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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 and B

**Public Redacted Version of ‘Corrigendum to the ‘Defence Request for Leave to Reply
 to the Prosecution’s Response to Bemba’s “Consolidated Request for Disclosure and
 Judicial Assistance”’, (ICC-01/05-01/13-2236-Conf), 6 October 2017’,
 ICC-01/05-01/13-2236-Conf-Corr, 10 October 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. On 18 September 2017, the Defence for Mr. Jean-Pierre Bemba requested the Appeals Chamber to order the Prosecution and the Registry to transmit certain categories of information that concerned the confidentiality interests of Mr. Bemba (“the Request”).¹
2. On 2 October 2017, the Prosecution filed the ‘Prosecution’s Response to Bemba’s “Consolidated Request for Disclosure and Judicial Assistance”’ (“the Response”).²
3. Rather than addressing the issue squarely before the Chamber – which is whether the Defence is entitled to receive the requested materials – the Prosecution has diverted the matter to issues of Defence diligence.³ Their submissions on this point are incorrect, and beside the point.
4. Apart from these erroneous and irrelevant submissions, the Response further seeks to muddy the record with a series of misleading and incorrect allegations. Of particular concern, without a shred of justification or consideration for the imperative of ensuring open and equal justice, the Prosecution filed information on an *ex parte* basis to the Chamber. And, when it concerns the merits of the Defence request, the Response adduces no clear and convincing reason as to why the requested information cannot be disclosed or transmitted to the Defence. Indeed, several points only serve to demonstrate the importance of granting the Defence request.
5. For example, according to the conditions established by the Investigating Judge, if the conditions for attachment to the criminal file were not met, the data was supposed to be destroyed immediately.⁴ Notwithstanding the safeguards that supposedly existed at the domestic level, the Prosecution has now averred that it received confidential private data that had no nexus to its investigations.⁵ Accordingly, even if 4 of the 5 CDR were apparently deemed by the OTP to be

¹ ICC-01/05-01/13-2227-Conf-Exp

² ICC-01/05-01/13-2233-Conf.

³ “Most importantly, it comes too late since it pursues investigative measures that counsel acting with due diligence should have conducted at trial” (Response, para. 3).

⁴ ICC-01/05-01/13-1799-Conf-AnxF, p.4.

⁵ Response, para. 10.

irrelevant to its investigation, the very fact that the OTP received irrelevant private information speaks to the effectiveness of the safeguards erected at the domestic and ICC level, which is an issue that is germane to the resolution of the Defence appeal.

6. Pursuant to Regulation 34(c) of the Regulations of the Court, the Defence seeks leave to reply to the following issues, that arise squarely from the Response:⁶
 - a. Whether the “diligence” of the Defence is relevant to the question as to whether the Prosecution/Registry are required to provide the requested information;
 - b. The Prosecution’s assertion that the particular information provided by the Dutch authorities did not contain confidential information, and was not generated through law enforcement activity that impacts on the rights of the accused;
 - c. The inferences that should be drawn firstly, from the Prosecution’s opposition to the provision of information concerning the date on which confidential information was first provided to the Prosecution, and secondly, the fact that the Prosecution received a CDR of the ‘[Redacted]’ number with data corresponding to the time period of 20-24 August 2013;
 - d. Whether the Prosecution’s submission of *ex parte* information to the Appeals Chamber, which presumably contains allegations concerning Mr. Bemba, violated the principle of open justice, and the guidelines established by the ICC for the use of *ex parte* procedures.
7. The current filing has been filed on a confidential basis due to the fact that it includes extracts from confidential filings and evidence (including telephone numbers). A public redacted version will be filed forthwith.

Submissions

The issue as to whether the “diligence” of the Defence is relevant to disclosure duties under the Rome Statute

8. If and when the Defence files a motion to adduce additional evidence, the Defence will establish that the Prosecution arguments concerning due diligence are completely specious. But, for the purposes of assessing whether the threshold for

⁶ If it is the intention of the Appeals Chamber to set a short deadline for the reply, the Defence respectfully requests that the filing deadline does not fall within the half-term period (namely, 16-20 October 2017).

disclosure is met, the Defence seeks leave to adduce submissions concerning why the focus of inquiry is on the actions of the Prosecution and not the Defence.

9. Although the Appeals Chamber granted a Defence request for disclosure in the *Lubanga* case, it did not address the issue as to whether the diligence of the Defence was relevant to the Defence request.⁷ This issue therefore arises from the Response itself.
10. There is good cause to allow the Defence to address this question due to the significant consequences it could have for the rights of the Defence, and the utility of the disclosure process. In particular, by focussing on issues of diligence, the Prosecution is seeking to put the cart before the horse; that is, to have the Appeals Chamber adjudicate whether the threshold for the admission of evidence is met before the Defence has even received the materials in question. Such an approach is clearly inappropriate and prejudicial. The purpose of disclosure is to facilitate the “preparation of the Defence”;⁸ in the current case, the information has been requested to assist the Defence to make an informed decision as to whether to submit a request to admit additional evidence on appeal, and to then prepare that potential request.⁹
11. This purpose would be defeated if the Defence were compelled to litigate the ultimate outcome that is being pursued before it has received the materials that are key for its preparation for this outcome; it would be the equivalent of being compelled to litigate whilst wearing a blindfold.
12. Of further relevance, although ICC case is at a formative stage as concerns the specific parameters as to when evidence might be admitted on appeal, the ICTY/ICTR have held that even if the Defence has failed to act with the requisite level of diligence, it might be possible to admit the evidence in question if it would

⁷ ICC-01/04-01/06-3017.

⁸ ICC-01/04-01/06-1433, para. 2.

⁹ “It is emphasised that rule 77 concerns material that the defence is entitled to have disclosed to it in order to prepare its defence. It may be that information that is material to the preparation of the defence is ultimately not used as evidence at the trial or may not turn out to be relevant to it. Yet, the defence is still entitled to this information on the basis of a *prima facie* assessment.” ICC-02/05-03/09-501, para. 42.

occasion a miscarriage of justice not to do so, in the sense that if it had been admitted at trial, it *would* have affected the verdict.¹⁰

13. Clearly, the Defence will not be in a position to establish whether this would be the case unless it first receives and reviews the requested materials. Denying disclosure on grounds of diligence would therefore prevent the Defence from obtaining and admitting evidence that could be admitted, potentially, on these grounds. In the context of redactions, Appeals Chamber has further determined firstly, that the burden of establishing that information should not be withheld from the Defence should not fall on the Defence, and secondly, that the Chamber must “bear in mind that the defence is at a disadvantage in being able to make a case given its inability to access the withheld information.”¹¹ There principles equally militate against the disclosure approach advocated by the Prosecution.

14. The particular legal framework for disclosure at the appeal stage must also be crafted in a manner that is consistent with the Rome Statute. The Appeals Chamber has clarified that the Prosecution has a duty to disclose Rule 77 materials, irrespective as to whether the Defence has requested the materials.¹² The diligence of the Defence is therefore entirely irrelevant to the question as to whether the Prosecution should disclose materials, which are *prima facie* relevant to Defence preparation, and should have been disclosed during the trial stage.

15. In the alternative, should the Appeals Chamber consider that issues of diligence could be relevant to its determination of the Defence request, the Defence seeks leave to respond to, and rebut the Prosecution claims on this point.¹³

¹⁰ See for example, Prosecutor v. Ngirabatware, Decision On Ngirabatware's Motions For Relief For Rule 73 Violations And Admission Of Additional Evidence On Appeal', 21 November 2014, MICT- 12-29-A, para. 67.

¹¹ ICC-02/11-01/15-915-Red, para. 1.

¹² ICC-02/05-03/09-501, para. 34; See also ICC-01/04-01/06-1433, para. 50, in which the Appeals Chamber underscored that “[t]he lack of any correlation between the right to receive prosecution disclosure and any disclosure obligations of the Defence is evident in that the Prosecutor is duty-bound to provide full disclosure even if an accused elects to remain silent or does not raise a defence.”

¹³ As non-exhaustive examples, the Prosecution claim that the Defence did not repeat its request for disclosure of the missing ‘[Redacted]’ CDR is undermined first, by the Defence email, which disputed the legal basis for non-disclosure (the alleged duplication of content), and secondly, subsequent Defence filings, which reiterated the Defence concern that it had not yet received this CDR (see ICC-01/05-01/13-2227-Conf-AnxG; ICC-01/05-01/13-2188-Conf, paras 10-12). Of further concern, the Prosecution’s claim that the Defence had never suggested that excel sheets could be modified is also untrue. This argument was first made at the start of the trial in the Defence’s response to the first Prosecution’s Bar Table Motion (See ICC-01/05-01/13-1074-Conf, paras.74-79 and paras.90-92, and in particular its annex C which compiled all defence arguments on this subject). See also, in relation to Vodacom Congo, ICC-01/05-01/13-1402-Conf, paras.48-50.

The Prosecution's assertion that the particular information provided by the Dutch authorities did not contain confidential information, and was not generated through law enforcement activity that impacts on the rights of the accused

16. The Appeal Chamber's observation that "that the defence is at a disadvantage in being able to make a case given its inability to access the withheld information"¹⁴ is of particular pertinence to the Prosecution's claim that the withheld information does not concern confidential Defence information. The Defence clearly cannot prove the extent to which it contains confidential or privileged information since it is yet to receive the requested CDR.

17. Nonetheless, given that the Prosecution has made a positive assertion that the CDR did not contain confidential information, or information generated through law enforcement activities,¹⁵ the Defence seeks leave to adduce submissions concerning indicia that suggest the contrary.

18. In terms of the potential content of the CDR, the Dutch authorities gave the Prosecution the "historical data and B analysis" of the '[Redacted]' number.¹⁶ The Vodafone '[Redacted]' CDR that was provided to the OTP in October had a significant amount of confidential information, including the identity and addresses of persons contacted by this number. Given that the Defence case was ongoing, this would have included potential witnesses.

19. Defence confidentiality extends not only to counsel-client communications, and inter-term work product, but interactions with potential witnesses. Rule 73(1)(b) of the Rules of Procedure and Evidence specifically recognises that legal privilege extends to interactions with third parties, provided that the third party has not given voluntary testimony on such matters. The right to conduct such interactions on a confidential basis is integral to the overall effectiveness of lawyer-client privilege: "[i]f a client knows that his lawyer's communications with others will be subject to

¹⁴ ICC-02/11-01/15-915-Red, para. 1.

¹⁵ Response, paras. 14-20

¹⁶ Request, para. 17.

disclosure, the client will not have any “subjective freedom of mind”.”¹⁷ For this reason, the Venice Commission concluded that surveillance practices leading to the interception of confidential communications with lawyers might infringe upon the right to fair trial.¹⁸ According to Canadian case-law, “absolute privilege continues to apply outside the courthouse if the lawyer is acting in performance of his or her duty to advance the client’s interests in a judicial proceeding (...). Absolute privilege applies to lawyers and witnesses, covering their communications in preparation for judicial proceedings.”¹⁹ The fact that some of these contacts that were captured by the call histories violated the cut-off point did not eliminate the need to ensure proper safeguards to filter out any proper contacts protected by Defence confidentiality.

20. Until the Defence receives the exact version of the materials transmitted by the Dutch at this juncture (irrespective as to whether the information was provided officially or through “informal checks”), it will not be in a position to assess the full extent of the impact on Defence confidentiality.²⁰ Again, by litigating this point now, the Prosecution has put the cart before the horse.

21. It suffices, for the low *prima facie* threshold, that the Defence has a legitimate forensic interest in comparing different versions of the call histories compiled at different times. This interest was made known to the Prosecution from the very commencement of the trial.

22. [Redacted],²¹ [Redacted].²² [Redacted].

23. [Redacted].²³

¹⁷ Pierre Trudel, *Droit à l’image : la vie privée devient veto privé – Aubry c. Éditions Vice-Versa inc.*: Aubry c. Éditions Vice-Versa Inc. [1998] I.R.C.S. 591, the Canadian Bar Review, 77 Can. B. Rev. 456, 566 (1998), p. 556.

¹⁸ European Commission For Democracy Through Law (Venice Commission) Poland Opinion On The Act Of 15 January 2016 Amending The Police Act And Certain Other Acts, footnote 24.

¹⁹ Duncan v. Lessing, 2016 BCSC 1386, paras. 94-95, citing *McDaniel v. McDaniel*, 2009 BCCA 53 ([CanLII](#)) at paras. 28, 29.

²⁰ The Prosecution has employed carefully worded phrases to imply that the missing records pertain to contacts between 20-24 August, without explicitly stating whether these were the only contacts that the Prosecution received prior to the October 2013 transmission. The warrant that was addressed to Lyca and KPN on 3 September 2013 included a much broader date range, including up until 12 September 2013 (see Annex B, documents 87 and 88, and related partial translation).

²¹ CAR-OTP-0090-0724 at 0747 (p. 134, fn. 17).

²² T-12-Conf-Eng, p. 39, lns. 13-25, p.40, lns. 2-5.

²³ T-12-Conf-Eng, p. 39, lns. 13-25, p.40, lns. 2-5.

24. It was, therefore, clear from Defence line of questioning that the issue as to whether the Prosecution had the raw data, or a means of verifying what had been formatted, was considered by the Defence to be relevant to its case, and its related preparation. Yet, neither P-433 nor the Prosecution team followed up this court session by disclosing the earlier versions of the records in question.

25. There is, moreover, good cause to grant the Defence request for leave to reply in order to address the Prosecution's specious claim that the requested records are mere billing records compiled in the ordinary course of business.²⁴

26. The Prosecution submission on this point contradicts Prosecution evidence and their in-court submissions. P-361 wrote in his report that CAR-OTP-0082-0072 "is different from other Vodafone CDR files the author has analysed".²⁵ When testifying, the Prosecution was quite careful to ask P-361 whether this information in this record was typical of the type of records that would be provided by Vodafone "to law enforcement agencies", to which P-361 answered in the affirmative.²⁶

27. Apart from the fact this exchange suggests that were substantive discussions post-Report between P-361 and the OTP concerning this CDR that have never been disclosed to the Defence, it also confirms that the information provided by Vodafone (at least in the later CDR) differed from standard business generated CDR, and included information collected pursuant to law enforcement requests.²⁷

The inferences that should be drawn from the Prosecution's opposition to the provision of information concerning the date on which confidential information was first provided to the Prosecution

28. In its Response, the Prosecution had a clear opportunity to state, in unequivocal terms, that apart from the information received directly from Western Union, the content of all other confidential data was brought to the attention of the OTP through

²⁴ Response, para. 16.

²⁵ CAR-OTP-0090-1825 at 1833.

²⁶ T-16, pp. 88.

²⁷ Vodafone published a law enforcement disclosure report in 2014, which indicated that several countries – including The Netherlands – had required Vodafone to establish a direct access pipe to allow law enforcement authorities to collect data from their network (without a warrant): <https://www.theguardian.com/business/2014/jun/06/vodafone-reveals-secret-wires-allowing-state-surveillance>
The Prosecution did not call any witnesses from the Telecom Services Providers involved in this case.

regular channels, after receiving the appropriate judicial authorisations. Similarly, if the Defence had been disclosed all relevant information concerning the date on which the Prosecution first accessed confidential Defence information, then the Defence request would have been moot. And yet, the Prosecution has asserted that disclosing the requested information would be “excessively time and resource consuming”²⁸ – a claim that would only be the case if there is information that has not been provided to the Defence.

29. This ambiguity must be construed to the benefit of the Defence. The Defence requests concerns confidential and private data pertaining to the defendants and/or their family members. This information was collected on a covert/*ex parte* basis, but the reason for the covert nature of the investigative activities has not existed for over three and a half years. Although the Prosecution has accused the Defence of engaging in speculation, the point is that the Defence should not be compelled to speculate, nor should the Defence be compelled to parse the wording of Prosecution filings and correspondence in order to determine what happened and when. As set out in the Request, the Defence has a right under human rights law to be provided this information in clear and comprehensive terms.

30. Even if standard international disclosure precedents are applied, although private data is intangible, there is no reason for not applying same disclosure approach that applies to the accused’s right to receive restitution and an inventory of personal items that were collected during the investigation.²⁹

31. This was the approach that was applied vis-à-vis confidential information that was routed by the Registry;³⁰ the fact that the information in question was routed *via* the Prosecution instead only serves to enhance the importance of ensuring full transparency as concerns what happened and when. The possibility that the

²⁸ Response, para. 29.

²⁹ *Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera’s Motion for Immediate Return of Seized Property (26 November 2007) p.4; *Prosecutor v. Nzirorera*, ICTR-98-44-T ‘Decision on Defence Third Motion for Return of Property and Sanctions for Violation of Court Order’, 13 October 2003; *Prosecutor v. Ndindiliyimana*, Case No. ICTR-00-56-1, Decision on Defence Urgent Motion for the Disclosure of Evidence and for the Return of Seized Items (24 September 2001) paras.6, 9 and 13; *Prosecutor v. Bizimungu*, Case No. ICTR-99-50-T, Decision on Jerome-Clement Bicamumpaka’s Motion for Return of Personal Properties (22 June 2004) paras 6-7; *Prosecutor v. Nzirorera*, Case No. ICTR-98-44-T, Decision on the Defence Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting the Return of Personal Items Seized (7 September 2000) paras.32-36; *Prosecutor v. Stakic*, Case No. IT-97-24-T, Decision on the Defence Motion to Exclude Evidence as Inadmissible (31 July 2002) p.3.

³⁰ ICC-01/05-01/13-124-Red

disclosure of this information might expose impropriety on the part of the Prosecution (or reveal factual inaccuracies in its written submissions) is not grounds for withholding it. In the same manner that a State cannot invoke national security protections in order to withhold information that could be embarrassing or expose information concerning wrongdoing or human rights violations,³¹ the OTP cannot pull the veil down concerning investigative activities that directly concerned the Defence in order to shield them from proper scrutiny.

32. The Defence therefore seeks leave to file submissions as to whether the Prosecution's failure to refer to these precedents and related obligations in its Response suggests that the Prosecution is applying the wrong legal standard to its review of disclosure. If that were to be the case, that is, that it is treating the confidential and private data obtained through its investigations as the property of the Prosecution, rather than the property of the defendants/Bemba Defence or third parties, then that would constitute good cause for ordering the preparation of the inventory requested by the Defence.³²

33. Certain information in the Prosecution Response also underscores why it is necessary to receive such an inventory, notwithstanding the advanced stage of the proceedings. In particular, the Response notes that the CDR in question for the '[Redacted]' number relates to contacts that took place during the period of 20- 24 August 2013, and that these contacts allowed the Prosecution to attribute the '[Redacted]' number to Mr. Kilolo.³³

34. This point suggests either that there was no basis for attributing the '[Redacted]' number to Mr. Kilolo until after 13 September 2013 (that is, more than two weeks

³¹ See the following definition of "Legitimate national security interest" in the Global Principles On National Security And The Right To Information ("THE TSHWANE PRINCIPLES"), 12 June 2013, <http://www.right2info.org/exceptions-to-access/national-security/global-principles>

"**Legitimate national security interest**" refers to an interest the genuine purpose and primary impact of which is to protect national security, consistent with international and national law. (Categories of information whose withholding may be necessary to protect a legitimate national security interest are set forth in Principle 9.) A national security interest is not legitimate if its real purpose or primary impact is to protect an interest unrelated to national security, such as protection of government or officials from embarrassment or exposure of wrongdoing; concealment of information about human rights violations, any other violation of law, or the functioning of public institutions; strengthening or perpetuating a particular political interest, party, or ideology; or suppression of lawful protests."

³² Prosecutor v. Karadzic, Decision On Accused's Forty-Ninth And Fiftieth Disclosure Violation Motions, 30 June 2011, paras. 53-54.

³³ Response, para. 23.

after the content interception commenced),³⁴ or, that the Prosecution received information from these CDR at an earlier juncture of the proceedings.

35. In terms of the latter possibility, the ability of the Defence to ascertain what happened and when has been severely impeded by the Prosecution's claim that it has no records or notes concerning its interactions with the Dutch authorities, notwithstanding the fact these interactions played an integral role in the collection of the confidential Defence data.³⁵ Had such records been compiled and disclosed, then it is likely that the Defence Request would not have been necessary. The Defence therefore respectfully invites the Appeals Chamber to draw the necessary inferences in connection with the absence of such records, in disposing of the Request.

36. The Defence has nonetheless gleaned the following, from the limited tit bits of information that have been disclosed, which suggests that confidential information was conveyed (orally, or in person) before the later September transmission date.

37. On 12 August 2013, an [Redacted] in the OTP met with the Dutch Prosecutor [Redacted] to discuss the Prosecution requests,³⁶ in a meeting which was described as "fruitful".³⁷ The Defence has never received any records or notes concerning this meeting.

38. The day after this meeting, the OTP staff member emailed the Dutch Prosecutor to confirm her interest in receiving the logs/histories of the numbers concerning Mr. Kilolo and Mr. Mangenda.³⁸ The OTP staff member in question was the same staff member responsible for organising for the OTP to "screen" Western Union records in Austria in relation to an investigation concerning "ongoing crimes".³⁹

39. At some point in the week start 19 August 2013, the aforementioned [Redacted] in the OTP went on an urgent mission to the [Redacted]. The Defence has requested

³⁴ A draft RFA, dated 29 August 2013, concerning the '[Redacted]' number requested the Dutch to provide the call histories concerning the '[Redacted]' number "to enable the OTP to **determine that a concrete connection to the investigation exists**": CAR-OTP-0092-0802 at 0803. Given that the content interception of the '[Redacted]' number occurred on this date, it would appear that the number was intercepted even though the OTP had no evidence of a "concrete connection to the investigation".

³⁵ Annex A.

³⁶ CAR-OTP-0090-1961.

³⁷ CAR-OTP-0090-1963. The correspondence includes two redacted persons with [Redacted]

³⁸ CAR-OTP-0090-1961.

³⁹ CAR-OTP-0092-0890, CAR-OTP-0092-0892.

further particulars as to the nature of this mission, and its potential link to the Article 70 case, from the Prosecution.

40. On 20 August 2013, the Dutch intercepted communications between D-26 and the mobile number of Mr. Mangenda (which was being used by Mr. Kilolo).⁴⁰ These contacts occurred at 11.09 and 11.12 hours. According to the OTP, the Dutch had commenced listening to the conversations immediately.⁴¹

41. On the same day, there were contacts between D-26 and the '[Redacted]' number,⁴² and the Belgian number "[Redacted]".⁴³ The OTP had the telephone number of D-26 as a result of the records that it had received from Western Union.⁴⁴ In a later Status Conference, the OTP explained that they had used this witness number to build "things up bit by bit in this case" –i.e. to establish interactions between witnesses and Counsel.⁴⁵ But at the same time, the OTP has not disclosed any RFA or CDR concerning the Republic of Congo, which suggests that they never requested CDR from the Republic of Congo concerning this number.

42. On or just before 21 August 2013, the same OTP staff member had a conversation with the Dutch Prosecutor.⁴⁶ It is unclear who initiated the call, and, despite Defence requests, the Prosecution has not disclosed notes of the contemporaneous telephone conversation that occurred between the ICC-OTP and the Dutch authorities.⁴⁷

43. That afternoon, for the very first time during the Main Case, the Prosecutor started to question a Defence witness about whether he had been in contact with the Defence after the commencement of the cut-off point.⁴⁸

44. Later that day, the ICC staff member emailed the Dutch Prosecutor to indicate, for the first time, that they believed that Mr. Kilolo had additional Belgian numbers that were active in The Netherlands (Mr. Kilolo was in court in The Hague at the time,

⁴⁰ CAR-OTP-0090-0630 at 0705.

⁴¹ See ICC-01/05-T2-Conf, p. 10, lns. 5-6 [Redacted]

⁴² CAR-OTP-0072-0082, row 4060.

⁴³ CAR-OTP-0090-0630 at 0705.

⁴⁴ ICC-0/5-60-AnxB.

⁴⁵ T-4-Conf, p. 22, lns. 5-13.

⁴⁶ CAR-OTP-0090-1965-R01.

⁴⁷ Annex A.

⁴⁸ ICC-01/05-01/08-T-333, pp. 68-69.

examining D-26), including the number [Redacted]. The OTP staff member gave no information as to how they suddenly became aware that this was the number of Mr. Kilolo, or, if they were aware that this number was used by him, why they were only now requesting its interception,⁴⁹ or how they were aware that such numbers were active in The Netherlands.

45. At the same time, the staff member asked the Dutch Prosecutor to conduct “informal checks” in relation to the ‘[Redacted]’ number.⁵⁰ The phrasing of the email “the OTP will formalise this request should any significant information come out of your informal checks” is clear in its intent to solicit and receive information from the Dutch Prosecutor, which the OTP would then use for the purpose of formalising its request. The ICC staff member requested information concerning the user of the phone numbers,⁵¹ but, as acknowledged in the Response,⁵² the Dutch authorities appear to have collected information that fell beyond the terms of the formal requests submitted by the OTP.

46. On 22 August 2013, the OTP staff member emailed to the Dutch Prosecutor to confirm that they would now send the official request during the day.⁵³ This suggests that the requested information had been received at this juncture. The RFA in question specifically references the discussions between OTP and the Dutch authorities in relation to these numbers.⁵⁴

47. Although the RFA was submitted on 22 August 2013,⁵⁵ according to the Dutch dossier, that the Dutch investigating judge issued an oral order for the interception and collection of CDR concerning the “[Redacted]” number on 21 August 2013.⁵⁶ Given that the aforementioned email exchange occurred at 19.13 hours, the oral order must have been issued before the OTP first mentioned this number in the aforementioned email correspondence. The alacrity with which it was issued also

⁴⁹ CAR-OTP-0090-1965 at 1966. The OTP asked the Belgian authorities to inform them of the specific numbers used by Mr. Kilolo in Belgium, but according to the chain of custody provided by the Prosecution, they did not receive this information until “2013-12-10”. If the reason for the OTP addressing this request to the Dutch was because of the legal position in Belgium that the registered number of a lawyer could not be monitored, then this legal position should have been communicated to the Dutch authorities.

⁵⁰ CAR-OTP-0090-1965 at 1967.

⁵¹ CAR-OTP-0090-1965 at 1966.

⁵² Response, paras. 6, 10.

⁵³ CAR-OTP-0090-1965.

⁵⁴ CAR-OTP-0090-1928.

⁵⁵ CAR-OTP-0090-1928.

⁵⁶ Annex B (document 46 and related partial translation).

suggests that specific information was provided in connection with the necessity of obtaining immediate interception.

48. On 23 August 2013, the ICC Prosecution followed up their earlier questioning of D-26's contacts by asking very specific questions concerning the dates and duration of all contacts between D-26 and the Defence (Mr. Kilolo in particular).⁵⁷
49. On 28 August 2013, the ICC-OTP met with the Dutch Prosecution and appear to have discussed the above numbers during this meeting.⁵⁸ At a Status Conference that was convened two days later, the OTP were aware of the amount of activity for certain numbers.⁵⁹
50. After this meeting, the OTP requested the logs/call histories for the '[Redacted]' number and other four numbers. Although the OTP claimed that it had ascertained the relevance of these numbers through the Babala CDR, they had been in possession of the Babala CDR since 20 March 2013, and yet, did not include these Dutch numbers in the initial RFA. The RFA concerning the first formal request concerning the '[Redacted]' number) specifically references the "subsequent discussions (...) on 28 August 2013 regarding the interception from and to identified phone numbers of the two individuals".⁶⁰ The Dutch Prosecutor who attended this meeting appears to have had personal access to the CDR.⁶¹
51. There are simply too many questions that remain unresolved – a situation which has been exacerbated by the Prosecution's failure to call any persons involved in this process to testify, and the unwillingness of all such authorities to speak to the Defence.⁶² If, as is suggested by the Prosecution, it is too late to cure these lacunae through disclosure, then, at the very least, the Defence should be entitled to adduce discrete submissions, in reply, in relation to the inferences that should be drawn from the existence of such lacunae.

⁵⁷ T-335, pp. 15-19.

⁵⁸ CAR-OTP-0092-0799 at 0800; CAR-OTP-0090-1932, paras. 9 and 11.

⁵⁹ T-2-Conf, p. 11, lns. 6-7.

⁶⁰ CAR-OTP-0090-1932, paras. 9 and 11.

⁶¹ [Redacted] (CAR-OTP-0093-0019).

⁶² ICC-01/05-01/13-1749-Conf-AnxB; ICC-01/05-01/13-2150-Conf, para. 19.

Whether the Prosecution's submission of ex parte information to the Appeals Chamber, which presumably contains allegations concerning Mr. Bemba, violated the principle of open justice, and the guidelines established by the ICC for the use of ex parte procedures.

52. Although the Defence request for information was addressed to the Registry, the Prosecution opposed this request, and further attached correspondence on a confidential *ex parte* (Prosecution, Registry only) basis. The Prosecution's only justification for utilising this classification was that "since it is not disclosable (nor has Bemba requested its disclosure) it is provided *ex parte*".⁶³

53. Again, the fact that the Prosecution appears to believe that a specific request addressed to the Prosecution is necessary to trigger its disclosure obligations highlights the fact that the Prosecution misunderstands the scope of its disclosure obligations at this Court. This, in itself, is a ground to disregard the Prosecution's (carefully worded) assertion that it received no information that is relevant to the disposition of this appeal⁶⁴ (again, an assertion that it framed by the Prosecution's mistaken belief as to the scope of its disclosure obligations). The Prosecution already confirmed the existence of "exchanges" on this issue.⁶⁵ even a singular 'exchange' implies the existence of a response. As found by the ICTY, "[t]here should be no possibility of misunderstanding"⁶⁶ in relation to disclosure issues; ambiguously worded phrases are not an answer when fundamental disclosure rights are at stake.

54. As troubling, is the Prosecution's disrespect for the rights of the accused, and the cardinal rule of open and transparent justice. The Prosecution's decision to place the information directly before the Chamber (without even the pretext of requesting redactions) has deprived the Defence of the choice as to whether to do so. At the same time, by filing the information *ex parte*, the Prosecution has exposed the Chamber to information concerning allegations in this case, to which the Defence has no opportunity to respond.

⁶³ Response, para. 40.

⁶⁴ Response, para. 39.

⁶⁵ ICC-01/05-01/08-T-303, p. 27 lns. 10-11.

⁶⁶ Prosecutor v. Kordić & Čerkez, Decision on Motions to Extend Time for Filing Appellant's Briefs, 11 May 2001, para. 14.

55. The principle of open justice is not an empty phrase; it is the cornerstone of fair and impartial proceedings,⁶⁷ which dictates that the parties must be afforded an effective opportunity to be heard in relation to any evidence that is put to the Chamber.⁶⁸ ICC case law has, moreover, established that *ex parte* filings should be resorted to on an exceptional basis, and only to the extent that necessary to protect legitimate confidentiality requirements.⁶⁹ It was, therefore, a complete abuse of procedure for the Prosecution to file the annex on an *ex parte* basis, without any valid justification (or indeed, even the pretext of a valid one).

56. The Defence therefore seeks firstly, the immediate disclosure of the Annex, and secondly, a right to reply in relation to any consequences emanating from the fact that this information has been placed before the Chamber.

Relief Requested

57. For the reasons set out above, the Defence for Mr. Bemba respectfully requests the Honourable Appeals Chamber to grant leave to reply in relation to the requested issues.

⁶⁷ See *Re K (Infants)* ([1965] AC 201, in which Lord Devlin referred at p 237 to "the fundamental principle of justice that the judge should not look at material that the parties before him have not seen". See also the ECHR case of *Edwards and Lewis v. The United Kingdom* (*Applications nos. 39647/98 and 40461/98*) 27 October 2004, in which the European Court expressed that two principles were of fundamental importance: 1) the trial process was adversarial; 2) there had to be equality of arms. Putting these two principles together, it became manifestly unfair for the trial judge to view material which supported the Prosecution case, but which he held should not be disclosed on the grounds of public interest immunity, since it meant that the applicants had no opportunity to seek to challenge the way in which the material ostensibly assisted the Prosecution. See also the following concerning the importance of transparency in criminal proceedings: ICC-01/04-01/06-T-104-ENG, 16 January 2009, pp 3-4; *Werner v. Austria*, Judgment of November 24, 1997, para. 45.

⁶⁸ *Piersack v. Belgium*, ECHR, judgment of 1 October 1982, Series A No. 53, para. 30; *Hauschildt v. Denmark* (1990) 12 EHRR 266, para. 48; *Bulut v. Austria*, ECHR, judgment of 22 February 1996, Reports of Judgments and Decisions 1996-II-347, at 356 (paras. 31-33); *Du Cubber v. Belgium* (1984) 7 EHRR 236, at 243, para. 24; and *Gregory v. United Kingdom* (1997) 25 EHRR 577, at 593, para. 45.

⁶⁹ ICC-01/04-01/06-568, para. 39; ICC-01/04-01/06-1058, paras. 7, 12; ICC-01/04-01/06-108-Corr.



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