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**International
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PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

Confidential, *Ex parte*, Prosecution and Registry only

**Prosecution's Submissions on the Registry's Observations on the Implementation
of the "Decision on the Prosecutor's Request for Judicial Assistance to Obtain
Evidence for Investigation under Article 70"**

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for the Defence of Jean-Pierre
Bemba Gombo

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for
Participation/Reparation

The Office of Public Counsel for
Victims

The Office of Public Counsel for the
Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel

Counsel Support Section

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Other
Section

I. Introduction

1. The Office of the Prosecutor ("Prosecution") hereby files its submissions on the Registry's observations¹ on the implementation of the Single Judge's "Decision on the Prosecutor's Request for judicial assistance to obtain evidence for investigation under Article 70" ("Single Judge's Decision").²

2. The Prosecution supports the Registry's proposal to limit the scope of the materials to be provided to the Prosecution to the recordings of relevant telephone conversations, as identified in the Prosecution's request for judicial assistance ("Prosecution's Request").³

3. The Prosecution objects to the appointment of an *ad hoc* Counsel to represent and protect the interests of the Defence.

4. The Prosecution also objects to the Registry's observations that the Victims and Witnesses Unit ("VWU") should not provide assistance in relation to contacts between the Prosecution and witnesses called by the Defence of Jean-Pierre Bemba Gombo ("Defence witnesses"), unless it is authorized to inform the Defence. Neither the Registry's neutrality requirement, nor the protocol for contact with witnesses established by Trial Chamber III in the case of *the Prosecutor v. Jean-Pierre Bemba Gombo* ("Protocol"),⁴ prevent the VWU from providing the assistance necessary to the Prosecution's Article 70 investigation without informing the Defence. The Registry therefore should comply with the Single Judge's Decision, which requires full co-

¹ ICC-01/05-48-Conf-Exp, Registry's Observations pursuant to regulation 24 *bis* of the Regulations of the Court on the implementation of the "Decision on the Prosecutor's "Request for judicial assistance to obtain evidence for investigation under Article 70" dated 8 May 2013, 20 May 2013.

² ICC-01/05-46-Conf-Exp, Decision on the Prosecutor's "Request for judicial assistance to obtain evidence for investigation under Article 70", 8 May 2013.

³ ICC-01/05-44-Conf-Exp, Request for judicial assistance to obtain evidence for investigation under Article 70, 3 May 2013, para. 41 b).

⁴ ICC-01/05-01/08-2293-Conf, Decision on the Prosecution Motion on Procedure for Contacting Defence Witnesses and to Compel Disclosure, 4 September 2012.

operation on the part of the Registry so as to allow the Prosecution to conduct its investigation.

II. Request for Confidentiality

5. The Prosecution requests that these submissions be received as “Confidential, *Ex parte*, Prosecution and Registry only” pursuant to Regulation 23 *bis* of the Regulations of the Court (“Regulations”), as they refer to previous documents filed with this classification.

III. Procedural Background

6. On 3 May 2013, the Prosecution filed its “Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70”.⁵

7. On 6 May 2013, Pre-Trial Chamber II designated Judge Cuno Tarfusser as the Single Judge responsible for addressing and determining the issues arising in connection with the above-mentioned Prosecution Request.⁶

8. On 8 May 2013, the Single Judge issued his decision on the Prosecutor’s request (“Single Judge’s Decision”).⁷

9. Following the Single Judge’s Decision, the Prosecution repeatedly sought to discuss implementation of the Decision with the Registrar in order to determine whether it could reach agreement on the most efficient way to implement the Decision. The Registry declined to meet with the Prosecution for this purpose, however, indicating that it preferred to file its observations with the Single Judge.

⁵ ICC-01/05-44-Conf-Exp.

⁶ ICC-01/05-45-Conf-Exp, Decision Designating a Single Judge, 6 May 2013.

⁷ ICC-01/05-46-Conf-Exp.

The Prosecution nonetheless indicated to the Registry that it wished only to receive (1) the full log of telephone calls of the Accused, and (2) recordings of only those calls the Prosecution deemed pertinent and relevant after reviewing the log and considering other information available to it.

10. On 20 May 2013, twelve days after the Single Judge's Decision, the Registry filed its observations on the implementation of the Single Judge's Decision.⁸

IV. Prosecution's Submissions

11. The Registry's first observation about the scope of the Single Judge's Decision is regrettably unclear. The Registry notes that providing all of the recordings to the Prosecution would be a significant undertaking, which is no doubt true, but in its proposed solution it is not clear if it is suggesting to provide the full log of telephone calls to the Prosecution or simply portions of the log, in addition to relevant recordings. As noted in paragraph 9 above, the Prosecution does not wish to receive the recordings of *all* of the Accused's calls, and the Single Judge's Decision orders no such thing (it only orders the Registry to make "available" the recordings). The Prosecution seeks only (1) the full log of telephone calls of the Accused, and (2) recordings of only those calls the Prosecution deemed pertinent and relevant after reviewing the log and considering other information available to it. Because the Prosecution's narrowed focus is fully in line with what the Registry proposes as well as the Single Judge's Decision, no amendment of that Decision is required.⁹

12. The Registry further notes that it is "considering the possibility of appointing an *ad hoc* Counsel in order to represent and protect the interests of the Defence at the early stage of the investigation." This step is both unnecessary and completely

⁸ ICC-01/05-48-Conf-Exp.

⁹ The Prosecution notes that this issue could have easily been resolved through more complete consultation between the Registry and the Prosecution, as sought by the Prosecution.

outside the role and mandate of the Registry in this matter, and the Single Judge should order that it not be done.

13. The Single Judge's Decision makes plain that the interests of the Defence have already been carefully considered and that the investigative measures ordered in the Decision can be fully implemented without any infringement on the rights of the Defence.¹⁰ It is noted that the recordings of calls to be provided to the Prosecution concern only the Accused's non-privileged calls. Further, the Registry is involved in this matter *only* because it has custody of log of telephone calls and the recordings. The Registry does not represent the Accused, and has no mandate whatsoever to attempt to represent the "interests" of the Accused in this particular matter. In addition, the Accused has no right to be "represented" in connection with the investigative steps ordered by the Single Judge. Finally, appointment of *ad hoc* counsel to represent the "interests" of the Accused would only cause unnecessary delay to no purpose and interfere with the Prosecution's investigation in this matter. Accordingly, the Prosecution requests the Single Judge to order the Registry to take no such step and to comply with the Single Judge's Decision forthwith.

14. Finally, the Registry says that because of its "neutrality requirement" and the Protocol for contact with witnesses in the main case, it cannot assist the Prosecution with interviews of Defence witnesses for the purposes of this investigation without informing the Defence. This position misapprehends both the Registry's role, including the meaning of the neutrality requirement, and the Protocol. The neutrality requirement means only that the Registry must provide services and assistance to the parties equally and without bias.¹¹ In fact, the Registry frequently provides assistance

¹⁰ Paragraph 4 of the Single Judge's Decision states that "As long as such calls are not directed to counsel for the Accused, however, they can be legitimately directly accessed by the Prosecutor for the purposes of her investigation and there is accordingly no need for an 'independent counsel' to be appointed."

¹¹ The Registry refers to the Appeals Chamber jurisprudence on the neutrality of the Registry, but that jurisprudence is inapposite and does not support the Registry's stance in this matter. The Appeals Chamber noted the Registry's neutrality in the context of the functioning of the Victims and Witnesses Unit (VWU).

to the investigations of both the Prosecution and the Defence – with logistics and support for missions as well as measures to protect the safety of witnesses – without informing the other party. This case is no different. There is simply no basis in the Statute, the Rules, the regulations, or the jurisprudence for the Registry's assertion that it would be required to notify the Defence if it assisted the Prosecution with its limited interviews of Defence witnesses in this case.

15. With respect to the Protocol, the Single Judge already determined that it does not preclude the Single Judge from granting special authorization to the Prosecution to contact Defence witnesses, without informing the Defence, "for the specific and limited purposes of the investigation into the scheme alleged in her Request." Likewise, it follows that the Protocol does not preclude the Registry from assisting the Prosecution with these limited investigative steps without informing the Defence. Further, by its own terms, the Protocol does not bind the Registry with respect to witness contact. It binds only the "parties and participants", which does not include the Registry.¹² Accordingly, there is no basis for the Registry to contend that the Protocol requires it to notify the Defence if it assists the Prosecution with the limited interviews authorized by the Single Judge. Finally, the Registry's stance with regard to informing the Defence will hinder the Prosecution's investigation into this matter. Accordingly, the Prosecution requests that the Single Judge order the Registry to

ICC-01/04-01/07-776 OA7, 26 November 2008, para. 90. It nowhere indicates that the Registry should represent the interests of the parties or that it must inform all parties of all steps it undertakes. In fact, the VWU itself often interacts with the parties without informing the other party.

¹² ICC-01/05-01/08-813-Conf, Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents, 7 July 2010, paras. 66 to 68.

Regulation 24bis (1) of the Regulations of the Court provides that "[t]he Registrar, when necessary for the proper discharge of his or her functions, in so far as they relate to any proceedings, may make oral or written submissions to a Chamber with notification to the participants". Taking note of this provision, the Appeals Chamber found that, unlike the parties and participants, the Registrar has no "blanket authority to initiate what are effectively new proceedings before the Appeals Chamber." (ICC-01/04-01/06-2823 OA20, 21 November 2011, para.13). A Chamber may nevertheless allow the Registry to file submissions where it is "appropriate and of assistance to it in the circumstances of this appeal to hear from the Registrar" (ICC-01/04-01/07-675 OA7, 11 July 2008, paras.3-4). This is in stark contrast with the rights of the parties and participants to file submissions under Regulation 24. Judge Pikis, spelled this principle out more expressly when stating as follows: "The Registrar is not a party to or a participant in the proceedings.[...] Nowhere in the Statute is a right conferred upon the Registrar or the Registry to participate as of right in any proceedings before the Court" (ICC-01/04-01/07-675, 11 July 2008, para. 4 Diss. Op). He dissented with the Majority in the sense that he would not have allowed the Registrar to make submissions at all (para.8).

assist the Prosecution with the limited interviews to the extent necessary, without informing the Defence.

V. Conclusion

16. For the reasons set forth above, the Prosecution requests that the Single Judge:
- a) Decline to modify the scope of the Single Judge's Decision and order the Registry to consult fully with the Prosecution on the implementation of the Decision;
 - b) Order the Registry to refrain from appointing an *ad hoc* counsel to represent the interests of the Accused; and
 - c) Order the Registry to assist the Prosecution with limited interviews with Defence witnesses as required without informing the Defence.



Fatou Bensouda, Prosecutor

Dated this 22nd Day of May 2013

At The Hague, The Netherlands