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Date: **14 February 2018**

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 Redacted Version with Confidential and *EX PARTE* Annex A, only available to the Prosecution, Registry and Mr Jean-Pierre Bemba Gombo Defence

Public Redacted Version of "Prosecution's Response to Bemba's 'Consolidated Request for Disclosure and Judicial Assistance'", 2 October 2017, ICC-01/05-01/13-2233-Conf

Source: **Office of the Prosecutor**

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

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Introduction

1. On 18 September 2017, Mr Bemba requested the Appeals Chamber to order the Prosecution's disclosure of Call Data Records ("CDRs") of five telephone numbers, and a schedule showing the dates when the Prosecution first received information derived from the content of confidential Defence materials (including financial records, e-mails, CDR, phone logs and intercepts) and all versions of confidential Defence materials in its possession ("Category 1"). He also requested that the Registry be ordered to provide information related to any response to an e-mail sent by the Prosecution in 2013 ("Category 2"), and information related to an internal staff investigation carried out by the Registry ("Category 3").[1]

2. The Request does not meet the requirements of *prima facie* materiality and specificity, and is overly broad and vague. It misunderstands the record, and relies on unfounded speculative theories that are divorced from reality.

3. Most importantly, it comes too late since it pursues investigative measures that counsel acting with due diligence should have conducted at trial. Bemba has waited until the conclusion of the appellate briefing to start these enquiries despite knowing of the information underpinning the Request since 2013, 2014, 2015 and 2016. Measures challenging the Prosecution's investigation in 2012 to 2014 and/or the sufficiency of its subsequent disclosure should have been conducted during the pre-trial and trial phases, not commenced on appeal. The Request is the latest of a series of filings and correspondence by Bemba that unnecessarily dissipate the Court's time and resources.[2]

4. Such requests on appeal should be restrictively considered. Appellate proceedings are of corrective nature and should not be used to make up for perceived shortcomings in the parties' strategic decisions at trial. The Appeals Chamber should reject the Request.

[1] ICC-01/05-01/13-2227-Conf-Exp ("Bemba Request or Request"). Bemba has also filed a Confidential Redacted and a Public Redacted Version of the same document.
[2] *See e.g.* ICC-01/05-01/13-2227-Conf-Anx D (enclosing e-mail exchanges from 12 to 18 July 2017); ICC-01/05-01/13-2172-Red (Bemba's request to submit as additional evidence two Dutch Court decisions); ICC-01/05-01/13-2150-Conf (Bemba's request to take judicial notice of the same decisions).

Confidentiality

5. The Prosecution files this submission as "Confidential" pursuant to regulation 23*bis*(2) of the Regulations of the Court, since it responds to a submission with the same level of classification.[3] It also attaches a confidential and *ex* parte annex, only available to the Prosecution and the Registry. The Prosecution will file a public redacted version of its response in due course.

Submissions

I. Request for the Prosecution to disclose certain material: Category I

6. Bemba requests disclosure from the Prosecution of:

- one CDR document concerning Kilolo's '18' number relating to a four-day period for which the relevant information has already been disclosed in another form, and CDRs relating to four other numbers which were and are irrelevant to the case;[4] and

- a schedule "with the specific dates on which the Prosecution first received (in the broadest sense) information collected by or from States, and third parties (including the Registry), which is derived from the content of confidential Defence materials (including financial records, e-mails, CDR, phone logs, and intercepts)"[5] and "all versions of such materials in its possession".[6]

7. Bemba submits that this disclosure is necessary: (i) since the dates on which the Prosecution received CDRs are material to determine the legality of the collection,[7] and to "issues of prejudice" resulting from the Prosecution's receipt of "confidential Defence communications while the Main Case was ongoing";[8] (ii) "to further test the accuracy and

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[3] The matters addressed in the *ex parte* version of Bemba's submission need not be addressed herein.
[4] *See* Request, para. 26. Bemba refers to CDRs corresponding to [REDACTED] (the '18' number or "Kilolo's '18' number"), [REDACTED], [REDACTED], [REDACTED] and [REDACTED] for the period 30 July 2013 until 30 August 2013 ("Requested CDRs). *See* Request, para. 19.
[5] Request, para. 26.
[6] Request, para. 26. *See also* para. 1.
[7] Request, paras. 10, 14.
[8] Request, para. 14.

reliability of the records";[9] and (iii) to examine several aspects related to the legality of the Dutch proceedings.[10]

8. Bemba's Request concerning the disclosure of various CDRs for five telephone numbers should be rejected. The Request misstates the Prosecution's disclosure at trial, ignores Counsel's lack of diligence, and does not show *prima facie* materiality. Bemba's further request for the Prosecution to produce the requested schedule and materials lacks a sufficient showing of materiality and specificity. This latter request is overly broad, unjustified and tantamount to a fishing expedition. It is inconsistent with the general understanding of rule 77 embraced by the Court to date.[11]

A. Bemba's request for disclosure of the Requested CDRs is misconceived, belated and irrelevant

a. The Request is misconceived and fatally undermined by Bemba's lack of diligence

9. The Prosecution has met its disclosure obligations and rejects Bemba's unfounded assertions.[12] The Prosecution conducted disclosure at trial in accordance with the Statute, the Rules of Procedure and Evidence (*i.e.* rule 76 and rule 77 and article 67(2)) and the Trial Chamber's orders.[13] In relation to CDRs for relevant phone numbers, the Prosecution began disclosing this material in December 2013 and had completed the bulk of relevant disclosure

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[9] Request, para. 13. Bemba argues that the CDRs are transmitted in Excel which is an easily modifiable format.

[10] Request, para. 21 (a) ("Whether the Dutch authorities transmitted confidential and private information to the Prosecution, notwithstanding the absence of an evidential foundation for suspecting that the targeted number was engaged in serious criminal activities"); (b) ("Whether appropriate safeguards were put in place to ensure that private and irrelevant information was not transmitted to the Prosecution") and (c) ("If the Dutch were unable to identify that at least some of these numbers were not Mr. Kilolo, if and how they were able to identify that the '18' number <u>was</u> Mr. Kilolo for the purposes of full content interception").

[11] *See e.g.* ICC-01/05-01/08-632 ("*Bemba* Admissibility Disclosure Decision"), para. 26 ("the Chamber rejects the defence submission that the prosecution has an obligation to provide the defence with all the material relating to an issue that is in its possession, to enable the accused to analyse it and to assess for himself whether or not it is relevant to the submissions he wishes to advance. The prosecution does not have the obligation of 'handing the defence the keys to the warehouse' in this way"). *See also* ICC-01/11-01/11-392-Red-Corr, para. 40 and ICC-01/05-01/13-1658, para. 5.

[12] Request, para. 7.

[13] *See e.g.* ICC-02/05-03/09-501 OA4 ("*Banda & Jerbo* Disclosure AD"), para. 42. *See also* ICC-01/04-01/06-1433 OA11, para. 78 ("the term 'material to the preparation of the defence' must be interpreted broadly"). *But also* ICC-01/05-01/08-3100 ("*Bemba* Further Disclosure Decision"), para. 11 ("the prosecution's disclosure obligation under the materiality prong of Rule 77 of the Rules is broad but not unlimited."); ICC-01/11-01/11-392-Red-Corr, para. 40 (requiring disclosure requests to be "specific enough both in terms of what is sought by the Defence and the reasons why disclosure of the […] material appears necessary"). *See also* ICC-01/05-01/08-3336, para. 34 ("[…] Generally, the Prosecution holds responsibility for making such determinations."). Similarly, *see Bemba* Admissibility Disclosure Decision, paras. 20-22.

during the pre-confirmation proceedings.[14] This included disclosure on 20 December 2013 of CDRs for Kilolo's '18' telephone number covering the period 24 September 2012 to 13 September 2013, as part of the Prosecution's pre-confirmation disclosures. Bemba's suggestion that the Prosecution at trial "attempt[ed] to avoid disclosure by artificially narrowing the scope of [one of the Chamber's] decision[s]" is gratuitous and unsupported.[15] Indeed, once the Chamber clarified on 17 February 2016 that its disclosure orders went beyond material related to the legality of *intercepting telecommunications*,[16] and also included "records related to the legality of the collection of *telecommunication evidence* by the Dutch authorities" (which also comprised CDRs),[17] the Prosecution immediately complied and disclosed further relevant material.[18]

10. With respect to CDRs for Kilolo's '18' number covering the period 30 July 2013 to 30 August 2013 (yielding CDRs in the period 20 to 24 August 2013), the Prosecution did not disclose this document since the same information was subsumed in a document from the same provider containing CDRs covering the wider period of 24 September 2012 to 13 September 2013. The Prosecution disclosed this latter document to the Defence on 20 December 2013.[19] As for documents containing CDRs for the four other telephone numbers Bemba refers to, the Prosecution did not disclose these since those four telephone numbers were found to be unrelated to the case, not pursued in interception requests, and thus irrelevant to the charges.[20]

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[14] In particular, this included notable disclosures on 20 December 2013, 16 January 2014, 28 February 2014, 10 March 2014, and 20 June 2014, as well as some material disclosed in pre-trial disclosure (for example on 4 June 2015, and 26 June 2015).
[15] Request, para. 11 (referring to ICC-01/05-01/13-1234-Conf). *See also* para. 15.
[16] The original order of the Chamber directed the Prosecution to disclose "all material related to the assessment of the legality of the telephone surveillance of Mr Mangenda": ICC-01/05-01/13-1148-Conf ("14 August 2015 Order"), p. 6. *See also* ICC-01/05-01/13-1234-Conf (10 September 2015 Decision"), para. 13 referring to "intercepted data and communications".
[17] ICC-01/05-01/13-1632 ("Decision of 17 February 2016"), paras. 12, 15 (emphasis added). *See also* para. 13.
[18] 26 February 2016, Trial Rule 77 Package 42.
[19] CAR-OTP-0072-0082. Bemba's reliance on ICC-01/05-01/08-1594-Red, para. 23 is misplaced (*see* Request, fn. 20). In the *Bemba* Main Case, the Prosecution did not disclose all requested items "because the 52 disclosed [items] constitute 'a fair sample' of the 895 [items] that the Prosecution obtained from Witness 63". Against these facts—completely different from the present case—Trial Chamber III still found that "items obtained from a prosecution witness will presumptively be material to the defence's preparation for that witness' testimony—and possibly for other purposes as well—unless those items (i) are truly repetitive in the sense that they are duplicates; or (ii) bear no connection to the events relevant to the charges, such as items of a purely personal nature").
[20] *Contra* Request, para. 15. This approach is consistent with decision ICC-01/05-01/13-1936. *See in particular* para. 5, where the Trial Chamber explained its approach to "relevance" as "to the case generally". Further, in this and a previous decision (ICC-01/05-01/13-947), the Chamber granted access to the raw material "to the person whose information was seized, as well as to the Bemba Defence" (ICC-01/05-01/13-1936, para. 16), "given the

11. The Prosecution did not breach its disclosure obligations. Bemba fails to show that the Prosecution's assessment of these documents was erroneous. Bemba's arguments as to why these CDRs are material are either misplaced, or purely speculative.[21] And even if *arguendo*, the Appeals Chamber were to find that the Prosecution should have disclosed them, Bemba suffered no prejudice. He has had the same information as contained in the CDR for Kilolo's '18' number since 20 December 2013. And, as noted, the four other telephone numbers are unrelated to the case.[22]

12. Bemba's belated Request is also fatally undermined by his lack of diligence at trial. Bemba has been aware that the Prosecution had CDRs for Kilolo's '18' number for the period 20 to 24 August 2013 (and hence, within the requested period of 30 July to 30 August 2013) since 13 February 2014.[23] Yet, he never asked the Prosecution for this material at trial. Further, Bemba has known since 28 August 2015 that the Prosecution had asked the Dutch authorities for CDRs for all five numbers,[24] yet never asked for these at trial. Bemba should not be permitted at this stage to seek the Appeals Chamber's intervention to pursue irrelevant and unnecessary investigative enquiries that he chose to forego at trial.

13. Finally, and contrary to Bemba's assertion, the Prosecution did not "decline" to disclose CDRs for Kilolo's '18' number CDR on appeal.[25] After several enquiries from Bemba's Counsel[26] (to which the Prosecution responded),[27] on 27 July 2017 Counsel requested an omnibus review and disclosure of "all records and information collected in relation to the defendants in this case".[28] The Prosecution declined that latter request, but noted that it would

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interest that the Bemba Defence has in many of these same materials" (ICC-01/05-01/13-947, para. 40). In this case, the CDRs are not relevant to the case generally nor, according to the Prosecution's assessment, Bemba has an interest.

[21] *See below* paras. 14-24.

[22] Although the Prosecution considers that Bemba has not raised doubts as to the correctness of the Prosecution's approach, if the Appeals Chamber considers it appropriate, the Prosecution can provide the CDRs to the Appeals Chamber to review the Prosecution's assessment.

[23] When the redacted versions of ICC-01/05-60-Red ("Third Judicial Request") and ICC-01/05-60-Conf-Red2 were notified to Bemba. *See* Third Judicial Request, paras. 10-11, where the Prosecution explained that "[t]he Dutch authorities have provided the Prosecution with KILOLO's CDR obtained between the periods of 20-24 August 2013 and MANGENDA CDR between the periods of 26 August 2012 and 6 August 2013".

[24] RFA 2 September 2013 (CAR-OTP-0090-1930) was disclosed to Bemba on 28 August 2015. *See* Trial Rule 77 Package 26.

[25] *Contra* Request, para. 7. *See* e-mails dated 21 July 2017 at 12:24 PM, 27 July 2017 at 1:30 PM and 28 July 2017 at 18:30 PM from Prosecution to Bemba included in Annex G to the Request.

[26] *See* e-mail dated 19 July 2017 at 16:16 PM from Bemba to Prosecution included in Annex G to the Request; *see* e-mail dated 21 July 2017 at 14:28 PM from Bemba to Prosecution included in Annex G to the Request.

[27] *See* e-mails dated 21 July 2017 at 12:24 and 27 July 2017 at 1:30 from the Prosecution to Bemba, included in Annex G to the Request.

[28] *See* e-mail dated 27 July 2017 at 14:37 PM from Bemba to Prosecution included in Annex G to the Request.

remain open to considering requests with respect to specific documents or material which were considered as falling within rule 77.[29] An invitation to which Bemba never responded.

b. CDRs are not privileged and the Prosecution was entitled to collect them directly from domestic authorities

14. Bemba's submission as to the materiality of the date when the Prosecution received CDRs to the issues in this appeal is misconceived.[30] Bemba knows—and knew at trial—that CDRs are distinct from logs related to intercepted conversations (also known as telecommunication network data or "TND"). Further, CDRs are not privileged, and the Prosecution was entitled to obtain them directly from the Dutch authorities, without prior vetting by the Independent Counsel. As such, Bemba's submissions about the [REDACTED] are inapposite.

15. First, CDRs are different from logs associated with the intercepted calls (or TNDs), and the Prosecution's direct collection of CDRs from the Dutch authorities was lawful.[31] Throughout the proceedings, the Prosecution distinguished between three separate types of material: (i) intercepted communications (sometimes called "recordings"), (ii) phone logs accompanying the intercepts (also called telecommunication network data or TND); and (iii) Call Data Records or CDRs.

16. Intercepted communications (or recordings) are the intercepted phone conversations provided by domestic authorities. Phone logs or TNDs are the records obtained as a result of, and in connection with, those intercepted communications. They include the date, time, duration, and interlocutors of each conversation and all salient information regarding SMS communications.[32] CDRs are billing records made and kept by private telephone companies (such as KPN, Vodafone, Vodacom, T-Mobile, Orange, Belgacom, and Free Mobile) in the normal course of their business.[33] The data in CDRs may include the date, time, duration and

[29] *See* e-mail dated 28 July 2017 at 18:30 PM from Prosecution to Bemba included in Annex G to the Request.
[30] Bemba Request, paras. 10, 14.
[31] *Contra* Bemba Request, para. 8.
[32] *See* ICC-01/05-01/13-1013-Red ("Prosecution's Bar Table Motion"), para. 22. *See also* CAR-OTP-0090-1825 ("Expert Report") at 1847-1858 (in particular 1847). *See also* T-17-Red, p. 7, ln. 19 to p. 10, ln. 8. The Prosecution has also occasionally referred to CDRs in RFAs as "call histories" and "CDs with historic telephone data".
[33] Prosecution's Bar Table Motion, paras. 30, 31 and 36. *See also* Expert Report at 1828-1844 (in particular 1828). *See also* T-16-Red, p. 68, ln. 5 to p. 69, ln. 15 and more generally p. 68, ln. 5 to p. 70, ln. 25. This definition is consistent with other tribunals. *See* STL, *Prosecutor v. Ayyash et al*, Decision on Appeal by Counsel for Mr Oneissi against the Trial Chamber's Decision on the Legality of the Transfer of Call Data Records, 28

the telephone numbers called and received by a telephone. They are *not* interception-related material. They do not derive from the interception or monitoring of telephone numbers, nor are they the product of any law enforcement activity.

17. Bemba has been aware of the distinction between CDRs, and logs associated with intercepted communications (TNDs), since at least:

- *The Prosecution's bar table motion dated 16 June 2015*, in which the Prosecution submitted intercepted communications, corresponding logs associated with the intercepted communications and transcripts/translations, and CDRs. The Prosecution clearly distinguished between phone logs associated with the intercepts (category I) and CDRs (category II).[34]

- *The Prosecution's disclosure of the report of telecommunications expert Mr René Pluijmers*. On 21 July 2015, the Prosecution disclosed to the Defence the expert report of Mr René Pluijmers, which explained the distinction between TNDs or "Interception Related Information", and CDRs.[35] On 8 October 2015, Mr Pluijmers further confirmed this distinction during his testimony.[36]

18. Second, since CDRs do not contain the contents of intercepted conversations, they do not contain any 'privileged information'.[37] The Prosecution was entitled to obtain CDRs directly from the Dutch authorities (and other authorities, such as those in [REDACTED]), and the Independent Counsel was not required to review them.

19. Bemba has been aware that the Prosecution was following such a procedure since at least:

July 2015 ("*Ayyash* Legality Transfer CDRs AD"), paras. 3, 4 and 42 (upholding the Trial Chamber's decision of 6 May 2015: see *Ayyash* Legality Transfer CDRs Decision).

[34] *Compare* Prosecution's Bar Table Motion, para. 22 (on phone logs) and paras. 30, 31 and 36 (on CDRs). Furthermore, in an *inter partes* letter of 1 May 2015, seeking agreement between the Parties (including Bemba) on the authenticity of relevant evidence, the Prosecution likewise distinguished between "phone logs provided by the Dutch authorities" which "correspond[ed]" to various intercepted communications (category I), and "CDRs from independent private carriers" which are "the technical information telecommunications service providers generate for mobile and fixed telephone communications" (category II).

[35] Expert Report at 1828-1844 (CDRs) and 1847-1858 (TNDs).

[36] *See also* T-16-Red, p. 68, ln. 5 to p. 70, ln. 25 (on CDRs) and T-17-Red, p. 7, ln. 19 to p. 10, ln. 8 (on TNDs).

[37] *Contra* Request, para. 9.

- The date of 13 February 2014, when he had access to the public redacted version of the *Prosecution's Request for Intercept Authorisation* of 19 July 2013.[38] The Prosecution *sought* in that request the Chamber's authorisation "to collect *recordings* of the telephone conversations of [Kilolo and Mangenda] from the Belgian and Dutch authorities".[39] However, it did not seek authorisation from the Single Judge to collect CDRs, since none was needed.[40] In his *Intercept Authorisation Decision* of 29 July 2013, the Single Judge granted the Prosecution's request and appointed an Independent Counsel "tasked with (i) reviewing the logs of telephone calls either placed or received by […] Kilolo and […] Mangenda […]; (ii) listening to the recordings; (iii) transmitting to the Prosecutor the relevant portions" of the calls.[41] By 'logs', the Single Judge referred to the TNDs associated with the intercepts of recordings, and *not* CDRs, since the Prosecution had not made any request for them.[42] Bemba had access to this decision since 15 May 2014.[43]

- The dates of 13 February 2014 when Bemba got access to the Prosecution's *Third Judicial Request*[44] and 15 May 2014 when he got access to [REDACTED]. [45] In [REDACTED] its request [REDACTED], the Prosecution was fully transparent with the Single Judge as to its contacts with the Dutch authorities and what it had so far received from them. In its Third Judicial Request on 7 October 2013, which Bemba has had in redacted form since 13 February 2014, the Prosecution explained that "[o]n 13 September 2013, pursuant to a request for international cooperation and assistance, Dutch authorities released to the Prosecution CDR of KILOLO [for the period 20 to 24 August 2013] and MANGENDA's mobile communications [for the period 26 August 2012 to 6 August 2013]".[46] Further, [REDACTED].[47] [REDACTED]

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[38] *See* ICC-01/05-51-Red ("Request for Intercept Authorisation").
[39] Request for Intercept Authorisation, para. 32. *See also* paras. 23, 27 (emphasis added).
[40] In its Bar Table Motion, the Prosecution explained that the CDRs stem from the Prosecution's RFAs to the Dutch and Belgium authorities which were issued after Intercept Authorisation Decision. *See* Prosecution's Bar Table Motion, para. 36.
[41] ICC-01/05-52-Red2 ("Intercept Authorisation Decision"), para. 2 (noting the scope of the Prosecution's request) and p. 7.
[42] *Contra* Bemba Request, para. 8. Bemba quotes paragraph 6 of the Decision which relates to the Single Judge's 8 May 2013 decision authorising the Prosecution's access to logs and recordings which were not directed to counsel for the accused from the Detention Centre (*see* fn 16, referring to ICC-01/05-46).
[43] *See* ICC-01/05-01/13-399-Conf.
[44] *See* ICC-01/05-60-Red.
[45] Pursuant to Pre-Trial Chamber II's decision ICC-01/05-01/13-399-Conf.
[46] Third Judicial Request, paras. 10-12.
[47] [REDACTED]

"[REDACTED]."[48] Hence, and contrary to Bemba's assertion in his Appeal Brief, the Prosecution did not claim [REDACTED].[49] To the contrary, [REDACTED].[50] [REDACTED] "[REDACTED]"[51] he was not modifying his previous ruling.[52] Instead [REDACTED]. That same day, the Single Judge granted the Prosecution's Third Judicial Request, referring to the fact that the Prosecution was already in possession of CDRs.[53]

- *The Prosecution's disclosure to the Defence of Requests for Assistance ("RFAs") to, and communications with, the Dutch authorities*. Following the Single Judge's Intercept Authorisation Decision of 29 July 2013, the Prosecution contacted the Dutch authorities to obtain the intercepted communications, through the transmission of RFAs. In those RFAs (or sometimes separate RFAs) the Prosecution also requested CDRs, albeit using different terminology. For example, in its RFA of 2 September 2013, the Prosecution asked the Dutch authorities for the "logs/records of phone numbers contacted and calls received [and] cell location […] of all the identified SIM cards and IMEIs at the moment of the phone calls […] from 1st August 2013 to 30 August 2013" for the five numbers listed in Bemba's Request, including the '18' number.[54] On 13 September 2013, the Dutch authorities informed the Prosecution *via* e-mail that a Dutch Court had authorised the release of three DVDs containing the "call histories",[55] which the Prosecution received that same day.[56] The Prosecution disclosed the RFA dated 2 September 2013 on 28 August 2015[57] and the e-mail dated 13 September 2013 on 26 February 2016.[58]

20. In sum, since CDRs are not privileged and the Prosecution was entitled to obtain them directly from the Dutch authorities (and before [REDACTED]), Bemba's claim as to the materiality of the date when the Prosecution began to receive CDRs is misplaced. Bemba has

[48] [REDACTED].
[49] *Contra* ICC-01/05-01/13-2144-Red ("Bemba Appeal Brief"), para. 173.
[50] [REDACTED].
[51] [REDACTED].
[52] *Contra* Bemba Request, para. 9.
[53] ICC-01/05-60-Red ("Third Judicial Order Decision"), pp. 3-5.
[54] RFA 2 September 2013 (CAR-OTP-0090-1930).
[55] CAR-OTP-0093-0021.
[56] CAR-OTP-0093-0023. *See also* RFA 19 September 2013 (CAR-OTP-0090-1935), requesting "[c]all histories containing logs/records of phone numbers contacted and calls received, as well as cell location […] of all the identified SIM cards and IMEIs […] from 01 January 2012 to 30 September 2013" for three numbers, including the '18' number. *See also* RFA 24 October 2013 (CAR-OTP-0093-0046), requesting call histories and CDRs of the '18' number from 28 October 2013 till 24 November 2013.
[57] Trial Rule 77 Package 26.
[58] Trial Rule 77 Package 42.

known since at least 13 February 2014 that the Prosecution had received from the Dutch authorities CDRs for Kilolo's '18' number for the period 20 to 24 August 2013 on 13 September 2013.[59] He has known since at least 28 August 2015 that the Prosecution had initially requested the Dutch authorities' assistance to obtain CDRs for the other four numbers.[60] Yet, he did not request this material at trial. Bemba should not be entitled on appeal to make up for his lack of diligence at trial, much less when he has failed to show the materiality of his request.

c. The Request is speculative

21. Bemba's remaining arguments for the disclosure of the Requested CDRs are speculative. First, that CDRs are in Excel format does not mean that they have been tampered with.[61] Bemba made no such allegation when he responded to the Prosecution's Bar Table Motion,[62] in his Article 69(7) Request,[63] or when he cross-examined Mr Pluijmers on the reliability and accuracy of CDRs.[64]

22. Second, Bemba's claim of potential prejudice in the Main Case resulting from the Prosecution's collection of CDRs is unsupported and, in any event, irrelevant to this case.[65] Third, his submissions as to Dutch procedures and safeguards for transmitting CDRs to the Prosecution, and how the '18' number was identified as Kilolo's, are obscure.[66] He has not made it clear how the transmission of the Requested CDRs by the Dutch authorities to the Prosecution supports his alleged issues.[67] Bemba's conjecture cannot alter the Chamber's

[59] When he was notified of the redacted version of the Prosecution's Third Judicial Request dated 7 October 2013. *See also* ICC-01/05-01/13-1799-Red ("Bemba Article 69(7) Request"), para. 66 noting ("The call data records and historical data were transmitted directly from the Dutch authorities to the ICC Prosecution; as a result, there was no ICC judicial oversight as concerns the transmission of information which may have identified the location of protected Defence witnesses, and Defence contacts with sources, and potential witnesses in an ongoing trial.").
[60] *See above* para.12 .
[61] *Contra* Request, para. 13.
[62] Bemba Bar Table Response, paras. 49, 75-79, referred to in Request, para. 14. Although Bemba submitted that the Excel tables were not signed or stamped, he did not argue that they may have been tampered with.
[63] Bemba Article 69(7) Request.
[64] T-17, p. 22, ln. 20 to p. 29, ln. 4.
[65] *Contra* Request, para. 14.
[66] *Contra* Request, para. 21.
[67] Request, para. 21. On relevant factors to assess the legality of the transfer of CDRs from domestic authorities to an international criminal tribunal, *see:* *Ayyash* Legality Transfer CDRs AD (28 July 2015), paras. 47 (finding "a compelling case as to [the CDRs] protection by the right to privacy), 48 (noting that "any limitation on [the right to privacy] must be provided by law, be necessary for reaching a legitimate aim and be proportionate"), 54 (noting that judicial authorisation although desirable, it is not an absolute necessity whose absence would result in the violation of international human rights standards), 56 (finding that the CDRs transfer to the UNIIIC or the Prosecutor "had a narrow and legitimate forensic purpose" since it took place for the investigation of concrete

findings that the procedure adopted by the Dutch authorities did not amount to a violation of the internationally recognised right to privacy,[68] and that no violation under the Statute or internationally recognised human rights occurred in the interception of Kilolo's number.[69]

23. The Prosecution requested CDRs through RFAs sent to the Dutch authorities.[70] The Dutch authorities followed their domestic procedure and transmitted CDRs to the Prosecution after a court order.[71] With respect to Kilolo's '18' number, the Prosecution suspected that the number belonged to Kilolo, after analysing Babala's phone records from the DRC. In particular, the Prosecution observed that, in the November 2012 through February 2013 period, Babala sent messages to Kilolo and minutes later was called by the '18' number.[72] The Prosecution's suspicions were confirmed once it obtained the CDRs for Kilolo's '18' number for the period 20 to 24 August 2013 on 13 September 2013, and compared the numbers therein with phone numbers attributed to some Defence witnesses in the Bemba case.[73]

24. Further, Bemba's speculation that "there are indications that the Dutch Prosecutor also put voice taps on <u>all</u> of the above [five] numbers" is pure conjecture.[74] Bemba does not support his assertion. While the Prosecution initially requested CDRs for all five numbers,[75] it only requested interception of the '18' telephone number and not the other four telephone numbers.[76] Bemba admits as much.[77] Further, Kilolo's '18' number was lawfully intercepted,

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and specific crimes whose execution had already taken place") and 57 (finding that the transfer was not disproportionate since it was limited to the Judges, Parties and participants of the *Ayyash et al*. trial. The Appeals Chamber upheld the Trial Chamber's decision of 6 May 2015: see *Ayyash* Legality Transfer CDRs Decision.

[68] ICC-01/05-01/13-1855 ("Article 69(7) Decision"), paras. 28-30.

[69] Article 69(7) Decision, para. 27.

[70] *See e.g.* RFA 2 September 2013 (CAR-OTP-0090-1930); RFA 19 September 2013 (CAR-OTP-0090-1935); RFA 24 October 2013 (CAR-OTP-0093-0046).

[71] E-mail 13 September 2013 (CAR-OTP-0093-0021), informing the Prosecution of the Dutch Court's decision. *See also* T-16, p. 73, lns. 14-20.

[72] *See* Request for Intercept Authorisation, para. 15, and RFA 2 September 2013 (CAR-OTP-0090-1930).

[73] Third Judicial Request, paras. 11-18.

[74] *Contra* Request, para. 22.

[75] RFA 2 September 2013 (CAR-OTP-0090-1930) regarding the five numbers, and RFA 19 September 2013 (CAR-OTP-0090-1935) regarding the '18' number and two other numbers; RFA 24 October 2013 (CAR-OTP-0093-0046) regarding the '18' number.

[76] RFA 6 August 2013 (CAR-OTP-0092-1922) read together with e-mail of 29 August 2013 (CAR-OTP-0092-0799); RFA 25 September 2013 (CAR-OTP-0090-1937); RFA 11 October 2013 (CAR-OTP-0090-1941); RFA 24 October 2013 (CAR-OTP-0093-0046). *See also* e-mail exchanges of 28, 29 and 30 August 2013 (CAR-OTP-0092-0804), and ICC-01/05-01/13-1855 ("Article 69(7) Decision"), paras. 24-25.

[77] Bemba Request, fn. 31. The 9 October 2013 District Court Decision only refers to the interception and release of the intercepts relating to the '18' number. *See* CAR-D20-0008-0008 ad 0014. The 20 September 2013 request by the Dutch Prosecutor (attached as Annex F to Bemba Request) did not reflect the Prosecution's RFAs and was corrected.

and the intercepted communications (and logs or TNDs) lawfully transmitted in accordance with Dutch law after they had been vetted by the Independent Counsel.[78]

B. Bemba's request for a schedule and other materials in Category I is not justified

25. The second aspect of Bemba's Request regarding Category I (a schedule listing the dates when the Prosecution collected information derived from "the content of confidential Defence materials (including financial records, e-mails, CDR, phone logs and intercepts"), and disclosure of all versions of those materials" is overly broad and unjustified. He has not shown that the Prosecution violated its disclosure obligations *via-à-vis* the CDRs for Kilolo's '18' telephone number for the period 20-24 August 2013 (nor those for the four unrelated telephone numbers), let alone justified this further overly broad request.

26. First, this request is vague and constitutes a "fishing expedition" to review almost the entirety of the Prosecution's investigation.[79] His request is inconsistent with the general understanding by Chambers of rule 77 to date.[80] The Trial Chamber in this case rejected a similarly far-reaching and unjustified request for the disclosure of "any other documents relating to the involvement, presence, and participation in the investigation on the Cameroonian territory" because the "Defence's description [was] too vague to substantiate materiality in the sense of Rule 77 of the Rules".[81] This Request should be rejected on the same basis.

27. Bemba fails to justify such a far-reaching disclosure request. He has not shown a breach of the Prosecution's disclosure obligations, let alone one that would justify such a wide-ranging remedy.[82] Moreover, although he suggests collusion between the Prosecution and the Dutch authorities, and between the Prosecution and Western Union, his gratuitous speculations cannot justify such a far-reaching request.[83]

[78] Article 69(7) Decision, paras. 22-32.
[79] ICC-01/11-01/11-392-Red-Corr, para. 40 (requiring disclosure requests to be "specific enough both in terms of what is sought by the Defence and the reasons why disclosure of the […] material appears necessary").
[80] *See above* fn. 11.
[81] ICC-01/05-01/13-1658, para. 5.
[82] *See above*, paras 10- 12. *See also* ICC-02/11-01/11-351-Red, paras. 17-19 (In *Gbagbo*, the Pre-Trial Chamber declined to order disclosure of RFAs because it was not "provided with enough reasons to doubt that the duty of disclosure has been properly fulfilled", having regard to the "far-reaching" nature of the Defence request.)
[83] Request, paras. 22, 24-25. Requests for disclosure which are based on speculative, vague or minimal arguments have been generally rejected. *See Bemba* Further Disclosure Decision, paras. 29; ICC-01/04-02/06-1360, para. 30.

28. This approach to disclosure (*i.e.* disallowing broad fishing expeditions into the Prosecution's evidence collection without proper justification) is consistent with the approach of the STL,[84] the SCSL,[85] the ICTR[86] and the ICTY.[87] This approach is even more necessary when a case is in the appeals phase, in view of the corrective nature of appellate proceedings. As stated by the STL Appeals Chamber when endorsing a decision by the Trial Chamber in *Banda and Jerbo*:

> Rule 110(B) [analogous to rule 77 of this Court] does not invite a fishing expedition. Accordingly, we accept (with deletion of the word 'necessarily') a recent ICC Trial Chamber clarification that 'Rule 77 […] does not […] provide for an unfettered 'right to inspection', triggered by any unsubstantiated claim of relevance made by the defence'. Rather, Rule 110(B) demands a context-specific application by the chambers of first-instance, which is uniquely situated to determine whether the defence has sufficiently demonstrated materiality by making the requisite showing that items sought are relevant to the preparation of the defence case. We note that this approach is also supported by relevant domestic case-law.[88]

29. Second, the Prosecution's disclosure in these proceedings has been abundant. In the pre-trial and trial stages of the proceedings, the Prosecution disclosed a total of 6,816 items, including 33,492 pages of documents and approximately 206 hours of audio/video recordings. Compiling a schedule such as the one requested by Bemba (and disclosing all documents again) would be excessively time and resource-consuming, and is not needed or justified when the Prosecution has already complied with its disclosure obligations at trial.

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[84] STL, *Prosecutor v. Ayyash et al*, Decision on Call Data Records and Disclosure to Defence (On Remand from Appeals Chamber), 4 December 2013, para. 18 ("The Defence […] may not rely on unspecific and unsubstantiated allegations or a general description of the information. […] International case law has also consistently held that 'fishing expeditions' are not permitted").

[85] SCSL, *Prosecutor v. Sesay et al*, Decision on Sesay Motion Seeking Disclosure of the Relationship between Governmental Agencies of the United States of America and the Office of the Prosecutor, 2 May 2005, paras. 51-65 ("it is not enough to premise its application either on presumptions, on speculations, or on probabilities. […] In the same vein, a mere speculative assertion without specifying or advancing concrete proof of the nature and content of the exculpatory evidence which the Defence is alleging to be in the possession of the Prosecution […] fails to meet the test required to warrant an Order by the Chamber for the Prosecution to disclose under Rule 68 […] We observe however, that where the request to disclose lacks specificity as to the details of facts sought to be disclosed […] the Chamber cannot, and should not be called upon to grant, a vaguely formulated request.")

[86] The Appeals Chamber has likewise described the requisite showing of materiality as a "case-specific assessment" to be made at the "appropriate standard". *See* ICTR, *Prosecutor v. Bagosora et al*, Decision on Interlocutory Appeal relating to Disclosure under Rule 669(B) of the Tribunal's Rules of Procedure and Evidence, 25 September 2006, para. 9.

[87] ICTY, *Prosecutor v. Delalić et* al, Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, 26 September 1996, para. 9.

[88] STL, *Prosecutor v. Ayyash et al*, Public Redacted Version of 19 September 2013 Decision on Appeal by Counsel for Mr Oneissi against Pre-Trial Judge's "Decision on Issues Related to the Inspection Room and Call Data Records", 2 October 2013, para. 22.

30. Third, the Trial Chamber already rejected a similar request from the Defence at trial, and its reasoning remains fully applicable:

> In relation to the Defence request to be provided with a schedule of all items in the Prosecution's possession, the Single Judge holds that such remedy is not warranted in the present circumstances. The Single Judge recalls that a vast amount of evidentiary material has already been disclosed to the Defence. Absent any concrete references for the disclosure of evidentiary material, the Single Judge does not find it appropriate, at this advanced stage of the proceedings, to order the Prosecution to prepare and submit a detailed schedule of all items in its possession. Obviously, the preparation and examination of such document would inevitably divert the parties' attention of the trial hearings […].[89]

31. Finally, the ICTY jurisprudence cited by Bemba[90] is inapposite, since Bemba's request is not only unjustified, but also far more wide-ranging than the remedies which have been ordered by ICTY Chambers. In *Karadžić*, the Prosecution was found to have violated its disclosure obligations on multiple occasions, and the Trial Chamber ordered the Prosecution to file a disclosure report. In *Kordić & Čerkez*, the Appeals Chamber asked the Prosecution to provide a written assurance that while it was still searching some materials, it had not yet found any rule 68 material (potentially exonerating or exculpatory material). In *Blaskić*, the Trial Chamber merely reiterated the Prosecution's ongoing disclosure obligations. In *Popović*, a defence witness was recalled for questioning about some documents that he obtained and asked to bring those documents. None of those cases, whose facts are quite distinct from this case, justify Bemba's Request.

32. In sum, Bemba's Request for the Prosecution to disclose the materials in Category 1 should be dismissed.

II. <u>Requests to obtain materials from the Registry: Categories 2 and 3</u>

33. With regard to the materials described as "Category 2" and "Category 3",[91] Bemba does not seek disclosure at all. Rather, he seeks an order from the Appeals Chamber requiring the Registry:

[89] ICC-01/05-01/13-1308, para. 15.
[90] *See* authorities cited in fn. 35 of Bemba Request.
[91] *See* Request, paras. 27-50 ("Category 2"), 51-60 ("Category 3").

- to inform him whether "any information was provided to the Single Judge, or the Prosecution (either written or informally)," in response to a Prosecution e-mail of which Bemba was informed at trial, and, if so, to disclose its content;[92] and

- [REDACTED].[93]

34. It is uncontroversial that the Registry has no statutory obligations of disclosure. Accordingly, Bemba seeks the Appeals Chamber's assistance simply in carrying out further investigations—a distinct legal procedure which he does not address.[94] Yet, similar to the Prosecution's position on a related matter, motions for judicial assistance brought on *appeal* to elicit information which could reasonably have been discovered *at trial* should be viewed restrictively.[95] Given the corrective nature of appeal proceedings, the Appeals Chamber's powers are not intended for a party to remedy its own perceived strategic errors or previous lack of diligence, or to pursue speculative and unsubstantiated claims. This view is reinforced by the rigorous standard to admit additional evidence on appeal.[96]

35. As the following paragraphs demonstrate, Bemba's requests are no more than an attempt to pursue speculative lines of inquiry which he neglected during trial. There is no prospect that these inquiries will impact on these proceedings, and thus Bemba fails to make the requisite showings of necessity and relevance to justify the Appeals Chamber's intervention.

36. The Prosecution also notes various speculative arguments raised *en passant* throughout these sections of the Request. These arguments are obscure in their meaning, unfounded, unconnected to the matters at hand, and seem designed to call into question the good faith of the Prosecution.[97] The Prosecution objects to this practice, which is incapable of advancing

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[92] *See* Request, paras. 33-35, 41. *See also* paras. 1(b), 50 (referring to "information in its broadest sense").
[93] *See* Request, para. 59. *See also* para. 1(c); ICC-01/05-01/13-1989-Red ("Judgment"), para. 772.
[94] *Cf.* Request, paras. 4-5 (arguing only that the Prosecution's disclosure obligations continue on appeal). *See also e.g.* para. 47 (referring to "the purposes of obtaining disclosure" with regard to the Registry).
[95] *See also* ICC-01/05-01/13-2330-Conf, paras. 3, 7.
[96] *See* ICC-01/04-01/06-3121-Red A5, para. 57 ("Allowing the admission of evidence on appeal, without further restriction, entails a real risk of litigation 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").
[97] *See e.g.* Request, paras. 31 (speculating generally that it "would be improper, and inherently unfair for the Prosecution to cherry pick what information it chooses to put in the record, whilst hiding any reliability flaws behind the shield of Article 54(3)(e)" but not particularising any allegation to this effect); 32 (complaining generally "that Defence has no means to test, investigate, or respond to the 'information' relied upon by the Prosecution" in commencing the article 70 investigation; engaging (in footnote 48) in a lengthy critique of the [REDACTED] upon which the Prosecution relied in the 2013 motion (*see below* para. 37), without showing any

these proceedings and cannot provide any assistance to the Appeals Chamber. Consequently, it should disregard them without any further consideration.

A. The "Category 2" material is not relevant to this appeal

37. On 20 March 2013, the Prosecution sought the assistance of the Trial Chamber in case ICC-01/05-01/08, on an *ex parte* basis, in investigating apparent offences under article 70. That motion was subsequently disclosed to Bemba on 21 March 2014,[98] while the pre-trial proceedings in this case were still at an early stage.[99] In the motion, the Prosecution explained [REDACTED].[100] With respect to this particular quotation, the Prosecution further noted that it had "[REDACTED]."[101]

38. It is primarily on the basis of [REDACTED], that Bemba—having had this information for some three and a half years— now alleges "that there had been exchanges between the Prosecution and the Registry on issues concerning Mr Bemba's detention".[102] Yet Bemba makes no effort to explain his failure to make inquiries with the Registry (or even the Prosecution) about this matter at any point either in the course of proceedings before the Pre-Trial Chamber, or the Trial Chamber. For this manifest lack of due diligence alone, his request should be dismissed.

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relevance to this Request, speculating about his identity, and making the unsubstantiated allegation that "the duty to conduct independent and impartial Article 70 investigations was not respected" by the Prosecution; and asserting without foundation that such "'information' and any related allegations[] cannot be considered for the purposes of these appellate proceedings"), 42 (referring to "information informally and illegally obtained from P-267" by the Prosecution), 47 (referring to "exaggerated or misleading allegations" by the Prosecution), 50 (in footnote 72, making a veiled allusion to "[a]t least four Registry legal staff […] who had access to confidential information concerning Mr Bemb[a]'s detention during the relevant time period" and who "were subsequently recruited by the Prosecutor", with the plain implication that these staff members might have breached the professional obligations upon them).

[98] *Cf.* Request, para. 27 (suggesting that the Prosecution "averred that this information was further elaborated in ICC-01/05-01/08-3022-Conf-Anx7, which is not available in the Article 70 case"). Moreover, a motion of very similar content subsequently filed before Pre-Trial Chamber II was made available in confidential and redacted form to Bemba and other defendants in the Article 70 case on 13 February 2014 (ICC-01/05-44-Conf-Red2) and indeed publicly (ICC-01/05-44-Red). Bemba appears to be well aware of this, since he cites this document frequently: *see e.g.* Request, para. 27, and fns. 39, 41, 48-50, 68."

[99] *See* ICC-01/05-01/08-3022-Conf-Anx7 ("Prosecution Investigative Assistance Motion"). The charges against Bemba in this case were, for example, only confirmed on 15 November 2014: ICC-01/05-01/13-749.

[100] *See* Prosecution Investigative Assistance Motion, paras. 20-26; *cf.* Request, paras. 27-30, 33. [REDACTED]: Prosecution Investigative Assistance Motion, para. 25 (citing CAR-OTP-0070-0096; CAR-OTP-0070-0149). This evidence was also disclosed in its original form (CAR-OTP-0070-0096) to Bemba under rule 77 in case ICC-01/05-01/08 on 8 March 2013. *Cf.* Motion, para. 33 (asserting that this evidence "was never disclosed in the Article 70 case").

[101] Prosecution Investigative Assistance Request, fn. 27.

[102] Request, para. 28. *See also* para. 33. [REDACTED] (mis-cited in the Motion: see fn. 51). Like the Prosecution Investigative Assistance Request, this transcript was disclosed to Bemba in case ICC-01/05-01/08 on 21 March 2014.

39. In any event, Bemba's claim that the requested information is "relevant" to his appeal is unfounded.[103] Bemba assumes—without any foundation—that the Prosecution communication to the Registry pertained to "confidential information pertaining to his detention" or otherwise "shed[s] light on the extent to which there was a reasonable suspicion" that Bemba was involved in criminal acts.[104] Yet this is incorrect.

40. As *Ex Parte* Annex A demonstrates, the Prosecution made no reference to confidential information in communicating with the Registry, but instead merely brought to its attention a matter *in the public domain* relevant to its mandate under article 43 of the Statute and regulation 90 of the Regulations of the Court.[105] The Prosecution did not recommend any particular course of action, nor did it request further information beyond assurances that appropriate measures would be taken. Indeed, approximately one month later, it took its own steps by filing its own motion to enable the article 70 investigation.

41. The Prosecution did not receive any information from the Registry relevant to this appeal as a result of its communication.[106] Thus, although the Prosecution is not in a position to comment on whether "any steps […] were taken [by the Registry] in connection with the information provided by the Prosecution",[107] there is no basis to consider that such detention matters are related to the substance of the present appeal. Bemba indeed seems to concede this likelihood by characterising the potential fruit of his request as pertaining to "*internal measures* taken within the Registry".[108] To the extent that Bemba is concerned that the Registrar may in some way have infringed his rights as a detainee, this is not an issue germane to any ground of appeal in these proceedings.[109]

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[103] *Contra* Request, para. 36.
[104] *See* Request, para. 36.
[105] *See Ex Parte* Annex A. This information is provided for the benefit of the Appeals Chamber. As a matter of principle, however, since it is not disclosable (nor has Bemba requested its disclosure), it is provided *ex parte*.
[106] *Contra* Request, paras. 42 (asserting that there is a "possibility that confidential transmission was transmitted to the Prosecutor (formally or informally)" and speculating whether "information provided to the Prosecution influenced or informed its subsequent submissions or evidence collection" or whether "improper transmission of information may have tainted the subsequent process"), 45 (asserting without foundation that "the Prosecution had *already* received information (from the Registry or elsewhere) that undermined any basis for linking the MLC meeting to the focus of the Article 70 investigation"), 48 (speculating "whether the Prosecution's evidential submissions relied, in any part, on information received directly from the Registry (rather than independent sources)").
[107] Request, para. 49.
[108] Request, para. 49 (emphasis added). Conversely, to any extent the Appeals Chamber considers that such material is relevant to the appeal proceedings, then it should be provided on an *inter partes* basis.
[109] *See generally* Request, paras. 36-40, 42.

42. Bemba's belated and speculative attempts to dispute the substance of the Prosecution's 2013 request for investigative assistance likewise fail to show the relevance of the information he now seeks. Indeed, his claims are largely unrelated to the information which he seeks to obtain, and in any event lack any potential impact on these appeal proceedings.[110] Thus, there is no logic in his claim that access to the "open source materials" (the basis for the quotation used by the Prosecution in corroborating its 2013 motion) made further investigation unnecessary.[111] Likewise, whether the Prosecution further investigated the particular meeting recorded in that open source material is irrelevant, and certainly does not suggest that reporting the occurrence of the meeting was "an empty pretext", an "illegal fishing expedition", or "a shot in the dark"—to the contrary, its relevance as *corroboration* to the Prosecution's claim in its request is manifest; the evidence in question speaks for itself.[112] And that the Prosecution was right in its broader suspicions about Bemba's conduct has, of course, been confirmed beyond reasonable doubt in the subsequent trial. His request to the Registry should be dismissed.

B. The "Category 3" material is not relevant to this appeal

43. As explained by the Trial Chamber in its Judgment, Mangenda and Kilolo learned of the article 70 investigation because Mangenda was "informed by a source whose wife worked at the Court that they were being investigated in connection with allegations of witness bribery."[113] It is thus indisputable that this question was a live matter at trial. Indeed, Bemba's final trial brief contains various references to what he terms the "*faux scenario*", to which this leak is intrinsically related.[114]

44. Yet, in the Motion, Bemba now attempts to suggest that the idea to ask the Registry whether it has any information concerning the circumstances of the leak only came to him because of a recent legal judgment,[115] and never occurred to him at trial. This assertion strains credulity, given the knowledge of this Court's procedures (and those of international organisations more generally) which might be expected of Bemba's legal team. It is

[110] *Contra* Request, paras. 44-47.
[111] *Contra* Request, para. 44.
[112] *Contra* Request, paras. 44-47. The Prosecution notes that Bemba, again, fails to explain why he has only "recently" come to this conclusion.
[113] Judgment, para. 772.
[114] *See e.g.* Request, paras. 51-52; ICC-01/05-01/13-1902-Corr2-Red, paras. 87, 89, 111, 233, 239, 302.
[115] *See* Request, paras. 53-56, 59.

inconsistent with the requirement for due diligence; nor does Bemba present any argument to explain this apparent lapse. This request should therefore be dismissed on this basis alone.

45. Furthermore, and in any event, Bemba again fails to show the relevance of his request to the issues on appeal. As the Prosecution has previously explained, the Trial Chamber's findings concerning Bemba's efforts to frustrate the article 70 investigation were just one aspect of the steps he took to authorise, ensure, and/or implement measures to conceal the common criminal plan, which in turn were just one part of his essential contribution to that plan. Likewise, his efforts to frustrate the article 70 investigation were just one factor among others in determining his *mens rea*.[116] In this context, the Chamber's findings cannot be dented by any evidence suggesting, *arguendo*, that "the information provided to Mr Bemba differed from the information provided to Mr Mangenda."[117] This is because, as the Prosecution has already noted, the key point is not the degree to which Bemba correctly understood all the contours of the Prosecution's article 70 investigation, but his conduct when *believing* (correctly) that he was under investigation for article 70 offences.[118] Bemba's request to the Registry should be dismissed.

Conclusion

46. The Prosecution requests the Appeals Chamber to reject the Request.

Fatou Bensouda, Prosecutor

Dated this 14th day of February 2018[119]
At The Hague, The Netherlands

[116] *See e.g.* ICC-01/05-01/13-2203-Conf, para. 52 (fn. 129); ICC-01/05-01/13-2170-Corr-Red ("Prosecution Conviction Response"), paras. 449, 453; Judgment, paras. 815-816.
[117] *Contra* Request, para. 55. *See also* paras. 57-58.
[118] *See* Prosecution Conviction Response, para. 467.
[119] This submission complies with regulation 36, as amended on 6 December 2016: ICC-01/11-01/11-565 OA6 ("*Al Senussi* AD"), para. 32.