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Date: **29 April 2016**

**TRIAL CHAMBER VII**

**Before:** Judge Bertram Schmitt, Presiding Judge  
Judge Marc Perrin de Brichambaut  
Judge Raul C. Pangalangan

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC**

**IN THE CASE OF**  
*THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO  
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU  
and NARCISSE ARIDO*

**Public**

**Decision on Requests to Exclude Dutch Intercepts and Call Data Records**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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**Legal Representatives of Victims**

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**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for Victims**

**The Office of Public Counsel for the Defence**

**States Representatives**

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**REGISTRY**

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**Registrar**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Others**

**Trial Chamber VII** ('Chamber') of the International Criminal Court ('Court' or 'ICC'), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Articles 69(7) and 69(8) of the Rome Statute ('Statute'), Rule 63(5) of the Rules of Procedure and Evidence ('Rules') and Regulations 24(5) and 37 of the Regulations of the Court, issues the following 'Decision on Requests to Exclude Dutch Intercepts and Call Data Records'.

## **I. Procedural History**

1. On 8 April 2016, the defence for Mr Kilolo ('Kilolo Defence') requested, in part, to exclude all telephonic and intercepted communications evidence ('Kilolo Defence Request').<sup>1</sup>
2. On 12 April 2016, the defence for Mr Bemba ('Bemba Defence') requested that the Chamber exclude the Dutch intercepts and call data records collected in this case ('Bemba Defence Request', collectively with Kilolo Defence Request: 'Requests').<sup>2</sup>
3. On 22 April 2016,<sup>3</sup> the defence for Mr Mangenda joined the relief sought in the Requests,<sup>4</sup> and the Kilolo Defence filed a short response indicating that, if the Bemba Defence Request is granted, those materials should be excluded in relation

<sup>1</sup> Motion on behalf of Aime Kilolo Musamba pursuant to Article 69(7) of the Statute to exclude evidence obtained in violation of the Statute and/or internationally recognized human rights, ICC-01/05-01/13-1796-Conf, paras 55-76. The Chamber notes that the Kilolo Defence Request is 21 pages long and therefore in violation of Regulation 37(1) of the Regulations of the Court. However, the Chamber considers it appropriate to consider the submissions made in this request in the interest of justice.

<sup>2</sup> Defence Application pursuant to Article 69(7) of the Rome Statute, ICC-01/05-01/13-1799-Red (with six annexes; public redacted version notified 22 April 2016). The Chamber had set a deadline of 8 April 2016 for the submission of all such applications, but the Bemba Defence had been granted an extension for the Bemba Defence Request. Decision on Bemba Defence Request for Extension of Time, 6 April 2016, ICC-01/05-01/13-1774. *See also* Decision on Bemba Defence Application for Admission of D20-2's Prior Recorded Testimony Pursuant to Rule 68(2)(b) of the Rules, 29 March 2016, ICC-01/05-01/13-1753, paras 9-12 (also foreshadowing the filing of the present request).

<sup>3</sup> The response deadline was shortened to this date. Email from Trial Chamber VII Communications to the parties, 11 April 2016 at 16:34.

<sup>4</sup> Mangenda Defence Response to ICC-01/05-01/13-1785-Conf, ICC-01/05-01/13-1795-Conf, ICC-01/05-01/13-1796-Conf and ICC-01/05-01/13-1799-Conf, ICC-01/05-01/13-1832-Conf.

to all accused.<sup>5</sup> The Office of the Prosecutor ('Prosecution') also responded ('Response'), submitting that the Requests be rejected.<sup>6</sup>

4. On 26 April 2016, the Bemba Defence sought leave to reply to the Prosecution's response.<sup>7</sup> On 28 April 2016, the Prosecution opposed this request.<sup>8</sup>

## II. Analysis

### A. Preliminary Issues

5. First, the Bemba Defence requests an extension of 600 words '[g]iven the complexity of Dutch law and procedures'.<sup>9</sup> The Chamber accepts these arguments and, also noting the minimal nature of the extension sought, grants this request.
6. Second, as to the Bemba Defence request for leave to reply, the Chamber considers that it does not require any further submissions in order to render its ruling. This request is rejected.
7. Third, both the Kilolo and Bemba Defence Requests make reference to the allegedly illegal means by which the Prosecution obtained information from Western Union. All such arguments are addressed in a separate decision.
8. Fourth, the Chamber notes that the Kilolo Defence's relief sought is presented more broadly than that sought by the Bemba Defence, but from the Kilolo Defence's argumentation it appears that they are largely challenging the same Dutch intercepts and call data records as the Bemba Defence. The Chamber will therefore limit its analysis below to the exclusion of the Dutch intercepts and call

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<sup>5</sup> Response on behalf of Mr Kilolo to Article 69(7) Applications submitted by other Defence teams, ICC-01/05-01/13-1830-Conf.

<sup>6</sup> Prosecution's Consolidated Response to Defence Motions Seeking Exclusion of Evidence under Article 69(7) of the Rome Statute, ICC-01/05-01/13-1833-Conf (with annex).

<sup>7</sup> Request for Leave to Reply to the 'Prosecution's Consolidated Response to Defence Motions Seeking Exclusion of Evidence under Article 69(7) of the Rome Statute', ICC-01/05-01/13-1848-Conf.

<sup>8</sup> Prosecution's Response to Bemba's "Request for Leave to Reply to the 'Prosecution's Consolidated Response to Defence Motions Seeking Exclusion of Evidence under Article 69(7) of the Rome Statute'", ICC-01/05-01/13-1852-Conf (notified 29 April 2016).

<sup>9</sup> Bemba Defence Request, ICC-01/05-01/13-1799-Red, para. 6 (at footnote 2).

data records, which are hereafter referred to as the ‘Dutch Materials’. That said, all of the Kilolo Defence’s arguments that are unrelated to Western Union materials are addressed in the present decision, and the Chamber’s reasoning below applies broadly to any other materials at issue in the Kilolo Defence Request.

## **B. Applicable Law**

9. The Chamber recalls the approach taken in its previous decisions taken pursuant to Article 69(7) of the Statute<sup>10</sup> – such applications have been ruled upon during trial as an exception to the general rule that the Chamber ‘defers its assessment of the admissibility of evidence until deliberating its judgment’.<sup>11</sup>
10. In accordance with Article 69(7) of the Statute, the Chamber will first consider whether the evidence was collected in violation of the Court’s statutory scheme or internationally recognised human rights. If such a violation is determined, the Chamber will then consider whether this violation ‘casts substantial doubt on the reliability of the evidence’ or whether the admission of the evidence ‘would be antithetical to and would seriously damage the integrity of the proceedings’. In the present case, the internationally recognised human right at issue is the right to privacy, which may not be interfered with except ‘in accordance with the law’.<sup>12</sup> The ‘in accordance with the law’ standard requires, among other things, that: (i) the measure or measures in question should have some basis in law; (ii) the law in question should be accessible to the person concerned and foreseeable as to its effects; and (iii) as regards foreseeability, the law must set forth with sufficient

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<sup>10</sup> Corrigendum of public redacted version of Public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests, 12 November 2015, ICC-01/05-01/13-1478-Red-Corr; Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible, 30 October 2015, ICC-01/05-01/13-1432; Decision on Request to declare telephone intercepts inadmissible, 24 September 2015, ICC-01/05-01/13-1284; Decision on Kilolo Defence Motion for Inadmissibility of Material, 16 September 2015, ICC-01/05-01/13-1257.

<sup>11</sup> Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf), 24 September 2015, ICC-01/05-01/13-1285, paras 9, 13.

<sup>12</sup> Art. 8(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Interference with this right is subject to other requirements, such as the interference being ‘necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country’, but there is no argument in the present case that any privacy rights have been violated in these respects.

precision the conditions in which a measure may be applied, to enable the persons concerned – if need be, with appropriate advice – to regulate their conduct.<sup>13</sup>

11. Accordingly, the Chamber will determine for each issue in question first whether the Statute or internationally recognised human right have been violated and second whether the criteria of Article 69(7)(a) or (b) of the Statute have been fulfilled.
12. The parties raise several arguments concerning the application of national law and the Chamber's power and limits to decide if evidence was obtained in accordance with national law. The Prosecution argues that the Chamber is 'expressly and categorically prohibited' from considering such arguments.<sup>14</sup>
13. The Chamber is not persuaded that the role of national law in the present inquiry is as categorically clear as the Prosecution suggests. Indeed, Article 69(8) of the Statute provides that '[w]hen deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.' Rule 63(5) of the Rules also provides that '[t]he Chambers shall not apply national laws governing evidence, other than in accordance with Article 21'. In accordance with these provisions, it is clear that the Chamber cannot analyse whether or not the Dutch authorities correctly applied domestic laws as such.
14. However, Article 69(7) of the Statute also requires the Chamber to explore whether a violation of the Statute or internationally recognised human rights occurred. Some specific provisions of the Statute apply directly to national authorities acting on request of the Court - such as Articles 55(2) and 59 of the Statute – making the way in which national procedures were implemented

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<sup>13</sup> See European Court of Human Rights (Grand Chamber), *Khoroshenko v. Russia*, 30 June 2015, 41418/04, para. 110 (further citations therein). See also Human Rights Committee, General Comment 16, 28 September 1988, paras 3, 8 and 10; Inter-American Court of Human Rights, *Case of Tristán Donoso v. Panamá*, Judgment, 27 January 2009, paras 55-57.

<sup>14</sup> Response, ICC-01/05-01/13-1833-Conf, paras 7-13.

relevant in an Article 69(7) analysis. Further, any interference with the internationally recognised right to privacy must be done 'in accordance with the law', and a Chamber's analysis of this right may also have some element of reviewing national law when national authorities act pursuant to Court cooperation requests. In this way, an Article 69(7) inquiry may engage with a discussion of the application of national law,<sup>15</sup> which creates tension with Article 69(8) of the Statute.

15. This tension requires the Chamber to balance its obligations under Article 69(7) and (8) of the Statute. The Chamber will review the application of national law only to the extent necessary to determine whether a violation occurred under Article 69(7) of the Statute. In other words, the Chamber in these situations engages with national law solely to determine if something so manifestly unlawful occurred that it amounts to a violation of the Statute or internationally recognised human rights. If the Chamber cannot conclude that such manifestly unlawful conduct occurred at the national level, the Chamber is not permitted to further examine whether a mere infringement of domestic rules of procedure transpired.
16. In this regard, the Chamber notes that cooperation in Article 70 cases is done in accordance with Article 70(2) of the Statute. This provision specifies that cooperation with the Court in Article 70 investigations 'shall be governed by the domestic laws of the requested State'. The Chamber notes that the Bemba and Kilolo Defence rely on provisions of Part IX of the Statute which make reference to complying with requests in accordance with national law.<sup>16</sup> The provisions referenced are Articles 93(1), 96(3) and 99(1) of the Statute.

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<sup>15</sup> See Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803-tEN, paras 62-90 (translation notified 14 May 2007).

<sup>16</sup> Kilolo Defence Request, ICC-01/05-01/13-1796-Conf, paras 16-20; Bemba Defence Request, ICC-01/05-01/13-1799-Red, paras 7-10.

17. At the outset, the Chamber observes that provisions under Part IX address the relationship between requested States and the Court. Safeguard clauses embedded in the various provisions of Part IX address sovereignty concerns of States and are not generally apt to protect the interests of the individual. Once the State has complied with the Court's cooperation request, even if national laws were not correctly applied, the State is considered to have nevertheless complied with its obligations under Part IX. Thus, in the present instance, while Part IX of the Statute generally applies to the proceedings,<sup>17</sup> a failure to comply with national procedures in executing a request under Part IX does not necessarily mean that this Statute has been violated for purposes of Article 69(7) of the Statute.
18. There is also a further consideration which militates against conflating Part IX considerations with those under Article 69(7) of the Statute. If these provisions in Part IX are understood as setting out the requirement that the national law of the requested State be respected in the course of executing a cooperation request, then every potential breach of national procedure – even mere infringements of domestic procedure that do not constitute violations of international human rights law – would qualify as a violation of the Statute for purposes of Article 69(7) of the Statute. Such an interpretation would render Article 69(8) of the Statute essentially superfluous, because the Chamber would be required to rule on the application of every aspect of national law in order to be assured that the Statute was not breached. Such an interpretation is untenable – Article 69(8) of the Statute was designed to make sure that the Court would not interfere with State sovereignty and 'get involved in intricate inquiries about domestic laws and procedures'.<sup>18</sup>

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<sup>17</sup> See Rule 167 of the Rules.

<sup>18</sup> Preparatory Committee, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, March-April and August 1996, A/51/22 Supp. 22, pages 60-61; Hans-Jörg Behrens, *The Trial Proceedings*, in Roy Lee (ed.), *The International Criminal Court – The Making of the Rome Statute*, 1999, page 246. The April 1998 Draft Statute also had bracketed language in what became Article 69(8) which would have given Chambers more flexibility in examining national law, but this language was ultimately removed. Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for the International Criminal Court, 14 April 1998, A/CONF.183/2/Add.1, page 110 ('When deciding on the relevance or



19. An overly broad interpretation of these provisions in Part IX would also call into question why Article 69(7) of the Statute only addresses violations of the ‘Statute’ and ‘internationally recognised human rights’. The most common situation when the application of national law arises in Article 69(7) challenges is when States Parties act pursuant to cooperation requests falling under Part IX of the Statute. If any kind of domestic procedural violation qualified as an Article 69(7) violation, then the chapeau of the provision would not need to be limited to only violations of the Statute or internationally recognised human rights.
20. In order to preserve the meaning of Article 69(8) of the Statute and to maintain the limits on the kinds of violations specified in Article 69(7) of the Statute, the Chamber determines that infringements of domestic procedure do not *per se* constitute violations of the Statute under Article 69(7), even if such infringements are not in accordance with the laws of the requested State referenced in Part IX of the Statute.<sup>19</sup> This conclusion is necessitated by the principle of treaty interpretation that every provision in the Statute must be interpreted in a manner which gives every provision meaning and independent content. On this understanding, the references to national law in Articles 93(1) and 99(1) describe obligations between the Court and its member states – they indicate how States execute requests for cooperation, and do not establish independent rights for the accused. A State’s failure to respect its own national procedures does not automatically result in a ‘violation of this Statute’ for Article 69(7) purposes.

### **C. Whether a Violation of the Statute or Internationally Recognised Human Rights Occurred**

21. The Chamber’s factual assessment will relate to the two primary allegations raised in favour of excluding the Dutch Materials: (i) the absence of a legal basis for the

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admissibility of evidence collected by a State, the Court shall not rule on [, but may have regard to,] the application of the State’s national law’).

<sup>19</sup> See ICC-01/05-01/13-1432, para. 24 (making reference to Article 99(1) and how the Chamber could not conduct any further review by virtue of Article 69(8)).

interception of a phone number allegedly used by Mr Kilolo ('Kilolo Number') between August and September 2013 and (ii) the absence of adequate safeguards in the manner in which this evidence was collected.<sup>20</sup>

1. *Absence of a legal basis for the interception of the Kilolo Number between August and September 2013*

22. With reference to the relevant Dutch legal provisions, the Bemba Defence argues that the interception of the Kilolo Number between August and September 2013 was illegal because: (i) the Prosecution did not formally request the interception of this number and (ii) certain key discussions in the interception of this number were not recorded in writing.<sup>21</sup> The Prosecution denies that any violation falling under Article 69(7) of the Statute occurred.<sup>22</sup>

23. The Chamber notes that the Bemba Defence provides a timeline of all the events relating to the collection of the Dutch Materials.<sup>23</sup> The Prosecution does not dispute the events listed by the Bemba Defence, although it attributes a different interpretation to them. The Chamber considers that the most relevant parts of this timeline in relation to the interception of the Kilolo Number between August and September 2013 are as follows:

- i. On 6 August 2013, the ICC Prosecution sent a request for assistance ('RFA') to the Dutch authorities. This request did not specifically include the Kilolo Number, but listed other specific numbers and more generally sought: (a) all phone details on Mr Kilolo and Mr Mangenda – 'all SIM cards registered in their names, as well as associated IMEI [which stands for International

<sup>20</sup> Bemba Defence Request, ICC-01/05-01/13-1799-Red, para. 21.

<sup>21</sup> Bemba Defence Request, ICC-01/05-01/13-1799-Red, paras 23-39.

<sup>22</sup> Response, ICC-01/05-01/13-1833-Conf, paras 34-36.

<sup>23</sup> Annex F of the Bemba Defence Request, ICC-01/05-01/13-1799-Conf-AnxF. The Chamber notes that some of the supporting materials in the timeline are not in either of the working languages of the Court. The timeline is sufficiently specific to assess the relevant facts, but the Bemba Defence is reminded that it must both provide English or French translations of any supporting materials it wishes for the Chamber to consider and link these translations to the original language document in e-court.

Mobile Equipment Identity]’ and (b) intercepting of all telecommunications ‘from and to all the identified SIM cards and IMEI, from 15 August 2013 to 30 September 2013, and providing the audio recording and transcripts of all phone conversations and transcripts of text messages’.<sup>24</sup>

- ii. On 28 August 2013 at 22:03, the ICC Prosecution sent the Dutch Prosecution office an email with a draft RFA in relation to the call histories of five further numbers. The draft RFA mentions the Kilolo Number as the most used number of these five and speculated that this number ‘may belong to Kilolo’. On 29 August 2013 at 17:55, the Dutch Prosecution responded that the draft RFA was sufficient to provide the help requested and suggested that ‘maybe it’s worth trying to ask the investigating judge to put an interception on the one number that is mostly used’.<sup>25</sup>
- iii. On 29 August 2013 at 19:10, the ICC Prosecution inquired as to ‘[w]hat, if anything, do you need from [the ICC Prosecution] for a potential intercept request to the investigating judge’ in relation to the Kilolo Number. The Dutch Prosecution responded at 20:06, indicating that ‘there is no need for another formal request. The first request [of 6 August 2013] was about all known numbers’.<sup>26</sup>
- iv. On 30 August 2013 at 09:53, the Dutch Prosecution confirmed that they had spoken with the Investigating Judge and that this judge had given permission to intercept the Kilolo Number for two weeks.<sup>27</sup>
- v. On 3 September 2013, the Dutch Prosecutor applied in writing for leave to intercept the Kilolo Number, referring to earlier requests for legal

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<sup>24</sup> Annex F of the Bemba Defence Request, ICC-01/05-01/13-1799-Conf-AnxF, page 1, *referring to* CAR-D21-0005-0001.

<sup>25</sup> Annex F of the Bemba Defence Request, ICC-01/05-01/13-1799-Conf-AnxF, pages 6-7.

<sup>26</sup> Annex F of the Bemba Defence Request, ICC-01/05-01/13-1799-Conf-AnxF, pages 7-8.

<sup>27</sup> Annex F of the Bemba Defence Request, ICC-01/05-01/13-1799-Conf-AnxF, pages 8-9.

assistance (mentioning the 6 August 2013 RFA) and the oral approval given on 30 August 2013. This interception was authorised that same day.<sup>28</sup>

vi. On 10 September 2013, the Investigating Judge authorised the extension of the interception of the Kilolo Number until 30 September 2013.<sup>29</sup>

24. The Bemba Defence submits that the facts above are unlawful under Dutch national procedure and argues that there was no valid ICC Prosecution RFA for the Kilolo Number when its interception was ordered.<sup>30</sup> Contrary to the arguments of the Bemba Defence, the Chamber considers that the Prosecution's 6 August 2013 RFA is written sufficiently broadly to be reasonably understood as including the Kilolo Number. The Dutch Prosecution and Investigating Judge appear to have understood it on these terms, with the former in particular assuring the Prosecution on 29 August 2013 that no further formal written request was necessary in order to intercept the Kilolo Number.

25. The Chamber does not consider that subsequent discussions between the ICC Prosecution and Dutch authorities on a formal RFA in relation to the Kilolo Number affect the original justifications provided for intercepting it.<sup>31</sup> The Prosecution did send a formal RFA on 11 October 2013 and made what it then described as a 'post hoc request to intercept and obtain resultant recordings from [the Kilolo Number]',<sup>32</sup> but the Investigative Judge decisions which the Bemba Defence concedes authorised the interception seem to have been clearly issued on the basis of the 6 August 2013 RFA.<sup>33</sup> The 15 October and 19 November 2013 Dutch District Court decisions - which authorised the transmission of intercepted

<sup>28</sup> Annex F of the Bemba Defence Request, ICC-01/05-01/13-1799-Conf-AnxF, pages 13-15.

<sup>29</sup> Annex F of the Bemba Defence Request, ICC-01/05-01/13-1799-Conf-AnxF, page 18.

<sup>30</sup> Bemba Defence Request, ICC-01/05-01/13-1799-Red, paras 26-27; Annex C of the Bemba Defence Request, ICC-01/05-01/13-1799-Conf-AnxC, pages 7-8.

<sup>31</sup> *As described in* Bemba Defence Request, ICC-01/05-01/13-1799-Red, paras. 29-32.

<sup>32</sup> CAR-OTP-0090-1941, 1943.

<sup>33</sup> Annex F of the Bemba Defence Request, ICC-01/05-01/13-1799-Conf-AnxF, pages 14-15 (showing the 3 September 2013 decision was based on a request explicitly referencing the 6 August 2013 RFA) and 18 ('Investigating Judge [...] authorises the extension of interception of the [Kilolo N]umber pursuant to the Dutch Prosecutor's 9 September 2013 request and the ICC's 6 and 22 August 2013 Requests').

communications to the ICC during this period – also make no reference to any irregularities in the interception of the Kilolo Number.<sup>34</sup>

26. The Chamber is not convinced that any violation of the Statute occurred in relation to the Dutch authorities' legal basis for interception the Kilolo Number, particularly in view of the considerations above on the limits of Part IX in an Article 69(7) analysis. As regards whether a violation of internationally recognised human rights occurred, the Chamber considers that the actions of the Dutch Prosecution in requesting interception of the Kilolo Number and the Dutch Investigative Judge in authorising the interception do not appear to be so manifestly unlawful that they amount to a failure to act 'in accordance with the law' for purposes of Mr Kilolo's right to privacy. Any further inquiry would involve applying Dutch law to determine a mere infringement of national procedure, which this Chamber is expressly precluded from doing by the terms of Article 69(8) of the Statute and Rule 63(5) of the Rules.
27. The Chamber is satisfied that, on these facts, no violation under the Statute or internationally recognised human rights occurred in the interception of the Kilolo Number.

2. *Absence of adequate safeguards*

28. The Bemba Defence argues that the following specific safeguards were not respected when collecting the Dutch Materials: (i) the Dean of The Hague Bar Association played no role in reviewing the materials; (ii) the Independent Counsel cannot qualify as a substitute for the Dean under Dutch law; (iii) neither the Dutch Investigative Judge or Pre-Trial Chamber Single Judge were able to verify the Independent Counsel's recommendations and (iv) the Bemba Defence

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<sup>34</sup> CAR-OTP-0085-0596 (ICC-01/05-01/13-6-Conf-AnxA-Red); CAR-OTP-0085-0606 (ICC-01/05-01/13-6-Conf-AnxB-Red).

had no ability to obtain a remedy concerning these violations before the Dutch courts or Pre-Trial Chamber.<sup>35</sup>

29. The Bemba Defence indicates that, on 14 August 2013, the Dutch Investigating Judge authorised the interception of voice and data and decided the manner in which the selection of communications must take place.<sup>36</sup> In circumstances where potentially privileged communications may be intercepted, the Dean of the Hague Bar Association typically reviews the conversations in question and provides non-binding advice as to what materials should be provided. In the present case, it appears that the Dutch Investigative Judge personally consulted with the Dean, but appointed the same Independent Counsel appointed by the Pre-Trial Chamber II Single Judge for purposes of reviewing the potentially privileged character of the intercepts in question.<sup>37</sup>
30. As to the role of the Dean and the Independent Counsel's role under Dutch law as his substitute, the Chamber is not convinced that the Bemba or Kilolo Defence establish any Article 69(7) violation. First, the Dean was consulted in the course of the collection of the Dutch Materials, so he did have some advisory role in the collection of the Dutch Materials.<sup>38</sup> Second, as indicated by Bemba Defence witness D20-2, the Investigating Judge proceeded with using the Independent Counsel instead of the Dean after receiving information from the Dean that this lawyer falls under the Dean's authority.<sup>39</sup> Even if the Dean had conducted the review himself, his advice would not have been binding on the Investigative Judge under Dutch law.<sup>40</sup> The Chamber is not persuaded that any violation of the Statute occurred in relation to the role of the Dean and Independent Counsel under Dutch

<sup>35</sup> Bemba Defence Request, ICC-01/05-01/13-1799-Red, paras 41-84. *See also* Kilolo Defence Request, ICC-01/05-01/13-1796-Conf, paras 61-67.

<sup>36</sup> Annex F of the Bemba Defence Request, ICC-01/05-01/13-1799-Conf-AnxF, pages 2-4.

<sup>37</sup> Bemba Defence Request, ICC-01/05-01/13-1799-Red, paras 42-50; Annex C of the Bemba Defence Request, pages 8-12.

<sup>38</sup> CAR-D20-0006-1316, at 1320; CAR-D20-0006-1345; at 1346.

<sup>39</sup> CAR-D20-0006-1347, 1347-48.

<sup>40</sup> CAR-OTP-0094-0359, 0364-0366.

law, particularly in view of the considerations above on the limits of Part IX in an Article 69(7) analysis. The Chamber further considers that the procedure adopted by the Dutch Investigating Judge does not appear to be so manifestly unlawful that it amounts to a failure to act 'in accordance with the law' for purposes of the internationally recognised right to privacy. Any further inquiry would involve applying Dutch law to determine a mere infringement of national procedure, which this Chamber is expressly precluded from doing.

31. As to the inability for the Investigative Judge and Pre-Trial Chamber Single Judge to review the work of the Independent Counsel, this part of the Bemba Defence's argumentation is tantamount to challenging the propriety of this Court's procedure in appointing and using the Independent Counsel. This Chamber has already affirmed the mandate of the Independent Counsel and has rejected a Kilolo Defence request to exclude all communications it identified as privileged in this case.<sup>41</sup> The Chamber sees no need to revisit these assessments on what the Bemba and Kilolo Defence advance in their requests.
  
32. As to the Bemba Defence's inability to obtain an effective remedy for any violation,<sup>42</sup> the Chamber is likewise unpersuaded that this is the case. The Chamber is not able to pronounce itself as to how any remedy may be sought before a Dutch court. As to seeking a remedy before the Pre-Trial Chamber, the Chamber notes that both the Pre-Trial Chamber and this Chamber have made multiple rulings on defence challenges to the legality and propriety of using the Dutch Materials.<sup>43</sup> The present decision is the latest such ruling. The Bemba and Kilolo Defence had therefore numerous occasions to put forward their challenges -

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<sup>41</sup> Decision on 'Request concerning the review of seized material' and related matters, 9 April 2015, ICC-01/05-01/13-893-Red; Decision Providing Materials in Two Independent Counsel Reports and Related Matters, 15 May 2015, ICC-01/05-01/13-947; ICC-01/05-01/13-1257.

<sup>42</sup> Bemba Defence Request, ICC-01/05-01/13-1799-Red, paras 72-84.

<sup>43</sup> ICC-01/05-01/13-1284; ICC-01/05-01/13-1257; Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, 15 November 2014, ICC-01/05-01/13-749, para. 14.

it cannot be said they did not have any opportunity to obtain a remedy for alleged violations.

### 3. *Other arguments*

33. The Bemba and Kilolo Defence make other arguments in relation to the Dutch Materials, specifically to challenge the authenticity and reliability of the evidence collected.<sup>44</sup> The Chamber is not persuaded that these concerns are relevant when discussing whether to exclude the Dutch Materials pursuant to Article 69(7) of the Statute. The Chamber considers these arguments are relevant in deciding how these items should ultimately be assessed, and this Chamber has generally deferred its considerations of evidence's relevance, probative value and potential prejudice until the trial judgment.<sup>45</sup>
34. As particularly regards the Kilolo Defence argument that the Prosecution is required to present its 'best evidence',<sup>46</sup> the Chamber also recalls that its Single Judge recently concluded that the parties are given deference in how they present their evidence and that the statutory scheme does not impose any 'best evidence' requirement.<sup>47</sup>

## **D. Conclusion**

35. For the reasons above, the Chamber concludes that no violation of the Statute or internationally recognised human rights is established within the meaning of Article 69(7) of the Statute. As such, the Chamber is not required to engage with the alternative requirements set out in Article 69(7)(a)-(b) of the Statute.

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<sup>44</sup> Kilolo Defence Request, ICC-01/05-01/13-1796-Conf, paras 68-74. Bemba Defence Request, ICC-01/05-01/13-1799-Red, paras 95-101. *See also* Revised Request to Exclude Evidence Pursuant to Article 69(7), 8 April 2016, ICC-01/05-01/13-1791-Conf-Corr, para. 53 (with six annexes; revised version notified 11 April 2016).

<sup>45</sup> ICC-01/05-01/13-1285, para. 9.

<sup>46</sup> Kilolo Defence Request, ICC-01/05-01/13-1796-Conf, paras 68-74.

<sup>47</sup> Decision on Prosecution Request to Order the Disclosure of Material in Possession of the Defence, 20 April 2016, ICC-01/05-01/13-1820, para. 9.



36. However, the Chamber does wish to emphasise that it considers that these further criteria are not met, even if it assumed for sake of argument that a violation occurred.
37. The Bemba and Kilolo Defence arguments, if accepted, amount to procedural irregularities under Dutch law whereby certain formal requirements were not met when intercepting the Dutch Materials. Such irregularities cannot substantially affect the reliability of the evidence, and the Bemba Defence advances only speculation that the interception operation significantly affected the reliability of the intercepts once Mr Kilolo and Mr Mangenda discovered it.<sup>48</sup> Further, the Chamber does not consider it 'antithetical to and would seriously damage the integrity of the proceedings' to use evidence obtained on the basis of the judicially authorised deviations from Dutch criminal procedure advanced by the Bemba and Kilolo Defence. The Bemba and Kilolo Defence have argued consistently during this trial that privileged conversations have been wrongfully provided to the Prosecution.<sup>49</sup> Particularly in view of its previous finding that communications in furtherance of a crime or fraud are not privileged,<sup>50</sup> the Chamber remains unpersuaded that the information collected would be antithetical to or would seriously damage the integrity of the proceedings in this case.
38. Accordingly, the Chamber does not find the Dutch Materials inadmissible pursuant to Article 69(7) of the Statute. As indicated previously,<sup>51</sup> the Chamber's reasoning extends to the other telephonic and intercepted evidence in the case as well. The Requests are rejected.

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<sup>48</sup> Bemba Defence Request, ICC-01/05-01/13-1799-Conf, para. 98. *But see* ICC-01/05-01/13-1830-Conf, para. 8 note 6 (the Kilolo Defence disputes the Bemba Defence arguments on this point).

<sup>49</sup> *E.g.* Annexes A and B of the Bemba Defence Request, ICC-01/05-01/13-1799-Conf-AnxA, ICC-01/05-01/13-1799-Conf-AnxB.

<sup>50</sup> ICC-01/05-01/13-947, para. 14.

<sup>51</sup> *See* paragraph 8 above.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**GRANTS** the Bemba Defence request for additional pages in its Request;

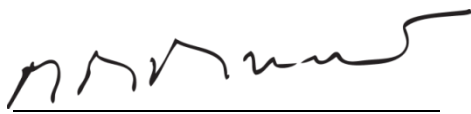
**REJECTS** the Bemba Defence request for leave to reply; and

**REJECTS** the relief sought in the Requests.

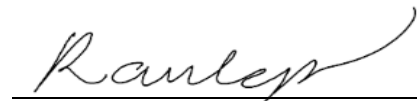
Done in both English and French, the English version being authoritative.



**Judge Bertram Schmitt, Presiding Judge**



**Judge Marc Perrin de Brichambaut**



**Judge Raul C. Pangalangan**

Dated 29 April 2016

At The Hague, The Netherlands