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Date: **6 May 2024**

**TRIAL CHAMBER V**

**Before:** **Judge Bertram Schmitt, Presiding Judge**
**Judge Péter Kovács**
**Judge Chang-ho Chung**

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II**
**IN THE CASE OF *THE PROSECUTOR v.***
***ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

**Public**

**Public redacted version of 'Yekatom Defence Request for leave to appeal the "Decision on Yekatom Defence Request for the Exclusion of Allegedly Fabricated Evidence" (ICC-01/14-01/18-2460-Conf)'**

**Source:** **Defence for Mr. Alfred Rombhot Yekatom**

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## INTRODUCTION

1. Pursuant to article 82(1)(d) of the Rome Statute, the Defence for Mr Alfred Rombhot Yekatom ('Defence') hereby seeks leave to appeal Trial Chamber V's 'Decision on Yekatom Defence Request for the Exclusion of Allegedly Fabricated Evidence' ('Impugned Decision').[1] Specifically, the Defence seeks leave to appeal the following three issues arising from the Impugned Decision:

> whether the Chamber erred in fact and law in its assessment of the evidence and argumentation regarding the Prosecution's violation of article 54(1), due to an improperly narrow application of its powers and responsibilities vis-à-vis review of the Prosecution's compliance with its duties ('First Issue');
>
> whether the Chamber erred in law in finding that the Prosecution's obligation to investigate exonerating circumstances was 'limited to the investigation stage' ('Second Issue'); and,
>
> whether the Chamber erred in fact and law in finding that there was no causal link between the Prosecution's violation of article 54(1) and the obtaining of the impugned fabricated evidence ('Third Issue') (collectively, 'Issues').

## PROCEDURAL HISTORY

2. On 5 December 2023, the Defence filed the 'Request for the Exclusion of Fabricated Evidence',[2] in which it sought the exclusion of the evidence of three Prosecution witnesses, two CLRV1 witnesses, including their associated exhibits, and other relevant evidentiary items ('Fabricated Evidence') constituting the product of a large-scale conspiracy involving multiple individuals, including Court-employed intermediaries, to fabricate evidence against Mr Yekatom for personal gain ('Conspiracy'). The Request was made pursuant to article 69(7) of the Statute, and on the basis of *inter alia* the Prosecution's violation of its article 54(1) investigative duties, including its wilful blindness to the manifest *indicia* of misconduct and unreliability of its witnesses and evidence.

3. On 23 April 2024, the Chamber issued the Impugned Decision, dismissing the Exclusion Motion.

## SUBMISSIONS

[1] ICC-01/14-01/18-2460-Conf.
[2] ICC-01/14-01/18-2240-Red.

### A. First Issue: whether the Chamber erred in fact and law in its assessment of the evidence and argumentation regarding the Prosecution's violation of article 54(1), due to an improperly narrow application of its powers and responsibilities vis-à-vis review of the Prosecution's compliance with its duties.

4. In the Impugned Decision, the Chamber made the preliminary finding that it 'only has a very limited role in reviewing whether the Prosecution complied with its duties under Article 54(1) of the Statute'.[3] This erroneously self-imposed constraint is at odds with the statutory framework and jurisprudence of the Court.[4]

5. Under article 64(2), the Chamber must ensure that the trial is 'fair and expeditious and is conducted with full respect for the rights of the accused'. This is the overarching obligation of the Chamber.[5]

6. Accordingly, Court chambers have repeatedly found that oversight responsibility vis-à-vis the Prosecution's compliance with article 54(1) duly lies with them, without confining themselves to the 'only […] very limited role' self-imposed by the Chamber in the Impugned Decision. This includes cases in which chambers made express

[3] Impugned Decision, para. 16.
[4] The jurisprudence relied on by the Chamber in this regard does not constitute authority for the Chamber's self-imposed limits on its review powers vis-à-vis the Prosecution's article 54(1) duties, as they pertain to the highly specific and therefore materially distinguishable context of i) an examination as to the extent of the Pre-Trial Chamber' power to restrict the scope of the Prosecution's article 15 investigations in the Afghanistan Situation, and otherwise in respect of its powers vis-à-vis of the Prosecution's decision to defer said investigation; and ii) a request for leave to submit *amicus curiae* observations regarding the Prosecution's decision to issue summonses in the Kenya Situation; see Impugned Decision, fns 24-25.
[5] See e.g., *Prosecutor v Ongwen,* Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgment", ICC-02/04-01/15 A, 15 December 2022, para. 364. 'Overarching' is defined in the Oxford English Dictionary as 'all-embracing; that spans or encompasses all else'; see *Oxford English Dictionary,* Oxford UP, July 2023, accessed 24 April 2024.

findings to this effect – e.g. in *Ruto & Sang,*[6] *Banda,*[7] *Katanga*[8] and by the Appeals Chamber in *Lubanga*[9]. In fact, in these proceedings, the Chamber has previously assessed, and issued express findings on, whether the Prosecution violated its obligations under article 54(1)(a) in not obtaining a statement from a witness, without mentioning this 'only […] very limited role'.[10]

7. Upon being asked to review the Prosecution's violation of article 54(1), itself a matter of central importance in the Exclusion Motion, instead of conducting a review in

[6] *Prosecutor v Ruto & Sang,* Decision on Joint Defence Application for Further Prosecution Investigation Concerning [REDACTED] of Certain Prosecution Witnesses, ICC-01/09-01/11-1655-Red, 12 January 2015 ('Ruto TC Decision'), para. 38 ('Great caution is called for when the Prosecution purports to assert its 'independent role' under the Statute, whenever the Statute imposes an explicit or implicit duty on the Prosecution—such as Article 54 of the Statute does in the present context. In those circumstances, the Prosecution may not correctly assert an 'independent role' in any way that suggests that it is 'best placed' to determine whether or not it has discharged the duty so imposed. The Chamber retains the amplitude of the power to adjudicate that question whenever it is presented before the Chamber [emphasis added].').

[7] *Prosecutor v Banda*, Public redacted "Decision on the 'Defence Request for Termination of Proceedings'", ICC-02/05-03/09-535-Red, 30 January 2014, para. 50 ('At the outset, the Chamber underlines that, it has a review power over the prosecution's obligation to "investigate incriminating and exonerating circumstances equally" under Article 54(l)(a) of the Statute in the context of its general obligation to ensure the fairness of the trial pursuant to Article 64(2) of the Statute [emphasis added]. However, this does not mean that it is appropriate for a Chamber, at either the confirmation of charges or trial stage, to make determinations on each of the prosecution's investigative choices.'). The Defence submits that this latter qualification is irrelevant for the purposes of this motion or the Impugned Decision – the Defence did not request that the Chamber make such determinations, nor was it necessary or indeed desirable for the Chamber to do so in its determination of the Exclusion Motion.

[8] *Prosecutor v Katanga*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, 27 July 2009 ('Katanga TC Decision'), para. 26 ('[A]s was emphasised by the Appeals Chamber, it is the responsibility of the Chamber to safeguard that the Prosecution's right to continue investigating does not in any way undermine the right of the defence to have adequate time and facilities for the preparation of the trial, in accordance with article 64(3)(c) [emphasis added].'), citing *Prosecutor v Lubanga,* Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", ICC-01/04-01/06-568, 13 October 2006 ('Lubanga AC Decision'), para. 55.

[9] Ibid.

[10] ICC-01/14-01/18-883-Red, paras 8-10; see especially, para. 8 (where the Chamber held that 'failing to take statements may constitute a violation of the Prosecution's investigative obligations under this provision, if the Prosecution does not make sufficient efforts to question witnesses about their knowledge of the case in the course of its investigation.'). See similarly: *Prosecutor v Bemba et al,* Decision on Joint Request to Strike Prosecution Witnesses P-198 and P-201 from the Witness List, ICC-01/05-01/13-1202, 31 August 2015, paras 12-15 (where Trial Chamber VII found that article 54(1)(a) 'obligates the Prosecution to make sufficient efforts to question witnesses about their knowledge of the case in the course of its investigation'; and proceeded to consider whether 'the Prosecution's conduct could be understood as falling short of its investigative obligations'); and *Prosecutor v Kenyatta,* Decision on defence application pursuant to Article 64(4) and related requests, ICC-01/09-02/11-728, 26 April 2013, para. 123 (where the majority of Trial Chamber V held that 'the Prosecution should have conducted a more thorough investigation prior to confirmation in accordance with its statutory obligations under Article 54(l)(a) of the Statute.'); and, Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, ICC-01/09-02/11-908, 31 March 2014, para. 88 (where Trial Chamber V raised 'serious concerns regarding the timeliness and thoroughness of Prosecution investigations in this case - including, in accordance with its responsibilities under Article 54(l)(a) of the Statute, in verifying the credibility and reliability of the evidence upon which it intended to rely at trial.' and moreover, found it appropriate to expressly caution the Prosecution in that regard.).

accordance with its statutory powers and duties, the Chamber improperly imposed limits on its review powers at the outset, and proceeded to assess the relevant evidence and argumentation from within the constraints of its 'only […] very limited role'. The Chamber stated as much in Impugned Decision, wherein it expressly prefaced its finding that the Prosecution had not violated its article 54(1) duties with the qualifying statement: 'bearing these limitations in mind'.[11]

8. Concrete indications that the Chamber limited its engagement with the evidence and argumentation cited and set out in the Exclusion Motion can be found within the Impugned Decision.

9. First: in erroneous findings of fact, which sweepingly dismiss Defence arguments without citing or make specific reference to any of the considerable body of evidence cited by the Defence,[12] or otherwise selectively rely on a fragment of this evidence. For instance, in the Impugned Decision, the Chamber found that the Defence had not demonstrated that 'the Alleged Conspiracy and alleged investigative failures were clearly detectable at the investigation stage'; and held that the Prosecution could not 'be expected to investigate [fraud in post-conflict demobilisation programmes for alleged 'former child soldiers' in the CAR] absent an indication that a potential fraud had occurred in the specific case under investigation [emphasis added]'.[13]

10. On the contrary: there were myriad indicia that fraud had occurred in the Prosecution investigation; and further, the Conspiracy and Prosecution investigative failures were clearly detectable at the investigation stage.[14] Specifically, as set out in the Exclusion Motion, in the period before the confirmation of charges against Mr Yekatom,[15] the Prosecution was on notice of *inter alia* the following facts and circumstances:

[11] Impugned Decision, para. 17.
[12] See, in addition to evidence directly cited in the Exclusion Motion, the Chronology annexed thereto (ICC-01/14-01/18-2240-Conf-AnxA, 'Chronology'), setting out relevant events and circumstances over the period 2018-2023, comprising 30 pages and citing discrete evidentiary elements across 237 footnotes.
[13] Impugned Decision, paras 19-20.
[14] Regarding the fact that the Chamber further improperly limited its examination of the Prosecution's investigative obligations to the investigation stage, see *infra*, 'Second Issue'. The errors set out in the Second Issue also appear to evidence the Chamber's limited engagement as set out in the First Issue, given that their erroneous nature is evidenced in part by the authorities and support cited in the Exclusion Motion, wherein the Defence set out the contours of the Prosecution's investigative duties, and therefore would have been clear to the Chamber had it fully engaged with the arguments within the Exclusion Motion; see *infra,* fns 47, 50-52.
[15] Charges were confirmed against Mr Yekatom on 11 December 2019; see, ICC-01/14-01/18-403-Conf.

(in August 2016 via P-0876) that children in UN-affiliated demobilisation programmes had been fraudulently presented as former Anti-Balaka child soldiers;[16]

(in [REDACTED] 2018) that Prosecution witnesses [REDACTED] and [REDACTED] were discussing their mutual contact with Prosecution investigators; that P-2018 was offering to being select alleged 'former child soldiers' to meet the investigators; and that investigators were discussing with [REDACTED] a 'strategy and criteria for witness selection';[17]

(in [REDACTED] 2019) that P-2018 was in direct contact with alleged 'former child soldier' [REDACTED], contrary to express Prosecution instructions; and that [REDACTED] had lied to investigators in denying this contact;[18] that [REDACTED] had advised [REDACTED] to participate in the ESF child soldier demobilisation programme ('Programme') despite knowing that he was 'not part of the Anti-Balaka'; and that '[a] lot' of the participants lied about their ages;[19]

(in [REDACTED] 2019) that P-2018 was working as a VPRS intermediary, and had been identifying and collecting alleged 'former child soldiers' with the aim of having them complete victim application forms for these proceedings;[20]

(in [REDACTED] 2019 via P-2475) that many alleged 'former child soldier' participants pictured in Programme reports were not in fact former Anti-Balaka and had participated *inter alia* to 'benefit from the training';[21]

(in [REDACTED] 2019) that P-2082 had interacted with a Programme participant who lied about his age [REDACTED] and stated that [REDACTED];[22]

(in [REDACTED][23] and [REDACTED] 2019) that P-2582's claim to have been a 12 year old child soldier and '[REDACTED]' within Mr Yekatom's group was contradicted by previous interviews with [REDACTED][24] and P-2580[25]; and that P-2582 was unable to correctly identify her alleged [REDACTED] in video footage;[26]

(in [REDACTED] 2019) of inconsistencies in purported ages of alleged 'former child soldiers' as indicated in the Programme list provided to investigators by [REDACTED];[27]

(in [REDACTED] 2019) of fundamental discrepancies in the accounts of alleged 'former child soldier' P-2620, between that provided in her victim application form and that provided in her Prosecution interview; [28] and that P-2620 was unable to identify her alleged [REDACTED] in a photograph presented to her by investigators.[29]

[16] See, Exclusion Motion, para. 57 and fn. 141, and references cited therein.
[17] See, Exclusion Motion, para. 60, and references cited therein.
[18] See, Exclusion Motion, para. 62, and references cited therein.
[19] See, Exclusion Motion, para. 64, and references cited therein.
[20] See, Exclusion Motion, para. 63 and references cited therein.
[21] See, Exclusion Motion, para. 64, and references cited therein.
[22] See, Exclusion Motion, para. 64, and references cited therein.
[23] See, Chronology, p. 7, and references cited therein.
[24] See Exclusion Motion, para. 88, and references cited therein.
[25] See, Exclusion Motion, para. 90, and references cited therein.
[26] See, Exclusion Motion, para. 91, and references cited therein.
[27] See, Exclusion Motion, para. 65, and references cited therein.
[28] See, Exclusion Motion, para. 99, and references cited therein.
[29] See, Exclusion Motion, para. 101, and references cited therein.

11. None of the above evidence (nor indeed, the bulk of the evidence demonstrating such indicia set out in the Motion) was meaningfully addressed in these erroneous findings of fact, demonstrating the Chamber's limited engagement with this material resulting from the improper limits on its review powers self-imposed by the Chamber.[30] Notably, in finding that during the Prosecution investigation there was no indicia that fraud had occurred, the Chamber referred only to 'publicly available information' cited in the Exclusion Motion;[31] despite this latter being a mere fraction of the evidence of said indicia, as the above shows.

12. The Chamber's improperly limited engagement can also be seen in its errors of reasoning, including multiple misquotations of Defence arguments. First, in finding that 'the information provided by the Defence does not demonstrate that the Alleged Conspiracy and alleged investigative failures were clearly detectable at the investigation stage', the Chamber relied on the fact that these were 'only identified retrospectively by the Defence during the trial'.[32] Yet this is an irrelevant consideration: the timing of the Defence's gradual discovery of the Conspiracy and investigative failures, through repeated disclosure requests[33] and ensuing Defence field investigations, has no bearing on the question of whether and when they ought to have been identified, and therefore acted on pursuant to article 54(1), by the Prosecution. It is evident that the Defence would only have been in a position to identify them 'retrospectively', as opposed to the Prosecution, which was effectively 'identifying' them – and in respect of the failures, actually committing them – in real time.

13. The Defence's supposed 'acknowledgement' as to this difference in timing is thus likewise irrelevant and should not have been relied upon by the Chamber.[34] Further compounding this error, the Chamber's finding that this 'acknowledgement' (i.e. that 'some of [the Prosecution's investigative failures] only became apparent' at a later stage of the proceedings) is 'at odds with the Defence's claim that the Alleged Conspiracy

[30] The Defence also notes that the impact of the Chamber's self-imposed limits of review powers is also apparent from the fact that the Chamber did not explain 'with sufficient clarity the basis of its decision' not to rely on this evidence in its impugned factual findings regarding the lack of indicia of fraud; see e.g., *Prosecutor v Bemba*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', ICC-01/05-01/08-1386, 3 May 2011, para. 59.
[31] Impugned Decision, para. 19.
[32] Impugned Decision, para. 20.
[33] See also, Impugned Decision, para. 50.
[34] Impugned Decision, para. 21.

and alleged investigative failures were "blindingly obvious" during the investigation stage'[35] is also erroneous, as it is in fact based on a dual misquotation: the Defence stated that the Conspiracy – not the investigative failures – was 'blindingly obvious'; and it did not limit the 'fundamentally crude and blindingly obvious' nature of the Conspiracy to 'during the investigation stage'.[36] The Chamber's finding that the Defence's criticism of the Prosecution's failure to identify the Conspiracy 'during the investigation phase' is 'contradictory', is thus likewise flawed, as it is tainted by the same improper reliance on the timing of the Defence's discovery thereof, and the same misquotation.[37]

14. The First Issue is an appealable issue for the purposes of article 82(1)(d).[38] Due to this erroneously self-imposed 'only […] very limited role' in reviewing whether the Prosecution complied with article 54(1), the Chamber's review of the evidence and arguments set out in this regard in the Exclusion Motion was fatally flawed from the outset. As a result of this foundational error, the Chamber proceeded to make sweeping and erroneous factual errors, and errors of reasoning, that underpinned its broader (erroneous) finding that the Prosecution had not been wilfully blind and had not ignored exonerating evidence.[39] This led to the flawed conclusion that the Prosecution had not violated article 54(1) of the statute, on which basis the Exclusion Motion was dismissed.[40] Resolution of the First Issue is therefore essential for the correct determination of the Exclusion Motion.[41]

### B. Second Issue: whether the Chamber erred in law in finding that the Prosecution's obligation to investigate exonerating circumstances was 'limited to the investigation stage'.

15. In the *Lubanga* case, the Appeals Chamber held that:

> '[t]he [Prosecution's article 54(1)(a)] duty to establish the truth is not limited to the time before the confirmation hearing. Therefore, the Prosecutor must be allowed to continue his

[35] Ibid.
[36] Exclusion Motion, para. 31. On the contrary, in the very next sentence, the Defence alluded to the fact that the success of the Conspiracy was the result of the Prosecution's 'consistent failure to meet its statutory investigative obligations throughout the course of these proceedings [emphasis added].'
[37] Impugned Decision, para. 21.
[38] Situation in the Democratic Republic of Congo, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006 ('AC Decision in DRC Situation), para. 9.
[39] In addition to the errors cited above, see, also demonstrating the Chamber's limited and flawed review of the evidence and arguments, *infra*, para. 23 and fn. 57.
[40] Impugned Decision, paras 17-18; 54.
[41] AC Decision in DRC Situation, para. 9

> investigation beyond the confirmation hearing, if this is necessary in order to establish the truth [emphasis added].'[42]

16. While the Chamber acknowledged that the Prosecution is permitted to investigate beyond the confirmation stage,[43] it nonetheless found that the Prosecution's duty to investigate exonerating circumstances was 'limited to the investigation stage'.[44]

17. This is an erroneous reading of the Court's statutory framework and jurisprudence. The underlying *ratio* of the above-cited *Lubanga* decision enshrines the continuous nature of the Prosecution's duty to establish the truth. Read in conjunction with article 54(1)(a) – i.e. the mandatory language, and the all-embracing nature of the mandated investigation[45] – it must be understood from *Lubanga* that, pursuant to its duty to establish the truth, the Prosecution must duly conduct all investigations necessary to achieve that end. It thus follows that, as this duty continues beyond the confirmation of charges, the Prosecution's duty to conduct all necessary investigations as required by that duty must also continue beyond that stage, including investigations into exonerating circumstances.[46]

18. Accordingly, *Ruto & Sang*, Trial Chamber V(A), granted a mid-trial defence application made pursuant to article 54(1)(a), on the basis that this provision 'obligate[d] the Prosecution to make reasonable efforts to obtain' potentially exculpatory information that was not in the Prosecution possession;[47] and it notably held that 'significant forensic events in the circumstances of this case [..] have fairly put the Prosecution upon its inquiry as to the need for the further investigation in a manner that justified the Application'.[48] In the same vein, in *Katanga*, Trial Chamber II, citing *Lubanga*, thus envisaged continuing investigations into exonerating evidence in setting out safeguards applicable where 'the Prosecution might discover important new and potentially

[42] Lubanga AC Decision, para. 52.
[43] See also, where the Chamber previously held in the context of a mid-trial Prosecution request for a judicial cooperation order from [REDACTED], that 'nothing prevents the Prosecution under the statutory framework from seeking the Sought Material directly', ICC-01/14-01/18-1933-Conf, para. 12.
[44] Impugned Decision, para. 27.
[45] I.e. 'The Prosecution shall: in order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally' [emphasis added].
[46] See also, Lubanga AC Decision, para. 54 ('[I]n certain circumstances[,] to rule out further investigation after the confirmation hearing may deprive the Court of significant and relevant evidence, including potentially exonerating evidence.')
[47] Ruto TC Decision, paras 31-32. Cited in Exclusion Motion, para. 41.
[48] Ibid., para. 37.

exonerating evidence after the confirmation of charges', as a result of these continued investigations.[49]

19. The Chamber's impugned finding is also at odds with the Prosecution's own understanding of its investigative duties. The Prosecution has stated that its 'Article 54(l)(a) duties as to "establishing the truth" transcend the confirmation hearing to also cover trials';[50] and in the trial testimony of the Prosecution 'investigations team leader' in *Katanga & Ngudjolo,* she stated that '[i]nvestigation into the potentially exonerating facts and themes is an inseparable part of the rest of the investigation process. […] It is also a continuous process. We are under the obligation to investigate potentially exonerating evidence even today.'[51] In the same vein, Prosecution Code of Conduct mandates that the Prosecution 'investigate incriminating and exonerating circumstances equally in all steps involved in the planning and conduct of investigative and prosecutorial activities', expressly extending this investigative duty to both categories.[52]

20. Accordingly, in its Response to the Exclusion Motion, the Prosecution did not draw a distinction between its pre- and post-confirmation investigative obligations.[53] On the contrary: in arguing that article 54(1)(a) was not violated, the Prosecution cited 'procedural safeguards meticulously applied during the evidence gathering process and in the context of the trial [emphasis added].'[54]

21. The Chamber's reliance on the fact that the Prosecution is 'expected to be trial-ready' after confirmation and 'to conclude its investigations speedily thereafter'; or to 'focus on proving the confirmed charges,' is also flawed.[55] While the pace and extent of

[49] Katanga TC Decision, paras 26-29.
[50] *Prosecutor v Ruto & Sang,* Public redacted version of "Prosecution's Response to 'Joint Defence request under Article 54'", 7 November 2014, ICC-01/09-01/11-1642-Conf, ICC-01/09-01/11-1642-Red, 23 July 2015, para. 7. Cited in Exclusion Motion, para. 41.
[51] *Prosecutor v Katanga & Ngudjolo*, Trial Transcript of 25 November 2009, ICC-01/04-01/07-T-81-Red-ENG, 25 November 2009, 16:23-17:4. Cited in Exclusion Motion, para. 41. The Defence notes that this testimony is endorsed in part in the Impugned Motion (see para. 51 and fn. 70), with respect to the suggestion that 'exonerating themes evolve over time'; and submits that the Chamber's concomitant finding that in cases such as the present, 'evidence may not seem relevant at first, but become relevant only at a later stage of the proceedings', further undermines the Chamber's suggestion that the Prosecution has no duty to investigate exonerating circumstances beyond the investigation stage.
[52] Code of Conduct for the Office of the Prosecutor, OTP2013/024322, 5 September 2013, para. 49. Cited in Exclusion Motion, para. 38. In fact, this Code indicates that the Prosecution's duty to pursue exonerating circumstances even continues post-conviction, as it mandates (at para. 50) that staff members 'report to the Prosecutor concerns which, if substantiated, would tend to render a previous conviction made by the Court unsafe'.
[53] ICC-01/14-01/18-2313-Conf ('Response').
[54] Ibid., para. 17.
[55] Impugned Decision, paras 27-28.

investigations may diminish post-confirmation, and while the Prosecution may indeed primarily focus to proving its case, it does not follow that this can occur – or that this can be permitted to occur – at the expense of the Prosecution's due and full compliance with article 54(1)(a), including its duty to conduct all investigations necessary in order to establish the truth.

22. In any event, the Chamber's suggestion that this 'refocussing' absolves the Prosecution of its failure to investigate exonerating circumstances was not a justification proffered by the Prosecution in its Response.[56]

23. Nor could any such justification be reasonably made. As is clear from the Exclusion Motion, the vast majority of the investigative steps that the Defence argued that the Prosecution was duty-bound to have taken pursuant to article 54(1)(a) were exceedingly basic, in that they simply required authentication or verification of its evidence, or simple testing of inconsistencies, with or from its own witnesses, including during already-occurring Prosecution interviews being conducted post-confirmation – in other words, as part of the investigations into incriminating evidence that were already occurring at the time.[57] It cannot be suggested that these steps were beyond the remit or capacity of the Prosecution post-confirmation, or otherwise incompatible with its 'refocussing' on proving the charges.[58]

24. The purported distinction drawn in the Impugned Decision between the pre- and post-confirmation investigation obligations is further undermined by the fact that, in the context of the Prosecution's post-confirmation attempt to add to the charges sexual violence crimes based on allegations from two [REDACTED] witnesses (both of whom, it subsequently emerged, were central participants in the evidence fabrication

[56] ICC-01/14-01/18-2313-Conf.
[57] See e.g., Exclusion Motion, para. 81 (where during a follow-up interview with P-1839, investigators sought to have her confirm the presence of child soldiers in the group by presenting her with photographs, but apparently deliberately avoided seeking verification as to whether P-2475 was a member of the group); paras 102-103 (on OTP failing to pursue with P-2620 her failure to recognise her alleged [REDACTED] in photographs, despite conducting a follow-up interview deemed 'critical to obtain additional details and clarifications'); paras 105-106 (on OTP failure to confront P-2620 with material inconsistencies in her [REDACTED] records); and paras 108-113 (on OTP failure to verify account of P-2511 in interview with [REDACTED] referred to in his evidence). See also, paras 75-79 (on the Prosecution's failure to authenticate P-2475's fabricated documents despite obvious indica of tampering therein; or to verify [REDACTED]'s claims regarding the original [REDACTED] or [REDACTED] registry); and paras 85-86 (where the Prosecution failed to seek verification of fraudulent birth certificates through [REDACTED]).
[58] Indeed, the very fact that the Prosecution is tasked with proving the charges at trial only underscores the need for due authentication and verification to be conducted where it arises, pursuant to article 54(1).

Conspiracy and [REDACTED][59]), the Prosecution has stated that it was taking 'reasonable and necessary steps to investigate and verify [emphasis added]' these allegations, including 'an extensive internal evidence review conducted in March 2020 involving several senior Prosecution staff members in accordance with the Prosecution standardised practice, to ensure the viability of the underlying evidence';[60] and this, three months after the confirmation of charges, and thus in the midst of the Prosecution's trial preparations.

25. The Second Issue is an appealable issue. The Chamber's finding that the Prosecution's duty to investigate exonerating circumstances was 'limited to the investigation stage' necessarily led it into error: the Chamber could not have correctly determined whether the post-confirmation conduct of the Prosecution was contrary to its article 54(1) duties, given its finding that these duties did not apply post-confirmation in the first place.

26. On this flawed basis, a vast proportion of the evidence and argumentation setting out the facts and circumstances proving the Prosecution's post-confirmation violation of article 54(1) was thus erroneously rendered irrelevant and effectively disregarded *in limine*, or at the very least, was not accorded the weight it properly merited. The lack of substantive engagement with this material is concretely apparent from the Impugned Decision: in finding that the Prosecution did not violate article 54(1)(a) 'beyond the investigation stage, notably by virtue of how it has prosecuted Mr Yekatom up until today', the Chamber did not address a single element of the extensive body of evidence relied on by the Defence in this regard; and further, only addressed a single, discrete investigative failure[61] – i.e. the Prosecution's failure to test its own witnesses while in court – among the such numerous failures cited by the Defence.[62] It is also apparent from the distinction repeatedly drawn between the pre- and post-confirmation stages in the impugned findings within the First Issue.[63]

27. The Second Issue thus underpinned the Chamber's erroneous finding that the Prosecution did not violate its article 54(1)(a) duties 'beyond the investigation stage'[64]

[59] [REDACTED].
[60] ICC-01/14-01/18-518-Conf, para.
[61] Impugned Decision, paras 26-29.
[62] See e.g. *supra*, para. 23, fn. 58.
[63] See Impugned Decision, para. 19 ('in the specific case under investigation'); para. 20 ('at the investigation stage' and 'during the trial'); para. 21 ('during the investigation phase', referred to twice). See also, para. 31 ('during the investigation').
[64] Impugned Decision, paras 26-28.

– which in turn was central to the Chamber's finding that no violation of article 54(1) occurred, on which basis the Exclusion Motion was dismissed.[65] Resolution of the Second Issue is thus essential for the correct determination of this latter finding, as well as the Exclusion Motion more broadly.

### C. Third Issue: whether the Chamber erred in fact and law in finding that there was no causal link between the Prosecution's violation of article 54(1) and the obtaining of the Fabricated Evidence.

28. In the Exclusion Motion, the Defence set out in detail the causal chain of events linking the Prosecution's article 54(1)(c) violations with the obtaining of the impugned Fabricated Evidence.[66] The Chamber's dismissal of the Defence position in this regard notably made no specific reference to these specific arguments in the Exclusion Motion.[67] Instead, the Chamber noted that, as the relevant witnesses 'all testified before the Chamber', 'their evidence was thus clearly not obtained by means of a violation of the statute'.[68] The Chamber thus concluded that the fact that this evidence was 'obtained directly by the Chamber' negated or otherwise broke the causal chain of events linking the Fabricated Evidence to the violation of article 54(1). This was an error.

29. First, this indicates a flawed understanding of legal causation. For an event to be considered to have broken the chain of causation, it must have occurred after the commission of the initial act (in this case, the violation of article 54(1)) and must have been 'not reasonably foreseeable' by the entity that committed this initial act (i.e. the Prosecution).[69] Any ultimate 'obtaining' by the Chamber of the impugned Fabricated Evidence cannot be qualified as an event unforeseeable to the Prosecution; in fact, the very opposite is true.

30. Second, this is flawed reasoning. The mere fact that the Fabricated Evidence was ultimately elicited by means of witness testimony before the Chamber does not mean *per se* that it could not have been obtained by means of a violation of the Statute. By way of illustrative example: if the Prosecution had been expressly instructing witnesses

[65] Ibid., para. 54.
[66] Exclusion Motion, paras 123-128; 131-140.
[67] Impugned Decision, paras 23-25. See also, *supra,* First Issue.
[68] Impugned Decision, para. 23.
[69] See e.g., *Prosecutor v Katanga*, Public Redacted Version of Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgment of 8 March 2018, ICC-01/04-01/07-3804-Red-tENG, 19 July 2018, para. 17 (see especially, where Trial Chamber II noted that this understanding of causation was 'according to a wide range of case law').

to fabricate evidence and to lie during their testimonies, it cannot be reasonably suggested that the fact that these witnesses' evidence was ultimately elicited before the Chamber would wipe the slate clean in the manner suggested in the Impugned Decision, and thereby effectively render article 69(7) inapplicable. This erroneous reasoning is further compounded by the Chamber's misplaced reliance on the fact that the Defence was allowed 'ample opportunities […] to question and challenge these witnesses' accounts', as though this too would somehow sufficiently negate any preceding violation for the purposes of article 69(7).[70]

31. The Chamber committed further errors in its findings regarding the non-testimonial Fabricated Evidence. In its suggestion that 'one can only speculate' as to the impact of due investigation into the Conspiracy by the Prosecution,[71] the Chamber erroneously failed to consider in this context actual facts that arose after the Prosecution was alerted to the Conspiracy by the Defence. For instance, the Prosecution stated that it would not rely on fabricated documents procured by P-2475 and Prosecution intermediary [REDACTED];[72] it sought and obtained Facebook material in respect of P-2580, which indicated that he was soliciting money from 'former child soldier' and co-conspirator [REDACTED];[73] it indicated that it would effectively 'exclude' i.e. not rely on [REDACTED]'s testimonial evidence in respect of [REDACTED];[74] and it withdrew P-2582 and her co-conspirator 'former child soldier' P-2620 as witnesses.[75] To the extent that some of these facts constitute investigative steps, they are insufficient, untimely, self-serving, and fail to negate the Prosecution's article 54(1) violations.[76] Yet these facts nonetheless demonstrate that the Chamber erred in characterising as 'speculative', and failing to meaningfully engage in, a reasonable examination of the likely impact of an article 54(1)-compliant, timely, objective, and effective Prosecution investigation into the Conspiracy in its entirety, on the ultimate obtaining of the Fabricated Evidence.

32. Lastly, the Chamber also erred in its finding that 'it can certainly not be argued definitively that the Allegedly Fabricated Evidence would not have been obtained at all,

[70] Impugned Decision, para. 23.
[71] Impugned Decision, para. 24.
[72] Exclusion Motion, para. 83.
[73] Exclusion Motion, para. 136; see also, Chronology, p. 29.
[74] ICC-01/14-01/18-2249-Conf, para. 11.
[75] See Exclusion Motion, para. 126.
[76] In this regard, see Exclusion Motion, para. 126.

or with a different content [emphasis added]'.[77] This is not the test for causation: instead, the Chamber appears to have repurposed the test for the second sub-limb, in article 69(7)(a), i.e. whether the violation cast substantial doubt on the reliability of the evidence.[78] This is despite elsewhere having stated that it would not address this limb of article 69(7);[79] all of which further demonstrates the Chamber's flawed approach and ultimate determination as regards the causal link between the Prosecution's violation and the obtaining of the Fabricated Evidence.

33. The Third Issue is an appealable issue. In the Impugned Decision, the Chamber held that article 69(7) 'requires a causal link between the violation and the gathering of evidence in question'.[80] Further, it repeatedly relied on its erroneous finding that there was no causal link, throughout the Impugned Decision, in the form of a 'backstop', i.e. finding that 'even if' other elements of article 69(7) were established, the Exclusion Motion failed as a result of the purported lack of causal link.[81] The Third Issue therefore must be resolved for the correct determination of the Exclusion Motion.

### D. The Issues significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial.

34. The Fabricated Evidence constitutes a substantial portion of the body of evidence being brought against Mr Yekatom: 1416 pages of transcripts and 105 pages of documentary evidence from seven witnesses, directly underpinning 12 of the 21 counts against Mr Yekatom.[82] These witnesses are key to the Prosecution case: P-2475 claims membership of Mr Yekatom's group for the quasi-entirety of the indictment period, and purports to have directly witnessed key events in three of the four 'crime bases', before and during the 5 December attack in BOEING and CATTIN, to the group's advance down the PK9-MBAIKI Axis, until his 'demobilisation' through the Programme. Witnesses P-2018 and P-2074 are key figures in [REDACTED], whose testimonial and documentary evidence form the cornerstone of the child soldiers charge under Count 29.

[77] Impugned Decision, para. 24.
[78] See e.g., *Prosecutor v Bemba et al.*, Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7), ICC-01/05-01/13-1854, 29 April 2016, para. 62; *Prosecutor v Lubanga*, Decision on the confirmation of charges, ICC-01/04-01/06-803-tEN, 29 January 2007, para. 85.
[79] Impugned Decision, para. 54.
[80] Impugned Decision, para. 11.
[81] See, Impugned Decision, paras 22, 39, 46 and 53.
[82] See, ICC-01/14-01/18-2240-Conf-AnxC. Two of the seven witnesses were withdrawn; [REDACTED]. In fact, given that P-2475's evidence is relied on to underpin the Prosecution's allegations as to the charged modes of liability, this evidence in fact underpins all charged counts and modes in this case.

35. The upshot of the Issues is thus that a vast, highly relevant body of fabricated evidence, obtained by means of the Prosecution's violation of its investigative duties, remains on the evidentiary record in these proceedings. Given this, the implications of the Issues on the fair conduct of the proceedings trial are significant and clear. For one, it is fundamentally contrary to basic fairness that evidence known to be fabricated be allowed to form part of the trial record at all, let alone in such quantities. To force Mr Yekatom to continue to divert limited time and resources to defend against this evidence is also contrary to fairness. Further, the Prosecution's proper exercise of its duty of impartial investigations is of itself a fundamental component of a fair trial at the Court;[83] especially in the specific context of the crimes that fall within the Court's jurisdiction.[84] As noted by the German delegation to the Court's Preparatory Committee, which submitted the drafting proposal in which article 54(1) finds its origins: '[t]he first step to guarantee a fair trial and equity for both sides is to oblige the prosecutor to extend the taking of evidence to all facts being of importance for the verdict.'[85]

36. Further, the Issues will have a natural, foreseeable and material impact on the expeditiousness of the proceedings.[86] Pursuant to the 'submission system' adopted in these proceedings, the Chamber will assess the relevance, probative value and potential prejudice of each evidentiary item in the trial record 'as part of its holistic assessment when deliberating its judgment'.[87] Accordingly, in the Impugned Decision, the

[83] See e.g., *Prosecutor v Lubanga,* Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049, 30 November 2007, para. 45 ('The ICC Statute has, through important advances, created a procedural framework which differs markedly from the ad hoc tribunals, such as, for example, in the requirement in the Statute that the prosecution should investigate exculpatory as well as incriminatory evidence, for which the Statute and Rules of the ad hoc tribunals do not provide. […] Therefore, the Statute moves away from the procedural regime of the ad hoc tribunals, introducing additional and novel elements to aid the process of establishing the truth.')

[84] See, Bergsmo, Morten, 'Article 54', in *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 1999, para. 2 ('In dealing with the most serious crimes of concern to the international community as a whole, it should be borne in mind that the main focus of the Court will be to bring to justice those offenders at the highest level of responsibility. To achieve this will require considerable investigative work, including activities as wide ranging as exhuming mass graves and conducting forensic work at such sites, sending investigators to many countries to interview witnesses, and accessing and sifting large volumes of governmental records. To properly perform these functions, it is likely that the office of the Prosecutor would prefer to enlist the assistance of Governments. In contrast, most suspects or accused would not be able to wield similar authority to enlist support or assistance with a view to preparing the defence as broadly, if necessary. This is one area where the civil law approach of an investigative judge showed the way to a workable solution to this problem, which relates essentially to potential inequality of resources between parties.')

[85] See, Proposal Submitted by Germany for Article 44(a), Preparatory Committee on the Establishment of an International Criminal Court, A/AC.249/WP.37, 23 August 1996; and Proposal Submitted by Germany for Article 26, Preparatory Committee on the Establishment of an International Criminal Court, A/AC.249/WP.1, 15 August 1996.

[86] See also, ICC-01/14-01/18-2449-Conf, paras 33-36.

[87] ICC-01/14-01/18-631, para. 53.

Chamber undertook to subject each item of Fabricated Evidence to this 'same scrutiny during the Chamber's deliberation […] at the end of the trial'.[88] On top of this, the Chamber will be required to assess the Defence, Prosecution and CLR1 submissions on the standard evidentiary criteria of these items. This is so, regardless of whether the Chamber ultimately decides to disregard the Fabricated Evidence. If it does not, the Chamber will then need to take the relied-upon Fabricated Evidence, and parties' submissions thereon, into account in its assessment as to whether the relevant charges are proven. Given the sheer quantities of the Fabricated Evidence remaining on the record as a consequence of the Issues, the latter will thus impact the Chamber's judgment issuance timeline.

37. This impact on expeditiousness must be assessed along with the impact that will realistically be posed by the non-exclusion of the Fabricated Evidence on the timeline of any appeals proceedings. As things stand,[89] this substantial body of evidence will naturally form part of the appellate proceedings, given that three parties in these proceedings occupy two diametrically opposed positions on the Exclusion Motion, the standard evidentiary criteria of the Fabricated Evidence, and the correct outcome of the charges in these proceedings.[90] The Appeals Chamber will thus be required to examine any issues involving the Fabricated Evidence: whether this be re-litigation of the Exclusion Motion; litigation of the Chamber's ultimate determination of the probative value and weight of the Fabricated Evidence; or litigation of the Chamber's reliance, if any, and to whatever extent, on the Fabricated Evidence – all of which will combine to affect the expeditiousness of the Appeals Chamber's judgment drafting and issuance.

38. Further, given the sheer quantity of the Fabricated Evidence, and its central importance to multiple charges, its continued non-exclusion materially compromises the Chamber's ability to correctly assess the probative value and weight of the trial evidence generally.

39. This is not speculative. In fact, it is envisaged in the Court's legal framework: specifically the requirement that article 69(7) applications be ruled upon prior to the assessment of evidence stage,[91] itself due to the fact that, as held by the Appeals Chamber, evidence inadmissible under article 69(7) is 'unsuitable to be considered by

[88] Impugned Decision, para. 55.
[89] I.e. unless the Fabricated Evidence is definitively excluded through appellate intervention at this stage.
[90] See, ICC-01/14-01/18-2313-Conf, ICC-01/14-01/18-2314-Conf.
[91] See ICC-01/14-01/18-631, para. 54.

a trial chamber for the purpose of its decision under article 74 of the Statute', and that as such, chambers are 'required to ensure' that such evidence is 'disregarded in the decision on the guilt and innocence of the accused'.[92]

40. In this regard, the Defence notes that evidence obtained in violation of human rights or the statute, while often inherently fundamentally unreliable, will by its nature not often display outward indicia of this. On the contrary, such evidence – for example, deliberately fabricated evidence, evidence affected by collusion; evidence created or planted by corrupt law enforcement or government officials; or evidence obtained through torture – may very well appear perfectly reliable, because of the manner in which that evidence came into existence. In other words, such evidence is in fact created and designed to deceive: to appear reliable or authentic, or to appear to corroborate, or be corroborated.[93] Nor are professional judges immune to this deception; on the contrary, it is precisely because of the risk posed by such material to the professional judges of the Court that the above-cited legal framework and case law exist.

41. In light of the above, the specific circumstances here[94] are such that the continued non-exclusion of the Fabricated Evidence would result in the distortion of Chamber's ultimate assessment of the evidentiary record. First: i) the inherently deceptive nature of the Fabricated Evidence; ii) the Chamber's obligation to assess the relevance, probative value and potential prejudice of each item of Fabricated Evidence; and iii) the sheer quantity and central importance of this evidence, all combine to materially compromise the integrity of the Chamber's ultimate evidence assessment process.

42. In addition: while the fact that a large-scale, systematic evidence fabrication scheme has been operating in the context of these proceedings is by now evident, the exact contours and extent of this scheme remains unknown, and may never be known, including to the Chamber. As such, given the known extent and magnitude of the scheme, relative to the

[92] *Prosecutor v Bemba et al.,* Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", ICC-01/05-01/13-2275-Red, 8 March 2018 ('Bemba et al AC Judgment'), paras 580-582.
[93] See also, Murphy, P., No Free Lunch, No Free Proof: The Indiscriminate Admission of Evidence is a Serious Flaw in International Criminal Trial, JICJ Vol 8 Issue 2, May 2010 ('rather like cancer cells, pieces of fabricated evidence disguise themselves and gain sustenance by attaching themselves to genuinely probative evidence. Over the course of a trial lasting several months or a year evidential debris has ample opportunity to contaminate genuine and probative evidence in the minds of the judges.)
[94] It is not the Defence's position that all unsuccessful article 69(7) applications should merit leave to appeal on this basis; on the contrary, all applications must be assessed on their own merits, on a case-by-case basis.

localised scale and nature of the Prosecution's evidence underpinning Count 29 (which is predominantly centred on the fraudulent Programme, its conspirator organisers, and its participants) there is thus a clear risk that evidence linked to this far-reaching Conspiracy, unbeknownst to the Defence or Chamber, forms part of the trial record, and will therefore be assessed with and alongside the deceptive Fabricated Evidence.

43. The Issues, and the resulting improper non-exclusion of the Fabricated Evidence, would thus result in the Chamber being induced into error in its article 74 judgment, and thus significantly affect the outcome of the trial.

### E. Immediate appellate resolution of the Issues may materially advance the proceedings.

44. First, unless the Appeals Chamber corrects the Issues to ensure the definitive exclusion of the Fabricated Evidence at this stage, the Defence will be required to divert limited time and resources to addressing matters arising from the Fabricated Evidence, at the trial stage and during any subsequent appellate proceedings,[95] which evidence should never have formed part of the trial record in the first place. Should the Impugned Decision be erroneous, any time and resources spent addressing the Fabricated Evidence would be at the expense of addressing the remainder of the considerable quantity of evidence being brought against him by the Prosecution;[96] and more broadly, the charges, to the irrevocable detriment of Mr Yekatom's right to effective trial preparation, thereby tainting the fairness of the proceedings.[97] More generally, and for the same reasons, any future engagement with this improperly admitted Fabricated Evidence, whether by the Chamber or by the Parties, would 'cloud the judicial process'.[98] In the same vein, should the Chamber improperly proceed to materially rely on any aspect of this substantial body of material in findings on the charges in its judgment, this will 'mar the outcome of the trial';[99] and further, the Appeals Chamber will be required to address this tainted reasoning in its own judgment, and to untangle the Chamber's reliance on the Fabricated Evidence from the remainder of the evidence underpinning its eventual factual findings.

[95] See *supra*, paras 36-37.
[96] The Prosecution has previously cited the 'unprecedented size and scope of the trial record in this case' and stated that these proceedings are 'in many respects the largest ever before this Court; see ICC-01/14-01/18-2391-Conf, paras 8-9.
[97] AC Decision in DRC Situation, paras 14, 16.
[98] Ibid.
[99] Ibid.

45. Second: as argued in the Exclusion Motion, the admission of the Fabricated Evidence is antithetical to and seriously damages the integrity of the proceedings, pursuant to article 69(7)(b).[100] The evaluation of this sub-limb[101] would have required an assessment of the impact of the admission of the Fabricated Evidence on broader considerations of principle: e.g. the need to respond to the international community's expectations; respect for the core values which run through the Rome Statute', including the fairness of proceedings before the Court and effective prosecutions; and the 'deterrence and discipline' purpose embedded and recognised within article 69(7).[102]

46. Should the Defence have been correct that the elements of article 69(7)(b) are established, by erroneously dismissing the Exclusion Motion, the Chamber has improperly allowed the Fabricated Evidence to continue to occasion 'serious damage' to the integrity of the proceedings unabated.

47. Further, while the Chamber noted that its dismissal of the Exclusion Motion was 'by no means an indication of whether, and to what extent' the Fabricated Evidence will be relied on in its eventual judgement, this will have no bearing on this serious damage to integrity.[103] In other words, even if the Chamber were to disregard the Fabricated Evidence in its entirety, this would not remedy (or even address) the serious damage that the non-exclusion of the Fabricated Evidence will have done to considerations such as the expectations of the international community or the core values of the Statute. The fact will remain that at the International Criminal Court – i.e. the supposed international exemplar of international criminal justice and the rule of law, touted as offering the highest standards of fairness – systematic, large-scale fabrication of evidence, involving multiple Prosecution- and Registry-employed intermediaries, will have occurred as a result of the Prosecution's unlawful dereliction of its statutory duties; and further, this Fabricated Evidence will be improperly allowed to remain on the trial record of a Court proceedings for years, before the matter might be addressed in any appeal proceedings.

48. In the same vein, if the Chamber has erroneously found that the Prosecution has not violated its article 54(1) duties, the deterrence and discipline purpose of article 69(7)

[100] Exclusion Motion, paras 141-150.
[101] This was not conducted by the Chamber; see, Impugned Decision, para. 54.
[102] See, Exclusion Motion, paras 142-150, and references cited therein.
[103] Indeed, the Chamber itself 'stressed' that its assessment of the admissibility of the Fabricated Evidence vis-à-vis article 69(7) 'is distinct from the probative value that the Allegedly Fabricated Evidence will be eventually awarded in the judgement; see, Impugned Decision, para. 55.

will have been undermined. The Impugned Decision will thus not only have allowed the Prosecution's statutory violations to remain unaddressed – it will in fact have effectively condoned the Prosecution's conduct, by fixing thereon a de facto stamp of judicial approval.[104] This failure to deter or discipline also carries with it the real risk that the Prosecution will henceforth adopt the improperly lowered standards set out in the Impugned Decision – not least given that the Chamber has thereby effectively absolved the Prosecution of its duty to pursue exonerating circumstances, effective for the remainder of these trial proceedings. In this regard, these findings may very well have jurisprudential repercussions beyond these proceedings, in other cases and situations under investigation or otherwise before the Court.

49. Unless immediately corrected by the Appeals Chamber therefore, serious and potentially permanent damage to the integrity of the proceedings – not to mention the legitimacy, reputation and continued operation of the Court – will be done.

## CONFIDENTIALITY

50. This Request is filed on a confidential basis as it refers to information on protected witnesses and in confidential filings. A public redacted version will be filed forthwith.

## RELIEF SOUGHT

51. In light of the above, the Defence respectfully requests that Trial Chamber V:

**GRANT** leave to appeal the Issues.

**RESPECTFULLY SUBMITTED ON THIS 6th DAY OF MAY 2024**

Me Mylène Dimitri
Lead Counsel for Mr. Yekatom

The Hague, the Netherlands

[104] In this regard, the Defence notes that in the Impugned Decision there is a striking lack of any suggestion that the Prosecution investigation was lacking in any way; and reiterates that in the Impugned Decision, the Chamber repeatedly held the Prosecution to a lower standard of investigative objectivity than that to which the Prosecution holds itself; see *supra*, paras 19-24.