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Original: **English** No.**: ICC-01/05-01/13**
Date: **08/01/2018**

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, and G

Public Redacted Version of "Second Request for an Effective Remedy for Disclosure Violations", ICC-01/05-01/13-2252-Conf, 4 January 2018

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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1. Introduction

1. In this case, there is a small amount of known knowns, a large amount of known unknowns, and an unfathomable amount of unknown unknowns. And that is the opposite of what it should be.

2. Mr. Bemba's communications were not incidentally intercepted by third parties during the course of an armed conflict; his communications with family, friends, and Defence were covertly recorded at the request of the ICC Prosecution, and transmitted to the ICC Prosecution with the express intention that they would be used by the ICC Prosecution against Mr. Bemba.

3. The justification for maintaining the secrecy of these measures expired in November 2013, but the Defence continues to remain in the dark as concerns what was collected, when, and why. In the absence of such information, and due to his lack of standing before domestic courts, Mr. Bemba has never had an effective opportunity to contest all relevant aspects concerning the admissibility of the related materials.

4. The ability of the Defence to investigate such issues has, in a particular, been obstructed by firstly, the Prosecution's failure to collect or disclose critical information concerning the legality of the processes, and secondly, the Prosecution's construction of a parallel chain of custody, based on duplicates received at a later juncture, which obscured the actual date on which the Prosecution first received access to confidential and privileged Defence information.

5. The Defence accepts that in <u>other</u> Article 5 cases, the Court has imposed limitations concerning the extent to which the Prosecution is obliged to disclose all information concerning contacts with national authorities and witnesses. But the issue of contacts and investigative practices goes to the very subject matter of this case, and further underpins particular challenges to the admissibility of a specific type of evidence, namely confidential and private data derived from the defendants in this case. The Trial Chamber recognised as such, and confirmed repeatedly that the Prosecution's disclosure obligations extended to information (records, RFAs, and correspondence) concerning the legality of the collection of evidence. But, it would seem that it would be easier for a camel to pass through the eye of a needle than for the Prosecution to acknowledge that information within these categories falls within its disclosure

duties. The Prosecution's repeated refusal to disclose information falling within the parameters of these rulings, and active discouragement of Defence requests for information, is tantamount to a form of obstruction,[1] which inhibits Defence investigations and the Court's truth finding processes. It should therefore be both deprecated and remedied.

6. In line with the Appeals Chamber's positive duty to ensure the effective protection of the rights of the accused,[2] the Defence for Mr. Jean-Pierre Bemba respectfully requests the Honourable Appeals Chamber to either exclude evidence which is impacted by this non-disclosure,[3] or, when considering the fairness and legality of the Trial Chamber's approach to the admission and weight of evidence, take into consideration the Prosecution's intentional non-disclosure of key information concerning the legality of domestic processes, the chain of custody, and the reliability of privileged/confidential/private information derived from the defendants in this case.[4] This request has been filed confidentially due to the fact that it includes confidential information and names. A public redacted version will be filed forthwith.

2. The Prosecution's Disclosure Violations are Relevant to Grounds of Appeal

7. This request relates to the Prosecution's intentional non-disclosure of information that impacts on Ground 3 (the legality of the collection of evidence) and Ground 4 (the Trial Chamber's erroneous approach to the admission and evaluation of evidence) of the Defence Appeal Brief.

8. Concretely, the Prosecution failed to disclose at trial, and has refused to disclose on appeal:
    a. Specific call data records/logs that were collected by the Dutch authorities, and which are relevant to the authenticity and reliability of the admitted CDRs/logs;

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[1] C. Jones 'A Reason To Doubt: The Suppression Of Evidence And The Inference Of Innocence', 100 J. Crim. L. & Criminology 415 (2010), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?referer=https://www.google.es/&httpsredir=1&article=7353&context=jclc

[2] Prosecutor v. Krstic, Appeals Judgment, para. 211:"Where an accused can only seek a remedy for the breaches of a Rule in exceptional circumstances – in particular where the very enforcement of that Rule relies for its effectiveness upon the proper conduct of the Prosecution - any failure by the Appeals Chamber to act in defence of the Rule would endanger its application."

[3] ICC-01/09-02/11-728, para.90; ICC-01/04-01/06-2690-Red2, para. 212.

[4] "adverse inference may be drawn by international tribunals from a party's refusal to produce evidence known or presumed to be in its possession": ICC-01/11-01/11-321-Red, para. 35

b. Records of its verbal or in person interactions with Dutch authorities in relation to the interception of telephone communications or collection of related records;
c. Certain letters and email correspondence from the Belgium authorities concerning the interception of Mr. Kilolo's Belgian numbers and the provision of call data records; and
d. The specific dates on which it first received confidential Defence information from domestic authorities.

9. The Prosecution also informed the Defence that it appears to have deleted correspondence with Western Union.[5] At the same time, the Prosecution also opposed Defence requests to interview Prosecution investigators and Austrian authorities in relation to the subject matter of such correspondence.[6]

10. The information in question was requested by the Defence – repeatedly - and the Trial Chamber confirmed - repeatedly - that due to the specific characteristics of this case, the information fell within the scope of Rule 77.[7] Given the clear directions given by the Trial Chamber, 'compliance' with Rule 77 meant disclosing the information as soon as practicable, not waiting for the Defence to discover missing information, and then withholding the information unless and until the Chamber ordered its disclosure.[8]

11. By refusing to disclose this information pursuant to specific Defence inquiries on appeal, the Prosecution has confirmed that the non-disclosure is <u>intentional,</u> and not inadvertent. Although the Prosecutor has cited the appellate phase of the proceedings as justification for refusing to disclose the information in question, this position is legally incorrect.[9] It is also improper and unfair: unless and until the ruling is reversed by the Appeals Chamber, the Prosecution remained obligated to fulfil its

[5] CAR-OTP-0095-0017 at 0018 (Annex F) – the Defence is not seeking to admit this into evidence for the truth of its contents; it is attached for the sole purpose of communicating information that has been relayed by the Prosecution.
[6] Annex E; ICC-01/05-01/13-2230-Conf, para.19
[7] ICC-01/05-01/13-1308, para. 13; ICC-01/05-01/13-1632, paras 13-15; ICC-01/05-01/13-1542-Red; ICC-01/05-01/13-1234-Conf; ICC-01/05-01/13-1148-Conf; ICC-01/05-01/13-1658, para. 4 ("agreements, correspondence and records of meetings referred to in its requests for assistance"). See also fn 3;
[8] For the purposes of establishing non-compliance, it suffices to identify the material sought, establish its *prima facie* relevance to the Defence, and prove that the material is under the custody or control of the Prosecution: Mugenzi & Mugiraneza v. The Prosecutor, Case No. ICTR-99 5GA, Appeals Judgement, 4 February 2013, para. 39; Bagosora et al. v. The Prosecutor, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motions for Disclosure, l8 January 2011, para.7
[9] Prosecutor v Milosevic, No. IT-98-29/1-A, Decision on Motion Seeking Disclosure of Rule 68 Material, 7 September 2012, para. 12; See also ICC-01/09-02/11-211, pars. 21-23.

disclosure obligations in accordance with the directions of the Trial Chamber.[10] In case of any ambiguity during the appeals phase, the duty fell on the Prosecution – and not the Defence – to seek the direction of the Appeals Chamber; placing the burden of litigation on the Defence defeats the very purpose of the Prosecution's *proprio motu* disclosure duties.

2.1 The Prosecution's Disclosure Violations Obstructed the Defence from Challenging Legality Issues (Ground 3 of the Appeal Brief)

2.1.1 The Western Union records

12. In 2016, an Austrian Court revoked the legality of the transmission of these records to the Prosecution due to the fact that the Prosecution had not first established an independent reasonable suspicion, which justified lifting bank secrecy laws and related confidentiality protections.[11] Notwithstanding this development, the Trial Chamber determined that the manner in which the Prosecutor had collected this evidence did not attract Article 69(7) because "[e]ven though the Oberlandesgericht deemed that the information provided by the Prosecution was insufficient, the Prosecution was in no position to know this."[12]

13. Apart from the fact that the Prosecutor should be expected to know, and comply with human rights standards concerning the unlawfulness of fishing expeditions,[13] new information has emerged during the appellate proceedings concerning the possibility that the Prosecution deleted correspondence, which would have shed light on the question as to whether the Prosecution <u>genuinely</u> believed that it was lawful and appropriate to receive confidential Western Union data concerning persons protected by privileges and immunities, in advance of a domestic judicial decision.

14. The Prosecution's most recent revelations must be considered within the context of its conduct during the pre-trial and trial stage. During the pre-trial phase, the Prosecution did not disclose all of the Western Union spreadsheets in its possession; only the versions that were transmitted <u>after</u> the Prosecution obtained judicial authorisation. Moreover, notwithstanding the Trial Chamber's order to disclose <u>all</u> materials

[10] ICC-01/04-01/06-2582, paras. 1-2.
[11] CAR-D23-0011-0006 at 0012: "Bank secrecy may not be lifted to confirm suspicions; in any case, there must be pre-existing indications forming the basis of such suspicions"
[12] ICC-01/05-01/13-1948, para. 36.
[13] Council of Europe, Committee of Experts Discussion Paper, 1 April 2014, p. 10; https://rm.coe.int/168070afb4 p. 10. Funke v France, para. 44; SEP v Commission (T-39/90), Judgment of the General Court of December 12, 1991, para.25

concerning the legality of the collection of evidence, the Prosecution disclosed no correspondence with Mr. Smetana. As a result, the Defence had no means of identifying the existence of a parallel chain of custody, predating the authorisation given by Austrian Courts.[14]

15. The Defence's ability to investigate such matters was further obstructed by the Prosecution's initial denial that any such correspondence existed.[15] Although the Prosecution disclosed some emails after Mr. Smetana confirmed their existence, the Prosecution also attempted to introduce new incriminating evidence after the disclosure cut-off point,[16] namely, a self-serving report from the Prosecution's own investigator,[17] which was only written after Mr. Smetana acknowledged that he had transmitted data to the Prosecution before receiving judicial authorisation. The Prosecution also never introduced the report through Rule 68, notwithstanding the fact that it was clearly testimonial in nature.

16. The Prosecution then disclosed new, and similarly self-serving information on appeal. In response to Mangenda requests for further information concerning the details of the transmission of Western Union records to the Prosecution, the Prosecution disclosed and a report from its investigator, claiming firstly, that the Western Union records had been received by email, but that the email in question appears to have been deleted,[18] and secondly, that the OTP had been informed by Mr. Smetana that in accordance with their data retention policy, emails are deleted after three months (a particularly incredulous practice for the law enforcement division where Mr. Smetana was employed).[19]

[14] The E-Court chain of custody of the records disclosed before P-267's testimony stated that they were transmitted from the Government of Austria during the course of 2013 and 2014. If the Prosecution had disclosed the earlier versions, the Defence might have ascertained the earlier transmission from the properties of the excel sheets. For example, the document properties of CAR-OTP-0092-0029(which was only disclosed after Mr. Smetana started testifying) reveal that it was created on 4 October 2012. When read in connection with correspondence (CAR-OTP-0092-0022 at 0023), which was also only disclosed after Mr. Smetana started testifying) it is possible to deduce that the sheets were and transmitted to the OTP as an attachment on 11 October 2012.

[15] ICC-01/05-01/13-T-33-ENG,page 8 lines 21-25. See also page 35 concerning the fact that the Prosecutor informed the Chamber that there was no correspondence between the Prosecutor and Mr. Smetana.

[16] See ICC-01/04-01/07-2288, para. 43 regarding the obligation to disclose incriminating evidence prior to the commencement of the trial.

[17] CAR-OTP-0092-0018.

[18] Annex F.

[19] Annex D (this is attached for the purpose of conveying the position of the Prosecution,and not for the truth of its contents). EU regulations require financial institutions to retain records of information and documents pertinent to ongoing legal proceedings for a period of five years if no more: Directive (EU) 2015/849, 20 May 2015 on the prevention of the use of the financial system for the purposes of money

17. This email was likely to contain information that would have shed light on the question as to whether the ICC-OTP was aware that its receipt of excel spreadsheets from Mr. Smetana was compatible with Austrian law. The deletion of the email has also prevented the Defence from pursuing important lines of inquiry which impact on the credibility of Mr. Smetana, who claimed, categorically, that he provided no information during the first meeting with the Prosecutor because, as a matter of law, he could not do so until he received the official request from the Austrian Prosecutor.[20]

18. The **timing** of the deletion of this email has not been disclosed to the Defence, and the Prosecution has refused to attempt to resurrect the email from the ICC server.[21] The credibility of the investigator is also in issue given firstly, he appears to have informed Mr. Vanderpuye initially that there was no email correspondence between himself and Western Union,[22] and secondly, the contents of his 2015 'report' contains incorrect and misleading information.[23] The fact that the same investigator appears to have deleted an email that is of crucial importance to legality issues also undermines the reliability of this investigator, and the reasonableness of the Chamber's conclusion that the Prosecution conducted its Austrian investigations 'in good faith'.

2.1.2 The Prosecution's Non-Disclosure Obstructed the Defence from Investigating the Legality of the Dutch materials

19. During pre-trial, the Defence communicated its position that as the privilege holder and targeted person, Mr. Bemba was entitled to receive a copy of all confidential materials collected in this case, not just the materials that were identified by the Independent Counsel as being 'relevant' to the Prosecution's charges.[24] This position is consonant with the Trial Chamber's rulings,[25] human rights law,[26] and Dutch law;

laundering or terrorist financing, para.45, ***http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2015_141_R_0003&from=ES***

[20] ICC-01/05-01/13-T-34-CONF-ENG, page 37, lines 18-23

[21] Annex G

[22] Fn. 15 *supra.*

[23] The investigator claimed that the Prosecution 'screened' 67 names (set out in a list), but omits the fact that *via* email, the same investigator requested Mr. Smetana to search for, and send results concerning Ms. Caroline Bemba CAR-OTP-0092-0035-R01; ICC-01/05-01/13-2144-Conf, para.184. The Prosecution had also informed the Chamber that the end of mission report did not specify the names that were screened at the office (ICC-01/05-01/13-T-33-ENG, p.9,lines 4-5), which begs the question as to how and why the *post facto* 2015 report did.

[24] ICC-01/05-01/13-822, paras. 29, 38; ICC-01/05-01/13-1888-Red, para. 9.

[25] ICC-01/05-01/13-947, para. 40; ICC-01/05-01/13-1936, para. 16.

in terms of the latter, according to the directives of the Investigating Judge, a full record was supposed to be kept of all materials collected during the investigations so that the Defence could, if necessary, access them.[27]

20. Yet, as a result of the hybrid system adopted in this case, both ICC and Dutch Defence Counsel were denied standing to request such information from the Dutch,[28] whilst at the same time, the ICC Prosecution carefully doled out selective information that supported its case, whilst refusing to transmit materials that would have assisted the Defence to contest it.

21. Thus, although the Dutch lawyer for Mr. Kilolo requested the Dutch Prosecutor to provide a copy of all records, the Dutch Prosecutor declined to do so, stating that the ICC was responsible for granting such access.[29] Since the ICC Prosecution received the CDRs directly from the Dutch authorities, this meant that the ICC Prosecution was the **sole gatekeeper** for access to these records.

22. Given that CDRs presumptively belong to the defendants in this case and should not have been transmitted to the Prosecution if they were irrelevant to the proceedings, the Defence was entitled to assume that all CDRs or materials collected from the national authorities had in fact been transmitted to the Defence. This expectation was further cultivated by the Prosecution's statements. Before confirmation, the Prosecution proposed that the Single Judge establish a mechanism to enable the defendants to request and receive any un-transmitted information from the Dutch authorities,[30] thus implying that the Prosecution itself had no further materials to transmit. During the trial phase, the Prosecution also averred repeatedly that it had

[26] *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).
[27] ICC-01/05-01/13-6-Conf-AnxA-Red, p.6.
[28] ICC-01/05-01/13-2172-Red, para. 11.
[29] ICC-01/05-01/13-2172-Conf-AnxC, p. 4.
[30] ICC-01/05-01/13-154-Conf, para. 6; ICC-01/0-01/13-116, para. 9.

transmitted all records that it had obtained from the Dutch authorities.[31] This assertion was repeated on appeal.[32]

23. Yet, after querying the accuracy of the chain of custody information for '{Redacted}'CDR on E-Court and reviewing in detail the Dutch dossier, the Defence discovered that the Prosecution had received CDRs concerning 5 numbers, which had never been disclosed to the Defence.[33] When the Defence requested the Prosecution to disclose these CDRs, the Prosecution claimed that the records were duplicated by other materials, or were irrelevant.[34] Neither claim can be upheld.

A. 'Duplication' was not a legitimate basis for withholding disclosure

24. The possible duplication of content is not a valid justification for withholding such materials.[35] Rule 77 obliges the Prosecution to disclosure materials that were "obtained from or belonged to" the defendants, the Prosecution had no right to decide, unilaterally, to withhold the materials. The need for judicial supervision is of particular importance given that the Prosecution has adopted a strained, overly broad interpretation of 'duplication' in this case. For example, the Prosecution resisted disclosing emails between the Dutch authorities and the Prosecution on the ground that the content was 'duplicative' of the content of RFAs.[36] Nonetheless, after the Chamber ordered their disclosure, the Prosecution claimed the opposite, namely, that the content of the emails could be used to plug the gaps in the RFAs.[37]

25. Duplication is also not a valid claim as concerns telecoms evidence since the specific metadata of the undisclosed records will not be 'duplicated' in later records. As demonstrated above in relation to Western Union records, the property details of excel sheets can assist the Defence to ascertain when the documents were first created

[31] ICC-01/05-01/13-1148-Conf, para. 9: "the Prosecution possesses no order, decision or record of the Dutch Court concerning the legality of the intercepts to which the Defence does not have access". ICC-01/05-01/13-1607-Conf, para.7; the Prosecution "has disclosed *all materials* that, in its view, fall within the ambit of the order ICC-01/0-01/13-1542-Conf, namely "the communications with the Dutch authorities concerning the monitoring of one of the Dutch numbers of Mr. Kilolo, + [Redacted], **and any other related records**" (para.4). The Prosecution's response was clear and unambiguous **leaving no basis to speculate about the existence of further relevant records**".
[32] ICC-01/05-01/13-2227-Conf-AnxG
[33] ICC-01/05-01/13-2227-Conf-AnxB (Translation – CAR-D20-0009-0111 at 0115).
[34] ICC-01/05-01/13-2233-Conf, para. 6.
[35] *Prosecutor v Karadzic*, Decision on Accused's Eighty-Seventh Disclosure Violation Motion (10 March 2014), paras. 13-14; ICC-01/04-01/06-1401, para. 60; ICC-02/05-03/09-501, para. 40; ICC-01/05-01/08-1594-Red, para. 23.
[36] ICC-01/05-01/13-1528, para. 11.
[37] ICC-01/05-01/13-1833-Conf, para. 34.

and transmitted to the ICC Prosecution.[38] The Prosecution is clearly aware that such excel property details are material to the preparation of the parties because it has relied on them itself during these appeal proceedings.[39] Whereas the Prosecution disclosed the earlier Western Union spreadsheets once the 'cat was already out of the bag', its refusal to disclose earlier versions of telecoms evidence appears to be a deliberate attempt to keep the cat **in** the bag as concerns the first chain of custody details. Their continued non-disclosure thus prevents the Defence from ascertaining the full scope of the Prosecution's improper use of its Article 70 powers to obtain informal access to confidential and privileged Defence information from national authorities.

26. Concretely, as was the case with Mr. Smetana, the ICC Prosecution was in regular contact with the Dutch Prosecutors, and, during the course of these contacts, solicited information concerning the content of telecoms evidence.[40] But, although multiple verbal interactions and physical meetings took place, the ICC Prosecution continues to maintain on appeal that no 'disclosable' records exists of such interactions.[41]

27. The absence of records ('disclosable' or otherwise) in itself calls adverse inferences to be draw in relation to the integrity of the investigation in light of clear indicia that specific details of the call patterns of various numbers were discussed during these undocumented interactions. This can be deduced from firstly, the Prosecution's submissions to the Single Judge,[42] secondly, the fact that the Dutch authorities took specific steps concerning particular numbers in advance of written requests from the ICC Prosecution,[43] and thirdly, the fact that subsequent Requests for Assistance (RFAs) reference these 'verbal discussions'.[44]

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[38] See fn. 14 *supra.*
[39] ICC-01/05-01/13-2170-Conf-Corr2, fn. 211
[40] The ICC-OTP requested the Dutch Prosecutor to conduct informal checks of the '{Redacted}' number, and indicated that "the OTP will formalise this request should any significant information come out of your informal checks": CAR-OTP-0090-1965 at 1967.
[41] ICC-01/05-01/13-2172-Conf-AnxA, p. 12; But Cf ICC-01/05-01/13-1607-Red, para. 9 asserting that no records of these interactions exist.
[42] On 28 August 2013, the ICC-OTP met with the Dutch Prosecutors, and had 'discussions' concerning certain numbers, including the '{Redacted}' number: CAR-OTP-0092-0799 at 0800; CAR-OTP-0090-1932, paras. 9 and 11. At a Status Conference on 30 August 2013, [Redacted] also revealed his awareness of the degree of 'activity' concerning certain numbers T-2-Conf, p. 11, lns. 6-7.
[43] 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 (CAR-OTP-0090-0630 at 0705). On the same day, there were contacts between D-26 and the '{Redacted}' number (CAR-OTP-0072-0082, row 4060) and the Belgian number [Redacted]" (CAR-OTP-0090-0630 at 0705). 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 (T-4-Conf, p. 22, lns. 5-13). On or just before 21 August 2013, the OTP staff member had a conversation with the Dutch

28. The inference that the Prosecution obtained confidential information concerning these call histories through such informal interactions is further supported by specific questions put by the Prosecution to D-26 during his testimony,[45] which mirrored the patterns of call histories that had yet to be officially transmitted to the Prosecution, and which coincided with the 'off-the-record' conversations between [Redacted] and [Redacted].[46]

29. According to the specific terms of the MoU between the ICC-OTP and The Netherlands, any requests for assistance must comply with the requirements of Article 96 of the ICC Statute,[47] which in turn, specifies that requests must be in writing. Dutch law also specifies that written records of investigative acts concerning the interception process should be kept, and added to the case file.[48]

30. Even if the Prosecution's decision to rely on Main Case prosecutors to liaise with the Dutch authorities in relation to confidential Defence communications did not in and

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Prosecutor (CAR-OTP-0090-1965-R01), of which the Defence has no record. 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 (ICC-01/05-01/08-T-333, pp. 68-69). 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, examining D-26), including the number + [Redacted]. The OTP staff member gave no information as to how they were aware that such numbers were active in The Netherlands. At the same time, the ICC staff member asked the Dutch Prosecutor to conduct "informal checks" in relation to the '{Redacted}' number (CAR-OTP-0090-1965 at 1967), which the OTP would then use for the purpose of formalising its request. 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 (CAR-OTP-0090-1965). 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 (CAR-OTP-0090-1928). Although the RFA was submitted on 22 August 2013 (CAR-OTP-0090-1928), according to the Dutch dossier, the Dutch investigating judge issued an oral order for the interception and collection of CDR concerning the "[Redacted]" number on 21 August 2013 (CAR-D20-0009-0029 at 0030). 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 suggests that specific information was provided verbally in connection with the necessity of obtaining immediate interception.

[44] CAR-OTP-0090-1941 at 1943; CAR-OTP-0092-0802 at 0803; CAR-OTP-0090-1930 at 1933; CAR-OTP-0090-1965 at 1967 "Again, as discussed" (…).

[45] ICC-01/05-01/08-T-335, pp. 15-19, concerning questions as to whether D-26 had been in contact with Mr. Kilolo after the cut-off point. This type of question had not been put to witnesses previously. The Prosecution confirmed on appeal that they received no 'disclosable' information from [Redacted] (ICC-01/05-01/13-2241-Conf,para. 5; ICC-01/05-01/13-2241-Conf-AnxA).

[46] See footnote 43 above.

[47] Section 3(7) of the MoU, https://www.coe.int/t/dlapil/cahdi/Source/ICC/4th%20Consult%20ICC%20(2006)%2016%20E%20Memorandum%20of%20understanding%20-%20Netherlands.pdf

[48] In *Aalmoes v Netherlands*, the ECHR noted the requirement under "Article 152 of the CCP, [that] all acts and findings of officials in a criminal investigation must be recorded in writing", as part of its conclusion that there were sufficient safeguards to protect targeted persons against arbitrary application of the law (Application no. 16269/02).

of itself give rise to a conflict of interest,[49] the Prosecution had a clear duty to document such interactions in order to protect the interests of the targeted individuals, and ensure the appearance of the integrity of the proceedings. The absence of documentation in such circumstances is analogous to 'breaks in the recordings' during suspect interviews; in the same manner that the ICTY Appeals Chamber concluded that adverse inferences should be drawn in relation to undocumented discussions occurring during such breaks,[50] it would be proper for the Appeals Chamber to find firstly, that the Prosecution's investigation of both Main Case Defence witnesses and telecoms evidence was informed by confidential information that it had received directly from the Dutch authorities, in violation of the rights of Mr. Bemba, and secondly, that the Prosecution's conduct (non-disclosure and non-documentation of its interactions) obstructed the Defence from investigating this issue fully.

B. <u>Irrelevance was not a valid basis for withholding disclosure</u>

31. As concerns the second prong of the Prosecution's justification for non-disclosure - that the CDRS are "irrelevant"- this irrelevance is itself, relevant to the issue as to whether adequate safeguards were erected to prevent such an occurrence.[51] The Prosecution's failure to disclose, in a timely manner, the fact that it had received 'irrelevant' CDRs, prevented the Defence from raising arguments before the Trial Chamber concerning whether a reasonable suspicion to intercept the '{Redacted}' number existed, at the time that it was first intercepted.

32. In particular, the Prosecution conceded, in its official RFA dated 2 September 2013, that it first needed to obtain the call histories of the '{Redacted}' number in order to identify whether it was linked to its investigation.[52] Although the Dutch Prosecutor indicated that they would intercept the '{Redacted}' number for the purpose of identifying the user, there is no indication that they were successful in doing so; to the

[49] The involvement of [Redacted] in such interactions was also contrary to Section 3(2) of the OTP-Dutch MoU, which specifies that JCCD should, in general, be the focal point for such communications.
[50] Prosecutor v. Halilovic, Decision On Interlocutory Appeal Concerning Admission Of Record Of Interview Of The Accused From The Bar Table, 19 August 2005**,** paras. 40-42. See also SCSL, Written Reasons – Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution, Prosecutor v. Sesay et al., Case No. SCSL-04-15, T. Ch. I, 30 June 2008,
[51] ICC-01/05-01/13-2170-Conf, para. 15: "These processes were judicially authorised by the Court and the relevant national authorities. Moreover, effective systems were in place to protect legitimate privileged material.' Compare with Defence Appeal Brief, para. 174 concerning the privileged nature of the CDR received by the Prosecution.
[52] CAR-OTP-0090-1930 at 1933.

contrary, the fact that the Dutch authorities appear to have intercepted,[53] and collated CDRs concerning <u>irrelevant</u> numbers, which were then transmitted to the Prosecution on 13 September, suggests that as of this date, the Dutch authorities had not yet identified the users of these numbers.[54] This is consistent with the Prosecutor's claim, before the Appeals Chamber, that it was the contacts in the '{Redacted}' CDR, which allowed them to attribute the '{Redacted}' number to Mr. Kilolo.[55]

33. Although the Defence now has access to specific documents which were provided to Mr. Kilolo's Dutch lawyer ("the dossier"), this does not cure the prejudice caused by the Prosecution's failure to disclose all the records collected formally or informally from the Dutch authorities as part of its investigation into these defendants. Since the request for records emanated from Mr. Kilolo's lawyer, his lawyer only received documents concerning numbers that were at some point attributed to him. It does not, therefore, include individual warrants and decisions concerning all 'irrelevant' numbers, even though the fact that 'irrelevant' numbers and persons were caught up in this web of surveillance was relevant to Defence arguments concerning whether there were sufficient safeguards.

34. Moreover, although the various decisions in the dossier refer to hearings in connection with the District Court decisions,[56] there are no records of these hearings in the dossier. Under Dutch law, it is compulsory to prepare a *procès-verbal* in relation to any hearings concerning interception investigations, which is then attached to any related decision.[57] This *procès-verbal* is an important safeguard as concerns the interests of targeted persons if the interception is conducted on a covert

[53] The Dutch Prosecutor's application to the District Court states clearly that they requested the interception of these four irrelevant numbers: see CAR-D20-0009-0083 at 0086 (originally disclosed in April 2016 as CAR-D20-0006-3381_R01 at 3381-3382).
[54] The 13 September District Court decision explains that the Dutch Prosecutor only requested CDRs for a one month time period for five numbers (including the '{Redacted}' number) because "the communications data provided for these numbers **<u>must first indicate whether the numbers are relevant for the investigation</u>**" (CAR-D20-0009-0111 at 0117).
[55] ICC-01/05-01/13-2233-Conf, para. 23.
[56] Before issuing its 9 October 2013 decision, the District Court convened a hearing on 2 October 2013:CAR-D20-0008-0008 at 0014.
[57] Article 25(1) of the Code of Criminal Procedure, "The clerk to the court shall prepare a record of the hearing at the court in chambers, which record shall contain the substance of the statements made and other events that took place at that hearing." http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafvordering_ENG_PV.pdf This provision applies to District Court hearings convened to decide whether to transmit materials to the ICC: Section 52(3) of the ICC Implementation Act: http://www.legal-tools.org/doc/50de13/

basis; if either no *procès-verbal* was prepared, or one was prepared, but not transmitted to the targeted person, this nullifies the related decision.[58]

35. Apart from the fact that the absence of such records nullifies the validity of the related decisions, in their absence, the Defence lacks clarity as to the circumstances of the interception of the '{Redacted}' number, and how and why the Prosecutor received records of 'irrelevant' numbers. This lacuna underscores the importance of the Prosecution's duty to disclose the relevant records in its possession, and the prejudice caused by its failure to do so.

2.1.2 The Prosecution's Non-Disclosure of Belgian Correspondence and Records Obstructed the Defence from Investigating the Legality of Dutch Materials

36. Although the terms of the Chamber's disclosure orders specifically encompassed evidence collected in Belgium,[59] the Prosecution failed to disclose a raft of correspondence, including official letters and emails, which directly concerned the legality collection of this evidence.

37. The fact that the missing letters are in the custody of the Prosecution is confirmed by the fact their existence is referred to in disclosed correspondence, and transcripts. For example, CAR-OTP-0091-0385 (an RFA from the OTP) refers to a response from the Belgium authorities dated 9 August 2013 (reference WL35/ICT-90-84/5220/JdH/2013/110). The RFA dated 16 August 2013 refers to a response dated 14 August 2013 (WL35/ICT-90-84/5220/JP/2013/020).[60]

38. During the 30 August 2013 Status Conference, {Redacted] apprised the Single Judge of various interactions between the Prosecution and the Belgian authorities, including email correspondence, in which the Prosecution attempted to convince the Belgian authorities to intercept Mr. Kilolo; it would appear, however, that Belgian judges were unwilling to intercept a lawyer due to the nature of the offences (i.e. Article70 rather than war crimes).[61] Although the Prosecutor felt able to discuss snippets of

[58] HR 28 mei 1946, NJ 1946, 566. HR 22 april 1986, NJ 1986, 783 and HR 16 juni 1998, NJ 1998, 838. See also *C.P.M. Cleiren e.a., Tekst en Commentaar, Strafvordering, tiende druk, artikel 25* and G*.J.M. Corstens, Het Nederlands Strafprocesrecht, vijfde druk, pages 26, 161 and 742*.
[59] ICC-01/05-01/13-1234, paras.3 and 13
[60] CAR-OTP-0091-0410
[61] ICC-01/05-T-2-CONF-ENG,pp. 13-14, See p. 14, lines 1-4 in particular: "We tried to explain why we wanted to make this request, but the Belgian judge 2 seemed to feel that there had to be a direct link between the person

these developments before the Single Judge and the Independent Counsel, none of these emails or related domestic records have been disclosed to the Defence.[62] There is no indication that the Prosecution applied to be exempted from disclosure, and the possibility that this was an inadvertent oversight is rebutted by the fact that the Prosecution refused to comply with an explicit request to disclose missing letters on appeal.[63]

39. The legal basis and reasoning underpinning the Belgian authorities' refusal to intercept Mr. Kilolo's communications was clearly relevant to the preparation of the Defence; even if the ICC and The Netherlands were not bound by this determination, the specific grounds for the rejection of the request would have informed Defence arguments concerning the necessity and proportionality of the orders issued by Judge Tarfusser, the scope of the crime-fraud exception at the ICC, and the extent to which the Prosecution may have violated Article 54(1) by engaging in forum shopping on issues concerning fundamental rights, such as legal privilege.

2.2 The Prosecution's disclosure violations obstructed the Defence from contesting the probative value of the telecoms evidence (Ground 4 of the Appeal Brief)

40. The Prosecution tendered the majority of the digital evidence collected from national authorities through a bar table motion of 345 items. As argued by the Defence, the Prosecution provided no information concerning the source of legality, chain of custody, and reliability of the methods of collection.[64] Mr. Bemba was also not a party to most of the telecoms evidence,[65] and was therefore not in a position to assess the authenticity of a substantial number of items tendered into evidence.

41. At trial, the Prosecution also declined to call:

- anyone from the telecom service providers (TSPs);
- anyone who was involved in the interception process, or who had knowledge and expertise in this area;[66]

being listened to 3 and the case in court, this Court**. So we've had a lot of emails on this subject." See also** ICC-01/05-T-4-CONF-ENG, pp. 16-17.

[62] The Belgian authorities refused to communicate domestic records to the Bemba Defence (Annex C), and according to the Chamber's approach with the Dutch authorities, it was necessary for the Defence to first exhaust all possibilities of obtaining them from the Prosecution, before they would consider issuing an order for judicial assistance (ICC-01/05-01/13-1148)

[63] Annex B

[64] ICC-01/05-01/13-1074-Red, paras. 2, 50, 76, 99-101.

[65] ICC-01/05-01/13-2102-AnxA.

[66] P-433 was called as an "evidence summary witness", and not as an independent source of information, or expertise. ICC-01/05-01/13-1242, para. 2. See also ICC-01/05-01/13-1280, para. 8 concerning the position of the Chamber that P-433 was not an expert witness, and the oral decision that "the Chamber understands the

- anyone who was involved in the domestic processes concerning the collection of the telecoms evidence;
- anyone who worked for the ICC Prosecution at the time that the telecoms evidence was collected on an *ex parte* basis (i.e. 2013); or
- the Independent Counsel.

42. The Prosecution also did not otherwise cure these defects throughout the trial phase. Although a handful of intercepts were tendered through witnesses, none of these intercepts concerned Mr. Bemba.

43. In line with consistent case law concerning the requirements for establishing the admissibility for such digital evidence,[67] and ICC appellate case law clarifying that although the onus may fall on the Defence to raise issues concerning the admissibility of evidence, the burden should not fall on the Defence to <u>disprove</u> the admissibility of evidence,[68] the Defence had a legitimate expectation that the Chamber would exclude such evidence *vis-à-vis* Mr. Bemba, or, at the very least, treat it with caution.[69]

44. And yet, key evidential findings against Mr. Bemba in the judgment rely exclusively on digital items of evidence derived from Mr. Bemba's co-defendants, which were tendered from the bar, never discussed during the testimony of a witness or otherwise authenticated, and for which key details concerning the legality and modalities of their collection were not disclosed.[70]

45. Although the Chamber acknowledged the existence of case law requiring testimonial authentication, the Chamber ruled that such legal precedent did not bar the admission of the materials in this case. This conclusion was based on the following findings:

i. <u>Some</u> CDRs (i.e. Orange Cameroon and KPN Belgium) had a water-mark;[71]
ii. The Chamber performed its own authentication *in camera;*[72]
iii. P-361's testimony that it was 'likely' or 'highly likely' that the CDRs had come from the TSPs in question;[73]

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anticipated testimony of this witness to be about facts that are immediately apparent in the evidence collected by the Prosecution and are available without any specific knowledge beyond what is contained in this material. (…) **<u>As long as the testimony is limited in this way,</u>** the Chamber does not see a difficulty with the witness's testimony": ICC-01/05-01/13-T-11-Red-ENG, p. 6, lns. 7-14
Although the Defence tendered detailed objections concerning the admissibility and weight of P-361's expertise on interception matters (Annex A), the Chamber never issued a reasoned decision concerning these objections, and ultimately relied on his report and testimony without any qualifications or caveats (Trial Judgment, fn. 227).

[67] Appeal Brief, para. 196.
[68] ICC-01/05-01/08-1386, para. 73.
[69] Prosecutor v. Oric, Trial Judgment, para. 28.
[70] ICC-01/05-01/13-2102-AnxA.
[71] Trial Judgment, para. 219.
[72] Trial Judgment, paras. 216, 220.

iv. The Chamber's found that the "case record is replete with further information confirming the chain of custody and authenticity of these communications and logs", which in turn, was based on filings concerning information received by the Registry (and not the Prosecution);[74]

v. The Registry generated or received "many" (but not all) of the challenged materials;[75] and

vi. The Chamber has been unable to identify instances where the communication was inconsistent with the corresponding log, and the "Defence has likewise been unable to present a single substantiated challenge to the authenticity of any of this information".[76]

46. As set out in the Defence Appeal Brief, the above approach failed to distinguish between the different types of digital evidence;[77] the fact that certain CDRs might be more reliable because they have a watermark does not mean that other CDRs also collected by the Prosecution must also be reliable. As a result, a significant amount of materials were not captured by the criteria applied by the Chamber. In particular, findings i., ii, iv., v. do not concern the CDRs generated by the Dutch authorities and transmitted directly to the Prosecution. This means that the Chamber's decision to admit these materials hinged primarily on its conclusion that neither the Chamber nor the Defence had <u>disproved</u> the authenticity and reliability of these materials. This conclusion in turn, rests on the implicit assumption that the Defence had the means and ability to explore these issues in a fair and adversarial manner.

47. The Defence obviously had no ability to object to, disprove the reliability of the Chamber's *in camera* authentication of materials,[78] but its ability to make meaningful submissions as concerns the very small modicum of information placed in the record by the Prosecution was, and continues to be impeded by the non-disclosure of critical information by the Prosecution.[79]

48. In particular, the discovery on appeal that the Prosecution intentionally withheld different versions of telecoms records in its possession, such as the '{Redacted}' CDRs, further bolsters Defence arguments that the Trial Chamber's approach to the admissibility of evidence placed an unfair and inappropriate burden on the Defence of

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[73] Trial Judgment, para. 221.
[74] Trial Judgment, para. 221.
[75] Trial Judgment, para. 223.
[76] Trial Judgment, para. 224. Cf Appeal Brief,para. 195 concerning specific examples of such errors.
[77] Appeal Brief, para. 196.
[78] Appeal Brief, para. 191. In Katanga & Ngudjolo, the Trial Chamber underlined that "it is not for the Chamber to start its own investigations into material which may prove a document's authenticity and reliability" (ICC-01/04-01/07-2635, para. 23).
[79] Appeal Brief, para. 197.

Mr. Bemba: as a result of the non-disclosure of critical information at trial, the Defence did not have the means to prove that digital evidence was unreliable or inauthentic. The evidence should therefore have been excluded, or its weight significantly lessened as result of the Prosecution's failure to lead evidence establishing authenticity and reliability and related failure to disclose information concerning the authenticity and reliability of its evidence.

49. The non-disclosed records were relevant to several Defence challenges concerning the authenticity and reliability of digital records. For example, although the Prosecution claimed that it had obtained the CDRs with an "unbroken chain of custody",[80] some of the '{Redacted}' records had been modified in an unknown and undocumented manner by the Dutch police, after they received them from the TSPs.[81] Since Mr. Bemba was not the user of these numbers, the Bemba Defence also had no means to check the accuracy and reliability of these 'modified' records by reference to Mr. Bemba's recollection. The Prosecution's ongoing refusal to disclose earlier exemplars of the '{Redacted}' CDR therefore deprived the Defence of a means to assess and verify the impact of the break in chain of custody/formatting on the content of the CDRs.

50. The existence of errors is also not a mere hypothetical possibility. The Belgian authorities acknowledged in 2014 that there had been a 'purging error' in earlier versions of the '[Redacted]' CDRs.[82] Moreover, although the Chamber claimed that it did not identify any examples where the logs did not match the intercepts, row 253 of the log – CAR-OTP-0077-1026 - refers to a conversation between [Redacted] and [Redacted] which lasted 8 hours although there is no corresponding intercept of such a duration nor do the [Redacted] CDRs refer to it. The same anomaly (i.e 8 hour calls) exists with respect to rows 177, 193, 207, 210, 222. Given that excel is a modifiable format which is amenable to errors,[83] the above examples underscore the prejudice which arises in circumstances in which the Defence has no possibility to check the accuracy of records by reference to other versions generated by the same provider, which are in the possession of the Prosecution.

[80] ICC-01/05-01/13-597-Conf-AnxB, para. 15.
[81] T-12-Conf-Eng, p. 39, lns. 13-25, p.40, lns. 2-5; CAR-OTP-0090-0724 at 0747 fn.17
[82] CAR-OTP-0088-0283.
[83] ICC-01/05-01/13-1074-Conf, para. 75; ICC-01/05-01/13-1074-Conf-AnxC, p18, row 16.

3. Requested Relief

51. Any system for the admission of evidence must respect the defendant's right to a fair trial,[84] but the approach adopted by the Trial Chamber in this case presented the Defence for Mr. Bemba with the worst of all worlds in an adversarial trial context: the burden was effectively shifted onto the Defence to disprove the admissibility of the evidence,[85] even though:

    i. The content of the majority of evidence emanated from co-defendants, who could not be compelled to testify; and
    ii. The Prosecution exercised exclusive control over information and records that were relevant to the admissibility criteria.

52. This approach to the admissibility of evidence therefore failed to comport to the requirement under human rights law that the defendant must be afforded a fair and adversarial opportunity to challenge the legality and reliability of evidence used to convict him.[86]

53. Even if the Appeals Chamber declines to overturn the legality of the Trial Chamber's system concerning the admission of evidence, the Defence has the right to an effective remedy as concerns the above instances of intentional non-disclosure, which obstructed the ability of the Defence to challenge the admissibility of Prosecution evidence during the trial proceedings.

54. As observed by the ICTY, the Prosecution's disclosure duty has "an important function as it requires the Prosecution to disclose exculpatory material because of its superior – and sometimes even sole – access to this material."[87] In this case, the Prosecution's failure to disclose materials in this case was particularly egregious because it was aware of the difficulty, if not impossibility, for the Defence to obtain the information otherwise: it was the sole gatekeeper. The gravity of this non-disclosure is further exacerbated by the Prosecution's destruction of relevant

[84] Article 64(2), ICC Statute; ICC-01/05-01/08-1386, para. 37.
[85] Appeal Brief, para. 190.
[86] *Khan v United Kingdom*, app. no. 35394/97, paras. 37-38; Appeal Brief, para. 187.
[87] Prosecutor v Kordic & Cerkez, No. IT-65-14/2-A, Decision on Appellant's Notice and Supplemental Notice of Prosecution's Non-Compliance with its Disclosure Obligation Under Rule 68 of the Rules (11 February 2004), para. 17

correspondence, and failure to notarise discussions with domestic authorities on issues concerning confidential and privileged Defence information.

55. Like a witness, the Prosecution had a Statutory duty under Article 54(1) to assist the Chamber to establish the truth. The maintenance and disclosure of investigative records was an important component of this duty. It would be, therefore, fundamentally unbalanced and unfair to uphold the very broad notions of improper conduct set out by the Trial Chamber in the context of Defence investigations, whilst affording no sanction or remedy for conduct on the part of the Prosecution that is tantamount to obstruction: if the provision of false or misleading information on matters concerning the credibility of Defence witnesses potentially falls within the parameters of Article 70, then surely the destruction of information and provision of misleading information concerning the chain of custody and probative value of Prosecution evidence also warrants a finding that this conduct undermined the integrity of these proceedings.

56. In line with the aforementioned *Halilovic* decision, and ECHR judgment of *V v. Finland*,[88] the most appropriate remedy would be to exclude the evidence in question in order to protect the integrity and overall fairness of the proceedings: apart from the harm caused through the Prosecution's failure to comply with its disclosure obligations, the Prosecution's destruction of correspondence and failure to maintain necessary records has deprived the Chamber of the ability to assess and counterbalance the full extent of the prejudice to the Defence.

57. In the alternative, the Chamber should draw adverse inferences against the Prosecution. In terms of the specific inferences which should be drawn:
   a. As concerns the Western Union evidence, it would be appropriate to reverse the Chamber's unsubstantiated finding that the Prosecution acted in good faith, when it violated Austrian bank secrecy laws, the privacy of the defendants and Caroline Bemba, and the privileges and immunities of the Bemba Defence. This in turn, impacts on the 'fruits of the poisoned tree' obtained by virtue of information in these records;[89] and
   b. With respect to the Dutch and Belgian materials, the Appeals Chamber should reverse the Chamber's presumptions of fact concerning the probative value of

[88] *V v. Finland*, Application no. 40412/98, paras. 77-79, cited with approval in ICC-01/04-01/06-1401, fn. 130.
[89] Appeal Brief, para. 184; See also ECJ judgment, 18 June 2015, Case C-583/13 P, paras. 65-66.

telecoms evidence (legality, chain of custody, and reliability), which were not supported by independent evidence or testimony.

58. Even if the latter does not result in the exclusion of evidence, the impacted evidence must, as a result, be treated with extreme caution. Consequently, the Appeals Chamber should reverse the findings against Mr. Bemba which are based exclusively on such evidence.

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Dated this 8th day of January 2018

The Hague, The Netherland