

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13

Date: 27 July 2017

THE APPEALS CHAMBER

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Piotr Hofmański
Judge Geoffrey A. Henderson

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**

**Second Public Redacted Version of “Second corrected version of Aimé
Kilolo Musamba’s Appeal Brief (ICC-01/05-01/13-2148-Conf-Corr2)”**

Source: Counsel for Aimé Kilolo Musamba

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Ms Helen Brady

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Ms Mylène Dimitri

Counsel for Aimé Kilolo Musamba

Mr Michael G. Karnavas

Counsel for Jean-Jacques Kabongo Mangenda

Mr Christopher Gosnell

Mr Peter Robinson

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Ms Beth Lyons

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Victims and Witnesses Unit

Defence Support Section

Detention Section

Table of Contents

OVERVIEW:.....	6
SUMMARY OF ARGUMENTS:.....	10
I. GROUND 1: The Trial Chamber erred in law, fact, and procedure in finding that the Western Union materials were not obtained in violation of the Statute and that the criteria to exclude evidence under Article 69(7)(b) of the Statute were not met, and by admitting and relying on evidence obtained because of or resulting from the Western Union materials.	15
A. The Trial Chamber erred in law, fact, and procedure in finding that the Western Union materials were not obtained in violation of the Statute.	15
1. <i>The Trial Chamber erred in law in concluding that Article 99(1) was not relevant in determining whether to exclude the Western Union materials under Article 69(7).</i>	15
2. <i>The Trial Chamber erred in law in concluding that Article 99(4) of the Statute was not applicable.</i>	17
3. <i>The Trial Chamber abused its discretion in failing to consider whether the OTP violated Defence Counsel's immunity under Article 48(4) of the Statute.</i>	19
B. The Trial Chamber erred in law, fact, and procedure in finding that the criteria to exclude evidence under Article 69(7)(b) of the Statute were not met.	24
1. <i>The Trial Chamber erred in law and fact and abused its discretion failing to consider the totality of the circumstances of the OTP's bad faith conduct in investigating the Defence in purposeful circumvention of the proper safeguards.</i> ..	30
a. <i>The Trial Chamber erred in law and fact and abused its discretion failing to consider the totality of circumstances of the OTP's bad faith conduct in investigating Mr. Kilolo in purposeful circumvention of national law and the international human right to privacy.</i>	33
b. <i>The Trial Chamber erred in law and fact and abused its discretion in failing to consider the totality of the circumstances of the OTP's bad faith conduct in investigating Mr. Kilolo in purposeful circumvention of Defence Counsel's immunity.</i>	40
2. <i>The Trial Chamber erred in law and abused its discretion by failing to seek evidence that would have led it to the truth.</i>	47
3. <i>The Trial Chamber abused its discretion in failing to consider the chilling effect of its decisions on Counsel practicing before the ICC.</i>	52

4. <i>The Trial Chamber should have found that the admission of the Western Union materials was antithetical to and seriously damaged the integrity of the proceedings.</i>	56
C. The Trial Chamber erred in law, fact, and procedure in admitting and relying on evidence obtained because of and resulting from the Western Union materials.	58
1. <i>The Trial Chamber erred in law and fact by failing to consider the link between the illegally obtained Western Union materials and the intercepts of communications, which are the fruits of the poisonous tree.</i>	59
2. <i>The Trial Chamber erred in law and procedure by failing to consider the Single Judge's procedural violations in granting the OTP's request to obtain intercepts of communications without first lifting immunity.</i>	63
II. GROUND 2: The Trial Chamber erred in law, fact, and procedure in failing to exclude and relying on evidence obtained in breach of legal professional privilege.	67
A. The Trial Chamber erred in law by failing to consider the purpose of legal professional privilege.	68
B. The Trial Chamber erred in law and procedure by failing to apply a clear standard in its application of the crime-fraud exception to legal professional privilege.	70
C. The Trial Chamber erred in law, fact, and procedure in failing to consider whether the OTP had sufficient information to trigger the crime-fraud exception.	74
D. The Trial Chamber failed to consider that the lack of a pre-existing framework to monitor communications at the ICC rendered the intercepts of Mr. Kilolo's privileged communications antithetical to and seriously damaging to the integrity of the proceedings.	76
III. GROUND 3: The Trial Chamber erred in law and in fact and abused its discretion in finding that the evidence presented by the Prosecution in support of the charges against Mr. Kilolo was sufficient to find the allegations proved beyond a reasonable doubt.	80
A. The Trial Chamber erred in law and in fact and abused its discretion in failing to properly assess the credibility of witnesses D-2, D-3 and D-23, and in relying on their evidence to make findings of fact against Mr. Kilolo.	81
B. The Trial Chamber erred in fact in finding that Mr. Kilolo induced the false testimony of 14 witnesses.	87

1. The Trial Chamber erred in fact in finding that Mr. Kilolo induced D-4, D-6, D-13, and D-25 to give false testimony.....	87
a. The Trial Chamber erred in fact in finding that Mr. Kilolo induced D-4 and D-6 to give false testimony.....	88
b. The Trial Chamber erred in fact in finding that Mr. Kilolo induced D-13 to give false testimony.	90
c. The Trial Chamber erred in fact in finding that Mr. Kilolo induced D-25 to give false testimony.	92
2. The Trial Chamber erred in fact in finding that Mr. Kilolo induced D-29, D-55, D-57, and D-64 to give false testimony.....	94
a. The Trial Chamber erred in fact in finding that Mr. Kilolo induced D-29 to give false testimony.	95
b. The Trial Chamber erred in fact in finding that Mr. Kilolo induced D-55 to give false testimony.	97
c. The Trial Chamber erred in fact in finding that Mr. Kilolo induced D-57 and D-64 to give false testimony.....	100
3. The Trial Chamber erred in fact in finding that Mr. Kilolo induced D-26, D-15, and D-54 to give false testimony.	101
C. The Trial Chamber erred in fact in finding that Mr. Kilolo made an essential contribution to a common plan with Mr. Bemba and Mr. Mangenda to corruptly influence witnesses and present false evidence.	101
OVERALL CONCLUSION:.....	103

Aimé Kilolo Musamba, through his Counsel, hereby submits his Appeal Brief, pursuant to Article 81(b) of the Rome Statute (“Statute”) and Rule 150 of the Rules of Procedure and Evidence (“Rules”), in support of his appeal against the Trial Chamber VII’s Judgment pursuant to Article 74 of the Statute (“Trial Judgment”). The procedural history is set forth in Annex B of this Appeal Brief. Mr. Kilolo respectfully requests the Appeals Chamber to reverse all findings of guilt and convictions against him and to vacate the Trial Judgment.

OVERVIEW:

1. This appeal is about the integrity of the proceedings at the International Criminal Court (“ICC”): *whether the Office of the Prosecutor (“OTP”) should be permitted to surreptitiously and without court authorization or supervision investigate Defence Counsel while engaged in trial proceedings, in violation of Defence Counsel’s immunity, the international human right to privacy, and the constitutional law of a State Party.* The answer is no. Illegality in the investigation of alleged illegality cannot be countenanced; the consequences of the OTP’s conduct undermine the very integrity of the process. Defence Counsel cannot independently perform their function – to zealously represent the accused in accordance with their ethical and professional responsibilities – if they fear that they will become subject to prosecutorial fishing expeditions based on speculative claims with the hope of finding something that would taint or temper Defence Counsel.

The Investigation

2. On 14 June 2012, Mr. Bemba had been on trial for a year and a half in the Main Case; in two short months, the Defence would begin the presentation of its case, led by Mr. Bemba's Counsel, Aimé Kilolo Musamba. [REDACTED].
3. Based on the informant's information, the OTP sought access to Western Union's records. However, the Austrian Banking Act protecting those transaction records has the force of constitutional law in Austria. The OTP knew that: (a) it needed a search warrant to troll through the Western Union database; (b) it did not have sufficient reliable information at that time to make a request for a search warrant; and (c) Mr. Kilolo was covered by immunity. So, the OTP contrived to circumvent the law and his immunity.
4. On 28 September 2012, OTP Investigator [REDACTED] reached out to Western Union's Vienna-based Director of Global Investigations (P-0267), with whom he and an Austrian senior public prosecutor had collaborated on an unrelated matter in March 2011. It was from this earlier collaboration that [REDACTED] knew the protections and procedures under Austrian law. [REDACTED] emailed P-0267, stating that the OTP sought a year's worth of transactions involving various persons associated with the Bemba Defence case. A week later [REDACTED] renewed his request, identifying transactions by three "priority" persons.
5. As shown in this brief, [REDACTED] knew his request violated the Austrian Banking Act and so did P-0267. Nonetheless, P-0267 turned over to the OTP a spreadsheet of the protected financial transactions. After reviewing that spreadsheet, the OTP made a formal request for a search warrant. But

without waiting for the warrant, the OTP and P-0267 continued to examine further protected financial records. At no juncture of the investigation prior to charging Mr. Kilolo did the OTP ask the Presidency to lift his immunity.

6. Relying upon the illegally obtained Western Union information, the OTP obtained authorization from the Single Judge of Pre-Trial Chamber II to monitor Mr. Bemba's telephone conversations. It also went to the Dutch and Belgian authorities to wiretap members of the Bemba Defence team, including his Lead Counsel. The information from these wiretaps served as the basis for lifting Mr. Kilolo's immunity and arresting and charging him for Article 70 offenses: having induced witnesses to give false testimony, presenting evidence known to be false, and corruptly influencing witnesses by bribing and coaching them to provide false evidence. Chillingly, had the OTP's investigation been fruitless, Mr. Kilolo would never have known that the OTP had been investigating him, was accessing his confidential banking information, and prying into his privileged communications.

The Article 70 Trial

7. This was not the end of the trail of dominoes that started with the OTP and the Western Union investigation scheme. When testifying at trial on 3 November 2015, P-0267 had difficulty recalling details of his interactions with the OTP. In an attempt to cure his lapses, the OTP investigators built an *ex post facto* investigative report purporting to detail events occurring between P-0267 and the OTP investigation team three years earlier. To this day, the entire story of the interactions between P-0267 and the OTP is unclear. During his testimony, the OTP "discovered" and provided redacted email exchanges

between the OTP investigator and P-0267, although whether these emails reflect the entire thread of their discussions remains unresolved.

8. While the Defence objected to the admission of the OTP's evidence because Mr. Kilolo's international human right to privacy and immunity were violated, the Trial Chamber concluded that none of the information obtained by the OTP – from the tip to taps – should have been excluded since its admission would not be antithetical to nor seriously damage the integrity of the proceedings.
9. Eventually, the Austrian courts would render two decisions invalidating the search warrant. The Trial Chamber reconsidered, and while it acknowledged that there was a violation of the international human right to privacy of those involved in the search, it found that the violations of the right to privacy were not so severe as to taint the proceedings. The Trial Chamber convicted Mr. Kilolo on the basis of the illegally obtained evidence and the falling dominoes it produced. Without this material, the Trial Chamber would not have had sufficient evidence to convict Mr. Kilolo beyond a reasonable doubt of any of the charges brought by the OTP.
10. As a result of the Trial Chamber's rulings, the OTP is freed of all constraints, with license to search for confidential and privileged information – even in contravention of domestic constitutional law and international human rights standards – as it pleases and without first making any attempts to lift Defence Counsel's immunity. The chilling effect, which the Trial Chamber failed to consider in determining whether the OTP's evidence “would be antithetical to and would seriously damage the integrity of the proceedings,” is that Defence Counsel in all future cases are presented with two untenable choices:

either zealously represent the accused and risk coming under investigation by the OTP, or provide a less-than zealous representation, thus breaching their ethical and professional duties towards the client.

SUMMARY OF ARGUMENTS:

11. Article 81 of the Statute allows for appeals against convictions based on errors of law,¹ errors of fact,² procedural errors,³ or any other grounds that affect the fairness or reliability of the proceedings or decision.⁴

12. When assessing errors of law, the Appeals Chamber should arrive at its own conclusions as to the appropriate law and determine whether the Trial Chamber misinterpreted the law.⁵ As the Appeals Chamber will only intervene if legal errors materially affect the impugned decision,⁶ Mr. Kilolo will show in this brief how the Trial Chamber's interpretation of the law was incorrect and how its decision would have been substantially different had it not been for the legal errors it committed.⁷

13. As the Appeals Chamber will only interfere with the Trial Chamber's findings of fact if clear error is shown, Mr. Kilolo will show in this brief how the Trial Chamber failed to properly assess the facts it considered, failed to

¹ Rome Statute, Article 81(1)(b)(iii).

² Rome Statute, Article 81(1)(b)(ii).

³ Rome Statute, Article 81(1)(b)(i).

⁴ Rome Statute, Article 81(1)(b)(iv).

⁵ ICC-01/04-01/06-3121-Red, para. 18.

⁶ *Id.*, para. 18 (internal citation omitted).

⁷ *Id.*, paras. 19, 31 (internal citation omitted).

consider relevant facts, and took into account irrelevant facts.⁸ In doing so, Mr. Kilolo will show how the Trial Chamber could not have reasonably reached the conclusions it did based on the evidence before it,⁹ setting out specifically why the Trial Chamber's findings were unreasonable.¹⁰

14. Errors based on events occurring in the proceedings leading up to a conviction decision are appealable.¹¹ Mr. Kilolo will show in this brief how the Trial Chamber's conviction decision was materially affected by its procedural errors.¹² As some procedural errors articulated in this brief relate to the Trial Chamber's exercise of its discretion, Mr. Kilolo will show how the Trial Chamber's exercise of discretion was either based on an erroneous interpretation of law or patently incorrect conclusions of fact, or was so unfair and unreasonable as to constitute an abuse of discretion.¹³

15. This appeal raises three grounds. Grounds 1 and 2 allege errors of law, fact, procedure and abuses of discretion by the Trial Chamber in declining to exclude the Western Union banking records and their fruits: intercepts of Mr. Kilolo's communications. Ground 3 alleges errors of law and fact and abuses of discretion by the Trial Chamber in assessing the evidence and finding that the charges against Mr. Kilolo were proved beyond a reasonable doubt.

⁸ ICC-01/04-02/12-271-Corr, para. 22 (internal citation omitted).

⁹ ICC-01/04-01/06-3121-Red, para. 21 (internal citation omitted); ICC-01/04-01/10-283, paras. 1, 17; ICC-01/04-02/12-271-Corr, para. 22 (internal citation omitted).

¹⁰ ICC-01/04-01/06-3121-Red, para. 33.

¹¹ *Id.*, para. 20 (internal citation omitted).

¹² *Id.*

¹³ ICC-01/04-02/12-271-Corr, para. 21 (internal citation omitted).

16. Concerning Grounds 1 and 2, the Trial Chamber erred in finding that the OTP's collection of the impugned evidence was not in violation of the Statute and that its admission into evidence would not be antithetical to nor seriously damage the integrity of the proceedings by:

- a. misinterpreting the *chapeau* element of Article 69(7) of the Statute in finding that Articles 99(1) and 99(4) of the Statute did not apply in this case (Grounds 1(A)(1) and (A)(2));
- b. failing to consider the totality of the circumstances of the OTP's conduct in investigating members of the Defence in purposeful circumvention of the proper legal safeguards (Grounds 1(B)(1));
- c. failing to exercise its authority to seek evidence necessary for the determination of the truth (Ground 1(B)(2));
- d. failing to consider the chilling effect of its decisions on Defence Counsel practicing before the ICC and its long-term effect on the integrity of the proceedings (Ground 1(B)(3));
- e. failing to consider the link between the Western Union materials and the intercepts of communications, which are the fruits of the poisonous tree (Ground 1(C)(1));
- f. failing to consider the Single Judge's procedural violations in granting the OTP's request to obtain intercepts of Mr. Kilolo's conversations when Mr. Kilolo's immunity had not yet been lifted (Ground 1(C)(2));
- g. misapplying the crime-fraud exception to legal professional privilege (Grounds 2(A)-(C)); and
- h. failing to consider that the lack of a pre-existing framework to monitor communications at the ICC rendered the intercepts of Mr.

Kilolo's privileged communications antithetical to and seriously damaging to the integrity of the proceedings (Ground 2(D)).

17. Concerning Ground 3, the Trial Chamber erred in finding that the evidence presented by the OTP in support of the charges against Mr. Kilolo was proved beyond a reasonable doubt by:

- a. failing to properly assess the credibility of witnesses D-2, D-3, and D-23 and in relying on their evidence to make findings of fact against Mr. Kilolo (Ground 3(A));
- b. finding that Mr. Kilolo induced the false testimony of the 14 witnesses (Ground 3(B)); and
- c. finding that Mr. Kilolo was part of a common plan with Mr. Bemba and Mr. Mangenda to corruptly influence witnesses and present their false testimony (Ground 3(C)).

18. Had the Trial Chamber properly evaluated the totality of the circumstances, as it is required to do under Article 74(2) of the Statute, it would have concluded that the admission of the Western Union materials and their fruits "would be antithetical to and would seriously damage the integrity of the proceedings." It also would have found that the Western Union materials formed the basis of the OTP's case, and that without the deliberate violation of Austrian law, compromise of Mr. Kilolo's unwaived immunity, and intrusion into his privacy based on the Western Union materials, no conviction would have resulted. Mr. Kilolo's convictions should be overturned.

19. Notwithstanding the admission of the Western Union evidence and the intercepted communications, had the Trial Chamber properly assessed the evidence, it would not have concluded that Mr. Kilolo induced fourteen witnesses to give false testimony pursuant to Article 70(1)(a) in conjunction with Article 25(3)(b) and was a part of a common plan with Mr. Bemba and Mr. Mangenda to corruptly influence fourteen witnesses and present their false testimony pursuant to Article 70(1)(b) and 70(1)(c) in conjunction with Article 25(3)(a).

I. GROUND 1: The Trial Chamber erred in law, fact, and procedure in finding that the Western Union materials were not obtained in violation of the Statute and that the criteria to exclude evidence under Article 69(7)(b) of the Statute were not met, and by admitting and relying on evidence obtained because of or resulting from the Western Union materials.

A. The Trial Chamber erred in law, fact, and procedure in finding that the Western Union materials were not obtained in violation of the Statute.

1. *The Trial Chamber erred in law in concluding that Article 99(1) was not relevant in determining whether to exclude the Western Union materials under Article 69(7).*

20. The Trial Chamber concluded that Article 99(1) of the Statute was not relevant in determining whether to exclude evidence under Article 69(7).¹⁴ This is an error of law because the Trial Chamber misinterpreted the *chapeau* element of Article 69(7).¹⁵

21. Under Article 99(1), “[r]equests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State[.]” In Austria, Requests for Assistance concerning Article 70 offenses are governed by the same standards as Requests for Assistance concerning national crimes.¹⁶ To obtain information regarding bank accounts and financial transactions, there must be “sufficient suspicion” that an intentional crime was committed.¹⁷ The Request for Assistance must state the crime for which the measure is sought, the underlying facts, and the rationale justifying the

¹⁴ ICC-01/05-01/13-1854, paras. 35-40.

¹⁵ *Id.*, para. 40.

¹⁶ CAR-D24-0005-0001; CAR-D24-0005-0045 (French translation of CAR-D24-0005-0001); CAR-D23-0011-0006 (English translation of CAR-D24-0005-0001), p. 0012.

¹⁷ *Id.*

request, taking into account the principles of necessity and proportionality.¹⁸ Banking secrecy has the rank of constitutional law in Austria and must not be broken merely to establish suspicion.¹⁹ The circumstances establishing suspicion must already exist when the request is made.²⁰

22. The plain text of the *chapeau* of Article 69(7) states: “Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if...”²¹ The language is disjunctive. “A violation of this Statute” includes both substantive and procedural violations of the Statute and does not require that the statutory violation harm a right of the accused. “A violation of the Statute is a relatively straightforward concept, which could include a violation of any of the rights of an accused or of victims or witnesses or other substantive or procedural provisions of the Statute, provided that the violation is causally related to the collection of the impugned evidence.”²²

23. If a “violation of this Statute” is used as the first prong, rather than a violation of international human rights, a violation of a statutory provision must be indicated. To hold that the entire admissibility inquiry falls exclusively under

¹⁸ *Id.*

¹⁹ *Id.* See also CAR-D23-0006-0001, pp. 0002-0004: Austrian Banking Secrecy Act, Article 38(5). Article 38(5) of the Austrian Banking Secrecy Act states: “(Constitutional law provision): Paras. 1 to 4 may only be amended by the National Counsel with at least one-half of the representatives present and with a two-thirds majority of the votes cast.” (as translated in D23-1’s report). The original German version states: “Die Abs. 1 bis 4 können vom Nationalrat nur in Anwesenheit von mindestens der Hälfte der Abgeordneten und mit einer Mehrheit von zwei Dritteln der abgegebenen Stimmen abgeändert werden.”

²⁰ CAR-D24-0005-0001; CAR-D24-0005-0045 (French translation of CAR-D24-0005-0001); CAR-D23-0011-0006 (English translation of CAR-D24-0005-0001), p. 0012.

²¹ Emphasis added.

²² D.K. Piragoff, *Article 69*, in O. TRIFFTERER & K. AMBOS, *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1745 (3d ed. 2016).

Article 69(7) – while ignoring violations of the Statute – is illogical. Basic statutory construction provides that the plain meaning of the article is the presumptive interpretation.²³ Absent a specific exclusion for Part IX of the Statute, Article 69(7) must be read to include that which it describes: “a violation of this Statute.” From the Preamble to Article 1, and throughout the entirety of the Rome Statute, the document is referred to as the “Statute.” Thus, in relegating Part IX of the Statute as strictly limited to obligations between the Court and its Member States, the Trial Chamber rendered the *chapeau* element of Article 69(7) superfluous.

24. As argued in Ground 1(B), in failing to find a violation of Article 99(1), the Trial Chamber further erred in law and fact and abused its discretion in failing to consider the totality of the circumstances of the OTP’s conduct in investigating the Defence, and abusing its discretion to seek evidence that would have led it to the truth.

2. *The Trial Chamber erred in law in concluding that Article 99(4) of the Statute was not applicable.*

25. The OTP directly executed a request in Austria that would have required compulsory measures without first notifying the Austrian authorities. The Trial Chamber erred in law by finding that Article 99(4) was not applicable in this case by misinterpreting the *chapeau* element of Article 69(7).

²³ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 23 May 1969, Article 31(1): “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”

26. On 22 April and 24 May 2016, the Vienna Court of Appeal rendered two decisions (“Austrian decisions”) overturning the lower court’s grant of authorization to the OTP to collect documents from Western Union.²⁴ Before being informed of the two Austrian decisions, the Trial Chamber concluded that Article 99(4) of the Statute did not apply in this case because the Western Union materials were provided by the Austrian authorities in response to the OTP’s Requests for Assistance.²⁵ When the Defence sought reconsideration based on the two Austrian decisions,²⁶ the Trial Chamber did not reconsider its conclusion that Article 99(4) did not apply.²⁷ The Trial Chamber erred in law by finding that Article 99(4) was not applicable in this case by misinterpreting the *chapeau* element of Article 69(7).

27. Under Article 99(4) of the Statute, the OTP must consult with the requested State Party before directly executing a request that does not involve compulsory measures on the territory of the concerned State Party. The Trial Chamber did not conduct any analysis of the interplay between Part IX of the Statute and Article 69(7) for Article 99(4) purposes, as it had done for Article 99(1). However, its erroneous legal reasoning of the relationship between Part IX of the Statute and Article 69(7) for Article 99(1) purposes²⁸ also constitutes an error of law for Article 99(4) purposes because both are included in Part IX

²⁴ CAR-D24-0005-0001; CAR-D24-0005-0045 (French translation of CAR-D24-0005-0001); CAR-D23-0011-0006 (English translation of CAR-D24-0005-0001); CAR-D24-0005-0013; CAR-D24-0005-0033 (French translation of CAR-D24-0005-0011); CAR-D23-0011-0016 (English translation of CAR-D24-0005-0013).

²⁵ ICC-01/05-01/13-1854, para. 45.

²⁶ ICC-01/05-01/13-1928-Conf-Corr; ICC-01/05-01/13-1929-Conf; ICC-01/05-01/13-1938; ICC-01/05-01/13-1940; ICC-01/05-01/13-1941-Corr.

²⁷ ICC-01/05-01/13-1948.

²⁸ See *supra* Ground 1(A)(1).

of the Statute. Had the Trial Chamber correctly analyzed the *chapeau* element of Article 69(7), it would have correctly concluded that violations of Part IX of the Statute can constitute “violation[s] of this Statute” for the purposes of Article 69(7). Thus, inescapably, it would have correctly concluded that both Article 99(1) and Article 99(4) are applicable.

28. As argued in Ground 1(B), the Trial Chamber further erred in law and fact and abused its discretion in failing to find a violation of Article 99(4) by: failing to consider the totality of circumstances of the OTP’s conduct in investigating the Defence in purposeful circumvention of legal safeguards; and failing to exercise its discretionary authority to seek evidence necessary for the determination of the truth.

3. The Trial Chamber abused its discretion in failing to consider whether the OTP violated Defence Counsel’s immunity under Article 48(4) of the Statute.

29. The Trial Chamber did not consider the issue of immunity because (i) the first Austrian decision’s mention of Mr. Kilolo’s immunity as a potential obstacle to grant the initial orders was a mere recapitulation of Defence submissions; and (ii) the arguments raised after the Austrian decisions were not new facts that could be taken into account for the purpose of reconsideration because the facts underlying the alleged violation of Defence Counsel’s immunity were known at the time of the request leading to the first Western Union decision, and were independent of the Austrian decisions.²⁹ The Trial Chamber abused its discretion by failing to consider the scope, purpose, and waiver of Defence Counsel’s immunity.

²⁹ ICC-01/05-01/13-1948, para. 31.

30. As a general principle of procedural law, questions of immunity must be expeditiously decided as a threshold issue before the commencement of any legal case.³⁰ The Trial Chamber's failure to consider the scope, purpose, and application of Defence Counsel's immunity in its Article 69(7) analysis constitutes an abuse of discretion because the Trial Chamber misdirected itself on the applicable law.³¹

31. The Trial Chamber failed to consider that the *scope* of Defence Counsel's immunity is such treatment as is necessary for the independent performance of Defence functions. It made no mention of Article 48(4) of the Statute or Article 18 of the Agreement on Privileges and Immunities of the ICC.³² Article 48(4) of the Statute states that "Counsel ... shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court." Article 18 of the Agreement on the Privileges and Immunities of the ICC states that Counsel shall enjoy privileges, immunities, and facilities "to the extent necessary for the independent performance of his or her functions." Under Article 18, these immunities include: "(b) immunity from legal process of any kind in respect

³⁰ See Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights, Advisory Opinion of 29 April 1999, para. 63: "[E]xperts on mission shall be accorded immunity from legal process of every kind in respect of words spoken or written and acts done by them in the course of the performance of their mission. By necessary implication, questions of immunity are therefore preliminary issues which must be expeditiously decided *in limine litis*. This is a generally recognized principle of procedural law, and Malaysia was under an obligation to respect it. The Malaysian courts did not rule *in limine litis* on the immunity of the Special Rapporteur ... thereby nullifying the essence of the immunity rule contained in Section 22 (b)."

³¹ ICC-01/04-02/12-271-Corr, para. 21.

³² Agreement on Privileges and Immunities of the International Criminal Court, ICC-ASP/1/3, adopted by the Assembly of States Parties 3-10 September 2002.

of words spoken or written and all acts performed by him or her in official capacity;” “(c) [i]nviolability of papers and documents in whatever form and materials relating to the exercise of his or her functions;” and “(d) [f]or the purposes of communication in pursuance of his or her functions as counsel, the right to receive and send papers and documents in whatever form.” Article 25 of the ICC Headquarters Agreement with The Netherlands³³ grants Counsel the same privileges and immunities as Article 18 of the Agreement on Privileges and Immunities of the ICC.

32. The Trial Chamber failed to consider that the *purpose* of immunity is to facilitate the independent performance of Defence duties.³⁴ Defence Counsel benefit from functional immunity even in the absence of an agreement on privileges and immunities. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) in *Gotovina et al.* held:

[D]efence working in an international criminal court operate in a different legal environment than those working in domestic criminal courts. Finding and interviewing witnesses, conducting on-site investigations, and gathering evidence in a State’s territorial jurisdiction may be more difficult without the grant of functional immunity, as there is always a risk that a State could interfere by exercising its jurisdiction in such a way as to impede or hinder the activities of the defence. Permitting freedom of action in these situations by virtue of a grant of functional immunity protects individuals before the Tribunal in a manner unnecessary in domestic courts, where individuals can rely upon

³³ Headquarters Agreement between the International Criminal Court and the Host State, ICC-BD/04-01-08, 1 March 2008.

³⁴ *Prosecutor v. Gotovina et al.*, IT-06-90-AR73.5, Decision on Gotovina Defence Appeal Against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, 14 February 2011, para. 28. *See also* *Prosecutor v. Bagosora et al.*, ICTR-98-41A, Decision on Aloys Ntabakuze’s Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Pieter Erlinder, 6 October 2010, paras. 22-23.

the State's judicial apparatus and other entities to protect their ability to perform their functions in a criminal trial.³⁵

The Trial Chamber failed to consider jurisprudence which would have assisted in determining the purpose of Defence Counsel's immunity.

33. The Trial Chamber failed to consider that *waiver* of Defence Counsel's immunity belongs exclusively to the Presidency.³⁶ Thus, Defence Counsel's immunity cannot be breached by an ICC Chamber or any national authority under a crime-fraud exception.³⁷

34. The Trial Chamber failed to consider that a search warrant or the taking of statements from Counsel is "legal process."³⁸ Thus, anything that would require a search warrant or the taking of statements requires a waiver of

³⁵ *Prosecutor v. Gotovina et al.*, IT-06-90-AR73.5, Decision on Gotovina Defence Appeal Against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, 14 February 2011, para. 31.

³⁶ See Agreement on Privileges and Immunities of the ICC, Article 26(2)(f); ICC Headquarters Agreement, Article 30(2)(b)(ii).

³⁷ See ICC-01/11-01/11-291, paras. 26-27 (holding that (1) the Pre-Trial Chamber was not the appropriate organ of the Court to determine whether privileges and immunities of Defence Counsel should be waived; (2) the Pre-Trial Chamber did not "have the power to seek and receive submissions of fact and law in relation" to the events giving rise to Libya's seizure of materials belonging to the Defence; and (3) "in the absence of a waiver of privileges and immunities by the appropriate organ of the Court, the principle of inviolability of the Defence documents stands fully.").

³⁸ States' guidelines to local police indicate that as soon as someone's immunity is established, that person cannot be subject to any summons or warrant, or required to produce documents, and the police must immediately contact the State Department / Ministry of Foreign Affairs. See e.g. Devon & Cornwall Police Policy Paper, D033, 17 October 2014 (England), §3.6.1; Milwaukee Police Department, Standard Operating Procedure, 24 March 2016, §130. In a recent example, a U.S. diplomatic staffer was involved in a criminal incident in New Zealand, but the police were unable to question him after the U.S. embassy declined a request to waive his immunity. *New Zealand: US diplomat expelled amid police inquiry*, BBC, 19 March 2017, <http://www.bbc.com/news/world-asia-39321568>.

immunity. The OTP should have sought a waiver of Mr. Kilolo's immunity before proceeding to investigate him during trial. Although diplomatic immunity is rather different from the immunity provided to Defence Counsel, how it is applied and waived in national jurisdictions may be instructive as to how Mr. Kilolo's immunity should have been applied and waived at the ICC.

35. Diplomatic immunity can only be waived by the executive of a State.³⁹ While States may investigate crimes concerning foreign diplomats,⁴⁰ anything that requires legal process, such as a search warrant or the taking of statements, requires a waiver of immunity. Indeed, the government of The Netherlands announced that it will request more waivers of immunity for foreign diplomats, so that there will be "more scope for the Public Prosecution Service to investigate, allowing a more balanced decision to be made on whether to prosecute."⁴¹ By analogy, the same reasoning should apply to Defence Counsel's immunity. Thus, the OTP should have sought a waiver of Mr. Kilolo's immunity before embarking on investigative actions requiring compulsory legal process.

36. Had the Trial Chamber properly considered the applicable law, it would have found that the OTP should have sought to lift Mr. Kilolo's immunity before proceeding to investigate him during trial. As argued in Ground 1(B), its

³⁹ See U.S. DEPARTMENT OF STATE, OFFICE OF FOREIGN MISSIONS, DIPLOMATIC AND CONSULAR IMMUNITY, GUIDANCE FOR LAW ENFORCEMENT AND JUDICIAL AUTHORITIES 21 (2015).

⁴⁰ Canada - Circular note no. XDC-0427 of March 14, 2001, updated on 22 December 2015, http://www.international.gc.ca/protocol-protocole/policies-politiques/circular-note_note-circulaire_xdc-0427.aspx?lang=eng&_ga=1.172920035.1560619228.1490869505.

⁴¹ Government of the Netherlands, *Netherlands to seek more frequent waiver of diplomatic immunity*, 23 April 2014, <https://www.government.nl/latest/news/2014/04/23/netherlands-to-seek-more-frequent-waiver-of-diplomatic-immunity>.

failure to do so rendered the admission of the Western Union materials and their fruits antithetical to and seriously damaging to the integrity of the proceedings.

B. The Trial Chamber erred in law, fact, and procedure in finding that the criteria to exclude evidence under Article 69(7)(b) of the Statute were not met.

37. The Trial Chamber concluded that the admission of the Western Union materials and fruits thereof was not antithetical to and would not seriously damage the integrity of the proceedings because “the infringements to the right to privacy are not so severe as to taint the fairness of the proceedings.”⁴² The Trial Chamber erred in law and fact and abused its discretion in finding that the criteria to exclude evidence under Article 69(7)(b) of the Statute were not met by: (i) failing to consider the totality of the circumstances of the OTP’s bad faith conduct in investigating the Defence in purposeful contravention of the proper safeguards; (ii) failing to exercise its discretionary authority to seek evidence necessary for the determination of the truth; and (iii) failing to consider the chilling effect of its decision on Defence Counsel practicing before the ICC.

38. Article 69(7)(b) of the Statute states that evidence obtained by means of a violation of the Statute or an internationally recognized human right is not admissible if “[t]he admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.” The decision to

⁴² ICC-01/05-01/13-1948, para. 39.

exclude evidence under Article 69(7)(b) is discretionary.⁴³ There are no clear criteria or factors to assess under Article 69(7)(b) because the terms “antithetical” and “integrity of the proceedings” have not been expressly defined by the ICC or any of the *ad hoc* tribunals.

39. In *Lubanga*, the Pre-Trial Chamber considered that the decision to exclude evidence under Article 69(7) is discretionary and that the judges should “seek an appropriate balance between the Statute’s fundamental values in each concrete case.”⁴⁴ The *Lubanga* Pre-Trial Chamber did not provide any criteria or expressly define what sort of circumstances should render the admission of evidence collected in violation of the Statute or international human rights antithetical to and seriously damaging to the integrity of the proceedings. Rather, it “endorsed the human rights and ICTY jurisprudence which focuses on the balance to be achieved between the seriousness of the violation and the fairness of the trial as a whole.”⁴⁵

40. The ICTY Trial Chamber in *Delalić et al.* understood the integrity of the proceedings as relating to the fundamental fairness of the proceedings.⁴⁶ In considering whether to exclude a confession taken by national authorities without counsel being present, the *Delalić et al.* Trial Chamber held the confession itself “[did] not fall below fundamental fairness and such as to

⁴³ Article 69(7)’s formula appears mandatory at first glance considering the language “shall not be admissible.” However, the inclusion of two additional criteria in (a) and (b) renders the rule discretionary. ICC-01/04-01/06-803-tEN, para. 84. *See also* PETRA VIEBIG, *ILLICITLY OBTAINED EVIDENCE AT THE INTERNATIONAL CRIMINAL COURT*, INTERNATIONAL CRIMINAL JUSTICE SERIES, Vol. 4 106-108 (Asser Press 2016) (explaining the discretionary nature of Article 69(7)).

⁴⁴ ICC-01/04-01/06-803-tEN, para. 84.

⁴⁵ *Id.*, para. 89.

⁴⁶ *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on Zdravko Mucic’s Motion for the Exclusion of Evidence, 2 September 1997, para. 55.

render admission antithetical to or to seriously damage the integrity of the proceedings.”⁴⁷ In *Kordić & Čerkez*, Judge Robinson considered that “the concept of serious damage to the integrity of the proceedings connotes ... shades of conduct, shades of illegality.”⁴⁸ Judge Robinson found that evidence derived from a confession procured by intimidation or by force would seriously damage the integrity of the proceedings, but “each case has to be judged on its own merits.”⁴⁹ The *Brđanin* Trial Chamber understood the integrity of the proceedings as relating to the ICTY’s mandate.⁵⁰ It held that excluding relevant evidence due to procedural flaws was inappropriate, as long as the fairness of the trial was guaranteed, considering the ICTY’s responsibilities towards the international community to prosecute serious violations of international law, to bring justice to the victims, and to promote peace and reconciliation in the former Yugoslavia.⁵¹

41. In *Karemera et al.*, the International Criminal Tribunal for Rwanda (“ICTR”) excluded the OTP’s post-arrest interviews of Nzirorera and Ngirumpatse, two accused in the *Karemera et al.* case, finding that their admission into evidence would be antithetical to and would seriously damage the integrity

⁴⁷ *Id.*, para. 55.

⁴⁸ *Prosecutor v. Kordić & Čerkez*, IT-95-14/2, Transcript, 2 February 2000, T.13684, ll. 12-16.

⁴⁹ *Id.*, T.13684, ll. 17-23, T.13685, ll. 4-5.

⁵⁰ *Prosecutor v. Brđanin*, IT-99-36-T, Decision on the Defence “Objection to Intercept Evidence”, 3 October 2003, para. 63(7).

⁵¹ *Id.*: “This Tribunal has a mandate to bring to justice persons allegedly responsible for serious violations of international law, to render justice to the victims, to deter further similar crimes and to contribute to the restoration of peace by promoting reconciliation in the former Yugoslavia. This mandate imposes on this Tribunal a tremendously heavy burden which it needs to carry in an efficient and successful manner.”

of the proceedings.⁵² The Trial Chamber excluded Nzirorera's post-arrest interview because the OTP had not "established beyond a reasonable doubt that Joseph Nzirorera waived his right to be silent and to be assisted by counsel in an express and unequivocal manner."⁵³ Ngirumpatse's interview was excluded because he gave information about other co-accused, and to admit the transcript of the interview into evidence would violate the other co-accused's right to cross-examination.⁵⁴ The ICTR has also excluded evidence as antithetical to and seriously damaging to the integrity of the proceedings due to prosecutorial misconduct.⁵⁵ In *Kajelijeli*, the ICTR OTP interviewed a protected Defence witness in violation of the Trial Chamber's orders.⁵⁶ The Trial Chamber found that, while such behavior was not sufficient for a showing of contempt, it was nevertheless intolerable.⁵⁷ It held that:

The integrity of the proceedings is protected by the Chamber by means of the Orders that it issues. Violations of the procedure laid down by the Chamber in an Order with regard to the formalities of contacting protected witnesses for the other side is antithetical to the integrity of, and causes serious damage to, the proceedings.⁵⁸

42. National jurisprudence is also of value considering the lack of a clear definition or clear criteria applied at the international level. Since the Statute,

⁵² *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews of Joseph Nzirorera and Mathieu Ngirumpatse, 2 November 2007, paras. 32, 46-47.

⁵³ *Id.*, para. 31.

⁵⁴ *Id.*, paras. 44-47.

⁵⁵ *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, Decision on Kajelijeli's Motion to Hold Members of the Office of the Prosecutor in Contempt of the Tribunal (Rule 77(C)), 15 November 2002.

⁵⁶ *Id.*, paras. 2, 15.

⁵⁷ *Id.*, para. 14.

⁵⁸ *Id.*

Rules, and applicable treaties provide no clear guidance on how to interpret the terms “antithetical” and “integrity of the proceedings,” Article 21(1)(c) of the Statute allows the Court to apply “general principles of law derived by the Court from national laws of legal systems of the world.” As shown below, jurisprudence from Canada, South Africa, the United Kingdom (“U.K.”), and France is instructive. The principles derived from these national systems are not inconsistent with the Statute, international law, and internationally recognized norms and standards.

43. The Canadian Supreme Court considered that the integrity of the proceedings takes into account the “overall repute of the justice system, viewed in the long term.”⁵⁹ Courts in Canada consider whether the admission of tainted evidence “would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct.”⁶⁰

44. In South Africa, the decision to exclude evidence antithetical to the integrity proceedings is a matter of public policy: “public policy in this context, is concerned not only to ensure that the guilty are held accountable; it is also concerned with the propriety of the conduct of investigating and prosecutorial agencies in securing evidence against criminal suspects.”⁶¹

⁵⁹ *R v. Grant*, 2 S.C.R. 353, 393 (2009), para. 68.

⁶⁰ *Id.*, p. 394, para. 72.

⁶¹ *Mthembu v The State*, 379/2007 [2008] ZASCA 51, para. 26.

45. In the U.K., the House of Lords held that if the Court becomes aware of a serious abuse of power “it should ... express its disapproval by refusing to act on it.”⁶²
46. In France, evidence presented at trial must respect the principle of “loyalty of evidence.”⁶³ The French *Cour de Cassation* held that this principle was violated where the accused was apprehended on the basis of a plot by the police and an accomplice to entrap him, vitiating “the search for and establishment of the truth.”⁶⁴
47. The Trial Chamber failed to look beyond the limited jurisprudence of the ICC in determining the relevant criteria under Article 69(7)(b). It did not avail itself of jurisprudence from national jurisdictions which would have assisted it in determining what circumstances would render the admission of evidence collected in violation of the Statute or international human rights antithetical to and seriously damaging to the integrity of the proceedings. By failing to consider relevant factors gleaned from national jurisprudence, it erred in failing to consider the chilling effect the OTP’s conduct would have on Defence Counsel in this and in all future cases before the ICC – a consideration that assuredly impacts on the integrity of the proceedings.

⁶² *R v Horseferry Road Magistrates’ Court, ex p. Bennett* [1994] 1 AC 42, 62 HL.

⁶³ The principle of loyalty means “loyalty to one’s obligations, to obey the rules of honor and probity.” M. Pascal Lemoine, Advisor to the Court of Cassation, *La loyauté de la preuve (à travers quelques arrêts récents de la Chambre criminelle)* (2004), fn. 6, available at https://www.courdecassation.fr/publications_26/rapport_annuel_36/rapport_2004_173/deuxieme_partie_tudes_documents_176/tudes_diverses_179/travers_quelques_6401.html.

⁶⁴ *Cour de cassation*, Chambre criminelle, Arrêt du 27 février 1996, n° 95-81.366, Publié au bulletin.

1. The Trial Chamber erred in law and fact and abused its discretion failing to consider the totality of the circumstances of the OTP's bad faith conduct in investigating the Defence in purposeful circumvention of the proper safeguards.

48. While the Trial Chamber concluded that the OTP “did not act with the deliberate intention to circumvent” the national law or the international human right to privacy,⁶⁵ it did not base its decision on a holistic evaluation of the entire proceedings.⁶⁶ The Trial Chamber merely considered the OTP's belated disclosure of its contacts with P-0267⁶⁷ in isolation in finding that the OTP did not act in bad faith.⁶⁸

49. The Trial Chamber was required to base its decision on an “evaluation of the evidence and the entire proceedings” under Article 74(2). This requires it to holistically evaluate “*all the evidence taken together.*”⁶⁹ “Indeed, it would be incorrect for a finder of fact to do otherwise.”⁷⁰ An analysis of a limited segment of the evidentiary record is not sufficient.⁷¹ The Trial Chamber was required to make findings of fact which were essential in determining whether the admission of the Western Union materials and their fruits were antithetical to and would seriously damage the integrity of the proceedings. It was required to do so because, first, it allows a meaningful exercise of the

⁶⁵ ICC-01/05-01/13-1854, para. 69.

⁶⁶ ICC-01/04-01/06-3121-Red, para. 22.

⁶⁷ See *infra* Ground 1(B)(1)(a), paras. 57-67.

⁶⁸ ICC-01/05-01/13-1854, para. 68.

⁶⁹ ICC-01/04-01/06-3121-Red, para. 22.

⁷⁰ *Id.*

⁷¹ *Prosecutor v. Gotovina & Markač*, IT-06-90-A, Judgement, 16 November 2012, para. 12; *Prosecutor v. Perišić*, IT-04-81-A, Judgement, 28 February 2013, para. 95.

right to appeal by the parties, and second, it enables the Appeals Chamber to review the Trial Chamber's findings as well as its evaluation of the evidence.⁷²

50. Had the Trial Chamber holistically "evaluate[d] *all the evidence taken together*,"⁷³ it would have concluded that the OTP *in bad faith* purposefully circumvented the proper legal safeguards: national constitutional law, the international human right to privacy, and Defence Counsel's immunity.

51. While international jurisdictions have not expressly defined bad faith conduct, it can be found where the OTP repeatedly fails to disclose exculpatory material⁷⁴ or deliberately violates a Chamber's orders.⁷⁵ Considering the lack of international jurisprudence defining bad faith conduct, national jurisprudence is of value.⁷⁶

52. The United States Court of Appeals for the Fifth Circuit has held that bad faith conduct is "not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; ... it contemplates a state of mind affirmatively operating with

⁷² *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, 28 February 2005, para. 23; *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001, para. 481; *Prosecutor v. Musema*, ICTR-96-13-A, Judgement, 16 November 2001, para. 18.

⁷³ ICC-01/04-01/06-3121-Red, para. 22.

⁷⁴ *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Forty-Sixth Disclosure Violation Motion, 20 April 2011, paras. 8-9 (where the Trial Chamber considered imposing penalties on the OTP, including the exclusion of testimony, for its failures to meet deadlines).

⁷⁵ *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, Decision on Kajelijeli's Motion to Hold Members of the Office of the Prosecutor in Contempt of the Tribunal (Rule 77(C)), 15 November 2002, paras. 11, 14 (finding that while the OTP did not deliberately violate a witness protection order, its conduct "cannot be tolerated by the Trial Chamber.").

⁷⁶ Rome Statute, Article 21(1)(c). *See supra* Ground 1(B), para. 42.

furtive design or ill will.”⁷⁷ The Fifth Circuit found “bad faith and a violation of the public interest” where the federal government knowingly failed to apply its own policy that precludes trying a person a second time on essentially the same facts that were prosecuted in a state court.⁷⁸ In that case, bad faith was indicated by the fact that the federal government never characterized its failure to adhere to its own policy as inadvertent.⁷⁹

53. In the U.K., bad faith conduct by the prosecutor is characterized as an abuse of process. In *R v Derby Crown Court, ex p. Brooks*, the Court considered it an abuse of process where the prosecutor manipulates or misuses the court to deprive the accused of fair trial rights or to take unfair advantage of a technicality.⁸⁰

54. In Belgium, the *Cour de Cassation* held the prosecutor’s conduct was inexcusable and unforgivable where he deliberately engaged in a malicious fishing expedition to collect evidence on offenses that were not the object of a judicially authorized request.⁸¹

⁷⁷ *United States v. Gilbert*, 198 F.3d 1293, 1299 (11th Cir. 1999), quoting BLACK’S LAW DICTIONARY 139 (6th ed. 1990).

⁷⁸ *In re Washington*, 544 F.2d 203, 208 (5th Cir. 1976).

⁷⁹ *Id.*

⁸⁰ *R v Derby Crown Court, ex p. Brooks* [1985] 80 Cr. App. R 164, 168-169 DC.

⁸¹ Arrêt de la Cour de cassation de Belgique du 28 mai 2013, P.13.0066.N/6, para. 16: “[T]he contested investigative acts amounted to a fishing expedition, namely maliciously collecting and without any proof, evidence of offenses that were not the subject of a referral in the context of the judicial investigation; [T]he irregularity committed is not the result of objectionable conduct that is excusable and forgivable, nor the result of negligence or excusal recklessness; but it is the deliberate action of the person in charge of the investigation.” (unofficial translation). “[L]es actes d’instruction litigieux se résument à [sic] une partie de pêche [sic] à la drague, à savoir recueillir avec malveillance [sic] et sans le moindre indice des preuves sur des infractions ne faisant [sic] pas l’objet d’une saisine dans le cadre de l’instruction judiciaire [sic];... [L]’irrégularité commise ne découle pas d’un comportement reprochable mais excusable et pardonnable, ni d’une

55. The totality of circumstances of the OTP's bad faith conduct should have been considered by the Trial Chamber in determining whether the admission of the Western Union materials was "antithetical to and would seriously damage the integrity of the proceedings."

a. The Trial Chamber erred in law and fact and abused its discretion failing to consider the totality of circumstances of the OTP's bad faith conduct in investigating Mr. Kilolo in purposeful circumvention of national law and the international human right to privacy.

56. While the Trial Chamber correctly found, based on the Austrian decisions, that Mr. Kilolo's international human right to privacy had been violated, it erroneously concluded that "the infringements to the right to privacy are not so severe as to taint the fairness of the proceedings."⁸² In making this finding, the Trial Chamber failed to consider the totality of circumstances of the OTP's bad faith conduct in investigating Mr. Kilolo in purposeful circumvention of national law and the international human right to privacy.

57. The Trial Chamber ignored its own finding⁸³ that based on an anonymous tip,⁸⁴ the OTP contacted and received confidential banking records from P-

négligence ou d'une imprudence excusable, mais a été sciemment produite par la personne en charge de l'enquête."

⁸² ICC-01/05-01/13-1948, para. 39.

⁸³ ICC-01/05-01/13-1854, para. 42.

⁸⁴ CAR-D24-0004-0285, Annex A, Confidential Redacted version of ICC-01/05-01/13-292-Conf-Exp-Anx A.

0267 before filing a Request for Assistance to the Austrian authorities. On 28 September 2012, OTP Investigator [REDACTED] asked P-0267:

[REDACTED].⁸⁵

On 4 October 2012, OTP Investigator [REDACTED] sent a follow up email to P-0267:

[REDACTED].⁸⁶

P-0267 responded on 11 October 2012, providing a spreadsheet of confidential banking transactions, including those of Mr. Kilolo.⁸⁷ After receiving the spreadsheet, the OTP failed to seek a search warrant.

58. The Trial Chamber failed to consider that the OTP's emails to P-0267 were misleading because there was no urgency and the OTP gave no context as to why the information it required was necessary. [REDACTED].⁸⁸ The OTP had known the identity of the Bemba Main Case⁸⁹ witnesses and the proposed topics of their testimony since 13 July 2012.⁹⁰ The OTP then waited 77 days before contacting P-0267 on 28 September 2012.⁹¹ It waited another six days to send a follow up email to P-0267 on 4 October 2012.⁹² These delays conclusively repudiate any alleged sense of urgency stated in the OTP's

⁸⁵ CAR-OTP-0092-0021-R01, Email from [REDACTED] to Herbert Smetana, 28 September 2012; CAR-OTP-0092-0018, Investigation Report, [REDACTED], 3 November 2015.

⁸⁶ CAR-OTP-0092-0022-R01, Email from [REDACTED] to Herbert Smetana, 4 October 2012.

⁸⁷ *Id.*, Email from Herbert Smetana to [REDACTED], 11 October 2012, p. 0023; CAR-OTP-0092-0024 (Attachment Excel Spreadsheet).

⁸⁸ CAR-D24-0004-0285, Annex A, Confidential Redacted version of ICC-01/05-01/13-292-Conf-AnxA-Red, p. 0303.

⁸⁹ The "Main Case" refers to Jean-Pierre Bemba Gombo's trial for war crimes and crimes against humanity (*Prosecutor v. Bemba*, ICC-01/05-01/08).

⁹⁰ ICC-01/05-01/08-2221; ICC-01/05-01/08-2222-Red; ICC-01/05-01/08-2245; ICC-01/05-01/08-2246.

⁹¹ CAR-OTP-0092-0021-R01, Email from [REDACTED] to Herbert Smetana, 28 September 2012.

⁹² CAR-OTP-0092-0022-R01, Email from [REDACTED] to Hebert Smetana, 4 October 2012.

request to P-0267. P-0267 was misled, effectively coaxed into divulging confidential banking records under a sense of urgency, believing that the request concerned African war crimes:

[W]e usually disclose information when, as I said, when it's on urgent cases only for informative and investigative purpose, which should not be used at all for any other things. And when its urgent, life threatening or very urgent cases, as I could here – I mean, was aware of African war crimes. I heard about these things and that these kind of things is very, for me, very urgent so....⁹³

59. The Trial Chamber failed to consider that the OTP's request to P-0267 required compulsory measures under Austrian law. It thus violated Article 99(1) of the Statute because the OTP did not comply with Austrian law before contacting P-0267 and requesting information protected under the Austrian Banking Act.⁹⁴ Banking secrecy has the rank of constitutional law in Austria,⁹⁵ and the OTP's request required compulsory measures. The OTP purposefully circumvented the search warrant requirement because it knew that it did not have a basis for "sufficient suspicion" based on the tip information.⁹⁶ The information requested from P-0267 was not his own information to disclose. He had no right to divulge financial information protected under the Austrian Banking Act without a judicial order.⁹⁷ The Trial Chamber failed to consider that the OTP's emails also constituted a direct request on the territory of a State Party pursuant to Article 99(4) of the Statute and that the OTP failed to notify the Austrian authorities.

⁹³ ICC-01/05-01/13-T-35-CONF-ENG, p. 70, ll. 1-5.

⁹⁴ See *supra* Ground 1(A)(1).

⁹⁵ CAR-D23-0006-0001, Letter from Dr. Otto Lagodny to Mr. Christopher Gosnell, 2 February 2016, pp. 0002-0003.

⁹⁶ CAR-D24-0005-0001; CAR-D24-0005-0045 (French translation of CAR-D24-0005-0001); CAR-D23-0011-0006 (English translation of CAR-D24-0005-0001), p. 0012.

⁹⁷ *Id.*

60. While the OTP's *ex post facto* investigative report – produced during the second day of P-0267's testimony⁹⁸ – asserted that in 2011 it was allegedly advised by the Austrian senior public prosecutor that it could screen names against the Western Union database,⁹⁹ the investigative report is unverifiable hearsay without any independent indicia of corroboration.¹⁰⁰ It is hearsay within hearsay: the report itself is hearsay and contains hearsay statements of what was allegedly said. Hence, the report itself was valueless and merely used to inappropriately vouch for and bolster the testimony of P-0267.¹⁰¹

61. [REDACTED], the Austrian senior public prosecutor who gave the alleged advice, did not testify at trial. The investigators who attended the meeting with [REDACTED] did not testify. No contemporaneous notes or other reports documenting the meeting were produced. The Trial Chamber made no inquiry into the accuracy of the investigative report, and if accurate, whether the OTP's actions complied with that advice. "If the Judges are not furnished with genuine information," they cannot properly assess the evidence.¹⁰²

62. Even if the OTP was given this alleged advice, its actions constituted more than a mere screening of names. The OTP did not simply ask P-0267 if there

⁹⁸ See *infra* Ground 1(B)(1)(a), para. 66.

⁹⁹ CAR-OTP-0092-0018, Investigation Report, [REDACTED], 3 November 2015.

¹⁰⁰ Although hearsay is admissible at the ICC, hearsay statements should not be relied upon without independent indicia of corroboration. For example, Rule 68(c) allows a prior recorded statement of a deceased or unavailable witness to be admitted provided it is necessary and the prior recorded statement "has sufficient indicia of reliability." See also *Prosecutor v. Aleksovski*, IT-95-14/1, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15 (finding that while it is "well settled in the practice of the Tribunal that hearsay is admissible," the Trial Chamber must be satisfied that hearsay evidence is reliable, voluntary, truthful, and trustworthy.).

¹⁰¹ See *infra* Ground 1(B)(1), para. 67.

¹⁰² ICC-01/05-01/13-1989-Conf, para. 22.

were any “hits” in the Western Union database for it to then make a Request for Assistance to the Austrian authorities. It requested information concerning [REDACTED].¹⁰³

63. The Trial Chamber failed to consider that the OTP’s notification email to the Austrian Ministry of Justice of 15 October 2012¹⁰⁴ did not disclose that it had already obtained confidential banking records from P-0267 or that the notification contained a material misstatement. The OTP made a material misstatement by falsely and deliberately representing that the notification was made in the context of the situation in Côte d’Ivoire.¹⁰⁵

64. The Trial Chamber failed to consider that after visiting the Western Union office on 19 and 20 October 2012 and screening names, including Mr. Kilolo’s, under false pretenses¹⁰⁶ the OTP failed to seek a search warrant from the Austrian authorities.¹⁰⁷ Although the notification stated that the OTP would not interview witnesses or collect documents or copies,¹⁰⁸ what was discussed, what materials were requested, and what was provided to Western Union during this meeting was never disclosed. As discussed below in Ground 1(B)(2), the Trial Chamber failed to exercise its discretionary

¹⁰³ CAR-OTP-0092-0024 (Attachment Excel Spreadsheet).

¹⁰⁴ CAR-OTP-0092-0892-R01, Notification of Mission Report, *CIV – Notification to the competent authorities of Austria*, Email from [REDACTED], 15 October 2012.

¹⁰⁵ CAR-OTP-0092-0892-R01, Notification of Mission Report, *CIV – Notification to the competent authorities of Austria*, Email from [REDACTED], 15 October 2012, pp. 0892-0893. The email states: [REDACTED].

¹⁰⁶ See *supra* Ground 1(B)(1)(a), para. 58. P-0267 was misled from the OTP’s emails into believing that there was a sense of urgency. He believed that the OTP’s request to him concerned African war crimes. There was no sense of urgency.

¹⁰⁷ CAR-OTP-0092-0018, Investigation Report, [REDACTED], 3 November 2015.

¹⁰⁸ CAR-OTP-0092-0892-R01, Notification of Mission Report, *CIV – Notification to the competent authorities of Austria*, Email from [REDACTED], 15 October 2012.

authority under Articles 64(6)(d) and 69(3) of the Statute and Rule 140(2) to inquire into this information, which would have been essential in determining whether the OTP's conduct in gathering the evidence made its admission antithetical to and seriously damaging to the integrity of the proceedings.

65. The Trial Chamber failed to consider that while its Request for Assistance of 2 November 2012 was pending,¹⁰⁹ the OTP continued to circumvent Austrian law by communicating with and receiving confidential financial information from Western Union. On 7 November 2012, OTP Investigator [REDACTED] emailed P-0267 and requested him to "[REDACTED]."¹¹⁰ P-0267 responded that same day and [REDACTED].¹¹¹
66. The Trial Chamber failed to consider the OTP's orchestrated, untimely disclosure of its contacts with Western Union and the OTP's investigative report, produced and disclosed during P-0267's testimony.¹¹² The second day of P-0267's testimony (cross-examination) revealed the OTP's prior contacts with him, prompting the OTP investigators to produce an *ex post facto* "report."¹¹³ After the conclusion of the second day of his testimony, the OTP

¹⁰⁹ [REDACTED]. CAR-D23-0002-0021 (Word Documents Austrian authorities, unofficial translation).

¹¹⁰ CAR-OTP-0092-0028-R01, Email from [REDACTED] to Herbert Smetana [REDACTED], 7 November 2012 and CAR-OTP-0092-0029 (Attachment Excel Spreadsheet); CAR-OTP-0092-0033-R01, Email from [REDACTED] to Herbert Smetana, [REDACTED], 7 November 2012 at 3:41 pm.

¹¹¹ CAR-OTP-0092-0033-R01, Email from Herbert Smetana to [REDACTED], [REDACTED], 7 November 2012, 17:00; CAR-OTP-0092-0034 (Attachment Excel Spreadsheet); CAR-D23-0003-0001, Extract of Email Attachment from Herbert Smetana to [REDACTED], [REDACTED], Sent: 07 November 2012, 17:00.

¹¹² CAR-OTP-0092-0018, Investigation Report, [REDACTED], 3 November 2015; ICC-01/05-01/13-T-35-CONF-ENG, pp. 72-74.

¹¹³ ICC-01/05-01/13-T-34-CONF-ENG, p. 43, ll. 12-20.

investigators prepared a short “investigative report” of their contacts with P-0267 and the purported advice the OTP received from the Austrian public prosecutor in 2011.¹¹⁴ This report was then disclosed to the parties.¹¹⁵ According to the report, the OTP investigators met with the Austrian senior public prosecutor and P-0267 on an unrelated matter, where allegedly the screening of names from Western Union was discussed in general.¹¹⁶ The report was prepared more than four years after the advice it purports to document; advice from an unrelated situation.

67. Considering the nature of the discussions and the events that transpired between the OTP, the Austrian public prosecutor, and Western Union, the one-page report provides no details, making it impossible for the Defence to know the exact nature and extent of the contacts. The OTP attempted to bolster P-0267’s testimony through this report.¹¹⁷ P-0267 was having difficulty answering questions concerning his contacts with the OTP.¹¹⁸ The report was offered at this stage to compensate for his amnesia. None of these facts were considered by the Trial Chamber.

68. The Trial Chamber’s failure to consider the totality of the circumstances constitutes an error of law because it failed to base its decision on a holistic evaluation of the entire proceedings as it is required to do under Article 74.

¹¹⁴ ICC-01/05-01/13-T-35-CONF-ENG, p. 10, ll. 5-18; CAR-OTP-0092-0018, Investigation Report, [REDACTED], 3 November 2015.

¹¹⁵ ICC-01/05-01/13-T-35-CONF-ENG, p. 10, ll. 5-18.

¹¹⁶ CAR-OTP-0092-0018, Investigation Report, [REDACTED], 3 November 2015.

¹¹⁷ ICC-01/05-01/13-T-35-CONF-ENG, p. 74, ll. 12-21.

¹¹⁸ ICC-01/05-01/13-T-34-CONF-ENG, p. 25, ll. 24-25, p. 26, ll. 1-15, p. 50, ll. 17-25, p. 57, ll. 6-10. P-0267 repeatedly claimed not to have a recollection of the meeting with the OTP in 2011 and had no contemporaneous notes from which to refresh his memory.

Had it holistically “evaluate[d] *all the evidence taken together*,”¹¹⁹ it would have concluded that the OTP in bad faith purposefully circumvented national law and the international human right to privacy in obtaining the Western Union materials, and that this rendered the admission of the impugned evidence antithetical to and seriously damaging to the integrity of the proceedings.

69. The Trial Chamber’s failure to consider all relevant facts further constitutes an abuse of its discretion under Article 69(7)(b) of the Statute. The Trial Chamber claimed to have considered the OTP’s conduct as a relevant factor in deciding under Article 69(7)(b) whether the admission of the Western Union materials and their fruits would be antithetical to and would seriously damage the integrity of the proceedings, but it ignored relevant facts showing the OTP’s bad faith.¹²⁰ This was so unreasonable and prejudicial as to constitute an abuse of discretion because the Trial Chamber admitted and relied on the impugned evidence to Mr. Kilolo’s detriment in making findings of facts leading to his conviction.

b. The Trial Chamber erred in law and fact and abused its discretion in failing to consider the totality of the circumstances of the OTP’s bad faith conduct in investigating Mr. Kilolo in purposeful circumvention of Defence Counsel’s immunity.

70. When the issue of Mr. Kilolo’s immunity was raised, the Trial Chamber declined to consider it, finding that the first Austrian decision’s mention of

¹¹⁹ ICC-01/04-01/06-3121-Red, para. 22.

¹²⁰ ICC-01-05/01-13-1948, para. 33. The Trial Chamber stated that it considered as relevant factors “the nature of the violation in question and the fault, or lack thereof, of the Prosecution.”

Defence Counsel's immunity was a mere recapitulation of Defence submissions.¹²¹ The Austrian decision did not merely recapitulate Defence arguments as the Trial Chamber claimed,¹²² but suggested that any further Request for Assistance by the OTP would be subject to an assessment of whether Mr. Kilolo's immunity applied as an impediment to prosecution.¹²³ The Trial Chamber also failed to consider the totality of circumstances of the OTP's bad faith conduct in investigating Mr. Kilolo in purposeful circumvention of his immunity.

71. The Trial Chamber failed to consider that the OTP did not seek to lift immunity:

- a. After receiving an unsolicited and anonymous tip on 14 June 2012 that the Defence may have bribed witnesses in the Bemba Main Case by making monetary transfers through Western Union;¹²⁴
- b. After sending the two emails to P-0267 on 28 September and 4 October 2012, soliciting confidential banking information;¹²⁵
- c. After P-0267 provided the OTP with a spreadsheet of financial transactions, including Mr. Kilolo's banking data, on 11 October 2012;¹²⁶

¹²¹ ICC-01/05-01/13-1948, para. 31.

¹²² ICC-01/05-01/13-1948, para. 30: "In respect of the first Austrian Ruling the mentioning of potential additional obstacles to grant the initial orders due to immunities is a mere recapitulation of the assertions by the defence."

¹²³ CAR-D24-0005-0001; CAR-D24-0005-0045 (French translation of CAR-D24-0005-0001); CAR-D23-0011-0006 (English translation of CAR-D24-0005-0001), p. 0015: "[REDACTED]."

¹²⁴ ICC-01/05-44-Conf-Red2, paras. 3-9.

¹²⁵ CAR-OTP-0092-0021-R01, Email from [REDACTED] to Herbert Smetana, 28 September 2012; CAR-OTP-0092-0018, Investigation Report, [REDACTED], 3 November 2015; CAR-OTP-0092-0022-R01, Email from [REDACTED] to Herbert Smetana, 4 October 2012.

- d. After visiting the Western Union office on 19 and 20 October 2012 and screening names, including Mr. Kilolo's;¹²⁷
- e. After visiting the Western Union office for a second time on 5 November 2012 and screening more names;¹²⁸
- f. After receiving another spreadsheet from P-0267 on 7 November 2012,¹²⁹ while its Request for Assistance of 2 November 2012 was pending;¹³⁰
- g. When the OTP requested the Main Case Trial Chamber to order the Registry to release information concerning payments to Defence witnesses;¹³¹
- h. After receiving the spreadsheet from the ICC Victims and Witnesses Unit ("VWU");¹³²
- i. In making its Second Request for a Judicial Order to Obtain Evidence for Investigation under Article 70 on 19 July 2013, in which it sought the Single Judge's authorization to "collect

¹²⁶ CAR-OTP-0092-0022-R01, Email from Herbert Smetana to [REDACTED], 11 October 2012, p. 0023.

¹²⁷ CAR-OTP-0092-0018, Investigation Report, [REDACTED], 3 November 2015.

¹²⁸ CAR-OTP-0092-0018, Investigation Report, [REDACTED], 3 November 2015. *See also* CAR-OTP-0092-0027-R01.

¹²⁹ CAR-OTP-0092-0033-R01, Email from Herbert Smetana to [REDACTED], [REDACTED], 7 November 2012, 17:00; CAR-OTP-0092-0034 (Attachment Excel Spreadsheet); CAR-D23-0003-0001, Extract of Email Attachment from Herbert Smetana to [REDACTED], [REDACTED], Sent: 07 November 2012, 17:00.

¹³⁰ CAR-OTP-0091-0351. *See also* CAR-OTP-0092-0027-R01.

¹³¹ ICC-01/05-01/08-2412.

¹³² ICC-01/05-01/08-2461.

recordings of telephone intercepts from the Dutch and Belgian governments of Messrs. Kilolo and Mangenda;”¹³³

- j. Before making its Requests for Assistance to the Dutch and Belgian authorities on 6 August 2013 to obtain intercepts of Mr. Kilolo’s communications;¹³⁴
- k. [REDACTED];¹³⁵ and
- l. In making its Second Request for Assistance to the Austrian authorities on 18 October 2013.¹³⁶

72. The Trial Chamber also failed to consider that:

- a. The notification email to the Austrian authorities on 15 October 2012 failed to disclose that Mr. Kilolo was covered by Defence Counsel’s immunity;¹³⁷
- b. The OTP’s second notification email to the Austrian Ministry of Justice of 1 November 2012 failed to disclose that Mr. Kilolo was covered by immunity;¹³⁸

¹³³ ICC-01/05-51-Conf.

¹³⁴ CAR-D21-0005-0001, [REDACTED]; CAR-OTP-0091-0380, [REDACTED].

¹³⁵ ICC-01/05-60-Conf-Red2, para. 10; CAR-OTP-0093-0019-R01, p. 0019; CAR-OTP-0093-0021-R01; CAR-OTP-0093-0023-R01.

¹³⁶ CAR-OTP-0091-0360.

¹³⁷ CAR-OTP-0092-0892-R01, Notification of Mission Report, CIV – Notification to the competent authorities of Austria, Email from [REDACTED], 15 October 2012.

¹³⁸ CAR-OTP-0092-0890-R01, Transmission Report, CAR – Request and mission notification dated 01 November 2012 to the competent authorities of Austria about the meetings with Western Union, Email from [REDACTED], 1 November 2012.

- c. The OTP's Request for Assistance of 2 November 2012 failed to disclose that Mr. Kilolo was covered by immunity,¹³⁹ and that Mr. Kilolo's name appeared in the Annex to the Request for Assistance as one of the 67 identified persons involved in the Western Union transfers;¹⁴⁰
- d. The VWU provided the OTP with spreadsheets detailing the amounts paid to Defence witnesses on 26 November 2012,¹⁴¹ without the Main Case Trial Chamber's prior authorization;¹⁴²
- e. After the Registry had already transmitted the information, the Main Case Trial Chamber committed a procedural error because it failed to consider Defence Counsel's immunity and the totality of the circumstances;¹⁴³
- f. Before granting the OTP's Second Request on 29 July 2013,¹⁴⁴ the Single Judge did not request the Presidency to lift immunity. The Single Judge erroneously granted the request and authorized the OTP "to seize the relevant authorities of Belgium and of the Netherlands, with a view to collecting logs and recordings of telephone calls placed or received" by Mr. Kilolo and Mr.

¹³⁹ CAR-OTP-0091-0351, [REDACTED]; CAR-OTP-0091-0351, [REDACTED], pp. 0356-0359.

¹⁴⁰ CAR-OTP-0091-0351; CAR-OTP-0091-0351, [REDACTED], pp. 0356-0359.

¹⁴¹ ICC-01/05-01/08-2461.

¹⁴² *Id.*, para. 4.

¹⁴³ *Id.*, para. 4. The Trial Chamber III found that no decision on the OTP's request was required because the Registry had already "provided the prosecution with most of the information sought in relation to witnesses called by the defence including the type of expenses incurred, the instances in which payments were made through the defence team, and the professional fees to be paid to expert witnesses."

¹⁴⁴ ICC-01/05-52-Conf.

Mangenda.¹⁴⁵ (*See infra* Ground 1(C)(2) and Ground 2(A)-(B)). In granting the OTP's second request, the Single Judge failed to analyze whether the OTP had sufficient information to trigger the crime-fraud exception to legal professional privilege in order to begin listening in on privileged attorney-client communications (*See infra* Ground 2(A)-(B));

- g. The OTP's request to the Dutch and Belgian authorities contained material misstatements because it represented that the Single Judge authorized it to collect recordings of telephone intercepts from Mr. Kilolo.¹⁴⁶ The Single Judge did not authorize the OTP to collect intercepted communications, but merely authorized it to seize the national authorities "with a view to collecting logs and recordings of telephone calls placed or received" by Mr. Kilolo and Mr. Mangenda.¹⁴⁷ The Single Judge's language indicates that the decision whether to grant authorization would be up to the Dutch and Belgian authorities. The OTP's language was designed to lead the Dutch and Belgian authorities to proceed based on the ICC's authorization;
- h. The OTP only for the first time in its 16 month investigation acknowledged Mr. Kilolo's immunity when raising it in its application of 19 October 2013 for Mr. Kilolo's arrest.¹⁴⁸ In its request for an arrest warrant, the OTP stated that privileges and

¹⁴⁵ *Id.*, p. 7.

¹⁴⁶ CAR-D21-0005-0001, [REDACTED], p. 0004, para. 8; CAR-OTP-0091-0380, [REDACTED], p. 0383, para. 9.

¹⁴⁷ ICC-01/05-52-Conf, p. 7.

¹⁴⁸ ICC-01/05-01/13-19-Conf.

immunities did not serve as a limitation to prosecute Mr. Kilolo under Article 70 and requested that the Single Judge specify to national authorities that Mr. Kilolo's privileges and immunities would not serve as a bar to arrest and surrender him to the Court;¹⁴⁹ and

- i. Immunity was only waived by the Presidency on 20 November 2013,¹⁵⁰ after the Single Judge applied to the Presidency based on the OTP's application for a warrant of arrest.¹⁵¹

73. The Trial Chamber's failure to consider the totality of the circumstances constitutes an error of law because it failed to base its decision on a holistic evaluation of the entire proceedings as it is required to do under Article 74(2) of the Statute. Had it "evaluate[d] *all the evidence taken together*,"¹⁵² it would have concluded that the OTP in bad faith purposefully circumvented Mr. Kilolo's immunity. The Trial Chamber should have considered the OTP's bad faith conduct. The OTP's purposeful violation of Mr. Kilolo's immunity

¹⁴⁹ ICC-01/05-01/13-19-Conf, para. 125. In its request, the OTP stated:

The Prosecution further notes that Counsel before the Court and persons assisting Defence counsel enjoy certain privileges and immunities which may only be waived by the Presidency. However, such privileges and immunities, and their waiver, apply only with respect to the exercise of jurisdiction by national courts with respect to their official capacity before the ICC, and do not serve as a limitation to their prosecution under Article 70 of the Statute before this Court. Accordingly, in transmitting requests for arrest and surrender with respect to KILOLO and MANGENDA, the Prosecution requests the Court to specify to the relevant State(s) that such persons are not entitled to invoke such privileges and immunities as a bar to their arrest and surrender to the Court.

¹⁵⁰ ICC-01/05-68-AnxII.

¹⁵¹ ICC-01/05-68-AnxI.

¹⁵² ICC-01/04-01/06-3121-Red, para. 22.

rendered the admission of the Western Union materials antithetical to and seriously damaging to the integrity of the proceedings.

74. The Trial Chamber's failure to consider the totality of the circumstances further constitutes an abuse of its discretion under Article 69(7)(b) of the Statute. The Trial Chamber claimed to have considered the OTP's conduct as a relevant factor in deciding under Article 69(7)(b) whether the admission of the Western Union materials and their fruits would be antithetical to and would seriously damage the integrity of the proceedings, but it ignored relevant facts showing the OTP's bad faith.¹⁵³ This was so unreasonable and prejudicial as to constitute an abuse of discretion because the Trial Chamber admitted and relied on the impugned evidence to Mr. Kilolo's detriment in making findings of facts leading to his conviction.

2. The Trial Chamber erred in law and abused its discretion by failing to seek evidence that would have led it to the truth.

75. The Trial Chamber erred in law and abused its discretion by failing to exercise its authority under Articles 64(6)(d) and 69(3) of the Statute and Rule 140(2) to seek evidence that would have lead it to the truth. In failing to do so it also erred in law by failing to protect the integrity of the proceedings as required by Article 64(2) of the Statute.¹⁵⁴

¹⁵³ ICC-01-05/01-13-1948, para. 33. The Trial Chamber stated that it considered as relevant factors "the nature of the violation in question and the fault, or lack thereof, of the Prosecution."

¹⁵⁴ Rome Statute, Article 64(2): "The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.". ICC-01/09-02/11-365, para. 46 (characterizing the obligation under Article 64 as a duty to "protect the integrity of the proceedings.").

76. “[T]he search for the truth is the principal goal of the Court as a whole.”¹⁵⁵ Articles 64(6)(d) and 69(3) of the Statute and Rule 140(2)(c) are the vehicles by which the ICC Trial Chamber fulfils its mandatory obligation to determine the truth. Under Article 64(6)(d) of the Statute, the Trial Chamber “may, as necessary ... order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties.” According to Article 69(3), “the Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.” Rule 140(2)(c) gives the Trial Chamber the “right to question a witness before or after a witness is questioned by a participant.” Article 64(2) imposes an affirmative obligation on the Trial Chamber to “ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”
77. The language “may, as necessary,” in Article 64(6)(d) and “it considers necessary” in Article 69(3) indicate a discretionary power, rather than explicitly imposing an obligation. However, the language of Articles 64(6)(d) and 69(3) presupposes that the Trial Chamber should have sufficient evidence to get to the truth. Only if the parties have presented sufficient evidence for the Trial Chamber to determine the truth, then it need not exercise its discretionary authority. Read together, Articles 64(6)(d), 69(3), and 64(2) of the Statute and Rule 140(2)(c), impose a responsibility on the

¹⁵⁵ In the Main Case, the Trial Chamber “emphasis[ed] that the search for the truth is the principal goal of the Court as a whole.” ICC-01/05-01/08-55, para. 11.

judges to ensure that all evidence that may be obtainable – irrespective of what is adduced by the parties – should be considered so the truth can emerge. “[I]t was indeed impossible for Civil Law Delegations and especially for France to leave all the power on this point in the hands of the parties.”¹⁵⁶

78. The obligation to search for the truth relates not only to the guilt or innocence of the accused,¹⁵⁷ but also to the events occurring throughout the proceedings, including the conduct of OTP investigators.¹⁵⁸ For example, in *Katanga & Ngudjolo*, although neither Defence team requested it do so, the Trial Chamber, acting under Articles 64(2) and 64(6)(d) of the Statute, ordered the OTP Lead Investigator to testify as to how his investigations were conducted, his methods in taking statements from OTP witnesses, and the methods used to investigate exculpatory evidence.¹⁵⁹

79. One of the Defence Counsel in this case used the investigative report produced and disclosed after P-0267’s second day of testimony to refresh his memory without requesting the OTP to lay a foundation or to seek confrontation of the OTP investigators who authored the report.¹⁶⁰ No value can be ascribed to the report simply because a Defence Counsel used it.

¹⁵⁶ See Gilbert Bitti, *Functions and Powers of the Trial Chamber*, in O. TRIFFTERER & K. AMBOS, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, A COMMENTARY 1610 (3d ed. 2016): Article 64(6)(d) “gives an *ex officio* power to the Trial Chamber to order the production of further evidence to that already presented by the parties. That gives a very important role to the judges to ascertain the truth; it was indeed impossible for Civil Law Delegations and especially for France to leave all the power on this point in the hands of the parties.”

¹⁵⁷ ICC-01/05-01/08-2837-Red, paras. 19-20. In the *Bemba* Main Case, the Trial Chamber called additional witnesses that were mentioned by other OTP and Defence witnesses after the closing of the defence case.

¹⁵⁸ ICC-01/04-01/07-1603-tENG, para. 17.

¹⁵⁹ *Id.*

¹⁶⁰ ICC-01/05-01/13-T-35-CONF-ENG, p. 52, ll. 17-25, p. 53, ll. 1-25, p. 54, ll. 1-7.

Notwithstanding the use of this report, the Trial Chamber should have intervened as part and parcel of its responsibility to seek the truth.

80. The Trial Chamber failed to inquire into the provenance of this report before it was shown to P-0267: how the report was produced, the basis of the information in the report, and whether there were any notes or other documents (time sheets, other reports referencing the meeting, etc.) available that the investigators used to create the report. Although the Defence failed to timely object¹⁶¹ to the use of the report, since no foundation had been established, the Trial Chamber had an affirmative duty to raise the issue on its own pursuant to its obligation under Articles 64(2), 64(6)(d) and 69(3) of the Statute and Rule 140(2).

81. The Trial Chamber should have exercised its discretionary authority to compel the OTP to disclose the investigators' notes or other documents that in any way document the alleged meeting they had with the Austrian public prosecutor in 2011 and the entire thread of communications between the OTP and P-0267. It should have also compelled the OTP investigators' testimony, as was done in *Katanga & Ngudjolo*,¹⁶² to determine:

- a. Who was the target of investigations from the moment the OTP received the anonymous tip;

¹⁶¹ Counsel for Mangenda objected to the report after it had already been shown to the witness by Counsel for Bemba. The court overruled the objection since Counsel for Bemba had already presented the report to the witness, thus rendering thrust of the objection immaterial. ICC-01/05-01/13-T-35-CONF-ENG, p. 72, l. 25, p. 73, ll. 1-14.

¹⁶² ICC-01/04-01/07-1603-tENG, para. 17.

- b. Whether the OTP knew that Mr. Kilolo's immunity should have been lifted at that point;
- c. What advice the OTP allegedly received from the Austrian public prosecutor in 2011;
- d. Whether the OTP's actions complied with that alleged advice; and
- e. What was discussed, what materials were requested, and what was provided during the meetings with Western Union on 19-20 October and 5 November 2013.

82. This information was necessary to establish the truth concerning the OTP's investigative conduct. The Trial Chamber's failure to inquire into the provenance of the investigative report was so unreasonable and prejudicial as to constitute an abuse of discretion because the Trial Chamber relied on the uncorroborated hearsay report to Mr. Kilolo's detriment in finding that the OTP did not act with the intention to circumvent the legal safeguards, undertook the necessary steps to legally obtain the Western Union materials, and had to assume that it obtained the Western Union materials lawfully.¹⁶³ This materially impacted the conviction decision because the Trial Chamber admitted and relied on the Western Union materials and their fruits in making findings of fact that led to Mr. Kilolo's conviction.

¹⁶³ ICC-01/05-01/13-1948, para. 39.

3. The Trial Chamber abused its discretion in failing to consider the chilling effect of its decisions on Counsel practicing before the ICC.

83. In determining whether the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings, the Trial Chamber abused its discretion in failing to consider the chilling effect¹⁶⁴ on Defence Counsel and their professional obligations towards their clients, and that its decisions permit the OTP to surreptitiously and without court authorization or supervision investigate Defence Counsel while engaged in trial proceedings.

84. The OTP should come under judicial supervision where it is both prosecuting an accused and investigating the accused's Defence Counsel to secure evidence to charge and arrest Defence Counsel for Article 70 offenses. While there may not be an inherent conflict of interest that arises when the OTP investigates Defence Counsel, the Trial Chamber failed to appreciate the discrete facts of this case in that the Article 70 investigation was being conducted against Defence Counsel during trial.

85. From the tip information, it was obvious that Mr. Kilolo was one of the targets of the investigation. The investigation focused on gathering information to establish an Article 70 offense. The actions taken by the OTP

¹⁶⁴ BLACK'S LAW DICTIONARY 233 (7th ed. 1999): A chilling effect is "1. The result of a law or practice that seriously discourages the exercise of a constitutional right, such as the right to appeal or the right of free speech. 2. Broadly, the result when any practice is discouraged." See e.g., *James v. Illinois*, 493 U.S. 307, 314-315, 318 (1990) (finding that expanding the "impeachment exception" to permit prosecutors to use illegally obtained evidence to impeach the credibility of defence witnesses would "chill some defendants from presenting their best defense – and sometimes any defense at all – through the testimony of others.").

following the tip demonstrate the inherent bias that arose when the OTP investigated Mr. Kilolo, its adversary in an ongoing trial. (*See supra* Ground 1(B)(1)). The OTP, through its investigators, acted with bias by circumventing Austrian procedure when it appeared that the information from the tipster was insufficient for a search warrant. The OTP's decision to request an independent counsel to screen for privileged communications¹⁶⁵ shows that it knew this case required sensitivity. The OTP should have taken the same precautions when it came to investigating Defence Counsel. While there are no set guidelines or procedures in place mandating what the OTP must do to investigate Article 70 offenses, the need for an independent prosecutor is obvious when the OTP investigates its adversary in an ongoing trial.¹⁶⁶

86. None of these facts were considered by the Trial Chamber in its Article 69(7) analysis. The fact that the OTP was investigating an adversary, the fact that no independent counsel was requested or appointed to prosecute or investigate the Article 70 case, and the fact that the issue of Mr. Kilolo's immunity was never addressed until he was arrested renders the admission of the Western Union materials and their fruits antithetical to and seriously damaging to the integrity of the proceedings because of the chilling effect it has on Defence Counsel if the OTP is permitted to clandestinely investigate

¹⁶⁵ ICC-01/05-01/13-310-Conf.

¹⁶⁶ At the SCSL, the Trial Chamber, upon allegations of witness intimidation and bribery, appointed an independent prosecutor charged with investigating and prosecuting contempt charges. *See Prosecutor v. Bangura et al.*, SCSL-11-02-T-066, Judgement in Contempt Proceedings, 25 September 2012, para. 5. At the SCSL, Rule 77(C)(iii) expressly provides the Chambers with the authority to appoint an independent counsel to investigate contempt matters. While ICC Rule 165 gives the OTP authority to initiate investigations regarding to Article 70 offenses, Rule 165 does not adequately address situations where the OTP is investigating a Defence Counsel during trial. This was perhaps not contemplated by the Assembly of States Parties in drafting the Rules of Procedure and Evidence.

Defence Counsel during trial without first making any request to waive Defence Counsel's immunity.

87. Based on the Trial Chamber's decisions,¹⁶⁷ the OTP can effectively go rogue and investigate Defence Counsel based on insufficient information, such as unverified claims by anonymous tipsters. Moreover, the OTP is at liberty to search for confidential and privileged information – even in contravention of domestic laws and in violation of the internationally recognized human right to privacy – as it pleases and without first making any attempt to lift Defence Counsel's immunity. It is not fanciful to imagine that had the OTP's investigation been fruitless, neither Mr. Kilolo nor the Court would have ever known that Mr. Kilolo was the target of an investigation, that the OTP investigator approached P-0267 and obtained his confidential banking information, or that Mr. Kilolo's right to privacy and legal professional privilege had been breached.

88. Defence Counsel have an ethical duty to zealously represent their clients under Articles 5 and 14 of the ICC Code of Professional Conduct for Counsel.¹⁶⁸ The ethical duty of zealousness is a lawyer's "sacred duty,"¹⁶⁹ "an

¹⁶⁷ ICC-01/05-01/13-1854; ICC-01/05-01/13-1948.

¹⁶⁸ ICC Code of Professional Conduct for Counsel, ICC-ASP/4/Res.1, adopted at the 3rd plenary meeting on 2 December 2005, Articles 5, 14.

¹⁶⁹ H. BROUGHAM, *THE LIFE AND TIMES OF HENRY LORD BROUGHAM, WRITTEN BY HIMSELF*, Vol. II 406 (Edinburgh London: William Blackwood and Sons 1871): "I once before took leave to remind your Lordships – which was unnecessary, but there are many who it may be needful to remind – that an advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, THAT CLIENT AND NONE OTHER" (emphasis in original).

essential ingredient of a proper defence,”¹⁷⁰ and must be appreciated within the context of the Court’s Rules of Procedure and Evidence. It requires Defence Counsel to robustly challenge the OTP: to raise every conceivable legal issue of merit, to challenge every action taken by prosecutors and investigators, to challenge the veracity and accuracy of witness statements gathered by the OTP, and to object to any evidence that may lack relevance, reliability, or authenticity. The purpose of Defence privileges and immunities is to further this ethical duty; to ensure that Counsel are protected from legal action in performance of their functions.¹⁷¹ The Trial Chamber failed to consider that under its decisions, zealous representation could give rise to prosecutorial fishing expeditions: to investigate Defence Counsel – based on suspect claims – in the hopes of finding something that would taint or temper Defence Counsel.

89. The chilling effect, which the Trial Chamber failed to consider, is that Defence Counsel in all future cases are presented with two untenable choices: either zealously represent the accused and risk coming under investigation by the OTP, or take cover and provide a less-than zealous representation, even at the risk of breaching their ethical and professional duties towards their clients. Had the Trial Chamber considered this chilling effect on its own, or in concert with the facts that it failed to consider, the Trial Chamber would have

¹⁷⁰ The ethical duty of zealousness requires that lawyers serve their client’s interest even if concealing the truth. “A defence lawyer should not be required to act as an agent of the court whenever there is a potential conflict between the client’s interests and the pursuit of material information.” J. Temminck Tuinstra, *Defending the Defenders. The Role of Defence Counsel in International Criminal Trials*, 8 J. INT’L CRIM. JUST. 463, 472 (2010) (internal citations omitted).

¹⁷¹ See *supra* Ground 1(A)(3). *Prosecutor v. Gotovina et al.*, IT-06-90-AR73.5, Decision on Gotovina Defence Appeal Against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, 14 February 2011, paras. 28-31.

concluded that the admission of the OTP's evidence was antithetical to and seriously damaged the integrity of this proceeding, and damages the integrity of all future proceedings.

4. The Trial Chamber should have found that the admission of the Western Union materials was antithetical to and seriously damaged the integrity of the proceedings.

90. The Trial Chamber failed to consider that the OTP's circumvention of the proper safeguards was intentional, or that it at least acted in reckless disregard of national procedure, the international human right to privacy, and Defence Counsel's immunity. The OTP knew that it needed a search warrant to go through the Western Union database and that at the time it contacted P-0267 it did not have sufficient reliable information to obtain one. The OTP also knew that Mr. Kilolo was covered by immunity, and repeatedly failed to seek a waiver, or disclose his immunity to the national authorities. In its request to obtain judicial assistance to collect intercepts of Mr. Kilolo's telecommunications, the OTP rightly noted that "the intended collection of evidence in this instance implicates members of a defence team.... In these exceptional circumstances, the Prosecution considers it appropriate to seek independent judicial approval."¹⁷² The OTP's acknowledgement that it should seek judicial approval in this request is indicative of its bad faith because it knew that special measures were required to investigate the Defence during trial. By the time the OTP made the request to obtain the intercepts, however, it had already been gathering evidence in its investigation of members of the

¹⁷² ICC-01/05-51-Conf, para. 3.

Defence for over a year.¹⁷³ Its request for judicial authorization at this point was an ineffectual, gratuitous effort to close the barn door long after the horse had left: the OTP knew from the minute it received the tip that Mr. Kilolo would be a target of investigations.¹⁷⁴

91. The Trial Chamber failed to consider that the OTP's behavior was so egregious that it amounted to prosecutorial misconduct. As a general principle under the ICC Code of Conduct for the OTP, the OTP has a duty to uphold "professional ethics and integrity" and respect "human rights and fundamental freedoms recognized by international law in conformity with the Statute."¹⁷⁵ Specifically, the OTP must "refrain from any conduct which would adversely reflect on the Office," and in its dealings with Defence Counsel and the Court "uphold the highest standards of integrity."¹⁷⁶ In conducting its investigations and prosecutions, the OTP must:

refrain from proffering evidence reasonably believed to have been obtained by means of a violation of the Statute or internationally recognised human rights if ... the admission of evidence would be antithetical to and would seriously damage the integrity of the proceedings.¹⁷⁷

92. The OTP violated these ethical responsibilities by knowingly circumventing the proper safeguards: national law, the international human right to privacy, and Mr. Kilolo's immunity. The Trial Chamber failed to consider this in

¹⁷³ The OTP started its investigation after receiving the anonymous tip on [REDACTED]. CAR-D24-0004-0285, p. 0306.

¹⁷⁴ [REDACTED]. CAR-D24-0004-0285, p. 0306.

¹⁷⁵ ICC Code of Conduct for the Office of the Prosecutor, Chapter 1, Section 4, paras. (8)(b), 8(e).

¹⁷⁶ *Id.*, Chapter 2, Section 1, para. 20(c).

¹⁷⁷ *Id.*, Chapter 3, Section 2, para. 51(d).

determining whether the admission of the OTP's evidence would be antithetical to and would seriously damage integrity of the proceedings.

93. Had the Trial Chamber holistically evaluated the totality of the circumstances, considered the belated disclosure in context with the other facts that it failed to consider, considered the chilling effect, and properly used its discretion to seek the testimony of the investigators, it would have found that the admission of the Western Union materials and their fruits would be antithetical to and would seriously damage the integrity of the proceedings.

C. The Trial Chamber erred in law, fact, and procedure in admitting and relying on evidence obtained because of and resulting from the Western Union materials.

94. The Trial Chamber concluded that the admission of the fruits of the Western Union materials – intercepts of privileged attorney-client communications – would not be antithetical to nor seriously damage the integrity of the proceedings because it found that the Western Union materials were obtained lawfully.¹⁷⁸ In addition to the errors articulated in Ground 1(B), the Trial Chamber erred in law and fact and abused its discretion in admitting and relying on the fruits of the Western Union materials by:

- a. Failing to consider the link between the illegally obtained Western Union materials and the intercepts of communications, which are the fruits of the poisonous tree; and

¹⁷⁸ ICC-01/05-01/13-1948, para. 39; ICC-01/05-01/13-1854, paras. 69-70.

- b. Failing to consider the Single Judge's procedural error in granting the OTP's request to collect intercepts of privileged attorney-client communications without first seeking to lift immunity.

1. The Trial Chamber erred in law and fact by failing to consider the link between the illegally obtained Western Union materials and the intercepts of communications, which are the fruits of the poisonous tree.

95. The Trial Chamber erred in law and fact by failing to consider the link between the illegally obtained Western Union materials and the intercepts of communications collected from the Belgian and Dutch authorities, which are the fruits of the poisonous tree. The Western Union materials were the basis for further intrusion into Mr. Kilolo's privacy and legal professional privilege.¹⁷⁹ Without the collection of the Western Union materials, the OTP would have had no basis to intrude into Mr. Kilolo's private affairs. The information the OTP received from P-0267 served as its basis to collect telephone logs and recordings of telephone conversations between Mr. Bemba and Mr. Babala.¹⁸⁰ The call log data and recordings from Mr. Bemba's detention unit then served as the basis for obtaining wiretaps of Mr. Kilolo's telephone number from the Belgian and Dutch authorities.¹⁸¹ The Trial Chamber failed to consider this link and the totality of the circumstances of the OTP's bad faith conduct in investigating the Defence in finding that the admission of the intercepts collected by the Belgian and Dutch authorities

¹⁷⁹ ICC-01/05-52-Conf; ICC-01/05-46.

¹⁸⁰ ICC-01/05-44-Conf-Red2, paras. 3, 41(b).

¹⁸¹ CAR-D21-0005-0001, [REDACTED]; CAR-OTP-0091-0380, [REDACTED].

would not be antithetical to nor seriously damage the integrity of the proceedings. (*See supra* Ground (1)(B)(1)).

96. The Trial Chamber failed to consider whether the fruit of the poisonous tree doctrine applies at the ICC. The doctrine of the fruit of the poisonous tree applies to bar admission into evidence of the direct or indirect products of illegally obtained evidence.¹⁸² The rationale for the doctrine is to deter unlawful conduct by the police or investigative authorities.¹⁸³

97. In *Lubanga*, the Trial Chamber declined to apply the doctrine of the fruit of the poisonous tree.¹⁸⁴ The *Bemba et al.* Trial Chamber considered *Lubanga* for the proposition that “not every violation of an internationally recognised human right leads automatically to the exclusion of evidence under Article 69(7)(b) of the Statute,”¹⁸⁵ although it did not mention the fruit of the poisonous tree discussion by the *Lubanga* Trial Chamber. The *Lubanga* decision was not binding on the *Bemba et al.* Trial Chamber.¹⁸⁶ The permissive language in Article 21(2)¹⁸⁷ rejects the rule of *stare decisis*.¹⁸⁸ The Trial Chambers are co-equal bodies and do not create binding precedent for each other.¹⁸⁹

¹⁸² See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920); *Wong Sun v. United States*, 371 U.S. 471, 485 (1963).

¹⁸³ See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391-92 (1920).

¹⁸⁴ ICC-01/04-01/06-1981.

¹⁸⁵ ICC-01/05-01/13-1854, para. 63; ICC-01/05-01/13-1948, paras. 32-33.

¹⁸⁶ ICC-01/05-01/13-1948, paras. 32-33.

¹⁸⁷ Rome Statute, Article 21(2): “The Court *may* apply principles and rules of law as interpreted in its previous decisions.” (emphasis added).

¹⁸⁸ WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT, A COMMENTARY ON THE ROME STATUTE* 527 (2d ed. 2016).

¹⁸⁹ See ICC-01/04-168, para. 30 (finding that the Pre-Trial Chambers and Trial Chambers of the ICC “are not inferior courts in the sense that inferior courts are perceived and classified in England

98. Moreover, *Lubanga* is inapposite. The *Lubanga* Trial Chamber held that a technical procedural violation did not render the admission of illegally obtained evidence inadmissible under Article 69(7) of the Statute, reasoning in part that “[d]eterrence and discipline, if they are to be given any sustainable meaning and purpose within the framework of exclusionary rules, should be directed to those in authority.”¹⁹⁰ In *Lubanga*, “those in authority” were the national authorities of the Democratic Republic of Congo and not the OTP.¹⁹¹ The *Lubanga* Trial Chamber thus correctly found that “even if the purpose of this exclusionary rule is, *inter alia*, to discourage or discipline irregular activity, it would not apply in this instance as regards the prosecution.”¹⁹²

99. In this case, by contrast, the OTP engaged in unlawful conduct by soliciting and receiving confidential banking records without a search warrant and by failing to seek the lifting of Mr. Kilolo’s immunity. National authorities did not cause the violation. (*See supra* Ground 1(B)(1)). The exclusion of evidence in this case would have distanced the Trial Chamber from the OTP’s antithetical conduct. This would send a message to the OTP that such conduct

and Wales.”). At the *ad hoc* tribunals, the Trial Chambers have expressly been considered co-equal bodies that are not bound by each other’s jurisprudence. *See Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgement, 26 May 2003, para. 188: “Trial Chambers, which are courts with coordinate jurisdiction, are not mutually bound by their decisions, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive.” *See also Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgement, 24 March 2000, para. 114: “The Appeals Chamber considers that decisions of Trial Chambers, which are bodies with coordinate jurisdiction, have no binding force on each other, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive.”

¹⁹⁰ ICC-01/04-01/06-1981, para. 46.

¹⁹¹ *Id.*, paras. 2, 46.

¹⁹² *Id.*, para. 46.

is not tolerable in international criminal proceedings,¹⁹³ thereby deterring future misconduct. It would also reduce the chilling effect on Defence Counsel practicing before the ICC (*See supra* Ground 1(B)(3)), by placing sufficient safeguards on the OTP's investigative activities. The Trial Chamber failed to consider this in determining whether the intercepts should have been excluded as fruits of the poisonous tree.

100. Nothing bars the Court from applying the doctrine of the fruit of the poisonous tree since it is an accepted legal principle,¹⁹⁴ albeit not universally employed. When considering the OTP's bad faith conduct and its chilling effect, it behooves the Appeals Chamber to take this legal doctrine into consideration, particularly for the purpose of deterring behavior that would be antithetical to and would seriously damage the integrity of the proceedings. The criterion in Article 69(7)(b) of the Statute appears to be consistent with the doctrine of the fruit of the poisonous tree because the criterion was designed to deter conduct that would be considered "antithetical," and "damag[ing]" such as torture.¹⁹⁵ If this doctrine is not

¹⁹³ *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, Decision on Kajelijeli's Motion to Hold Members of the Office of the Prosecutor in Contempt of the Tribunal (Rule 77(C)), 15 November 2002, para. 14.

¹⁹⁴ The United States has consistently applied the doctrine of the fruit of the poisonous tree since its articulation in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

¹⁹⁵ Article 69(7) of the Rome Statute builds on the criteria of the exclusionary rules applied at the *ad hoc* tribunals. *See e.g.* Rule 95 applied at the ICTY states "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings." Rule 95 applied at the ICTR applies the exact same language as ICTY Rule 95. At the SCSL, Rule 162 expressly mentions torture as a factor that would be antithetical to and would seriously damage the integrity of the proceedings. SCSL Rule 162: "(A) No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings; (B) In particular, evidence shall be excluded if it has been obtained in violation of international standards on human rights,

applied, the OTP is effectively rewarded for engaging in antithetical conduct: it could still take advantage of the products of illegally obtained evidence, thereby reducing human rights protections to a mere “form of words.”¹⁹⁶

2. The Trial Chamber erred in law and procedure by failing to consider the Single Judge’s procedural violations in granting the OTP’s request to obtain intercepts of communications without first lifting immunity.

101. The Trial Chamber erred in law and procedure by failing to consider the Single Judge’s procedural error in granting the OTP’s second Request for Judicial Assistance to Obtain Evidence for Investigation.¹⁹⁷ Recognizing that procedural errors may occur in the proceedings leading up to a conviction decision, the Appeals Chamber has held that such errors based on events occurring during pre-trial are appealable.¹⁹⁸ To substantiate a procedural error, the appellant must show that the conviction decision was materially affected by the procedural error.¹⁹⁹

102. The Single Judge erred in law and procedure in granting the OTP’s request to seize national authorities “with a view to collecting logs and recordings of telephone calls” placed by Mr. Kilolo,²⁰⁰ by failing to (i) consider the totality of the circumstances preceding his appointment; (ii) consider that Mr. Kilolo’s immunity had not been lifted at that point; and (iii) request the

including the prohibition of torture.” *Prosecutor v. Brđanin*, IT-99-36-T, Decision on Defence “Objection to Intercept Evidence”, 3 October 2003, para. 63(7).

¹⁹⁶ *Silverthorne Lumber Co. v. United States*, 251 U.S 385, 392 (1920).

¹⁹⁷ ICC-01/05-52-Conf.

¹⁹⁸ ICC-01/04-01/06-3121-Red, para. 20.

¹⁹⁹ *Id.*

²⁰⁰ ICC-01/05-52-Conf, p. 7.

Presidency to lift Mr. Kilolo's immunity. (*See supra* Ground 1(B)(1)(b)). The Single Judge also erred in law and fact by failing to consider whether the OTP had sufficient evidence to trigger the crime-fraud exception to legal professional privilege. (*See infra* Ground 2(C)). The Trial Chamber upheld the Single Judge's decision without any analysis of Mr. Kilolo's immunity or any of the relevant circumstances.²⁰¹ This procedural error impacted the conviction decision because had the Trial Chamber correctly analyzed the Single Judge's decision, taking into account all the relevant circumstances (*See supra* Ground 1(B)(1)), it would have concluded that the OTP's request should not have been granted, and that the intercepts should not have been admitted into evidence or serve as a basis for Mr. Kilolo's convictions.

CONCLUSION:

103. The Trial Chamber erred in law and fact and abused its discretion by failing to consider the totality of the circumstances of the OTP's bad faith conduct in investigating the Defence in finding that the admission of the Western Union materials and their fruits was not antithetical to and would not seriously damage the proceedings. The OTP repeatedly failed to seek judicial authorization prior to contacting P-0267 and receiving confidential banking records from him. It also repeatedly failed to seek a waiver of Mr. Kilolo's immunity before collecting confidential banking information and intercepts of privileged attorney-client communications. Once the OTP's prior contacts with P-0267 were revealed, the Trial Chamber failed to exercise its discretionary authority to seek evidence which would have led it to the truth.

²⁰¹ ICC-01/05-01/13-1257, para. 13.

104. Despite finding that there was a violation of Mr. Kilolo's international human right to privacy, the Trial Chamber failed to recognize the seriousness of the violation and its effect on the integrity of future proceedings at the ICC. It failed to evaluate the overall reputé of the ICC in the long term and to dissociate itself from the OTP's unlawful conduct. The Trial Chamber acquiesced in the OTP's conduct, effectively putting a rubber stamp on the OTP's violation of Defence Counsel's immunity, international human rights, and national constitutional law. The OTP can now act without consequence. The chilling effect of the Trial Chamber's decisions is that Defence Counsel may be reticent to zealously represent accused before the ICC fearing that they may be the subject of an unbridled investigation, without application of appropriate safeguards and protections of fundamental rights and immunities.

105. Had the Trial Chamber properly evaluated the totality of the circumstances as it is required to do under Article 74(2) of the Statute, and properly utilized its discretion, it would have concluded that the admission of the Western Union materials and their fruits would be antithetical to and would seriously damage the integrity of the proceedings. It also would have concluded that the Western Union materials formed the basis of the OTP's case, and that without the intrusion into Mr. Kilolo's privacy based on the Western Union materials, no conviction would have resulted.

RELIEF SOUGHT:

106. Based on the totality of the Trial Chamber's errors, Mr. Kilolo requests the Appeals Chamber to:

- a. Review all relevant decisions and evidence;
- b. Apply the correct legal standards pursuant to Article 69(7) of the Statute;
- c. Exclude the Western Union materials and all evidence resulting from them; and
- d. Reverse Mr. Kilolo's convictions on all counts and return a finding of NOT GUILTY.

II. GROUND 2: The Trial Chamber erred in law, fact, and procedure in failing to exclude and relying on evidence obtained in breach of legal professional privilege.

107. The Trial Chamber concluded that the admission of intercepts of privileged attorney-client communications would not be antithetical to nor seriously damage the integrity of the proceedings because the OTP has a “wide mandate to collect evidence relevant to its investigations;”²⁰² it “did not exercise this mandate in the absence of judicial authority;”²⁰³ and the Western Union documents were obtained lawfully.²⁰⁴ In addition to the errors articulated in Ground 1, the Trial Chamber erred in law and fact in admitting and relying on evidence obtained in breach of legal professional privilege by failing to (i) recognize the importance of legal professional privilege; (ii) apply a clear standard in its application of the crime-fraud exception to legal professional privilege; (iii) consider whether the OTP had sufficient evidence to apply the crime-fraud exception; and (iv) consider that the lack of a pre-existing framework to monitor communications at the ICC rendered the intercepts of Mr. Kilolo’s privileged communications antithetical to and seriously damaging to the integrity of the proceedings. While technically, the text of Rule 73 implies that the legal professional privilege belongs to the client, and not Counsel,²⁰⁵ the Trial Chamber’s errors inhibit Defence Counsel

²⁰² ICC-01/05-01/13-1257, para. 18.

²⁰³ *Id.*

²⁰⁴ ICC-01/05-01/13-1854, para. 73.

²⁰⁵ Rule 73(1) states: “communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure, unless: (a) The person consents in writing to such disclosure; or (b) The person voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.”

from zealously representing their clients and have a chilling effect on their professional responsibility to provide effective legal representation.

A. The Trial Chamber erred in law by failing to consider the purpose of legal professional privilege.

108. The Trial Chamber erred in law by failing to consider that the purpose of legal professional privilege is to protect the fair trial rights of the accused; specifically, the right to communicate freely with counsel and freedom from self-incrimination.²⁰⁶

109. Accused at the ICC have a right to effective legal representation pursuant to Article 67 of the Statute.²⁰⁷ Essential to the right to effective legal representation is the right to communicate freely with Counsel.²⁰⁸ In *Popović et al.*, the ICTY Appeals Chamber held that legal professional privilege “is vital to the defence of an accused or appellant by allowing for the open communication between attorney and client necessary for effective legal

²⁰⁶ See *Prosecutor v. Šešelj*, IT-03-67-T, Redacted Version of the “Decision on Monitoring the Privileged Communications of the Accused with Dissenting Opinion by Judge Harhoff in Annex”, filed on 27 November 2008, 1 December 2008, paras. 22-33.

²⁰⁷ The right to legal representation under Article 67(b) of the Statute must be *effective*. See *A.T. v. Luxembourg*, ECtHR Application No. 30460/13, Judgment, 9 April 2015, para. 53 (finding that the “mere presence of a lawyer who is only entitled to remain silent, could in no way constitute real and effective legal assistance.”). See also *Prosecutor v. Akayesu*, ICTR-96-4-A, Judgment, 1 June 2001, para. 76 (finding that the accused have a right to competent counsel, and that “the effectiveness of representation by assigned counsel must be assured in accordance with the principles relating to the right to a defence.”). See also *Prosecutor v. Milošević*, IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, 22 September 2004, para. 32 (assigning counsel to an accused who chose to self-represent, considering that “[f]undamental ... is ensuring that [Milošević] has the opportunity and facility to present his defence fully and effectively.”).

²⁰⁸ Rome Statute, Article 67(1): “[T]he accused shall be entitled ... to the following minimum guarantees, in full equality: ... (b) to have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused’s choosing in confidence[.]”

assistance as guaranteed under Article 21(4)(d) of the Statute.”²⁰⁹ In *Šešelj*, the ICTY Trial Chamber concluded that the Registry’s monitoring of confidential communications between Šešelj and his legal team based on accusations of witness intimidation “rendered the Accused’s defence less effective,” “prevent[ed] the Accused from defending himself effectively,” and seriously infringed on his right to a fair trial.²¹⁰ The *Šešelj* Trial Chamber, quoting the European Court of Human Rights (“ECtHR”), held that it was “indisputable” that confidentiality of attorney-client communications is a fundamental right “that may only suffer rare exceptions”:

An accused’s right to communicate with his legal representative out of the hearing of a third person is part of the basic requirements of a fair trial.... If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness.²¹¹

110. As argued in Grounds 2(B) and 2(C), the Trial Chamber ignored the purpose of this fundamental legal protection when it upheld the Single Judge’s grant of authorization to the OTP to collect intercepts without any independent analysis of the crime-fraud exception.²¹²

²⁰⁹ *Prosecutor v. Popović*, IT-05-88-A, Decision on Prosecution Motion for the Appointment of Independent Counsel to Review Material Potentially Subject to Lawyer-Client Privilege, 16 July 2012, para. 7.

²¹⁰ *Prosecutor v. Šešelj*, IT-03-67-T, Redacted Version of the “Decision on Monitoring the Privileged Communications of the Accused with Dissenting Opinion by Judge Harhoff in Annex”, filed on 27 November 2008, 1 December 2008 para. 33.

²¹¹ *Id.*, para. 22, quoting *Öcalan v. Turkey*, ECtHR Application No. 46221/99, 12 May 2005, para. 133.

²¹² ICC-01/05-01/13-1257, paras. 12-13.

B. The Trial Chamber erred in law and procedure by failing to apply a clear standard in its application of the crime-fraud exception to legal professional privilege.

111. The Trial Chamber erred in law and procedure by failing to apply a clear standard in its application of the crime-fraud exception to legal professional privilege. The Single Judge concluded that the OTP had sufficient evidence to trigger the crime-fraud exception,²¹³ but failed to articulate a clear standard as to the burden of proof required to trigger the exception. The Trial Chamber upheld the Single Judge's application of the crime-fraud exception without any independent analysis of the standard he applied.²¹⁴

112. The plain text of Rule 73(1) does not contain an explicit crime-fraud exception.²¹⁵ Other international tribunals such as the Special Tribunal for Lebanon ("STL") and the ICTR have explicit crime-fraud provisions.²¹⁶ At the Special Court for Sierra Leone ("SCSL"), it appears that a crime-fraud exception was developed in *Bangura et al.*,²¹⁷ although it is not clear whether the Single Judge in that case explicitly ruled that a crime-fraud exception exists under the SCSL Statute. Currently, there is no international case law which defines the requisite burden of proof to trigger the crime-fraud

²¹³ ICC-01/05-52-Conf.

²¹⁴ ICC-01/05-01/13-1257, para. 13.

²¹⁵ Rule 73(1) states: "communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure, unless: (a) The person consents in writing to such disclosure; or (b) The person voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure."

²¹⁶ STL Rule 163(iii); ICTR Rule 97(B).

²¹⁷ See *Prosecutor v. Bangura et al.*, SCSL-2011-02-T-058, Decision on Prosecutor's Additional Statement of Anticipated Trial Issues and Request for Subpoena in Relation to the Principle Defender, 3 September 2012, para. 24 (recognizing a crime-fraud exception existed through Article 14(C) of the SCSL Code of Conduct).

exception. However, many domestic cases are helpful. Rule 73²¹⁸ appears to apply the common-law tradition of legal professional privilege (otherwise known as attorney-client privilege),”²¹⁹ rather than the civil law tradition of “professional secrecy,”²²⁰ because the text of the rule implies that the privilege belongs to the client and not Counsel. Thus, common-law cases are more helpful in defining the applicable standards.

²¹⁸ Rule 73(1) provides that “communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure unless (a) The person consents in writing to such disclosure or; (b) The person voluntarily disclosed the contents of the communication to a third party, and that third party then gives evidence of that disclosure.”

²¹⁹ Legal professional privilege is the oldest common law privilege for confidential communications, dating back to the Elizabethan era. *See* J. H. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (1905), §2290, *available in microform at* https://archive.org/stream/cihm_73414#page/n27/mode/2up/search/privilege. In the common law tradition legal professional belongs to the client and not Counsel. It is thus only the client that can waive the privilege. *See* U.K. Bar Standards Board, Code of Conduct (2017), § gC8 “[Y]our duty to the court does not permit or require you to disclose confidential information which you have obtained in the course of your instructions and which your client has not authorised you to disclose to the court.” *See also* ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.6(a) “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted....”

²²⁰ Unlike “legal professional privilege” in common law countries, “professional secrecy” under French law does not belong to the client. *See* Law No. 71-1130 on the reform of certain judiciary and legal professions, Article 66-5: “In all areas, whether with regard to advice or in the matter of defense, written opinions sent by a lawyer to his/her client or intended for the latter, correspondence between a client and a lawyer, between a lawyer and other lawyers with the exception, for the latter, of correspondence marked ‘official’, meeting notes and generally all documents held in a file are covered by professional secrecy....” (unofficial translation). *See also* French Criminal Code, Article L. 226-13, making violation of professional secrecy a criminal offense. *See also* French Code of Criminal Procedure, Article 109 (Official English translation *available at* http://www.legifrance.gouv.fr/content/download/1958/13719/version/3/file/Code_34.pdf): “Any person summoned to be heard in the capacity of a witness is obliged to appear, swear an oath, and to make a statement, subject to the provisions of articles 226-13 and 226-14 of the Criminal Code.”

113. In *O'Rourke v. Darbishire*, the House of Lords held that to drive the attorney-client privilege away, there must be "something to give colour to the charge ... *prima facie* evidence that it has some foundation in fact."²²¹ In the U.K., the Interception of Communications Code of Practice now governs intercepts of communications, including those of attorney-client communications.²²² Under paragraph 4.7 of the Code of Practice:

[A]ny communication between lawyer and client, or between a lawyer and another person for the purpose of actual or contemplated litigation (whether civil or criminal), must be presumed to be privileged unless the contrary is established: for example, where it is plain that the communication does not form part of a professional consultation of the lawyer, or there is clear and compelling evidence that the 'furthering a criminal purpose' exemption applies. Where there is doubt as to whether the communications are subject to legal privilege or over whether communications are not subject to legal privilege due to the "in furtherance of a criminal purpose" exception, advice should be sought from a legal adviser within the relevant intercepting agency.

114. U.S. and Australian case law follows *O'Rourke*.²²³ In *Clark v. United States*, the U.S. Supreme Court held that there must be a *prima facie* case in order to

²²¹ *O'Rourke v. Darbishire* [1920] A.C. 581, 604.

²²² U.K. Home Office, Interceptions of Communications Code of Practice (January 2016), *available at*

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/496064/53659_CoP_Communications_Accessible.pdf. The revised Code was published after the Investigatory Powers Tribunal held in *Belhadj v Security Services* [2015] UKIPTrib 13_132-H that the previous regime was in contravention of Article 8 of the European Convention on Human Rights on account of it not being "in accordance with the law" for the purposes of Article 8(2) of the European Convention on Human Rights.

²²³ *Clark v. United States*, 289 U.S. 1 (1933); *AWB Limited v Honourable Terence Rhoderic Hudson Cole* (No. 5), [2006] FCA 1234 [229].

establish the crime-fraud exception to legal professional privilege.²²⁴ While in *United States v. Zolin*, the U.S. Supreme Court declined to further elaborate on the burden of proof required to defeat privilege²²⁵, each U.S. federal court of appeal has developed its own burden.²²⁶

²²⁴ *Clark v. US*, 289 U.S. 1, 13-14 (1933).

²²⁵ *U.S. v. Zolin*, 491 U.S. 554, 563 (1989): “[W]e observe, first, that we need not decide the quantum of proof necessary ultimately to establish the applicability of the crime-fraud exception.”

²²⁶ *In re Grand Jury Proceedings*, 417 F.3d 18, 23 (1st Cir. 2005): “it is enough to overcome the privilege that there is a reasonable basis to believe that the lawyer’s services were used by the client to foster a crime or fraud”; *United States v. Jacobs*, 117 F.3d 82, 87 (2d Cir. 1997): “A party wishing to invoke the crime-fraud exception must demonstrate that there is a factual basis for a showing of probable cause to believe that a fraud or crime has been committed and that the communications in question were in furtherance of the fraud or crime.”; *In re Grand Jury*, 705 F.3d 133, 153 (3d Cir. 2012): The attorney-client privilege can be overcome where there is a “reasonable basis to suspect that the privilege holder was committing or intending to commit a crime or fraud and that the attorney-client communications or attorney work product were used in furtherance of the alleged crime or fraud.”; *Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1220 (4th Cir. 1976): “[The proof] must be such as to subject the opposing party to the risk of non-persuasion if the evidence as to the disputed fact is left un rebutted.”; *In re International Systems & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1246 (5th Cir. 1982): There must be evidence “[s]uch as will suffice until contradicted and overcome by other evidence.”; *United States v. Collins*, 128 F.3d 313, 321 (6th Cir. 1997): “To satisfy its prima facie showing, the evidence presented ... must be such that ‘prudent a person [would] have a reasonable basis to suspect the perpetration of a crime or fraud.’”; *United States v. Al-Shahin*, 474 F.3d 941, 946 (7th Cir. 2007): “In this circuit, the standard for prima facie evidence ‘is not whether the evidence supports a verdict but whether it calls for inquiry.’”; *In re Grand Jury Proceedings*, GS, FS, 609 F.3d 909, 913 (8th Cir. 2010): “With respect to the standard of proof required to establish a crime or fraud, we have held that the district court’s finding of probable cause satisfies the evidentiary showing necessary to compel production of privileged documents and testimony.”; *United States v. Martin*, 278 F.3d 988, 1001 (9th Cir. 2002): “The exception applies only when there is ‘reasonable cause to believe that the attorney’s services were utilized in furtherance of the ongoing unlawful scheme.’”; *Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1551 (10th Cir. 1995): “The party claiming that the crime-fraud exception applies must present prima facie evidence that the allegation of attorney participation in crime or fraud has some foundation in fact. The determination of whether such a prima facie showing has been made is left to the sound discretion of the district court.”; *In re Grand Jury Investigation*, 842 F.2d 1223, 1226 (11th Cir. 1987): “evidence that, if believed by a trier of fact, would establish the elements of some violation that was ongoing or about to be committed.”; *In re Sealed*, 107 F.3d 46, 50 (D.C. Cir. 1997): The burden of proof on the party asserting the exception is satisfied by evidence which, “if believed by the trier of fact would establish elements of an ongoing or imminent crime or fraud.”

115. The Trial Chamber failed to perform any analysis of the proper burden of proof to be applied at the ICC. This creates ambiguity as to the proper burden of proof required to pierce legal professional privilege. The principle of *in dubio pro reo* articulated in Article 22 of the Statute requires that ambiguity be resolved in favor of the person being investigated, prosecuted, or convicted. Considering this principle, the Trial Chamber should have applied the “clear and compelling evidence”²²⁷ standard in the U.K. Code of Practice, or at least the probable cause standard elaborated by the U.S. Court of Appeal for the Second Circuit: “A party wishing to invoke the crime-fraud exception must demonstrate that there is a factual basis for a showing of probable cause to believe that a fraud or crime has been committed and that the communications in question were in furtherance of the fraud or crime.”²²⁸ Had the Trial Chamber applied the correct standard, it would have found that the intercepting of Mr. Kilolo’s telephone violated legal professional privilege, and that this would have led it to properly conclude that the admission of the evidence was antithetical to and seriously damaging to the integrity of the proceedings.

C. The Trial Chamber erred in law, fact, and procedure in failing to consider whether the OTP had sufficient information to trigger the crime-fraud exception.

116. The Trial Chamber erred in law and fact by failing to consider whether the OTP had sufficient information to trigger the crime-fraud exception. The Single Judge concluded that the OTP had sufficient evidence to trigger the

²²⁷ U.K. Home Office, *Interceptions of Communications Code of Practice* (January 2016), para. 4.7.

²²⁸ *United States v. Jacobs*, 117 F.3d 82, 87 (2d Cir. 1997).

crime-fraud exception²²⁹ but failed to perform an analysis of the evidence under any burden of proof. The Trial Chamber upheld the Single Judge's application of the crime-fraud exception without an independent analysis as to whether the OTP had sufficient evidence to trigger the exception.²³⁰

117. When the OTP applied to the Single Judge for authorization to collect intercepts of Mr. Kilolo's communications, it merely had circumstantial evidence that Mr. Kilolo was involved in a scheme to bribe witnesses: an anonymous tip, transactions from Western Union, and allegedly coded²³¹ hearsay statements from Mr. Bemba and Mr. Babala, intercepted from Mr. Bemba's detention cell.²³² The OTP acknowledged in its request to obtain intercepts that its evidence was "largely circumstantial," and that it had an "incomplete understanding of the scheme."²³³ The evidence the OTP put forward was not sufficient to trigger the crime-fraud exception under the clear and convincing standard,²³⁴ the probable cause standard,²³⁵ or even the reasonable suspicion standard.²³⁶ The Trial Chamber, in ruling on the Defence objections to the admissibility of the intercepted materials,²³⁷ failed to perform

²²⁹ ICC-01/05-52-Conf.

²³⁰ ICC-01/05-01/13-1257, para. 13.

²³¹ *See infra* Ground 3.

²³² ICC-01/05-51-Conf, para. 4.

²³³ *Id.*, para. 22.

²³⁴ U.K. Home Office, *Interceptions of Communications Code of Practice* (January 2016), para. 4.7.

²³⁵ *United States v. Jacobs*, 117 F.3d 82, 87 (2d Cir. 1997): "A party wishing to invoke the crime-fraud exception must demonstrate that there is a factual basis for a showing of probable cause to believe that a fraud or crime has been committed and that the communications in question were in furtherance of the fraud or crime."

²³⁶ *In re Grand Jury*, 705 F.3d 133, 153 (3d Cir. 2012): The attorney-client privilege can be overcome where there is a "reasonable basis to suspect that the privilege holder was committing or intending to commit a crime or fraud and that the attorney-client communications or attorney work product were used in furtherance of the alleged crime or fraud."

²³⁷ ICC-01/05-01/13-1257.

any analysis of the Single Judge's decision. Had the Trial Chamber properly analyzed the sufficiency of the OTP's evidence at the point it made the request, the Trial Chamber would have concluded that the OTP's request should not have been granted, and this would have led it to properly conclude that the admission of the intercepts would be antithetical to and would seriously damage the integrity of the proceedings.

D. The Trial Chamber failed to consider that the lack of a pre-existing framework to monitor communications at the ICC rendered the intercepts of Mr. Kilolo's privileged communications antithetical to and seriously damaging to the integrity of the proceedings.

118. The Trial Chamber erred in law in holding that Article 54 of the Statute provides a sufficient "basis in law" to collect interceptions of legally privileged conversations so as to be "in accordance with the law."²³⁸ While Article 54 authorizes the OTP to "collect and examine evidence" and "take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court," it says nothing about whether, when, or how that power may be exercised when investigating Counsel, particularly one engaged in ongoing proceedings against the OTP at the ICC.

119. Any infringement on the right to privacy must be in "in accordance with the law."²³⁹ An infringement on the right to privacy is not "in accordance with

²³⁸ ICC-01/05-01/13-1257, para. 18.

²³⁹ European Convention on Human Rights, as amended by Protocols Nos. 11 and 14, ETS 5, 4 November 1950, Article 8: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic

the law” if there is no pre-existing framework regulating the infringement or if the framework that exists has not been complied with.²⁴⁰ An encroachment of legal professional privilege has repercussions on the administration of justice because a lawyer cannot provide effective legal representation if he or she cannot communicate freely and in confidence with the client.²⁴¹

120. Article 54 was not a sufficient basis upon which to subvert the requirement of a clearly articulated pre-existing framework. The protection of legal professional privilege is the fundamental condition upon which the

society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” American Convention on Human Rights, 22 November 1969, Article 11: “2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or unlawful attacks on his honor or reputation.”

²⁴⁰ *Halford v. The United Kingdom*, ECtHR Application No. 20605/92, Judgment, 25 June 1997, paras. 49-51; *Malone v. The United Kingdom*, ECtHR Application No. 8691/79, Judgment, 26 April 1985, para. 79; *Huwig v. France*, ECtHR Application No. 11105/84, Judgment, 24 April 1990, paras. 33-35; *Escher et al. v. Brazil*, IACtHR (ser. C) No. 200, Preliminary Objections, Merits, Reparations, and Costs, 6 July 2009, paras. 132-40 (holding that Brazilian authorities violated the right to privacy of land rights activists by intercepting their communications because *inter alia* the request to collect intercepts failed to specify a crime, the Military Police did not show that the interception was the only effective measure for obtaining the desired information, and the judge who approved the request did so without analyzing whether it complied with the American Convention on Human Rights).

²⁴¹ See *Niemietz v. Germany*, ECtHR Application No. 13710/88, Judgment, 16 December 1992, para. 37; *Prosecutor v. Popović*, IT-05-88-A, Decision on Prosecution Motion for the Appointment of Independent Counsel to Review Material Potentially Subject to Lawyer-Client Privilege, 16 July 2012, para. 8; *Prosecutor v. Šešelj*, IT-03-67-T, Redacted version of the “Decision on Monitoring the Privileged Communications of the Accused with Dissenting Opinion by Judge Harhoff in Annex”, 27 November 2008, paras. 22, 25, 33, quoting *Öcalan v. Turkey*, ECtHR Application No. 46221/99, 12 May 2005, para. 133.

administration of justice rests.²⁴² It cannot be overridden by general or ambiguous statutory words.²⁴³

121. By erroneously finding that the lack of any pre-existing framework did not give rise to a violation of Mr. Kilolo's right to privacy,²⁴⁴ the Trial Chamber failed to consider whether the lack of a pre-existing framework rendered the admission of the intercepted communications antithetical to and seriously damaging to the integrity of the proceedings. The lack of a pre-existing framework contributed to the chilling effect, which the Trial Chamber failed to consider,²⁴⁵ in determining the antithetical nature of the admission of the collected intercepts of Mr. Kilolo's privileged communications.

CONCLUSION:

122. The Trial Chamber erred in law, fact, and procedure in failing to exclude under Article 69(7) of the Statute evidence obtained in breach of legal professional privilege. In addition to the reasons set forth in Ground 1, the Trial Chamber erred by failing to: consider the purpose of legal professional privilege; apply a clear standard in its application of the crime-fraud

²⁴² See *Niemietz v. Germany*, ECtHR Application No. 13710/88, Judgment, 16 December 1992, para. 37.

²⁴³ *B and others v Auckland District Law Society and another* [2003] UKPC 38, [2003] 2 AC 736; *R (Morgan Grenfell and Co. Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563. The U.K. provides a good example of the very detailed framework that needs to be in play to be compliant with Article 8 and the requirement of "in accordance with the law" with the 2016 Interception of Communications Code of Practice. This was revised after *Belhadj v Security Services* [2015] UKIPTrib 13_132-H determined that the pre-existing code had not been sufficiently clear for the purpose of Article 8 of the European Convention on Human Rights.

²⁴⁴ ICC-01/05-01/13-1257, para. 22.

²⁴⁵ See *supra* Ground 1(B)(3).

exception to legal professional privilege; and consider whether the OTP would have had sufficient information to trigger the crime-fraud exception.

123. Had the Trial Chamber applied the correct legal standard regarding the crime-fraud exception, it would have also concluded that the OTP did not have sufficient information to indicate that a crime or fraud occurred before it collected intercepts from the Belgian and Dutch authorities. It would have excluded the OTP's evidence, which served as the basis for Mr. Kilolo's conviction, and would have thus concluded that no conviction would have resulted.

RELIEF SOUGHT:

124. Based on the totality of the Trial Chamber's errors, Mr. Kilolo requests the Appeals Chamber to:

- a. Review all relevant decisions and evidence;
- b. Apply the correct legal standard to the crime-fraud exception to attorney-client privilege; and consequently
- c. Exclude material obtained in breach of legal professional privilege and all improperly obtained evidence arising from it; and
- d. Reverse Mr. Kilolo's convictions on all counts and return a finding of NOT GUILTY

III. GROUND 3: The Trial Chamber erred in law and in fact and abused its discretion in finding that the evidence presented by the Prosecution in support of the charges against Mr. Kilolo was sufficient to find the allegations proved beyond a reasonable doubt.

125. The Trial Chamber convicted Mr. Kilolo of (i) inducing fourteen witnesses to give false testimony pursuant to Article 70(1)(a) in conjunction with Article 25(3)(b); and (ii) being party to a common plan with Mr. Bemba and Mr. Mangenda to corruptly influence fourteen witnesses and present their false testimony pursuant to Articles 70(1)(b) and 70(1)(c) in conjunction with Article 25(3)(a).²⁴⁶

126. The Trial Chamber erred in law and fact in finding that there was sufficient evidence to conclude that the allegations against Mr. Kilolo were proved beyond reasonable doubt by (a) failing to properly assess the credibility of witnesses D-2, D-3, and D-23 and in relying on their evidence to make findings of fact against Mr. Kilolo; (b) finding that Mr. Kilolo induced the false testimony of the 14 witnesses; and (c) finding that Mr. Kilolo was part of a common plan with Mr. Bemba and Mr. Mangenda to corruptly influence witness and present their false testimony.

²⁴⁶ ICC-01/05-01/13-1989-Conf, p. 455.

A. The Trial Chamber erred in law and in fact and abused its discretion in failing to properly assess the credibility of witnesses D-2, D-3 and D-23, and in relying on their evidence to make findings of fact against Mr. Kilolo.

127. When assessing a witness's credibility, the Trial Chamber may rely on a number of factors, including the witness's demeanor, willingness to respond to questions, spontaneity, coherence, chronological pattern, structure, use of vocabulary, attempt at accuracy, and consistency with prior recorded statements.²⁴⁷ If the Trial Chamber has reservations about a witness's credibility, it may only rely on that witness's testimony to the extent it is corroborated by other reliable evidence.²⁴⁸ When the Trial Chamber finds that a witness is inherently unreliable, in exercising its discretion it may not rely on his or her testimony even if other evidence appears to corroborate parts of his or her testimony.²⁴⁹

128. The Trial Chamber erred in law and fact in failing to properly assess witness D-2's credibility²⁵⁰ by ignoring indicia of D-2's inherent unreliability:

- a. D-2 was a self-confessed perjurer and admitted that he lied in the Main Case for his own benefit.²⁵¹ Virtually all his testimony in the Main Case was false.²⁵²

²⁴⁷ ICC-01/05-01/13-1989-Conf, para. 202.

²⁴⁸ ICC-01/04-02-12-271-Corr, para. 168.

²⁴⁹ *Id.*, paras. 168-69: "[T]he Appeals Chamber also finds that there may be witnesses whose credibility is impugned to such an extent that he or she cannot be relied upon even if other evidence appears to corroborate parts of his or her testimony.... The Appeals Chamber considers that in relation to witness P-250, the Trial Chamber found the latter to be the case. In the Trial Chamber's view, witness P-250's credibility was impugned to the extent that it affected his capacity to testify to the facts in issue and his evidence became entirely divested of reliability."

²⁵⁰ See *Prosecutor v. Muvunyi*, ICTR-2000-55A-A, Judgement, 29 August 2008, para. 147 (holding that the failure to properly assess witness testimony constitutes a failure to provide a reasoned opinion, an error of law).

- b. D-2 admitted that he misrepresented himself to Mr. Kilolo and the Main Case Trial Chamber. He falsely presented himself as a sub-lieutenant and member of the youth wing of the Movement for the Liberation of Congo ("MLC"), claimed that he was trained in the Karako,²⁵³ and stated that he was ready to testify in relation to what he had experienced.²⁵⁴
- c. D-2 created a false document with the intention to mislead Mr. Kilolo. He fabricated a document purporting to memorialize his experiences in the Central African Republic and dipped it in tea to make it look authentic.²⁵⁵

²⁵¹ ICC-01/05-01/13-T-20-CONF-ENG, p. 18, ll. 3-6: "Q. From the first 10 million [Central African Francs] that you thought you might receive until now, your aim has been to get money? 'A. No, Counsel. The first time, yes. But the second time it was out of my own conscience."

²⁵² D-2 testified under oath for two days in the Main Case that he was a FACA soldier. *See* ICC-01/05-01/08-T-321-CONF-ENG; ICC-01/05-01/08-T-322-CONF-ENG; *contra* ICC-01/05-01/13-T-18-CONF-ENG, p. 76, ll. 14-20.

²⁵³ CAR-OTP-0080-0494, p. 0500, ll. 209-214; CAR-OTP-0080-0021, p. 0031, ll. 352-357; CAR-D21-0007-0021, p. 0022; CAR-D21-0007-0001; CAR-D21-0007-0002; CAR-D21-0007-0003; ICC-01/05-01/13-T-19-CONF-ENG, p. 48, ll. 2-8, p. 63, ll. 24-25, p. 64, ll. 2-19: "Q. Very well. Whatever the case may be, Mr Witness, you did clearly state that you were second lieutenant and that you took part in the events in the Central African Republic between October 2002 between the -- and March 2003 for the MLC militia, you declared that clearly? A. I believe, Counsel, that I gave you to understand that before meeting Maître Kilolo there were a number of arrangements that had been made. Mr Arido gave me to understand that from the moment when I undertook to testify, I was to behave as a second lieutenant. And when I accepted, he then called Maître Kilolo for me to be put in contact with him. That does not mean that I was in fact a soldier. You might be able to check the military record or the staff headquarters of my country. You will never find a registration number saying this."

²⁵⁴ ICC-01/05-01/13-T-19-CONF-ENG, p. 65, ll. 4-6 "Q. Mr Witness, in Douala you told Maître Kilolo that you were ready to testify with relation to what you had heard or experienced; is that not what you told him? A. Yes that is what I told him."

²⁵⁵ ICC-01/05-01/13-T-19-CONF-ENG, p. 66, ll. 13-22: "Q. Mr Witness, you assimilated the information contained in this document in order to pass yourself up -- off by Mr Kilolo as an individual who took part in the events in CAR from far or close up? A. Yes, indeed. Q. Mr Witness, Maître Kilolo did not see those documents? A. Maître Kilolo did not see the first document. Q. Do you recall having said that you had dunked this document in some tea for it to look old and in order to impress upon Mr Kilolo that you had information in your possession

- d. D-2 also forged another person's signature on a document he knew to be false.²⁵⁶ D-2 did this knowing that it could potentially be relied upon as evidence in the Main Case.²⁵⁷

129. The Trial Chamber erred in law and fact in failing to properly assess D-3's credibility by ignoring indicia of D-3's inherent unreliability:

- a. D-3 was a self-confessed perjurer and his objective was to "make money" and "[REDACTED]."²⁵⁸ All his evidence in the Main Case concerning his military experience was false.²⁵⁹
- b. D-3 admitted that he misrepresented himself to Mr. Kilolo and the Main Case Trial Chamber in that he falsely presented himself as a "soldier" with knowledge of military matters.²⁶⁰ D-3 deceived Mr. Kilolo from January 2012 until after the end of his testimony in June 2013.²⁶¹

about what happened in the CAR over all those years. A. Yes, Counsel." ICC-01/05-01/13-T-20-CONF-ENG, p. 32, l. 25, p. 33, ll. 1-5.

²⁵⁶ CAR-OTP-0084-0472, p. 0482, ll. 341-67; ICC-01/05-01/13-T-20-CONF-ENG, p. 34, ll. 14-25, p. 35, ll. 1-2.

²⁵⁷ CAR-OTP-0084-0472, p. 0480, ll. 284-97.

²⁵⁸ ICC-01/05-01/13-T-22-CONF-ENG, p. 55, ll. 17-18: "The idea was to agree for me to testify in exchange for receiving some money or for [REDACTED]." *See also* ICC-01/05-01/13-T-22-CONF-ENG, p. 37, ll. 24-25, p. 38, l. 1: "Once again, he said to me that this was an opportunity to make some money because [REDACTED]... And this way we could even get to the West, and, if possible, stay there."

²⁵⁹ D-3 testified under oath for three days in the Main Case that he was a soldier. *See* ICC-01/05-01/08-T-325-CONF-ENG; ICC-01/05-01/08-T-326-CONF-ENG; ICC-01/05-01/08-T-330-CONF-ENG; *contra* ICC-01/05-01/13-T-22-CONF-ENG, p. 37, ll. 18-19.

²⁶⁰ ICC-01/05-01/13-T-22-CONF-ENG, p. 37, ll. 18-19; ICC-01/05-01/13-T-26-CONF-ENG, p. 17, ll. 12-15, p. 37, ll. 10-11, p. 38, ll. 4-5, 12, p. 46, ll. 21-22, p. 48, ll. 2-5.

²⁶¹ CAR-D21-0004-0450, p. 0452; ICC-01/05-01/13-T-22-CONF-ENG, p. 37, ll. 23-25, p. 38, ll. 1-7; CAR-OTP-0078-0218-R01, p. 0219, ll. 29-30.

130. The Trial Chamber erred in law and fact in failing to properly assess D-23's credibility by ignoring indicia of D-23's inherent unreliability:

- a. D-23 was a self-confessed perjurer.²⁶² His motivation was to be relocated to Europe.²⁶³ All his evidence in the Main Case concerning his military experience was false.²⁶⁴
- b. D-23 admitted that he misrepresented himself to Mr. Kilolo and the Main Case Trial Chamber.²⁶⁵ He falsely claimed that he was a soldier.²⁶⁶ In so doing he used his knowledge of military matters to appear authentic²⁶⁷ and sought to deceive a Defence military expert instructed to verify whether the information given by D-23 was correct.²⁶⁸

131. The Trial Chamber erred in law by failing to properly assess the extent of D-2's, D-3's, and D-23's dishonesty in making its findings on these witnesses' credibility.²⁶⁹ The Trial Chamber should have applied additional caution in assessing D-2, D-3, and D-23 when considering that these witnesses lied

²⁶² ICC-01/05-01/13-T-16-CONF-ENG, p. 25, ll. 3-9.

²⁶³ ICC-01/05-01/13-T-13-CONF-ENG, p. 60, ll. 5-11.

²⁶⁴ D-23 testified under oath for one day that he was a member of the Central African Republic armed forces. *See* ICC-01/05-01/08-T-332-CONF-ENG; *contra* ICC-01/05-01/13-T-13-CONF-ENG, p. 63, ll. 13-16.

²⁶⁵ ICC-01/05-01/13-T-13-CONF-ENG, p. 63, ll. 13-16.

²⁶⁶ ICC-01/05-01/13-T-13-CONF-ENG, p. 63, ll. 13-16. "[REDACTED]."

²⁶⁷ ICC-01/05-01/13-T-15-CONF-ENG, p. 17, ll. 10-25, p. 18, ll. 1-8.

²⁶⁸ ICC-01/05-01/13-T-15-CONF-ENG, p. 21, ll. 19-25, p. 20, ll. 1-25, p. 21, ll. 1-25, p. 22, ll. 1-2.

²⁶⁹ For D-2 and D-3 *see* ICC-01/05-01/13-1989-Conf, paras. 307-19. For D-23 *see* ICC-01/05-01/13-1989-Conf, paras. 423-27. *See also* *Prosecutor v. Muvunyi*, ICTR-2000-55A-A, Judgement, 29 August 2008, para. 147.

under oath about the very same incidents that were at issue in the present case.²⁷⁰

132. The Trial Chamber abused its discretion in failing to require independent corroboration of D-2's, D-3's, and D-23's testimony.²⁷¹ The Trial Chamber erroneously used D-2's and D-3's evidence to corroborate several aspects of each other's testimony.²⁷² Two inherently unreliable, self-confessed perjurers cannot be used to corroborate each other, as both are inherently unreliable.

133. As a result of its failure to properly assess these witnesses' credibility and its failure to require independent corroboration, the Trial Chamber erroneously relied on D-2 and D-3's testimony in making the following erroneous findings of fact:

- a. Mr. Kilolo distributed to D-2, D-3, D-4, and D-6 their prior recorded statements of February 2012 containing certain amendments and individually instructed them on aspects of their testimony.²⁷³
- b. Mr. Kilolo instructed D-2, D-3, D-4, and D-6 to deny receipt of payments and other non-monetary benefits.²⁷⁴
- c. Mr. Kilolo instructed D-2, D-3, D-4, and D-6 to withhold information concerning their contacts with Mr. Kilolo and their

²⁷⁰ *Independent Counsel v. Taylor*, SCSL-12-02-A-082, Judgment in Contempt Proceedings, 30 October 2013, para. 38.

²⁷¹ ICC-01/04-02-/12-271-Corr, para. 168; *Prosecutor v. Limaj*, IT-03-66-T, Judgement, 30 November 2005, para. 26; *Prosecutor v. Sesay*, SCSL-04-15-T-1234, Judgement, 2 March 2009, para. 490. *See also Labita v. Italy*, Application No. 26772/95, Judgment, 6 April 2000, paras. 157-58.

²⁷² ICC-01/05-01/13-1989-Conf, paras. 320, 327, 328, 332, 339, 341, 345, 346, 350, 368, 372.

²⁷³ *Id.*, para. 365.

²⁷⁴ *Id.*, para. 366.

knowledge of members of the Main Case Defence and other persons.²⁷⁵

- d. Mr. Kilolo distributed telephones to D-2, D-3, D-4, and D-6 for the illicit purpose of maintaining contacts after the VWU cut-off date.²⁷⁶
- e. Mr. Kilolo knew about Mr. Arido's promise of payment of FCAF 10 million²⁷⁷ and paid D-2, D-3, D-4 and D-6 each FCAF 540,000.²⁷⁸
- f. Mr. Kilolo was in contact with D-2 and D-3 during the course of their testimony.²⁷⁹

134. Only one aspect of D-23's testimony was corroborated: the Call Data Records ("CDRs") showed contact with Mr. Kilolo during the course of the proceedings.²⁸⁰ Notwithstanding, the Trial Chamber should not have relied on any portion of his testimony because he was a self-confessed perjurer.²⁸¹ As a result of its failure to properly assess D-23's credibility or require corroboration, the Trial Chamber erroneously relied on D-23's testimony in making the following erroneous findings of fact:

- a. Mr. Kilolo implicitly asked D-23 to conceal his knowledge of Mr. Kokaté;²⁸²
- b. The money Mr. Kilolo gave to D-23 was illicit in nature;²⁸³

²⁷⁵ *Id.*

²⁷⁶ *Id.*, para. 371.

²⁷⁷ *Id.*, para. 380.

²⁷⁸ *Id.*, paras. 377-78.

²⁷⁹ *Id.*, paras. 385-86.

²⁸⁰ *Id.*, para. 446.

²⁸¹ ICC-01/04-02-/12-271-Corr, paras. 168, 169; *Independent Counsel v. Taylor*, SCSL-12-02-A-82, Judgment in Contempt Proceedings, 30 October 2013, para. 38.

²⁸² ICC-01/05-01/13-1989-Conf, paras. 435, 451.

²⁸³ *Id.*, paras. 437, 439, 441.

- c. Mr. Kilolo instructed D-23 to withhold information concerning money and other non-monetary benefits he received;²⁸⁴ and
- d. Mr. Kilolo instructed D-23 to testify that he had joined Bozizé's rebellion.²⁸⁵

135. These erroneous findings were inextricably linked to the Trial Chamber's finding that Mr. Kilolo induced false testimony from D-2, D-3, and D-23.²⁸⁶ Had the Trial Chamber not erred in assessing D-2 and D-3, and required corroboration of their testimony, it would not have erroneously found that Mr. Kilolo induced them to give false testimony. But for the Trial Chamber's errors regarding D-23, it would not have found that Mr. Kilolo induced him to give false testimony.²⁸⁷

B. The Trial Chamber erred in fact in finding that Mr. Kilolo induced the false testimony of 14 witnesses.

1. The Trial Chamber erred in fact in finding that Mr. Kilolo induced D-4, D-6, D-13, and D-25 to give false testimony.

136. Witnesses D-4, D-6, D-13, and D-25 did not testify in the present case. The evidence does not support the Trial Chamber's conclusion that Mr. Kilolo induced these witnesses to give false testimony.

137. If a Trial Chamber relies on conclusions drawn from circumstantial evidence in establishing an accused's guilt, it is not sufficient that such

²⁸⁴ *Id.*, para. 451.

²⁸⁵ *Id.*

²⁸⁶ *Id.*, p. 455.

²⁸⁷ *Id.*

conclusions were reasonable; they must be the only reasonable conclusions available.²⁸⁸ If other reasonable conclusions exist based on the evidence, which are consistent with the accused's innocence, he must be acquitted.²⁸⁹

a. The Trial Chamber erred in fact in finding that Mr. Kilolo induced D-4 and D-6 to give false testimony.

138. The Trial Chamber erroneously concluded that Mr. Kilolo:

- a. Instructed D-4 to untruthfully testify that he did not know Mr. Arido, Mr. Kokaté, and D-7;²⁹⁰
- b. Instructed D-6 to untruthfully testify that he never received money from the Main Case Defence, was not instructed by a committee to harmonize his evidence, never had contacts with the Main Case Defence where he discussed events relevant to the charges, and never spoke to any person he knew to be a Main Case witness;²⁹¹ and
- c. Provided D-4 and D-6 with a document containing their prior recorded statements of February 2012 and additional information, and instructed them on discrete issues of their testimony.²⁹²

139. D-4 and D-6 did not testify in this case. In reaching these findings, the Trial Chamber relied on D-2's²⁹³ and D-3's²⁹⁴ testimony, D-2's "Annex 3,"²⁹⁵

²⁸⁸ *Id.*, para. 485.

²⁸⁹ *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001, para. 458.

²⁹⁰ ICC-01/05-01/13-1989-Conf, para. 414.

²⁹¹ *Id.*, para. 415.

²⁹² *Id.*, para. 416.

²⁹³ *Id.*, para. 360.

²⁹⁴ *Id.*, para. 363.

²⁹⁵ *Id.*, paras. 136, 336, 357, 359, 360, 388.

and inferences drawn from Mr. Kilolo's purported instructions to D-15, D-23, D-26, D-54, and D-55 regarding their knowledge of persons associated with the Main Case Defence or others.²⁹⁶

140. D-2 and D-3 were inherently unreliable and the Trial Chamber should not have relied on them to make any findings of fact against Mr. Kilolo.²⁹⁷ D-2's "Annex 3"²⁹⁸ should have been ignored considering D-2's propensity to forge documents.²⁹⁹ The only evidence that "Annex 3" was an authentic document prepared under Mr. Kilolo's instruction came from D-2.³⁰⁰

141. The remaining evidence on the record was circumstantial and insufficient to support the Trial Chamber's conclusions beyond a reasonable doubt. As noted, D-23 was inherently unreliable and the Trial Chamber should not have relied on his testimony to make any findings of fact against Mr. Kilolo.³⁰¹ And as explained in Ground 3(B)(2)(b), the record shows that Mr. Kilolo did not instruct D-55 to give false testimony.³⁰² The conclusion that Mr. Kilolo instructed D-4 and D-6 to give false testimony is not the only reasonable conclusion to be drawn from intercepted communications with D-15, D-26 and D-54.³⁰³

142. There is no evidence that Mr. Kilolo instructed D-4 to lie about knowing Arido, Kokaté, and D-7. There is no evidence that Mr. Kilolo instructed D-6 to

²⁹⁶ *Id.*, para. 366.

²⁹⁷ *See supra* Ground 3(A).

²⁹⁸ CAR-OTP-0079-1530.

²⁹⁹ *See supra* Ground 3(A).

³⁰⁰ *See supra* Ground 3(A).

³⁰¹ *See supra* Ground 3(A).

³⁰² *See infra* Ground 3(B)(2)(b).

³⁰³ *See infra* Ground 3(B)(3).

give false testimony on the number of contacts he had with the Main Case Defence. P-0433's report does not show any contacts between D-6 and Mr. Kilolo after the cut-off period or during his testimony.³⁰⁴

b. The Trial Chamber erred in fact in finding that Mr. Kilolo induced D-13 to give false testimony.

143. The Trial Chamber erroneously concluded that Mr. Kilolo illicitly coached D-13 during their telephone contacts³⁰⁵ and instructed D-13 to give an incorrect account of the number of his contacts with Mr. Kilolo.³⁰⁶ In making this finding, the Trial Chamber relied on the CDRs,³⁰⁷ D-13's Main Case testimony, intercepts of telephone conversations between Mr. Kilolo and Mr. Mangenda,³⁰⁸ and inferences drawn from its conclusions regarding D-2, D-3, D-23, D-15, and D-54.³⁰⁹

144. The Trial Chamber erroneously concluded that Mr. Kilolo illicitly coached D-13 during their telephone contacts³¹⁰ and instructed D-13 to give an incorrect account of the number of his contacts with Mr. Kilolo.³¹¹ In making this finding, the Trial Chamber relied on the CDRs,³¹² D-13's Main Case testimony, intercepts of telephone conversations between Mr. Kilolo and Mr.

³⁰⁴ CAR-OTP-0090-0630, p. 0650.

³⁰⁵ ICC-01/05-01/13-1989-Conf, para. 666.

³⁰⁶ *Id.*, para. 665.

³⁰⁷ *Id.*, para. 656; CAR-OTP-0090-0630, pp. 0656-0674.

³⁰⁸ ICC-01/05-01/13-1989-Conf, paras. 658-59; Audio recording, CAR-OTP-0080-1419 (ICC-01/05-01/13-438-Conf-AnxB062); Transcript of selected parts of the audio recording, CAR-OTP-0082-1054 (in French and Lingala); Translated transcript of selected parts of the audio recording, CAR-OTP-0082-1140 (French translation).

³⁰⁹ ICC-01/05-01/13-1989-Conf, paras. 662-664.

³¹⁰ ICC-01/05-01/13-1989-Conf, paras. 665-66.

³¹¹ *Id.*, paras. 182-84, 664, 666.

³¹² *Id.*, para. 656; CAR-OTP-0090-0630, pp. 0656-0674.

Mangenda,³¹³ and inferences drawn from its conclusions regarding D-2, D-3, D-23, D-15, and D-54.³¹⁴

145. D-13 did not testify in the present proceedings. The CDRs merely show that D-13 had contacts with Mr. Kilolo before the cut-off date of 11 November 2013.³¹⁵ In the Main Case, D-13 testified that he could not “remember very well” the last time he had spoken to Mr. Kilolo.³¹⁶ Without hearing from D-13 in the present case, the Trial Chamber’s conclusion that Mr. Kilolo instructed him to lie was not the only reasonable conclusion available to it. D-13 incorrectly testified about his contacts on his own volition because of his security concerns.³¹⁷

146. The remainder of the circumstantial evidence is insufficient to find beyond a reasonable doubt that Mr. Kilolo induced D-13 to give false testimony regarding his contacts with the Main Case Defence. Even if properly admitted into evidence,³¹⁸ the Trial Chamber misconstrued the intercepted telephone conversations between Mr. Kilolo and Mr. Mangenda.³¹⁹ The language used in the passage of the 10 November 2013 conversation relied upon by the Trial Chamber is ambiguous and the witness’s name is never mentioned.³²⁰ Thus,

³¹³ ICC-01/05-01/13-1989-Conf, paras. 658-59; Audio recording, Translated transcript of selected parts of the audio recording, CAR-OTP-0082-1140 (French translation); Transcript of selected parts of the audio recording, CAR-OTP-0082-1054 (in French and Lingala).

³¹⁴ ICC-01/05-01/13-1989-Conf, para. 662; ICC-01/05-01/08-T-352-CONF-ENG, p. 35, ll. 19-20.

³¹⁵ See CAR-OTP-0090-0630, p. 0667; CAR-D21-0012-0003, p. 0010.

³¹⁶ ICC-01/05-01/13-1989-Conf, para. 662; ICC-01/05-01/08-T-352-CONF-ENG, p. 35, ll. 19-20.

³¹⁷ See ICC-01/05-01/13-1903-Corr2, para. 95. See also CAR-D21-0013-0177 [REDACTED] and “[REDACTED].” Moreover, he was “[REDACTED]”

³¹⁸ See *supra* Ground 1 and Ground 2.

³¹⁹ ICC-01/05-01/13-1989-Conf, paras. 658-59.

³²⁰ ICC-01/05-01/13-1989-Conf, paras. 659-60; Audio recording, CAR-OTP-0080-1419; Translated transcript of selected parts of the audio recording, CAR-OTP-0082-1140 (French translation), p.

the Trial Chamber erroneously found that D-13 was the subject of the conversation.³²¹

147. There is no evidence that Mr. Kilolo instructed D-13 to give false testimony on the number of contacts he had with the Main Case Defence.

c. The Trial Chamber erred in fact in finding that Mr. Kilolo induced D-25 to give false testimony.

148. The Trial Chamber erroneously concluded that Mr. Kilolo illicitly coached and instructed D-25 to falsely deny that he had received any payments.³²² In drawing this conclusion, the Trial Chamber relied on Western Union transfers,³²³ two intercepted communications between Mr. Kilolo and Mr. Mangenda on 26³²⁴ and 27³²⁵ August 2013, and inferences drawn from its conclusions regarding witnesses D-57 and D-64.³²⁶

1142, ll. 10-16: "I, for example, am dealing with that person's colours because you see, the chap... as it had already been a long time, in his mind he knew that he was no longer coming, so he had...he no longer had those things in mind. So I just tried with him, like that ... even what he had said at our meeting with Kate, he can't take it any more (...). So, I had to start again from the beginning, and that took me some time...it really tired me out."

³²¹ ICC-01/05-01/13-1989-Conf, paras. 659-60.

³²² *Id.*, paras. 503-04.

³²³ *Id.*, para. 478; CAR-OTP-0074-0855, tab 40, line 11, column AA.

³²⁴ ICC-01/05-01/13-1989-Conf, paras. 487-88, 490; Audio recording, CAR-OTP-0074-0991 (ICC-01/05-01/13-6-Conf-AnxA037); Transcript of audio recording, CAR-OTP-0080-0365 (in Lingala and French); Translated transcript of audio recording, CAR-OTP-0080-0228 (French translation).

³²⁵ ICC-01/05-01/13-1989-Conf, paras. 491-93; Audio recording, CAR-OTP-0074-0992 (ICC-01/05-01/13-6-Conf-AnxA038); Transcript of audio recording, CAR-OTP-0079-0075 (in Lingala and French); Translated transcript of audio recording, CAR-OTP-0079-0114 (French translation).

³²⁶ ICC-01/05-01/13-1989-Conf, paras. 501-02.

149. D-25 did not falsely testify about the payments he received.³²⁷ D-25's Main Case testimony demonstrates that D-25 may have understood, for example, that money he received via Western Union had originated from the VWU to cover his travel expenses.³²⁸ The money he was sent had been transferred to the Bemba Main Case Defence by the VWU three days before the Western Union transfer to cover "the travel of these video link witnesses [including D-25] to the location of testimony."³²⁹ Thus, in giving evidence that he did not understand that he had received any money from the Defence, it was reasonable to conclude that D-25 did not intentionally testify falsely.

150. While D-25 falsely stated in the Main Case that he did not receive any payments from the Defence,³³⁰ there is no direct evidence to support the conclusion that Mr. Kilolo instructed him to lie or illicitly coached him. Mr. Kilolo had no reason to instruct D-25 to lie about the USD 132.61 transfer because it was legitimate and transparent.³³¹

151. Even if the 26 and 27 August 2013 intercepted communications were properly admitted,³³² the language used by Mr. Kilolo and Mr. Mangenda is ambiguous and does not relate to any instructions given to D-25.³³³ Without hearing from D-25 on the issue, the Trial Chamber could not have concluded that the only reasonable conclusion on the evidence was that Mr. Kilolo

³²⁷ *Id.*, paras. 503-04.

³²⁸ ICC-01/05-01/08-T-337-CONF-ENG, p. 40, ll. 13-20.

³²⁹ CAR-D21-0012-0003, p. 0008.

³³⁰ ICC-01/05-01/08-T-337-CONF-ENG, p. 40, ll. 13-20.

³³¹ CAR-D21-0012-0003, p. 0008.

³³² *See* Ground 1 and Ground 2.

³³³ CAR-OTP-0074-0991; CAR-OTP-0080-0228, ll. 59-61; CAR-OTP-0074-0992; CAR-OTP-0079-0114, ll. 153-60, 179-80.

instructed D-25 to lie about payments.³³⁴ Mr. Kilolo and Mr. Mangenda were simply discussing D-25's ongoing testimony.

152. The Trial Chamber erred in relying upon findings regarding D-57 and D-64 to support its findings regarding D-25.³³⁵ The circumstances in which D-57 and D-64 received money were different.³³⁶ The money that D-57 and D-64 received was for reimbursement of their expenses.³³⁷ The evidence does not support the conclusion that D-57 and D-64 were instructed to conceal payments. Thus, the Trial Chamber should not have relied on D-57 and D-64 to find that D-25 was instructed to falsely testify.

2. The Trial Chamber erred in fact in finding that Mr. Kilolo induced D-29, D-55, D-57, and D-64 to give false testimony.

153. The Trial Chamber erred in fact in finding that Mr. Kilolo induced false testimony from D-29,³³⁸ D-55,³³⁹ D-57³⁴⁰ and D-64.³⁴¹ The evidence does not support these conclusions. The record shows that in relation to each witness there was insufficient evidence to support the Trial Chamber's conclusion that Mr. Kilolo induced false evidence beyond a reasonable doubt. The Trial Chamber erred in reaching conclusions of fact based upon the evidence before it.

³³⁴ ICC-01/05-01/13-1989-Conf, para. 502.

³³⁵ ICC-01/05-01/13-1989-Conf, paras. 501-02.

³³⁶ For D-57 see ICC-01/05-01/13-1989-Conf, paras. 114-15. For D-64, see *Id.*, para. 118.

³³⁷ See *infra* Ground 3(B)(2)(c).

³³⁸ ICC-01/05-01/13-1989-Conf, paras. 540-41.

³³⁹ *Id.*, paras. 303-05.

³⁴⁰ *Id.*, paras. 253, 277.

³⁴¹ *Id.*, para. 278.

a. The Trial Chamber erred in fact in finding that Mr. Kilolo induced D-29 to give false testimony.

154. The Trial Chamber erroneously concluded that Mr. Kilolo instructed D-29 to lie about the receipt of payment and his contacts with the Main Case Defence.³⁴² In making these findings, the Trial Chamber relied on Western Union transfers,³⁴³ the CDRs,³⁴⁴ the intercepted communication,³⁴⁵ and D-29's Main Case testimony.³⁴⁶

155. D-29 testified that he was not instructed by Mr. Kilolo to lie about his receipt of payment or his contacts with the Main Case Defence.³⁴⁷ While the Trial Chamber considered D-29 to be unreliable on this point because of his defensive demeanor,³⁴⁸ it failed to consider other relevant factors as to why the witness's demeanor vis-à-vis the OTP during his questioning was defensive. The Trial Chamber disregarded other plausible inferences that could have been drawn from D-29's demeanor, such as his difficulty in dealing with a personal matter.³⁴⁹ For the OTP to suggest that he was lying was an affront considering this private matter in the context of the witness's culture.³⁵⁰

³⁴² *Id.*, paras. 540-41.

³⁴³ *Id.*, paras. 520-27, 530.

³⁴⁴ *Id.*, paras. 517, 533.

³⁴⁵ *Id.*, paras. 531, 533-39.

³⁴⁶ *Id.*, paras. 528-32.

³⁴⁷ ICC-01/05-01/13-T-40-CONF-ENG, p. 33, ll. 12-25, p. 34, l. 1.

³⁴⁸ ICC-01/05-01/13-1989-Conf, paras. 510-12.

³⁴⁹ ICC-01/05-01/13-T-40-CONF-ENG, p. 13, ll. 19-21, p. 62, ll. 14-25, p. 63, ll. 1-9.

³⁵⁰ ICC-01/05-01/13-T-41-CONF-ENG, p. 19, ll. 24-25, p. 20, ll. 1-2, p. 22, ll. 2-3, p. 22, ll. 13-22, p. 56, ll. 14-15.

156. The Trial Chamber correctly concluded that D-29 did not give false testimony regarding the USD 649.43 he received from the Bemba Main Case Defence to cover his son's travel and relocation.³⁵¹ There was therefore no reason for D-29 to lie about the receipt of the money or for Mr. Kilolo to instruct him to lie about it. As the former Chief of the VWU (D-21-9) testified, even after handing over a witness to the VWU, there is "strictly speaking ... no prohibition" on the calling party covering witness expenses not covered by the VWU.³⁵²

157. The Trial Chamber erroneously concluded that D-29 deliberately withheld contacts with the Main Case Defence, specifically: his encounter with Mr. Kilolo and Mr. Mangenda when they escorted D-29 and D-30 to their meeting with the VWU, and his telephone call to Mr. Kilolo during which he requested assistance in relocating his son.³⁵³ The Trial Chamber failed to provide any reference for its finding regarding these two contacts. There was no reason for D-29 to conceal a meeting with Mr. Kilolo and Mr. Mangenda introducing D-29 to the VWU. This was not an illicit meeting. There is no evidence that Mr. Kilolo had a separate and discrete contact with D-29 about the relocation of his son.

158. There is no evidence from which the Trial Chamber could have concluded that Mr. Kilolo instructed D-29 to lie. The intercepted communication between Mr. Kilolo and Mr. Mangenda about D-29's testimony, even if

³⁵¹ ICC-01/05-01/13-1989-Conf, paras. 521, 530.

³⁵² ICC-01/05-01/13-T-42-CONF-ENG, p. 27, ll. 18-25, p. 28, ll. 1-18, p. 113, ll. 4-25.

³⁵³ ICC-01/05-01/13-1989-Conf, para. 528.

admissible,³⁵⁴ does not show that Mr. Kilolo instructed D-29 to lie about payments or contacts.

159. The circumstantial evidence relied upon by the Trial Chamber is insufficient to support a finding beyond a reasonable doubt that Mr. Kilolo instructed D-29 to lie about his receipt of money or contacts with the Bemba Main Case Defence. The Trial Chamber relied on its conclusions regarding other witnesses to support its conclusions that Mr. Kilolo instructed D-29 to lie about payments he received (D-2, D-3, D-23, and D-54)³⁵⁵ and his contacts with the Main Case Defence (D-2, D-15, D-26, D54, and D-55).³⁵⁶ D-2, D-3, and D-23 were inherently unreliable and the Trial Chamber should not have relied on their testimony to make any findings of fact against Mr. Kilolo.³⁵⁷ There is also no evidence in the record supporting the Trial Chamber's findings regarding D-55,³⁵⁸ D-15, D-26, or D-54.³⁵⁹

b. The Trial Chamber erred in fact in finding that Mr. Kilolo induced D-55 to give false testimony.

160. The Trial Chamber erroneously concluded that Mr. Kilolo instructed D-55 to give false testimony about (i) a letter that D-55 co-authored with [REDACTED] to the OTP in November 2009; (ii) the payment of money; (iii)

³⁵⁴ See *supra* Ground 1 and Ground 2.

³⁵⁵ ICC-01/05-01/13-1989-Conf, para. 527.

³⁵⁶ *Id.*, para. 531.

³⁵⁷ See *infra* Ground 3(A).

³⁵⁸ See *infra* Ground 3(B)(2)(b).

³⁵⁹ See *infra* Ground 3(B)(3).

his prior contacts with the Bemba Main Case Defence; and (iv) having spoken to Mr. Bemba.³⁶⁰

161. The Trial Chamber was not persuaded that “Mr Kilolo specifically instructed D-55 to testify before Trial Chamber III that the November 2009 document was false.”³⁶¹ However, the Trial Chamber nonetheless erroneously found that the November 2009 document was prepared for the sole purpose of bolstering [REDACTED].³⁶² D-55 agreed that Mr. Kilolo did not instruct him to say that the letter was fabricated, and that it was a proposition for him to accept or reject.³⁶³

162. The Trial Chamber found that the Amsterdam meeting and the resulting costs were the result of “legitimate investigative activities.”³⁶⁴ There was no need for Mr. Kilolo to instruct D-55 to lie about receiving EUR 100 and the costs associated with the Amsterdam meeting. The witness confirmed that he had not appreciated the situation properly when answering questions regarding the money he received.³⁶⁵ There is no evidence showing that Mr. Kilolo asked the witness to lie about the money that he paid them. The Trial Chamber erroneously inferred that Mr. Kilolo instructed him to lie about the receipt of payment from its conclusions regarding D-57 and D-64, which as explained in Ground 3(B)(2)(c) have no basis in the record.

³⁶⁰ ICC-01/05-01/13-1989-Conf, paras. 303-05.

³⁶¹ *Id.*, para. 289.

³⁶² *Id.*, para. 290.

³⁶³ ICC-01/05-01/13-T-36-CONF-ENG, p. 29, ll. 10-18: “Q. Mr Witness, Mr Kilolo did not oblige you to answer that proposition one way or another. He put it as a proposition for you to either accept or reject. That's correct, isn't it? For you to accept or reject it according to your knowledge. A. Certainly. [REDACTED]?”

³⁶⁴ ICC-01/05-01/13-1989-Conf, para. 288.

³⁶⁵ CAR-OTP-0074-0872-R02, p. 0880.

163. Mr. Kilolo did not instruct D-55 to conceal the Amsterdam meeting.³⁶⁶ D-55's prior recorded testimony, relied on by the Trial Chamber,³⁶⁷ shows that Mr. Kilolo only instructed him not to reveal this information to the *public* as the meeting was private.³⁶⁸ D-55 did not deny the Amsterdam meeting.³⁶⁹ During the Amsterdam meeting, D-55 expressed that [REDACTED],³⁷⁰ [REDACTED].³⁷¹ This undermines any conclusions that Mr. Kilolo instructed D-55 to lie about having the meeting, when part of the substance of the meeting was to contact the Court (VWU).

164. The Trial Chamber erroneously concluded that Mr. Bemba spoke to D-55 and "thanked him for agreeing to testify in his favor."³⁷² D-55 merely said that Mr. Bemba thanked him for "having accepted to testify in this case."³⁷³

165. The Trial Chamber erroneously concluded that Mr. Kilolo instructed D-55 to conceal his telephone conversation with Mr. Bemba.³⁷⁴ First, D-55 did not know for certain that the person he had spoken with was Mr. Bemba.³⁷⁵

³⁶⁶ ICC-01/05-01/13-1989-Conf, para. 299.

³⁶⁷ *Id.*

³⁶⁸ CAR-OTP-0074-0872-R03, p. 0880: "[REDACTED]" (unofficial translation).

³⁶⁹ ICC-01/05-01/08-T-265-CONF-ENG, p. 14, ll. 18-25, p. 15, ll. 1-6.

³⁷⁰ ICC-01/05-01/13-1903-Conf-Corr2 *citing* CAR-OTP-0074-0872, p. 0878.

³⁷¹ ICC-01/05-01/13-1903-Conf-Corr2 *citing* ICC-01/05-01/13-T-36-CONF-ENG, p. 16, ll. 23-24, p. 17, ll. 4-24.

³⁷² ICC-01/05-01/13-1989-Conf, para. 305.

³⁷³ ICC-01/05-01/13-T-36-CONF, p. 65, ll. 13-25, p. 66, ll. 1-3. D-55 stated: "The third individual who was passed to me on the telephone was saying quite simply that, well, they were thanking me for having accepted to testify in this case, and this person said how grateful they were. That was all really. ... There was nothing further said in that conversation, unless, of course, I might have omitted or forgotten something. That person was thanking me for having accepted to testify."

³⁷⁴ ICC-01/05-01/13-1989-Conf, para. 299.

³⁷⁵ *Id.*, para. 294.

Second, D-55 was not expressly asked in the Main Case about whether he had spoken with Mr. Bemba. He therefore did not give false testimony. In light of the above, the Trial Chamber erroneously found that D-55 had lied and that Mr. Kilolo had instructed him to lie.

c. The Trial Chamber erred in fact in finding that Mr. Kilolo induced D-57 and D-64 to give false testimony.

166. The Trial Chamber erroneously concluded that Mr. Kilolo instructed D-57 and D-64 to lie about payments they received and the extent of their contacts with the Main Case Defence.³⁷⁶ Neither D-57 nor D-64 testified that Mr. Kilolo instructed them to lie.³⁷⁷ The Trial Chamber erroneously relied on its conclusions regarding other witnesses to support its conclusions that Mr. Kilolo instructed D-57 and D-64 to lie about their contacts with the Bemba Main Case Defence (D-2, D-15, D-26, D-54, and D-55)³⁷⁸ and money or other material benefits they received (D-2, D-3, D-15, D-23, D-54 and D-55).³⁷⁹

167. D-57 denied receiving payments because he thought that it was not worth mentioning.³⁸⁰ D-57 and D-64 testified that Mr. Kilolo never asked them to modify their testimony.³⁸¹ D-2, D-3, and D-23 were inherently unreliable and the Trial Chamber should not have relied on them to make any findings of

³⁷⁶ *Id.*, paras. 253, 277-78.

³⁷⁷ For D-57 see ICC-01/05-01/13-T-31-CONF-ENG, p. 28, ll. 11-15, p. 29, ll. 18-25, p. 30, ll. 1-10, p. 36, ll. 14-25, p. 37, ll. 1-3, p. 37, ll. 23-25, p. 38, ll. 1-17, p. 50, ll. 13-19, p. 53, ll. 6-8, p. 60, ll. 7-14. For D-64 see ICC-01/05-01/13-T-32 CONG-ENG, p. 48, ll. 13-25, p. 49, ll. 1-18, p. 66, ll. 23-25, p. 67, ll. 23-25, p. 68, ll. 1-9.

³⁷⁸ ICC-01/05-01/13-1989-Conf, paras. 251, 277.

³⁷⁹ *Id.*, paras. 250, 278.

³⁸⁰ ICC-01/05-01/13-T-31-CONF-ENG, p. 37, ll. 13-25, p. 38, ll. 1-11.

³⁸¹ For D-57 see ICC-01/05-01/13-T-31-CONF-ENG, p. 49, ll. 23-25, p. 50, l. 1. For D-64 see ICC-01/05-01/13-T-32-CONF-ENG, p. 66, ll. 23-25.

fact against Mr. Kilolo.³⁸² There is no evidence that Mr. Kilolo instructed D-55 to lie about the money he received or his contacts with Mr. Kilolo.³⁸³ D-26 did not testify in the present case. D-15 and D-54 never testified that Mr. Kilolo instructed them to lie.³⁸⁴

3. The Trial Chamber erred in fact in finding that Mr. Kilolo induced D-26, D-15, and D-54 to give false testimony.

168. The Trial Chamber erroneously concluded that Mr. Kilolo instructed D-26, D-15, and D-54 to give false testimony.³⁸⁵ D-26 did not testify in the Article 70 case.³⁸⁶ Neither D-15 nor D-54 testified that Mr. Kilolo instructed them to lie.³⁸⁷

C. The Trial Chamber erred in fact in finding that Mr. Kilolo made an essential contribution to a common plan with Mr. Bemba and Mr. Mangenda to corruptly influence witnesses and present false evidence.

169. By failing to properly assess witness credibility, and making erroneous findings of fact, the Trial Chamber erroneously concluded that Mr. Kilolo made an “essential contribution” to the common plan:

- a. Mr. Kilolo did not personally pay money to witnesses. This finding was based primarily on D-2’s, D-3’s, and D-23’s inherently

³⁸² See *supra* Ground 3(A).

³⁸³ See *supra* Ground 3(B)(2)(b).

³⁸⁴ For D-15 see ICC-01/05-01/13-T-30-CONF-ENG, p. 74, ll. 21-25, p. 75, l. 1. For D-54 see ICC-01/05-01/13-T-28-CONF-ENG, p. 32, ll. 21-23, p. 33, ll. 3-11.

³⁸⁵ For D-26 see ICC-01/05-01/13-1989-Conf, paras. 475-76. For D-15 see ICC-01/05-01/13-1989-Conf, paras. 589-90. For D-54 see ICC-01/05-01/13-1989-Conf, paras. 650-51.

³⁸⁶ ICC-01/05-01/13-1989-Conf, para. 454.

³⁸⁷ For D-15 see ICC-01/05-01/13-T-30-CONF-ENG, p. 74, ll. 21-25, p. 75, l. 1. For D-54 see ICC-01/05-01/13-T-28-CONF-ENG, p. 32, ll. 21-23, p. 33, ll. 3-11.

unreliable evidence.³⁸⁸ The remainder of the Trial Chamber's findings concerning the payment of money are based on its conclusions regarding D-29, D-57, and D-64, which are erroneous for the reasons articulated above in Ground 3(B)(2).

- b. Mr. Kilolo did not plan and execute the illicit coaching of witnesses. This finding is based the Trial Chamber's conclusions regarding D-2, D-3, D-23, D-6, D-13, D-25, D-29, D-57, D-64, D-26, D-15, and D-54, which are erroneous for the reasons articulated above in Grounds 3(B)(1)-(3).
- c. Mr. Kilolo did not collaborate with Mr. Mangenda to instruct witnesses to give false testimony. This finding is based on the Trial Chamber's conclusions regarding D-29, D-26, D-15, and D-54, which are erroneous for the reasons articulated above in Grounds 3(B)(2)-(3).
- d. Mr. Kilolo did not report to Mr. Bemba for the purpose of illicitly coaching witnesses to provide testimony in Mr. Bemba's favor. This finding is based on the Trial Chamber's conclusions regarding D-15 and D-54, which are erroneous for the reasons articulated above in Ground 3(B)(3).
- e. Mr. Kilolo did not present evidence known to be false. This finding is based on the Trial Chamber's erroneous conclusion that Mr. Kilolo induced the 14 witnesses to provide false testimony, which is erroneous for the reasons articulated above in Grounds 3(A) and 3(B).

³⁸⁸ See *supra* Ground 3(A).

CONCLUSION:

170. For all the reasons articulated above in Grounds 3(A) and 3(B), the Trial Chamber erred in law and fact in finding that the charges against Mr. Kilolo were proved beyond a reasonable doubt.

RELIEF SOUGHT:

171. Because of the Trial Chamber's errors, Mr. Kilolo requests the Appeals Chamber to:

- a. Review all relevant evidence;
- b. Apply the correct legal standard to the evidence under consideration;
- c. Find that the evidence presented does not satisfy the burden of proof beyond a reasonable doubt; and, accordingly,
- d. Reverse Mr. Kilolo's convictions all counts and return a finding of NOT GUILTY.

OVERALL CONCLUSION:

172. The admission of evidence obtained by OTP artifice, disregard, circumvention and violation of law, and the fruits thereof, was antithetical to and seriously violated the integrity of the proceedings. Failing to apply the correct legal standards and consider the entirety of the applicable facts, the

Trial Chamber erroneously concluded otherwise. The record is replete with substantial evidence of intentional bad faith conduct by the OTP in the collection of evidence, its disregard of Mr. Kilolo's international human right of privacy, the immunity protections afforded to him and his right to professional confidentiality. In a case awash with extraordinary revelations of improper conduct and manufactured attempts to cure, the OTP's unconstrained and unsupervised investigation of Mr. Kilolo without making any attempts to lift his immunity is perhaps the most shocking, with far ranging ramifications beyond this case. The Trial Chamber's refusal to properly consider the manner and methods the OTP employed in investigating Mr. Kilolo while he was in mid-trial, defending an accused before the ICC, in determining whether to admit the evidence it gathered against Mr. Kilolo was antithetical to and impugned the integrity of the proceedings. The decision declares an open season on Defence Counsel, with no restriction on the weapons employed in unsupervised clandestine prosecutorial investigations. The chilling effect cannot be ignored. The mission of a prosecutor is to do justice, not merely obtain convictions. The ICC OTP occupies the pinnacle of prosecutors, and thus must be above reproach. Where, as here, the OTP has refused to honor these immutable core principals, this international court must restore those standards. To do otherwise is to taint its own credibility as a body committed to upholding and promoting the highest values of human rights and the rule of law. Anything short of this goal is untenable. Moreover, because of errors of law, fact and procedure, the Trial Chamber's findings are unsustainable.

Respectfully submitted, 27 July 2017,
In The Hague, the Netherlands.

A handwritten signature in black ink, appearing to read 'M. Karnavas', enclosed within a rectangular border.

Mr. Michael G. Karnavas
Counsel for Mr. Aimé Kilolo Musamba