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Date: **12 September 2017**

THE APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

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

Public
Public redacted version of "Prosecution's response to Bemba's 'Request for Additional Evidence on Appeal'", ICC-01/05-01/13-2194-Conf, 14 August 2017

Source: **Office of the Prosecutor**

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

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Introduction

1. Admitting additional evidence on appeal is the exception, not the rule. As the Appeals Chamber has underscored:

> "[E]vidence relevant to a decision pursuant to article 74(2) of the Statute should, with only limited exceptions, be presented *before* the decision is taken. [A]llowing the admission of additional evidence on appeal, without further restriction, entails a real risk of litigation strategies that contemplate the presentation of evidence for the first time on appeal, even if such evidence was available at trial, or with due diligence, could have been produced."[1]

2. Bemba's 12 July 2017 Request to present additional evidence on appeal disregards this guidance.[2] It pursues exactly the type of litigation strategy that the Appeals Chamber discourages. Bemba seeks to have admitted on appeal three documents relating to the Dutch telephone interception and transmission process, notwithstanding the fact that they could have been introduced at the appropriate time. By now seeking a *de novo* assessment, on appeal, of documents previously available at trial, the Request dilutes the corrective function of the appellate process. It should be dismissed.

3. The purported additional evidence relates to three documents ("the Additional Documents") which emanated during the Dutch legal process allowing the interception and transmission to the Court of telephone traffic data and tapped conversations.[3]

- The first two documents are decisions of The Hague District Court (the "Dutch District Court") dated 9 October 2013 and 25 October 2013—two among several others already on the record allowing the transmission of data and content of Kilolo's "18" phone number.[4] The 9 October 2013 Decision permitted, *inter alia*, the release to the International Criminal Court of the traffic data for the "18" number for the period 1 January 2012 until 20 September 2013.[5] The 25 October 2013 Decision authorised the release to the International Criminal Court of tapped conversations for the "18" number for the period 30 August 2013 to 30 September 2013.[6]

[1] ICC-01/04-01/06-3121-Red ("*Lubanga* AJ"), para. 57.
[2] ICC-01/05-01/13-2172-Conf and ICC-01/05-01/13-2172-Red ("Request" or "Bemba's Request"). *See Lubanga* AJ, paras. 56-57.
[3] Also referred to as "Additional Documents".
[4] ICC-01/05-01/13-2144-Conf-AnxI ("9 October 2013 Decision" and "25 October 2013 Decision", collectively the "Dutch Decisions"). Kilolo's [REDACTED] phone number is referred to as the "18" number or the "Kilolo Number".
[5] 9 October 2013 Decision, pp. 3-5.
[6] 25 October 2013 Decision, pp. 1-3.

- The third document is a letter in Dutch dated 19 February 2014 from the Dutch Public Prosecutor (*Officier van Justitie*) to Kilolo's Counsel in the Dutch proceedings, noting that "[t]he judge's chamber [had] already given its permission to provide [recordings from the period of 16 October up until 23 November 2013] to the International Criminal Court upon receipt of the authorisation from the examining judge [according to] article 126aa Dutch Code of Criminal Procedure" and rejecting Kilolo's request not to hand over documents relating to the interception process to the International Criminal Court.[7]

4. None of the Additional Documents meets the stringent test governing additional evidence on appeal. Bemba had the Additional Documents in his possession for at least six months before the Trial Judgment was issued,[8] yet failed to exercise due diligence to bring these documents before the Trial Chamber before the conclusion of trial. As he concedes, he acquired the documents in April 2016, at least a week before he filed his article 69(7) application seeking exclusion of evidence relating to the "18" number[9]—a filing for which he sought and received an extension of time expressly to review Kilolo's Dutch file containing the documents.[10] Bemba's lack of diligence has continued on appeal. He requested the Appeals Chamber to take judicial notice of the Dutch Decisions only on 28 April 2017.[11] When that request was rejected on 17 May 2017,[12] he waited a further two months before bringing this Request, after the appeal and response briefs in relation to the Conviction Judgment had been filed.

5. Moreover, the documents, albeit related to the Dutch telephone interception process, are superfluous in light of the extensive record of this case upholding the legality of the interception process. They are not sufficiently important to affect the verdict.[13] Nor, contrary to Bemba's suggestion, can the documents "undermine the foundation of several key

[7] ICC-01/05-01/13-2172-Conf-AnxC ("19 February 2014 Letter"). The Defence attaches an unofficial translation in English.
[8] Request, para. 10. The Trial Judgment (ICC-01/05-01/13-1989-Red) was issued on 19 October 2016.
[9] Request, para. 10.
[10] *See* ICC-01/05-01/13-1769-Conf ("Bemba Extension of Time Request"), para. 8 (stating that the Kilolo Defence provided the Bemba Defence copies of the Dutch file at about 3 pm on 4 April 2016); ICC-01/05-01/13-1774 ("Extension of Time Decision"), p. 7.
[11] ICC-01/05-01/13-2150-Conf ("Judicial Notice Request").
[12] ICC-01/05-01/13-2159 ("Judicial Notice Decision").
[13] *Lubanga* AJ, para. 59.

decisions issued in this case".[14] To the contrary, if admitted they would bolster the record demonstrating the legality of the Dutch interception process.

6. Finally, the relevance of these documents, as suggested by Bemba, rests on a tenuous and incorrect reading of the record. Contrary to Bemba's claim, the plain text of these documents does not demonstrate alleged "unfairness, occasioned by the Prosecution's pattern of conduct […]" or that "[the 'hybrid system'] failed to ensure appropriate safeguards and remedies for the Defence", related to the "18" number or otherwise.[15] Aspects of this Request are no more than a second attempt on appeal to re-litigate the Trial Chamber's decision not to exclude evidence related to the interception of the "18" number.[16] Although Bemba's arguments in his Appeal Brief were confined to a few paragraphs, the Request elaborates and advances several new arguments as supplemental briefing, without first seeking the necessary leave.[17]

7. The Request also advances several irrelevant and unfounded comments, which should be dismissed summarily.[18]

Level of Confidentiality

8. The Prosecution files this submission as "Confidential" pursuant to regulation 23*bis* (2) of the Regulations of the Court, since it responds to a submission similarly classified. The Prosecution will file a public redacted version in due course.

Submissions

i. Admitting additional evidence on appeal is exceptional

9. Admitting additional evidence on appeal is exceptional and highly circumscribed. Regulation 62, articles 69(4) and 83 of the Statute, and rule 149 of the Rules of Procedure and Evidence govern the admission of additional evidence on appeal.[19] None contemplate re-opening the evidentiary phase of trial, or the liberal admission of evidence on appeal. As the

[14] Request, para. 3.
[15] Request, para. 2.
[16] ICC-01/05-01/13-1855 ("Dutch Intercepts and CDR Decision").
[17] *Compare* ICC-01/05-01/13-2144-Conf ("Bemba Brief"), paras. 173-179 *with* Request, paras. 1-48 (including Confidential Annexes A, B, C, D).
[18] *Lubanga* AJ, paras. 29-34.
[19] *Lubanga* AJ, paras. 53-64.

Appeals Chamber has held, the Court's appellate proceedings are corrective in nature and admitting additional evidence on appeal should be restrictive.[20]

10. In light of this, Bemba's Request must be rejected. He fails to show, either individually or cumulatively, that:[21]

a. there are convincing reasons why he did not present the Additional Documents at trial, applying due diligence; and

b. the Additional Documents are of sufficient importance and could have changed the verdict.

11. Moreover, although additional evidence on appeal may relate to questions of alleged procedural unfairness, Bemba must demonstrate this based "on the circumstances of the case and the evidence sought to be admitted."[22] He fails to do so. Moreover, Bemba has not demonstrated any reason—let alone a compelling one—to show why the Appeals Chamber should exercise its discretion to admit the Additional Documents, notwithstanding his failure to meet the criteria.[23]

ii. Bemba was not diligent

12. Bemba's Request fails because of his lack of diligence in presenting the Additional Documents at trial, or earlier on appeal. His attempt to shift the blame for his lack of diligence to the Prosecution is unjustified and transparent.

a) Bemba failed to present the Additional Documents at trial

13. Bemba could have presented the Additional Documents at trial and failed to do so.

14. First, Bemba knew of the Dutch case file relating to his co-accused Kilolo and Mangenda since 26 May 2014, when the Pre-Trial Chamber notified the Parties of the 28 April 2014 Decision of the Hague District Court.[24] The 28 April 2014 Decision authorised the Dutch Public Prosecutor to deliver to the Court the tapped telephone calls and historical data relating to telephone calls for the period up to and including 23 November 2013 for several

[20] *Lubanga* AJ, paras. 56-57.
[21] *Lubanga* AJ, paras. 54-59.
[22] *Lubanga* AJ, para. 60. *Contra* Request, para. 3.
[23] *Lubanga* AJ, para. 62.
[24] ICC-01/05-01/13-424-AnxI ("28 April 2014 Decision"), notified first to the Parties on 26 May 2014 and re-stamped on 17 September 2015.

numbers, including the "18" number.[25] It also rejected several of Kilolo's and Mangenda's complaints. Among other things, the 28 April 2014 Decision contained an extensive procedural history of key aspects of the litigation before the Dutch courts.[26] Thus, even before confirmation, Bemba knew that a Dutch proceeding relevant to his ICC case existed. Yet, Bemba delayed and, by his own admission, only wrote to Kilolo for the entire Dutch case file some eighteen months later, in December 2015.[27]

15. Second, Bemba failed to demonstrate any urgency in seeking access to the Dutch case file at trial. Despite the clarity provided by the Prosecution on two occasions before the start of trial—first on 18 June 2015 in a letter to the Mangenda Defence copying the Bemba Defence,[28] and later in a 10 September 2015 filing—that it "possesses no order, decision or record of the Dutch Courts concerning the legality of the intercepts to which the Defence does not have access",[29] Bemba continued to insist that the Prosecution request transmission of the Dutch judicial records.[30] Moreover, none of the efforts Bemba purports to have made show his diligence.[31] In fact, even when the Chamber invited the Defence to seise it, if records were unavailable from the Prosecution,[32] Bemba did not act immediately. And when he did, his requests were vague.[33]

16. Even the Trial Chamber noted the Defence's lack of diligence in seeking access to the Dutch case file. When deciding a request for the assistance of the Dutch authorities to provide material to the Mangenda Defence (a request that Bemba joined), the Chamber noted that the

[25] 28 April 2014 Decision, p. 10.
[26] 28 April 2014 Decision, pp. 3-11.
[27] ICC-01/05-01/13-1783 ("Bemba Clarification"), para. 2 (noting that apart from oral queries, it sent written requests to the Defence for Me. Kilolo to access both the entire case file, and specific documents and orders in advance of 1 February 2016, including several written requests in December 2015 and January 2016).
[28] ICC-01/05-0/13-1727-Conf-AnxD ("Prosecution's 18 June 2015 Letter") (noting, in response to Mangenda's request, that it did not have judicial decisions relating to the telephonic surveillance of Mangenda and his co-accused).
[29] ICC-01/05-01/13-1233-Conf ("Prosecution's Notice of Compliance"), paras. 5, 9-10 ("[h]owever, as noted in its 18 June 2015 Response, the Prosecution possesses no order, decision or record of the Dutch Courts concerning the legality of the intercepts to which the Defence does not have access."). *See also* ICC-01/05-01/13-1727-Conf ("Mangenda's Second Disclosure Request"), para. 6.
[30] *See e.g.,* ICC-01/05-01/13-1749-Conf ("Bemba Response to Mangenda's Second Disclosure Request"), para. 6. *See also* ICC-01/05-01/13-1747-Conf ("Prosecution Response to Mangenda's Second Disclosure Request"), para. 4.
[31] *See e.g.,* Bemba Response to Mangenda's Second Disclosure Request, fn. 15 ([REDACTED]).
[32] ICC-01/05-01/13-1148-Conf ("Mangenda Cooperation Decision"), para. 12.
[33] For instance, although Bemba joined Mangenda's request, his request remained broad, seeking "key filings and decisions concerning the evidential and legal basis for the interception process". *Compare* Bemba Response to Mangenda's Second Disclosure Request, para. 5 *with* Mangenda's Second Disclosure Request Annex A (specifying six documents).

Defence "did not undertake any steps in acquiring the Requested Material for a period of approximately four months after having received confirmation that the Prosecution was not in possession."[34] The Chamber found that "the unexplained delay" was "entirely unjustified" and that "the lapse of time in filing this Request casts doubt on the expected importance of the documents to the Mangenda Defence."[35]

17. Third, Bemba's claim that the Dutch file was "1142 pages" and was received "mere days before the deadline for filing Article 69(7) applications" omits crucial facts.[36] In particular—after receiving copies of the documents in the Dutch case file from Kilolo on 4 April 2016,[37] Bemba sought an additional 4 days to file his article 69(7) application (which had then been due on 8 April 2016) to "afford the Defence sufficient time to review and analyse the elements of the case file."[38] Bemba justified the extension on the basis that: (i) it would be more effective and efficient to incorporate the elements of the recently received documentation rather than filing staggered submissions; (ii) it would be improper for the Defence to put forward submissions without first verifying the content of the specific requests and orders which led to the Dutch collection of evidence; and (iii) the focus of the Defence submissions would relate to the interception of the "18" number.[39] On that basis, the Chamber granted an extension of four days (until 12 April 2016), stating that such extension was "for the limited purpose of submissions related to the specific evidence that has been intercepted by the Dutch authorities."[40] Bemba cannot now claim that he lacked sufficient time to review the Dutch case file before his article 69(7) application, given that he received an extension of time at trial from the Trial Chamber for that very purpose.

[34] ICC-01/05-01/13-1768 ("Second Mangenda Cooperation Decision"), paras. 13-14 and fn. 21.
[35] Second Mangenda Cooperation Decision, para. 14.
[36] Request, para. 10.
[37] Bemba Extension of Time Request, para. 8 (also noting that on 1 April 2016, Kilolo informed Bemba that he possessed elements of the Dutch case file).
[38] *Ibid*, para. 11 ("The Defence envisages that an additional four days, such that the deadline falls on 15 April 2016, would afford the Defence sufficient time to review and analyse these elements of the case file."). Bemba's proposed schedule excluded counting weekends, contrary to the Court's practice; in the end, the Trial Chamber granted Bemba time until 12 April 2016, partially granting the request.
[39] Bemba Extension of Time Request, paras. 13-15.
[40] Extension of Time Decision, para. 10 (*also* para. 5 noting "The Bemba Defence therefore requests an extension of the 8 April Deadline […] in order to be able to incorporate the Kilolo Material into its submission."); (noting also the Bemba submission that he had asked the other Defence teams "throughout 2015" and thus had not acted in a negligent manner).

18. Moreover, even if the Dutch case file's index did not specifically list the two Dutch Decisions,[41] Bemba fails to demonstrate that he took even preliminary measures at that time using, for instance, the index available in English to isolate the documents that were not indexed. This omission falls short of the standard of due diligence expected of the Defence. Although some of the content was in Dutch, Bemba does not demonstrate that he exhausted all reasonable options at the time, including using someone familiar with the Dutch language to review the documents or to assist with unofficial translations or summaries—as Bemba seems to have done for this Request.[42] Bemba's claim of apparently competing obligations in the Main Case at the time is also unpersuasive:[43] he specifically requested an extension to review the Dutch case file knowing this workload. The Bemba Defence's obligations on another case cannot excuse its lack of diligence in this case. In this context, Bemba's co-accused Arido's representation to the Trial Chamber about his alleged difficulties in reviewing the Dutch case file is irrelevant to Bemba's Request.[44] Notwithstanding, Bemba fails to mention that the Trial Chamber, even after the evidence had closed, expressly allowed the Parties to re-open the presentation of evidence at trial on "a truly exceptional basis"[45]—an opportunity that Arido availed himself of,[46] but Bemba did not.

19. Likewise, Bemba's comment that "[his] ability to avail [him]self of the contents [of the Dutch file]" was the "subject of dispute" is ambiguous: what Bemba refers to is his request for redactions to extracts from the Dutch case file following Kilolo's request that the contents of the file not be disclosed to third parties without prior written authorisation from the Kilolo Defence for each item.[47] The Trial Chamber summarily dismissed Bemba's request for redactions because it was poorly substantiated.[48] It is unclear how this sequence of events relates to Bemba's review of the case file.

[41] Request, para. 10, Annex D.
[42] *See* Request, Annex C (attaching an unofficial translation of a document in Dutch).
[43] Request, para. 10 (claiming work on "the Closing Brief", "the Sentencing Brief in the Main Case", "immediate cessation of funding").
[44] Request, para. 10, fn. 27 (citing ICC-01/05-01/13-1825 ("Arido Notice")).
[45] ICC-01/05-01/13-1859 ("Further Directions Decision"), para. 5.
[46] *See* ICC-01/05-01/13-1928-Corr ("Arido Effective Remedy Request"), presenting two Austrian Decisions made available after the evidence was closed.
[47] Request, para. 10 (referring to ICC-01/05-01/13-1804 ("Bemba Redaction Request") and ICC-01/05-01/13-1823 ("Kilolo Redaction Submission"). *See* Bemba Redaction Request, para. 3 (noting that the Kilolo Defence communicated its position "that the Defence for Mr Bemba could not disclose any elements of the case file to third parties without the prior written authorisation […]").
[48] ICC-01/05-01/13-1807 ("Redactions Decision"), paras. 4-5.

20. Fourth, Bemba's lack of diligence has continued on appeal. Notwithstanding that Bemba had the Additional Documents in early April 2016, he presented the two Dutch Decisions as part of a judicial notice request before the Appeals Chamber only in April 2017[49]—a year later. And when that request was rejected on 17 May 2017,[50] Bemba waited almost two months—until just after the Prosecution had filed its Response Brief—to present those same documents as additional evidence.[51]

21. Bemba's successive delays in diligently presenting the Additional Documents are inexcusable, and the Request should be dismissed on this basis alone.

b) Bemba's submissions on the Prosecution's conduct are incorrect

22. Bemba's attempt to attribute his failures to the Prosecution, the Single Judge and the Dutch authorities is meritless and irrelevant.[52]

23. First, contrary to Bemba's claim, once the Prosecution had clarified that the Additional Documents was not in its possession, it was not obliged to search for these documents on Bemba's behalf.[53] Nor did the Trial Chamber require the Prosecution to do so.[54] The Defence could have independently approached the Chamber with a cooperation request, as it later did, as specifically provided for by the Statute.[55] Bemba's reliance on a decision of the *Lubanga* Pre-Trial Chamber to argue that the Prosecution had a positive obligation "to collect statements, even if such statements were not in the custody or control of the Prosecution"[56] lacks merit as that decision is clearly distinguishable. That decision was specific to rule 76-related disclosure of statements (not emails or legal decisions), and concerned the Prosecution's obligation "to make its utmost effort to obtain the prior statements of those witnesses on whom the Prosecution intends to rely at the confirmation hearing which have been taken by other entities."[57] Likewise, Bemba's reliance on select ICTR case law is inapposite: even if some ICTR Trial Chambers may have commented on "a practice" of

[49] Judicial Notice Request, paras. 27-35.
[50] Judicial Notice Decision, paras. 6-9 (finding that article 69(6) is not a suitable legal basis for the introduction of the material at issue).
[51] The Request was filed on 12 July 2017.
[52] Request, paras. 6-17.
[53] Request, paras. 12-13.
[54] Mangenda Cooperation Decision, para. 11; Second Mangenda Cooperation Decision, para. 13.
[55] Article 57(3)(b), read with articles 61(11) and 64(6)(a).
[56] Request, para. 13 (citing ICC-01/04-01/06-718 ("*Lubanga* Disclosure Decision", p. 4).
[57] *Lubanga* Disclosure Decision, p. 4.

asking the Prosecution "to obtain and disclose certain records, specifically Rwandan judicial records of Prosecution witnesses, in the interests of justice",[58] Bemba's access to the Additional Documents—Dutch legal documents relating to litigation to which the Prosecution was not party—is neither comparable nor required.

24. Second, Bemba's commentary on the Prosecution's proper discharge of its disclosure obligations is both incorrect and gratuitous.[59] Bemba claims, without foundation, that "[the] Prosecution continues to withhold key details concerning the dates and contents of its interaction with the Dutch authorities […]" and that "notwithstanding their continuing duty to comply with disclosure decisions during the appeals stage, the Prosecution will not transmit further information."[60] Nothing in the email exchanges between Bemba's Counsel and the Prosecution that Bemba relies upon supports his claim.[61] [REDACTED], [62] rather than declining to "transmit further information", the Prosecution [REDACTED].[63] [REDACTED].[64] [REDACTED].[65] [REDACTED],[66] which they never did.

25. Moreover, the email that Bemba now purportedly claims as having "key relevance, demonstrating that the ICC-OTP solicited information from the Dutch concerning the content of evidence collected by the Dutch […]" [REDACTED]—disclosed first by the Prosecution, and not the Dutch authorities, to Bemba at trial.[67] [REDACTED][68]—[REDACTED]. Bemba appears to conflate the two emails.[69] Bemba also appears to confuse the terms "content" and "[REDACTED]",[70] leaving it unclear whether he believes that the Prosecution requested the

[58] Request, para. 13, fn. 34 (citing to select ICTR case law); *see e.g.*, ICTR: *Prosecutor v Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Callixte Nzabonimana's Motion for an Order concerning Disclosure of Gacaca and Judicial Material relating to Prosecution Witnesses, 29 October 2009, paras. 29-31 (available at http://www.legal-tools.org/doc/511039/).
[59] Request, paras. 6-8. *See also* Request, Annex A.
[60] Request, paras. 6, 8.
[61] *See* Request, Annex A.
[62] A similar email exchange was conducted at trial. *See* Request, Annex A ([REDACTED]).
[63] *See* Request, Annex A ([REDACTED]).
[64] *See* Request, Annex A ([REDACTED]).
[65] *See* Request, Annex A ([REDACTED]).
[66] *See* Request, Annex A ([REDACTED]).
[67] *See* Request, para. 6 (noting "an email of key relevance, demonstrating that the ICC-OTP solicited information from the Dutch concerning the content of evidence collected by the Dutch […]" and claiming that "the Dutch authorities later transmitted an email of key relevance"). *See also* [REDACTED].
[68] ICC-01/05-01/13-1861-Conf-Anx2, p. 5.
[69] Request, para. 6, fn. 15 (citing ICC-01/05-01/13-1861-Anx2, **p. 6**) (emphasis added).
[70] *See* Request, para. 6 ("[…] the Dutch authorities later transmitted an email of key relevance, demonstrating that the ICC-OTP solicited information from the Dutch concerning the **content** of evidence collected by the

content of the conversations [REDACTED][71]—a significant distinction. In this context, Bemba's effort to attribute his failures to the Prosecution is inaccurate and unhelpful.

26. Third, Bemba's remaining arguments are unsubstantiated and should be dismissed summarily. Many of them go well beyond the reasonable scope of this Request, and constitute impermissible supplemental briefing:

- Bemba's allegation that the Prosecution violated its article 54 obligation with respect to D-15 and P-242 is unsupported and has no bearing on the current Request.[72]
- Bemba's allegation that the Prosecution filled "[the] information lacuna with misleading, contradictory and inaccurate information" is equally unsupported. Bemba's reliance on a "sample" in Annex B—a random selection of filings from the case (with text sometimes emphasised in bold)—is obscure.[73] Notwithstanding the tenor of his allegation, Bemba fails to substantiate its accuracy or relevance.
- Likewise, Bemba's mere disagreement with the legal and factual submissions advanced by the Prosecution does not comprise a substantive showing, nor is it dispositive of the Request.[74]
- Additionally, the relevance of Bemba's attribution of various unsubstantiated conduct to the Single Judge and the Dutch authorities is unclear.[75]

iii. The Additional Documents could not and would not have changed the verdict

27. The Additional Documents could not and would not have altered the Chamber's decision not to exclude the intercepted materials pursuant to article 69(7).[76] That decision rested on two conclusions: (1) "the actions of the Dutch Prosecution in requesting interception of the Kilolo Number and the Dutch Investigative Judge in authorising the interception do not appear to be so manifestly unlawful" that they amounted to a violation of Kilolo's right to privacy; and (2) adequate safeguards were implemented by the Dutch court and the ICC to vet the intercepted material.[77] Bemba fails to show how the Additional

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Dutch, in order to use this information to influence the Independent Counsel's selection of privileged information [REDACTED])" (emphasis in bold added).
[71] CAR-OTP-0093-0017 or ICC-01/05-01/13-1861-Anx2, p. 6.
[72] Request, para. 12.
[73] Request, para. 14.
[74] *See e.g.*, Request, para. 15 (expressing disagreement with the Prosecution's position in several filings).
[75] Request, para. 9.
[76] *See* Dutch Intercepts and CDR Decision, para. 38.
[77] *See* Dutch Intercepts and CDR Decision, paras. 22-32.

Documents could have or would have led the Chamber to conclude differently.[78] Rather, he relies on fragmented and unsupported (mis)interpretations of the case record. And even if Bemba seeks to demonstrate that the proceedings were unfair on some other unspecified grounds, the Additional Documents and the remaining record do not support that claim.[79]

28. If anything, had the Additional Documents been admitted at trial, they would have supported the Chamber's conclusions, further demonstrating the fairness of the proceedings. The record of this case simply does not support Bemba's conclusions. Rather, as the Dutch Public Prosecutor confirmed on 13 April 2016, "every action [relating to the lawfulness of the implementation documents that the ICC received from the Netherlands] was entirely in accordance with Dutch legislation and jurisprudence."[80]

a) The Additional Documents could not and would not have affected the Chamber's conclusion that the interception of the Kilolo Number was not manifestly unlawful

29. The Additional Documents do not show that the Chamber erred in finding that the Dutch interception of the Kilolo Number was not manifestly unlawful. In the 9 October 2013 Decision, the Dutch District Court noted the absence of a formal OTP RFA for the recording of communications relating to the Kilolo Number.[81] On that basis, the District Court decided not to grant the release of tapped conversations relating to the Kilolo Number for the period 15 August 2013 until 30 September 2013 "at this time".[82] However, in that same decision, the District Court authorised the release of the telephone traffic data for the Kilolo Number for the period 1 January 2012 until 20 September 2013.[83] In the 25 October 2013 Decision, the Dutch District Court released the tapped conversations for the Kilolo Number for the period 30 August 2013 to 30 September 2013, inclusive, finding that "all of the relevant requirements prescribed by law and laid down in the treaties applicable to this matter are complied with."[84] The third document, a letter from the Dutch Public Prosecutor confirms the same—that the recordings were transmitted to the ICC "upon receipt of the authorization

[78] *Lubanga* AJ, para. 59.
[79] *Lubanga* AJ, para. 60.
[80] ICC-01/05-01/13-1861-Conf-Anx3 ("13 April 2016 Statement"), p. 3.
[81] 9 October 2013 Decision, pp. 4-5.
[82] 9 October 2013 Decision, p. 4.
[83] 9 October 2013 Decision, pp. 3, 5.
[84] 25 October 2013 Decision, pp. 2-3.

from the examining judge in accordance with article 126aa [of the] Dutch Code of Criminal Procedure."[85]

30. Importantly, a plain reading of the two Dutch Decisions shows that the Additional Documents exclusively concern the transmission of the intercepted materials to the Court. In that regard, they neither directly concern, nor bring into doubt, the legality of the Dutch Prosecutor's or the Investigating Magistrate's decision to authorise the interception of the Kilolo Number. Nor do they relate to the Single Judge's authorisation of the Prosecution to request the Dutch authorities to collect logs and records of telephone calls placed, or received by, Kilolo and Mangenda.[86] They, for instance, do not address the sufficiency of the evidence presented by the Prosecution in support of its request to authorise the intercepts, or the appropriateness of the modality used to issue that request.[87] In this context, Bemba fails to acknowledge other Dutch decisions on the record, in particular the 15 October 2013 and 18 November 2013 decisions by the Investigating Judge, which, as noted by the Chamber, "make no reference to any irregularities in the interception of the Kilolo Number."[88] Moreover, the two decisions which Bemba now seeks to have admitted on appeal, like the 15 October 2013 and 18 November 2013 Investigating Judge decisions (relied on by the Trial Chamber),[89] implicitly accept that the interception process was lawful under Dutch law. This is particularly so with regards to the 25 October 2013 decision, which permitted transmission of intercepts of the Kilolo Number to the ICC *despite* the Dutch Court's full awareness that the intercepts contained potentially privileged material and the previous absence of a formal RFA.[90] Equally, the third document that Bemba seeks to have admitted on appeal, the 19 February 2014 letter from the Dutch Public Prosecutor (*Officier van Justitie*), simply underlines that the intercepted communications were transmitted to the ICC in accordance with Dutch law.[91]

31. In claiming the contrary, Bemba relies on a strained and incorrect view of the Additional Documents and resorts to re-hashing arguments he has already made on appeal

[85] 19 February 2014 Letter.
[86] ICC-01/05-52-Red2 ("Intercept Authorisation Decision"), pp. 7-8.
[87] *Contra* Request, paras. 25-29.
[88] *See* Dutch Intercepts and CDR Decision, para. 25 (citing CAR-OTP-0085-0596 (ICC-01/05-01/13-6-Conf-AnxA-Red); CAR-OTP-0085-0606 (ICC-01/05-01/13-6-Conf-AnxB-Red)).
[89] *See* Dutch Intercepts and CDR Decision, para. 25.
[90] *See* 25 October 2013 Decision, pp. 15-16.
[91] 19 February 2014 Letter.

that have no bearing on the admission of the Additional Documents. For instance, none of the three documents he seeks to admit have any bearing on whether the Dutch authorities assessed or applied the "reasonable suspicion" threshold prior to authorising their interception.[92] The Dutch authority responsible for authorising the intercepts was the Investigating Magistrate, who, as detailed in the Prosecution's Response Brief, assessed and determined whether the interception could commence under Dutch law. For instance, on 14 August 2013, the Dutch Investigating Judge authorised the wiretaps noting that "the allegations are based on concrete facts and circumstances", that the alleged offences were also criminal under Dutch law, and that the request satisfied the legal requirements of the Dutch Code of Criminal Procedure.[93] All three documents support this fact. They reiterate the Investigating Magistrate's careful consideration. As both Dutch District Court decisions note:

> "the examining magistrate explains in detail that, although the aforementioned lawyers must be regarded as holders of confidential information entitled to professional privilege, breaching the right of professional privilege is justified since they themselves are (or could be) regarded as suspects by the OTP-ICC and there are highly exceptional circumstances that justify a breach of the privilege."[94]

The Dutch Decisions also reflect that the Dutch authorities were mindful that the intercepted communications related to potentially privileged matters. The Dutch Decisions emphasise that the Investigating Magistrate took steps to ensure "that there will be no greater breach of professional privilege than necessary."[95]

32. Nothing in the Additional Documents undermines the Chamber's conclusion that prior to the interception of the Kilolo Number, the Dutch Prosecution and Investigating Judge understood that the Prosecution's 6 August 2013 RFA "was written sufficiently broadly to be reasonably understood as including the Kilolo Number."[96] Bemba's suggestion that the two Decisions make "clear" that "the 6 August RFA was not understood as including the Kilolo number" is unfounded.[97] The plain text of the Decisions does not support such a view. Nor does Bemba provide any special insight to contradict the express understanding of the Dutch

[92] Request, para. 21.
[93] *See* ICC-01/05-01/13-2170-Conf ("Prosecution Response Brief"), para. 124. *See also* 28 April 2014 Decision, p. 9 (noting that "requests for legal assistance were made to the The Netherlands on the basis of a suspicion of a serious criminal offence—breach of Article 70 of the Rome Statute.").
[94] 9 October 2013 Decision, p. 9; 25 October 2013 Decision, p. 16.
[95] *Ibid.*
[96] Dutch Intercepts and CDR Decision, para. 24.
[97] Request, para. 26.

authorities, who confirmed that the 6 August RFA was sufficient.[98] Moreover, the Decisions are from the Dutch District Court, not the Investigating Judge or the Dutch Public Prosecutor (*Officier van Justitie*). They could have no bearing on the Chamber's understanding and assessment of what the latter authorities understood. That the Dutch District Court subsequently authorised the transmission of those communications to the ICC supports the Chamber's conclusion that "the actions of the Dutch Prosecution in requesting interception of the Kilolo Number and the Dutch Investigative Judge in authorising the interception do not appear to be so manifestly unlawful that they amount to a failure to act 'in accordance with the law' for purposes of Mr Kilolo's right to privacy."[99] Bemba fails to demonstrate how this conclusion by the Chamber could or would have been any different. Given that three Dutch authorities—the Dutch Public Prosecutor, the Dutch Investigative Judge, and the Dutch District Court—expressly permitted the interception of the Kilolo Number and the transmission of its data to the ICC, any further inquiry into the legality of the interception process under Dutch law would contravene article 69(8) and rule 63(5), which expressly prohibit this Court from making determinations of national law when ascertaining the admission of evidence.

33. Bemba's remaining arguments are equally flawed:

- The two Dutch Decisions do not suggest that the strength of the Prosecution's belief that the Kilolo Number in fact belonged to Kilolo was insufficient when the interception was authorised. It also has no bearing on whether that belief was sufficiently supported to justify the intercepts under Dutch law.[100] The Prosecution's communications and RFAs to the Dutch authorities relating to the interception of the Kilolo Number were direct and transparent as to its level of suspicion that the "18" number belonged to Kilolo.[101] Bemba ignores communications from the Dutch Prosecutor and the Investigating Magistrate clearly demonstrating that this level of suspicion was sufficient to justify its interception under Dutch law.[102]
- Nothing in the Additional Documents supports Bemba's contention that the Prosecution sought to "address [an] evidential deficiency" by "[taking] advantage of its relationship with

[98] Request, para. 26. *See also* 13 April 2016 Statement.
[99] Dutch CDR and Intercepts Decision, para. 26.
[100] Request, paras. 22, 24.
[101] CAR-OTP-0092-0802, at 0802-0803; CAR-OTP-0090-1935, at 1935.
[102] *See* CAR-OTP-0092-0799-R02, at 0779; CAR-OTP-0092-0804-R02, at 0804.

national entities to obtain information on a direct basis".[103] To the contrary, the Additional Documents and the remaining record show that the Prosecution's requests for intercepted materials were regulated through domestic judicial processes that ensured compliance with domestic law, including the existence of evidential sufficiency. Similarly, Bemba's passing comment alleging a "modus operandi adopted in Austria with Western Union" is unsupported.[104]

- The Additional Documents do not suggest that, under Dutch law, communications cannot be intercepted for the purpose of verifying whether the number is being used by a suspect in the case, or a person outside of the bounds of the investigation.[105] To the contrary, that the Investigating Judge and the Dutch Public Prosecutor authorised the interception of the Kilolo Number for such purpose clearly demonstrates that it is permissible under Dutch law.[106] Nothing in the Additional Documents suggests that the District Court was unaware of this purpose—particularly since the Court had access to the relevant case file[107]—or that it legally mattered. Bemba advances a piecemeal view of the record.
- The Additional Documents do not suggest or show that the Investigative Judge lacked "clarity" as to the modality and basis of the Prosecution's request to intercept the Kilolo Number or that "key safeguards were omitted, corners were cut, and misunderstandings were rife."[108] As noted by the Dutch Prosecutor, the Investigating Judge received the request to intercept the Kilolo Number orally, and issued her authorisation granting that request orally.[109] Both were later formalised in writing.[110] The Dutch Public Prosecutor confirmed that "[REDACTED]."[111] Bemba's argument is speculative and contradicted by the Additional Documents, which show that the Dutch courts were mindful of the fact that the Kilolo Number had been intercepted absent a formal RFA, but never found such interceptions to be unlawful and, moreover, permitted their transmission to the ICC.

34. Finally, Bemba's argument mischaracterises the evidence and/or the Prosecution's prior position. For instance:

[103] Request, para. 23.
[104] Request, para. 23.
[105] *Contra* Request, paras. 24, 34.
[106] *See* CAR-OTP-0092-0804-R02, at 0804 (email from Dutch Public Prosecutor noting "[REDACTED].").
[107] *See* 9 October 2013 Decision, p. 7; 25 October 2013 Decision, p. 15.
[108] Request, para. 32.
[109] 13 April 2016 Statement, p. 3.
[110] 13 April 2016 Statement, p. 3.
[111] 13 April 2016 Statement, p. 3.

- Bemba's claim that the Prosecution had stated that "emails were not records" does not assist him.[112] To the contrary, during its article 69(7) submissions the Prosecution had submitted that, even if accepting that the request to intercept the Kilolo Number was done by email, "[t]hat the request for the interception of the '+918' number was not sent out in the form of an RFA, but instead by email, does not change the fact that it was sent out in accordance with the Statute and Dutch law."[113] Furthermore, Bemba's interpretation of one of the Prosecution's submissions on appeal is incorrect.[114] The argument that Bemba refers to merely stated, in a different context, that the Prosecution's emails to Western Union did not constitute an article 99(4) request; it is unrelated to the present circumstances.[115]
- Bemba's reliance on Mr Pestman's memorandum of legal advice is selective and repeats submissions rejected at trial.[116] As noted during trial, Mr Pestman's opinion was given without knowing of the emails between the Dutch Public Prosecutor and the OTP, and failed to accurately depict the events.[117] Equally, his opinion is tainted by the fact that Mr Pestman represented Bemba and Bemba's counsel Peter Haynes (formerly also part of the same Defence team as Bemba's current article 70 counsel) in the early stages of Bemba's case before the Dutch courts.[118] Both considerations affect the weight that can be given to his opinion and the objectivity and reliability of his representations. Both also show that the Chamber was reasonable not to rely on Mr Pestman's opinion.
- Bemba's suggestion that neither the Dutch authorities nor the Prosecution had attributed the "18" number when seeking its interception is misleading.[119] The request to intercept the "18" number was connected to the Prosecution's 6 August 2013 RFA,[120] which was aimed at intercepting the phones believed to be used by Kilolo and/or Mangenda, given that the information had indicated that they were using them to orchestrate the illegal scheme. That the Prosecution had requested its interception and the Dutch authorities, including the Investigating Judge and the Dutch District Court, agreed to authorise the intercepts *and*

[112] *Contra* Request, para. 30.
[113] ICC-01/05-01/13-1833-Red ("Prosecution's Consolidated Response to Article 69(7) Motions"), para. 36.
[114] Prosecution Response Brief, para. 48.
[115] Prosecution Response Brief, para. 48.
[116] Request, para. 31.
[117] Prosecution's Consolidated Response to Article 69(7) Motions, para. 37.
[118] The Bemba Defence failed to acknowledge these salient facts at trial and fails to do so again on appeal. *See* Prosecution's Consolidated Response to Article 69(7) Motions, fn. 109. *See also* ICC-01/05-01/13-1799-AnxC ("Michiel Pestman Letter"), p. 2.
[119] Request, para. 35.
[120] *See* CAR-D21-0005-0001 (RFA OTP/CAR/NLD-9/TL/JCCD-ptaf).

transmit them to the ICC, demonstrates that the number had been sufficiently attributed to Kilolo.

b) The Additional Documents could not and would not alter the Chamber's conclusion that there were adequate safeguards to vet the intercepted materials

35. The Additional Documents do not relate to the sufficiency of the safeguards put in place by the Investigating Magistrate, the Single Judge of Pre-Trial Chamber II, or the Chamber, in vetting the intercepts for privileged material.[121] In these respects, the Additional Documents, even if admitted, cannot alter the Chamber's article 69(7) decision. Nor do they demonstrate any unfairness in the proceedings.

36. First, many of Bemba's arguments concern the Chamber's disposition of challenges raised at trial regarding the interception process and whether the Chamber, not the Dutch authorities, sufficiently safeguarded Bemba's rights.[122] Those arguments are an attempt by Bemba to supplement his Appeal Brief, without seeking the Appeals Chamber's leave. Importantly, the Additional Documents do not relate to the Chamber's finding that the Defence had multiple opportunities to challenge the interception process *at the ICC*.[123] Moreover, the Prosecution has already responded to these arguments in its Response Brief, on which it relies.[124]

37. Second, the Additional Documents do not show that the protections afforded under Dutch law were diluted.[125] To the contrary, the Additional Documents, together with other evidence in the record, show that at every stage in the process the Dutch authorities ensured that Dutch law was satisfied. In particular, the Dutch District Court's 28 April 2014 Decision considered and rejected several of Kilolo's and Mangenda's challenges to the process, including the rule on non-inquiry and immunity, alleged ECHR violations and purported violations of attorney-client privilege.[126] Moreover, as confirmed by the Dutch Public Prosecutor, "every action was entirely in accordance with Dutch legislation and

[121] *Contra* Request, paras. 36-47.
[122] Request, paras. 37, 44-47 (challenging various determinations of the Trial Chamber, including prior article 69(7) decisions unrelated to the issue at hand).
[123] Request, para. 44 (emphasis added).
[124] Prosecution Response Brief, paras. 122-140.
[125] Request, para. 42.
[126] 28 April 2014 Decision, pp. 4-11.

jurisprudence."[127] In both decisions now sought to be admitted on appeal, the Dutch District Court cited Dutch law and only permitted the transfer of the audio recordings of the intercepted conversations "[s]ince all of the relevant requirements prescribed by law and laid down in the treaties applicable to the matter are complied with".[128] It also did so on the basis of the evidence, including "a statement by the examining magistrate of 14 August 2013 explaining the reasons for the authorizations for the recording of telecommunications that she issued".[129] Bemba's reading of the Dutch Prosecutor's 19 February 2014 letter is incorrect.[130] That letter addressed Kilolo's request not to hand over interception-related documents to the Court: it offered no comment on the legality of the Dutch procedures, as Bemba now claims.[131]

38. Third, nothing in the Additional Documents suggests that the Dutch District Court "did not review the legality of the [interception process] or the rights of the targeted persons, on the understanding that this would be addressed by the ICC."[132] There is no statement to that effect in the Additional Documents. Merely because the Dutch authorities followed the rule of non-inquiry *vis-à-vis* the ICC's legal processes does not imply that they did not safeguard the legality of *their own* processes.[133] Bemba merely speculates. His arguments in section 2.2.3 of his Request are based on a series of logical fallacies and misplaced assumptions. He relies on what the Dutch District Court did *not* address in its 9 October and 25 October 2013 Decisions to conclude that the Dutch Court must not have been apprised of such matters, or was misled about them. Bemba's consistent commentary that "the District Court appears to have been unaware" of various facts has no basis.[134] For instance, Bemba argues that because the Dutch District Court did not specifically address the Independent Counsel's role in the vetting process or Bemba's lack of standing to challenge the intercepts,[135] it must have been unaware of these issues. The argument is baseless, and in any case not dispositive, because the opposite conclusion is equally plausible: that the Dutch District Court believed this to be justified under Dutch law, as the Investigating Magistrate and the Dutch Public Prosecutor

[127] 13 April 2016 Statement, p. 3.
[128] 9 October 2013 Decision, p. 7; 25 October 2013 Decision, p. 15.
[129] *Ibid*.
[130] Request, para. 42.
[131] *See* 19 February 2014 Letter.
[132] Request, para. 19(b), sec. 2.2.3.
[133] *Contra* Request, paras. 29, 42.
[134] *See e.g.* Request, paras. 34, 39, 40.
[135] Request, paras. 39-41.

had concluded. Indeed, this is a far more logical conclusion given that "[t]he District Court ha[d] taken due note of the case file with the aforementioned prosecutor's office number" and knew "[t]he suspects were not called because […] the interests of the investigation would be seriously prejudiced by calling them."[136]

39. In any event, the Additional Documents do not suggest that the Dutch authorities violated Dutch law. To the contrary, as detailed in the Prosecution's Response Brief, the Chamber correctly found that the appointment of the Independent Counsel was permissible under Dutch law and that Bemba's lack of standing before the Dutch Court is a matter relevant to Dutch law and did not deprive Bemba of standing to challenge such matters before *this* Court. In fact he did challenge it before this Court—repeatedly—which the Chamber addressed—repeatedly.[137]

40. Finally, Bemba's argument that the "District Court tossed the ball to the ICC" and "the ICC then dropped that ball"[138] grossly mischaracterises events. The conduct of the Dutch authorities and the Court (through Pre-Trial Chamber II and the Chamber) demonstrate that the telephone interception process went through several levels of legal review, that all Defence challenges concerning that process were entertained and addressed, and despite rigorous scrutiny, the interception process was consistently upheld as lawful and appropriate.[139] They show that legal professionals at the domestic and international levels conducted themselves responsibly and in accordance with the law and with due consideration of the then accused's rights. Bemba's accusations are simply unsupported.

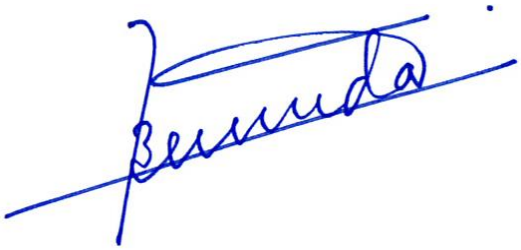
41. For all the above reasons, Bemba fails to show that the Additional Documents could have or would have led to a different conclusion.

Conclusion and Relief

42. The Prosecution requests the Appeals Chamber to dismiss Bemba's Request, which does not meet the high threshold for admitting additional evidence on appeal. Bemba did not

[136] *See* 9 October 2013 Decision, p. 7; 25 October 2013 Decision, p. 15.
[137] Prosecution Response Brief, paras. 139-140; Dutch CDR and Intercepts Decision, para. 32.
[138] Request, para. 43.
[139] *See* Prosecution Response Brief, paras. 123-125.

act with the required diligence, and the admission of the Additional Documents could not and would not alter the Trial Chamber's sound conclusions and decisions.



Fatou Bensouda, Prosecutor

Dated this 12th day of September 2017[140]
At The Hague, The Netherlands

[140] This submission complies with regulation 36, as amended on 6 December 2016: ICC-01/11-01/11-565 OA6 ("*Al Senussi* AD"), para. 32.