Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/05-01/13**
Date: **14/07/2017**

THE APPEALS CHAMBER

Before: **Judge Silvia Fernández de Gurmendi, Presiding Judge**
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Geoffrey A. Henderson
Judge Piotr Hofmański

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR
v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU AND NARCISSE ARIDO

Public with Confidential Annexes A, B, C and D

Public Redacted Version of "Request for Additional Evidence on Appeal", 12 July 2017, ICC-01/05-01/13-2172-Conf

Source: **Art. 70 Defence for Mr. Jean-Pierre Bemba Gombo**

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

The Office of the Prosecutor
Fatou Bensouda
James Stewart
Helen Brady

Counsel for the Defence of Mr Jean-Pierre Bemba Gombo
Melinda Taylor
Mylène Dimitri

Counsel for the Defence of Mr Aimé Kilolo Musamba
Michael G. Karnavas

Counsel for the Defence of Jean-Jacques Mangenda Kabongo
Christopher Gosnell
Peter Robinson

Counsel for the Defence of Fidèle Babala Wandu
Jean-Pierre Kilenda Kakengi Basila

Counsel for the Defence of Mr Narcisse Arido
Charles Achaleke Taku
Beth Lyons

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence
Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar Herman von Hebel	**Counsel Support Section**
Victims and Witnesses Unit	**Detention Section**
Victims Participation and Reparations Section	**Other**

I. INTRODUCTION

1. The current application[1] to admit evidence on appeal concerns two District Court decisions pertaining to the interception of the [Redacted] number during the time period of 30 August until 30 September 2013.[2] The Trial Chamber relied on intercepts between Mr. Bemba and this number during this period in order to convict Mr. Bemba.[3]

2. These two decisions and related correspondence[4] are probative of the issue before the Appeals Chamber as to whether the Trial Chamber erred by failing to exclude these intercepts, or lessen their weight, due to:

a. Firstly, unfairness, occasioned by the Prosecution's pattern of conduct in using its direct relationship with national authorities to obtain privileged information on an informal basis, which it then used to substantiate official requests for access to the same information;[5] and

b. Secondly, the fact that they were collected pursuant to a hybrid system, which failed to ensure appropriate safeguards and remedies for the Defence.[6]

3. The standard for admission of evidence on appeal is thus met: the two decisions and related correspondence undermine the foundation for several key decisions issued in this case,[7] and importantly, the admissibility of key evidence relied upon to convict the defendants.[8] The evidence also touches on "questions of whether the proceedings appealed from were unfair".[9]

4. The decisions were also not 'available' to the Defence at trial for reasons unrelated to the diligence of the Defence. Importantly, their admission is also

[1] This application has been filed confidentially due to its citation of confidential filings. A public redacted version will be filed forthwith.
[2] ICC-01/05-01/13-2144-Conf-AnxI
[3] Trial Judgment, paras. 567-568, relying on conversation set out at ICC-01/05-66-Conf-Anx-Corr, pages 21-22.
[4] Annex C
[5] ICC-01/05-01/13-2144-Conf, paras. 170-174, 184.
[6] ICC-01/05-01/13-2144-Conf, paras. 164-165,170,171,175,178-179
[7] ICC-01/04-01/06-3121-Red, para.59
[8] See fn. 2 above.
[9] ICC-01/04-01/06-3121-Red, para. 60

required to ensure the veracity of the record, which has been distorted by a series of incorrect submissions advanced by the Prosecution throughout this case.

2. Submissions

2.1 *The Standard of Diligence is met*

5. Although the Prosecution relied upon the legality of the Dutch process in order to exclude any consideration of issues of legality at the level of the ICC,[10] it also argued that the legality of the Dutch process was irrelevant,[11] and thus fell outside the scope of the Prosecution's disclosure obligations.[12] As a result of this Catch-22, the Defence experienced profound difficulties in ascertaining what happened during the domestic processes, and was compelled to engage in substantial litigation that lasted the entire duration of the case.

6. Indeed, to this day, the Prosecution continues to withhold key details concerning the dates and content of its interaction with the Dutch authorities in relation to matters concerning the collection of evidence in this case.[13] Although the Prosecution affirmed in unequivocal terms in 2016 that it had disclosed all relevant correspondence between the Dutch authorities and the ICC-OTP,[14] the Dutch authorities later transmitted an email of key relevance, demonstrating that the ICC-OTP solicited information from the Dutch concerning the content of evidence collected by the Dutch, in order to use this information to influence the Independent Counsel's selection of privileged information ("[REDACTED]*)* .[15]

7. When this omission was brought to the attention of the OTP, the OTP claimed it was an unintended omission, and that all other records had been disclosed.[16] Yet, the case-file demonstrates that whilst the ICC-OTP engaged in substantive consultations with the Dutch authorities in relation to the collection of

[10] ICC-01/05-01/13-482, paras. 9-10, 15; ICC-01/05-01/13-646-Conf, para.18; ICC-01/05-01/13-1206, para. 5; ICC-01/05-01/13-1152, para. 9; ICC-01/05-01/13-1090,paras.7-10, 13-14; ICC-01/05-01/13-1013-Conf, para. 25; ICC-01/05-01/13-842, fn. 14, paras.18-19; ICC-01/05-01/13-1905-Conf, para.11; ICC-01/05-01/13-1833-Conf, para. 40.
[11] ICC-01/05-01/13-1833-Red, paras.7-13; ICC-01/05-01/13-1605, paras. 8-15.
[12] ICC-01/05-01/13-475; ICC-01/05-01/13-1156.
[13] Annex A.
[14] ICC-01/05-01/13-1607-Conf, para.7; Annex A.
[15] ICC-01/05-01/13-1861-Conf-Anx2, p. 6; Annex A.
[16] Annex A.

confidential Defence information on multiple occasions, [17] records or notes corresponding to these interactions have never been disclosed.[18]

8. The Defence is still not in a position to verify what, when and why certain actions took place, nor is it aware of the full extent and content of communications between the Dutch authorities and the ICC-OTP. Although the Defence has continued to seek disclosure from the Prosecutor,[19] it is clear that notwithstanding their continuing duty to comply with disclosure decisions during the appeals stage, the Prosecution will not transmit further information. The Defence cannot, however, postpone the current application further.

9. The difficulties the Defence faced in understanding the details and rationale underlying certain domestic procedures were also compounded by the fact that the Single Judge declined to grant the Defence access to records of communications between the Single Judge and the Dutch authorities,[20] even though the Single Judge interacted directly with the Investigating Judge immediately prior to the domestic adjudication of the '[Redacted]' intercepts.[21] Moreover, notwithstanding a request for cooperation issued by the Trial Chamber, the Dutch authorities failed to provide full disclosure regarding the specific decisions and orders that had been issued in connection with the interception of the '[REDACTED]' number of Mr. Kilolo.[22] In particular, the Defence was not disclosed two key decisions issued by the District Court in October 2013 regarding the interception of the '[REDACTED]' issue, although the decisions fell squarely within the parameters of the co-operation request.[23]

10. Although the Defence received a copy of the Dutch dossier from the Kilolo team (mere days before the deadline for filing Article 69(7) applications), the file was approximately 1142 pages, primarily in Dutch, and the index provided by the Kilolo team did not refer to these decisions.[24] The ability of the Defence to avail

[17] ICC-01/05-01/13-234-Conf, para.26; ICC-01/05-01/13-1616, para.6; Annex A.
[18] Annex A.
[19] Annex A.
[20] ICC-01/05-01/13-345-Conf, para. 6; ICC-01/05-01/13-399-Conf
[21] ICC-01/05-T4-Conf-Eng, p. 2, lns. 11-13.
[22] ICC-01/05-01/13-2150-Red, para. 25.
[23] ICC-01/05-01/13-2150-Red, para. 21.
[24] Annex D (referenced in ICC-01/05-01/13-1823, para.6.).

itself of the contents was also the subject of dispute.[25] The Closing Brief was due immediately afterwards (as was the Sentencing Brief in the Main Case),[26] and the immediate cessation of funding after the closing hearing meant that the time and limited resources of the Defence were diverted to litigating issues of legal aid, rather than continuing to look for a needle in a hay stack. Other Defence teams also found it impossible to complete a full review of the dossier within the limited time afforded by the Chamber for the admission of evidence at trial.[27]

11. In terms of the relevance of this background to the current application, the Prosecution had a direct relationship with the Dutch authorities, and, through this relationship, was privy to a range of details that were unknown to the Defence (many of which remain unknown to the Defence). In contrast, the Dutch authorities refused to transmit relevant information to either the Dutch lawyers of Mssrs. Mangenda and Kilolo, or ICC Defence Counsel,[28] and, as noted above, ultimately declined to provide full disclosure in response to a request for cooperation emanating from the Trial Chamber.

12. In such circumstances, the Prosecution had a duty to search for and disclose all relevant information in order to ensure equality of arms and fair proceedings in this case.[29] Article 54(1) affords the Prosecution no discretion to ignore, or refuse to collect relevant information that might be inconsistent with Prosecution strategy. But, in the same manner that the Prosecution violated Article 54(1) by:

- preventing D-15 from volunteering potentially relevant information;[30] and
- failing to request the [Redacted] authorities to transmit an audio-recording of P-242 (that was taken immediately prior to the ICC-OTP interview with [Redacted]);[31]

the Prosecution violated Article 54(1) by declining to request the Dutch authorities to transmit relevant records concerning the implementation of ICC-OTP requests for assistance.

[25] ICC-01/05-01/13-1804, paras. 3, 6 ; ICC-01/05-01/13-1823.
[26] The deadline for the Main Case Sentencing brief was 25 April 2016.
[27] ICC-01/05-01/13-1825, paras. 2-3.
[28] ICC-01/05-01/13-2150-Red, paras. 3, 5, 11-19.
[29] Bergsmo & Krueger, 'Duties and Powers of the Prosecutor', (Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court (1999, Nomos Verlagsgesellschaft) p.716, para. 2.
[30] ICC-01/05-01/13-1202, para. 14; See also ICC-01/05-01/13-1222, fn. 3.
[31] ICC-01/05-01/13-T-37-CONF-ENG, pp.3-9.

13. Investigative powers are also concomitant to Prosecution duties (including disclosure duties).[32] In *Lubanga*, Pre-Trial Chamber I found that Article 54(1) imposed a positive obligation on the OTP to collect statements, even if such statements were not in the custody or control of the Prosecution.[33] Given the discrepancy between the cooperation powers of the Prosecution and the Defence, the ICTR also ruled that the Prosecution was responsible for obtaining statements of Rwandan witnesses from the Rwandese authorities, in order to disclose them to the Defence.[34] Although some ICTR Chambers declined to make such orders, given that the duty to search for, and disclose exculpatory information is broader at the ICC than the ICTY/ICTR, the ICC should apply the *Lubanga* precedent.

14. In the present case, the Prosecution compounded the prejudice stemming from such non-disclosure by filling this information lacuna with misleading, contradictory and inaccurate information. A sample is set out in Annex B, but the following are of critical importance. When the Bemba Defence first requested access to the RFAs and related correspondence in 2014, the Prosecution claimed either that the Defence had already received all relevant domestic records,[35] or that the RFAs were irrelevant to the issues in the case.[36]

15. In 2015, the Prosecution opposed the Mangenda Defence request for the Prosecution to either disclose or obtain copies of the Dutch records, claiming that the Defence was better placed than the Prosecution to obtain these records.[37] This statement influenced the Chamber's ultimate determination that the Defence should attempt to do so (which proved fruitless).[38] This statement was also contradicted by correspondence (which had not been disclosed to the Defence) in which the Dutch authorities volunteered to provide the Prosecution with any records or information

[32] ICC-01/04-01/07-621, para. 39;
[33] ICC-01/04-01/06-718, p. 4.
[34] Prosecutor v. Kajelijeli, "Decision on Juvénal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO", 2 November 2001, para. 20; Prosecutor v. Bagilishema, Decision of the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witnesses, Y, Z, and AA, 8 June 2000; Prosecutor v. Gatete, Decision on Defence Motion for Disclosure of Rwandan Judicial Records Pursuant to Rule 66(A)(ii) and Order to the Prosecution to Obtain Documents, 23 November 2009, para. 13; Prosecutor v. Nzabonimana, Decision on Callixte Nzabonimana's Motion for an Order Concerning Disclosure of Gacaca and Judicial Material relating to Prosecution Witnesses, 29 October 2009, para. 30 ("a practice has developed at the ICTR of requiring the intervention of the Prosecution to obtain and disclose certain records, specifically Rwandan judicial records of Prosecution witnesses, in the interests of justice.")
[35] See also ICC-01/05-01/13-116, para. 6 (relating to ICC-01/05-01/13-83, para. 9).
[36] ICC-01/05-01/13-475.
[37] ICC-01/05-01/13-1727-Conf, para. 3.
[38] ICC-01/05-01/13-2150-Red, para. 5.

that might be useful to the ICC.[39] At the same time, although the Prosecution was aware of the two District Court decisions,[40] the Prosecution not only failed to refer to the existence and dates of these decisions, its submissions implied repeatedly that the legality of this batch of intercepts was regulated by the April 2014 District Court decision.[41]

16. The Kilolo Defence obtained the Dutch dossier in early 2016, but it would appear that because the contents were in Dutch, they were not aware that they possessed documents that other Defence teams were seeking.[42] In the absence of a translation, the Kilolo Defence indicated that they were reluctant to transmit the contents to other teams, or authorise its full use in case of potential issues of privacy or privilege.[43] The situation is thus analogous to the *Bizimungu* case, in which the Trial Chamber rejected Prosecution arguments that one of the Defence Counsel could, or should have alerted the Defence teams to exculpatory information originating in another case.[44] The Chamber further found that placing the documents on EDS also did not satisfy the Prosecution's disclosure obligations unless the Defence were specifically alerted to the existence and exculpatory nature of the documents.[45] The ICTR Appeals Chamber also underscored that "[i]t is, of course, essential that the Chambers of the Tribunal be able to rely on the integrity of counsel on both sides and that counsel be able to rely on each other's statements."[46]

17. Given this backdrop, since the Defence's ability to access information concerning the Dutch proceedings was impeded by non-disclosure and materially incorrect statements proffered by the Prosecution, the Defence has a right to an effective remedy on appeal. As confirmed by the ICTR Appeals Chamber, the admission of evidence on appeal is one such remedy.[47]

2.2 The two decisions demonstrate that as a result of the hybrid system adopted in this case, the appropriate safeguards and evidential thresholds were never fulfilled

[39] CAR-OTP- 1965 at 1968 (offering to provide Dutch decisions and records). See also CAR-OTP-0092-0799 and ICC-01/05-01/13-1749-Conf-AnxB, p. 3.
[40] [REDACTED]
[41] ICC-01/05-01/13-1090, paras. 7-10, 13; ICC-01/05-01/13-482, para. 15; ICC-01/05-01/13-1773, para.4.
[42] ICC-01/05-01/13-1823
[43] ICC-01/05-01/13-1823
[44] Prosecutor v. Bizimungu, Trial Judgment, 30 September 2011, paras.152-153.
[45] Para. 154.
[46] Prosecutor v. Niyitegeka, Appeals Chamber Judgment, 9 July 9, 2004, para. 20.
[47] Prosecutor v. Mugenzi, 'Decision on Motions for Relief for Rule 68 Violations', 24 September 2012.

18. The Defence is not re-litigating the legality of domestic procedures as part of its appeal. Rather, the absence of evidential review and effective safeguards at the domestic level, triggered an obligation on the part of the ICC firstly, to ensure that the evidential threshold for interception was met, and secondly, to implement appropriate safeguards to protect Mr. Bemba's right to privilege and confidentiality. This obligation derives not from domestic law, but rather the requirement under human rights law there must be an independent and effective review of the legality of the interception process.[48] The ICTR Appeals Chamber has also affirmed that "the international division of labour in prosecuting crimes must not be to the detriment of the apprehended person".[49]

19. Throughout the Article 70 trial, the Prosecution averred that the legality of the intercepts had been assessed and reviewed at a domestic level, and that this therefore excluded the competence of the ICC, or obviated the need for the ICC Pre-Trial Chamber or Trial Chamber to scrutinise these measures.[50] It is, however, clear from the two District Court decisions and related correspondence that:

a. There was never an effective review of the reasonable suspicion threshold at the domestic level; and
b. The District Court did not verify whether the standard safeguards for interception (i.e. the involvement of the Independent Counsel) were complied with, and the District Court did not conduct any review of the legality of the process or the rights of the targeted persons, on the understanding that this would be addressed by the ICC.

2.2.1 The absence of a reasonable suspicion threshold

20. As set out in the Defence Appeal Brief, international human rights law specifies that in order to justify the extraordinary step of surveilling lawyer-client communications, it is necessary to identify the existence of a reasonable suspicion that the participants are engaged in serious criminal activity.[51] This determination

[48] ICC-01/05-01/13-2144-Conf, para.153,164
[49] Prosecutor v. Kajelijeli, Appeals Judgment, 22 May 2005, para. 220.
[50] ICC-01/05-01/13-482, paras.9-10; ICC-01/05-01/13-1206, para. 5; ICC-01/05-01/13-1152, para.9; ICC-01/05-01/13-1090, paras. 7-10, 13-14; ICC-01/05-01/13-1013-Conf, para. 25; ICC-01/5-01/13-842, fn.14, paras. 18-19; ICC-01/05-01/13-1905, para. 11; ICC-01/05-01/13-1833-Conf, paras. 34, 39, 40.
[51] ICC-01/05-01/13-2144-Conf, para. 147. The Dutch Prosecutor also acknowledged that the Single Judge's reliance on evidence derived from the detention unit recordings, which had not been intercepted in accordance with the reasonable suspicion threshold , might have tainted the investigation itself: "With respect to the ICC's recording of conversations prior to any suspicion relating to the complainant, the public prosecutor argues that

cannot be made on a general basis, nor is it permissible to issue an open-ended order for interception.[52] The Prosecution appears to have recognised as such through their claims that firstly, the legal basis for the interception of Mr. Kilolo and Mr. Mangenda's calls was not the Single Judge's July 2013 ruling, but the specific decisions of the Dutch authorities,[53] and secondly, that the Dutch authorities made a full evidential determination that the evidential threshold for the interception of specific numbers and periods was met. [54] Under both Dutch law and human rights law, the existence of a reasonable suspicion must be ascertained prior to the commencement of interception.[55]

21. Nonetheless, the two District Court decisions, when read in light of contemporaneous correspondence, confirm that the Dutch authorities did not assess or apply the reasonable suspicion threshold prior to interception. Given these contradictory positions and the absence of a RFA requesting the prospective interception of the '[Redacted]' number for the period of August until end of September 2013, it is clear that the assessment of a reasonable suspicion simply fell through the cracks: neither the ICC nor the Dutch authorities assumed responsibility for this duty.

22. This is evidenced by the following correspondence which precedes the two District Court decisions. In an email exchange of 21-22 August 2013, an ICC investigator requested the Dutch authorities to collect information concerning the registered owner of the '[Redacted]' number, and speculated that the number 'may' belong or be used by one of the defendants. The basis for this suspicion (which is clarified in a contemporaneous RFA)[56] was that the number appeared in the CDRs of Mr. Babala, which had been collected from the DRC authorities without judicial authorisation.[57] The provenance of this information was tainted,[58] and the number could equally have belonged to other privileged members of the Defence, or persons falling entirely outside the competence of the ICC. It thus fell outside the parameters

---

this state of affairs could possibly have constituted irregularities in the investigation." ICC-01/05-01/13-424-Anx1, p.8.

[52] ICC-01/05-01/13-2144-Conf, para. 150.
[53] ICC-01/05-01/13-1206, para. 5.
[54] ICC-01/05-01/13-1152, para. 9.
[55] ICC-01/05-01/13-1799-Conf, fn.31; A/HRC/34/60 para. 25.
[56] CAR-OTP-0092-0802.
[57] CAR-OTP-0071-0493
[58] ICC-01/05-01/13-2144-Conf, fn.319; A/HRC/34/60 para. 25.

of the Investigating Judge's decision of 14 August 2013 and the related 6 August 2013 Request for Assistance as it was not a 'known number'.

23. In order to address this evidential deficiency, the Prosecution requested the Dutch authorities to transmit information directly to the Prosecution, with the understanding that "the OTP will formalise this request should any significant information come out of your information checks."[59] This appears to be consistent with the *modus operandi* adopted in Austria with Western Union: i.e. the Prosecution took advantage of its relationship with national entities to obtain information on a direct basis, which it then employed to satisfy the evidential threshold required for judicial authorisation.[60]

24. As acknowledged by the Prosecution, the purpose of the initial interception of the '[Redacted]' number for the first two week period was to convey information to the ICC Prosecution regarding the identity of the caller, and not the content of the calls.[61] This 'purpose' is consistent with the fact that the reasonable suspicion threshold for the interception of content was not fulfilled at this point. Contemporaneous correspondence further confirms that at the time that the tap was put in place, the Dutch authorities had no evidential foundation to establish whether the number belonged to Mr. Kilolo or whether it fell outside the scope of the investigation.[62] Human rights law also prohibits the interception of <u>content</u> in such circumstances: the entity authorising interception of the content of communications must be "capable of verifying the existence of a reasonable suspicion **<u>against the person concerned</u>**" (emphasis).[63] This equates to a duty to assess whether there is a reasonable suspicion that the target of the interception is engaged in criminal activity.

25. In its decision on the admissibility of the Dutch intercepts, the Trial Chamber dismissed these arguments, ruling that "the Prosecution's 6 August 2013 RFA is

[59] CAR-OTP-0090-1965 at 1967.
[60] ICC-01/05-01/13-2144-Conf, para.146, fn.248; ICC-01/05-01/13-1952, para. 18, fn.12.
[61] "approval was made by the Investigative Magistrate fully aware of the relevant facts and with the primary purpose of establishing whether the number belonged to Kilolo": ICC-01/05-01/13-1833-Red, para.35.
[62] [Redacted]
[63] Zakharov v Russia, 47143/06, para.260.

written sufficiently broadly to be reasonably understood as including the Kilolo Number".[64]

26. It is, however, clear from the two District Court decisions that the 6 August RFA was not understood as including the Kilolo number. If that had been the case, then it would not have been necessary for the District Court to block the transmission of the intercepts to the ICC, due to the fact that the Court was:[65]

> not aware of any requests by the ICC-OTP for the recording of telecommunications with respect to telephone number [Redacted]. The court is therefore unable to establish that the recording of telecommunications and the release of tapped conversations with respect to that number **occurred at the request of the ICC-OTP**" (emphasis added).

27. The 25 October 2013 District Court decision further affirms that the 6 August 2013 RFA was, on its own, an insufficient basis to intercept the '[Redacted]' number,[66] and the ICC-OTP has averred that the interception of this number originated from the ICC-OTP-Dutch email exchange, and not preceding acts.[67]

28. It is also clear that the informal email exchange between the ICC-OTP and his Dutch counterpart did not amount to a 'request' for interception.[68] The exchange is not referenced by the Court as being part of the case file, nor did the Dutch Prosecutor advance the position before the District Court that the exchange itself constituted the ICC-OTP request.

29. The Dutch Prosecutor also had no authority to suggest interception, or to request it in the absence of a specific ICC RFA. Thus, in response to a request from the lawyer of Mr. Kilolo to be notified of the relevant Dutch decisions, the Dutch Prosecutor informed him that "there has been no investigation with regard to your client in the Netherlands. The Public Prosecutor Service has merely and solely complied with requests for judicial assistance".[69] The Dutch Prosecutor further averred, in later submissions to the District Court, that "the rule of non-inquiry

[64] ICC-01/05-01/13-1855, para.24.
[65] ICC-01/05-01/13-2144-Conf-AnxI, p. 10.
[66] "Taken together, insofar as is relevant here, the requests on 25 September and 1 October 2013 were for the recording of communications with suspect Kilolo's telephone number [Redacted] and for the release of these telecommunications for the period from 30 August to 31 October 2013 inclusive.": ICC-01/05-01/13-2144-Conf-AnxI, p. 16.
[67] ICC-01/05-01/13-1616, para. 6.
[68] See ICC-01/05-01/13-1799-Conf, para.36.
[69] Annex C.

prevents review of the suspicion. Since the request for legal assistance states that there is a suspicion, the Dutch authorities must assume that to be the case".[70] The Dutch therefore had no competence to implement interception without a request for assistance from the ICC.

30. The ICC-OTP also insisted in 2015, at a time when the Defence had not received access to the emails between the ICC-OTP and the Dutch authorities, that "the Prosecution possesses no order, decision or record of the Dutch courts concerning the legality of the intercepts to which the Defence does not have access".[71] Having advanced the position that these emails were not records, and were not otherwise relevant to the legality of the interception process,[72] the ICC-OTP cannot then claim that these emails constitute a sufficient legal basis to trigger content interception. Indeed, it would be an extremely chilling precedent if an ICC-OTP staff-member (not even the Senior Trial Attorney) could bring about the interception of his litigation adversary through a few sparsely worded unsigned emails, based on a mere hunch. The Prosecution has, in any case, affirmed before the Appeals Chamber that an email exchange cannot constitute a request for assistance for the purposes of Article 99 of the Statute.[73]

31. As observed in Mr. Pestman's memorandum of legal advice:[74]

> The interception of telecommunication, of course, seriously interferes with the right to privacy. As a rule, interception is only allowed if it is necessary for the investigation; the random interception of telephone numbers is not permitted. In case of international legal assistance, it is of course difficult to assess the necessity of interception. Dutch Prosecutors and Investigating Judges have to rely on the judgment of the requesting authority. For this reason, it would be inappropriate and, in my opinion, unlawful to unilaterally expand the scope of the interception, beyond the official request for legal assistance.

32. Contrary to the Trial Chamber's finding that the Investigating Judge authorised the interception of the '[Redacted]' number in full awareness that there was no specific RFA for content interception, it is not apparent as to whether the Investigating Judge was aware that this was the case. Rather, there appears to be a marked lack of clarity as to what the Investigating Judge authorised, when it was

[70] ICC-01/05-01/13-424-Anx1, p. 9.
[71] ICC-01/05-01/13-1148-Conf, para. 9.
[72] ICC-01/05-01/13-1528-Red, para. 11.
[73] ICC-01/05-01/13-2170-Conf, para.48.
[74] ICC-01/05-01/13-1799-Conf-AnxC, p. 7.

authorised, and the specific allegations underpinning the reasonable suspicion. Given the complexity of the process and the limited time under which the requests were processed, key safeguards were omitted, corners were cut, and misunderstandings were rife.

33. By requesting the OTP to resend their legal request for content interception of the '[Redacted]' number 'again' ,[75] the Dutch Prosecutor confirmed that in submitting his request for content interception (as opposed to voice recognition), he had acted under the understanding that the ICC Prosecution had in fact submitted a formal legal request. The warrant of interception is also addressed against Mr. Mangenda not Mr. Kilolo,[76] which begs the question as to how it could serve as a basis for the interception of communications between the '[Redacted]' number and Mr. Bemba, and why these documents were never transmitted to the Dutch lawyers for Mr. Mangenda. The Dutch Prosecution application to the District Court was also initially based on the wrong telephone numbers.[77] The 9 October 2013 District Court decision then claimed that the Investigating Judge had authorised interception of the [Redacted] number from 15 August until 30 September 2013. The 25 October decision then reframed it as an authorisation from 30 August until 30 September. The 25 October decision also cites the wrong date for the OTP Request for Assistance (1 October rather than 11 October). It even appears from the First Independent Counsel Report that the Dutch accidentally transmitted some of the **wrong intercepts to the ICC**.[78]

34. The District Court also appears to have been entirely unaware that the purpose of the initial tap was merely to identify the user of the '[Redacted]' number, and not to monitor content, which is particularly problematic given that both the Dutch Prosecutor and the ICC-OTP also confirmed their understanding that the purpose of the 30 August 2013 tap was merely to ascertain the ownership of the phone.[79]

[75] CAR-OTP-0092-0814
[76] CAR-D20-0006-3381 at 3432; ICC-01/05-01/13-1861-Conf-Anx3, p.4 (English translation).
[77] ICC-01/05-01/13-2144-Conf-AnxI,p.7.
[78] ICC-01/05-64-Conf, para.20.
[79] CAR-OTP-0092-0804.

35. Moreover, whereas the 2 September 2013 request for authorisation of content interception specifically attributes the '[Redacted]' number to Mr. Kilolo,[80] a request submitted on the same day for the attribution qualities of this number underscores that the Dutch authorities had not yet attributed the number to Mr. Kilolo at the very time that they claimed to have done so.[81] There is no disclosed record of the ICC-OTP transmitting further information to the Dutch Prosecutor concerning the ownership of the '[Redacted]' number, or *vice versa*. This means that the content of the '[Redacted]' number was intercepted without any evidential foundation for suspecting that it fell within the boundaries of the ICC Prosecution's investigation.

2.2.3 The two decisions confirm that the District Court did not review the legality of the process or the rights of the targeted persons, on the understanding that this would be addressed by the ICC.

36. The Trial Chamber dismissed Defence arguments that Mr. Bemba had never been afforded an effective opportunity to challenge or seek a remedy in relation to the interception process, finding that:[82]

> 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.[83]

37. The two District Court decisions shed important light on the question as to how a remedy should be sought before a Dutch court in connection with interception requested by the ICC, the answer being that such remedies should be sought before the ICC itself, which in turn means that the ICC had a corollary obligation to ensure that such remedies were available in full.

38. Under Dutch law, even if the interception is conducted *ex parte*, the targeted person has the right to challenge the legality of the process (including whether the requisite evidential threshold was met) and to seek the exclusion of the intercepts before the Trial Chamber.[84] Human rights law further specifies that any person who

[80] CAR-D20-0006-3381 at 3432; ICC-01/05-01/13-1861-Conf-Anx3, p.4
[81] CAR-D20-0006-3381 at 3433-34. Since the Dutch authorities failed to transmit this request, the Defence were not provided an English translation. It has now been submitted to STIC and will be disclosed forthwith.
[82] ICC-01/05-01/13-1855, para. 32.
[83] The Chamber cited ICC-01/05-01/13-1284; ICC-01/05-01/13-1257; ICC-01/05-01/13-749, para. 14.
[84] ICC-01/05-01/13-1799-Conf-AnxC, p. 8.

has been the subject of interception must have an effective mechanism for challenging the process and obtaining a remedy.[85]

39. However, when the Dutch authorities implement a request from the ICC, these possibilities do not exist at a domestic level. Whereas the Trial Chamber's decision under Article 69(7) remarked that "[t]he 15 October and 19 November 2013 Dutch District Court decisions - which authorised the transmission of intercepted communications to the ICC during this period – also make no reference to any irregularities in the interception of the Kilolo Number",[86] the District Court clarified that it was not reviewing the legality of the Investigating Judge's decisions or any irregularities in the process; indeed, the District Court does not appear to have been privy to the contents of the Investigating Judge's determination as to which materials should be added to the case file, nor was the Court apprised of the modalities of the review procedure.

40. This is exemplified by the fact that the two District Court decisions refer specifically to the conditions outlined by the Investigating Judge in her 14 August 2013 decision, and note that the purpose of these conditions was to ensure that "there will be no greater breach of professional privilege than necessary".[87] These conditions included the involvement of the Dean in providing advice to the Investigating Judge.[88] The District Court appears to have been unaware that the Investigating Judge later modified these conditions by replacing the Dean with the Independent Counsel, at the suggestion of the ICC-OTP.[89]

41. The role of the Dean was not to act as an interpreter or Prosecutor, but to "substitute for the lawyer concerned i.e. is the objective of the Dean's role to ensure that the rights of the lawyer/client are respected".[90] The ECHR affirmed that the involvement of the Dean was an essential safeguard, which ensured the compatibility of the Dutch interception process with international human rights law.[91] The fact that the Dean did not review the content of the intercepts, and only provided very limited generic advice on procedure (which was that the defendants should be consulted)

[85] ICC-01/05-01/13-2144-Conf, paras. 153, 164.
[86] ICC-01/05-01/13-1855, para. 25
[87] ICC-01/05-01/13-2144-Conf-AnxI, p.15.
[88] ICC-01/05-01/13-424-Anx1, p.5.
[89] ICC-01/05-01/13-2144-Conf, para. 171.
[90] CAR-D20-0006-1316 at 1318.
[91] Aalmoes v Netherlands: see ICC-01/05-01/13-1799-Conf, paras. 16, 49.

failed to satisfy the objective of his role.[92] By the same token, the fact that the Independent Counsel performed his role by acting as an extension of the ICC-OTP,[93] failed to fill the lacuna.

42. The modification and dilution of this standard safeguard was thus an issue that the Defence should have been entitled to litigate before a competent court. Yet, when Mr. Kilolo's Dutch Counsel requested the Dutch Prosecutor to formally notify him of the decisions taken in 2013 so that he could commence such actions before Dutch Court, he was informed that there was no criminal investigation in The Netherlands against Mr. Kilolo, he had no right to be formally notified of the decisions, and would need to turn to the ICC to seek access to the case file.[94] The District Court then affirmed in April 2014 that "on the ground of the rule of non-inquiry, the court must assume that the ICC will not only review any possible irregularities, but will also rectify them or – if that proves impossible – attach the necessary consequences."[95]

43. This chain of correspondence and decisions undermine the ICC-OTP's claim that Mr. Bemba's right to a remedy lay before Dutch courts, and not the ICC,[96] and that in any case, since the Defence had a right to appeal the decisions but did not do so, the decisions were final and could not be reviewed or remedied by the ICC.[97] The District Court decisions did not assess the rights of Mr. Bemba or exhaust his right to an effective remedy. Rather, the District Court tossed the ball to the ICC, but, due to lack of clarity concerning the Dutch domestic proceedings, the ICC then dropped that ball.

44. Concretely, although the Trial Chamber claimed that the Defence had been afforded an opportunity to challenge the interception process on multiple occasions, each such occasion was vitiated through the lack of clear or correct information concerning the Dutch procedure. The Confirmation Decision, cited by the Trial Chamber, did not address Defence arguments on the merits, merely referring to unspecified findings of the Single Judge and Presidency. The Defence has not encountered any such decisions addressing Defence arguments on the merits. The

[92] ICC-01/05-01/13-1799-Conf-AnxC, pp.9-10.
[93] ICC-01/05-01/13-1799-Conf, paras.51-60.
[94] Annex C
[95] ICC-01/05-01/13-424, page 8
[96] ICC-01/05-01/13-1833-Conf, para. 12.
[97] ICC-01/05-01/13-1833-Conf, para. 41.

Defence were either denied standing or the existence of (undisclosed) Dutch decisions was relied on as an answer to the legality question.[98] It is also notable that in its confirmation submissions, the Prosecution averred that the Mangenda and Kilolo Defence had been entitled to exercise the full array of procedural remedies in the Dutch system as concerns the intercepted materials,[99] which the District Court decisions prove not to have been the case.

45. The Trial Chamber's decision on the Kilolo challenge also framed the issue before it as a challenge to the crime-fraud exception and its assessment,[100] and did not touch on, or adjudicate the legality of the procedures used to collect Defence information during the 2013 period. Indeed, the specific details of the Dutch proceedings had yet to be disclosed due to ongoing litigation concerning the Prosecutor's disclosure obligations.

46. The third decision relied upon by the Chamber (ICC-01/05-01/13-1284) did address the merits of the Mangenda Defence arguments; but having recognised and implemented its duty to assess whether a reasonable suspicion existed in connection with the specific requests directed at Mr. Mangenda, the Chamber had no basis for failing to conduct the same exercise in connection with the Bemba Article 69(7) application, which concerned different intercepts, and which raised different issues that could not be litigated earlier due to Prosecution non-disclosure. The reasoning underpinning this third decision is also vitiated by the two District Court decisions. In rejecting Defence arguments that the OTP had misrepresented Single Judge's rulings to the Dutch authorities, the Chamber averred that:[101]

> The Request for Assistance can only be read as the Prosecution seeking judicial authorisation from the Dutch Authorities to collect the recordings, not merely informing them that such authorisation had been granted by the Single Judge. (…) Further, the Dutch district court issued several decisions affirming the legality of the authorisation of for telephone interception and the deliverance of the selected taped conversations to this Court (…)

47. It is nonetheless clear from the two District Court decisions that the role of the District Court was <u>not</u> to affirm the legality of the authorisation of specific interceptions, and they did not in fact play this role. The lack of detail in the

[98] ICC-01/05-01/13-1799-Conf, paras. 80-81.
[99] ICC-01/05-01/13-646-Conf, para. 18.
[100] ICC-01/05-01/13-1257, para. 12.
[101] ICC-01/05-01/13-1284, para. 25.

decisions throws into sharp relief the importance of the decisions taken by the ICC Single Judge and Independent Counsel during the preliminary phase, and the complete absence of any right on the part of the Defence to challenge or obtain a remedy for these decisions. The protracted absence of an effective remedy, in turn, warrants a determination by the Appeals Chamber that the '[Redacted]' intercepts collected during this period cannot safely be relied upon due to the fact that Mr. Bemba's "right to a fair hearing has been disrespected".[102]

3. **RELIEF SOUGHT**

48. For the reasons set out above, the Defence for Mr. Bemba respectfully requests the Appeals Chamber to admit, as evidence on appeal:

i. The two District Court decisions (ICC-01/05-01/13-2144-Conf-AnxI); and

ii. The 12 February 2014 letter of the Dutch Prosecutor (Annex C).

Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba

Mylène Dimitri
Associate Counsel of Mr. Jean-Pierre Bemba

Dated this 14th day of July 2017

The Hague, The Netherlands

[102] Supreme Court, 19 December 1995, NJ 1996, no. 249, 3 July 2001, NJ 2002, no. 8, cited in Aalmoes v Netherlands; ICC-01/05-01/13-2144-Conf, para.183.