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No.: **ICC-01/05-01/08 A**

Date: **27 January 2017**

THE APPEALS CHAMBER

Before: Judge Christine Van den Wyngaert, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Chile Eboe-Osuji
Judge Piotr Hofmański

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF
*THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO***

Public Redacted Document with Public Annex A

**Public redacted version of “Prosecution’s response to Bemba’s application to
present additional evidence in the appeal”, 21 November 2016,
ICC-01/05-01/08-3471-Conf A**

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Introduction

1. The Appeals Chamber should dismiss the *Bemba* Defence's application to present additional evidence on appeal¹ *in limine*. The 23 documents sought to be admitted as evidence² are wholly extraneous to this appeal: rather, they constitute an attempt to cloud the *Bemba* Main Case record with material pertaining to the related *CAR Article 70* case. To date, Chambers hearing the Main Case and the *Article 70* case have maintained a strict separation between the two proceedings. Yet, the *Bemba* Defence disregards this previous practice and the Chambers' instructions to keep the proceedings distinct. The Application attempts to conflate the two cases, bypasses earlier decisions, and, in effect, inappropriately asks the *Bemba* Main Case Appeals Chamber to rule upon matters previously before the Trial Chamber of the *CAR Article 70* case³ and/or to decide upon the merits of any prospective *CAR Article 70* appeal.

2. Moreover, the *Bemba* Defence—as the party proffering this material—fails to discharge its burden. Not only does the Application fail to meet the rigorous standard for additional evidence on appeal, the documents—and the paucity and inaccuracy of the accompanying argument—lack even a colourable basis for their admission. All the documents are irrelevant to this appeal. Many are wrongly characterised as “privileged”, when they are not; most were available to the *Bemba* Defence before the case was closed—and all were in the Defence's hands before the Trial Judgment was issued.⁴ Astonishingly, some are even the Defence's own product. The Defence fails to explain its lack of due diligence. Nor does it show that

¹ [REDACTED] and ICC-01/05-01/08-3435-Red A (“Application” or “Defence Application”).

² See Application, paras. 17 (i)-(xxiii) (“documents” or “material”); [REDACTED] and ICC-01/05-01/08-3434-Red (“Brief”).

³ See generally [REDACTED] and ICC-01/05-01/13-1989-Red (“*Bemba et al.* Trial Judgment”), where Trial Chamber VII convicted all five accused of article 70 offences.

⁴ Closing oral statements were heard on 12-13 November 2014. The Trial Judgment (ICC-01/05-01/08-3343) was issued on 21 March 2016.

the documents could, in any way, affect Trial Chamber III's verdict, or that the fairness or reliability of the proceedings was in any manner tarnished.

3. The Application is, at best, cursory: these appeal proceedings and their fair and expeditious conduct would be best served if it is dismissed outright. The Prosecution therefore requests the Appeals Chamber to dismiss the Application and the proffered material summarily. That the Chamber has chosen to follow the procedure set out in regulation 62(2)(b) of the Regulations of the Court⁵ does not preclude it from doing so.

Level of Confidentiality

4. The Prosecution files this submission as "Confidential" pursuant to regulation 23bis(2), since it responds to a confidential submission and refers to confidential decisions. The Prosecution will file a public redacted version, once public versions of the relevant decisions are available.

Certification

5. Pursuant to the Appeals Chamber's decision of 17 October 2016, the Prosecution notifies the Chamber that, based on its record, "[t]he documents [mentioned in the Defence Application] were disclosed or otherwise received by either party in *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*"⁶

⁵ ICC-01/05-01/08-3446-Conf A ("Additional Evidence Procedure Decision"), para. 5.

⁶ ICC-01/05-01/08-3445-Conf A ("LRV Access Decision"), p. 3 (directing *inter alia* the Prosecutor to "certify that the documents are copies of the documents that were disclosed or otherwise received by either party in *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*").

Submissions

i. Admitting additional evidence on appeal is exceptional

6. Admitting additional evidence on appeal is both exceptional and highly circumscribed. Regulation 62,⁷ along with articles 69(4)⁸ and 83 of the Statute,⁹ and rule 149 of the Rules of Procedure and Evidence,¹⁰ govern the admission of additional evidence on appeal.¹¹ None of these provisions are designed or intended to authorise a re-opening of the evidentiary phase of the trial or allow for the liberal admission of evidence on appeal. Rather, as the Appeals Chamber has held, the Court's appellate proceedings are corrective in nature and thus, admitting additional evidence on appeal should be restrictive.¹²

7. Accordingly, for its Application to succeed, the *Bemba* Defence must show the following:¹³

- a. the material is relevant, has probative value and is not prejudicial to a fair trial or to a fair evaluation of a witness;
- b. there are convincing reasons why such material was not presented at trial, including whether there was a lack of due diligence;
- c. the material is of sufficient importance and could have changed the verdict.

⁷ Regulation 62 requires the party seeking to present additional evidence to set out the evidence to be presented and to indicate the ground of appeal to which it relates and the reasons, if relevant, why the evidence was not adduced before the Trial Chamber.

⁸ Article 69(4) states "[t]he Court may rule on the relevance and admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness."

⁹ Article 83(1) gives the Appeals Chamber all the powers of the Trial Chamber.

¹⁰ Rule 149 provides, *inter alia*, that the rules governing submission of evidence in the Pre-Trial and Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber.

¹¹ See ICC-01/04-01/06-3121-Red A5 ("*Lubanga* AJ"), paras. 53-64.

¹² *Lubanga* AJ, paras. 56-57.

¹³ *Lubanga* AJ, paras. 54-59.

8. As shown below, the Application fails to meet these criteria, both individually and cumulatively. Moreover, although additional evidence on appeal may relate to questions of alleged procedural unfairness, it is for the *Bemba* Defence to demonstrate this, based “on the circumstances of the case and the evidence sought to be admitted.”¹⁴ Yet again, and as demonstrated below, the *Bemba* Defence fails to do so. Nor has the Defence given the Chamber any reason—let alone a compelling one—to exercise its discretion to admit the documents, despite its failure to meet the criteria.¹⁵

¹⁴ *Lubanga* AJ, para. 60, noting that “[t]he Appeals Chamber is not persuaded by the general statement[...] that additional evidence on appeal may never relate to questions of whether the proceedings appealed from were unfair. Such an evaluation will depend on the circumstances of the case and the evidence sought to be admitted.”

¹⁵ *Lubanga* AJ, para. 62.

ii. *The Bemba Defence fails to discharge its burden*

9. The Application's lack of substantiation at the threshold is fatal¹⁶ and it should be summarily dismissed.

10. Although the 23 documents are composed of three distinct categories (Western Union related documents from the *CAR Article 70* record; documents purportedly relating to the funding of Defence investigations; and intercepted phone conversations),¹⁷ the Defence treats these diverse documents in a wholesale manner. It claims—in a generic fashion—that they “[p]rovide important chronology and context to the narrative underpinning a central ground of appeal.”¹⁸ But the Application falls short of advancing concrete individualised reasons for each set of documents supporting their admission (let alone for each document).¹⁹ Mere references to its Brief do not, in any case, relieve the Defence of its burden to meet the formal requirements of such applications²⁰ or to advance substantive and pertinent argument. Further, even if the arguments advanced in the Brief are considered,²¹ they are minimal, inaccurate, and cannot sustain the Defence's request to admit these documents before the Appeals Chamber. Nor has the Defence described the content of the proposed evidence in any sufficient detail to allow the

¹⁶ See ICC-01/05-01/13-1964 OA13 (“*Mangenda* AC compensation decision”), paras. 27-28, noting that “[M]r. Mangenda has failed to meet the minimum requirements of substantiation for a consideration of the merits of this ground of appeal. Accordingly, the ground of appeal is dismissed *in limine*.” See also *Lubanga* AJ, paras. 53-64, 74-81, 91-96, 103-105, 112-113, implicitly acknowledging the applicant's burden to meet the criteria for admission of additional evidence; paras. 29-34, requiring the appellant to substantiate his arguments.

¹⁷ Application, para. 13.

¹⁸ Application, para. 15.

¹⁹ *Contra* Application, para. 15, stating only that “[these 23 documents] illustrate the prejudice to the accused arising from his right to privileged communication with his lawyers; the mistaken submissions that were conveyed to the Trial Chamber concerning the funding of Mr Bemba's defence that, without refutation, could not have failed to prejudice the minds of the Judges; and the purported foundation for certain submissions that were made by the Prosecution to the Judges during its *ex parte* submissions.”

²⁰ See *Popovi* 20 October 2011 Decision, para. 40, stating that an applicant “[m]ust fulfil all the requirements applicable to motions of additional evidence; this cannot be done through mere references to an appellant's brief.” *Contra* Application, fns. 11-13, citing Brief, paras. 18-21, 33, 94, 99, and 108.

²¹ Application, fns. 11-13, citing Brief, paras. 18-21, 33, 94, 99, and 108.

Chamber and the other parties on appeal to assess their relevance, if at all.²² Moreover, the Defence's general assertion that the proffered material is relevant to "a central ground of appeal",²³ without more, is insufficient and warrants summary dismissal.²⁴

11. Indeed, the Application lacks clarity on why the proffered material is indispensable to the appeal. Nor is the Defence's belated challenge—seven weeks after its original Application was filed—based on the "metadata" of "a number of the 23 Documents" "within their [e-Court] record" substantiated.²⁵

12. *First*, the Defence makes sweeping claims of unfairness purportedly relating to the *CAR Article 70* proceedings,²⁶ but fails to draw the essential link to *this* appeal and *these* proceedings. Merely stating that "[t]hese documents are relevant to the impact that the Prosecution's Article 70 investigations had on the fairness of the Main Case" or that "[the documents] merely reflect the information that was in the Prosecution's possession[...]" sheds no further light.²⁷ Nor, besides cursorily isolating the ground of appeal which alleges "a mistrial",²⁸ does the Defence specifically identify the findings of the Trial Chamber that this material is directed

²² *Hategekimana* 2 October 2008 Decision, paras. 7-8, noting that a failure to describe the content of the proposed evidence in sufficient detail is reason alone to dismiss the motion. *Contra* Application, para. 17, listing 23 documents, indicating only their nature, but not their content.

²³ Application, para. 15.

²⁴ *See Renzaho* 27 September 2010 Decision, para. 12, summarily dismissing admission of documents when only general assertions on their relevance were made.

²⁵ *Compare* ICC-01/05-01/08-3464 A ("Defence's 7 November 2016 Filing"), para. 8 (where the Defence argued for the Appeals Chamber's and LRV's access to the documents because *inter alia* their metadata was significant) and Application, paras. 1-17 (referring only to the documents, and not the metadata). *See also* ICC-01/05-01/08-3465 A ("E-Court Access Decision"), para. 3.

²⁶ *See e.g.*, Application, para. 4, stating "[a]lmost a quarter of this document is dedicated to detailing how the fairness of the proceedings were undermined by the way in which the Prosecution and Trial Chamber approached suspicions of offences against the administration of justice"; para. 12, stating "[t]he very purpose of reliance on many of these documents is that they were in the possession of the Prosecution trial team in the Main case while the trial was ongoing, which had an impact on its fairness"; para. 14, stating "[t]hese documents are relevant to the impact that the Prosecution's Article 70 investigations had on the fairness of the case".

²⁷ Application, para. 14.

²⁸ *See* Application, paras. 4, 15, noting Brief paragraphs relating to ground 1.

towards.²⁹ Rather, the Application disregards the Trial Chamber's pertinent findings on its approach to the related case, in particular that "[m]aterial arising from the proceedings in case ICC-01/05-01/13 is not necessary for the determination of the truth in the *Bemba* case."³⁰ The Defence fails to challenge this finding. Its mere subjective opinion, without more, is insufficient to admit the documents.³¹

13. *Second*, the Defence fails to show convincing reasons why these documents were not presented at trial. Rather, and somewhat counter-intuitively, the Defence underscores that "[e]ach of the documents [...] were in the parties' possession during the Main Case."³² But the Defence is silent on why—if the documents were in its possession during trial—it is compelled to present them only now at this advanced stage on appeal. The Appeals Chamber has discouraged "[l]itigation strategies that contemplate the presentation of evidence for the first time on appeal, even if such evidence was available at trial, or with due diligence, could have been produced."³³

14. *Third*, the Defence fails to concretely address the importance of this material, and the proposed impact—if any—that it could have on the verdict.³⁴ It fails to argue

²⁹ See *Gali* 28 August 2006 Decision, para. 5, noting *Gali*'s failure to identify with precision the specific Trial Chamber findings that the proposed additional evidence is directed towards. The ICTY Appeals Chamber found the application defective; *Naletili* Decision of 7 July 2005, para. 15, noting that the applicant should identify each ground of appeal that the additional evidence relates to and clearly describe the relationship of the evidence to the ground of appeal.

³⁰ Trial Judgment, para. 260. See also paras. 261-263, noting the Trial Chamber's approach to the testimony of the 14 witnesses. The Chamber noted "[t]he Defence's submission that it makes no concessions regarding the truthfulness of the evidence provided by the 14 witnesses", and understood "the approach adopted by the parties as reflecting their awareness that there are serious unresolved issues in relation to the 14 witnesses' testimony." The Chamber stated, however, that "[i]t is not bound by the parties' non-reliance on any witness."; paras. 303-378, where the Chamber considered issues of witness credibility, including for Defence witnesses.

³¹ *Gali* 28 August 2006 Decision, para. 5, noting that it is insufficient if the motion merely shows what facts the applicant thinks the proposed additional evidence shows. The applicant is required to identify, with specificity, the relevant findings which the applicant thinks the proposed additional evidence will undermine.

³² Application, para. 16. See also para. 12, stating "[e]ach of the documents is in the possession of both parties, and was in their possession during the course of the trial." But see para. 16, noting "[e]ach of the 23 documents came into the possession of the Appellant after the close of the evidence in the present proceedings."

³³ *Lubanga* AJ, para. 57.

³⁴ *Contra* Application, para. 15.

—let alone demonstrate—that “[t]he additional evidence could have led the Trial Chamber to enter a different verdict, in whole or in part.”³⁵

15. The Application’s lack of cogent argument and failure to comply with statutory requirements renders it unpersuasive. Indeed, the Defence concedes that “[t]he documents are not ‘fresh’ or ‘additional’ evidence in the usual sense.”³⁶ In these circumstances, the Appeals Chamber should invest in it no further,³⁷ and dismiss the Application *in limine*.

³⁵ *Lubanga* AJ, para. 59.

³⁶ Application, para. 14.

³⁷ *Contra* ICC-01/04-01/06-2958 A5A6, paras. 7-9, where the *Lubanga* AC, in deferring its decision on the admissibility of the additional evidence, considered *inter alia* the need to hear the Prosecution’s submissions and the relatively limited amount of proposed additional evidence.

iii. The documents do not qualify as additional evidence

16. Even if the Chamber were minded to consider the three individual categories of documents, they fail to meet the rigorous standard governing additional evidence on appeal.

a) Category 1: Western Union documents relating to CAR Article 70

17. Category 1 consists of 12 documents relating exclusively to the investigation in the *CAR Article 70* case.³⁸ Each of these documents pertains either to the Prosecution's communications with Western Union relating to the screening of names and records to further the investigation of article 70 offences, or the Austrian authorities' follow-up with Western Union. Of these, at least, three are email correspondence and five are Excel sheets containing Western Union related information.

18. The Defence appears to rely on these 12 documents to show the "purported foundation for certain submissions that were made by the Prosecution to the Judges during its *ex parte* submissions."³⁹ Yet, this is an unsubstantiated leap in logic. None of these documents—individually or together—advances that claim, nor has the Defence argued in any detail that it is so. Furthermore, none of the documents on their face support the Defence's claim—let alone, demonstrate unfairness to Bemba

³⁸ CAR-OTP-0092-0018 (Investigation report: screening of names against Western Union database, 3 November 2015); CAR-OTP-0091-0351 (OTP Correspondence addressed to the Embassy of the Republic of Austria and request for assistance to *inter alia* transmit Western Union records, 2 November 2012); CAR-OTP-0092-0021-R01 (email correspondence between OTP and Western Union, 28 September 2012); CAR-OTP-0092-0022-R01 (email correspondence between OTP and Western Union, 4 October 2012); CAR-OTP-0092-0024 (Financial document, Excel sheet containing Western Union related information, sent by Western Union to OTP); CAR-OTP-0092-0892-R01 (Notification of ICC-OTP meeting with Western Union in Austria, 15 October 2012); CAR-D24-0002-1363 (Translation of order from Austrian (Vienna) Prosecutor to Western Union, for information on bank accounts and transactions); CAR-OTP-0092-0028-R02 (email correspondence between OTP and Western Union, 7 November 2012); CAR-OTP-0092-0029 (Financial document, Excel sheet containing Western Union related information, 7 November 2012); CAR-OTP-0092-0030 (Financial document, Excel sheet containing Western Union related information, 7 November 2012); CAR-OTP-0092-0031 (Financial document, Excel sheet containing Western Union related information, 7 November 2012); CAR-OTP-0092-0032 (Financial document, Excel sheet containing Western Union related information, 7 November 2012).

³⁹ See Application, para. 15, fn. 13.

in the Main Case.⁴⁰ Finally, it is unclear why it would be necessary for the Appeals Chamber to consider these documents in order to decide on the issues raised in the Defence's first ground of appeal. At best, these documents advance a partial and disjointed chronology of events relating to the Prosecution's contacts with Western Union in the *CAR Article 70* case.⁴¹ The Defence's claim fails to demonstrate any evidentiary relevance to the Main Case, nor does it show that Bemba suffered any purported prejudice. These 12 documents are thus irrelevant to the Main Case.

19. Further, as much as these documents are irrelevant to the Main Case,⁴² they are highly relevant to the related *CAR Article 70* case. Trial Chamber VII was seised of the matter, and had issued several decisions relating to the transmission of the Western Union information in the investigation before it.⁴³ To consider this information now in the Main Case, when Trial Chamber III has rejected its relevance,⁴⁴ would unacceptably blur the boundaries between the two cases on appeal.

20. The Category 1 documents were available to Bemba *via* rule 77 disclosures in the Article 70 case on 5 October 2015, 4 November 2015, 20 November 2015, 22 January 2016 and 23 February 2016.⁴⁵ In other words, they were available to Bemba before the Trial Judgment was issued on 21 March 2016. The Defence never

⁴⁰ See *Lubanga* AJ, para. 104, where the Appeals Chamber considered that the proposed evidence did not, on its face, show any Congolese interference, and found Lubanga's arguments speculative and conclusory.

⁴¹ See Application, para. 15, fn. 13, citing to Brief, paras. 18-21.

⁴² See e.g., ICC-01/05-01/08-3336 ("Further Disclosure Decision"), para. 55, where Trial Chamber III found that the Defence had failed to establish that materials arising out of the Prosecution's investigations through Western Union are material to its preparation.

⁴³ See e.g., ICC-01/05-01/13-1854 ("Article 69(7) Decision"); ICC-01/05-01/13-1898 ("Article 69(7) ALA Decision"); ICC-01/05-01/13-1948 ("Second Article 69(7) Decision"); ICC-01/05-01/13-1963 ("Second Article 69(7) ALA Decision").

⁴⁴ Trial Judgment, para. 260.

⁴⁵ See e.g., ICC-01/05-01/13-338 ("*Bemba et al.* Access Decision"), pp. 3-4, noting that "Jean-Pierre Bemba has indeed access to all of the documents which his Counsel in the Main Case wishes to access[...]". See also ICC-01/05-01/08-3100 ("Article 70 Case Access Decision"), para. 34, noting that "[t]he defence's access to materials in case ICC-01/05-01/13 undermines its allegations of prejudice to the accused's interests."

attempted to seise the Trial Chamber hearing the Main Case with this material despite its availability. Nor does it explain its failure to exercise due diligence, including to pursue relevant procedural avenues to at least “attempt[] to bring the evidence before the Trial Chamber”, including motions to reopen its case to present these documents.⁴⁶

21. Moreover, the Category 1 documents could not have any impact on the Main Case verdict, nor do they demonstrate that the proceedings were unfair or unreliable. Trial Chamber III desisted from ruling on the article 70 procedural history, of which the Western Union material is part. Nor has the Defence demonstrated how this fragmented chronology shows unfairness to Bemba himself.

22. For the reasons above, the Appeals Chamber should not admit the Category 1 documents as additional evidence.

b) Category 2: Documents purportedly relating to the funding of Defence investigations in the Main Case

23. Category 2 consists of 3 documents, which the Defence advances to show “the mistaken submissions that were conveyed to the Trial Chamber concerning the funding of Bemba’s defence that, without refutation, could not have failed to prejudice the minds of the Judges.”⁴⁷ Again, they are cursorily presented and argued.

24. Category 2 documents—all emails between members of the *Bemba* Defence team and the Counsel Support Section—are not relevant to this appeal. Although the Defence claims that this “[i]nternal correspondence [illustrates] the expenses of

⁴⁶ See *Popovi* 20 October 2011 Decision, para. 33, noting that the applicant had not fulfilled his obligation to exercise due diligence in at least attempting to bring the evidence before the Trial Chamber.

⁴⁷ Application, para. 15, fn. 12, referring to CAR-D20-0005-270 [REDACTED]; CAR-D20-0005-0280 [REDACTED]; CAR-D20-0005-0281 [REDACTED].

mission costs supported by the defence team,”⁴⁸ this is less than apparent from the text of these documents. Rather, this Defence correspondence contains various snippets of information pertaining to [REDACTED] and [REDACTED].⁴⁹ And they fail to cogently support the Defence claim. Nothing in these documents shows either “mistaken submissions” by the Prosecution or that the Judges were prejudiced by any such submissions. The Defence’s patent conjecture demonstrates no unfairness to Bemba.

25. Moreover, according to their plain text, all documents in Category 2 were in the Defence’s possession since March 2012. Bemba’s Defence team was the originator of these emails: Bemba’s current Co-counsel herself sent one of the emails, and she is copied on the other two. The Defence does not even attempt to explain its failure to present these documents during trial, nor can it do so.

26. Yet again, none of the Category 2 documents show that Bemba was prejudiced, let alone, have an impact on the Main Case verdict or the fairness and reliability of the proceedings.

27. As shown above, the Appeals Chamber should not admit the Category 2 documents as additional evidence.

⁴⁸ Application, fn. 12, referring to Brief, para. 33, fn. 43.

⁴⁹ See Category 2 documents.

c) *Category 3: Intercepted communications*

28. The documents in Category 3 are eight transcripts/audio calls, again from the *CAR Article 70* record.⁵⁰ The Defence appears to advance these documents to “[i]llustrate the prejudice to the accused arising from his right to privileged communication with his lawyers”.⁵¹

29. These documents are likewise irrelevant to this appeal. The Defence sweepingly suggests that these documents constitute “privileged communication”.⁵² Again, this is the primary subject matter of the *Article 70* case, and not the Main Case. The issue of “privileged communication”, as such, lies beyond the remit of this appeal.⁵³ Trial Chamber III in the Main Case did not *substantively* rule on the legality of the article 70 investigative measures—neither in its article 74 Judgment, nor in its interlocutory decisions. To the contrary, when the Defence attempted to seise Trial Chamber III with the issue, the Chamber found that “[i]t was not competent to review decisions taken by Pre-Trial Chamber II in the course of the Article 70 Investigations.”⁵⁴ Indeed, it did not consider it “[in] the interests of justice for matters which may be central to the charges before the Pre-Trial Chamber to be litigated in parallel before the Trial Chamber.”⁵⁵ The Defence fails to acknowledge these findings—much less,

⁵⁰ Application, para. 15, fn. 11, referring to CAR-OTP-0080-1402 [REDACTED]; CAR-OTP-0077-1407 [REDACTED]; CAR-OTP-0077-1414 [REDACTED]; CAR-OTP-0082-0663 [REDACTED]; CAR-OTP-0080-1369 [REDACTED]; CAR-OTP-0080-1370 [REDACTED]; CAR-OTP-0079-0114 [REDACTED]; CAR-OTP-0080-0228 [REDACTED].

⁵¹ Application, para. 15.

⁵² Application, para. 15, also fn. 11 referring to Brief, paras. 94, 99 and 108.

⁵³ See Prosecution’s Response Brief (filed on 21 November 2016), paras. 60-68, addressing the limited relevance of the Defence arguments on privilege to the fairness of *this* trial.

⁵⁴ See e.g., ICC-01/05-01/08-3059 (“Interim Relief Decision”), paras. 15-25. Nevertheless, the Chamber considered the *CAR Article 70* Single Judge’s statement that “[w]e made sure that no privileged document came in the possession of the Prosecution.” It also found that the Defence had failed to substantiate its claim that Bemba was prejudiced because of the related proceedings. See also ICC-01/05-01/08-3255 (“Abuse of Process Decision”), para. 17, where the Chamber recalled its prior decisions and reiterated that “[i]t is not competent to make any determinations as to the legality and propriety of [measures conducted in the Prosecution’s Article 70 investigation]”. See also ICC-01/05-01/08-3080 (“Privileged Communications Decision”), paras. 35, 41; ICC-01/05-01/08-3101 (“Disclosure Decision”), paras. 21, 22 and 26; ICC-01/05-01/08-2606-Red (“Article 70 Decision”), para. 21.

⁵⁵ Interim Relief Decision, para. 16.

demonstrate the relevance of the Category 3 documents to Trial Chamber III's decision making and to the fairness of the trial.

30. Moreover, different Chambers—Trial Chamber VII (and previously Pre-Trial Chamber II)—were seised with the question of the legality of the Prosecution's investigative measures in the *Article 70* case.⁵⁶ The Defence conflates the two cases and inappropriately advances the merits of the *Article 70* case in this appeal.⁵⁷

31. Likewise, the Defence's claims of relevance are greatly undermined by their inaccuracy. It wrongly claims, without argument, that this material is "privileged". None of these conversations involve Bemba (the accused, now, convicted person), and as such, no lawyer-client privilege as reflected in rule 73 attaches.⁵⁸ Nor has the Defence attempted to concretely show that they are "privileged" or "confidential" in any way. Rather, the proffered documents contain an arbitrary selection of communications involving—variously—Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, D-15 and D-54, among others. The Defence has not explained its choice. Nor is the Defence even accurate in its interpretation of the crime-fraud exception as applied in the related case.⁵⁹

32. Further, all Category 3 documents have been available to Bemba since March-June 2014, as part of the *CAR Article 70* pre-confirmation INCRIM disclosure package.⁶⁰ The Application is silent on the *Bemba* Defence's lack of due diligence to

⁵⁶ See e.g., Interim Relief Decision, paras. 15-16, where Trial Chamber III expressed its view that for it to review the legality of investigative measures ordered by the Single Judge of Pre-Trial Chamber II "would allow an accused to challenge the legality of decisions of a Chamber through a route not envisioned in the statutory framework, with the effect that the same concrete legal and factual issue could come to be addressed before two different chambers of the Court simultaneously."; Privileged Communications Decision, paras. 35,41; Disclosure Decision, paras. 21, 22 and 26; Article 70 Decision, para. 21.

⁵⁷ See Prosecution's Response Brief, paras. 6-71, submitting that Trial Chamber III was obliged only to ensure that *this trial* was fair.

⁵⁸ Rule 73(1) states "[...]communications made in the context of the professional relationship between a person and his or legal counsel shall be regarded as privileged, and consequently not subject to disclosure[...]"

⁵⁹ Brief, paras. 94, 99 and 108. See Prosecution's Response Brief, paras. 64-70.

⁶⁰ Two were further re-disclosed as part of the trial INCRIM package on 19-20 June 2015.

present this material in the course of the trial—not least in its omnibus abuse of process motion, originally filed in November 2014.⁶¹ Indeed, even if the non-presentation of this material at trial was a defence strategy, the Defence team “bears the consequences of [its] strategy and should not assume that evidence that could have been presented at trial will be admitted on appeal.”⁶² As the Appeals Chamber has held, this would risk the appellate process being transformed into a trial *de novo*.⁶³

33. Finally, the Category 3 material could not affect the verdict in the Main Case. Nor does it show that the proceedings were unfair or unreliable in any way. Not only has the Defence failed to demonstrate the pertinence of this material to the Main Case, its Application—notwithstanding the purported “privileged” or “confidential” nature of the documents—does not reveal any prejudice or unfairness to Bemba himself. There is no unfairness.

34. As shown above, the Appeals Chamber should not admit the Category 3 documents as additional evidence on appeal.

⁶¹ ICC-01/05-01/08-3217-Red2, with Annexes I-X (originally filed on 11 November 2014, and refiled on 15 December 2014).

⁶² *Lubanga* AJ, para. 75.

⁶³ *Ibid.*

Conclusion and Relief

35. The Application must fail. Not only is it unsubstantiated, the *Bemba* Defence has failed to discharge its burden to meet the rigorous criteria to present additional evidence on appeal. In these circumstances, the Prosecution respectfully requests the Appeals Chamber not to invest further time and resources in this Application, and to dismiss it *in limine*.

Word count: 5116⁶⁴



Fatou Bensouda, Prosecutor

Dated this 27th day of January 2017

At The Hague, The Netherlands

⁶⁴ The Prosecution hereby makes the required certification: ICC-01/11-01/11-565 OA6, para. 32.