reflects Austria's nderstanding that the Prosecution request concerned investigations against Mr.

[29] STL, *Ayyash et al.*, Decision Reconsidering 'Decision on the Oneissi Defence Motion for Disclosure of Requests for Assistance', 7 November 2014, 6 March 2015, para. 20.
[30] STL, *Ayyash et al*, Decision Reconsidering 'Decision on the Oneissi Defence Motion for Disclosure of Requests for Assistance', 7 November 2014, 6 March 2015, para. 18.
[31] Pre-Trial Chamber I and Trial Chamber I have both found that a failure to comply with the principle of proportionality could constitute a violation of internationally recognised human rights, and thus trigger the potential application of Article 69(7) of the Statute: ICC-01/04-01/06-1981, paras. 19, 38.

Arido for genocide.[32] The Austrian Cooperation Act does not provide for judicial assistance for an Article 70 investigation.[33]

38. In terms of the relevance of the RFAs to Defence investigations or preparation for cross-examination, several witnesses were interrogated by the Prosecution or national authorities in very specific environments, which could be deemed coercive, or non-compliant with fundamental procedural guarantees under the ICC Statute. For example,

i. D-64 was arrested,[34] and interviewed in the presence of [REDACTED] police station;[35]

ii. [REDACTED] police actively participated in the interview of D-57, which took place at a [REDACTED] police station;[36]

iii. The [REDACTED] police and the ICC Prosecution spoke to D-3 in a [REDACTED] police station regarding D-3's willingness to testify as a Prosecution witness, without taking any notes or recording of these discussions, as required by Rule 112;[37] and

iv. D-55 was interviewed by [REDACTED] authorities, in the presence of the ICC Prosecution, without taking any audio or video-recording of the interview.[38]

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[32] CAR-OTP-0082-1948, at 1949. "*Völkermord*" (genocide) as in original German version: CAR-OTP-0073-0278.

[33] Austrian ICC Cooperation Act 2002. Article 2(1) of the Act provides for an obligation to fully cooperate with the ICC. The scope of the obligation is defined in Article 2(2):

> The obligation in paragraph 1 above shall consist in particular [...] in granting the Court access to information and documents concerning suspected crimes falling within its jurisdiction, providing it with judicial assistance [...]

Article 3 further clarifies the meaning of "the ICC's jurisdiction", which only covers genocide, crimes against humanity and war crimes. The Act opts out from cooperation with Article 70 investigations.

[34] CAR-OTP-0074-1091 at 1096.

[35] CAR-OTP-0074-1091 at 1092 and 1093.

[36] CAR-OTP-0077-0003 at 0015, 0016, 0017.

[37] Annex G, ICC-01/05-01/13-1098-Conf-Exp-AnxE.

[38] CAR-OTP-0074-0872-R02, specifically at 0876.

39. In declining to effect disclosure concerning the circumstances of D-55's interview, the Prosecution has asserted that the interview of D-55 was "carried out in accordance with the applicable [REDACTED] law".[39] If that is the case, then it is a matter to be established by facts in evidence, not mere assertions.[40]

40. [REDACTED] law also does not exclude the possibility of the ICC Prosecution conducting interviews on [REDACTED] territory nor does it exclude the possibility of taking full audio or video records of suspect interviews.[41] Where the application of a particular procedure involves a choice on the part of the ICC Prosecution (i.e. a choice to utilise [REDACTED] investigators rather than ICC investigators to conduct the interview, or a mixed team), and this choice resulted in less procedural protections for the witness in question, the Defence should be disclosed the full context under which such choices were made.

*The requested domestic records*

41. The requested domestic records concerning the execution of the RFAs are intrinsically linked to the legality of the collection of evidence, and are thus material to the right of the Defence to challenge the admissibility of the evidence derived from these processes. Article 69(7) of the Statute can be invoked if the evidence was obtained in violation of the Statute (if the other criteria under Article 69(7) are fulfilled). Article 93(1) of the Statute in turn, requires national authorities to comply with relevant national procedures. Depending on the nature and objective of the national procedure, a failure to comply with domestic procedures could also constitute a violation of an internationally recognised human right.[42]

[39] Annex E.
[40] ICC-02/04-01/05-371, para. 36.
[41] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED].
[42] In the Lubanga case, a failure to comply with DRC domestic law procedures rendered the search and seizure illegal, and disproportionate. This in turn, supported a finding that the search violated internationally recognised human rights (such as the right to privacy): ICC-01/04-01/06-1981.

42. The procedures employed by national authorities are also relevant to the reliability of the evidence. For example, it is apparent that certain CDRs have been edited by national law enforcement agencies, after they were produced by the telecommunication service providers, and before they were transferred to the Prosecution.[43] The details concerning this alteration, which impacts on data integrity, authenticity and reliability, is not recorded in any of the disclosed documents. It is therefore of material relevance to Defence preparation to receive any documents in the custody of the Prosecution which would shed light on what has been changed, and why it was changed.

**<u>The Requested Records are not confidential to the Defence under Article 87(3)</u>**

43. In its response to the Defence letter on 10 July, the Prosecution erroneously claimed that it cannot effect disclosure because it is "bound by a reciprocal obligation of confidentiality *vis-à-vis* the requested States", pursuant to Article 87(3) of the Statute.

44. Article 87(3) stipulates that

> *The requested States* shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request. (emphasis added)

45. Similar to provisions in many mutual assistance treaties,[44] Article 87(3) prohibits the voluntary or inadvertent disclosure of the request and its supporting

[43] See, e.g., CAR-OTP-0900-0724, at 0747, fn 1: "CAR-OTP-0072-0082 was formatted by the [REDACTED] [REDACTED] [REDACTED] [REDACTED] prior to being provided to the OTP." CAR-OTP-0072-0082 is the call data records of [REDACTED], allegedly used by Aime Kilolo, from 24 September 2012 to 13 September 2013.

[44] See, Draft Statute for an International Criminal Court: Alternative to the ILC Draft (Siracusa-Draft), July 2015, page 53; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 980; Otto Triffterer (ed), *Commentary on the Rome Statute of International Criminal Court: Observers' Notes, Article by Article* (2nd edn, Hart Publishing 2008) 1521. See, e.g., UN Model Treaty on Mutual Assistance in Criminal Matters, A/RES/45/117, 14 December 1990, Article 9.

material by the requested State;[45] it does not, however, prohibit disclosure by the requesting party.

46. Article 87(3) does not and should not justify any derogation from the defendant's statutory right to disclosure.[46]

47. There is also no other legal basis for exempting RFAs and correspondence with States from disclosure, if they are otherwise disclosable under Article 67(2) or Rule 77.

48. Correspondence between the Prosecution and external entities are not "purely internal", and as such, do not attract the application of Rule 81(1) of the Rules.[47] Although Rule 81(2) could apply on a hypothetical basis,[48] given the advanced stage of this case, any claim that redaction or non-disclosure is required to protect ongoing investigations would raise serious concerns regarding the diligence of the Prosecution, and the feasibility of the commencement of the trial.

**Relief Sought**

49. For the reasons above, the Defence for Mr. Bemba respectively request the Trial Chamber to order the Prosecution to disclose the Requested Records set out in Annex A.

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[45] See, *Prosecutor v. Ruto and Sang*, Decision concerning the Government of Kenya's Submissions on its cooperation with the Court, 3 July 2013, ICC-01/09-01/11-798, paras. 17-18; *Prosecutor v. Kenyatta*, Decision concerning the Government of Kenya's Submissions on its cooperation with the Court, 3 July 2013, ICC-01/09-02/11-770, paras 16-17.
[46] See Article 67(2).
[47]In the Matter of El Sayed, STL Appeals Chamber, Decision on Partial Appeal By Mr. El Sayed of Pre-Trial Judge's Decision Of 12 May 2011, 19 July 2011, paras 108. 109.
[48] See, *Prosecutor v. Lubanga*, Decision on Mr. Thomas Lubanga's request for disclosure, 11 April 2013, ICC-01/04-01/06-3017, para. 12; *Prosecutor v. Lubanga*, Decision on the Prosecutor's request for non-disclosure in relation to document "OTP/DRC/COD-190/JCCD-pt", 27 May 2013, ICC-01/04-01/06-3031.

Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba

Date this 21th June 2016

The Hague, The Netherlands