

**Public Redacted Version of
“Second corrected version of
CONFIDENTIAL ANNEX B
(ICC-01/05-01/13-2148-Conf-AnxB-Corr2)”**

Timeline of Events Relevant to Grounds 1 and 2

2010 and 2011

1. On 22 November 2010, the trial began in *Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08) (“the Main Case”).¹

2. On 16 March 2011, the International Criminal Court (“ICC”) Office of the Prosecutor (“OTP”) Investigators [REDACTED] and [REDACTED] met with the Austrian senior public prosecutor [REDACTED] about a Request for Assistance made in relation to [REDACTED]. According to the OTP’s investigative report, [REDACTED] advised the OTP that it could screen Western Union materials, however, once the material was required for evidentiary purposes, the OTP would need to obtain a court order.²

2012

3. On 14 June 2012, an anonymous informant sent an unsolicited email to the OTP alleging a bribery scheme involving Defence witnesses in the *Bemba* Main Case.³

4. From June 2012 to March 2013, the OTP exchanged emails [REDACTED]. [REDACTED]. [REDACTED].⁴

¹ ICC-01/05-01/08-T-32-ENG.

² CAR-OTP-0092-0018, Investigation Report, [REDACTED], 3 November 2015.

³ ICC-01/05-44-Conf-Red2, paras. 3, 9; CAR-D24-0004-0285, Annex A, Confidential Redacted version of ICC-01/05-01/13-292-Conf-Exp-AnxA, Prosecution and Defence, 1 April 2014, p. 0306.

⁴ ICC-01/05-44-Conf-Red2, para. 10; CAR-D24-0004-0285, Annex A, Confidential Redacted version of ICC-01/05-01/13-292-Conf-Exp-AnxA, Prosecution and Defence, 1 April 2014.

5. On 14 August 2012, the first Defence witness in the Main Case appeared before Trial Chamber III.⁵
6. On 28 September 2012, OTP Investigator [REDACTED] sent an email to Herbert Smetana (P-0267), the Director of Global Investigations for Western Union, stating:
[REDACTED].⁶
7. On 4 October 2012, OTP Investigator [REDACTED] sent a follow-up email to P-0267 stating:
[REDACTED]. [REDACTED].⁷
8. On 11 October 2012, P-0267 responded, providing an Excel spreadsheet with financial transactions: “[REDACTED].”⁸
9. On 12 October 2012, the [OTP] met with [REDACTED], [REDACTED]. [REDACTED] [REDACTED]. [REDACTED] told the [OTP] that [REDACTED] [REDACTED]. [REDACTED] stated that in fact [REDACTED] had [REDACTED].⁹
10. On 15 October 2012, the OTP sent a notification email to the Ministry of Justice of that it would visit the Western Union offices in Vienna between 18 and 19 October 2012:
[REDACTED].

⁵ ICC-01/05-01/08-T-229-Red2-ENG.

⁶ CAR-OTP-0092-0021-R01, Email from [REDACTED] to Herbert Smetana, 28 September 2012; CAR-OTP-0092-0018, Investigation Report, [REDACTED], 3 November 2015.

⁷ CAR-OTP-0092-0022-R01, Email from [REDACTED] to Herbert Smetana, 4 October 2012; CAR-OTP-0092-0018, Investigation Report, [REDACTED], 3 November 2015.

⁸ CAR-OTP-0092-0022-R01, Email from Herbert Smetana to [REDACTED], 11 October 2012, p. 0023; CAR-OTP-0092-0024 (Attachment Excel Spreadsheet).

⁹ ICC-01/05-44-Conf-Red2, para. 11.

[REDACTED].

[REDACTED].¹⁰

11. On 19 and 20 October 2012, OTP investigator [REDACTED] visited the offices of the Western Union in Vienna in order to “[REDACTED].” “[REDACTED]” were checked.¹¹

12. On 1 November 2012, the OTP sent another notification email to the Ministry of Justice of Austria that it will visit the Western Union offices in Vienna on 4 and 5 November. The email states:

[REDACTED].

[REDACTED].

[REDACTED].

[REDACTED].

[REDACTED].¹²

The OTP informed the Ministry of Justice for first time that the investigations were related to the Bemba Main Case.

13. On 2 November 2012, the OTP sent its first Request for Assistance (“RFA”) to the Austrian Government pursuant to Articles 54, 87, and 93 of the Rome Statute. The OTP explained that in the course of the ongoing proceedings in the case of *The*

¹⁰ CAR-OTP-0092-0892-R01, Notification of Mission Report, *CIV – Notification to the competent authorities of Austria*, [REDACTED], 15 October 2012, pp. 0892-0893.

¹¹ CAR-OTP-0092-0018, Investigation Report, [REDACTED], 3 November 2015.

¹² CAR-OTP-0092-0890-R01, Transmission Report, *CAR – Request and mission notification dated 01 November 2012 to the competent authorities of Austria about the meetings with Western Union*, [REDACTED], 1 November 2012, pp. 0890-0891.

Prosecutor v. J.P. Bemba, “[REDACTED].”¹³ The OTP requested the assistance of the competent authorities of Austria to transmit copies of records held by Western Union regarding all monies transacted, sent, or received by or from the individuals listed in “Annex A” of the document, including:

- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED]; and
- [REDACTED].

The OTP additionally requested that records of any further future transactions between the relevant individuals in “Annex A” be provided for the period following the RFA (November 2012 until 31 January 2013) as it considered that such transactions were also likely to be directly relevant to their continuing investigations.

The Annex to the request contained a list of [REDACTED].¹⁴

14. On 5 November 2012, the OTP visited Western Union for a second time in Vienna “to check the remaining names as per the Team Leader’s request.”¹⁵

¹³ CAR-OTP-0091-0351, Request for Assistance, 2 November 2012, p. 0354, para. 5.

¹⁴ CAR-OTP-0091-0351, Annex A to Request for Assistance OTP/CAR/AUT-1/ID-pt, pp. 0356-0359.

¹⁵ CAR-OTP-0092-0018, Investigation Report, [REDACTED], 3 November 2015. *See also* CAR-OTP-0092-0027-R01, Email from [REDACTED] to Herbert Smetana, 6 November 2012, at 16:19.

15. On 6 November 2012, after the OTP's second visit to Western Union in Vienna, P-0267 sent the following email to the OTP:

[REDACTED].¹⁶

16. On 7 November, at 15:41, OTP Investigator [REDACTED] emailed P-0267:

[REDACTED].

[REDACTED].¹⁷

17. On 7 November 2012, at 17:00, P-0267 responded to OTP Investigator [REDACTED], attaching a spreadsheet with the requested information.¹⁸

18. On 8 November 2012, the Austrian prosecutor sent a request/order to the *Landesgericht* ("Vienna County Criminal Court"), seeking an "Order for information regarding bank accounts and bank transactions." The Austrian prosecutor requested the Vienna County Criminal Court to provide information related to all Western Union transfer of money prior to 31 January 2013, to transmit all copies of payments in possession of Western Union, and to provide all sent and received transfers related to the accused.¹⁹

¹⁶ CAR-OTP-0092-0027-R01, Email from Herbert Smetana to [REDACTED], 6 November 2012, at 16:15.

¹⁷ CAR-OTP-0092-0028-R01, [REDACTED] to Herbert Smetana, Subject: list of names, 7 November 2012, at 15:41; CAR-OTP-0092-0029 (Excel Sheet Attachment).

¹⁸ CAR-OTP-0092-0033-R01, Email from Herbert Smetana to [REDACTED], 7 November 2012, at 17:00; CAR-OTP-0092-0034 (Excel Sheet Attachment); CAR-D23-0003-0001, Extract of Email Attachment From Herbert Smetana to [REDACTED], Sent: 07 November 2012, at 17:00.

¹⁹ CAR-OTP-0092-0834, Anordnung Der Auskunftserteilung Bankkonten und Bankgeschäfte, 8 November 2012. See CAR-D24-0002-1349. See also CAR-D24-0002-1363, Order for the Information regarding Bank Accounts and Bank Transactions, 2 November 2015 (unofficial translation).

19. On 9 November 2012, OTP Investigator [REDACTED] sent an email to P-0267, requesting a drill down on “[REDACTED].” [REDACTED].²⁰
20. On 12 November 2012, P-0267 responded to OTP Investigator [REDACTED]’s email of 9 November, providing the requested information.²¹
21. On 15 November 2012, the OTP requested Trial Chamber III to order the registry to release information on the legitimate payments to Defence witnesses.²²
22. On 15 November 2012, the Vienna County Criminal Court approved the Austrian prosecutor’s request of 8 November (based on the OTP’s First RFA of 2 November 2012) and issued an order to Western Union. The subject/matter line of the request stated: “[REDACTED].” The “grounds” of the request stated:
[REDACTED].²³
23. On 26 November 2012, the ICC Victims and Witness Unit (“VWU”) provided the OTP with spreadsheets detailing the amounts paid to Defence witnesses.²⁴
24. On 3 December 2012, the Trial Chamber III found that it was not necessary to make a decision on the OTP’s request to the Registry of 15 November 2012 because the Registry already provided the OTP with spreadsheets detailing the amounts paid to Defence witnesses.²⁵

²⁰ CAR-OTP-0092-0035-R01, Email from [REDACTED] to Herbert Smetana, 9 November 2012, at 11:12.

²¹ CAR-OTP-0092-0035-R01, Email from Herbert Smetana to [REDACTED], 12 November 2012, at 16:30; CAR-OTP-0092-0037 (Excel Sheet Attachment).

²² ICC-01/05-01/08-2412, para. 5(a)-(b).

²³ CAR-D23-0002-0021, Order from Austrian authorities to Witness P-0267(1), 15 November 2012 (*Estimated*) (unofficial translation).

²⁴ ICC-01/05-01/08-2441.

²⁵ ICC-01/05-01/08-2461, paras. 4-5.

2013

25. On 3 May 2013, the OTP filed its Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70. The OTP requested the Pre-Trial Chamber II to:

- a. Order the Registry to verify whether certain telephone numbers were listed in the Registry records, and, if so, to identify to whom do they belong;
- b. Order the Registry to provide an Independent Counsel appointed by the OTP access to the Accused's telephone logs and to existing records of (1) all calls made to Mr. Babala and (2) all calls made to third parties through Mr. Babala;
- c. Further order the Independent Counsel to provide only relevant information to the OTP from his or her review of the telephone logs and pertinent recordings of telephone calls;
- d. Rule that there be no disclosure to the Accused until such time that disclosure would not prejudice the investigation; and
- e. Vary the terms of the protocol governing contact with Defence witnesses to allow the OTP to conduct interviews with Defence witnesses who received payments as set forth in the Western Union documents without the prior notice to the Defence.²⁶

26. On 6 May 2013, Pre-Trial Chamber II designated Judge Cuno Tarfusser as the Single Judge to adjudicate matters arising from the OTP's request of 3 May 2013 seeking

²⁶ ICC-01/05-44-Conf-Red2, para. 41(a)-(d).

judicial assistance in obtaining evidence necessary in respect of its investigative activities pursuant to Article 70.²⁷

27. On 8 May 2013, the Single Judge granted the OTP's request of 3 May 2013. The Single Judge:

- a. Ordered the Registrar to verify whether any of the telephone numbers listed in the OTP's request were included in the Registry's records for the purposes of the functioning of the monitoring of telephone conversations held by the Accused at the detention center and, in the affirmative to provide the OTP with all available details pertaining to those numbers;
- b. Ordered the Registrar to make available to the OTP the complete log of all telephone calls placed or received by the Accused during his stay at the detention center, as well as any available recording of all non-privileged calls either placed or received by him; and
- c. Authorized the OTP to contact and interview Defence witnesses for the limited purposes of the investigation evoked in the OTP's request, without prejudice to all the limitations set forth in the protocol for contact with witnesses established by Trial Chamber II.²⁸

28. On 27 May 2013, the Single Judge stated the modalities of the execution of the order of 8 May 2013.²⁹

²⁷ ICC-01/05-45.

²⁸ ICC-01/05-46, p. 8.

²⁹ ICC-01/05-50, paras. 8-11.

29. On 3 June 2013, the Registry provided the OTP access to a TRIM folder containing audio files of Bemba's conversations on the non-privileged line.³⁰

30. On 19 July 2013, the OTP submitted a Second Request for Judicial Order to Obtain Evidence for Investigation under Article 70, in which it sought the Single Judge's authorization to "collect recordings of telephone intercepts from the Dutch and Belgian governments of Messrs. KILOLO and MANGENDA" in *The Prosecutor v. Jean-Pierre Bemba Gombo*.³¹ The OTP stated that: "the intended collection of evidence in this instance implicates members of a defence team" ... and that "[i]n these exceptional circumstances [it] considers it appropriate to seek independent judicial approval."³²

31. On 29 July 2013, the Single Judge authorized the OTP "to seize the relevant authorities of Belgium and of the Netherlands, with a view to collecting logs and recordings of telephone calls placed or received" by Mr. Kilolo and Mr. Mangenda.³³ The Single Judge also appointed Mr. Fidel Nsita Luvengika as Independent Counsel tasked with:

(i) reviewing the logs of telephone calls either placed or received by Mr Aime Kilolo and Mr Jean-Jacques Mangenda made available by the relevant Belgian and Dutch authorities, with a view to identifying any calls received from or placed to parties connected with the investigation; (ii) listening to the recordings of any and all such calls; (iii) transmitting to the Prosecutor the relevant portions of any and all such calls which might be of relevance for the purposes of the investigation.³⁴

³⁰ ICC-01/05-01/13-33, para. 4.

³¹ ICC-01/05-51-Conf, para. 23.

³² *Id.*, para. 3.

³³ ICC-01/05-52-Conf, p. 7.

³⁴ *Id.*, pp. 7-8.

The Single Judge also “ORDER[ED] Mr Fidel Nsita Luvengika to promptly submit to the Single Judge any issue which might arise in the context and for the purposes of the implementation” of his tasks.³⁵

32. On 6 August 2013, the OTP sent an RFA to the Dutch authorities, seeking (a) all phone details on Mr. Kilolo and Mr. Mangenda – all SIM cards registered with their names, as well as associated International Mobile Equipment Identity (“IMEI”); and (b) intercepts of all telecommunications from and to all the identified SIM cards and IMEI from 15 August 2013 to 30 September 2013, and the audio recordings and transcripts of all phone conversations and transcripts of text messages.³⁶

33. On 6 August 2013, the OTP sent an RFA to the Belgian authorities, seeking (a) [REDACTED]; and (b) [REDACTED].³⁷

34. On 28 August 2013, the OTP sent the Dutch prosecution office an email with a draft RFA in relation to the call history of five further numbers. The draft RFA mentioned Mr. Kilolo’s number as the most used number of the five and speculated that this number may belong to Mr. Kilolo.³⁸ On the next day, the Dutch prosecutor responded that the draft RFA was sufficient to provide the help requested and

³⁵ *Id.*, p. 8.

³⁶ CAR-OTP-0090-1922, Request for Assistance, 6 August 2013, p. 1925, para. 9.

³⁷ CAR-OTP-0091-0380, Demande d’Entraide Judiciaire, 6 August 2013, p. 0383, para. 10.

³⁸ CAR-OTP-0092-0804-R01, Email from [REDACTED] to [REDACTED], 28 August 2013, p. 0805, at 22:03; CAR-OTP-0092-0799-R01, Email from [REDACTED] to [REDACTED], 28 August 2013, at 23:03, p. 0800.

suggested that “maybe it’s worth trying to ask the investigating judge to put an interception on the one number that is mostly used.”³⁹

35. On 29 August 2013, the OTP asked the Dutch prosecutor “[w]hat, if anything, do you need from [the OTP] for a potential intercept request to the investigating judge” in relation to Mr. Kilolo’s number.⁴⁰ The Dutch prosecutor replied that “there is no need for another formal request. The first request was all about known numbers.” The Dutch prosecutor also suggested the interception of a “[REDACTED]” number, pursuant to the email from the OTP sent on 28 August 2013.⁴¹

36. On 30 August 2013, the Dutch prosecutor confirmed that he had spoken with the Investigative Judge and that this Judge had given permission to intercept the Kilolo number for two weeks.⁴²

37. On 30 August 2013, a status conference was held during which [REDACTED].⁴³ [REDACTED].⁴⁴

38. On 3 September 2013, the Dutch prosecutor applied in writing for leave to intercept Mr. Kilolo’s number. The interception was authorized that same day.⁴⁵

³⁹ CAR-OTP-0092-0804-R01, Email from [REDACTED] to [REDACTED], 29 August 2013, at 17:55, pp. 0804-0805; CAR-OTP-0092-0799-R01, Email from [REDACTED] to [REDACTED], 29 August 2013, at 17:55.

⁴⁰ CAR-OTP-0092-0799-R01, Email from [REDACTED] to [REDACTED], 29 August 2013, at 07:10 pm.

⁴¹ CAR-OTP-0092-0799-R01, Email from [REDACTED] to [REDACTED], 29 August 2013, at 20:06; CAR-OTP-0092-0804-R01, Email from [REDACTED] to [REDACTED], 28 August 2013 and Email from [REDACTED] to [REDACTED], 29 August 2013, pp. 0804-0805.

⁴² CAR-OTP-0092-0804-R01, Email from [REDACTED] to [REDACTED], 30 August 2013, at 9:53.

⁴³ ICC-01/05-T-2-CONF-ENG, p. 10, ll. 5-6, p. 12, l. 20.

⁴⁴ ICC-01/05-T-2-CONF-ENG, p. 11, ll. 23-25.

⁴⁵ CAR-D20-0006-3554, Dutch Casefile part. 4, 3 September 2013; CAR-D20-0006-3381-R01, Dutch Casefile part. 6, 26 September 2013; CAR-D20-0006-3538, Dutch Casefile part. 2, 3 September 2013.

39. On 10 September 2013, the Dutch Investigative Judge authorized the extension of interception of Mr. Kilolo's number until 30 September 2013.⁴⁶

40. On 13 September 2013, the Dutch authorities provided the OTP with a CD-ROM containing the communications recorded from the telephones of Mr. Kilolo and Mr. Mangenda.⁴⁷

41. On 17 September 2013, the Dutch prosecutor submitted [REDACTED].⁴⁸

42. On 19 September 2013, the OTP sent an email to the Dutch authorities forwarding a signed RFA in relation to the interception of phone numbers belonging to Mr. Kilolo:

[REDACTED].⁴⁹

43. On 25 September 2013, a second status conference was held where [REDACTED].⁵⁰

44. On 1 October 2013, the Independent Counsel produced his [REDACTED].⁵¹

⁴⁶ CAR-D20-0006-3381-R01, Dutch Casefile part. 6, 26 September 2013, pp. 3456-3457.

⁴⁷ ICC-01/05-60-Conf-Red2; CAR-OTP-0093-0019-R01, Email from [REDACTED] to [REDACTED], 13 September 2013, at 8:49 and Email from [Redacted B.3] to [REDACTED], 13 September 2013, at 10:00, p. 0019; CAR-OTP-0093-0021-R01, Email from [REDACTED] to [REDACTED], 13 September 2013, at 1:28 pm, p. 0021; CAR-OTP-0093-0023-R01, Email from [REDACTED] to [REDACTED], 13 September 2013, at 16:41, p. 0023.

⁴⁸ CAR-OTP-0079-1553; CAR-OTP-0085-0596 (French translation), p. 0597.

⁴⁹ CAR-OTP-0093-0025-R01, Email from [REDACTED] to [REDACTED], 19 September 2013, at 13:29, p. 0025; CAR-OTP-0093-0027, [REDACTED], 19 September 2013 (Attachment).

⁵⁰ ICC-01/05-T-3-CONF-ENG, p. 7, ll. 14-22.

⁵¹ ICC-01/05-59-Conf, with Confidential annex.

45. On 7 October 2013, the OTP submitted its Third Request for Judicial Order to Obtain Evidence for Investigation under Article 70, in which it sought the telephone numbers of Defence witnesses detained by the ICC VWU in order to cross-reference, attribute, and verify the unidentified or non-attributed numbers contained in the CD-ROM tendered by the Dutch authorities.⁵²
46. On 10 October 2013, the Single Judge granted the OTP's Third Request for Judicial Order.⁵³
47. On 10 October 2013, a third status conference was held [REDACTED].⁵⁴
48. On 11 October 2013, the OTP sent a formal RFA and made what it then described as a "post hoc request to intercept and obtain resultant recordings from [Mr. Kilolo's number]." ⁵⁵
49. On 15 October 2013, the Dutch District Court authorized the transmission of intercepted communications to the ICC.⁵⁶
50. On 15 October 2013, the Dutch judicial authorities transmitted to the Single Judge the reports, documents, and CDs concerning the technical investigative activities carried out by them to further the Decision of 29 July 2013.⁵⁷

⁵² ICC-01/05-60-Conf-Red2, paras. 19-20.

⁵³ ICC-01/05-62-Conf, p. 5.

⁵⁴ ICC-01/05-T-4-CONF-ENG, p. 3, ll. 1-17.

⁵⁵ CAR-OTP-0090-1941, Request for Assistance, 11 October 2013, p. 1943.

⁵⁶ CAR-OTP-0079-1553; CAR-OTP-0085-0596 (French translation), pp. 0600-0602.

⁵⁷ See ICC-01/05-01/13-6-Red, p. 3.

51. On 28 October 2013, pursuant to the Single Judge's 8 May 2013 Decision, the ICC Detention Center made its first transmission of the detention call logs and recordings to the OTP.⁵⁸
52. On 18 October 2013, the OTP sent a Second RFA to the Austrian authorities.⁵⁹
53. On 7 November 2013, the Vienna County Criminal Court approved the OTP's second RFA made on 18 October 2013. The RFA cited as grounds:
[REDACTED].⁶⁰
54. On 25 October 2013, the Independent Counsel produced his First Report after receiving a DVD from the Dutch authorities.⁶¹
55. On 14 November 2013, the last witness appeared before Trial Chamber III in the Main Case.⁶²
56. On 14 November 2013, the Independent Counsel produced a Second Report.⁶³
57. On 18 November 2013, the Dutch District Court authorized the transmission of intercepted communications to the ICC.⁶⁴

⁵⁸ According to the chain of custody (metadata on Ringtail).

⁵⁹ CAR-D23-0002-0024, Order from Austrian authorities to Witness P-0267(2), 7 November 2013 (*Estimated*) (unofficial translation).

⁶⁰ *Id.*, p. 0026.

⁶¹ ICC-01/05-64-Conf-Anx.

⁶² ICC-01/05-01/08-T-352-CONF-ENG.

⁶³ ICC-01/05-66-Conf.

⁶⁴ CAR-OTP-0079-1571; CAR-OTP-0085-0606 (French translation), pp. 0607-0609.

58. On 19 November 2013, the Dutch judicial authorities transmitted to the Single Judge the further reports, documents, and CDs concerning the technical investigative activities carried out by them to further the Decision of 29 July 2013.⁶⁵

59. On 19 November 2013, the OTP applied to the Single Judge to issue a warrant of arrest for Mr. Bemba, Mr. Kilolo, Mr. Mangenda, Mr. Babala, and Mr. Arido.⁶⁶ In its request, the OTP noted:

Counsel before the Court and persons assisting Defence counsel enjoy certain privileges and immunities which may only be waived by the Presidency. However, such privileges and immunities, and their waiver, apply only with respect to the exercise of jurisdiction by national courts with respect to their official capacity before the ICC, and do not serve as a limitation to their prosecution under Article 70 of the Statute before this Court. Accordingly, in transmitting requests for arrest and surrender with respect to KILOLO and MANGENDA, the Prosecution requests the Court to specify to the relevant State(s) that such persons are not entitled to invoke such privileges and immunities as a bar to their arrest and surrender to the Court.⁶⁷

60. On 19 November 2013, the Single Judge wrote to the President and Vice President and requested the Presidency to make a finding as to whether to waive the privileges and immunities of Mr. Kilolo and Mr. Mangenda, and to be disqualified from the Presidency in making such a decision.⁶⁸

61. On 20 November 2013, the Presidency agreed to excuse the Single Judge for the purpose of deciding on the immunities of Mr. Kilolo and Mr. Mangenda.⁶⁹

⁶⁵ See ICC-01/05-01/13-6-Red, p. 3.

⁶⁶ ICC-01/05-01/13-19-Conf.

⁶⁷ *Id.*, para. 125.

⁶⁸ ICC-01/05-68-AnxI.

⁶⁹ ICC-01/05-68-AnxII.

62. On 20 November 2013, the Presidency waived the immunities of Mr. Kilolo and Mr. Mangenda.⁷⁰ The Presidency considered that: “there is no immunity attaching to the acts of allegedly committed by the persons concerned which presents a bar to their arrest and potential detention on remand for alleged article 70 offences in the instant case and it follows, therefore, that no waiver need be granted.”⁷¹ However, the Presidency ultimately waived the immunities considering: (i) that immunity from arrest and detention may impede the course of justice where persons present a serious flight risk; and (ii) the immunities may be waived without prejudice to the purpose for which they were granted in this case because the purpose for which immunity is granted does not include the commission of offenses against the administration of justice.⁷²

63. On 20 November 2013, the Single Judge issued a warrant of arrest for Mr. Bemba, Mr. Kilolo, Mr. Mangenda, Mr. Babala, and Mr. Arido.⁷³

64. On 23 November 2013, the Belgian authorities executed the warrant and arrested Mr. Kilolo.⁷⁴

65. On 27 November 2013, the record of the case was created and made accessible to all authorized persons.⁷⁵

66. On 4 December 2013, the Registry submitted a report that it had received “sealed documentary as well as electronic material” during the searches of the person and

⁷⁰ ICC-01/05-68.

⁷¹ *Id.*, para. 10.

⁷² *Id.*, para 11.

⁷³ ICC-01/05-01/13-1-Red2-tENG, p. 16.

⁷⁴ ICC-01/05-01/13-1989-Conf, para. 2.

⁷⁵ *See* ICC-01/05-01/13-109, p. 5.

cell of Mr. Jean-Pierre Bemba and the residences of Mr. Narcisse Arido and Mr. Fidèle Babala.⁷⁶

67. On 4 December 2013, the Single Judge issued an oral decision, ordering, *inter alia*, that:

As regards all evidence collected between 23 November 2013 and 31st January 2014 on which [the OTP] intends to rely for the purpose of the confirmation hearing, no later than Friday, 31st January, the Prosecutor shall disclose it to the Defence or submit to the Chamber requests for redactions or other protective measures.⁷⁷

68. On 5 December 2013, the OTP requested the Single Judge to assign an Independent Counsel to screen telephone calls recorded at the Detention Unit between Mr. Bemba and Mr. Mangenda for privileged information.⁷⁸

69. On 13 December 2013, the Single Judge appointed an Independent Counsel tasked with:

(i) being present at the unsealing and the forensic acquisition of the Seized Material, as well as the Additional Seized Material, if any [documentary and electronic material seized upon the searches of the person and cell of Jean-Pierre Bemba, the residence of Narcisse Arido and the residence of Fidèle Babala]; (ii) reviewing the Seized Material, if any, with a view to identifying any item which is privileged or otherwise obviously irrelevant for the purposes of the proceedings; (iii) promptly submitting a report to the Single Judge as to the results of such review[.]⁷⁹

The Single Judge ordered the Independent Counsel to promptly liaise with the Registry, with a view to making it possible for the unsealing, the forensic

⁷⁶ See ICC-01/05-01/13-41, p. 3.

⁷⁷ ICC-01/05-01/13-T-2-Red-ENG, p. 32, ll. 9-13.

⁷⁸ ICC-01/05-01/13-33, para. 1.

⁷⁹ ICC-01/05-01/13-41, p. 6.

acquisition, and the review of the Seized Material and Additional Seized Material to be carried out. The Single Judge also ordered the OTP and Defence Teams to submit a list of properly motivated keywords which may be used to assist the Independent Counsel in identifying items of a privileged nature within the Seized Material and Additional Seized Material.⁸⁰

70. On 17 December 2013, the Single Judge denied the OTP's request of 5 December 2013, and ordered that the OTP, no later than 10 January 2014, disclose to the Defence teams any material pertaining to the Mangenda Calls on which it intends to rely for the purposes of the confirmation hearing.⁸¹ The Single Judge considered that the Mangenda Calls were not entitled to any legitimate expectation of privacy or confidentiality because the "case manager" is not on par with counsel for the purpose of privilege.⁸²

71. On 17 December 2013, the Kilolo Defence sought leave to appeal the Single Judge's decision of 13 December 2013. It argued that the (i) decision violated the fairness of the proceedings; (ii) that the Independent Counsel is not provided under the Court's statutory texts and this is therefore *contra legem*; and (iii) that the acts of the Independent Counsel were illegal and irregular.⁸³

72. On 17 December 2013, pursuant to the Single Judge's 8 May 2013 Decision, the ICC Detention Center made its second transmission of the detention call logs and recordings to the OTP.⁸⁴

⁸⁰ *Id.*, p. 6.

⁸¹ ICC-01/05-01/13-48, p. 7.

⁸² *Id.*, paras. 3-6.

⁸³ ICC-01/05-01/13-45, paras. 7, 15, 17.

⁸⁴ According to the chain of custody (metadata on Ringtail).

73. On 18 December 2013, the Single Judge denied the Kilolo Defence leave to appeal, considering *inter alia* that the Pre-Trial Chamber has broad authority under Article 57 of the Statute to “provide for the needs arising in connection with the proceedings and to preserve their fairness.”⁸⁵

2014

74. On 24 January 2014, the Kilolo Defence submitted a motion for the disclosure and communication of procedural acts and documents in connection with the diligent investigation against Mr. Kilolo.⁸⁶

75. On 10 February 2014, the Kilolo Defence sought leave to appeal the “Decision on the Prosecutor’s ‘Request for judicial order to obtain evidence for investigation under Article 70’.”⁸⁷

76. On 14 February 2014, the Single Judge denied the Kilolo Defence applications. The Single Judge considered that proceedings triggered by an OTP application under Article 58 are conducted on a confidential, *ex parte*, basis, and that the subject of the investigation had no standing to challenge the relevance and probative value of the evidence or the intrinsic quality of the investigation, and that reclassification did not retroactively confer the right to challenge them.⁸⁸

77. On 20 February 2014, the Kilolo Defence filed a motion requesting that the Single Judge order the Registrar to address a request for judicial cooperation to the Dutch

⁸⁵ ICC-01/05-01/13-50, p. 4.

⁸⁶ ICC-01/05-01/13-129, para. 1.

⁸⁷ ICC-01/05-01/13-169, para. 1.

⁸⁸ ICC-01/05-01/13-187, pp. 6-7.

authorities for the purpose of obtaining to the totality of the intercepted communications.⁸⁹

78. On 21 February 2014, the Single Judge rejected the Kilolo Defence's 20 February 2014 request and directed the Kilolo Defence to directly address the Dutch authorities if it wished to receive materials other than the one filed pursuant to its 21 November 2013 Order.⁹⁰

79. On 3 March 2014, the Kilolo Defence filed for the disqualification of the OTP and its staff from the investigation and prosecution of Mr. Kilolo because their impartiality could reasonably be doubted in this case due to their involvement in the Main Case.⁹¹

80. On 21 March 2014, the OTP received two DVDs from national authorities containing the contents of email accounts, including Kilolo's.⁹²

81. On 24 March 2014, the Mangenda Defence submitted an appeal brief against the Pre-Trial Chamber II's denial of his Application for Release, wherein it argued *inter alia* that "the Prosecutor did not request **the lifting of the Appellant's immunity** before seeking authorization to monitor his telephone conversations, thereby rendering the monitoring unlawful."⁹³ It argued that: (a) the warrant of arrest was mainly based on the unlawful monitoring of confidential conversations between persons who are

⁸⁹ ICC-01/05-01/13-210-Conf.

⁹⁰ ICC-01/05-01/13-214, p. 5.

⁹¹ ICC-01/05-01/13-233-Conf. *See also* ICC-01/05-01/13-233-Conf-tENG, paras. 19-36.

⁹² ICC-01/05-01/13-310-Conf, para. 5.

⁹³ ICC-01/05-01/13-288-tENG, para. 14 (bold in original).

entitled to immunity, and (b) the unlawful monitoring of the Independent Counsel did not remedy this defect.

82. On 2 April 2014, the OTP notified the Single Judge that it had received two DVDs from the French authorities on 3 March 2014 containing the contents of Mr. Kilolo's and Mr. Mangenda's email accounts. It requested the Single Judge to (i) appoint an Independent Counsel to review the email accounts of Mr. Mangenda and Mr. Kilolo for potentially privileged and/or legally protected confidential information, and to provide all non-confidential information contained therein to the OTP on a rolling basis as and when they are reviewed; and (ii) instruct the Registry to copy/extract Mr. Arido's and Mr. Babala's email accounts in the presence of the Independent Counsel, and to promptly transmit the copied/extracted material to the OTP.⁹⁴

83. On 14 April 2014, pursuant to the Single Judge's 8 May 2013 Decision, the ICC Detention Center made its third transmission of the detention call logs and recordings to the OTP.⁹⁵

84. On 14 April 2014, the Kilolo Defence submitted a response to the OTP's request to refer potentially privileged materials to Independent Counsel.⁹⁶ The Defence argued, *inter alia*:

[W]aiver of immunity does *not* envision or afford a waiver of professional secrecy. As such, a waiver of counsel's immunity does not render privileged documents unprivileged and subject to disclosure;⁹⁷

A waiver of the aforementioned immunity is the only means by which a Counsel's privileged and protected information can be seized;⁹⁸ and

⁹⁴ ICC-01/05-01/13-310-Conf, para. 10.

⁹⁵ According to the chain of custody metadata on Ringtail.

⁹⁶ ICC-01/05-01/13-335-Conf.

⁹⁷ *Id.*, para. 23.

[T]he lifting of immunity should be limited in both temporal and substantive scope. Thus, the lifting of immunity would allow examination only of those materials and communications formulated *after* the date on which the immunity was lifted and allow examination only of content relating to the specific evidence underlying the Arrest Warrant.⁹⁹

85. On 17 April 2014, the Single Judge ordered the Independent Counsel to prepare redacted versions of the items referred to in paragraph 37 of his report and to file in the record a confidential version reserved to the Bemba Defence only.¹⁰⁰

86. On 25 April 2014, the Single Judge appointed an Independent Counsel tasked with (i) being present at the unsealing and the forensic acquisition of the DVDs; (ii) reviewing the DVDs, with a view to identifying any item which is privileged or otherwise obviously irrelevant for the purposes of the proceedings; and (iii) to promptly submit a report to the Single Judge as to the results of the review.¹⁰¹

87. On 28 April 2014, The Hague District Court granted leave to the Dutch prosecutor to:

- a. Deliver to the ICC the tapped calls and historical data for the period up to and including 23 November 2013, for which the examining magistrate granted authorization pursuant to Section 126aa (2) of the Dutch Code of Criminal procedure for several telephone numbers; and

⁹⁸ *Id.*, para. 24.

⁹⁹ *Id.*, para. 24.

¹⁰⁰ ICC-01/05-01/13-347-Conf, p. 5.

¹⁰¹ ICC-01/05-01/13-366, p. 10.

- b. Deliver to the ICC the documentary evidence seized from Mr. Mangenda during searches conducted on 23 November 2013.¹⁰²

88. On 1 May 2014, the Kilolo Defence moved for the Disqualification of Single Judge Cuno Tarfusser,¹⁰³ arguing, *inter alia* that:

- a. The Single Judge breached his duty of impartiality by personally applying to the Presidency for a waiver of Mr. Kilolo's immunity when the OTP should have made such an application;
- b. Such immunity should have acted as a bar to the granting of the warrant of arrest; and
- c. The Independent Counsel's investigations included reviewing the logs and recordings of Kilolo's phone conversations during a period in which he was Lead Counsel and protected by immunity.¹⁰⁴

89. On 13 May 2014, the Dutch Ministry of Security and Justice seized items belonging to Mr. Mangenda.¹⁰⁵

90. On 15 May 2014, the Registry submitted a report detailing the evidence seized from Mr. Mangenda and provided by the Dutch Ministry of Security and Justice.¹⁰⁶

¹⁰² ICC-01/05-01/13-424-Anx1.

¹⁰³ ICC-01/05-01/13-372.

¹⁰⁴ *Id.*, paras. 8, 29, 14.

¹⁰⁵ See ICC-01/05-01/13-403, p. 3.

¹⁰⁶ See *Id.*

91. On 22 May 2014, the Independent Counsel submitted his Third Report.¹⁰⁷

92. On 30 June 2014, the OTP filed its Document Containing the Charges and its List of Evidence.¹⁰⁸

93. On 3 July 2014, the Trial Chamber III rejected the submissions by the Bemba and Arido Defence Teams for urgent disclosure and injunctive relief concerning privileged Defence communications.¹⁰⁹ In its decision, the Trial Chamber III reasoned that it would be inappropriate for it to review the legality of investigative measures ordered by the Single Judge of Pre-Trial Chamber II and that an assertion of an interest in identifying whether specific material contains privileged information does not in itself constitute an adequate ground for disclosure.¹¹⁰

94. On 11 July 2014, the Appeals Chamber denied the Mangenda Defence appeal against the Pre-Trial Chamber II's denial of his application for release.¹¹¹ The Appeals Chamber made no findings on or analysis of Mr. Mangenda's arguments concerning immunity. The dissenting opinions also do not mention immunity.

95. On 23 July 2014, the Registry submitted a report wherein it stated that:

- On 10 July 2014 the Registry in the presence of Counsel for Mangenda and Independent Counsel unsealed 15 envelopes transmitted by the Dutch authorities.

¹⁰⁷ ICC-01/05-01/13-421-Conf.

¹⁰⁸ *See* ICC-01/05-01/13-526, paras. 1-2.

¹⁰⁹ ICC-01/05-01/08-3101.

¹¹⁰ *Id.*, paras. 21, 33.

¹¹¹ ICC-01/05-01/13-560.

- Between 10 and 17 July 2014, certified copies were made in the presence of Independent Counsel.
- In one of the envelopes an electronic storage device was found inside a sealed bag. The bag was unsealed in the presence of Independent Counsel and the Registry proceeded to the forensic acquisition of the electronic item on 21 July 2014.
- All documentary material copied and extracted from the electronic storage device was made available to the Independent Counsel on 17 and 23 July 2014.¹¹²

96. On 20 June 2014, the Presidency rejected the Kilolo Defence motion to disqualify the Single Judge.¹¹³

97. On 30 July 2014, the Kilolo Defence made its submissions on the confirmation of charges. It also argued that Single Judge breached the immunities of Kilolo by ordering the interception of his telecommunications.¹¹⁴

98. On 30 July 2014, the Mangenda,¹¹⁵ Arido,¹¹⁶ Babala¹¹⁷, and Bemba¹¹⁸ Defence Teams also made their submitting on the confirmation of charges.

¹¹² ICC-01/05-01/13-587.

¹¹³ ICC-01/05-01/13-511-Anx.

¹¹⁴ ICC-01/05-01/13-600-Conf-Corr2, paras. 20-40.

¹¹⁵ ICC-01/05-01/13-594-Conf.

¹¹⁶ ICC-01/05-01/13-598-Conf.

¹¹⁷ ICC-01/05-01/13-596-Conf.

¹¹⁸ ICC-01/05-01/13-599.

99. On 22 August 2014, the Appeals Chamber denied Mr. Kilolo's request to disqualify the OTP and its staff, finding that the arguments put forward did not give rise to reasonable doubts as to the OTP's impartiality.¹¹⁹

100. On 11 November 2014, the Pre-Trial Chamber II confirmed the charges against Mr. Kilolo.¹²⁰

2015

101. On 23 January 2015, the Single Judge denied the Defence requests for leave to appeal the Decision on the Confirmation of Charges.¹²¹

102. On 27 January 2015, a Registry representative met a representative of the Dutch Ministry of Security and Justice for the purpose of transferring seized items.¹²²

103. On 9 February 2015, the Registry informed the Trial Chamber VII that it was ready to conduct the unsealing of materials and would use the process set by the Pre-Trial Chamber (i.e. the Independent Counsel).¹²³

104. On 12 March 2015, the Registry met with representatives of the Belgian Ministry of Justice for the purpose of the transfer of seized items belonging to Mr. Kilolo.¹²⁴

¹¹⁹ ICC-01/05-01/13-648-Conf-Exp, paras. 40, 43, 48, 56, 59.

¹²⁰ ICC-01/05-01/13-749, pp. 48-49.

¹²¹ ICC-01/05-01/13-801, p. 21.

¹²² ICC-01/05-01/13-815, p. 4.

¹²³ *Id.*

¹²⁴ ICC-01/05-01/13-850, p. 3.

105. On 13 March 2015, the Independent Counsel made a report to the Trial Chamber VII on the procedure adopted in unsealing, forensically acquiring, and reviewing certain material from the Belgian and French authorities.¹²⁵ [REDACTED].¹²⁶

106. On 24 March 2015, the Kilolo Defence submitted observations related to the Registry's report of the collection of Belgian documents on 12 March 2015. In its observations, the Kilolo Defence requested that the Belgian Material not be reviewed by Independent Counsel because the Independent Counsel had a previous professional relationship with a member of the OTP team.¹²⁷

107. On 9 April 2015, the Trial Chamber VII rejected Mr. Kilolo's request to exclude all communications he identified as privileged because he failed to demonstrate how a past relationship between the Independent Counsel and a member of the OTP concretely impacted on Independent Counsel's impartiality or qualifications. The Trial Chamber VII also ordered that:

Independent Counsel shall be present at the place and time when representatives of the Registry will proceed with the unsealing of the Seised Material and shall thereafter review the Seized Material with a view to identifying any item which is privileged or otherwise obviously irrelevant for the purposes of these proceedings.

After the unsealing of the Seised Material, Independent Counsel and the Registry shall promptly make a joint report to the Chamber...describing (i) the unsealing process...; (ii) the volume and type of materials unsealed and recommendations...; (iii) the status of any original material...; and (iv) an estimate as to the amount of time Independent Counsel will need to conduct his review.

¹²⁵ ICC-01/05-01/13-845-Conf.

¹²⁶ *Id.* See also ICC-01/05-01/13-845-Conf-AnxD-Red.

¹²⁷ ICC-01/05-01/13-866-Conf.

The Chamber acknowledges that the Single Judge permitted the parties to be present at the unsealing of seized material. However, the Chamber sees little, if any, added value in continuing this aspect of the review procedure at this time insofar as it risks some, even if minimal, exposure of privileged information and may result in scheduling difficulties, unnecessary expense....

Upon his completion of his review of the Dutch Material, Independent Counsel shall promptly submit a confidential, ex parte report to the Chamber, notified to [the Defence]... detailing the results of his review, in particular, that material he considers to be relevant and not privileged.

Within 5 days of being notified of this report, the Bemba Defence and Kilolo Defence may make observations on the report, if any.¹²⁸

108. On 13 April 2015, the Kilolo Defence was notified of the relevant material.¹²⁹

109. On 13 April 2015, the Bemba Defence filed for urgent access to the content of the seized material.¹³⁰

110. On 14 April 2015, the Trial Chamber VII denied the Bemba Defence request for urgent access to the content of the seized material.¹³¹

111. On 16 April 2015, the Kilolo Defence joined Mr. Bemba's leave to appeal the decision of 9 April 2015 particularly on the issue of "[w]hether the Trial Chamber erred by finding that the continued appointment of the Independent Counsel was

¹²⁸ ICC-01/05-01/13-893, paras. 19-23.

¹²⁹ ICC-01/05-01/13-906, para. 1.

¹³⁰ *Id.*, para. 2.

¹³¹ *Id.*, p. 5.

both ‘necessary and appropriate to prevent undue access by any party to privileged information in this case.’”¹³²

112. On 20 April 2015, the Kilolo Defence filed observations on the Independent Counsel’s Report.¹³³

113. On 15 May 2015, the Trial Chamber VII analyzed the materials provided in two Independent Counsel reports. The Trial Chamber stated that it did not rely on the Independent Counsel’s analysis of the selected material, but conducted its own independent analysis of the relevance and potentially privileged character of the documents in question. It analyzed each batch of evidence and identified whether it was relevant and privileged. It also ordered that the Registry make available the complete materials underlying the two Independent Counsel Reports to the Defence teams with confidential redactions.¹³⁴

114. On 28 May 2015, the Trial Chamber VII denied the Bemba Defence request for leave to appeal the Decision of 9 April 2015 – to which Mr. Kilolo joined – finding that the Bemba Defence failed to convincingly demonstrate that the proposed issue significantly affects the fair and expeditious conduct of the proceedings in light of the fact that an Independent Counsel has been appointed for the very reason to guarantee that the privileged information is protected.¹³⁵

¹³² ICC-01/05-01/13-911, para. 1.

¹³³ ICC-01/05-01/13-919.

¹³⁴ ICC-01/05-01/13-947, para. 16 and p. 19.

¹³⁵ ICC-01/05-01/13-966, para. 16.

115. On 17 June 2015, the OTP sought the admission of evidence including intercepts, CDRs, and financial records through Bar Table Motion:¹³⁶
- a. Category I items – 96 intercepted voice calls, 35 intercepted SMS messages, 96 transcripts, 67 translations, and 8 phone logs;
 - b. Category II items – 20 CDRs; and
 - c. Category III items – Western Union financial records.
116. On 9 July 2015, the Defence Teams responded to the OTP's First Bar Table Motion.¹³⁷ The Kilolo Defence argued:
- a. The OTP failed to demonstrate the necessity of admitting the evidence through Bar Table Motion;
 - b. The OTP's motion did not include information required by case law;
 - c. The OTP's motion did not meet the eligibility criteria to admit the evidence.¹³⁸
117. On 31 July 2015, the OTP submitted its Second Request for the Admission of Evidence from the Bar Table requesting the admission of evidence including ICC Detention Center recordings, their transcriptions, and call logs of Mr. Bemba's non-privileged line.¹³⁹
118. On 10 August 2015, the Kilolo Defence submitted its "Motion on the inadmissibility of material obtained in violation of the statutory guarantee that accused and counsel be able to communicate freely and in confidence." The Kilolo Defence argued that:

¹³⁶ ICC-01/05-01/13-1013-Conf, paras. 1-3.

¹³⁷ ICC-01/05-01/13-1073-Conf; ICC-01/05-01/13-1074-Conf; ICC-01/05-01/13-1075-Conf; ICC-01/05-01/13-1076-Conf; ICC-01/05-01/13-1077-Conf.

¹³⁸ ICC-01/05-01/13-1075, paras. 9, 14-20.

¹³⁹ ICC-01/05-01/13-1113-Conf, paras. 1-3.

- a. Article 67(1)(b) of the Statute provides that communications between counsel and accused must be in confidence. Rule 73 provides only two limited exceptions to this rule;
- b. There is no ICC regime or framework that provides for the monitoring and obtaining evidence of communications between counsel and accused;
- c. Obtaining details of communications between counsel and accused amounts to a violation of the right to privacy;
- d. Without there being any clear, readily available, pre-existing framework on how to monitor and obtain details of such communications, the interference with the right to privacy cannot be said to have been “in accordance with the law” as required by Article 8 of the European Convention on Human Rights; and
- e. Evidence of any communication between counsel and accused should be held inadmissible at trial pursuant to Article 69(7) of the Statute as both: (a) a violation of the Statute, and (b) a violation of internationally recognized human rights law.¹⁴⁰

119. On 21 August 2015, the OTP submitted its Third Bar Table Motion seeking the admission of evidence including Independent Counsel reports and related materials, and one additional intercepted conversation between Mr. Kilolo and Mr. Mangenda.¹⁴¹

¹⁴⁰ ICC-01/05-01/13-1140, para. 3.

¹⁴¹ ICC-01/05-01/13-1170-Conf, para. 9.

120. On 31 August 2015, the Defence Teams responded to the OTP's Second Bar Table motion.¹⁴² The Kilolo Defence argued that "[u]nless and until the participants to the telephone conversations [for which OTP sought admission] give evidence, there is... 'an overwhelming legal obstacle' against the admission of the conversations against Mr. Kilolo."¹⁴³

121. On 14 September 2015, the Defence Teams responded to the OTP's Third Bar Table Motion.¹⁴⁴ The Kilolo Defence argued that Independent Counsel Report and related material should be tendered through the Independent Counsel and additional relevant witnesses.¹⁴⁵

122. On 16 September 2015, the Trial Chamber VII denied Mr. Kilolo's Motion for Inadmissibility of the Material because:

- a. The Trial Chamber adopted the same safeguards adopted by the Single Judge to ensure that no privileged communications were provided to the OTP;
- b. There is no indication in Mr. Kilolo's request that the specific safeguards adopted by the Trial Chamber were inadequate in isolating privileged materials which are not affected by the crime-fraud exception; and
- c. The acquisition of the challenged material was "in accordance with the law."¹⁴⁶

¹⁴² ICC-01/05-01/13-1197-Conf; ICC-01/05-01/13-1199-Conf; ICC-01/05-01/13-1200-Conf; ICC-01/05-01/13-1201; ICC-01/05-01/13-1203-Conf.

¹⁴³ ICC-01/05-01/13-1201, para. 19 (emphasis in original).

¹⁴⁴ ICC-01/05-01/13-1241-Conf; ICC-01/05-01/13-1243-Conf; ICC-01/05-01/13-1244-Conf; ICC-01/05-01/13-1245-Conf; ICC-01/05-01/13-1246.

¹⁴⁵ ICC-01/05-01/13-1246, para. 6(v).

¹⁴⁶ ICC-01/05-01/13-1257, paras. 13-17.

123. On 18 September 2015, the Defence Teams submitted a joint request to the Trial Chamber VII to limit the scope and testimony of witness P0433. The Defence Teams argued that the scope of P-0433's testimony should be limited to issues of which he had factual knowledge and should exclude opinion evidence or argument.¹⁴⁷

124. On 21 September 2015, the Kilolo Defence submitted leave to appeal the "Decision on Kilolo Defence Motion for Inadmissibility of Material."¹⁴⁸

125. On 24 September 2015, the Trial Chamber VII rejected the Mangenda, Arido and Bemba Defence requests to declare inadmissible the telephone intercepts.¹⁴⁹ The Trial Chamber VII reasoned that it was not convinced that the OTP made material misstatements in its Request to Obtain Evidence.¹⁵⁰

126. On 28 September 2015, OTP filed its Fourth Bar Table motion.¹⁵¹ The OTP sought the admission of:

- a. Call logs from the ICC Detention Center;
- b. Invoices, emails and letters containing the Accused's contact information;
- c. Call data records;
- d. Intercept communications;
- e. Other materials.

127. On 20 October 2015, the Defence Teams filed their responses to the OTP's Fourth Bar Table motion.¹⁵²

¹⁴⁷ ICC-01/05-01/13-1271-Conf, p. 13.

¹⁴⁸ ICC-01/05-01/13-1274.

¹⁴⁹ ICC-01/05-01/13-1284.

¹⁵⁰ *Id.*, paras. 20-26.

¹⁵¹ ICC-01/05-01/13-1310-Conf, para. 8.

128. From 2 to 4 November 2015, P-0267 testified before Trial Chamber VII.¹⁵³

129. On 4 November 2015, the OTP disclosed its Investigative Report “[REDACTED]” in which the OTP stated that it met Austrian senior public prosecutor [REDACTED] on 16 March 2011 in the context of [REDACTED].¹⁵⁴ The metadata on ringtail shows that the report was prepared on 3 November 2015.

130. On 27 November 2015, the OTP filed its Fifth Bar Table motion.¹⁵⁵ The OTP sought the admission of:

- a. Emails correspondence by the Accused;
- b. Invoices and hotel reservations;
- c. Recording and call logs from the ICC Detention Unit;
- d. Social media evidence;
- e. Information extracted from telephones seized from Accused Arido;
- f. Independent Counsel reports and related materials;
- g. Materials related to Arido’s statement to the French authorities; and
- h. Other materials.

131. On 7 December 2015, the Defence Teams filed their responses to the OTP’s Fifth Bar Table motion.¹⁵⁶

¹⁵² ICC-01/05-01/13-1398; ICC-01/05-01/13-1401-Conf; ICC-01/05-01/13-1402-Conf; ICC-01/05-01/13-1403-Conf; ICC-01/05-01/13-1404.

¹⁵³ ICC-01/05-01/13-T-33-ENG; ICC-01/05-01/13-T-34-CONF-ENG; ICC-01/05-01/13-T-35-CONF-ENG.

¹⁵⁴ CAR-OTP-0092-0018, Investigation Report, [REDACTED], 3 November 2015.

¹⁵⁵ ICC-01/05-01/13-1498-Conf, para. 8.

¹⁵⁶ ICC-01/05-01/13-1513-Conf; ICC-01/05-01/13-1514; ICC-01/05-01/13-1515; ICC-01/05-01/13-1516.

2016

132. On 2 March 2016, [REDACTED], [REDACTED]:

[REDACTED].¹⁵⁷

133. On 8 April 2016, the OTP filed its Sixth Bar Table motion.¹⁵⁸ The OTP sought the admission of

- a. Annexes to Independent Counsel reports
- b. Witnesses statements and related documents
- c. Other documents

134. On 8 April 2016, the Kilolo Defence moved to exclude evidence obtained in violation of the statute and/or international human rights pursuant to Article 69(7).¹⁵⁹

135. On 18 April 2016, Defence Teams responded to the OTP's Sixth Bar Table motion.¹⁶⁰

136. On 22 April 2016, the Bemba Defence submitted an application to exclude the evidence obtained pursuant to Article 69(7).¹⁶¹ The Bemba Defence argued that Dutch law was violated because the Dean of The Hague Bar Association played no actual role in vetting the call data records or intercepted communications.

¹⁵⁷ CAR-OTP-0093-0387, Email from [REDACTED] to [REDACTED], 2 March 2016 (emphasis in original).

¹⁵⁸ ICC-01/05-01/13-1784-Conf, para. 9.

¹⁵⁹ ICC-01/05-01/13-1796-Conf, paras. 1-3.

¹⁶⁰ ICC-01/05-01/13-1811-Conf; ICC-01/05-01/13-1813-Conf; ICC-01/05-01/13-1814; ICC-01/05-01/13-1818-Conf; ICC-01/05-01/13-1819.

¹⁶¹ ICC-01/05-01/13-1799-Conf, para. 41.

137. On 22 April 2016, the Kilolo Defence joined the Mangenda, Babala, and Arido Defence requests to exclude evidence under Article 69(7).¹⁶²
138. On 22 April 2015, the *Oberlandsegericht* (Vienna Court of Appeal) reversed the Vienna County Criminal Court regarding the authorization of the OTP's RFA for the collection of documents from Western Union.¹⁶³
139. On 29 April 2016, the Trial Chamber VII denied all requests to exclude the Western Union Documents and other evidence pursuant to Article 69(7).¹⁶⁴
140. On 29 April 2016, the Trial Chamber VII rejected the Defence motions to exclude the Dutch Intercepts and Call Data Records.¹⁶⁵ The Trial Chamber reasoned that "the actions of the Dutch Prosecution in requesting interception... do not appear to be so manifestly unlawful that they amount to a failure to act 'in accordance with the law' for purposes of Mr Kilolo's right to privacy. Any further inquiry would involve applying Dutch law to determine a mere infringement of national procedure...."¹⁶⁶
141. On 24 May 2016, the Vienna Court of Appeal reversed the Vienna County Criminal Court regarding the authorization of the OTP's RFA for the collection of documents from Western Union.¹⁶⁷
142. On 9 June 2016, the Arido Defence submitted its request for an effective remedy in light of two Austrian decisions. The Arido Defence requested that the Trial

¹⁶² ICC-01/05-01/13-1830.

¹⁶³ CAR-D24-0005-0001; CAR-D23-0011-0006 (English translation of CAR-D24-0005-0001).

¹⁶⁴ ICC-01/05-01/13-1854, p. 25.

¹⁶⁵ ICC-01/05-01/13-1855, p. 18.

¹⁶⁶ *Id.*, para. 26.

¹⁶⁷ CAR-D24-0005-0013; CAR-D23-0011-0016 (English translation of CAR-D24-0005-0013).

Chamber take notice of the two Austrian decisions; order the destruction or transfer-back to the Austrian authorities of all material obtained on the basis of the decisions that have been invalidated; reconsider its previous decision of 29 April 2016; and admit the two Austrian decisions into evidence.¹⁶⁸

143. On 24 June 2016, the Kilolo Defence joined Narcisse Arido's request for an effective remedy in light of two Austrian decisions.¹⁶⁹

144. On 29 June 2016, the Bemba Defence filed a corrigendum to its response to "Narcisse Arido's Request for an Effective Remedy in Light of Two Austrian Decisions," wherein it argued that "as a result of the Austrian Court's ruling that privileges and immunities continue to apply to the Western Union records, the records should either be destroyed or returned to the Defence, or Mrs. Bemba":¹⁷⁰

As recognized by the Austrian Court, at the time the documents were transmitted, the Presidency had not lifted any privileges and immunities, which attached to the records.

In the absence of such a waiver, the Prosecution had no right to arrogate to itself the right to access, on a completely *ex parte* basis, whether activities fall within the proper remit of the Defence or their witnesses and whether privileges and immunities should attach vis-à-vis States.

[I]f the Trial Chamber or ICC were to ratify the right of any entity, other than the entity designated by the Statute or APIC, to determine the proper scope and content of immunities, then it would open a Pandora's Box to States doing exactly the same in other cases, which would vitiate the very purpose of the Court's immunities

¹⁶⁸ ICC-01/05-01/13-1928-Corr, paras. 11-27.

¹⁶⁹ ICC-01/05-01/13-1938.

¹⁷⁰ ICC-01/05-01/13-1941-Corr, para. 25.

The Prosecution failed to request any such waiver during the course of its investigations and was thus aware that Defence immunities applied in full force.

[A]t the time that the records were transmitted, the Prosecution had no legitimate, and independent basis to claim that the transmission of moneys between all sixty-seven persons over the time period in question, fell outside of the scope of Defence functions.¹⁷¹

145. On 14 July 2016, the Trial Chamber VII rejected the Defence requests to have the Western Union documents excluded from evidence because it found that the admission of the documents would not be antithetical to and would not seriously damage the proceedings under Article 69(7)(b). It also rejected the Defence submissions regarding immunity because it considered that the Austrian decisions merely recapitulated arguments put forward by the Defence.¹⁷²

146. On 3 August 2016, the Trial Chamber VII rejected the Defence requests for leave to appeal the decision of 14 July 2016.¹⁷³

147. On 19 October 2016, the Trial Chamber VII pronounced its Judgment pursuant to Article 74 of the Statute.¹⁷⁴

¹⁷¹ *Id.*, paras. 54-57.

¹⁷² ICC-01/05-01/13-1948, paras. 30-31, 33-40.

¹⁷³ ICC-01/05-01/13-1963.

¹⁷⁴ ICC-01/05-01/13-1989-Conf.