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TRIAL CHAMBER III

Before: **Judge Sylvia Steiner, Presiding Judge**
Judge Joyce Aluoch
Judge Kuniko Ozaki

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF
THE PROSECUTOR
***v.* Jean-Pierre Bemba Gombo**

Public
With Confidential ex parte Annexes I, II, III
Public Redacted Annexes IV, V, VI, VII, VIII
And Confidential Annex IX

Public Redacted Version of Defence Request for Relief for Abuse of Process

Source: **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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A. INTRODUCTION

MR BADIBANGA: […] We know precisely what we are looking for. We do not think that will require six or eight months. It is sufficient for me to hear Mr Bemba telling Mr Babala "Have you given the $1,000 to Mr X who is coming to testify next week?" If I have just that information then I can come back to you and tell you "This is a recording that confirms the payment of money by -- through Western Union and which in turn confirms what a witness told us." […]

PRESIDING JUDGE STEINER: Maître Badibanga, for instance, would be a good start for the Prosecution investigation just to check the log-book that Detention Centre's – nodding does not help.[1]

Jean-Jacques Badibanga and Her Honour Judge Steiner

1. Through a combination of different events and actions, the constituent elements of Mr. Jean Pierre Bemba Gombo's right to a fair, impartial and independent trial have been irreparably ruptured.

2. Over the last two years, the ICC Prosecution has engaged in actions which have violated Mr. Bemba's right and/or the right of his Defence to:

i. privileged communications, as protected by rule 73(1) of the Statute;
ii. privileges and immunities, as protected by Article 48(4) of the Statute; and
iii. receive timely disclosure of Article 67(2) and Rule 77 information, as pertains to Prosecution witnesses and the Defence case.

3. The Prosecution has also abused its prosecutorial powers to the detriment of Mr. Bemba's rights under the Statute, including the right to equality of arms, and adversarial proceedings.

[1] T-303-Conf-Red3-ENG-ET, p.23, lines 17-22, p.24, lines 8-10.

4. Although the Prosecution had the power to initiate an Article 70 investigation, it also had a corresponding duty under Article 54(1)(c) to ensure that its investigations and prosecutorial actions were consistent with Mr. Bemba's right to a fair trial in the Main Case.

5. Notwithstanding this duty, the Prosecution:

i. exploited the Article 70 investigation in order to obtain information concerning Defence witnesses, and Defence strategy, which it would not otherwise have been entitled to, in violation of the right to equality of arms;
ii. failed to implement any "Chinese walls" or safeguards to ensure that information obtained through the Article 70 investigation was not used in connection with the Main Case;
iii. failed to inform the Article 70 Single Judge or the Registrar of the existence of a potential conflict of interest, which had significant repercussions concerning the system for monitoring privileged information;
iv. compromised the appearance of the impartiality of the Trial Chamber by initiating an *ex parte* rebuttal case before the Trial Chamber, during the Defence case, of which the Defence had no notice or ability to address.

6. The Prosecution has also aggravated these violations by withholding relevant and disclosable information from the Defence, and providing misleading information to both the Defence and different Chambers.

7. The judicial division of labour between the Trial Chamber and the Single Judge in the Article 70 case has also created a lacuna as concerns the protection and enforcement of Mr. Bemba's fair trial rights, and his related right to a remedy.

8. Since referring the Article 70 investigation to the Pre-Trial Chamber, the Trial Chamber has declined to exercise any oversight in relation to the impact of such proceedings on the fair trial rights of Mr. Bemba in the Main Case. At the same time, the Single Judge in the Article 70 expressly excluded the issue of the impact on Mr. Bemba's fair trial rights in the Main Case from his consideration.

9. The Defence has also been denied the opportunity to contest the legality of these actions before the Trial Chamber, the Single Judge, or the legal mechanisms which should otherwise have applied in connection with decisions impacting on detention rights. Concretely, the prejudice suffered by Mr. Bemba is as follows:

i. the Prosecution has obtained access to privileged information concerning Defence strategy and instructions, in violation of Mr. Bemba's right to communicate in confidence with his Defence, and his right to remain silent before the Court;
ii. this in turn, has severely impinged the ability of Mr. Bemba to seek legal advice on any sensitive issues, in violation of his right to effective representation;
iii. the disclosure of Defence strategy and internal communications concerning the strengths and weaknesses of the Defence case has prejudiced the ability of the Defence to prepare its Final Brief and rely on certain evidence;
iv. the illegal investigative activities of the Prosecution (obtaining information from States, which should have been protected by privileges and immunities) were used to trigger further incursions into Defence rights, such as the monitoring of non-privileged and privileged communications;
v. the protective measures of Defence witnesses have been violated, which impacts on their availability to assist the Defence in connection with future proceedings;
vi. the appearance of impartiality of the Trial Chamber was compromised through *ex parte* communications concerning the credibility of Defence witnesses and Defence evidence; and
vii. the repeated public violations of Mr. Bemba's right to be presumed innocent, and public tainting of the professionalism and integrity of his Defence have impacted on the impartiality of the proceedings and occasioned unnecessary mental stress and harm for Mr. Bemba.

10. The universal nature of the right to a remedy has been recognised by the ICC. Cumulatively, when viewed in conjunction with the enormous payments made to Prosecution witness and the repeated interferences on the part of the DRC authorities, the

magnitude of these violations is such that is no longer possible for Mr. Bemba to have a fair trial before the ICC, and it is therefore necessary and appropriate to issue a permanent stay of the proceedings.

11. In particular, given the central role played by the Prosecution in such violations, the ICC cannot adhere to its duty to promote "lasting respect for and the enforcement of international justice" whilst tolerating or failing to condemn such egregious abuses of prosecutorial powers.

12. As acknowledged by the Prosecution, the question as to whether there has been an abuse of process, which has vitiated the defendant's right to a fair trial, should be assessed at the close of trial in order to avoid hypothetical discussions of prejudice.[2] It also bears noting that notwithstanding the fact that the Defence has notified the Chamber and the Prosecution of its intention to file an abuse of process motion, and has requested access to information for that purpose,[3] the Trial Chamber has never requested the Defence to file it by a certain deadline. Several of the issues set out herein were also the subject of ongoing litigation, and as such, it would have been premature and potentially unnecessary to raise these issues whilst a judicial determination was still pending.

B. REQUEST FOR AN EXTENSION OF THE PAGE LIMIT

13. Under Regulation 37(2) of the Regulations of the Court, the Chamber may "at the request of a participant, extend the page limit in exceptional circumstances." Such extensions have been granted in other cases on the basis of the number of potentially relevant issues and their complexity;[4] the novelty of issues raised;[5] and the need of a party to set forth in sufficient detail the facts and circumstances involved, and discuss facts and law that involve numerous people.[6]

[2] ICC-01/05-01/08-3067, para. 12, citing ICC-02/05-03/09-410, para.102.
[3] ICC-01/05-01/08-2945-Red, para. 77; ICC-01/05-01/08-3121-Conf, para. 1067-1069; ICC-01/05-01/13-728-Anx1, para. 3.
[4] ICC-01/04-01/07-3334, para. 7; ICC-01/04-01/06-2946, para. 5.
[5] ICC-01/09-01/11-1134, para. 4
[6] ICC-01/09-27, para. 4.

14. The present application is 87 pages and 29918 words. Exceptional circumstances exist in relation to the present application. The Prosecution has been engaged in litigation before two Chambers of the ICC, often conducted *ex parte*, and widespread investigations across multiple jurisdictions for a period of years. Each of these steps has the potential to impact significantly the fair trial rights of Mr. Bemba. Privileges and immunities have been lifted, documents and casefiles seized, privileged phone conversations recorded and listened to, Mr. Bemba's cell and his Defence Office raided, and his lawyers arrested. The number of potentially relevant and complex issues require a full discussion and consideration, and many of the questions raised are not only novel before this Court, but novel to international criminal law. The individuals involved, and the facts and law which will need to be engaged for a proper analysis of the impact of the Prosecution's investigative stance constitute exceptional circumstances, and warrant an extension of the page limit.

15. This motion in terms of substance and effect is of equal if not greater importance to a challenge to jurisdiction or admissibility, which attract a 100 page limit. To further curtail the ability of the Defence to develop Mr. Bemba's right to an effective remedy as concerns repeated and grave violations of his rights would in itself, violate his rights.

C. PROCEDURAL HISTORY

16. The Defence case started on 14 August 2012 with the testimony of D-53[7] and ended on 14 November 2014 with D-13.[8]

17. Two months into the Defence case, on 15 November 2012, the Prosecution approached the Trial Chamber in an *ex parte* filing and requested the record of payments made by the Registry to witnesses called by the Defence of Mr. Jean-Pierre Bemba.[9] The Prosecution informed the same Judges sitting in Trial Chamber III, hearing the Defence witnesses, that the Prosecution was conducting a parallel investigation pursuant to Article 70 of the Rome Statute.[10]

[7] ICC-01/05-01/08-T-229-ENG.
[8] ICC-01/05-01/08-T-352-ENG.
[9] ICC-01/05-01/08-2412, para. 1.
[10] ICC-01/05-01/08-2412, para. 1.

18. Instead of finding that it had no competence to deal with the Prosecution's request, and that the Prosecution had erroneously raised these issues in front of the Chamber seized with the Main Case, the Trial Chamber ordered the Registry to provide observations.[11] The Chamber then ruled that the Registry observations listing all expenses incurred by the Defence meant that the Chamber was not required to rule on the filing,[12] leaving the serious allegations that Defence witnesses were bribed, hanging in the air over the Main Case.

19. During the next three months, the Defence continued to present its witnesses to the Chamber. The Defence was left completely in the dark regarding the steps being taken in the background to obtain the details of expenses provided to its witnesses. At the same time, the Prosecution systematically questioned Defence witnesses, about money and benefits they received in relation to their testimonies.[13]

20. On 20 March 2013, while the Defence was presenting its 16th witness, the Prosecution came again before Trial Chamber III with a new *ex parte* request relating to the Article 70 investigation. This time, the Prosecution shared information given by the Austrian authorities regarding Western Union financial transactions of the suspects, namely a biased breakdown of money transferred via Western Union from a certain "Babala" to various Defence witnesses,[14] all the while knowing that bringing these allegations and sharing the progress of their investigation would without a doubt unconsciously influence the way Defence witnesses were perceived by the Bench: as liars.[15]

[11] ICC-01/05-01/08-2421, para.3.
[12] ICC-01/05-01/08-2461, para.3.
[13] [REDACTED]; T-258-Red-ENG-ET, p.2, line 25 – p.3, line 9; T-260-Red ENG-ET, p.6, lines 14-23; T-263-Red-ET, p.14, lines 6-20; T-265-Red -ENG-ET, p.15, lines 7-18; T-268-Red ENG-ET, p.78, line 22 – p.79, line 12; T-274-Red ENG-ET, p.34, lines 2-14; [REDACTED]; T-277-Red ENG-ET, p.39, lines 4-11; T-297-Red -ENG-ET, p.18, line 17 – p.20, line 5; T-299-Red -ENG-ET, p.24, lines 11-16; T-322-Red ENG-ET, p.27, line 24 – p.28, line 21; T-323bis-Red-ENG-ET, p.21, lines 22-23; T-334-Red -ENG-ET, p.17, lines 23-25; T-335-Red-ENG-ET, p.19, lines 8-13; T-337-Red-ENG-ET, p.40, lines 3-6; T-337-Red-ENG-ET, p.40, lines 13-20; T-339-Red-ENG-ET, p.41, lines 18-19; T-342-Red-ENG-ET, p.13, lines 1-10; T-345-Red-ENG-ET, p.12, line 4 – p.15, line 6.
[14] ICC-01/05-01/08-2548, para. 11.
[15] ICC-01/05-01/08-2548, Prosecution's Notice to the Trial Chamber of Article 70 investigation and request for judicial Assistance to obtain evidence.

21. Three weeks later, on 9 April 2013, the Trial Chamber convened an *ex parte* Status Conference, where the Prosecution requests and technical implications were discussed.[16] The Prosecution was represented by the Senior Trial Attorney from the Main Case, Mr. Jean-Jacques Badibanga, and other members of the Main Case trial team.[17] Relevant information given by the Prosecution to the Trial Chamber remains redacted from the Defence, with the Trial Chamber having denied a Defence request for the provision of an unredacted version.[18] From what Senior Trial Attorney Badibanga says, the Defence can establish that the Prosecution informed the Chamber that it planned to obtain assistance from a number of States:[19]

> And regarding (Redacted) (Redacted). With the information that we have, we plan to enter into contact with the authorities of those countries to be able to act in their territories (Redacted) Obviously the Defence would be informed at that time, because the information will not remain secret.

22. During the same Status Conference, Mr. Badibanga asked for authorisation to monitor the calls,[20] in response to which, the Presiding Judge requested further information:[21]

> In terms of interference of the Chamber – this Chamber, or any other Chamber, what the Prosecution would request more specifically is the authorisation for the tapping telephone and (Redacted) (Redacted) because apparently the other kind of investigation the Prosecution has already proceeded without the need of judicial authorisation [of the Chamber]; is that correct?

By doing so, the Chamber implicitly agreed to be a part of an investigation which was outside of its competence.

[16] T-303-Conf-Red3-ENG-ET.
[17] T-303-Conf-Red3-ENG-ET, p.1, lines 17-21.
[18] ICC-01/05-01/08-3021.
[19] T-303-Conf-Red3-ENG-ET, p.6, line 18 – p.7, line 7; CAR-OTP-0071-0529 (money allegations); CAR-OTP-0077-1483 (money allegations); CAR-OTP-0073-0615 (money allegations).
[20] T-303-Conf-Red3-ENG-ET, p.4, lines 2-21.
[21] T-303-Conf-Red-ENG-ET, p.4, line 25 – p.5, line 4.

23. It was only three weeks later, on 26 April 2013 that the Chamber, after hearing and being involved with the Prosecution's possible Article 70 investigation, finally ruled that it had "no competence on the request of the Prosecution of 20 March 2014".[22]

24. Moreover, six months after the Prosecution's first request, whilst the Defence was presenting its witnesses, the Prosecution filed two *ex parte* requests, obtained expenses incurred by Defence from the Registry and shared their suspicions with the Registry and the Chamber.[23]

25. On 3 May 2013, the Prosecution filed a request before Pre-Trial Chamber, submitting that it was in possession of evidence indicating that Mr. Bemba, his associates and/or members of his Defence team were involved in a scheme to provide benefits to Defence witnesses in exchange for false testimony and false documents.[24] The Prosecution made four requests:

> Order the registry to verify whether any of [a series of telephone numbers are listed in Registry records and, if so to whom they belong ("First Request")
> Order the registry to provide to an independent counsel appointed by the Prosecution access to the Accused's telephone logs and to existing recordings" of all calls made to, or through, Fidèle Babala ("a close confidant of the Accused within the Mouvement de Libération du Congo political leadership and his chef-de-cabinet during his tenure as vice-president of the Democratic Republic of the Congo"), and to provide only relevant information to the Prosecution from his or her review of the telephone logs and pertinent recordings of telephone calls("Second Request");
> Should the Chamber find that Regulation 92 of [the] Regulations [of the Court] applies, order pursuant to Regulation 92(4) that there be no disclosure to the Accused until such time that disclosure would not prejudice the investigation ("Third Request");
> Vary the terms of the protocol governing contact with Defence witnesses to allow the prosecution to conduct interviews with Defence witnesses who received payments as set forth in the

[22] ICC-01/08-01/05-2606-Red.
[23] ICC-01/05-01/08-2412; ICC-01/05-01/08-2548; T-303-Conf-Red3-ENG-ET.
[24] ICC-01/05-01-46, Decision on the Prosecutor's "Request for judicial assistance to obtain evidence for investigation under Article 70", para. 1. Refers to the ICC-01/05-44-Red, para.1, disclosed to the public on 12 February 2014; see also, ICC-01/05-44-Red, Public redacted version of "Request for judicial assistance to obtain evidence for investigation under article 70", 3 May 2013, ICC-01/05-01/-44-Red.

> Western Union records without prior notice to the Defence ("Fourth Request").

26. Of significance is the fact that the Prosecution admitted that it was:[25]

> currently seeking cooperation from a number of states to obtain further evidence of the scheme. Among other steps, the Prosecution has [REDACTED], through their [REDACTED]. The Prosecution has taken steps to obtain a judicial order from the [REDACTED] to release any relevant information. It expects the results of this enquiry to be available in the coming weeks.

27. On 6 May 2013, Judge Tarfusser was designated as Single Judge.[26] Two days later, he granted all four of the Prosecution requests.[27]

28. On 20 May 2014, the Registry filed observations[28] regarding the Prosecution's request for judicial assistance, which were rejected by the Prosecution on 22 May 2014.[29]

29. On 27 May 2014, the Single Judge ordered the Registry to make available to the Prosecution without delay the complete log of all telephone calls placed or received by Mr. Bemba during his stay at the Detention Centre, as well as any available recording of all non-privileged calls either placed or received by him.[30]

30. On 19 July 2014, the Prosecution filed another request,[31] submitting that the logs and recordings received from the Registry […] strongly support the previously collected evidence of the:[32]

> scheme to bribe witnesses in exchange for false testimony and false documents" in violation of Article 70(1)(a)-(c) of the

[25] ICC-01/05-44-Red, para.18; CAR-OTP-0071-0529 (money allegations); CAR-OTP-0077-1483 (money allegations); CAR-OTP-0073-0615 (money allegations).
[26] ICC-01/05-45-Red, Decision designating a Single Judge.
[27] ICC-01/05-46, Decision on the Prosecutor's Request for judicial assistance to obtain evidence for investigation under Article 70.
[28] ICC-01/05-48.
[29] ICC-01/05-49, (disclosed to the public on 25 February 2014).
[30] ICC-01/05-50.
[31] ICC-01/05-51-Red
[32] ICC-01/05-52-Red2, quoting Prosecution's request ICC-01/05-51, paras. 1-2.

> Statute and "indicate that the Accused is orchestrating the scheme, employing Aimé Kilolo, Jean-Jacques Mangenda, Fidèle Babala and [REDACTED] to facilitate [such] scheme."

31. The Prosecution then asked for recordings of telephone intercepts from the Dutch and Belgian governments of Mr. Bemba's Lead Counsel Aimé Kilolo, and Jean-Jacques Mangenda, his Case Manager.[33]

32. [REDACTED].[34]

33. On 29 July 2013, the Single Judge granted the Prosecution request by allowing the Prosecution to approach the Dutch and Belgian authorities to access the record of telephone calls made by Mr. Kilolo and Mr. Mangenda, in spite of the fact that such recordings involve conversations between Counsel and the Accused.[35]

34. The Single Judge also appointed an independent counsel tasked with

a. reviewing the logs of telephone calls either placed or received by Mr. Kilolo and Mr. Mangenda made available by the relevant Belgian and Dutch authorities, with a view to identify any calls received from or placed to parties connected with the investigation;
b. listening to the recordings of any and all such calls;
c. transmitting to the Prosecutor the relevant portions of any and all such calls which might be of relevance for the purpose of the investigation.[36]

35. On 7 October 2014, the Prosecution filed its third request for judicial assistance to obtain evidence.[37] The Prosecution claimed it was in possession of information showing telephone contact between Mr. Kilolo and a number of Defence witnesses, *inter alia* in

[33] ICC-01/05-52-Red2, para. 2.
[34] [REDACTED].
[35] ICC-01/05-52-Red2, para. 5.
[36] ICC-01/05-52-Red2, pp.7-8.
[37] ICC-01/05-60-Red, with confidential, ex parte annexes A and B; see also, ICC-01/05-60-Red, Public Redacted version of "Third Request for Judicial order to obtain evidence for investigation under article 70", ICC-01/05-60-Conf-Exp.

violation of protocols established by Trial Chamber III,[38] and therefore asked the Pre-Trial Chamber to order the VWU to provide the Prosecution with information relating to telephone contact information for Defence witnesses, with a view of allowing the Prosecutor to "assess the scope of probable unauthorised contact Mr. Aimé Kilolo has had with Defence witnesses".[39]

36. On 10 October 2013, the Single Judge granted the Prosecutor's request in full. He ordered the VWU to provide the Prosecutor with all available telephone contact information for all 62 Defence witnesses, all available telephone contact information for VWU mobile phones issued to Defence witnesses during their stay in the Netherlands, and clarification as whether Mr. Kilolo had specific authorisation to contact Defence witnesses D04-23 and D04-26 during overnight adjournments in their testimonies.[40]

37. [REDACTED].[41] [REDACTED].[42]

38. On 20 November 2013, the privileges and immunities of Mr. Kilolo and Mr. Mangenda were lifted by the Presidency at the request of the Single Judge Tarfusser.[43] On the same day, [REDACTED] seized personal belongings from Fidèle Babala's residence.[44]

39. On 24 November 2013, Jean-Pierre Bemba, Lead Counsel Aimé Kilolo, Case Manager Jean-Jacques Mangenda and Congolese politician Fidèle Babala were arrested.[45]

D. REQUEST FOR CONFIDENTIALITY

[38] ICC-01/05-60-Red, with confidential, ex parte annexes A and B, quoted in ICC-01/05-61-Red, p.4.
[39] ICC-01/05-60-Red, with confidential, ex parte annexes A and B, quoted in ICC-01/05-61-Red, p. 4.
[40] ICC-01/05-62-Red, 4 February, p.5.
[41] [REDACTED].
[42] [REDACTED].
[43] ICC-01/05-68-Red, Decision on the urgent application of the Single Judge of Pre-Trial Chamber II of 19 November 2013 for the waiver of the immunity of lead defence counsel and the case manager for the defence in the case of The Prosecutor v Jean-Pierre Bemba Gombo.
[44] CAR-OTP-0072-0142.
[45] http://www.icc-cpi.int/EN Menus/icc/press%20and%20media/press%20releases/pages/pr962.aspx.

40. This filing is *ex parte*, Prosecution and Defence only, due to references to confidential materials in the Article 70 case. The Defence will submit both a confidential redacted version and a public redacted version forthwith.

E. SUBMISSIONS

1. The Prosecutor abused its investigative powers, and in so doing, violated the rights of Mr. Bemba and prejudiced his Defence

41. Investigative powers are strictly linked to other duties incumbent on the Prosecution under the Rome Statute. In particular, the Prosecution is required to conduct itself as an independent and impartial Minister of Justice, and to "fully respect the rights of persons arising under the Statute", as per Article 54(1)(c) of the Statute.

42. For this reason, Her Honour Judge Steiner has previously stated that:[46]

> As the title of article 54 of the Statute expressly states, investigative powers are concomitant with investigative duties and, as the organ primarily in charge of the investigation, the Prosecution is bound to act with due care to ensure that investigative techniques will by no means affect at a later stage the right of accused persons to a fair trial.

43. Article 54(2) further imposes on the Prosecution a duty to ensure that its investigative activity does not prejudice the security or protection of witnesses, which self-evidently includes Defence witnesses.

44. Accordingly, although the Prosecution had the power to investigate the credibility of Defence witnesses and evidence, it was also under a strict obligation not to employ this power in a manner which either violates or infringes on the rights of Mr. Bemba, or, the protection and security of Defence witnesses.

[46] ICC-01/04-01/07-621, para. 39.

45. The Chamber is empowered and indeed required to intervene to provide a remedy in circumstances in which the actions of the Prosecution have violated or prejudiced the rights of the Defence.[47]

46. In conducting its investigations into the credibility of Defence witnesses and evidence, the Prosecution:

a. Requested States to perform actions which violated the privileges and immunities of the Defence;
b. Received privileged information concerning Defence strategy and instructions from Mr. Bemba, internal work product, and *ex parte* information;
c. Employed sharp trial tactics by failing to disclose to the Defence information concerning the credibility of Defence witnesses and evidence, and failing to put its case to these witnesses; and
d. Repeatedly attempted to contaminate the ability of the Trial Chamber to adjudicate the case impartially by firstly, making submissions on the credibility of Defence witnesses and evidence during *ex parte* Status Conferences, and secondly, repeatedly employing the existence of the pending Article 70 case as a basis for impugning the credibility of the Defence and its case.

47. Each violation, and the resultant prejudice will be addressed in turn.

2. The Prosecution requested States to perform actions which violated the privileges and immunities of the Defence

48. Breaches of privileges and immunities do not constitute technical infringements: they go to the heart of the ability of the Defence to perform its work.[48] The overarching

[47] ICC-01/04-01/07-621, para. 55: [i]n the view of the Single Judge, the competent Chamber, as the organ of the Court which has ultimate responsibility for interpreting and applying the different provisions of the Statute and the Rules, has always the competence to determine whether the Prosecution's practices, as well as agreements concluded by the Prosecution pursuant to article 54 (3) (e) of the Statute, are consistent with the Statute and the Rules. See also ICC-01/04-01/06-2582, paras. 47-48.

purpose of privileges and immunities is to ensure the ability of the Defence to perform its functions in an independent manner, which is also consistent with Defence confidentiality, as set out in Article 67(1)(b) and (g) and Rule 73(1).

49. Any breach or violation of immunities therefore has a chilling effect on the willingness of Defence team members to prioritise the interests and rights of their client, over their concern that they could be subjected to legal processes as a result.[49]

50. If the inviolability of Defence information is compromised (which is the case if it is accessed by national authorities), the protection and security of Defence witnesses and investigations are also compromised. This in turn, undermines the ability of potential witnesses and sources to have confidence that their cooperation with the Defence will remain strictly confidential.

51. Breaches in the inviolability of Defence information therefore affect the ability of the Defence to obtain information and evidence, under the same conditions as the Prosecution. Since these immunities attach to Defence team members in their professional rather than personal capacity, it also follows that any violation of these immunities impacts on the rights of Mr. Bemba himself, and not just the individuals concerned.

52. In this particular case, the Prosecution informed the Trial Chamber on an *ex parte* basis that it received information from Western Union, in Austria, concerning financial transfers between persons believed to be either Defence witnesses or related to Defence witnesses, and members of the Defence.[50] It would appear that the Prosecution obtained this

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[48] *Prosecutor v. Gotovina et al.,* Decision on Gotovina Defence Appeal Against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, (Gotovina Immunities Decision) 14 February 2011, para. 31: Finding and interviewing witnesses, conducting on-site investigations, and gathering evidence in a State's territorial jurisdiction may be more difficult without the grant of functional immunity, as there is always a risk that a State could interfere by exercising its jurisdiction in such a way as to impede or hinder the activities of the defence.

[49] "Failure to accord functional immunity to defence investigators could impact upon the independence of defence investigations, as investigators may fear legal process for actions related to their official Tribunal function", Gotovina Immunities Decision, para. 33, citing ICTR Appeals Chamber *Erlinder* decision, at para. 19, where the Appeals Chamber stated: "The proper functioning of the Tribunal requires that Defence Counsel be able to investigate and present arguments in support of their client's case without fear of repercussions against them for these actions. Without such assurance, Defence Counsel cannot be reasonably expected to adequately represent their clients."

[50] ICC-01/05-01/08-2548-Red4; T-303-Conf-Red3-ENG-ET.

information pursuant to a request for cooperation, during the course of 2012.[51] This request was submitted and executed prior to the initiation of the Article 70 investigation before the Single Judge.

53. The Prosecution also used this information as the basis for *ex parte* submissions to the Trial Chamber in relation to credibility of Defence evidence.[52] The Prosecution further informed the Trial Chamber of other investigative steps, which involved the Prosecution requesting States to provide information that fell within the purview of Article 18 of the Agreement on Privileges and Immunities of the International Criminal Court ("APIC").[53]

54. For example, in its submissions to the Trial Chamber on 20 March 2013, the Prosecution informed the Chamber that:[54]

> The Prosecution is currently requesting cooperation from a number of states to obtain further evidence of the scheme. Among other steps, the Prosecution has [REDACTED], through their [REDACTED]. The Prosecution has taken steps to obtain a judicial order from the [REDACTED] to release any relevant information. It expects the results of this enquiry to be available in the coming weeks.

55. Although information concerning the identity of the States and content of the requests is redacted from the Defence, it is apparent from subsequent filings and disclosure in the Article 70 case that the Prosecution had addressed several requests for assistance to different States, prior to the referral of the case to the Single Judge.

56. [REDACTED].[55] In addition to revealing the link between these individuals and the Defence for Mr. Bemba, the Prosecution also provided the French authorities with the country of residency of these persons.

57. [REDACTED].[56] [REDACTED].

[51] ICC-01/05-01/08-2548-Red4, para 3.
[52] T-303-Conf-Red3-ENG-ET.
[53] ICC-ASP/1/3, 9 September 2012.
[54] ICC-01/05-01/08-2548-Red4, para. 16.
[55] [REDACTED], attached as Annex I: the last page has been redacted in order to avoid possible further contamination of the Chamber.
[56] [REDACTED] (Annex II) – [REDACTED].

58. The requests to monitor all the telephone communications of Mr. Kilolo and Mr. Mangenda also predated the lifting of their privileges and immunities,[57] even though it was self-evident that their communications would encompass in whole or in part sensitive information protected by Article 18 of APIC.

59. Significantly, the Prosecution failed to provide the Dutch and Belgian authorities with any specific numbers that they should not monitor.[58] The Dutch and Belgian authorities (and Independent Counsel) therefore had full access to all communications between Mr. Peter Haynes QC, Ms. Kate Gibson, Dr. Guenael Mettraux and Mr. Jean-Jacques Mangenda.

60. On the issue as to whether this monitoring of the Defence violated APIC, the Dutch authorities have also found that they do not possess the legal authority to examine the legality of ICC requests for cooperation: the ICC remains responsible for giving full effect to the right to a remedy for violations of privileges and immunities.[59]

61. It also appears that the Prosecution addressed requests for assistance to the authorities of the Democratic Republic of Congo. The Prosecution has refused to disclose this information to the Defence, despite repeated requests,[60] and the fact that such information is absolutely disclosable in the Main Case.[61] Although Prosecution has refused to acknowledge whether it submitted any requests for assistance to the DRC in relation to Defence witnesses or Defence evidence, it is apparent from earlier records in the case that:

a. [REDACTED];[62] and

[57] ICC- 01/05-51-Red, para. 3; ICC-01/05-68, 20 November 2013.
[58] The Prosecution requested the Dutch authorities to record all communications involving the telephone numbers: [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]: ICC-01/05-01/13-424, p.3. [REDACTED] (Annex III).
[59] ICC-01/05-01/13-424, p.7: In the court's opinion, the international rule of non-inquiry applies to the relationship between the Netherlands and the ICC. The Dutch courts are entitled to rely on the decision of an international judicial body that provides every guarantee of impartiality and independence. The Netherlands must therefore operate on the basis of the legal presumption that the ICC will apply its own law – including the provisions relating to immunity - adequately and properly.
[60] ICC-01/05-01/08-3016-AnxB-Red, pp.13, 16.
[61] ICC-01/04-01/06-3017; ICC-01/04-01/06-3031; ICC-01/04-01/10-47, para. 14; ICC-01/04-01/10-275. In the *Katanga* case, pursuant to Rule 77, the Prosecution disclosed correspondence between OTP and DRC concerning the provision of evidence and assistance to the DRC; ICC-01/04-01/07-949, footnote 41; ICC-01/04-01/06-2624; ICC-02/05-03/09-501, para. 38; ICC-01/04-01/10-47, para. 16.
[62] [REDACTED].

b. [REDACTED].[63]

62. These highly intrusive monitoring and surveillance measures were instigated on the basis of information provided by P-169, a witness who is demonstrably lacking in credibility,[64] and [REDACTED].[65]

63. [REDACTED][66], [REDACTED].[67] [REDACTED].[68] [REDACTED]:[69]

[REDACTED].[70] [REDACTED].

64. In both the 26 August 2011 Status Conference and its 19 March 2012 filing, the Prosecution alerted the Trial Chamber to the fact that it was working closely with national authorities in the DRC and CAR to obtain monitored telephone communications and metadata in connection with information concerning phones numbers and names [REDACTED].[71]

65. Notwithstanding the grave potential for interference in Defence investigations or the security and confidentiality of Defence witnesses, neither the Trial Chamber nor the Prosecution appear to have discussed the need to implement safeguards to ensure that the involvement of national authorities would not compromise the independent and integrity of the proceedings.

66. It should have been reasonably foreseeable to the Prosecution that such persons could be potential witnesses or sources for the Defence, and that any monitoring of their movements or communications would inevitably capture confidential communications with the Defence.

[63] [REDACTED].
[64] See Defence Closing Brief, paras. 104-116; ICC-01/05-01/08-3200-Conf.
[65] [REDACTED].
[66] [REDACTED].
[67] [REDACTED].
[68] [REDACTED].
[69] [REDACTED].
[70] [REDACTED].
[71] [REDACTED].

67. Article 18 (1)(c) of APIC establishes the inviolability of any information, documents, and materials in whatever form which relate to the functions of the Defence. This provision enshrines the confidentiality of all forms of Defence correspondence – including emails and telephone communications with potential witnesses. Information concerning bank records is also considered to fall within the type of information, which is covered by diplomatic and functional immunity.[72]

68. Mr. Bemba is not an indigent accused: his Defence team is funded through funds, which are released from his frozen assets.[73] There is therefore no prohibition as concerns the ability of his Defence team to receive and utilise any funds in connection with either Defence activities or detention needs of Mr. Bemba.[74]

69. Mr. Bemba has an express right to receive money to make purchases at the detention unit.[75] He is detained under the authority of the ICC, specifically, by virtue of the Trial Chamber's repeated denial of his requests for provisional release. It was therefore squarely within the scope of his Defence functions for Mr. Mangenda to receive and transmit funds to the ICC detention unit in order to facilitate Mr. Bemba's right to make detention purchases.[76]

70. Accordingly, there is a presumption that any transfers between the Defence or persons associated with the Defence fell within the investigative functions of the Defence and, in the absence of a waiver from the Presidency, were protected from any form of legal process by Article 18(1)(c) of APIC.

71. Indeed, the Prosecution cannot in good faith assert that the mere existence of payments (of very smalls sums) between a party and persons connected to the case is inherently improper or outside the functions of Counsel, given their practice of providing money to intermediaries (some of whom were witnesses) in other cases before this Court.[77] In the absence of a waiver of privileges and immunities, the Prosecution therefore should

[72] Liberian E. Timber Corp. v. Gov't. of Republic of Liberia, 659 F. Supp. 606, 608 (D.D.C. 1987).
[73] ICC-01/05-01/08-76; [REDACTED] and [REDACTED]; ICC-RoC85-01/08-3.
[74] Specifically, the prohibition under Article 22(1) of the Code of Conduct does not apply.
[75] Regulation 166(9) of the Regulations of the Registry.
[76] Article 18(4) of APIC extends the privileges and immunities of Counsel to persons assisting Counsel.
[77] See for example, *Prosecutor v. Lubanga*, Judgment, ICC-01/04-01/06-2482, paras. 198-202, 308.

have expressly excluded Defence team members from any request addressed to national authorities to obtain financial records.

72. The Prosecution also violated Article 19(d) and (e) of APIC by requesting States to take measures to monitor the communications of Defence witnesses ([REDACTED]), which would inevitably expose the national authorities to confidential information concerning Defence witnesses, their testimony, and their communications with Counsel concerning such testimony.[78]

73. The only legal entity which has the competence to lift the privileges and immunities of the Defence and Defence witnesses is the Presidency, pursuant to Article 26(2)(f) and (g) of the APIC. Neither the Prosecution nor State Parties have the right to do so on a unilateral basis, absent such a waiver.

74. The Prosecution cannot play the roles of investigator, prosecutor and judge in this case: the Prosecution therefore cannot arrogate to itself the right to assess, on a completely *ex parte* basis, whether activities fall within the proper remit of the Defence or their witnesses and whether privileges and immunities should attach. The Prosecution has neither the independence nor the necessary information to perform an assessment as to whether certain acts fall within the scope of legitimate Defence activities.

75. In this regard and as will be elaborated *infra*, had the Prosecution put the matter before the Trial Chamber or the Presidency to adjudicate, the Registry would have been able firstly, to clarify that the Defence were required to fund logistical costs for potential witnesses, and secondly, provide the Chamber with the ICC detention unit receipts, which corresponded to the amounts transferred to Mr. Mangenda.

76. Both the rationale and protection afforded by such privileges and immunities would also be completely undermined if any entity other than the Presidency could issue their own determination as to the applicability of such privileges and immunities, and act accordingly.

[78] [REDACTED].

77. Concretely, if the competence for deciding whether to waive privileges and immunities is not vested exclusively in the particular entity, which is empowered by Article 26 to adjudicate the matter, court officials would be unable to perform their tasks without there being a real risk that they could be arbitrarily arrested or detained at will. The ICC as a Court would be unable to function if that were to be the case. To put it this way, if the Trial Chamber or ICC were to ratify this precedent, then it will open Pandora's Box to States doing exactly the same. For example, authorities could initiate a search and seizure in relation to the ICC field office on the pretext that ICC communication facilities had been used for non-ICC purposes, or Prosecution investigators could be detained or monitored on the basis that payments or logistical support to Prosecution witnesses were illegal.

78. For this reason, the International Court of Justice underscored in the *Case concerning United States diplomatic and consular staff in Tehran*, that the underlying rationale of privileges and immunities would be vitiated if States could revoke them on a unilateral basis, even if their concerns are justified.[79]

79. If the Prosecution were in possession of evidence that the financial records pertained to activities falling outside of the scope of Defence functions, then it should have first submitted a substantiated request to the Presidency to waive this specific aspect of Mr. Kilolo's or Mr. Mangenda's privileges and immunities.

80. It is however apparent from the Prosecutor's submissions to the Trial Chamber that it only attempted to ascertain whether there was any linkage between these payments and Defence activity after it obtained the records.[80] The Prosecution thus requested a State, which is a party to APIC, to intrude into areas protected by Defence immunities, on the basis of a fishing expedition.

81. Both the ICC and the ICTY have found that in the absence of an explicit waiver of immunity, the principle of inviolability of the information fully stands, and the information must be returned to the Defence.[81] In line with this jurisprudence, the Prosecution should

[79] Judgment, 24 May 1980, ICJ Reports 3, paras. 83-85, available at: http://www.icj-cij.org/docket/files/64/6291.pdf.
[80] ICC-01/05-01/08-2548-Red4, para. 4.
[81] Gotovina Immunities Decision; ICC-01/11-01/11-291.

have been precluded from using this information in its Article 70 investigations. Instead, it is apparent that this information formed a key plank in the Prosecutor's requests to obtain further access to confidential Defence information.[82]

82. It is clear from the Single Judge's reasoning that but for this information, the Prosecution would not have been granted access to confidential recordings between Mr. Bemba and persons other than his Counsel, nor would the Prosecution have been authorised to contact Defence witnesses in relation to such payments without following the protocol issued by the Trial Chamber.[83]

83. In terms of further prejudice emanating from breaches of privileges and immunities in this particular case, from March 2012, the Trial Chamber and the Prosecution were put on notice concerning the prejudicial impact that a failure to respect privileges and immunities could have on the rights of the Defence.

84. On 5 March 2012, the Defence copied the Trial Chamber to a report to the Registrar concerning an incident, in which Cameroonian authorities attempted to search the baggage of Ms. Kate Gibson, apparently at the behest of the French and Belgian authorities.[84] The Cameroonian authorities had received information that Ms. Gibson was working for the defence of Mr. Bemba, although this information had not been provided in any official ICC correspondence.[85]

85. Although the Defence requested the Registry to conduct an urgent inquiry into the incident, the Defence has never received any substantive results. The Defence also raised this matter before the Trial Chamber and the Prosecution at a Status Conference, which was convened to draw the attention of the Trial Chamber and the Prosecution to the fact that the

[82] ICC-01/05-46, para. 1.
[83] ICC-01/05-46, paras. 7-9, 12.
[84] Email From: Mangenda, Jean-Jacques, Sent: 05 March 2012 09:32 To: OTR Counsel Support Section; [REDACTED]; Cc: [REDACTED]; Subject: Confidentiel-Rapport Mission de la Défense au Cameroun (Annex IV).
[85] Report of the Defence Team of Mr, Jean-Pierre Bemba of Defence Mission to Cameroon, 1 March 2012, addressed to the Registrar, Deputy Registrar, Counsel Support Section of the ICC, [REDACTED], Special Adviser to the Registrar on External Relations, Trial Chamber III (Annex V).

Lead Counsel had been apprehended without cause, by security officials at Kinshasa airport.[86]

86. At this Status Conference, the Defence expressed its concern regarding the fact that breaches of Defence privileges and immunities by national authorities would create a risk for Defence witnesses, and deter persons from cooperating with the Defence in future. The Defence explicitly requested the Prosecution to investigate this incident under Article 70 of the Statute.[87] Both the Trial Chamber and the Prosecution also heard evidence of the intimidation of Defence witnesses at the hands of the [REDACTED].[88]

87. However, rather than condemning these acts, and investigating the perpetrators, the Prosecution appears to have used the same methods as a template for obtaining information concerning the Defence, outside of the framework of the Court's disclosure regime. Apart from the fact that the disclosure of such information to an entity outside the Court violated the Trial Chamber's protective measures concerning these witnesses,[89] the specific involvement of national authorities from DRC, France, Belgium and Cameroon in such measures will have compromised the confidentiality and security of the Defence.

88. As observed by the ICTY Appeals Chamber, privileges and immunities are afforded to Defence investigations precisely because of the risk that exposure of confidential Defence information to national authorities could imperil the safety of witnesses and their families, or deter witnesses from being able to confide in the party interviewing them.[90]

89. For this reason, the Chamber's duty to uphold Mr. Bemba's right to a fair trial includes a positive obligation to take necessary measures to ensure the confidentiality of Defence information.[91]

90. Throughout this case, the Trial Chamber has evinced a vigorous concern to protect Prosecution witnesses from any form of exposure or threat, even going so far as to

[86] ICC-01/05-01/08-241-Red.
[87] ICC-01/05-01/08-241-Red.
[88] [REDACTED].
[89] [REDACTED].
[90] Gotovina Immunities Decision, para. 31 and fn. 88.
[91] Gotovina Immunities Decision, para. 68.

[REDACTED] were not being sufficiently vigilant as concerns their assessment of Prosecution witnesses,[92] and [REDACTED].[93]

91. This therefore begs the question as to why the Trial Chamber did not act in a similar manner, when faced with clear indicia that information pertaining to Defence witnesses and investigation was being disclosed to national authorities.

92. The Defence does not contest the imperative of protecting Prosecution witnesses, but such protection should not be achieved at the expense of the protection of Defence witnesses and fundamental Defence rights. There is also an objective appearance of complete inequality in a case in which the Trial Chamber, which was so diligent and interventionist on the behalf of Prosecution witnesses, fails to intervene or query Prosecution actions which clearly impinge on the security and confidentiality of Defence witnesses and Defence investigations, or to require the implementation of the same type of safeguards that it insisted be afforded to Prosecution witnesses and evidence.

93. The particular investigative steps taken by the Prosecution were brought to the attention of the Trial Chamber and at time, taken at the instigation of the Trial Chamber (as *per* the Trial Chamber's recommendations concerning P-169 and P-178). The Trial Chamber had a duty to protect the rights and confidentiality of the Defence in this case which it failed to exercise. The prejudice suffered by the Defence was also fully realised in this case. The duty to provide a remedy for these violations therefore inheres squarely with the Trial Chamber.

3. The Prosecution received privileged information, including information concerning Defence strategy and instructions from Mr. Bemba

94. Mr. Bemba's right to a fair trial was prejudiced irretrievably by the joint failure of the Trial Chamber and the Single Judge to take steps to ensure that the review of privileged material in the Article 70 case did not prejudice Mr. Bemba's rights in the Main Case.

[92] [REDACTED].
[93] [REDACTED].

95. Article 64(2) imposes a positive and ongoing duty on the Trial Chamber to ensure that the rights of Mr. Bemba are fully respected throughout the trial proceedings. Although Article 64(4) specifies that the Trial Chamber may refer certain issues to the Pre-Trial Chamber, it further stipulates that such a referral must be necessary for the "effective and fair functioning" of the proceedings. Even if the explicit procedure in Article 64(4) was not applicable to the current case, it is nonetheless clear that the Statute envisages that any judicial division of tasks between different Chambers should not operate to the detriment of the defendant's right to a fair and effective trial.

96. This would be in line with the Trial Chamber's positive duty to take measures to ensure that privileged Defence material is not disclosed to the Prosecution, States or third parties.[94]

97. During the 9 April 2013 Status Conference, the Prosecution put the Trial Chamber on express notice that the Article 70 investigation would affect the Main Case, and that as such, "[i]t is up to us to try to conduct this process with the least possible effect on the ongoing trial".[95] The Prosecution further elaborated that its investigative measures were likely to intrude upon privileged information and for that reason, particular safeguards would be required.[96]

98. However, when the Trial Chamber directed the Prosecution to address all Article 70 related issues to the Pre-Trial Chamber, it failed to impose any measures to ensure that the initiation of such an investigation would not prejudice Mr. Bemba's right to a fair and expeditious trial in the Main Case.[97]

99. At the same time, when the case was transferred to the Single Judge, the Single Judge acted under the assumption that the Prosecution's Article 70 investigative requests were completely autonomous of the Main Case, and as such, it was not necessary to take any

[94] Gotovina Immunities Decision, para. 68.
[95] T-303-Conf-Red3-ENG-ET, p.3, lines 12-13.
[96] T-303-Conf-Red3-ENG-ET, p.3, lines 20-23; p.15, lines 19-22; p.18, lines 16-20.
[97] ICC-01/05-01/08-2606-Red.

measures to protect the rights of Mr. Bemba in relation to the Main Case, such as the appointment of an *ad hoc* Counsel (as envisaged by Article 56) or the OPCD.[98]

100. There was thus a gap in judicial oversight of the impact of the Article 70 investigation on the rights of Mr. Bemba, aggravated by the absence of a Defence Counsel or *ad hoc* Counsel to advocate for the interests of the Defence, and the appointment of an "Independent Counsel", who was, in reality, instructed to act as a second prosecutor.

101. As a result of this lack of effective oversight, and notwithstanding its protestations to the contrary, and attempts to shroud the gravity of the situation by making an arbitrary distinction between 'legitimate' and 'illegitimate' privilege, it is clear that the Prosecution has received:

a. Privileged information concerning Defence activities and Defence witnesses, which were submitted to CSS and VWU on conditions of strict confidentiality;
b. Privileged communications between Mr. Bemba and members of his Defence, and between such Defence team members, including:
    - Discussions concerning the credibility of witnesses and potential lines of inquiry; and
    - Discussions concerning the content of the Defence Closing Brief, and possible arguments concerning superior responsibility.
c. Privileged internal work product, which had been communicated to potential witnesses and potential experts under conditions of strict confidentiality.

102. Each category will be addressed in turn.

a) Privileged information related to the payment of Defence witnesses, which had been submitted to CSS and VWU under strict guarantees of confidentiality

103. On 19 November 2012, the Trial Chamber requested VWU to submit its observations on a Prosecution request for access to information concerning the payment of

[98] ICC-01/05-50, para. 9.

Defence witnesses.[99] Notably, the Trial Chamber only requested the Registry to "file its observations on the Request";[100] the Chamber did not order the Registry to implement it.

104. The Registry responded by filing its observations to both the Trial Chamber and the Prosecution, in which the Registry set out specific information concerning the modalities of payments to Defence witnesses and proposed expert witnesses.[101] As subsequently noted by the Trial Chamber, the Registry had, on a unilateral basis:[102]

> already addressed the First Request, providing the prosecution with most of the information sought in relation to witnesses called by the defence including the type of expenses incurred, the instances in which payments were made through the defence team, and the professional fees to be paid to the expert witnesses. The Chamber therefore found that a decision on the prosecution's First Request was no longer required.

105. Unlike the Prosecution, which has its own administrative and budgetary services, the Defence is dependent on the Registry to facilitate its work. This dependency should not, however, operate to the detriment of the confidentiality or independence of the Defence. For this reason, Rule 20(1)(a) specifies that the Registrar shall facilitate the protection of Defence confidentiality as defined in Article 67(1)(b), and Rule 20(2) requires the Registrar to meet the administrative requirements of the Defence in a manner which ensures "the professional independence of Defence Counsel".

106. It follows that any information received by the Registry for the purpose of facilitating the work of the Defence, should be kept strictly confidential, and should not be disseminated further without the consent of the Defence. To hold otherwise would create a fundamental inequality of arms between the Prosecution and the Defence, and discriminate between Defence teams, which are dependent on the legal aid services of the Registry and those, which are not.

107. Apart from the explicit references to the need to preserve Defence confidentiality and independence in Rule 20, Regulation 130 of the Regulations of the Registry reiterates the

[99] ICC-01/05-01/08-2421.
[100] ICC-01/05-01/08-2421, para. 2.
[101] ICC-01/05-01/08-2441, paras. 5, 8-11.
[102] ICC-01/05-01/08-2606-Red, para. 3.

Registrar's obligation to respect the confidentiality and professional independence of counsel, and further clarifies that all information concerning the provision of legal assistance shall be treated with "the utmost confidentiality. [Registry staff] shall not communicate such information to any person, except to the Registrar or to the legal aid commissioners".

108. Regulation 88(3) of the Regulations of the Registry stipulates that information concerning Defence witnesses shall be stored in a database, which can only be accessed to designated staff members of the Registry, unless the Registry is ordered to disclose the information to the Chamber.

109. In other cases before the ICC, the Registry has stated that "[t]he management of expenditure that the Registry undertook under Rules 81 to 86 of the Regulations of the Registry come under its internal procedures and are not shared with participants to the proceedings."[103] The Registry has also previously emphasised in this case that: [104]

> Neutrality is crucial to the fulfillment of the VWU's mandate, which is to protect equally all victims and witnesses according to the risk bearing on them and regardless of which party or participant is relying on evidence stemming from them. As such, the VWU should be in a position to receive confidential information from any witness, whichever party is calling him or her, and consider it only for the purpose of its security assessment without risk that this information be later on used in support of or against evidence adduced by the parties.

110. Given that the Defence has never consented to the disclosure of such information to anyone outside of CSS or VWU, it is a matter of considerable concern that confidential information concerning the logistics of Defence investigations has been disclosed to the Prosecution without any prior notice or consultation with the Defence.

111. The disclosure of such information on an *ex parte* basis also prevented the Defence from being able to provide clarification or contextual information, which would have influenced future judicial decisions concerning the Article 70 investigations.[105]

[103] ICC-01/04-01/07-T-215-Red-ENG-ET, p.7, lines 19-21.
[104] ICC-01/05-01/08-2400-Red, para. 8.
[105] See above, Section D. 2, paras. 72-93.

112. The above incident was not an isolated incident, but forms part of a pattern of incidents concerning the disclosure of highly sensitive Defence information by the Registry on a unilateral basis.

113. For example, in 2012, the VWU disclosed internal VWU protection reports to the Trial Chamber in relation to D-64, D-51, D-55, and D-57.[106] As clarified by the VWU, these reports contained "information obtained from the witnesses on a confidential basis and under the clear understanding that they will not be used for other purposes than the security assessment".[107] VWU also confirmed that "this unfortunate mistake was committed with respect to Defence witnesses only, whereas the Chamber never received protection reports, or the information contained therein, with respect to Prosecution witnesses".[108]

114. [REDACTED].[109]

115. Although the Trial Chamber later ruled that it would not take into account the VWU reports of any of the three witnesses as evidence,[110] it did not strike the [REDACTED] from the record. The Chamber's ability to assess the credibility of these witnesses will have been inevitably influenced by their exposure to these VWU reports, whereas as observed by the VWU, no such issue exists with respect to Prosecution witnesses.

116. There is now an appearance that the explicit protections for the confidentiality of the Defence and Defence evidence, which are set out in Rules and Regulations, are meaningless, as they can be overridden or ignored without any prior notice to the Defence, and without seeking the views of the Defence.

117. The possibility that privileged Defence information can be disclosed to the Prosecution *via* CSS or VWU – without a Court order - also concretely prejudices the Defence as regards future preparation or logistical requirements.

[106] ICC-01/05-01/08-2400-Red, paras. 2-3.
[107] ICC-01/05-01/08-2400-Red, para. 2.
[108] ICC-01/05-01/08-2400-Red, para. 8.
[109] [REDACTED].
[110] ICC-01/05-01/08-2410-Red.

118. Although the Trial Chamber has been aware of each incident, it has neither condemned such violations nor provided an effective remedy. The Defence now faces an irreconcilable conflict between its duty to ensure the necessary facilities and logistical support for the presentation of Mr. Bemba's case, and its duty to take all necessary steps to ensure the confidentiality of Defence information (as stipulated by Article 8 of the Code of Conduct).

119. Mr. Bemba's right to a fair, effective and impartial trial has therefore been fundamentally and irreparably prejudiced.

b) Privileged communications between Mr. Bemba and members of his Defence, and between such Defence team members

120. Notwithstanding its repeated protestations to the contrary, the Prosecution has received "legitimate" privileged Defence information concerning instructions from Mr. Bemba and Defence strategy.

121. The Prosecution has obtained such information through at least three different avenues:

i. Requests for assistance directed to State authorities;
ii. Information disclosed directly from the Detention unit; and
iii. Information disclosed *via* the Independent Counsel.

122. For the first two avenues, since the information was provided directly to the Prosecution, there was no mechanism for vetting whether the information contained privileged or *ex parte* information.

123. Moreover, due to lack of sufficient legal clarity concerning the mandate of the Independent Counsel and the notion of "legal privilege", and issues concerning the "independence" and impartiality of the person tasked with this role, the Independent Counsel failed to act as an effective review mechanism. As will be elaborated below, on several occasions, the Independent Counsel also volunteered privileged information to the Prosecution *sui sponte*, thus avoiding any judicial control.

124. The resultant prejudice to the Defence from such disclosures cannot be overstated. Although the Prosecution appeared to create the impression to the Single Judge that its Article 70 case was separate from its Main Case investigations and preparations,[111] that was never the case. From the beginning, the Article 70 investigations were overseen by the Senior Trial Attorney in the Main Case, Mr. Jean-Jacques Badibanga, as evidenced by his attendance at the 9 April 2013 Status Conference concerning the Article 70 case and the subsequent Status Conferences before the Single Judge, and the specific direction of the Prosecutor that all Article 70 related requests should be addressed to Mr. Badibanga.[112]

125. The Article 70 investigation was also conducted during the Defence case, with the result being the Prosecution was in a position to use privileged and *ex parte* information pertaining to Defence witnesses and Defence strategy as part of its cross-examination of Defence witnesses. Indeed, the Prosecutor specifically informed the Single Judge that steps were needed to collect evidence concerning Defence communications on an urgent basis as the Defence case was coming to a close.[113]

(i) Requests for assistance directed to State authorities

126. During the October 2013 Status Conference with the Single Judge, the Prosecution announced that it had submitted requests to the authorities in The Netherlands and Belgium to receive access to:[114]

[REDACTED].

127. [REDACTED].[115] The only inference which can be drawn is that the Prosecution directed requests for assistance to other countries in order to circumvent the legal requirements (and safeguards) in Belgium.

128. On this point, the Prosecution further elaborates that:[116]

[111] ICC-01/05-01/13-419-Anx.
[112] ICC-01/05-01/08-3016-AnxB-Red, pp.7-8, 12.
[113] ICC-01/05-44-Red.
[114] [REDACTED].
[115] [REDACTED].

[REDACTED].

129. During the same Status Conference, the Prosecution had also informed the Single Judge that:[117]

[REDACTED].

130. The only possible conclusion from the above submissions is that the Prosecution had listened to the contents of intercepts from The Netherlands, before they had been vetted by the Independent Counsel.

131. [REDACTED].

132. [REDACTED].

133. [REDACTED]: [118]

[REDACTED].

134. Call data records are covered by the same protection which applies to the contents of communications.[119] Nonetheless, at the time the Prosecution accessed this information, there had been no determination as to whether privilege could apply, and if so, whether it should be lifted.[120] No safeguards were put in place to ensure that the Prosecution's access to such information was necessary and proportionate, that it would not occasion any risk to the persons concerns, or, that it did not violate *ex parte* protective measures.

135. [REDACTED].[121]

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[116] [REDACTED].
[117] [REDACTED].
[118] [REDACTED].
[119] ICC-01/05-01/08-2991-Red, para. 5.
[120] See above, paras. 119-124.
[121] [REDACTED].

136. As a result of such access, the Prosecution would have obtained access to confidential Defence sources, the contact details of protected Defence witnesses (and their precise location), and the details of all persons contacted by the Defence throughout the Defence case. The fact that the Prosecution was able to use its Article 70 powers in order to obtain such privileged information is evidence of the fundamental inequality of arms between the Prosecution and the Defence in this case.

137. This inequality is evidenced by the disparate treatment afforded to the Defence in relation to its multiple attempts to obtain information and investigative assistance in relation to P-169 and P-178, in order to enable the Defence to explore the possibility of witness collusion and the provision of financial incentives in exchange for testimony.

138. [REDACTED].[122] [REDACTED].[123] [REDACTED].[124]

139. [REDACTED].[125] [REDACTED].[126] As a result, the Defence were deprived of the ability of putting its contents to the remaining witnesses in the prosecution case, and eliciting further information concerning the identity and motives of the persons present, in an adversarial environment, when the witnesses were under oath.

140. In July 2013, the Prosecution received a letter from P-169, appended to which was a list of [REDACTED]. Notwithstanding the fact that such information clearly fell within the scope of Rule 77 if not Article 67(2), the Prosecution did not disclose the letter to the Defence. The Trial Chamber ordered the Prosecution to disclose the letter five months after the Prosecution became aware of the contacts, eight days before the close of the Defence case.[127] The Defence could not properly explore or investigate this issue within such a limited time frame.

141. The Trial Chamber did not sanction the Prosecution or provide any remedy as concerns the Prosecution's failure to disclose information that was clearly relevant to the

[122] [REDACTED].
[123] [REDACTED].
[124] [REDACTED].
[125] [REDACTED].
[126] [REDACTED].
[127] ICC-01/05-01/08-2872-Red2, paras. 17-18.

credibility of Prosecution witnesses. The Chamber also rejected the Defence request for the witnesses in question to be recalled, so that the Defence could explore the nature of and extent of contacts between the witnesses in question, on the grounds that the Defence had failed substantiate the existence of the very collusion that the Defence was attempting to investigate.[128]

142. In contrast, the Single Judge ruled that the Prosecution had a right to obtain access to all Defence information that was not covered by privilege.[129]

143. The double standards at play are evidenced by the Prosecution's own submissions in relation to this issue. At the same time that the Prosecution used its Article 70 powers to obtain, on an *ex parte* basis, information concerning the contact details, call records, and financial payment of Defence witnesses, it opposed a Defence request for similar information on the grounds that: [130.]

[REDACTED]

144. In August 2014, P-169 addressed another letter to a secret non-ICC Prosecution email account, and the Registry.[131] P-169 again referred to a concerted plan to extract money from the ICC, which involved, at a minimum, P-178 and potentially several others, and averred that there had been witness subordination, and threated to withdraw his testimony.

145. Although the letter was addressed to the Defence, the Registry transmitted it to the Prosecution only. Upon receipt, the Prosecution filed *ex parte* submissions to the Chamber in which it tried to associate P-169's demands and threats to the Article 70 case.[132] The Defence once again asked to contact P-169 with a view to obtaining further information, and with a view to potentially calling him as Defence witness,[133] but was once again rejected.[134]

[128] ICC-01/05-01/08-2924-Conf. The Trial Chamber also rejected the Defence request for leave to appeal: ICC-01/05-01/08-2980-Conf.
[129] ICC-01/05-46, para. 4.
[130] [REDACTED].
[131] ICC-01/05-01/08-3138-Conf-AnxA.
[132] ICC-01/05-01/08-3138-Conf-Red.
[133] ICC-01/05-01/08-3139-Conf.
[134] ICC-01/05-01/08-3154-Red.

The Chamber elected instead to re-open the case for the limited purpose of hearing P-169 as a Chamber's witness,[135] during which time the Defence was allocated only four hours to complete its examination.[136]

146. [REDACTED].[137] [REDACTED].[138] [REDACTED].[139]

147. [REDACTED].[140] [REDACTED].[141]

148. Based on P-169's testimony concerning [REDACTED], the Defence requested the Chamber to:

i. [REDACTED];[142] and

ii. Order the recall of P-178 due to his direct implication in the matters described by P-169, [REDACTED].[143]

149. [REDACTED].[144]

150. [REDACTED].[145] [REDACTED].

151. [REDACTED].[146] [REDACTED],[147] [REDACTED].

152. [REDACTED]:[148]

[REDACTED].

[135] ICC-01/05-01/08-3154-Red.
[136] ICC-01/05-01/08-3157-Red, p.7.
[137] [REDACTED].
[138] [REDACTED].
[139] [REDACTED].
[140] [REDACTED].
[141] [REDACTED].
[142] [REDACTED].
[143] [REDACTED].
[144] [REDACTED].
[145] [REDACTED].
[146] [REDACTED].
[147] [REDACTED].
[148] [REDACTED].

153. The Chamber made a finding of fact in relation to the existence or not of collusion among witnesses, based on the Prosecution and VWU reports on contacts, before the Defence had been provided with an opportunity to file its submissions in relation to such matters, which rendered any future submissions on this point futile.

154. Of equal concern is the fact that the Chamber relied on information collected by VWU (a neutral section of the Court which has no capacity to investigate the credibility of witnesses), which had not been elicited under oath in the presence of the Defence or subjected to any form of questioning by the Defence.[149]

155. Apart from the questionable Statutory legality of such an approach, it reinforces the appearance that this trial has been conducted behind closed doors, in the absence of the Defence. Notwithstanding ICC jurisprudence concerning the fact that manipulation of witness testimony is inappropriate, and "will render the affected testimony unreliable or inadmissible",[150] clear instances regarding the manipulation of witnesses and their testimony remain un-investigated and ignored. The Defence is caught between Scylla and Charybdis. Although the Prosecution has investigated these matters with extreme vigour when it thought it could extract evidence that could be used to impugn the Defence or the associates of Mr. Bemba, it has refused to take any steps to investigate potentially exculpatory issues that could undermine the credibility of its own witnesses or case. At the same time, the Defence has been prohibited from investigating these issues itself through contact with the witnesses, whilst the absence of concrete proof of collusion (which the Defence obviously can't obtain if it can't investigate and the Prosecution won't investigate) has been cited by the Chamber to deny requests to obtain such information through the recall of the witnesses in question.

156. The end result is an appearance of complete unfairness and lack of transparency. What is more troubling is the absence of any rational justification for preventing the Defence from contacting the Prosecution witnesses in question, particularly when contrasted with the unfettered access that the Prosecution was granted to Defence witness. Given the persistent manner in which the Prosecution submitted *ex parte* submissions which tried to explain P-169's erratic behaviour and multiple *volte face* by reference to (now demonstrably

[149] [REDACTED].
[150] ICC-01/09-02/11-868-Red, para. 35.

false) allegations of threats from the MLC or improper conduct by the former Defence, there is an irresistible inference that the Chamber's ability to adjudicate matters concerning any matters concerning the 22 witnesses in an impartial manner has been contaminated and undermined through such submissions.

(ii) Information transmitted via the Detention Unit

157. Pursuant to the order of the Single Judge, the Registry transmitted to the Prosecution the call data records of all communications between Mr. Bemba and other persons (including all members of his Defence), and the recordings of all "non-privileged" communications.[151]

158. Although the Prosecution's requests and the decisions of the Single Judge up until that point had categorised Mr. Mangenda as falling within the same category as Mr. Kilolo (in that it was presumed that his calls were covered by privilege),[152] the Registrar transmitted the recordings directly to the Prosecution.[153]

159. According to the trim records, the trim folder granting the Prosecution access was created on 3 June 2013.[154] It is therefore reasonable to assume that the Prosecution had access to all the communications between Mr. Bemba and Mr. Mangenda from this point onwards, and were thus privy to communications concerning potential strategy for any Defence witnesses called during this time period, and the formulation of legal arguments intended for the Defence Closing Brief.

160. The recordings were not notified to the Defence prior to their transmission to the Prosecution (as required by Regulation 175(10) of the Regulations of the Court), nor were they reviewed in advance by any independent entity with a view to identifying and redacting any information that might be "privileged", the subject of *ex parte* protective measures, or at the very least, be considered as "internal work product".

[151] ICC-01/05-50.
[152] See for example, ICC-01/05-52-Red2, in which the Single Judge accepted the premise that Mr. Mangenda's communications with Mr. Bemba were in principle, governed by Rule 73(1) and that any recordings or transcripts should first be submitted to the Independent Counsel for review.
[153] ICC-01/05-01/13-T-2-Red-ENG-ET, p.8, lines 15-24.
[154] ICC-01/05-46; See also welcome page of the Trim Folder on Court Records.

161. The Prosecution has, themselves, described the contents as 'privileged'.[155]

162. The Defence acknowledges that Mr. Mangenda was not included on the list of persons, who benefit from a presumption of privilege as concerns the contents of their communications with Mr. Bemba. Nonetheless, the Defence had a reasonable expectation that pursuant to Regulation 175 of the Regulations of the Registry, Mr. Mangenda's and Mr. Bemba's communications would not be disclosed to the Prosecution unless firstly, there was a finding by the Registrar that the conversation in question had violated the Regulations of the Registry (or applicable detention regulations) or a Court order, and secondly, the Defence had first been accorded an opportunity to assert privilege over the contents of the communication in question as per Regulation 175(10).

163. In terms of the latter aspect, Rule 73(1) protects communications, not persons.[156] Whilst the identity of a Defence team member might in itself, create a presumption of privilege (as confirmed by the placement of such a person in the list of persons entitled to privileged communications with Mr. Bemba), for all other persons, Rule 73(1) creates a residual obligation on the Court to determine, on a case by case basis, whether the communication in question might be privileged.[157]

164. This is consistent with legal precedent from the Special Court for Sierra Leone, which has recognised that the notion of legal privilege cannot be defined in a formal or static manner but must be extended to cover the communications of certain lawyers with detainees, even if the Rules or Regulations do not expressly include this particular category of lawyers within its definition.[158]

165. The role of Mr. Mangenda included collating evidence and legal submissions, and liaising between different Defence team members and Mr. Bemba. Given this role, there was

[155] ICC-01/05-01/13-48, para. 1.
[156] ICC-01/05-01/08-3084, paras. 19-22, citing ICC-01/04-01/10-314, pp.5-6.
HRW Commentary to the Preparatory Commission Rules of Evidence and Procedure for the International Criminal Court, Part 1, February 1999, (Draft Rule 108).
http://www.hrw.org/legacy/campaigns/icc/docs/prepcom-feb99.htm.
[157] ICC-01/05-01/08-3084, paras. 5-8.
[158] *Prosecutor v. Bangura et al.*, Decision on Prosecutor's Additional Statement of Anticipated Trial Issues and Request for Subpoena in relation to the Principal Defender, 3 September 2012, paras. 13-23.

a high probability that the content of communications between Mr. Mangenda and Mr. Bemba would include matters pertaining to the Defence (including the views of both Lead and Co-Counsel).

166. The disclosure of Mr. Mangenda's communications to the Prosecution without any prior vetting by the Defence or any other independent entity, thus had the effect of revealing the content of communications between Mr. Bemba and his Counsel, "thereby depriving rule 73(1) of the Rules of any practical effect".[159]

167. Even if there may have been grounds to lift privilege as concerns specific aspects of these communications, such a determination should have been made by a Judge and not the Registrar. The fact that such information was disclosed *en masse* also violated the requirements of necessity and proportionality.[160]

168. Apart from the fact that such information fell within the parameters of Rule 73(1), it should have also been protected from direct disclosure to the Prosecution by virtue of the fact that it constitutes 'internal work product', which is protected from disclosure by virtue of Rule 81(1). This rule is broadly framed to encompass "a party, its assistants or representatives". Mr. Mangenda clearly falls within this category of persons.

169. Trial Chamber I has found that the following categories of information, *inter alia*, should be considered as 'internal work product':[161]

> i) all preliminary examination reports;
> ii) information related to the preparation of a case, such as internal memoranda, legal research, case hypotheses, and investigation or trial strategies;
> iii) information related to the prosecution's objectives and techniques of investigation;
> iv) analyses and conclusions derived from evidence collected by the OTP;
> v) investigator's interview notes that are reflected in the witness statements or audio-video recording of the statement;
> vi) investigator's subjective opinions or conclusions that are recorded in the investigator's interview notes; and
> vi) internal correspondence.

[159] ICC-01/04-01/10-314, p.6.
[160] ICC-RoR221-02/09-6-Corr, para. 45.
[161] ICC-01/04-01/06-2656-Red, para. 17.

170. Communications between Mr. Mangenda and Mr. Bemba can be categorised as "internal correspondence", "information related to the preparation of the case", and "analyses and conclusions" concerning the evidence.

171. Whereas the Prosecution has an obligation pursuant to Article 67(2) and Rule 77 to lift internal work product privilege as concerns specific information falling with these disclosure obligations, the drafters deliberately refrained from imposing any reciprocal disclosure obligation or broad inspection obligation on the Defence.[162] Moreover, even if there might have been grounds to disclose specific information to the Prosecution, "[a]t all times, the Chamber has an absolute duty to ensure that any discretionary order it makes regarding defence disclosure does not derogate from the accused's right to a fair and impartial hearing in which his rights are fully safeguarded."[163]

172. If the Chamber had such a duty, then Mr. Bemba had a corollary right to expect that the Chamber would exercise this duty, and take steps to ensure that the disclosure of the recordings to the Prosecution did not prejudice Mr. Bemba's right to a fair and impartial hearing. This simply did not occur at any juncture of the proceedings.

173. To put things in perspective, in order for the Defence team of Mr. Lubanga to obtain information concerning contacts between Prosecution intermediaries and Prosecution witnesses, or internal Prosecution documents evidencing impropriety on the part of intermediaries, the Defence was required to submit justified requests for every item of evidence within the possession of the Prosecution, even though it had already substantiated the existence of impropriety on the part of intermediaries.[164] Requests were determined on a case-by-case basis,[165] and the Prosecution was given an opportunity to be heard, and to seek protection measures from VWU prior to its disclosure to the Defence.[166]

174. It is inconceivable that the Trial Chamber would have countenanced the wholesale disclosure of all the Prosecution internal work product and communications with such

[162] ICC-01/04-01/06-T-254-Red-ENG, p.68; ICC-01/04-01/06-2192-Red, para. 63.
[163] ICC-01/04-01/06-1235, para. 33.
[164] ICC-01/04-01/06-2434-Red2, para. 139.
[165] ICC-01/04-01/06-2434-Red2, para. 139.
[166] ICC-01/04-01/06-2582.

intermediaries to the Defence without any prior vetting to ensure relevance and to redact *ex parte* information or sensitive information pertaining to Prosecution strategy and ongoing investigations. Yet, that is exactly what occurred in Mr. Bemba's case.

175. The right to maintain the confidentiality of internal Defence work product is intrinsically tied to the individual fair trial rights of the defendant, including the right to silence and the defendant's privilege against self-incrimination.[167] It therefore follows that the transmission to the Prosecution of hundreds of conversations including such information constitutes a fundamental breach of such rights.

176. It is also no answer to cite Counsel's duty to ensure the confidentiality of Defence information. The mere possibility that former Counsel might have had a theoretical obligation to instruct Mr. Mangenda not to discuss confidential matters with Mr. Bemba does not mitigate the prejudice suffered by Mr. Bemba as concerns violations of his fundamental rights,[168] nor does it eliminate the unfair advantage that the Prosecution obtained through its contemporaneous access to internal Defence work product.

177. As such, the trial proceedings have taken place on an uneven playing field skewered to the advantage of the Prosecution. The confidentiality of internal Defence information has simply been given less protection than that afforded to information belonging to the Prosecution.

(iii) Information transmitted via the Independent Counsel

178. As submitted above, the Independent Counsel failed to act as an effective mechanism for vetting legal privilege due to:

a. insufficient judicial supervision over the performance of his tasks;
b. lack of sufficient legal clarity concerning the mandate of the Independent Counsel and the notion of 'legal privilege'; and

[167] ICC-01/04-01/06-1235, para. 27.
[168] *Prosecutor v. Taylor*, Decision on Defence notice of appeal and submissions regarding the decision on late filing of Defence final trial brief, 1 March 2011, para. 57.

c. issues concerning the 'independence' and impartiality of the person tasked with this role.

a. Insufficient judicial supervision over vetting of privileged information

179. The notion of an "Independent Counsel" is not supported by the texts of the International Criminal Court, or its jurisprudence. The establishment of such an entity to review privileged material therefore constitutes an "abuse of judicial discretion".[169]

180. The Statute and Rules do not permit Judges to divest their judicial powers to an independent entity, particularly one, who is not subject to any obligations or professional controls. Article 57 in particular stipulates that the powers of the Pre-Trial Chamber must either be exercised by the Pre-Trial Chamber in full, or by a Single Judge: they cannot be delegated to a legal officer or quasi-judicial officer.

181. In this regard, although the Reports of the Independent Counsel were submitted to the Single Judge for approval before transmission to the Prosecution, the communications were mostly in Lingala, and had not been translated into English or French prior to their transmission to the Prosecution.[170]

182. Moreover, in terms of the *modus operandi* of the Independent Counsel, if he deemed any component of a conversation to be relevant to the Article 70 investigation, the entire conversation was communicated to the Prosecution.

183. [REDACTED],[171] the Single Judge failed to take any steps to protect such information from disclosure to the Prosecution.

184. [REDACTED],[172] which were relevant to the Article 70 investigation and did not contain any assessment as to whether the remainder of the conversation touched on privileged issues.

[169] Gotovina Immunities Decision, para. 69.
[170] ICC-01/05-01/13-108.
[171] [REDACTED].
[172] [REDACTED].

185. Since the Single Judge based his determination as to whether the entire conversations could be transmitted to the Prosecution on the Reports prepared by the Independent Counsel, the Single Judge had no means independently to assess or verify whether the contents of the communications corresponded to the summaries provided by the Independent Counsel, or to identify whether remainder of the designated conversations contained information, which should not have been disclosed to the Prosecution.

186. In reality, the Single Judge was wholly dependent on the assessment of the Independent Counsel,[173] who was never instructed to take any steps to redact privileged information from communications that were designated as being "relevant" to the Article 70 investigation, or to identify the specific minutes of the communications which contained privileged information.[174]

187. As a result, the Prosecution received a plethora of information concerning Defence strategy in the Main Case, and the internal views of the Defence on the conduct of the proceedings and weight of evidence. Moreover, notwithstanding the fact that the Single Judge never made any findings that any other members of the Defence were involved in improper conduct, the Independent Counsel transmitted communications which relayed information explicitly attributed to Mr. Peter Haynes QC, Ms. Kate Gibson and Dr. Guenael Mettraux on matters pertaining to Defence strategy, thereby violating Mr. Bemba's right to privileged communications with these persons.

188. [REDACTED].[175] [REDACTED].[176]

189. In such circumstances, even if the Single Judge had been inclined to reject the Independent Counsel's suggestion to transmit the information in question to the Prosecution,

[173] [REDACTED].
[174] [REDACTED].
[175] [REDACTED].
[176] The Defence does not have access to the cover filing. The annex nonetheless states that it is "CONFIDENTIELLE ET EX PARTE RESERVEE AU CONSEIL INDEPENDENTE ET AU BUREAU PROCUREUR". The filing number also indicates that a corrigendum was issued at some point, which suggests that the mistake in addressees was only noticed after the document was filed and distributed.

it would have been impossible for the Single Judge to have done so due to the fact that the transmission was a *fait accompli*.

b. Insufficient/inadequate legal guidance concerning the role of the Independent Counsel and the parameters of legal privilege

190. The Statute and Rules permit the Chamber to appoint a Counsel to act in the interests of the Defence; in this case to vet and identify privileged information. However, as noted above, the Single Judge declined to do so.

191. At the same time, the Single Judge failed to instruct the Independent Counsel to take measures to safeguard the rights of the Defence. To the contrary, it is apparent from the Single Judge's description of the Independent Counsel's mandate that he was more analogous to a Second Prosecutor, rather than an *ad hoc* Counsel for the Defence. For example, in his submissions to the plenary, the Single Judge confirmed that the Independent Counsel was: [177]

> tasked with listening to the intercepts, filtering them and only transmitting those, or sections thereof, "which might be of relevance for the purposes of the investigation". It was obvious to me that wording "relevance", as a neutral wording, would have to be assessed by Independent Counsel in light of article 54 of the Statute and the Prosecutor's overarching duty to "investigate incriminating and exonerating circumstances equally".

192. The Single Judge further confirmed that Independent Counsel's mandate was predicated on the "underlying assumption […] that no professional privilege could be legitimately claimed whenever crimes were committed by the beneficiaries of such privilege":[178] in line with this proposition, if the Independent Counsel was of the view that the participants in the conversation were implicated in 'crimes', then <u>any</u> conversation involving these persons could be relayed to the Prosecution if it was relevant to their investigations.

[177] ICC-01/05-01/13-419-Anx, para 7.
[178] ICC-01/05-01/13-419-Anx, para 7.

193. The fact that the Independent Counsel viewed his role as being to assist the Prosecution rather than to protect the interests of the Defence is further demonstrated by the fact that the Independent Counsel sought and received instructions and direction from the Prosecution in relation to the execution of his tasks.

194. [REDACTED].[179]

195. [REDACTED],[180] [REDACTED].[181]

196. The concrete prejudice to the Defence can be demonstrated, at a minimum, by the fact that the Independent Counsel intentionally adopted a broad approach due to his deference to the position of the Prosecution as to what type of information was relevant to the Article 70 investigation:[182]

> [REDACTED].

197. Similarly, the Independent Counsel and Single Judge concluded that a draft questionnaire for witnesses could be transmitted to the Prosecution, not because it did not fall within the context of the professional relationship between Mr. Bemba and his Defence or was not otherwise privileged, but because "the document might also assist the parties and the Chamber in making its determination for the purposes of the confirmation of the charges".[183]

198. The Single Judge also authorised the transmission of the contact details of potential witnesses and sources, and information concerning the finances of Defence investigations, notwithstanding the absence of any apparent evidence of illegality or specific link to the Article 70 allegation. In so doing, the Single Judge stated that:[184]

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[179] [REDACTED].
[180] [REDACTED].
[181] [REDACTED].
[182] [REDACTED].
[183] ICC-01/05-01/13-408, p.6.
[184] ICC-01/05-01/13-408, p.6.

> making the lifting of the privilege on a seized document conditional upon the finding that "there is an actual as opposed to speculative link to the article 70 investigation", or requiring that evidence that the document was generated for an illegitimate purpose be found "in the documents themselves", as argued by the Defence for Mr Bemba, "would be tantamount to virtually nullifying the usefulness of the seizure of documents […].

199. Such a broad approach is clearly incompatible with the requirement that any interference with or monitoring of the communications of a detainee must comport with the requirements of necessity and proportionality.[185]

200. By considering the utility of the documents to the Prosecution, the Single Judge read an additional exception into Rule 73(1), which is not supported by either the plain text of the Rule, its drafting history or its object and purposes.

201. As noted above,[186] in contrast to the equivalent scenario where information in the possession of the Prosecution is disclosable whenever it falls under either Article 67(2) or Rule 77, Rule 73(1) does not lift Defence privilege simply because the communications in question are useful or material to the preparation of the Prosecution.

202. The emphasis placed by the Single Judge on facilitating the Prosecution's investigations is also incompatible with the overarching emphasis placed in Rule 73(1) on ensuring the defendant's right to communicate in confidence with his Counsel (per Article 67(1)(b) of the Statute). The specific protections in Article 67(1)(b) and (g) exist because firstly, the defendant has no duty to assist the Prosecution, secondly, he has an absolute entitlement to receive legal advice on a confidential basis in relation to the allegations of his guilt.

203. This right is rendered meaningless in circumstances where the Single Judge authorises the transmission of communications between the Defence and the defendant, which concern the allegations and evidence against him and related Defence strategy,

[185]ICC-RoR221-02/09-6-Corr, para. 45. See also 'Order on Conditions of Detention', Case No. CH/PRES/2009/01/rev, 21 April 2009, paras. 19-20.
[186] See above, paras. 156-176.

without first adopting any safeguards to ensure that the information was not used to the detriment of the Defence in the Main Case.

c. Lack of independence and impartiality of the Independent Counsel

204. There is an appearance that the Independent Counsel possessed a predisposition against Mr. Bemba, and that he had specific preconceptions concerning Mr. Bemba himself. After his appointment, the Independent Counsel requested anonymity due to "concerns" regarding his or her security.[187] In particular, the Independent Counsel expressed the view that:[188]

[REDACTED].

205. The fact that the person in question appeared to consider [REDACTED], in itself, should have disqualified him or her from this role, as it evidences a predisposition to consider Mr. Bemba or the Defence [REDACTED].

206. A predisposition to view Mr. Bemba or his Defence in such terms would have objectively coloured the Independent Counsel's assessment as to whether communications from Mr. Bemba or members of the Defence concerned valid Defence objectives. The fact that it did have such an impact is borne out by the Independent Counsel's assessment that material, which was clearly privileged in nature and which bore no hallmarks of illegality and impropriety, should be transmitted to the Prosecution because within the context of the investigation as a whole, it was "relevant" to the Article 70 case.[189]

207. [REDACTED].[190]

208. It would appear that neither the Independent Counsel nor Mr. Badibanga disclosed the existence of this prior relationship to the Registry, the Prosecutor, the Single Judge, or Trial Chamber III.[191]

[187] ICC-01/05-01/12-103, p.4.
[188] [REDACTED].
[189] See above, paras. 189-202.
[190] [REDACTED].

209. The failure of both parties to disclose what was, at the very least, a factor that was relevant to the appointment of the Independent Counsel, creates a presumption of impropriety, from which adverse inferences should be drawn.

210. The existence of a potential conflict of interest impacts on the integrity and fairness of the proceedings, and potentially accords one party an unfair advantage over the other.[192] For these reasons, the Appeals Chamber has emphasised that Counsel have a stringent duty to "err on the side of caution" and disclose all information that could be relevant to the possible existence of an impediment to acting as Counsel.[193] Failing to disclose a potential impediment, in itself, constitutes a violation of Counsel's duty of candour and good faith.[194]

211. His Honour Judge Kourula has recently underscored that the "unilateral authority" vested in the Prosecution for conducting Article 70 investigations

> presupposes a high level of self-regulation by the Prosecutor. Given that the Code of Conduct is the governing document for the internal regulation of staff conduct, this statutory framework further underlines why the Code of Conduct's provisions should be rigorously adhered to and interpreted broadly, i.e. erring on the side of imposing an overly ethical standard in any questionable cases, by all members of the OTP, from individual staff members up to the Prosecutor herself.[195]

212. If the prior relationship had no impact on the person's independence, this raises the question of why neither the Independent Counsel nor the Prosecution brought it to the attention of the Single Judge or the Registry, and why the Prosecution refused to disclose information concerning the potential existence of conflicts of interest in such a vigorous manner.[196]

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[191] Annexes VI and VII.
[192] ICC-01/09-02/11-365, para. 51.
[193] ICC-01/09-02/11-365, para. 55.
[194] *The Registrar v. Mr Hervé Diakiese* - Decision of the Disciplinary Board, DO-01-2010, paras. 47-48.
[195] ICC-01/05-01/13-648-Anx1, para. 7.
[196] ICC-01/05-01/13-237-Red, para. 8.

213. The Independent Counsel's failure to disclose this information was aggravated by the fact that he requested anonymity from the Defence, and was thus aware that such anonymity would shield him from any background inquiries by them. [REDACTED].[197]

214. This appearance of impropriety is heightened by the fact that although the Independent Counsel was supposed to perform his tasks "independently" of the Prosecution, it appears that the Prosecution liaised directly with the Independent Counsel on several occasions,[198] and provided the Independent Counsel with a list of codes, formulated by the Prosecution, in order to determine which calls were "relevant" to the Article 70 investigations, and should thus be transmitted to the Prosecution.[199] [REDACTED].[200]

215. [REDACTED].[201]

216. In particular, the Independent Counsel decided to authorise the transmission of [REDACTED].[202] [REDACTED].[203] There is thus an ineluctable appearance that the Independent Counsel's performance of his mandate was influenced by his rapport with Mr. Badibanga.

217. ICC jurisprudence confirms on this point that even if there is no subjective impropriety, the appearances of justice are equally compromised if there is an "objective appearance of bias" or impropriety.[204] Where in doubt, "a cautious approach should be followed."[205]

218. In light of the above circumstances, there can be no doubt that the Independent Counsel failed to act as an independent, impartial, and most importantly, effective filter as concerns the transmission of privileged materials to the Prosecution. The Independent

[197] [REDACTED].
[198] ICC-01/05-58-Red2, ICC-01/05-63-Red.
[199] ICC-01/05-63-Red.
[200] [REDACTED].
[201] [REDACTED].
[202] [REDACTED].
[203] [REDACTED].
[204] ICC-02/05-01/09-76-Anx2, pp.4-5.
[205] ICC-01/04-01/06-2138-AnxIII, p.2.

Counsel did no more than rubber stamp the transmission of all apparently relevant materials to the Prosecution, irrespective as to whether they contained privileged information or not.

c) Privileged internal work product, which had been communicated to potential witnesses and potential experts under conditions of strict confidentiality.

219. The Prosecution confirmed that it received the contents of the email account of Mr. Arido directly from the French authorities on 23 January 2014, that is, without any prior vetting by the Independent Counsel, the Single Judge or the Registry.[206]

220. The Prosecution commenced reviewing the contents immediately, notwithstanding the fact that it had previously conceded that [REDACTED].[207]

221. Although he did not testify due to security concerns, Mr. Arido was a Defence witness, and was also instructed as a potential expert witness. In this capacity, he received information concerning Defence lines of inquiry, and potential Defence exhibits, which unless tendered in Court, remain protected by Defence privilege.

222. According to documents disclosed by the Prosecution, Mr. Arido's email account included correspondence with the VWU and Counsel detailing *ex parte* security concerns, and correspondence with Ms. Gibson (who is not the subject of the Article 70 investigations).[208] This information is privileged.

223. It is notable in this regard that Rule 73(1) was modeled on Rule 97 of the ICTY Rules of Procedure and Evidence, which in turn, appears to have been based on a proposal from Lawyers Committee for Human Rights (an American NGO).[209] Rule 73(1) is thus ultimately derived from the United States notion of legal privilege, which includes both legal advice between the Defence and the client, and litigation privilege, which protects documents prepared for litigation from disclosure.

[206] ICC-01/05-01/13-234-Red, para. 9.
[207] [REDACTED].
[208] Neither Mr. Bemba nor the Defence have ever waived privilege. As will be elaborated below, to require the Defence to "prove" privilege by placing it before the Chamber would undermine the very protection that privilege serves to achieve.
[209] V. Morris and M. Scharf, An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia (Transnational Publishers 1995) Vol. 2, p.566.

224. According to US commentators, this notion of privilege includes "reports, memoranda, or other internal defence memoranda' which may contain an attorney's mental impressions, conclusions, opinions, or legal theories"[210] and further recognises that "lawyers must act through investigators and other agents who prepare and aid in preparing documents and document summaries for trial preparation and their reports and memoranda are privileged".[211] Privilege therefore attaches to communications prepared by agents or employees prepared under the direction of the lawyer, for the purpose of legal advice.[212]

225. Rule 73(1)(b) itself contemplates that the Defence might legitimately share privileged material with a "third party", and that such privilege is not waived unless the "third party" then gives evidence of the disclosure.

226. In line with this formulation, Defence materials and lines of inquiry shared with Mr. Arido should have remained privileged unless such aspects were incorporated into his testimony before the Court, or a finalised expert report.[213] Since Mr. Arido never testified or tendered an expert report, the privilege should have remained intact.

227. Even if the contents of Mr. Arido's email included correspondence that was not privileged, the absence of any mechanism for excluding privileged and *ex parte* material from the purview of the Prosecution constituted a fundamental violation of Mr. Bemba's rights, and once again, enabled the Prosecution to obtain improper access to information concerning Defence strategy and future arguments.

4. The Prosecution employed sharp trial tactics by failing to disclose to the Defence information concerning the credibility of Defence witnesses and evidence, and failing to put its case to these witnesses

[210] J. Wesley Hall Jr, *Professional Responsibility in Criminal Defense Practice*, (Thomson West, 1996, 2nd ed), p.1089.
[211] *Ibid*., p.1090.
[212] *Ibid*., p.1037.
[213] This is the position regarding draft legal submissions, ICC-01/04-01/10-286, p.7.

228. The Prosecution is required to act as an impartial Minister of Justice:[214] its duty is to search for the truth, not convictions,[215] and in so doing, to respect Mr. Bemba's right to a fair trial.

229. Although the Prosecution is vested with a parallel mandate to investigate allegations of contempt, this mandate aims to ensure the integrity of the main proceedings,[216] not to frustrate or impede them.

230. As soon as the Prosecution received any information concerning alleged impropriety related to Defence witnesses, then such information should have been immediately provided to the Defence in compliance with the Prosecution's duty under Rule 77 to disclose any information within its possession relevant to the credibility of Defence witnesses.[217]

231. This did not occur. Although the Prosecution obtained evidence as early as 14 June 2012 concerning Defence witnesses,[218] none of this information was ever disclosed to the Defence in the Main Case. Instead, the Prosecution made a deliberate choice to wait until after the Defence case had closed, and ambush the Defence by the revelation of the existence of an Article 70 case.

232. Notwithstanding the centrality of the Article 70 allegations and evidence to the Main Case and the credibility of Defence evidence,[219] the Prosecution continued to refuse to provide any disclosure of the Article 70 evidence to the Defence. At the same time, the

[214] Article 54(1) of the Rome Statute; Separate Opinion of Judge M. Shahabuddeen, *Prosecutor v. J.B. Barayagwiza*, Case No. ICTR-97-19-AR72, Decision on Prosecutor's Request for Review or Reconsideration, 31 March 2000, para. 66; Situation in Uganda, ICC-04-05/85, Prosecution's Reply under Rule 89(1) to the Applications for Participation of Applicants a/0010/06, a/0064/06 to a/a/0070/06, a/0081/06 to a/00104/06, and a/0111/06 to a/0127/06, 28 February 2007, para. 32; Guideline 15, United Nations Guideline on the Role of Prosecutors, 1990, The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. Downloaded 9 December 2005.
[215] *Prosecutor v. Kupreskic*, IT-95-16-T, Decision on Communications between the Parties and their Witnesses, 21 September 1998, para. (ii); *Prosecutor v. Milosevic*, IT-02-64-AR.73.02, Decision on Admissibility of Prosecution Investigator's Evidence, Partial Dissenting Opinion of Judge Shahabuddeen, 2 September 2002, para. 18.
[216] ICC-01/09-01/13-1-Red2, para. 20; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-A-R77.4, Decision on Interlocutory Appeals on Kosta Bulatović Contempt Proceedings, 29 August 2005, para. 21.
[217] ICC-01/04-01/06-2624.
[218] ICC-01/05-44-Red, para. 9.
[219] ICC-01/05-01/13-1-Red2-tENG, para. 8.

Prosecution informed the Defence that they would consider it to be a violation of protective measures for the Defence to receive Article 70 material directly from Mr. Bemba.[220]

233. If the material had been disclosed contemporaneously, the Defence could have either put the allegations squarely to the witness, and thereby tested the veracity of the allegations, or made an informed decision to focus its time and resources on other evidence or witnesses. For this reason, the ICTY Appeals Chamber has deprecated the use of "sharp trial tactics", such as the belated disclosure of highly inflammatory or prejudicial allegations after the close of the Defence case.[221] Trial Chamber I of the ICC has also found that it is prejudicial and unfair to raise allegations concerning the credibility of a witness after the witness has testified, as it prevents the witness from being able to counter or respond to such accusations.[222]

234. The Prosecution's timely compliance with its disclosure obligations was thus central to the fairness of the proceedings, and to Mr. Bemba's right to be make an informed decision as to whether to waive his right to silence and put forward a positive Defence case.

235. Similarly, if the Prosecution suspected any wrongdoing on the part of members of the Defence, then rather than allowing the integrity of the proceedings to be compromised through the continuation of any improper acts, the Prosecution should have requested the Trial Chamber to suspend the proceedings until the matter could be addressed. The Appeals Chamber has recognised in other cases that such matters should be resolved immediately in order to ensure that Counsel's continued participation in the case does not compromise the integrity of the proceedings and the rights of the accused.[223]

236. The Prosecution's failure to disclose this information thus compromised the integrity of the proceedings, and vitiated Mr. Bemba's right to effective representation, in particular, his ability to make informed decisions –on the basis of impartial legal advice –concerning the Defence case.

[220] ICC-01/05-01/08-3016-AnxB-Red, pp. 21 and 27.
[221] *Prosecutor v. Krstić*, Appeals Judgment of 19 April 2004, para. 174.
[222] ICC-01/04-01/06-2693, para. 47.
[223] ICC-01/09-02/11-365, para. 46.

5. The Prosecution repeatedly contaminated the ability of the Trial Chamber to adjudicate the case impartially by making *ex parte* submissions on the credibility of Defence witnesses and evidence, and employing the existence of the pending Article 70 case as a basis for impugning the credibility of the Defence and its case

237. By directing its Article 70 requests for judicial assistance to the Trial Chamber hearing the Main Case, the Prosecution was doing one of two things. Either it was committing an inexcusable (and irremediable) legal error, based on a wholesale misreading of the Statute and Rules on the part of the Prosecution lawyers who drafted the filings, and the Prosecutor who signed them.

238. Alternatively, the Prosecution was well aware of the applicable law, but took a deliberate decision to place its unsubstantiated allegations about a "bribery scheme" affecting the Defence witnesses in front of the very Trial Chamber charged with assessing the credibility of these witnesses, in order to circumvent its disclosure obligations while at the same time ensuring the Defence had no opportunity to explain or rebut the allegations. Either scenario is possible. Neither means that these proceedings have proceeded on a fair footing.

239. A summary of the impugned filings has been set out in the "Procedural History" section above. This section will examine the extent of the Prosecution's malfeasance in more detail. On 15 November 2012, three months into the Defence presentation of evidence, the Prosecution informed the Trial Chamber in an *ex parte* filing that it had been conducting an investigation pursuant to Article 70 of the Statute into "potential payments to Defence witnesses of Mr. Jean-Pierre Bemba Gombo."[224]

240. The Prosecution seized the Trial Chamber in error. This is beyond dispute.[225] The drafters of the ICC Statute and Rules deliberately erected a wall between the Pre-Trial and Trial phases of proceedings before the Court. Article 39(4) of the Statute, for example, which provides that while Judges from the Trial Division may be temporarily attached to the Pre-Trial Division, or *vice versa*, this can only occur "provided that under no circumstances

[224] ICC-01/05-01/08-2412, para. 1.
[225] See, Article 57(3)(a), Article 64(4), Article 70(2) of the Statute, and Rules 162 to 169.

shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case." As eventually held by the Trial Chamber:[226]

> the interpretation of the Court's legal framework, in accordance with Article 21 of the Statute, and as confirmed by the travaux préparatoires, **makes it clear** that a Pre-Trial Chamber is the competent judicial authority to make determinations on any investigative measures requested by the prosecution in relation to an Article 70 investigation.

241. Following this error on 15 November 2012, the Trial Chamber should have immediately directed the Prosecution to seize the Pre-Trial Chamber with its request. It did not. Instead, the Trial Chamber directed the Registry to provide it with observations on the Prosecution request, issuing its "Decision requesting the Registry's observations on the prosecution's request relating to Article 70 investigation"[227] on 19 November 2012. Nowhere in this decision does the Trial Chamber address its lack of competence to entertain the Prosecution's application.

242. After the Registry advised that it had provided the Prosecution with the information sought, the Trial Chamber ruled that a decision on the Prosecution's request was no longer required.[228] Again, the Trial Chamber failed to indicate that it should never have been seized with the request, which it had no legal authority or competence to decide.

243. Doubtless, encouraged by this approach, on 20 March 2013, the Prosecution made a second *ex parte* request for judicial assistance,[229] again seizing the Trial Chamber. This 18-page filing contains a wealth of information concerning the Prosecution's Article 70 investigations, including (a) its dealings with an anonymous informant concerning an alleged bribery scheme;[230] (b) alleged promises of benefits to Defence witnesses;[231] (c) allegations of false documents being presented by the Defence;[232] (d) details of money transfers between Mr. Kilolo and Mr. Mangenda to nine Defence witnesses, all of whom are

[226] ICC-01/05-01/08-2606-Red, para. 21.
[227] ICC-01/05-01/08-2421.
[228] ICC-01/05-01/08-2461.
[229] ICC-01/05-01/08-2548-Red4
[230] ICC-01/05-01/08-2548-Red4, para. 8.
[231] ICC-01/05-01/08-2548-Red4, para. 9.
[232] ICC-01/05-01/08-2548-Red4, para. 10.

named;[233] (e) the alleged link between the results of the Prosecution's investigation and the testimony of Defence witnesses;[234] (f) further investigative avenues the Prosecution was intending to pursue;[235] (g) the alleged role of the accused in facilitating the apparently "bribery scheme";[236] (h) allegations concerning Mr. Bemba and Mr. Kilolo's practice of circumventing the Registry's telephone monitoring system;[237] and (i) allegations that Mr. Kilolo was releasing confidential information relevant to the proceedings.[238]

244. The Prosecution also appended a confidential ex parte Annex A, being an internal Prosecution memorandum entitled "Breakdown of the money paid using Western Union."[239] This table purports to show transfers of money originating from Mr. Kilolo and Mr. Mangenda, and from acquaintances and relatives of Mr. Bemba.

245. It appears, therefore, that the Prosecution gathered all the information concerning its Article 70 investigations, and laid it at the feet of the Trial Chamber seized with the Main Case. Having been apprised in full of the Prosecution's investigative steps, and its unsubstantiated suspicions concerning the Accused's role, the Trial Chamber did not direct the Prosecution back to the Pre-Trial Chamber. Instead, it called an *ex parte* Status Conference in order to "obtain additional information relating to the Second Request and to hear the Registry's views on the technical implications of the investigative steps requested by the prosecution."[240]

246. The 9 April Status Conference lasted 1.5 hours. The Accused was not represented. The Defence was not present. As noted above, the Prosecution was represented by the same Senior Trial Attorney who leads the Prosecution team in the Main Case, Mr. Jean-Jacques Badibanga, and other members of the Prosecution team in the Main Case.[241] No argument can be made that the Status Conference discussion was limited to technical or jurisdictional questions concerning judicial assistance. Rather, the Presiding Judge demonstrated an extensive knowledge of the Prosecution's Article 70 investigation and its potential impact

[233] ICC-01/05-01/08-2548-Red4, para. 13.
[234] ICC-01/05-01/08-2548-Red4, para. 15.
[235] ICC-01/05-01/08-2548-Red4, para. 16.
[236] ICC-01/05-01/08-2548-Red4, para. 16.
[237] ICC-01/05-01/08-2548-Red4, paras. 21-23.
[238] ICC-01/05-01/08-2548-Red4, para. 24.
[239] [REDACTED].
[240] ICC-01/05-01/08-2560-Red.
[241] T-303-Conf-Red3-ENG-ET, p.1, lines 17-22: Mr. Eric Iverson, Ms. Sylvie Vidinha.

on the Main Case, and even made suggestions as to further investigative avenues which the Prosecution could or may take, for example:

> PRESIDING JUDGE STEINER: Maître Badibanga, for instance, would be a good start for the Prosecution investigation just to check the log-book that Detention Centre's – nodding does not help. I need your answer.[242]

> PRESIDING JUDGE STEINER: […] the Prosecution enumerates a series of money transfers made to counsel, Maître Kilolo, or to the Defence case manager, Mr Mangenda, and at the same time by persons that are not witnesses or not involved in any way in this case. So has the Prosecution also is -- also envisages investigating these money transfers by its own, without involving the Chamber in such investigation?[243]

247. The Chamber asked numerous questions concerning the phone-tapping and monitoring of the Defence team members and the Accused;[244] including questions directly linked to substance of the allegations made by the Prosecution in its Second Request.[245]

248. The Status Conference transcripts reveal the Prosecution's deliberate conflation of the Article 70 investigations with the credibility of the Defence evidence in the Main Case. The Prosecution submitted:[246]

> Some witnesses received large sums of money, and some of them, when they were asked here in a neutral manner, "Did you accept the least amount of money?" And you will recall, Madam President, all those witnesses stated that they never received any money from the Defence, even in repayment for travel costs, but in this annex we have six pages of money transfers to those witnesses. So if those transfers were innocent, the witness would have said, "Look, I was given €20 to pay for my bus fare and to have a drink" but this is not the

[242] T-303-Conf-Red3-ENG-ET, p.24, lines 8-10.
[243] T-303-Conf-Red3-ENG-ET, p.8, lines 16-20.
[244] T-303-Conf-Red3-ENG-ET, p.4, line 25 – p.5, line 5, p.11, lines 5-8, p.13, lines 18 – p.17, line 22, p.19, line 24 – p.20, line 14, p.22, lines 3-8. See, for example, p.14, lines 9-12: "PRESIDING JUDGE STEINER: So, just in order to clarify the Chamber as a whole, how these phone calls are made by the detainee? [*sic*] He can call whoever he wants, or only certain numbers that are given in advance to the authorities at the Detention Centre? How in practice does that work?"
[245] See, for example, T-303-Conf-Red3-ENG-ET, p.16, lines 4-7: "PRESIDING JUDGE STEINER: And from a technological perspective, is it possible to find out whether the person that was called by the detainee is opening the phone for a conference call, or redirecting the phone call to third persons? Is there a way to find out in that respect?"
[246] T-303-Conf-Red3-ENG-ET, p.26, line 17 – p.27, line 1.

> case. For certain witnesses we are talking about 8,000, 10,000, €12,000. I believe that this is very serious and that is the basis for our application. **That is why we felt it was important to bring this to the attention of the Chamber.**

249. The Prosecution advanced the case that such denials were *prima facie* evidence of impropriety, notwithstanding the fact that it was aware that Prosecution witnesses, who had received expenses directly from the Prosecution, had also denied receiving any such payments when testifying.[247]

250. The Trial Chamber then stated definitively that it would decide on the investigative requests,[248] with no discussion of its lack of competence to do so, or the utter impropriety of the Prosecution bringing unsubstantiated and unproven allegations concerning Defence witnesses in an *ex parte* manner with no disclosure to the Defence or opportunity being given to the witnesses to explain.

251. Only on 26 April 2013, did the Trial Chamber finally decide that it had "no competence" over the Prosecution's request,[249] a decision it should have properly taken over five months earlier.

252. Having been rebuffed in their attempt to bring such matters before the Trial Chamber in an *ex parte* manner *via* the Article 70 investigation, the Prosecution then sought to admit discrete and highly prejudicial extracts from its investigations after the Defence case had closed.[250] Notwithstanding an explicit refusal from the Trial Chamber to admit such evidence,[251] the Prosecutor exploited the reopening of the case for the discrete purpose of hearing P-169 in order to place further privileged information before the Trial Chamber.

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[247] See for example, [REDACTED].
[248] T-303-Conf-Red3-ENG-ET, p.25, lines 16-25: "MR DUBUISSON: (Interpretation) Yes, specifically Regulation 92 of the Regulations of the Court, and also those that you have mentioned. I will be very honest with the Chamber and I am always honest, there might be exceptional circumstances but it is up to the Chamber to decide. PRESIDING JUDGE STEINER: For sure. We have no doubt that it will be for the Chamber at the end to decide even because the Regulations of the Registry, they can regulate the activities within Registry and not limit the activities of the Chamber for sure, and -- but it's important for the Chamber to receive from the Registry and that's the main reason for this status conference, the views of the Registry, in relation to the many different aspects of any possible line of action to be taken."
[249] ICC-01/05-01/08-2606-Red, para. 22.
[250] See above, Section D.4, paras. 227-235.
[251] ICC-01/05-01/08-3029.

253. In particular, the Prosecutor submitted extracts from the third Report of the Independent Counsel, setting out a purported conversation between Me. Kilolo and Mr. Mangenda.[252] The conversation sets out potential legal strategy in relation to the credibility of Prosecution witnesses, and was privileged within the terms of Rule 73(1).

254. The conversation did not contain evidence pertaining to ICC payments to P-169, alleged threats to P-169, or any of the issues set out in the correspondence sent by P-169 to the ICC at various times. Its lack of relevance to the hearing was born out by the fact that the Prosecutor did not tender the document[253] or question P-169 in relation to any issues pertaining to it. The Prosecution was not even able to explain the potential relevance of the document in advance of the hearing, as evidenced by the Prosecution's vague designation that its use was 'to be determined'.[254]

255. Apart from the fact that the Prosecutor in the Main Case should never have been granted access to this conversation, the lack of an objective foundation for disclosing this document in the Main Case to the Chamber and participants creates the impression that the Prosecutor's sole objective for doing so was to taint any Defence strategy concerning P-169 with the specter of the Article 70 case: i.e. to impugn any current Defence strategy that might have also been proposed by former Counsel, or imply that any deficiencies in the Prosecution case are somehow attributable to alleged Defence misconduct. The Defence submits that the Prosecution knew well that it was the practice of the Chamber to have printed for all members of the bench copies of all documents placed upon the parties' lists of documents. Thus by the simple expedient of placing these irrelevant and inadmissible documents on its list, the prosecution was able to ensure that the Chamber would read them, thus topping and tailing the defence case with express prejudice.

256. The Prosecution has also peppered its submissions in **this case** with references to Article 70 allegations that are based on evidence that it is not admitted in this case.[255] The purpose has always been clear: to undermine the credibility of both the Defence and its witnesses. The Prosecution has never been reprimanded for this practice.

[252] CAR-OTP-0082-1054; CAR-OTP-0082-1140 and CAR-OTP-0083-1307.
[253] [REDACTED].
[254] [REDACTED].
[255] See for example, [REDACTED]; ICC-01/05-01/08-2940, para. 3(iii).

257. Without any consideration to the possible ramifications to the fairness of the proceedings in the Main Case, the Prosecution has also placed privileged and sensitive information concerning the Defence case before the Plenary of Judges and the Appeals Chamber. In its response to request to disqualify Judge Tarfusser from the Article 70 case, the Prosecutor cited its application for the arrest warrant.[256] Judge Tarfusser's response also cites virtually the entire gamut of evidence collected by the Independent Counsel.[257] As a consequence, in order to resolve the request, these materials would have been transmitted to the Plenary of Judges, which includes this Trial Chamber. The record of the decision of the Plenary further details that the session convened to decide upon the request for disqualification was attended in person by Judge Aluoch and Judge Ozaki.[258]

258. Not only did the Trial Chamber refrain from recusing itself from this proceeding, it also failed to notify the Defence in the Main Case as to its receipt and consideration of these documents, or its direct involvement in deciding upon issues which were also before the Trial Chamber, for example, as concerns the legal competence of the Single Judge to lift privilege, and the mandate and efficacy of the Independent Counsel as a means for vetting privileged information.[259]

259. The Prosecution also made extensive submissions – based on recordings of conversation with former Counsel and *ex parte* VWU reports – in relation to the credibility of a Defence witness in a public appellate filing.[260] The witness in question was not included in the charges in the Article 70 case, and the assertions were included in an *ex parte* (Prosecution Kilolo Defence only) response to a reply in the Article 70 case, to which the Bemba Defence had no access and no right to respond.

260. In the same filing, the Prosecution also attempted to engage in parallel litigation by using the Article 70 case as a means to obtain a pre-emptive appellate ruling or opinion in relation to issues that were before the Trial Chamber. For example, notwithstanding the fact that the issue of potential Defence misconduct is of no relevance to the issue as to whether

[256] ICC-01/05-01/13-404, fn. 57, citing paras. 16, 21, 27, 35, 49, 51, 60, 61, 116, 117.
[257] ICC-01/05-01/13-419-Anx, fn. 7.
[258] ICC-01/05-01/13-511-Anx, para. 9.
[259] ICC-01/05-01/13-511-Anx, paras. 19-20; ICC-01/05-01/08-3062-Red; ICC-01/05-01/08-3036; ICC-01/05-01/08-2945-Red.
[260] ICC-01/05-01/13-481-Red, paras 7-8.

the Prosecutor should be disqualified, the Prosecution segued into an irrelevant argument to the effect that former members of the Defence had purportedly conspired to utilise the correspondence of P-169 for improper purposes.[261] On the basis of this (irrelevant) argument, the Prosecution attached substantial extracts from the Third Independent Counsel's Report to its filing (Annex B), thus unnecessarily exposing the entire Appeals Chamber to such information.

261. As a result of the above filings, almost every Judge at the ICC has been exposed to detailed information from the Defence case and substantial Prosecution accusations on these points, whilst at the same time, the Defence in the Main Case has had no opportunity to litigate or assert its privilege of the contents, or to respond to such arguments.

262. Trial Chamber III is composed of "professional Judges", who are "capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in the particular case."[262] However, the presumption of professionalism is rebuttable, and must be "viewed in the eyes of a reasonable observer".[263] The Prosecution's error – negligent or deliberate – of placing information concerning its Article 70 investigation in front of the same Judges seized with the Main Case, combined with the Trial Chamber's failure to correct this error for a period of over five months, resulted in the Trial Chamber being fed a wealth of *ex parte* unproven and unsubstantiated allegations concerning the credibility of the Defence evidence, at a time when it was actually hearing the evidence of these witnesses. This situation was allowed to continue, with no apparent regard for the inability of the Defence to challenge the foundation of these allegations.

263. In such circumstances, no reasonable observer would understand that any Judge, regardless of their experience or training, could fairly render a decision on the credibility of that evidence. The contamination was simply too widespread. The trial process has been damaged beyond repair.

[261] ICC-01/05-01/13-481-Red, paras. 16-17.
[262] ICC-02/05-01/09-76-Anx2, p.7; See Prosecutor v. Brđanin & Talić, IT-99-36, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, 18 May 2000, para. 17; Prosecutor v. Stanislav Galić, IT-98-29-A, Appeals Chamber Judgment of 30 November 2006, paras. 41 and 44; Prosecutor v. Jean-Paul Akayesu, ICTR-96-4, Appeals Chamber Judgment of 1 June 2001, para. 269.
[263] ICC-02/05-03/09-344-Anx, para. 14.

264. Moreover, an objective review of the transcripts of the case would lead a reasonable observer to understand that the Judges had in fact been poisoned by the Prosecution's extensive submissions, and that Prosecution and Defence witnesses were treated differently. To cite perhaps the most glaring example, the Defence was prohibited from asking Prosecution witnesses about benefits they received in exchange for their testimony. Such questions were deemed "offensive" by the Presiding Judge:[264]

[REDACTED]

265. In fact, it was later disclosed to the Defence – again in an untimely manner warranting a rebuke from the Trial Chamber[265] – that the witness in question, [REDACTED],[266] and organised [REDACTED] in an attempt to get more money from the Court.[267] Rather than being "offensive", it is difficult to imagine a situation where it was more appropriate or important for the Defence to explore these issues with a witness.

266. By contrast, the Prosecution was permitted to ask each and every Defence witness whether they had received payments or benefits. [REDACTED].[268] If Defence witnesses objected to questions about payments on the basis that they found them insulting, the Trial Chamber would compel an answer.[269] A different standard was applied as between the Prosecution case, and the Defence case.

267. The Prosecution was also permitted effectively to accuse Defence witnesses of being untruthful by challenging their testimony concerning the receipt of funds or contacts with the Defence.[270] Notwithstanding precedents which prohibits such lines of questioning unless the Prosecution has first laid an evidential foundation for such a suggestion and disclosed

[264] [REDACTED].
[265] [REDACTED].
[266] EVD-T-D04-00074/CAR-CHM-0001-0031 at 0033.
[267] ICC-01/05-01/08-2827-Red3, para. 15.
[268] [REDACTED].
[269] T-345-Conf-ENG-ET, p.12, line 4 – p.15, line 6.
[270] [REDACTED]; D-57, T-258-Red, p.2, line 25 – p.3, line 10; D-64, T-260-Red, p.6, lines 14-23; D-51, T-263-Red, p.14, lines 6-20; D-55, T-265-Red, p.15, lines 7-18; D-48, T-268-Red, p.78, line 22 – p.79, line 12; D-49, T-274-Red, p.34, lines 2-14; D-16, T-277-Red, [REDACTED], p.39, lines 4-11; D-45, T-297-Red, p.18, line 17- p.20, line 5; T-299-Red, p.24, lines 11-16; D-2, T-322--Red, p.26, line 6 – p.27, line 9; D-9, T-323bis-Red, p.21, lines 22-23; D-23, T-334-Red, p.17, lines 23-25; D-26, T-335-Red, p.19, lines 8-13; D-25, T-337-Red, p.40, lines 3-6, 13-20; D-29, T-339-Red, p.41, lines 18-19; D-30, T-342-Red, p.13, lines 1-10; D-15, T-345-Red, p.12, line 4 – p.15, line 6.

the material underlying such allegations,[271] the Trial Chamber failed to intervene. The Prosecution was thus able to exploit the fact that it had placed information before the Trial Chamber on such matters, on an *ex parte* basis, which in turn, prevented the Defence from being able to address such matters themselves.

268. Another discrepancy in the treatment of Prosecution and Defence witnesses is worth noting. Witness D-45 was erroneously permitted to enter the video-link location with this item of his personal property, being notes he had taken of issues about which he intended to discuss during his testimony.[272] [REDACTED].[273] [REDACTED].[274] No legal or factual basis was given for the reconsideration of the decision. When the Defence asked for such a basis, the Presiding Judge stated:[275]

> [REDACTED].

269. The Defence is not attempting to re-litigate the disclosure of the notes, its position being clear on the record. For the purposes of the present motion, the Defence simply notes that [REDACTED].[276] Again, a different standard was applied as between the Prosecution case, and the Defence case. In such circumstances, an observer would reasonably conclude that the different treatment afforded to Prosecution and Defence witnesses was a direct result of the Prosecution's impermissible tainting of the Chamber.

270. In fact, the Judges faced almost daily reminders from the Prosecution about the Article 70 investigation. Although the Defence was in the dark at the time, a retrospective reading of the transcripts reveals that the Prosecution was determined that the Chamber would not forget for one second that the Defence evidence was allegedly tainted. Each and

[271] *Prosecutor v. Krajisnik Case* No. IT-00-39-T, Decision on Cross-Examination of Milorad Davidovic, 15 December 2005; *Prosecutor v. Gotovina et al*, Transcript of 30 September 2009, T. 22352 to T. 22355.
[272] T-299-Red, p.9, lines 19-21: "When I arrived at the waiting room here on the first day of my testimony, it was on that day that I started taking notes. When I got into the room, a court officer was there. The court staff who were with me were present. I did not hide anything." ; T-300-CONF-ENG-ET, p.24, lines 4-5: "no-one - stopped me from bringing those documents into the courtroom."
[273] [REDACTED].
[274] [REDACTED].
[275] [REDACTED].
[276] [REDACTED].

every Defence witness was asked about payments made to them.[277] The Prosecution was consistent in asking witnesses whether they knew, or had been in contact with other witnesses on the Western Union list.[278]

271. As noted above, the Prosecution was permitted to ask such questions without laying an evidential foundation for doing so, and disclosing such foundation to the Defence. Unbeknownst to the Defence, the Prosecution was able to do so because it had already elaborated on the source and basis for these allegations to the Trial Chamber in *ex parte* hearings. Mr. Bemba has an absolute right to participate in his trial. The conduct of any evidential hearing in the absence of the Defence constitutes an impermissible trial *in absentia.*

272. As emphasised by Trial Chamber I in *Lubanga*, where questions have arisen concerning "a highly contentious and potentially important matter", it would be "incompatible with the accused's fair-trial right", to resolve the matter "in the absence of the accused".[279]

273. Similarly, in finding a violation of Article 6(1),[280] the ECHR in *Lanz v. Austria* concluded that the principle of equality of arms had not been respected[281] and noted:

> In a system where the filing of written observations by the parties before a hearing is not excluded and where a court, therefore, when deliberating on a case has at its disposal in addition to oral statements made at a hearing written statements filed beforehand, a party which is not informed about written submissions of the opposing party and thus deprived from reacting thereto is put at a substantial disadvantage vis-à-vis its opponent.[282]

[277] [REDACTED]; D-57, T-258-Red, p.2, line 25 – p.3, line 10; D-64, T-260-Red, p.6, lines 14-23; D-51, T-263-Red, p.14, lines 6-20; D-55, T-265-Red, p.15, lines 7-18; D-48, T-268-Red, p.78, line 22 – p.79, line 12; D-49, T-274-Red, p.34, lines 2-14; D-16, T-277-Red, [REDACTED], p.39, lines 4-11; D-45, T-297-Red, p.18, line 17- p.20, line 5; T-299-Red, p.24, lines 11-16; D-2, T-322--Red, p.26, line 6 – p.27, line 9; D-9, T-323bis-Red, p.21, lines 22-23; D-23, T-334-Red, p.17, lines 23-25; D-26, T-335-Red, p.19, lines 8-13; D-25, T-337-Red, p.40, lines 3-6, 13-20; D-29, T-339-Red, p.41, lines 18-19; D-30, T-342-Red, p.13, lines 1-10; D-15, T-345-Red, p.12, line 4 – p.15, line 6.
[278] [REDACTED].
[279] ICC-01/04-01/06-2434-Red2, para. 137.
[280] ECtHR, *Lanz v. Austria*, 24430/94, Judgment, 31 January 2002, para. 64.
[281] ECtHR, *Lanz v. Austria*, 24430/94, Judgment, 31 January 2002, para. 63.
[282] ECtHR, *Lanz v. Austria*, 24430/94, Judgment, 31 January 2002, para. 62.

274. In the *Brandstetter* case, the ECHR explained that the right to adversarial proceedings within the content of a criminal trial requires that "[b]oth prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. Various ways are conceivable in which national law may secure that this requirement is met. However, whatever method is chosen, it should ensure that the other party will be aware that observations have been filed and will get a real opportunity to comment thereon."[283]

275. The ECHR has further confirmed that in assessing whether there has been a violation of the right to adversarial proceedings, 'it is immaterial whether the documents or observations in issue are important for the outcome of the proceedings,[284] […] [or] whether the omission to communicate the document […] has caused any prejudice':[285] "What is particularly at stake here is litigants' confidence in the workings of justice, which is based on, *inter alia*, the knowledge that they have had the opportunity to express their views on every document in the file."[286]

276. The Trial Chamber's willingness to receive *ex parte* submissions from the Prosecution on issues that directly concerned the credibility of the Defence case creates an irresistible appearance that the Trial Chamber's duty to adjudicate the case impartially, and in the presence of Mr. Bemba has been irreversibly compromised.

277. A reasonable observer could only conclude that there was a deliberate effort to taint the entirety of the Defence case, and that this would inevitably impact on the ability of the Judges fairly to assess the credibility of Defence witnesses. An insistence that Judges are "professional" cannot trump every illegality, no matter the gravity.

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[283] ECtHR, *Brandstetter v. Austria*, 11170/84; 12876/87; 13468/87, Judgment, 28 August 1991, para. 67.
[284] Pieter van Dijk, Fried van Hoof, Arjen van Rijn & Leo Zwaak, *Theory and Practice of the European Convention on Human Rights*, 4th ed. (Intersentia, 2006), p. 584, citing ECtHR, *F.R. v. Swtitzerland*, 37292/97, Judgment, 28 June 2001, para. 37.
[285] Pieter van Dijk, Fried van Hoof, Arjen van Rijn & Leo Zwaak, *Theory and Practice of the European Convention on Human Rights*, 4th ed. (Intersentia, 2006), p. 584, citing ECtHR, *Walston (No. 1) v. Norway*, 37372/97, Judgment, 3 June 2003, para. 58.
[286] ECtHR, *Niderost-Huber v. Switzerland*, 18990/91, Judgment, 18 February 1997, para. 29.

278. The Defence suffered prejudice. It was unable to address these issues in re-examination, or to dispute the foundation of the Prosecution's allegations. Had Mr. Bemba and the Defence team been aware of the existence of alleged improprieties, the Defence could have addressed the issues and ensured that the case proceeded in a manner that was consistent with the best interests of Mr. Bemba, including his right to effective representation.

279. The Trial Chamber was aware that the Prosecution was in possession of the information at the material time, and, due to the *ex parte* nature of the hearings and filings, must have known that the Prosecution had not disclosed the information to the Defence. If the Trial Chamber were to continue to remain silent in the face of such violations, and fail to hold the Prosecution to account for its conduct, it would create the appearance that the Trial Chamber's exposure to allegations in the Article 70 case and involvement in such *ex parte* proceedings has compromised its ability now to adjudicate and sanction the Prosecution for conduct in which the Trial Chamber was indirectly involved. As a graphic illustration of the apparent impropriety, one can only imagine what might have happened had the defence case closed, say in August 2013, and oral arguments heard a year ago. Presumably, the Trial Chamber would have sat there and listened to Me Kilolo advancing the closing submissions of Mr Bemba, and been completely unsurprised by his arrest a few days afterwards. Where would the integrity of this trial have been then?

6. The Prosecution aggravated this conduct by withholding relevant information and providing misleading information to the Defence and ICC Chambers

280. The ability of the Defence either to assess the extent of the prejudice or to seek relief in a timely manner was hampered by the fact that members of the Prosecution abused their position as officers of the Court in order to advance positions that they knew or should have known to be incorrect, if they were acting with the diligence required for such an important office. The Prosecution's omissions, or false or misleading submissions on questions of fact were, in many cases, determinative or had a significant influence on the Chamber's decision, and resulted in a prejudicial outcome for the Defence.

281. This conduct was not limited to a confined issue, but extended to an array of matters related to Mr. Bemba's right to a fair trial, including issues concerning Mr. Bemba's legal

status, relevant jurisprudence concerning safeguards for monitoring, the relationship between the Article 70 case and the Main case, and issues related to the credibility of key Prosecution witnesses.

282. As noted above, the Prosecutor wrongly referred to Mr. Bemba as an 'indigent' accused during Status Conferences, and argued on the basis of this status, that any payment of money directly from third persons to the Defence, and from the Defence to witnesses, was *ipso facto* evidence of a crime, which warranted the lifting of privilege.[287] In so doing, the Prosecutor withheld key contextual information, which would not have been otherwise available to the Trial Chamber or the Single Judge in the Article 70 case, such as the fact that Prosecution witnesses had been paid expenses directly by the Prosecution, and had, nonetheless, denied receiving such funds when testifying in Court.[288]

283. The Prosecution also failed to bring the attention of either the Trial Chamber or the Article 70 Single Judge to legal precedents, which were of key relevance to their application to monitor privileged communications and to access other monitored recordings for the use of evidence in an Article 70 investigation. As has been revealed by a recently reclassified Prosecution Appeal Brief in the *Ndgujolo* case, Trial Chamber II repeatedly affirmed in that case that the power to order the monitoring of the defendant's communications rests with the Registrar, and not the Trial Chamber.[289] Even if the Prosecutor disagreed with these legal findings, it was clearly inappropriate for it not to have drawn the attention of the Trial Chamber to their existence (or to request the Appeals Chamber to reclassify the legal precedents for this purpose).

284. Similarly, it would appear that the Appeals Chamber has ruled that whilst a Chamber can allow the Prosecution to utilise the recordings of monitored recordings in the proceedings as evidence, the Chamber must balance their use with the impact on the rights of the defendant, including the substantive rights of their defence and their right to private life.[290] A Trial Chamber decision referred to by the Prosecution further suggests that the Appeals Chamber ruled that their use should be restricted to circumstances where they are of

[287] [REDACTED].
[288] [REDACTED] and Annex X.
[289] ICC-01/04-02/12-39-Red4, footnote 432. The *Ngdujolo* Defence Response further refers to a decision to the effect that the analysis of non-privileged conversations should be conducted by VWU and not the Prosecution: ICC-01/04-02/12-90-Corr2-Red, para. 254. See also para. 268.
[290] ICC-01/04-02/12-39-Red4, para 2011. See also ICC-01/04-02/12-90-Corr2-Red, para. 266.

"great importance" to a determination of the truth, and the evidence cannot be collected through other means.[291] Again, notwithstanding the fact that these legal precedents were of clear relevance to the Prosecution's multiple attempts to admit material collected through the monitoring of Mr. Bemba and members of his former Defence, the Prosecution failed to avert to them.

285. The Prosecution has also exploited the division between the two cases in order to advance different, and incompatible positions. For example, during the Article 70 investigation, the Prosecution averred that the information from the anonymous informant appeared to be relevant because the person was in possession of information concerning protected Defence witnesses, and Defence missions.[292] Nonetheless, in response to a Defence inquiry on this point, the Prosecution then denied that the anonymous informant had given them information on any "confidential Defence matters", or that the Prosecution ever transmitted any information concerning Defence witnesses.[293]

286. When confronted with the relevant section from its Article 70 filing, the Prosecution then qualified their response to acknowledge that the informant had provided identifying information concerning a Defence witness, albeit not the name itself.[294] However, according to information that was later filed in the Article 70 case but not in the Main Case, the Prosecution had in fact requested the informant to [REDACTED].[295] [REDACTED],[296] [REDACTED]:[297] [REDACTED].

287. When the informant expressed reservations in relation to [REDACTED],[298] which has thus deprived the Defence of an objective record of their interactions. The absence of [REDACTED] particular concern given that in [REDACTED],

[REDACTED].[299]

[291] ICC-01/04-02/12-39-Red4, para. 203. See also ICC-01/04-02/12-90-Corr2-Red, para. 275.
[292] ICC-01/05-44-Red, para. 10.
[293] ICC-01/05-01/08-3016-AnxB-Red, p.15.
[294] ICC-01/05-01/08-3016-AnxB-Red, p.18.
[295] [REDACTED].
[296] [REDACTED].
[297] [REDACTED].
[298] [REDACTED].
[299] [REDACTED].

288. The Prosecution has also repeatedly claimed that it has had no access to privileged Defence information.[300] The Trial Chamber relied on this assertion in order to reject the Defence request for interim relief.[301] As is clear from section 3 above, this claim was simply not true,[302] [REDACTED].[303] The Prosecution's attempt to distinguish between 'legitimate' and 'illegitimate' privilege is arbitrary, disingenuous, and irrelevant to the issue of prejudice to Mr. Bemba's rights.

289. According to the clear terms of Rule 73(1), information is either privileged or it is not. If the information arises from the professional relationship between Mr. Bemba and his Defence, then it is privileged under the terms of Rule 73(1). Irrespective as to whether the Chamber possesses the power to lift the privilege in order to facilitate Article 70 investigations, it is self-evident that the underlying rationale of privilege is destroyed if any such information is disclosed to any Prosecution lawyer involved in the main case.[304]

290. It would appear that the Prosecution attempted to avoid such a conclusion by (mis)-informing the Appeals Chamber that:

> the Prosecution has nevertheless ensured that the Prosecutor, the Deputy Prosecutor and staff members working on the Main Case do not access the Mangenda's conversations audio recorded by the Registry.[305]

[300] See for example, ICC-01/05-01/08-2965-Red, paras. 2-3.
[301] ICC-01/05-01/08-3059, paras. 16, 19, 24.
[302] See ICC-01/05-01/08-3103-Red2, paras. 28-32.
[303] [REDACTED].
[304] Even if the material was not covered by Rule 73(1), Rule 73(2) and Article 8 of the Code of Conduct protect the confidentiality of Defence internal work product privilege. Whereas the Prosecution has an obligation pursuant to Article 67(2) and Rule 77 to lift internal work product privilege as concerns specific information falling with these disclosure obligations, the drafters deliberately refrained from imposing any reciprocal disclosure obligation or broad inspection obligation on the Defence. ICC-01/04-01/06-T-254-Red-ENG-CT-WT, p.68, lines 3-10; ICC-01/04-01/06-2192-Red, para. 63. The Prosecution therefore has no entitlement to receive internal Defence documents, which address the credibility of Prosecution or Defence witnesses. As an example, the conversation between Me. Kilolo and Mr. Mangenda that was disclosed in this case (CAR-OTP-0082-1054 and CAR-OTP-0082-1140) clearly includes discussions on Defence strategy, touching on *inter alia*, the current abuse of process motion. It is clearly lawful for the Defence to discuss its strategy concerning such a motion, and it is in equal measures unlawful and prejudicial for the Prosecution in this case to have access to such strategy.
[305] ICC-01/05-01/13-314-Red, para. 43.

291. The Prosecution's assertion that Main Case lawyers had not accessed to the detention recordings of Mr. Mangenda is directly contradicted by its own submissions. As set out above, in a Status Conference before the Article 70 Single Judge, Mr. Badibanga appeared for the Prosecution and made extensive submissions based on [REDACTED].[306] Given the fact that the recordings were transmitted to the Prosecution only in Lingala and were not translated or transcribed,[307] it is reasonable to conclude that Mr. Badibanga accessed and reviewed their contents at some point. The Defence in the Main Case was also directed to address all Article 70 disclosure queries to Mr. Badibanga,[308] which would have been an ineffectual and improper suggestion if Mr. Badibanga were not familiar with the Article 70 dossier.

292. This issue was of key importance to the matter before the Appeals Chamber. As found by Judge Kourula:

> the circumstances of the *Bemba* and *Bemba et al* cases and the specific way in which the article 70 case is interrelated with the main case, as well as the timing of the commencement of the investigation at the end of the Bemba case, could indeed give rise to reasonable doubts as to the impartiality of the staff members who, I would note, have been intimately involved in the facts, evidence, and day to day legal strategies of the *Bemba* case. Therefore, I consider that these staff members should have requested their excusal pursuant to their obligations under the Code of Conduct. It follows from this statement that, in my view, the Prosecutor should have given more consideration to the spirit (and raison d'être) of the Code of Conduct and not appointed the same staff members to the two cases.[309]

293. In terms of matters concerning the credibility of Prosecution witnesses, the Prosecution averred to the Court in a filing that all contact with P-169 had 'involved' the VWU.[310] In response to a Defence query as to whether the Prosecutor had contacted P-169 at any point after his testimony, the Senior Trial Attorney asserted that "contacts with

[306] [REDACTED].
[307] ICC-01/05-01/13-177.
[308] ICC-1/05-01/08-2945-AnxA-Red.
[309] ICC-01/05-01/13-648-Anx1, para. 6.
[310] ICC-01/05-01/08-2897-Red, para. 17.

witnesses were made jointly with the VWU following Trial Chamber III's instruction".[311] It was only after the Defence requested access to the covering email that the Prosecution acknowledged that it had set up a non-ICC account for the purpose of communicating with this witness, and that it had in fact communicated with the witness on multiple occasions without any involvement of the VWU.[312]

294. The Prosecution also provided misleading information concerning the modalities of payment to P-169. Before ordered to disclose all relevant particulars concerning the payment of P-169, the Prosecutor asserted that the September 2011 payment to P-169 was "made on behalf of the Victims and Witnesses Unit ("VWU")."[313] In a 2 April 2014 filing, the Prosecution asserted that all payments to P-169 referenced by the Defence "represent payments from the VWU."[314] The Prosecution further stressed the importance of considering each payment in its proper context,[315] whilst at the same time, failing to disclose that context to the Defence – namely, that the Prosecution had advanced payments directly to P-169 without seeking prior authorisation from the Registry.[316] At the time these rather extraordinary payments were made, there had been no neutral determination that the witness was entitled receive them – his entitlement thus rested entirely within the discretionary powers of the Prosecution. The absence of a contemporaneous decision of the Registrar means that the witness would have understood the payment as a payment from the Prosecutor – its retrospective Registry authorisation would have had no impact on the statement of mind of P-169, which is the key issue as concerns his credibility.

295. The Defence only became aware of this 'context' on the eve of P-169's scheduled recall after the Chamber ordered the Prosecution to reclassify a VWU email on this matter and make it available to the Defence.[317]

296. In its 10 September 2014 filing, the Prosecution further asserted that it had disclosed the information requested by the Defence in relation to reimbursement and expenses paid to

[311] Annex VIII.
[312] [REDACTED].
[313] [REDACTED].
[314] [REDACTED].
[315] [REDACTED].
[316] [REDACTED].
[317] ICC-01/05-01/08-317.

P-169.[318] This was clearly untrue, as reflected by the later disclosures in October 2014 concerning extremely significant expenditures that had been made to P-169.[319]

297. Further Prosecution misstatements concerning P-169 are set out in the Defence filing of 17 September 2014.[320]

298. Both the Defence and the Trial Chamber depend on the Prosecution to exercise its duties in good faith and honesty. The disclosure regime – which is fundamental to the fairness of the proceedings – is predicated on such a presumption. In many instances, the Trial Chamber relied on undertakings from the Prosecution that it had disclosed all relevant information in order to dismiss Defence requests for disclosure of specific categories of information.[321]

299. This presumption of good faith and honesty has, however, been irreparably ruptured in this case. If the Prosecution has misinformed the Defence and the Trial Chamber in relation to the above matters, in relation to what else might they have misled the Defence? If they could blithely and repeatedly submit false information to the Appeals Chamber in order to defend themselves from a Defence request for disqualification, there is a real probability that they could have done the same in relation to verbal correspondence between the Prosecution and witnesses, or in relation to the existence of disclosable information within their control.

300. Ultimately, however, the responsibility rested with the Chamber under Article 64(3)(c) to "provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of trial to enable adequate preparation for trial". Disclosure occurred in a piecemeal and partial manner throughout the proceedings. Several documents of key importance to the credibility of Prosecution witnesses were disclosed after the close of the case, such as expense receipts which indicate that the Prosecution met with witnesses (who were implicated in the "marché de dupes") on multiple occasions, paid them significant expenses (from a local context), but failed to disclose any

[318] [REDACTED].
[319] [REDACTED].
[320] [REDACTED].
[321] [REDACTED]; ICC-01/05-01/08-3154-Red [REDACTED]; [REDACTED]; [REDACTED].

notes or statements concerning such meetings. [322] This deprived the Defence of the ability to put their contents to the concerned witnesses, or to conduct follow up investigations Notwithstanding clear indicia that the Prosecution was not fulfilling its disclosure obligations in good faith,[323] the Trial Chamber also resisted repeated Defence requests either to sanction the Prosecution or to require the Prosecution to certify that it had complied with its disclosure obligations.

301. The Prosecution's consistent disregard for accuracy in relation to crucial matters in dispute, when combined with the absence of vigilant judicial supervision, has ineliminably ruptured the fairness of the trial.

7. Mr. Bemba has a right to an effective remedy

302. The right to a remedy is recognised by all human rights instruments, including the Universal Declaration of Human Rights (UDHR), and the International Covenant on Civil and Political Rights (ICCPR).[324] The right to an effective remedy has been described as a "peremptory norm" of international law, and that it is "axiomatic that an international court […] may not derogate from or fail to comply with such a general norm".[325]

303. The Defence acted diligently to attempt to minimise the prejudice to Mr. Bemba stemming from the above violations. As soon as it became aware that the Prosecution had or was in the process of accessing privileged information, it sought interim relief from the Trial Chamber. In particular, the Defence requested the Trial Chamber to take measures to prevent the Prosecution from continuing to access Defence information concerning the Main

[322] Annex IX. The Prosecution disclosed the direct payments that they had made to the 22 witnesses in October 2014 - several months after the case closed. Disclosure was effected while P-169 was testifying. An analysis of the receipts later demonstrated that the Prosecutor met these witnesses on several occasions for which no notes or statements have been disclosed to the Defence. Adverse inferences must be drawn from the absence of disclosed records concerning these meetings.
[323] For example, for the first five months of the Article 70 case, the Prosecution refused to disclose any confidential filings or evidence from that case to the Defence, notwithstanding the clear links between the cases. At the same time, the Prosecution informed the Defence that they considered that it would be a breach of protective measures for the Defence to obtain this information directly from Mr. Bemba. The Chamber did not sanction or reprimand the Prosecution for this breach of its disclosure duties: see ICC-01/05-01/08-3103-Red2, fn. 6.
[324] Article 8 of the UDHR, and Article 2 of the ICCPR.
[325] In the matter of El Sayed, 'Order Assigning the Matter to the Pre-Trial Judge', CH/PRES/2010/01, paras. 26, 35.

Case, and requested to review the privileged material before its transmission to the Independent Counsel or the Prosecution.[326]

304. The Trial Chamber declined to do so, on the basis that it did not possess the competence to consider the legality of measures taken in the Article 70 case, and the Defence had – in a request for *interim measures* – "failed to substantiate the prejudice for which it seeks relief".[327]

305. As concerns the first aspect of this finding, the right to a remedy applies even if the persons violating the defendant's rights were acting in an official capacity.[328] Whilst the author of the violation can be an aggravating factor (in light of the particular duties and responsibilities of the entity in question):[329]

> [f]irst and foremost, [the] analysis focuses on the alleged violations of the Appellant's rights and is not primarily concerned with the entity responsible for the alleged violation(s). […] Thus, under the abuse of process doctrine, it is irrelevant which entity or entities were responsible for the alleged violations of the Appellant's rights.

306. It is therefore no answer to rely on the existence of judicial orders in the Article 70 case, if the judicial order in question violated the law, and Mr. Bemba's rights in the Main Case.

307. This is particularly the case where the Single Judge has prevented the Defence from being able to seek any remedy as concerns Article 70 decisions, which impacted on the Main Case. Apart from the fact that the Single Judge found that the individual Article 70 teams did not possess any standing to seek leave to appeal as concerns his decision to lift Mr. Bemba's legal privilege, the Single Judge also found that that Mr. Bemba's Defence in the Main Case possessed no standing to appeal decisions which concerned Mr. Bemba's right to privilege in the Main Case.[330]

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[326] ICC-01/05-01/08-2945-Red, ICC-01/05-01/08-2991-Red, ICC-01/05-01/08-3036.
[327] ICC-01/05-01/08-3059, para. 25.
[328] Article 2(3)(a) of the ICCPR.
[329] *Barayagwiza v. the Prosecutor*, Decision, Case No. ICTR-97-19-AR72, 3 November 1999, para. 73.
[330] ICC-01/05-01/13-456.

308. Having been refused standing to address the legality of the Single Judge's orders in the Article 70 case, the Defence also attempted to raise the issue with the Dutch authorities responsible for implementing these orders. They rejected such arguments *in limine* on the grounds that they had no competence to consider the legality of requests from the ICC.[331]

309. Similarly, when the Defence attempted to exercise Mr. Bemba's right to submit a complaint in relation to measures impacting on his right to privileged communications in the detention unit, the complaint was dismissed by the Presidency on the grounds that the complaint mechanism was not applicable.[332] Yet, when Mr. Bemba attempted to obtain relief from the Trial Chamber in relation to the fact that his right to privilege was not being respected in full, the Trial Chamber directed Mr. Bemba to file a complaint using the very mechanism which the Presidency had deemed to be inapplicable.[333]

310. The division of judicial tasks on matters concerning Mr. Bemba has operated to create a vicious cycle of deniability, in which no judicial forum is willing to hear and consider issues concerning the impact of the Article 70 case on Mr. Bemba's rights in the Main Case. The fact that the ICC has collectively refused to provide Mr. Bemba with an effective avenue to contest the legality of the monitoring, has denied him the right to an effective remedy, which in itself, violates Mr. Bemba's rights.[334]

311. In terms of the Trial Chamber's insistence that the Defence should have substantiated the existence of prejudice, it is manifestly incorrect to require the Defence to do so in filings requesting ***interim*** relief in order to avoid such prejudice.

312. The facts should have spoken for themselves. There is an obvious appearance of impropriety as concerns any access by the Prosecution in **this case** to internal Defence communications (written and oral) concerning **this case**. Otherwise, proof of prejudice could only be met by putting privileged information before the Chamber, which would vitiate the very purpose of the request.

[331] ICC-01/05-01/13-424
[332] ICC-RoR221-03/14-3.
[333] ICC-01/05-01/08-3059.
[334] Human Rights Committee, General Comment no. 31, para. 15, CCPR/C/21/Rev.1/Add.13.

313. The Trial Chamber's failure to mitigate or stem the prejudice has now rendered it impossible for the Defence to have a fair trial.

314. The abuse of process doctrine mandates a permanent stay of proceedings, where it would be "repugnant or odious to the administration of justice to allow the case to continue" or "where the rights of the accused have been breached to such an extent that a fair trial has been rendered impossible."[335]

315. In imposing a stay of proceedings, Chambers of the ICC have held that it is not necessary to find that the Prosecution acted in bad faith.[336] It is sufficient to show that: (a) the rights of the accused have been violated to such an extent that the essential preconditions of a fair trial are missing; and (b) there is no sufficient indication that this will be resolved during the trial process.[337]

316. While recognised as an "exceptional remedy" to apply as a "last resort",[338] the Appeals Chamber has held that:[339]

> [w]here fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.

317. The widespread procedural irregularities make the current case untriable.

318. The decision to file for a permanent stay of the proceedings in one of only two trials currently being heard by the International Criminal Court has not been taken lightly. The seriousness of this request is well understood. However, information has come to light revealing the extent of procedural irregularities on the part of the Prosecution, and which now gives context to the stance of Trial Chamber III towards both Defence witnesses and

[335] ICC-01/09-02/11-868-Red, para. 14, citing: ICC-01/09-02/11-728, paras. 74-77. See generally ICC-01/04-01/06-772; ICC-01/04-01/06-1486; ICC-01/04-01/06-2690-Red2.
[336] ICC-01/09-02/11-868-Red; ICC-01/09-02/11-728, para. 76.
[337] ICC-01/09-02/11-868-Red, para. 14, citing ICC-01/09-02/11-868-Red, ICC-01/09-02/11-728, para. 76; ICC-01/04-01/06-1401, para. 91.
[338] ICC-01/09-02/11-868-Red, para. 14.
[339] ICC-01/04-01/06-772, para. 37.

the Defence as a whole. Viewed alongside widespread breaches of disclosure violations, abuses of the privileges and immunities of the Defence team, and violations of Mr. Bemba's detention rights, the proceedings have reached a point where it would be repugnant to the administration of justice to allow them to continue.

319. There is no basis upon which an outsider could reasonably comprehend that Mr. Bemba would receive a fair trial before the present Trial Chamber, and no prospect that the deficiencies will or could be corrected, as evidenced by the Trial Chamber's refusal to grant interim relief and the refusal of the Pre-Trial Chamber, the Trial Chamber, the Presidency and the Dutch authorities to even consider the merits of Defence submissions concerning the illegality of the monitoring measures.[340]

320. The Trial Chamber's willingness to accept bald-faced assurances from the Prosecution that no improprieties occurred,[341] and unwillingness to sanction clear instances of such improprieties, demonstrates its inability to adjudicate this case in an impartial and fair manner.

321. To give just one example, the Defence has stated that privileged information concerning Defence strategy and the Defence Closing Brief has been accessed by the Prosecution. The Prosecution did not explicitly deny this, but simply repeated its refrain that it has had no access to information covered by "legitimate privilege".[342]

322. The fact that the Trial Chamber nonetheless concluded that the Prosecution has not had any improper access to Defence information either means that the Trial Chamber has been so poisoned by the Article 70 allegations that it considers that such information must have been evidence of illegal conduct even if it concerned Defence strategy or its Closing Brief, or, the Trial Chamber considers assertions from the Prosecution to have more weight and to be more credible than those of the Defence.

323. Either way, the trial cannot proceed to finality on this basis. Both the cumulative and protracted nature of the violations have irreparably eliminated the notion of equality of arms,

[340] See ICC-01/05-01/13-456; ICC-01/05-01/08-3059; ICC-RoR221-03/14-3.
[341] ICC-01/05-01/08-3059, para. 19.
[342] ICC-01/05-01/08-2965-Red.

Mr. Bemba's right to silence and privilege against self-incrimination, and his right to be judged in relation to the Main Case allegations in an impartial manner.

324. Since Mr. Bemba has already been in detention for over six years, it would also be contrary to his right to expeditious proceedings to order a retrial with a new Chamber and Prosecution. The latter is in any case impossible due to the joint failure of the Prosecution, Pre-Trial Chamber and Trial Chamber to require the establishment of "Chinese walls" within the Prosecution.

325. Even if the threshold for issuing a permanent stay of the proceedings has not been met, the duty to provide an effective remedy for such violations remains. The existence and extent of the prejudice suffered by Mr. Bemba may be relevant to the nature of the remedy, but prejudice is not in itself, a precondition for a remedy.

326. Given that the violations have prolonged Mr. Bemba's detention, prejudiced the effectiveness of the Defence, and occasioned undue mental harm, then it would be appropriate for the Trial Chamber to grant interim release; and in the event of an acquittal, monetary compensation, and in the event of a conviction, a significant reduction in sentence.

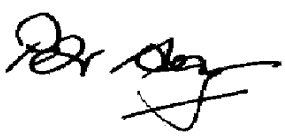
F. RELIEF SOUGHT

327. For the reasons set above, the Defence for Mr. Bemba requests the Trial Chamber to

STAY the proceedings; and

ORDER the immediate release of Mr. Bemba to the Kingdom of Belgium.

The whole respectfully submitted.



Peter Haynes, QC

Lead Counsel of Mr. Jean-Pierre Bemba

The Hague, The Netherlands

25 November 2014