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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 with Confidential Annexes A, B, C, D, E, F, G, H and I

Public Redacted Version of “Consolidated Request for Disclosure and Judicial Assistance”, ICC-01/05-01/13-2227-Conf-Red, 19 September 2017

Source: Art. 70 Defence for Mr. Jean-Pierre Bemba Gombo

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

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Introduction

1. Pursuant to Article 83 (1) of the Statute and rules 77, 84 and 149 of the Rules of Procedure and Evidence, the Defence for Mr. Jean-Pierre Bemba respectfully requests the Honourable Appeals Chamber to order the disclosure of the following categories of information:
 - a. Any records concerning Mr. Bemba, his former Defence, or Defence witnesses, that have not yet been disclosed, and a schedule concerning the date of the collection of this information (Category 1);
 - b. Information conveyed by the Registry to the Prosecution and Single Judge in connection with Prosecution's allegations that Mr. Bemba violated the detention unit monitoring regime (Category 2);
 - c. Internal records obtained in connection with a Registry security investigation, which are relevant to the context of the *faux scenario* (Category 3).
2. The above request is without prejudice to any relief that the Defence might request in relation to the prejudice incurred by virtue of the Prosecution's the non-disclosure of the relevant information.
3. The current filing has been submitted on a confidential *ex parte* (Prosecution, Bemba Defence only) basis due to the fact that it cites to the content of Main Case filings. Redacted versions will be filed forthwith.

Submissions

The Prosecution's Disclosure Obligations Continue at the Appeal Stage

4. ICC case law has repeatedly affirmed that the Prosecutor's disclosure duties towards the Defence continue throughout the proceedings, including during the appeal stage.¹ The obligation applies irrespective as to whether the Defence has requested the information in question;² it is therefore impermissible for the Prosecution to withhold disclosure merely because the Defence did not request it.

¹ ICC-01/04-01/06-3017, para. 9. For the duty to disclose on a continuous basis, see: ICC-01/05-01/08-55, p. 24; ICC-01/04-02/06-64, para. 28; ICC-01/04-01/06-3076, p. 3.

² ICC-02/05-03/09-501, para. 34.

5. In terms of the scope of Rule 77, “the term “material to the preparation of the defence” [must] be construed broadly, referring to all objects relevant for the preparation of the defence.”³ The burden of establishing *prima facie* relevance is low:⁴ it is also not necessary for the Defence to establish that the requested information would be admissible as evidence.⁵

Category 1

6. Although the Prosecution initially claimed that the Defence could not read Ringtail,⁶ and then claimed that the Prosecution had disclosed all Call Data Records (CDR) to the Defence,⁷ the Prosecution recently confirmed that they had not in fact disclosed all CDR received from the Dutch authorities.⁸ Thus, although the Prosecution relied heavily on allegations concerning the [Redacted] number throughout the case, they did not disclose the CDR that was first transmitted by the Dutch authorities in relation to this number, nor did they otherwise notify the Defence as to the original date on which information concerning this CDR was first received by the Prosecution.⁹
7. Notwithstanding the fact that the Defence explicitly requested the disclosure of the missing CDR, the Prosecution declined to do so.¹⁰ The Prosecution’s refusal to do so constitutes a clear breach of its disclosure obligations.
8. The Prosecution’s failure to disclose the [Redacted] CDR must also be considered in conjunction with the Single Judge’s explicit written ruling, which required all ‘logs’ concerning Mr. Kilolo to be transmitted to the Independent Counsel so that the Independent Counsel could then identify relevant calls.¹¹ Paragraph 6 of this decision further explained that “as long as the Prosecutor was only given access to logs and recordings of telephone calls which were not directed to counsel for the Accused, direct access could be provided to her”. The decision only authorised the Prosecution to request national authorities to collect logs and recordings. Accordingly, either CRD are encompassed within the term ‘logs’ or the collection of CDR was itself illegal.

³ ICC-01/04-01/06-3017, para. 10 citing CC-01/04-01/06-1433 (OA 11), paras 77-78.

⁴ ICC-02/05-03/09-501, para. 42.

⁵ *Prosecutor v. Nzirorera* ‘Decision on “Joseph Nzirorera’s Appeal from Decision on Tenth Rule 68 Motion” 14 May 2008, para 12.

⁶ ICC-01/05-01/13-2170-Conf, para. 131.

⁷ Annex G

⁸ Annex G

⁹ Annex G

¹⁰ Annex G

¹¹ ICC-01/05-52-Red2, pp. 7-8.

9. Although the Single Judge stated in the 10 October hearing that the Prosecutor could receive the pending CDR directly from the Dutch authorities, this off-the cuff ruling applied to the pending transmission referred to by the Prosecution; it did not exempt the Prosecution from prior compliance with the July 2103 ruling. Unless and until judicial decisions are modified, they are binding on the Prosecution.¹² The Single Judge also amended his order on the understanding that CDR are not protected by privilege, which is not correct.¹³
10. Given this backdrop, both the CDR and the date on which it was first transmitted to the Prosecution are material to the preparation of the Defence, and should have been disclosed prior to the commencement of the trial.
11. In 2015, the Trial Chamber ordered the Prosecution to disclose all information in its custody that concerned the legality of digital evidence collected in The Netherlands.¹⁴ Notwithstanding the Prosecution's attempts to avoid disclosure by artificially narrowing the scope of the decision,¹⁵ the Chamber clarified that the ruling encompassed both intercepts and CDR, and should be construed in light of the Chamber's prior ruling that it is "imperative that the Defence be able to test the reliability of the procedures employed in collecting the evidence against them".¹⁶ In a series of decisions issued during the first part of 2016,¹⁷ the Chamber further confirmed that this decision should be interpreted to include all such materials in the custody of the Prosecution. There was simply no basis for excluding the CDR themselves from the scope of this decision.
12. The Prosecution's claim that it was not obliged to disclose the CDR due to the fact that the information was duplicated elsewhere, is also misconceived. The fact that a different version of the information has already been disclosed to the Defence does not mean that the currently requested information was not *prima facie* disclosable;¹⁸ although it is

¹² ICC-01/04-01/06-2582, para. 1.

¹³ "Data are not objects but are covered by the professional duty of confidentiality [...] In principle, the content of data carriers in computerised material must first be read in full by the lawyer and the chairperson, to facilitate selection of the intended information within the framework of professional responsibility". CAR-D20-0006-1296 at 1301. CAR-D20-0006-1283 at 1288 and CAR-D20-0006-1316 at 1319 refers to the guidelines in response to a question as to whether CDRs are covered by privilege. See also *Malone v. UK*, para.84; ECJ ruling in *Digital Rights Ireland Ltd* (C-293/12), paras. 27, 58; *A/HRC/27/37* paras. 19-20.

¹⁴ ICC-01/05-01/13-1148-Conf

¹⁵ Annex E. See also ICC-01/05-01/13-1265-Red.

¹⁶ ICC-01/05-01/13-1308, paras. 12-13, citing ICC-01/05-01/13-1234-Conf, para. 13.

¹⁷ ICC-01/05-01/13-1542; ICC-01/05-01/13-1632.

¹⁸ ICC-01/04-01/06-1401, para. 60.

possible that the Chamber might exempt the Prosecution from disclosure if it would create a disproportionate burden for the Prosecution, “caution should be exercised in taking such an approach as it must not undermine the paramount right of the defence to disclosure of all information material to the preparation of the defence.”¹⁹ In this particular case, there is no indication that disclosure would have imposed an undue burden on the Prosecution, or that the Prosecution applied to be exempted from disclosure.

13. As noted by Trial Chamber III, the question as to whether information is in fact an exact duplicate cannot be assessed by the Prosecution alone, as it may depend on the purposes for which the Defence intends to use the information.²⁰ As concerns digital evidence, the existence of different version would have allowed the Defence to further test the accuracy and reliability of the records, which is of particular importance as concerns CDR transmitted in Excel (an easily modifiable format).
14. Moreover, even if the particular content of the records were identical, the date on which the Prosecution first received this information was relevant to the legality of the collection of evidence, and issues of prejudice tied to the Prosecutor’s receipt of confidential Defence communications whilst the Main Case was ongoing. Thus, when the Prosecution tendered the CDR through the bar table, the Defence specifically noted that the lack of detailed information concerning chain of custody prevented the Defence from advancing meaningful submissions on this issue;²¹ the Prosecution was thus aware that the Defence considered this information to be material to its preparation.
15. The defendants in this case also had a right to be notified of all surveillance requests and measures, and to receive a copy of the materials and related data collected pursuant to these requests, in order to give effect to their related right to contest the legality of such measures, and obtain a remedy.²² In line with these rights, the Trial Chamber confirmed that Mr. Bemba was entitled to receive a copy of all seized and intercepted materials that had been transmitted to the Registry (barring private information concerning Mr. Arido).²³ By virtue of these decisions, the Prosecution was aware that the Defence had a

¹⁹ ICC-02/05-03/09-501, para. 40.

²⁰ ICC-01/05-01/08-1594-Red, para. 23.

²¹ ICC-01/05-01/13-1074-Conf, paras. 49, 75-79.

²² *Rotaru v. Romania*, 28341/95, paras. 70-71; *Valenzuela Contreras v. Spain* (58/1997/842/1048); *Kruslin v. France* (11801/85) para. 35; See also *Digital Rights Ireland Ltd* (C-293/12), para.54 (ECJ).

²³ ICC-01/05-01/13-1936, para. 16.

right to receive such materials, and should have disclosed all such materials in its possession. Even if the materials were linked to persons outside the scope of the investigation, the fact that the Prosecution had nonetheless received such information was relevant to the legality of the investigations procedures, and thus relevant to Defence preparation.

16. This issue is not unique to the [Redacted] CDR. According to Mr. Kilolo's domestic case file, on 13 September 2013, the Dutch authorities transmitted CDR concerning the following numbers and time periods to the Prosecution:²⁴

[Redacted]

[Redacted]

17. The District Court decision specified that the records were "traffic data" and 'B' analysis, which includes a range of details, such as the identity and location of the persons being called.²⁵

18. The Defence sent this full list to the Prosecution on 19 July 2017, and inquired whether any of them had been received on 13 September 2013.²⁶ On 21 July 2017, the Prosecution responded that all CDR concerning these numbers had been disclosed.²⁷ Even after the Defence demonstrated that the [Redacted] CDR had not been disclosed, the Prosecution did not resile from its position, claiming in a subsequent filing that,²⁸

the Prosecution responded to the Bemba Defence's request for specific CDR information on eleven numbers by bringing to its attention that such information, including on metadata and the chain of custody, was disclosed to Bemba as part of the pre-confirmation disclosure and available to it since 2013.

19. The Defence has since verified with Ringtail/Ecourt and the disclosure lists that it has not received CDR that correspond to the above time periods and dates of transmission for the following numbers: [Redacted], [Redacted], [Redacted], [Redacted], [Redacted].

²⁴ Annex B.

²⁵ Article 2 of the following Dutch regulation: <http://wetten.overheid.nl/BWBR0017081/2017-01-01/0/afdrucken>

²⁶ Annex G

²⁷ Annex G

²⁸ ICC-01/05-01/13-2187-Conf, para. 19.

20. The information concerning the last four numbers is not duplicated by other records as the Defence has never received any CDR concerning these numbers. If the information was sufficiently relevant to trigger the threshold for collection by the Dutch and transmission to the Prosecution, then it should have also been sufficiently relevant to disclose to the Defence. Or, if the content is clearly irrelevant to the case, then this begs the question as to how and why fundamental privacy protections were violated for no legitimate purpose.

21. The Prosecution identified all five numbers by picking out Dutch numbers from the CDR of Mr. Babala,²⁹ but, apart from the [Redacted] number, the Prosecution has never positively attributed these numbers to a suspect in this case. Their collection and transmission to the Prosecution is nonetheless highly relevant to the following issues:

- a. Whether the Dutch authorities transmitted confidential and private information to the Prosecution, notwithstanding the absence of an evidential foundation for suspecting that the targeted number was engaged in serious criminal activities;
- b. Whether appropriate safeguards were put in place to ensure that private and irrelevant information was not transmitted to the Prosecution; and
- c. If the Dutch were unable to identify that at least some of these numbers were not Mr. Kilolo, if and how they were able to identify that the [Redacted] number was Mr. Kilolo for the purposes of full content interception.³⁰

22. In terms of the latter issue, there are indications that the Dutch Prosecutor also put voice taps on all of the above numbers.³¹ Again, as noted above, if these numbers had a link to the case, then the related CDR should have been disclosed by the Prosecution. If the numbers have no link, then it is clear that the Dutch required no evidential threshold to be satisfied, before intercepting numbers. The fact that the Dutch intercepted all of the numbers also undermines the Prosecution claim that the [Redacted] number was intercepted because of the exchange of emails pertaining to this number.³² Rather, it

²⁹ CAR-OTP-0090-1930 at 1933.

³⁰ The Independent Counsel was not appointed by the Dutch until 4 September, and stated that he did not commence monitoring and analysing recordings until 12 September 2013: ICC-01/05-T-3-CONF-ENG, p. 2.

³¹ Annex F. [Redacted].

³² During the October 2013 Status Conference, the Independent Counsel noted that, "[Redacted]" ICC-01/05-T4-Conf-Eng, p. 6lns 19-24. It is unclear if there are Belgium numbers that fit this description, and when read in the context of the above developments concerning these numbers, it would appear that the Independent Counsel might be referring to the [Redacted] number or at least a modus operandi that was also adopted for the [Redacted] number and others. Since the Independent Counsel refused to be interviewed by the Defence (and

appears that the Prosecution and the Dutch engaged in a joint fishing expedition, and after not catching anything useful for these numbers, tried to throw them back into the sea to hide this particular misconceived excursion.³³

23. Since the Prosecution never called anyone to testify in relation to these issues, and since the Dutch authorities refuse to speak to the Defence, the Defence has had no means to clarify these issues. Disclosure of the missing CDR (including in particular, the [Redacted] CDR) would be a first (albeit insufficient) step.
24. The Prosecution's failure to disclose such relevant information points to a larger problem and a recurring theme – that is, there are now concrete indicia that although the Prosecution repeatedly received confidential Defence information directly from sources, it would only disclose the version it received later through official channels, which has the effect of concealing the existence of the earlier transmission from the Defence.
25. This occurred with Western Union, which the Defence only discovered after the Prosecutor firstly claimed that it had no correspondence with Western Union in its custody, only to then find the missing correspondence after P-267 acknowledged in his testimony that he had corresponded with the Prosecutor.³⁴ The Prosecution has now acknowledged that the same occurred with respect to the [Redacted] CDR. There is therefore a very real probability that the same also occurred with other materials received from national authorities.
26. Accordingly, in addition to the disclosure of the CDR that have yet to be transmitted to the Defence, the Defence further requests the Appeals Chamber to order the Prosecution to provide the Defence with the specific dates on which the Prosecution first received (in its broadest sense) information collected by or from States, and third parties (including the Registry), which is derived from the content of confidential Defence materials (including financial records, emails, CDR, phone logs, and intercepts), and all versions of such materials in its possession. The filing of such a schedule would be consistent with ICTY precedents, in which the Prosecution has been ordered to file detailed

the Single Judge rejected the Defence request to compel his attendance: ICC-01/05-01/13-457), the Defence had no means to obtain further clarification on his comments.

³³ See ECJ judgment of 18 June 2015, Case C-583/13 P, paras. 60-68 concerning the obligation to restrict the collection of information to the specific parameters of the official investigative request; anything falling outside this scope will be considered to have been collected illegally.

³⁴ ICC-01/05-01/13-2202-Conf-Red, fn. 255.

disclosure reports if it appears that the Prosecution has adopted an erroneous approach to its disclosure obligations.³⁵ Parties have also been required to submit a list of all documents collected by them in their investigations in order to ensure full compliance with disclosure obligations concerning a particular witness.³⁶

Category 2

27. In its Consolidated Response to Defence Appeals against Conviction, the Prosecution averred that its request to access the detention unit recording was supported by ‘evidence’, which included “the Prosecution’s interviews with resource persons”.³⁷ When the Bemba Defence inquired as to the identity of the resource persons, and specific relevance to the Prosecution May 2013 application, the Prosecution asserted that it would not reveal the identity of these persons, and that the specific information from these sources was set out in paragraphs 10, 12, 22 and 23 of ICC-01/05-44.³⁸ The Prosecution also averred that this information was further elaborated in ICC-01/05-01/08-3022-Conf-Anx7, which is not available in the Article 70 case.

28. In light of the Prosecution’s claim before the Appeals Chamber that ‘evidence’ underpinning these allegations was put to the Single Judge, and in light of the disclosure correspondence from the Prosecution, the Defence carefully reviewed all relevant filings in order to identify the allegations that could have emanated from the ‘resource person/s’. During the course of its review, the Defence discovered that there had been exchanges between the Prosecution and the Registry on issues concerning Mr. Bemba’s detention. These exchanges, and related steps taken by the Registry, form the subject matter of the current request.

29. The Article 70 investigation was triggered by information from an anonymous informant that [Redacted] was encouraging false witnesses to testify with the incentive of potentially obtaining asylum and benefits by virtue of their status. These allegations did not, however, refer to Mr. Bemba. Accordingly, in its first Article 70 application to the

³⁵ *Prosecutor v Karadzic*, No. IT-95-5/18-PT, Decision on Accused’s Forty-Ninth and Fiftieth Disclosure Violation Motions, 30 June 2011; *Prosecutor v. Kordić & Čerkez*, Decision on Motions to Extend Time for Filing Appellant’s Briefs, 11 May 2001, para. 15; *Prosecutor v. Blaškić*, Decision on the Appellant’s Motions for the Production of Material, Suspension of Extension of the Briefing Schedule, and Additional Filings, 26 September 2000

³⁶ *Prosecutor v. Popovic*, Transcript of 29 October 2008, T27553

³⁷ ICC-01/05-01/13-2170-Conf, para. 104.

³⁸ Annex D.

Single Judge, the Prosecutor sought to inveigle Mr. Bemba into the parameters of its investigation *via* claims that Mr. Bemba had abused the detention unit telephone regime. These claims rested on:

- *Firstly*, allegations that Mr. Bemba had abused the privileged line to contact Mr. Babala and [Redacted]; and
- *Secondly*, allegations concerning an incident, dated 5 January 2013, during which Mr. Bemba was alleged to have spoken to some MLC supporters during a gathering.³⁹

30. Although the Prosecutor informed the Single Judge and the Defence, at the beginning of the case, that “[t]here are no 54(iii)(e) agreements that I am aware of, and certainly even if there were, they wouldn’t be dispositive of any salient issue before the Chamber”,⁴⁰ the only source for the first allegation (abuse of the privileged line) that is cited in the Main Case and Article 70 filings is a source protected under Article 54(3)(e).⁴¹

31. Information collected under Article 54(3)(e) clearly cannot constitute ‘evidence’,⁴² and should not be relied upon to the detriment of the accused.⁴³ Article 54(4)(e) serves to protect legitimate spring-board information in a manner that it is consistent with the rights of the accused. It would be improper, and inherently unfair for the Prosecution to cherry pick what information it chooses to put in the record, whilst hiding any reliability flaws behind the shield of Article 54(3)(e).⁴⁴ Of further import, throughout this case, the

³⁹ICC-01/05-44-Conf-Red2, paras. 23-27.

⁴⁰ T-2-Red-ENG, p. 9, lns. 4-7.

⁴¹ ICC-01/05-44-Conf-Red2, fn. 20.

⁴² The ECHR has held that the reasonable suspicion standard for surveillance can only be met by evidence that can be verified: *Santare and Labaznikovs v Latvia*, paras. 55, 60; *Dragojevic v Croatia*, paras. 90-101; *Zakharov v Russia*, para. 298 (see also para. 261 regarding the inadequacy of relying on information that cannot be verified); *Szabo & Vissy v Hungary*, paras 79, 83, 86, (see also para. 71, concerning the fact that the reasonable suspicion must be established by evidence and not mere accusation).

⁴³ The ICC has held that it may be appropriate for the Prosecution to withdraw allegations that are impacted by materials protected by Article 54(3)(e): ICC-01/04-01/06-1486, paras 28, 44; The ICTY has applied the same approach in connection with confidentiality obligations that would negatively impinge on the right of the Defence to test credibility issues: *Prosecutor v. Milutinovic*, ‘Decision on Interlocutory Appeal on Against Second Decision Precluding the Prosecution from Adding General Wesley Clark to its 65th witness list’, 20 April 2007; See also *Secretary of State of the Home Department v MB* [2007] UKHL 46 [2008] 1 AC 440 *per* Baroness Hale, para. 72 (concerning consequences of non-disclosure), and for the United States, Article 2 of the Classified Information Procedures Act of 15 October 1980, as amended 18 November 1988, which also provides that allegations affected by non-disclosed security information should be withdrawn - <https://www.dni.gov/index.php/ic-legal-reference-book/classified-information-procedures-act>

⁴⁴ “The State must not be able to ‘cherry pick’ material so as to give itself an unjust advantage over the defendant. This could for example happen if investigators can choose to intercept evidentially only those lines they believe will yield incriminating material, while protecting other product from disclosure that contained exculpatory material. If cherry picking was suspected, the defence could apply to the judge to stop the trial on

Single Judge and Trial Chamber rejected Defence requests for disclosure of information concerning the sources relied upon by the Prosecution during the investigation phase on the grounds that such ‘information’ was not ‘evidence’,⁴⁵ and further emphasised that:⁴⁶

by no means can information provided by an informant (as opposed to a witness statement), be regarded, treated or relied upon as evidence in the context of judicial proceedings and even less constitute the sole basis for a judicial decision.

32. Apart from the fact that the first allegation – even if it were to be accepted – concerns conversations about “[Redacted]”⁴⁷ and not witness bribery, in light of the fact that Defence has no means to test, investigate, or respond to the ‘information’ relied upon by the Prosecution,⁴⁸ this ‘information’ and any related allegations, cannot be considered for the purposes of these appellate proceedings, and cannot be taken into consideration for the purposes of ascertaining whether the ‘reasonable suspicion threshold’ was met in connection with the Prosecution’s request to access the detention unit recordings of Mr. Bemba.

33. In terms of the evidential foundation of the second allegation, the Prosecution filing refers to a YouTube video (which was never disclosed in the Article 70 case) concerning a meeting that took place in January 2013 (at the house of Madame Bemba), in which a MLC supporter mentions that Mr. Bemba spoke to some MLC associates that attended

abuse of process grounds” Privy Council Review of Intercept as Evidence Report of 30 January 2008 Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty, p. 43 <http://www.official-documents.gov.uk/document/cm73/7324/7324.pdf>

⁴⁵ ICC-01/05-01/13-1166-Conf, para. 6.

⁴⁶ ICC-01/05-01/13-35, p. 4.

⁴⁷ ICC-01/05-01/08-3022-Conf-Anx7, para. 21.

⁴⁸ By refusing the Defence request for disclosure, the Prosecution confirmed that the confidentiality protections continue for the appeal stage: Annex D (the claim that the Defence somehow waived its right to obtain this information because it did not request the Chamber to lift redactions is specious: the Chamber has no power to lift Article 54(3)(e) redactions).

There is, however, an intrinsic incoherence as concerns ‘information’ emanating from this source. According to the more detailed information set out in ICC-01/05-01/08-3022-Conf-Anx7 (paras. 21-23), [Redacted]. There was no [Redacted] number registered to Mr. Kilolo at the detention unit prior to 2012, nor did Mr. Kilolo travel to the [Redacted] prior to 2012. The CDR of Mr. Babala (which the Prosecution received before it requested access to the privileged contents of Mr. Bemba’s calls), also showed that Mr. Babala received, and made calls to the [Redacted] number registered to Mr. Kilolo in 2012 (see CAR-OTP-0071-0503, row 1284), which further undermines the coherence of this allegation.

[Redacted], and secondly, [Redacted] there is an appearance that the duty to conduct independent and impartial Article 70 investigations was not respected in this aspect: *Ramasai v. Netherlands*, 52391/99 (Grand Chamber), paras. 337, 340, 341; *Hugh Jordan v. United Kingdom*, 24746/94, para. 120.

the meeting.⁴⁹ The Prosecution also stated in its application that it had had “informed the Registry by email of the apparently unauthorized conversation.”⁵⁰ In the Main Case April 2013 Status Conference, the Prosecution confirmed further that it had engaged in “exchanges” with the Registry on this specific issue.⁵¹

34. On 24 July 2017, the Defence wrote to the Registry to inquire firstly, as to what steps, if any, the Registry took in response to this ‘information’, and secondly, whether the Registry responded to the Prosecution, or provided any information in response to the Prosecution’s allegation.⁵² The Registry confirmed that the Prosecution had written to them, but further informed the Defence that since the Prosecution’s information was included in a confidential filing, it was unable to respond to the Defence inquiry without a Court order.⁵³

35. The Defence therefore seises the Appeals Chamber accordingly.

36. In terms of the relevance of this information to the Bemba Defence, Mr. Bemba has a right to receive, and to be notified of the manner in which confidential information pertaining to his detention situation has been handled. The information in question is also likely to shed light on the extent to which there was a reasonable suspicion underpinning the Prosecutor’s first application to the Single Judge.

37. As concerns the first prong regarding Mr. Bemba’s right, as a detainee, to access this information, the allegation in question had no link to Prosecution or Defence witnesses or the content of the ongoing trial proceedings. There was therefore no basis for failing to apply the Regulations of the Court (RoC) and the Regulations of the Registry (RoR) to an alleged infraction of the communications regime. If the Registrar decided, on the basis of this information, to actively monitor Mr. Bemba’s calls, and to transcribe the calls of 5 January 2013, Mr. Bemba should have been notified pursuant to Regulation 175(3) and (10) of the RoR. Regulation 92(4) of the RoC affords Mr. Bemba with a right to be heard in connection with any information from his detention record that is transmitted to a third party, and Regulation 175 of the RoR mirrors this right in connection with the content of his phone calls.

⁴⁹ ICC-01/05-44-Conf-Red2, para. 27.

⁵⁰ ICC-01/05-44-Conf-Red2, fn. 31.

⁵¹ ICC-01/05-01/08-T-303, p. 27 lns. 10-11.

⁵² Annex H

⁵³ Annex H

38. Regulations 208-210 further set out due process rights for the detainee, including the right to be informed of the allegations, and any evidence underpinning the allegations, and the right to be heard before any measures are imposed. If the Registrar imposed any restrictions following this information, Mr. Bemba should have been informed of them so that he could exercise his right to file a complaint.⁵⁴
39. In circumstances in which there are no investigative exigencies that would justify non-disclosure, ICC case law affirms that the detainee has a general right to receive reports prepared by the Registry in relation to the detention contacts of the detainee. In the *Ntaganda* case, Trial Chamber VI granted the Defence for Mr. Lubanga access to a report prepared by the Registry in relation to the restrictions imposed on Mr. Lubanga's contacts. The decision, which is heavily redacted, appears to recognise that persons affected by a Registry report concerning detention surveillance measures had a right to receive a copy of the report.⁵⁵ Similarly, Trial Chamber II ordered the Registry to transmit a copy of its monitoring reports to the Defence for Mr. Ngudjolo so that the Defence could be heard in relation to any infractions alleged by the Prosecution.⁵⁶ In *Ongwen*, the Defence was also afforded a right to be notified of the content of alleged detention infractions, and a related right to be heard.⁵⁷
40. Both the ICC Presidency and the ICTY President have also concluded that in accordance with the principles of natural justice and due process, the detainee should be afforded an opportunity to be heard in connection with any allegations that the detainee has breached the detention unit regulations.⁵⁸ UN model rules on detention further enshrine detainees' right to access any information recorded by the detention authorities in relation to their behaviour and discipline.⁵⁹

⁵⁴ Regulation 173 (6) of the Regulations of the Registry.

⁵⁵ ICC-01/04-02/06-1939-Red, paras. 8-9.

⁵⁶ ICC-01/04-01/07-1243-tENG-Red, pp. 3-4.

⁵⁷ ICC-02/04-01/15-590-Red, para 34.

⁵⁸ ICC-RoR221-02/09-6-Corr, para. 14; *Prosecutor v. Seselj*, 'Decision on Appeal Against the Registrar's Decision of 19 October 2006', 23 November 2006.

⁵⁹ Rule 9, UN Model Rules of Detention (the Mandela Rules).

41. In line with the above provisions and case law, if any information was provided to the Single Judge,⁶⁰ or the Prosecution (either written or informally), then Mr. Bemba has a right to be apprised as to the content of such information.
42. The possibility that confidential detention information was transmitted to the Prosecutor (formally or informally), also raises the question as to whether Mr. Bemba's right to confidentiality was adequately protected, given the absence of judicial oversight over such transmission.⁶¹ If the information provided to the Prosecution influenced or informed its subsequent submissions or evidence collection (i.e. in the same manner that the Prosecution relied on information informally and illegally obtained from P-267 to justify its request to access the records through formal channels), then the improper transmission of information may have tainted the subsequent process.⁶² In any case, internationally recognised human rights law dictates that Mr. Bemba has a right to know precisely which private information was transmitted to whom.⁶³ The basis for transmission of this information to Mr. Bemba is therefore clearly met.
43. With respect to the second basis for access, according to another video of this meeting, which was uploaded onto You Tube on 16 January 2013 (and was thus freely available to the Prosecutor), the MLC meeting was convened from 6pm onwards,⁶⁴ at the house of Madame Bemba, for the purpose of signing a card offering New Years' wishes to Mr. Bemba. Neither Mr. Babala nor Mr. Kilolo were present at the meeting.
44. Apart from the fact that such open source materials rendered the need to access the recordings, redundant, the Defence also recently learned that the Prosecutor took no steps to investigate this incident once they received such access. Concretely, even though the call logs demonstrated that the Bemba-Babala calls occurred during the morning, and did not, in any way, overlap with the time frame of the meeting, the Prosecution only requested the Registry to transmit the Bemba-Babala recordings for this date.⁶⁵

⁶⁰ It would also appear that at some unidentified point, the Registry provided information to the Single Judge in relation to the telephone regime applying to Mr. Bemba; see ICC-01/05-46, fn.10.

⁶¹ IBA Report, 'Offences against the administration of justice and fair trial considerations before the International Criminal Court', August 2017, p. 48.

⁶² See ECJ judgment of 18 June 2015, Case C-583/13 P, paras. 65-66 concerning the application of the 'fruits of the poisonous tree' doctrine to information collected *via* search and seizures that violated privacy rights.

⁶³ See fn. 22 above.

⁶⁴ "le samedi 5 janvier 2013 a 18h00, nous sommes dans le royaume de la belgique [...]" from 00:00 to 01:04 <https://www.youtube.com/watch?v=K6mtW8xxTyM>

⁶⁵ Annex A

45. Either this was because the MLC meeting was a simply an empty pretext that bore no relationship to the focus of the Prosecution's investigations, or, the Prosecution had already received information (from the Registry or elsewhere)⁶⁶ that undermined any basis for linking the MLC meeting to the focus of the Article 70 investigation, and yet maintained the allegation in its May 2013 application, nonetheless.
46. If the first scenario is applicable, then the request was an illegal fishing expedition,⁶⁷ disguised with irrelevant allegations that the Prosecutor would have known to be incapable of supporting a reasonable suspicion of Article 70 wrongdoing. Their request was a shot in the dark, couched in misleading terms.
47. If, however, the latter scenario is applicable, then it was improper, and contrary to Article 54(1) of the Statute, for the Prosecution to maintain that there was a 'corroborative'⁶⁸ link between the 5 January meeting and its request to access the recordings of Mr. Bemba and Mr. Babala for the purposes of investigating witness bribery.⁶⁹ In domestic settings, if surveillance is ordered on the basis of exaggerated or misleading allegations, the resulting intercepts can be excluded from any subsequent proceedings.⁷⁰ In any case, for the purposes of obtaining disclosure, it is not necessary for the Defence to establish whether such a threshold could and would be met; it suffices that the requested information would be material to any such preliminary analysis.
48. In the current case, disclosure of the requested information would assist the Defence to ascertain whether the Prosecution had grounds to know that its allegations concerning Mr. Bemba had no link to Article 70 misconduct, and whether the Prosecution's

⁶⁶ The Prosecution also received Mr. Babala's CDR in April 2013, and therefore had the means, before submitting the application, to verify that the calls between Mr. Bemba and Mr. Babala did not overlap with the time frame of this meeting.

⁶⁷ As affirmed by ECHR case law and Council of Europe resolutions, it is impermissible to conduct interception, or breach privacy protections, for the purposes of conducting a 'fishing expedition'; the reasonable suspicion threshold must be met before and not after the private material is accessed. "Mounting a general 'fishing expedition' with a view to gathering potential evidence through the use of special investigation techniques is neither effective, nor, as a rule, compatible with the right to private life enshrined in Article 8." (Council of Europe, Committee of Experts Discussion Paper, 1 April 2014, p. 10) <https://rm.coe.int/168070afb4> p. 10. See also *Funke v France*, para. 44.

There must also be a clear nexus between the infringement alleged, and the material to which access is sought: *SEP v Commission* (T-39/90), Judgment of the General Court of December 12, 1991, para.25

⁶⁸ ICC-01/05-44, para. 27.

⁶⁹ As an independent Minister of Justice, the Prosecution has a duty not to advance submissions or allegations that are misleading, unfounded, or unrelated to the issues at stake: ICC-01/04-01/06-2433, para. 41; ICC-01/04-01/07-322, p. 12.

⁷⁰ ICC-01/05-01/13-1179-Conf, paras. 63 -73.

evidential submissions relied, in any part, on information received directly from the Registry (rather than independent sources).

49. This particular request for disclosure is directed to the Registry since the Registry should have maintained a record as to any steps that were taken in connection with the information provided by the Prosecution. The Defence further requests that the Appeals Chamber to order that the information should be transmitted to the Defence *ex parte* the Prosecution: if the information was not disclosed previously to the Prosecution, then it should not be disclosed to them now. Mr. Bemba has a right to be apprised confidentially as to internal measures taken within the Registry without risking that such information is then disseminated on even wider basis by virtue of his request.
50. As concerns the content of the exchanges between the Registry and the Prosecution (formal or otherwise), the Defence does not know which Registry section or personnel was involved. It would appear that sections other than the detention unit, such as the Counsel Support Section, used information in Mr. Bemba's call logs to perform their respective mandates.⁷¹ Since it is possible that the formal email records might not exist within the Registry at this point time,⁷² this request should be understood to encompass information in its broadest sense. Thus, if the Registry is aware that information has been conveyed (even though it no longer has access to the specific means by which it was conveyed), the Defence should be apprised of this fact, so that it can undertake the necessary follow up with the Prosecution.

Category 3

51. The Chamber's conviction of Mr. Bemba turns, to a significant extent, on their reliance of his involvement in a plan to conduct remedial measures in relation to the Article 70 investigation. Whereas the Independent Counsel characterised this plan as a *faux scenario*,⁷³ the Trial Chamber concluded that the defendants took steps concerning specific Defence witnesses, with the understanding that these witnesses were investigative targets in a genuine Article 70 investigation.⁷⁴ The Chamber further

⁷¹ See Annex I, in which CSS inform Mr. Kilolo that information in his time sheet was incorrect as they had "verified" that he had not spoken to Mr. Bemba on a certain date.

⁷² At least four Registry legal staff from CSS and the detention unit, who had access to confidential information concerning Mr. Bemba's detention during the relevant time period, were subsequently recruited by the Prosecutor.

⁷³ ICC-01/05-01/13-421-Conf-Anx, p. 22, 24, 30 etc

⁷⁴ Trial Judgment, paras. 110, 774, 792, 793,

inferred that Mr. Bemba knew, and understood these steps to be taken for the purpose of frustrating a genuine Article 70 investigation.⁷⁵

52. These inferences stem from firstly, the fact that there was an actual Article 70 investigation at this time, secondly, intercepts which suggest that Mssrs. Kilolo and Mangenda became aware of this investigation, and thirdly, an evidentially unsupported inference that Mr. Bemba must have been informed, in accurate terms, of the Article 70 investigation. The Chamber's conclusion nonetheless depends on their being a correlation between the actual investigation, the information transmitted to Mr. Mangenda, and the information ultimately conveyed to Mr. Bemba.

53. [Redacted],⁷⁶ [Redacted].

54. [Redacted].

55. [Redacted],⁷⁷ [Redacted].

56. [Redacted].⁷⁸ [Redacted].⁷⁹

57. [Redacted].

58. [Redacted].⁸⁰ [Redacted].

59. [Redacted].⁸¹

60. [Redacted]:

- a) [Redacted];
- b) [Redacted];
- c) [Redacted].

⁷⁵ Trial Judgment, para. 774.

⁷⁶ [Redacted]

⁷⁷ See CAR-OTP-0080-0322 at 0325, lns 78-96. [Redacted].

⁷⁸ T-4-Conf-Eng, p.5, lns. 4-6.

⁷⁹ T-4-Conf-Eng, p. 3, lns. 22-24.

⁸⁰ See CAR-OTP-0080-0322 at 0325, lns 63-68. [Redacted].

⁸¹ Annex C

Relief sought

61. For the reasons set out above, the Defence for Mr. Bemba respectfully requests the Appeals Chamber to order the Prosecution and the Registry to transmit the requested categories of information to the Defence.



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Dated this 20th day of September 2017

The Hague, The Netherlands