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Date: **14 February 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 Redacted Version

Public Redacted Version of "Prosecution's response to Bemba's 'Second Request for an Effective Remedy for Disclosure Violations', 15 January 2018, ICC-01/05-01/13-2254-Conf

Source: **Office of the Prosecutor**

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

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Introduction

1. Bemba's 4 January 2018 request for an "effective remedy" for alleged "disclosure violations" is yet another instance of Bemba's blithe refusal to acknowledge the clear record of this case.[1] Having failed to demonstrate in his appeal brief specific error in the careful and lawful conduct of this case,[2] Bemba now resorts to unsubstantiated assertions and unfair and illogical inferences to generate such a claim. Yet, hyperbole is no substitute for fact. Nor can careless innuendo supersede precision. Bemba's arguments are unfounded, inaccurate and unnecessary. They should be dismissed summarily.

2. Throughout these proceedings, the Prosecution has, in good faith, made proper disclosure. None of Bemba's arguments alleging "violations"—be it relating to the Western Union records, Dutch materials, or Belgian materials—show otherwise.[3] It follows that none of the sought remedies—be it excluding evidence or drawing adverse inferences[4]—are necessary, let alone justified.

[1] ICC-01/05-01/13-2252-Conf ("Bemba's Request"), and confidential annexes A, B, C, D, E, F and G. *See also* ICC-01/05-01/13-2252-Red.
[2] *See* ICC-01/05-01/13-2144-Conf and ICC-01/05-01/13-2144-Red ("Bemba Appeal Brief"), paras. 141-200 (Grounds 3 and 4.1).
[3] *See* Bemba's Request, paras. 12-18 (2.1.1: The Prosecution's "Disclosure Violations" Obstructed the Defence from Challenging Legality Issues (Ground 3 of the Appeal Brief) [The Western Union records]); paras. 19-35 (2.1.2: The Prosecution's "Non-Disclosure" Obstructed the Defence from Investigating the Legality of the Dutch materials); paras. 36-39 (The Prosecution's "Non-Disclosure" of Belgian Correspondence and Records Obstructed the Defence from Investigating the Legality of Dutch Materials); paras. 40-50 (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)).
[4] *See* Bemba's Request, para. 6 ("[Bemba] requests the Honourable Appeals Chamber to either exclude evidence which is impacted by this non-disclosure, 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."); para. 57 ("In the alternative, the Chamber should draw adverse inferences against the Prosecution […] a. As concerns the Western Union evidence, it would be appropriate to reverse the Chamber's […] finding that the Prosecution acted in good faith […]; 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 telecoms evidence (legality, chain of custody, and reliability) […]").

3. This is Bemba's *ninth* standalone motion on appeal since the briefing was completed.[5] Following his 113-page appeal brief with 13 accompanying annexes, Bemba has, as of today, filed a *further* 154 pages of argumentation, along with an *additional* 42 annexes. Bemba may consider a last throw of the dice necessary. Notwithstanding, he is still not entitled to improperly supplement his appeal, much less through reams of additional and irrelevant argument. This ninth motion even repeats and supplements previous improper requests. That the Appeals Chamber has yet to rule on Bemba's pending motions should not be considered a general benediction to repeatedly violate the established rules of appellate proceedings. And, critically, Bemba is not entitled to make allegations of prosecutorial bad faith without founded cause or substantiated reason.[6] The Prosecution objects to Bemba's allegations made without a reasonable or accurate reading of the record. The Prosecution understands this litigation style to be incompatible with Counsel's obligations under the Code of Conduct.[7]

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[5] *See e.g.,* ICC-01/05-01/13-2172 (Bemba First Additional Evidence Request); ICC-01/05-01/13-2200 (Bemba Reply First Additional Evidence Request); ICC-01/05-01/13-2227-Conf-Red ("Bemba Disclosure Request"); ICC-01/05-01/13-2236-Conf-Corr ("Bemba Reply Disclosure Request"); ICC-01/05-01/13-2241-Conf ("Bemba Remedy Request"); ICC-01/05-01/13-2245-Conf ("Bemba Reply Remedy Request"); ICC-01/05-01/13-2244 ("Bemba Second Additional Evidence Request"); ICC-01/05-01/13-2249 ("Bemba Reply Second Additional Evidence Request").

[6] *See e.g.,* Bemba's Request, para. 5 ("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 […] It should therefore be both deprecated and remedied."); para. 7 ("This request relates to the Prosecution's *intentional* non-disclosure of information […]"); para. 11 ("By refusing to disclose this information pursuant to specific Defence inquiries on appeal, the Prosecution confirmed that the non-disclosure is *intentional* […]"); para. 13 ("[n]ew information has emerged during the appellate proceedings concerning that the Prosecution deleted correspondence, which would have shed light on the question as to whether the Prosecution *genuinely* believed that it was lawful and appropriate to receive confidential Western Union data concerning persons protected by privileges and immunities […]"); para. 25 ("[…] its refusal to disclose […] appears to be a deliberate attempt to keep the cat in the bag as concerns the first chain of custody details."); para. 48 ("In particular, the discovery on appeal that the Prosecution *intentionally* withheld different versions of telecoms records in its possession […]"); para. 54 ("The gravity of this non-disclosure is further exacerbated by the Prosecution's *destruction* of relevant correspondence […]"); para. 55 ("[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 the proceedings"). (emphasis added).

[7] *See e.g.,* Code of Professional Conduct for counsel: Article 24(2): Counsel is personally responsible for the conduct and presentation of the client's case and shall exercise personal judgment on the substance and purpose of statements made and questions asked; Article 24(3): Counsel shall not deceive or knowingly mislead the Court. He or she shall take all steps necessary to correct an erroneous statement made by him or her or by assistants or staff as soon as possible after becoming aware that the statement was erroneous.

4. For all these reasons, the Prosecution requests the Appeals Chamber to dismiss Bemba's Request.

5. On 15 January 2018, Arido filed a submission supporting Bemba's Request "in principle", but failing to advance any specific arguments.[8] Like Arido's earlier motion, he seeks again, in the guise of a "response", to advance some generalised conclusions.[9] For these reasons, the Prosecution requests the Appeals Chamber to dismiss Arido's Submission *in limine*. If the Appeals Chamber should wish to consider Arido's Submission, the Prosecution relies on its position as expressed in its consolidated response on appeal.[10]

Level of Confidentiality

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

Submissions

I. Bemba fails to show a "violation"

7. Bemba's claim that this case related to "known unknowns" and "unknown unknowns" is eye-catching,[11] but empty. Each of the four purported "violations" that he describes is unfounded—let alone that they were allegedly committed in some "intentional" or "deliberate" manner.[12] Bemba, yet again, misreads the pre-trial, trial and appellate record of this case. And he persists in misinterpreting *inter-partes* exchanges that the Prosecution conducted with the Bemba Defence in good faith, and continues to draw unwarranted inferences from them.

[8] ICC-01/05-01/13-2253-Conf ("Arido's Submission"), paras. 1-5.
[9] Arido's Submission, paras. 1-5. *See also* ICC-01/05-01/13-2242-Conf ("Arido's 22 November 2017 Submission"), paras. 1-5; ICC-01/05-01/13-2243-Conf ("Prosecution Response to Bemba Remedy Request"), paras. 5, 24 (asking to dismiss Arido's submission summarily).
[10] *See generally* ICC-01/05-01/13-2170-Corr2-Red ("Prosecution's Consolidated Response").
[11] *See* Bemba's Request, para. 1.
[12] *See e.g.*, Bemba's Request, paras. 5, 7, 13, 25, 48.

a) Bemba's incorrect claims regarding the Western Union records must fail

8. Bemba's claims with respect to the Western Union records are incorrect.[13] Rather than showing a "disclosure violation", the record of the case shows the opposite: the Prosecution's proper disclosure following the Trial Chamber's orders, and its good faith in doing so. Bemba misinterprets the record. Moreover, Bemba inaccurately suggests that the Western Union records are related to ground 3 of his appeal.[14] They are not. His arguments should be dismissed summarily.

9. *First,* Bemba's narrative of the record relating to Western Union-related disclosure during the pre-trial phase and during the trial is partial and faulty.[15] In accordance with its obligations, the Prosecution disclosed Western Union material as part of numerous disclosure packages in the pre-trial and trial phases (2013-2016).[16] Bemba fails to acknowledge any of these disclosures. And he fails to explain why—when he had these materials from 2013-2016—he has chosen to raise claims of further "investigation" only in 2018.[17] And in this light, Bemba's submission that "[he] had no means of identifying the existence of a parallel chain of custody"—even if assumed to be relevant (which it is not)—is wholly inaccurate.[18]

[13] Bemba's Request, paras. 12-18.
[14] Bemba's Request, paras. 7, 12-18, 57(a).
[15] Bemba's Request, paras. 14-15.
[16] *See e.g.*, Pre-Confirmation INCR Package 1 (20 December 2013), Pre-Confirmation INCR Package 3 (31 January 2014), Pre-Confirmation INCR Package 5 (28 February 2014), Pre-Confirmation INCR Package 6 (10 March 2014), Pre-Confirmation INCR Package 7 (18 March 2014), Pre-Confirmation INCR Package 9 (17 April 2014), Pre-Confirmation INCR Package 10 (12 May 2014), Pre-Confirmation INCR Package 14 (9 June 2014), Pre-Confirmation INCR Package 16 (27 June 2014), Pre-Confirmation Rule 77 Package 7 (11 April 2014), Pre-Confirmation Rule 77 Package 10 (28 May 2014), Pre- Confirmation Rule 77 Package 13 (30 July 2014), Trial INCR Package 19 (6 February 2015), Trial INCR Package 21 (20 March 2015), Trial INCR Package 26 (19 June 2015), Trial INCR Package 29 (6 July 2015), Trial Rule 77 Package 15 (6 February 2015), Trial Rule 77 Package 17 (20 March 2015), Trial Rule 77 Package 31 (5 October 2015), Trial Rule 77 Package 35 (3 November 2015), Trial Rule 77 Package 36 (4 November 2015), Trial Rule 77 Package 37 (20 November 2015), Trial Rule 77 Package 38 (18 December 2015), Trial Rule 77 Package 39 (22 January 2016), Trial Rule 77 Package 40 (4 February 2016), Trial Rule 77 Package 41 (23 February 2016), Trial Rule 77 Package 44 (9 March 2016), Trial Rule 77 Package 45 (11 March 2016).
[17] Bemba's Request, para. 14.
[18] Bemba's Request, para. 14, fn. 14.

10. Likewise, Bemba's arguments regarding the Western Union-related correspondence must fail.[19] Bemba is mistaken when he states that "the Prosecution disclosed no correspondence with Mr Smetana".[20] The record shows that, following the Trial Chamber's specific order, the Prosecution disclosed correspondence with Mr Smetana.[21] Critically, the Prosecution's good faith in making such disclosure is apparent,[22] and Bemba's failure to acknowledge these aspects of the record is marked.[23] It also bears noting that Bemba extensively examined P-267 not once, but twice[24]—another fact that Bemba omits. Similarly, Bemba's submission regarding the investigators' report has little to do with this Request, or his appeal, and should be dismissed summarily.[25]

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[19] Bemba's Request, para. 15.

[20] Bemba's Request, para. 14.

[21] *See* ICC-01/05-01/13-T-33-CONF-ENG, p. 12, lns. 16-p. 13, ln. 3 ("The Chamber issues the following ruling: the Prosecution is to inquire if there has been prior correspondence with the witness [P-267] on this matter. Further, it is directed to provide this correspondence, if any, and the end-of-mission report in question to the Chamber by 1 o'clock. The Chamber will then assess if the material contains disclosable information. As regards the contact logs for this witness, the Chamber considers that, in view of the date of disclosure of certain information and the extended discussions between the parties regarding the Prosecution's contacts with this witness, the Defence has a legitimate interest to obtain this information. Accordingly, the Prosecution is ordered to disclose the contact log for P-267 to the Defence forthwith. This concludes the ruling."); p. 34, ln. 23-p. 35, ln. 12 ("We have the following short ruling: Earlier today the Chamber ordered the Prosecution to inquire whether there was any prior correspondence with Witness 267 regarding the Prosecution submission in October 2012, and if so, to provide this prior correspondence and the Prosecution's end-of-mission report to the Chamber. The Prosecution was further requested to disclose to the Defence its contact logs with Witness 267. The Prosecution has duly provided that end-of-mission report to the Chamber and also informed the Chamber that there exists no further documentation in respect of the mission in question. Having reviewed the end-of-mission report, the Chamber is satisfied that the Prosecution has disclosed all relevant information contained therein to the Defence. […]"). *See* emails from the OTP (2 November 2015 and 3 November 2015) to the Trial Chamber and the Defence, disclosing correspondence with P-267, Western Union spreadsheets and the investigators' report. These materials were also formally disclosed.

[22] *See particularly* ICC-01/05-01/13-T-34-CONF-ENG, p. 43, ln. 12- p. 44, ln. 9 ("MR VANDERPUYE: Thank you, Mr President. *And I apologise for interrupting my learned colleague. I just received an email that we had some emails in relation to this witness, so I didn't want Ms Taylor to rest without giving her that information. I'm having trouble getting them, so I'm going to get them. And as soon as I get them, I will disclose them to the Defence. Literally I received this email 30 seconds ago from some investigators*—PRESIDING JUDGE SCHMITT: Information what these emails will be about? MR VANDERPUYE: *They relate to the contacts with the witness, which is what the Defence was specifically asking for and what we've been trying to ascertain.* PRESIDING JUDGE SCHMITT: So would it make sense to wait until you receive these emails and then provide them to the Defence before they continue the questioning perhaps. MR VANDERPUYE: *Yes. We can continue the questioning. I just wanted to point that out, because I don't want her to rest without having that information. She may have additional questions once that information is provided*. […] MR GOSNELL: I'd prefer to proceed with my questions now *and perhaps my learned colleague, Ms Taylor, would reserve her right to ask questions based on anything that is disclosed*. PRESIDING JUDGE SCHMITT: *Absolutely, I think that's the best solution*. […]")(emphasis added).

[23] *See* Bemba's Request, paras. 14-15.

[24] ICC-01/05-01/13-T-34-CONF-ENG, p. 25, ln. 15-p. 43, ln. 6 and ICC-01/05-01/13-T-35-CONF-ENG, p. 43, ln. 17-p. 60, ln. 21.

[25] Bemba's Request, paras. 15, 18.

11. *Second,* Bemba's claim that the Prosecution "destroyed" Western Union-related correspondence is unfounded and regrettable.[26] So is Bemba's unsupported suggestion that the Prosecution may not have "genuinely" believed that it was lawful and appropriate to receive the Western Union material.[27] Allegations of bad faith should not be made lightly. Although Bemba prefers to go down a "rabbit-hole" of suspicion, a reasonable and obvious reading of the *inter-partes* exchanges (some of which Bemba even attaches) shows otherwise. It is clear from this that following a 17 July 2017 request from the Mangenda Defence to disclose certain specific correspondence between P-267 and the Prosecution relating to the screening of Western Union material, the Prosecution made further enquiries. It was unable to locate the specific correspondence. In good faith, however, and to assist the Defence, the relevant Prosecution investigator provided a solemn declaration.[28] The Prosecution also disclosed to the Defence all other material relevant to its efforts to locate the specific correspondence.[29] Moreover, contrary to Bemba's commentary, the record shows that the Prosecution made reasonable efforts to locate the correspondence from the ICC server.[30] Although Bemba has known of this matter since August 2017, his first (albeit incomplete) mention of it comes only now—almost five months later.

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[26] *See* Bemba's Request, para. 54 ("The gravity of this non-disclosure is further exacerbated by the Prosecution's destruction of relevant correspondence […]"); para. 55 ("[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 the proceedings"). *See also* Bemba's Request, paras. 9, 13, 16-18.

[27] Bemba's Request, para. 13.

[28] *See* Bemba's Request, Confidential Annex F.

[29] Emails from Helen Brady to Christopher Gosnell, 25 August 2017 and 29 August 2017 and 3 October 2017 (copying all other Defence teams).

[30] *See* Bemba's Request, para. 18 ("[…] the Prosecution has refused to attempt to resurrect the email from the ICC server.") *But see* Bemba's Request, Confidential Annex G (3 October 2017 email from Helen Brady to Christopher Gosnell) ("[I]n this specific circumstance, the Prosecution did make further reasonable inquiries with the Registry to locate the email(s) in question. Following your request of 17 July 2017, Cristina Ribeiro (OTP Investigations Coordinator) contacted the Head of the Information Security Unit (IMSS) within the Registry regarding the feasibility of retrieving a staff member's emails received in the time period in question—including any that might have been deleted—and the procedures involved. She learned that emails for the relevant time period were not easily retrievable;[REDACTED].").

12. Moreover, Bemba's conjecture as to the content of this correspondence is unconvincing.[31] He has no special insight as to what the content may have been; he has not shown that his extensive examination of P-267 would have been any different if he had had the emails, or that this issue is relevant to his appeal; and most importantly, he has not shown any error in the Trial Chamber's findings confirming the legality of the Western Union-related procedure (findings that he did not contest on appeal). Although Bemba claims that the Western Union materials are relevant to ground 3 of his appeal, they are not. Apart from two "blink and miss" references to "Western Union",[32] Bemba focussed ground 3 of his appeal on other issues.[33] He should not be allowed to expand his appeal in this wholesale manner.[34] These arguments should be dismissed summarily.[35]

13. For these reasons, Bemba's arguments relating to the Western Union material are unsustainable and should be dismissed.

b) Bemba's incorrect claims regarding the CDRs and other Dutch materials must fail

14. Bemba's submission on the Dutch materials is a transparent attempt to re-litigate the issue.[36] He has explored this issue not only in his brief, but also in four previous standalone motions on appeal, including in requests for leave to reply where he has provided substantive submissions even though the Appeals Chamber has yet to decide *if* leave should be granted.[37] His present arguments merely repeat such submissions. But most significantly, Bemba's 17 paragraphs of submission on

[31] *See e.g.*, Bemba's Request, para. 17.
[32] Bemba Appeal Brief, para. 146 (second bullet point) ("Privileged information collected illegally from Western Union, relating to payments that did not originate from Mr Bemba, or otherwise concern Mr Bemba himself"); para. 170 ("As was the case with Western Union, the Prosecution also availed itself of its Article 70 powers to obtain privileged access to information that it then employed to the detriment of the Main Case Defence").
[33] Bemba Appeal Brief (3.1: Mr Bemba's right to privacy and confidentiality was violated through the collection of detention unit materials; 3.2 The Chamber applied an erroneous definition of privilege, and its exception; 3.3: The Chamber failed to rule on, or remedy the ineffective system for vetting privilege, established by the Single Judge).
[34] *Contra* Bemba's Request, para. 57(a) (referring to the "fruit of the poisoned tree" argument).
[35] *See by analogy* ICC-01/04-01/06-3121-Red ("*Lubanga* AJ"), paras. 155-156 (where the Appeals Chamber did not address Lubanga's arguments since he had not challenged a specific finding on appeal).
[36] Bemba's Request, paras. 19-35.
[37] *See* Bemba First Additional Evidence Request; Bemba Reply First Additional Evidence Request; Bemba Disclosure Request; Bemba Reply Disclosure Request.

this issue fail to show any "violation"—let alone that the Defence has been "obstructed" in any manner. His arguments should be dismissed summarily.

15. *First,* Bemba's reluctance to acknowledge the record is apparent. He persists in his mistaken belief that "CDRs presumptively belong to the defendants".[38] In response, the Prosecution relies on its earlier submissions.[39]

16. *Second,* by arguing that the Prosecution's disclosure of CDRs was a "deliberate attempt to keep the cat in the bag",[40] Bemba disregards the Prosecution's reasonable explanation[41] and persists in his mischaracterisation. He fails to show any "violation".

17. *Third,* although Bemba generally speculates on the "informal interactions" between the Prosecution and the Dutch authorities and the "absence of records",[42] his partisan view shows no "violation" or error. And although Bemba appears to rely on certain provisions of Dutch law to claim, among others, that "there were no records of hearings" in the Dutch dossier,[43] he surprisingly omits mentioning the Dutch Public Prosecutor's 13 April 2016 affirmation that "every action [relating to the lawfulness of the implementation documents that the ICC received from the Netherlands] was entirely in accordance with Dutch legislation and jurisprudence".[44] It strains credulity that Bemba could argue otherwise. Nor do the terms of article 69(8) of the Statute permit any greater scrutiny of national law and procedures.

[38] Bemba's Request, para. 22.
[39] ICC-01/05-01/13-2233-Conf ("Prosecution Response to Bemba Disclosure Motion"), paras. 5-24; ICC-01/05-01/13-2238-Conf ("Prosecution Response to Bemba Reply Disclosure Motion"), paras. 7-21.
[40] Bemba's Request, para. 25.
[41] *See* Prosecution Response to Bemba Disclosure Motion, paras. 5-24.
[42] Bemba's Request, paras. 26-30.
[43] Bemba's Request, paras. 31-35.
[44] ICC-01/05-01/13-1861-Conf-Anx3 ("13 April 2016 Statement"), p. 3.

18. *Fourth,* in referring to the Dutch file, Bemba once again mischaracterises his access to it.[45] Contrary to his suggestion and as already noted, Bemba has had access to the Dutch dossier since *April 2016*, and even received further time at trial to review the documents therein.[46] His claim as to the Prosecution's disclosures are unfounded, and merely an attempt to deflect attention from his own lack of diligence. Moreover, in referring to the Dutch materials, Bemba impermissibly refers to some which are not in the trial record (for instance the 13 September 2013 Dutch District Court Decision).[47] Notwithstanding, even if this decision were in the record, its clear terms would only further support the legality of the process.

19. Bemba's arguments on the CDRs and other Dutch materials are unsustainable and should be dismissed summarily.

c) Bemba's unfounded arguments on the Belgian correspondence and records must fail

20. Bemba's claims regarding the Belgian correspondence and records should be dismissed summarily.[48] Indeed, his claims that his defence was "obstructed" are manifestly unfounded.

21. Bemba presents no cogent link why *Belgian* documents would be relevant to investigating the "legality of *Dutch* materials".[49] Bemba himself can provide no more than a tenuous link. And even while arguing that "the legal basis and reasoning underpinning the Belgian authorities' refusal to intercept [Kilolo's] communications" was relevant, he concedes that "the ICC and the Netherlands [are] not bound by this

[45] Bemba's Request, para. 33 ("Although the Defence *now* has access to specific documents which were provided to [Kilolo's] Dutch lawyer […]").
[46] ICC-01/05-01/13-2194-Conf ("Prosecution Response to Bemba First Additional Evidence Request"), paras. 12-21.
[47] Bemba's Request, para. 32, fn. 54 (referring to CAR-D-20-0009-0111 at 0117). The Bemba Defence disclosed this document to the Parties on 11 December 2017, and communicated the same to the Appeals Chamber on 13 December 2017 (ICC-01/05-01/13-2248 and confidential annexes "Bemba 13 December 2017 Disclosure") . Bemba has not sought to admit this decision as additional evidence on appeal.
[48] Bemba's Request, paras. 36-39.
[49] Bemba's Request, paras. 36-39 (emphasis added).

determination".[50] Moreover, all the arguments that Bemba claims he could make (the necessity and proportionality of the Single Judge's orders, and the scope of the crime-fraud exception at the ICC, among others) have been made by him in ample measure.[51]

22. For these reasons, Bemba's arguments should be dismissed.

d) Bemba's unsustainable arguments on "digital evidence" must fail

23. Bemba recycles old arguments he has already made regarding the "digital evidence".[52] In claiming that he was "not in a position to assess [their] authenticity",[53] Bemba merely repeats his earlier submissions on bar-table motions,[54] ones as recently as November 2017 (in another standalone motion, albeit in a different context).[55]

24. Moreover, although Bemba provides a lengthy commentary on the reliability of "digital evidence",[56] he appears to concede that the Chamber itself authenticated the specific materials.[57] And indeed the Chamber conducted its own independent assessment of the telephone communications to verify them.[58] Bemba's effort to second-guess the Chamber lacks merit. For instance, his attempt to rely on a letter from the Belgian authorities relating to a "purging error" with respect to one specific number fails to note that he has had this information since May 2015.[59] Likewise, his

[50] Bemba's Request, para. 39.
[51] *See generally* Bemba Appeal Brief.
[52] Bemba's Request, paras. 40-50. The Prosecution assumes that Bemba's reference to "digital evidence" means "telecommunications-related evidence".
[53] Bemba's Request, para. 40.
[54] *See generally* Bemba Appeal Brief (ground 4).
[55] *See generally* Bemba Second Additional Evidence Request; Bemba Reply Second Additional Evidence Request.
[56] Bemba's Request, paras. 43-47.
[57] Bemba's Request, para. 47 ("The Defence obviously had no ability to object to, disprove the reliability of the Chamber's *in camera* authentication of materials […]").
[58] ICC-01/05-01/13-1989-Red ("Trial Judgment"), paras. 213-225, and particularly, para. 216 ("When determining the relevant details of the telephone communications, such as the speakers, relevant numbers and the date of the call, the Chamber has conducted its own independent assessment.").
[59] Bemba's Request, para. 50 (referring to CAR-OTP-0088-0283, disclosed to the Defence in May 2015, Trial INCR Package 24, 19 May 2015).

attempt to link the letter from the *Belgian* authorities to a different document relating to *Dutch* CDRs is ambiguous.[60] Even so, Bemba could have made full use of this information before the Trial Chamber, if he wished. To do so now is to merely disagree with the Trial Chamber's overall assessment, without showing error. Finally, considering the frequency and volume of Bemba's submissions in the trial and appellate record, his claim that his ability to do so was "impeded" by the Prosecution is surprising.[61]

25. For these reasons, Bemba's submissions on "digital evidence" are unconvincing and should be dismissed.

26. Further, as set out in paragraph 5 above, Arido's Submission should also be dismissed summarily.

[60] Bemba's Request, para. 50 (referring to CAR-OTP-0077-1026, disclosed as part of Pre-Confirmation INCR Package 7 (18 March 2014)).
[61] Bemba's Request, para. 47.

Conclusion and Relief

27. Bemba's Request fails to establish a disclosure violation, or that his defence was "obstructed" in any manner. He deserves no remedy. Moreover, Bemba seeks to improperly expand his appeal. The Prosecution respectfully requests the Appeals Chamber to dismiss Bemba's Request summarily.

28. Likewise, since Arido's Submission fails to qualify as a response, and impermissibly re-litigates his appeal, the Prosecution requests the Appeals Chamber to dismiss it *in limine*.

Fatou Bensouda, Prosecutor

Dated this 14 February 2018[62]
At The Hague, The Netherlands

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