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No.: **ICC-01/05**
Date: **12 February 2014**

PRE TRIAL CHAMBER II

Before: **Judge Ekaterina Trendafilova, Presiding Judge**
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

Public Redacted document
With
Confidential, *EX PARTE*, only available to Prosecution and Registry Annex A

Public redacted version of ''Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70'', 3 May 2013, ICC-01/05-44-Conf-Exp

Source: **The Office of the Prosecutor**

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

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I. Introduction

1. The Office of the Prosecutor ("Prosecution") is currently investigating potential offences against the administration of justice under Article 70 of the Rome Statute ("Statute") and Rule 165 of the Rules of Procedure and Evidence ("Rules") in the case of The Prosecutor v. Jean-Pierre Bemba Gombo. The available evidence so far indicates that close associates of Jean-Pierre Bemba Gombo (''Accused''), members of the Accused's Defence team, and possibly the Accused himself are involved in a scheme to provide benefits to Defence witnesses in exchange for false testimony and false documents, in violation of Article 70(1)(a)-(c) of the Statute.

2. The Prosecution now seeks from Pre-Trial Chamber II ("Chamber") authority to take additional investigative steps in order to confirm or refute the indications of misconduct. Further investigative steps, in particular obtaining recorded calls and/or interviewing Defence witnesses who may have received monetary benefits, could further illuminate what has occurred – and may still be occurring -- between close associates of the Accused and Defence counsel (as well as the Accused himself) on the one hand, and the Defence witnesses on the other. The Prosecution has the mandate to investigate these matters under the Statute, and is best positioned to do so, but requires authorisation from the Chamber to undertake certain additional specific investigative steps.

3. The Prosecution's inquiry began when it received anonymous information indicating possible misconduct by persons associated with the Defence. The Prosecution took preliminary investigative steps, including a successful request for information from Western Union that showed several high-dollar[1] payments from Aimé KILOLO MUSAMBA, Fidèle BABALA, [REDACTED], [REDACTED] and

[1] All amounts listed in Annex A are in US Dollars. The term "high-dollar" is relative to the standard of living in the countries where the witnesses reside and a number of factors should be taken into account, including monthly salary and cost of living.

other close Accused associates to Defence witnesses in the case.[2] The Prosecution's investigation has additionally uncovered reliable information that the Accused may be using the Detention Centre telephone system to contact supporters, providing him with another means to further the bribery scheme.

4. The Prosecution also inquired with the Registrar to determine if these payments represent legitimate disbursements from the Victims and Witnesses Unit ("VWU"), through persons associated with the Defence. After receiving information from the Registrar concerning the VWU payments to Defence witnesses, the Prosecution determined that those payments did not appear to be related to the money transfers to Defence witnesses reflected in the Western Union information. The Prosecution has so far been unable to establish any legitimate explanation for the payments.[3]

5. In order to investigate further under Article 54(1) of the Statute, the Prosecution requests judicial authorization from the Chamber to collect telephone logs and recordings of pertinent telephone conversations currently in the possession of the Registry. Additionally, the Prosecution seeks authorization to contact and interview potentially implicated Defence witnesses at an appropriate time without prior notification to the Defence.

6. Article 57 (3) (a) of the Statute provides that a Pre-Trial Chamber is competent to issue "orders and warrants as may be required for the purposes of an investigation". Pursuant to Regulation 46 of the Regulations of the Court, the Prosecution is filing the instant request with the Chamber, as it is responsible for any matter arising out of the situation in the Central African Republic.

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[2] *See* Annex A for the full list

[3] *See* ICC-01/05-01/08-2441-Conf-Exp-Anx1-Red, Redacted version of the Annex 1 - Registry's Observations relating to the "Decision requesting the Registry's observations on the prosecution's request relating to Article 70 investigations", 13 December 2012.

II. Confidentiality

7. The Prosecution submits this request as confidential, *Ex parte*, only available to the Prosecution and the Registry since it contains sensitive information that, if disclosed, would compromise an ongoing investigation.

III. Procedural Background

8. On 20 March 2013 the Prosecution submitted the instant request, on an urgent basis, to Trial Chamber III.[4] On 26 April 2013 Trial Chamber III decided that did not have competence over the request and ruled that such requests should be brought before a Pre-Trial Chamber.[5]

IV. Investigation Background

Anonymous Informant Leads to Western Union Evidence

9. On 14 June 2012 an anonymous informant ("informant"), identifying himself as a [REDACTED], sent an unsolicited email to the OTP Information Desk alleging a bribery scheme involving Defence witnesses in The Prosecutor v. Jean-Pierre Bemba Gombo. The informant stated that [REDACTED]. The informant further stated that he could provide details about the purported bribery scheme.

10. From June 2012 to September 2012, the Prosecution exchanged emails with the informant seeking verifiable information, including the basis of the informant's

[4] ICC-01/05-01/08-2548-Conf-Exp, Notice to the Trial Chamber of Article 70 Investigation and Request for Judicial Assistance to Obtain Evidence, 20 March 2013.
[5] ICC-01/05-01/08-2606-Conf-Exp, Decision on the prosecution's request relating to Article 70 investigation, 26 April 2013.

knowledge, the details of his information, and whether the information could be corroborated by other independent sources. The informant provided reliable information on the identity and travel itineraries of one Defence witness – [REDACTED] (D04-52) – which the Prosecution was able to confirm independently through subsequent news reports, [REDACTED][6] and [REDACTED][7], and the Defence disclosure on 13 July 2012. The informant identified [REDACTED] as the Central African Republic citizen paying bribes to other witnesses in exchange for false testimony. The informant also provided information about the methods of transferring the money via Western Union to witnesses. The informant also stated that the "Congolese" lawyer of the Accused was behind the payments.

11. On 12 October 2012, the Prosecution met with [REDACTED], a person whom the Prosecution previously interviewed during the investigation stage of the instant case. The Prosecution [REDACTED] in order to gather information for questioning of Defence witnesses who purported to be in CAR during the 2002-2003 period. [REDACTED] was going to be called as a Defence witness. [REDACTED] told him that [REDACTED] facilitated contact with a person from The Hague who promised him relocation to Europe if he testified that he was [REDACTED]. [REDACTED] stated that in fact [REDACTED] had [REDACTED].

12. At the same time the Prosecution was receiving this information about the Defence procuring false testimony, it noted (1) evidence of false documents included on the exhibit list of the Defence[8], (2) that the witness who may have played a role in forging those documents -- Narcisse ARIDO (D04-11) [9] – failed to travel to The

[6] [REDACTED]
[7] [REDACTED].
[8] ICC-01/05-01/08-2301-Conf + Anx., Request to Reject Admission into Evidence of Several Fraudulent Documents Disclosed by the Defence on 12 July 2012 and Submitted on 16 August 2012, 6 September 2012.
[9] Narcisse ARIDO (D04-11), the first person in the chain of custody of documents the Prosecution believes to be forgeries has received a total of $8.257,13. The amounts paid to ARIDO compared to other witnesses and his status as the source of false documents together suggest that his payment included payments for the production of the documents.

Hague[10], and (3) that witness [REDACTED] (D04-7)[11] disappeared from The Hague in the middle of his testimony. The Prosecution later discovered that Narcisse ARIDO is currently residing in [REDACTED] where he accepted a Western Union payment from D04-59 in [REDACTED]. Prior to ARIDO's expected testimony at the Court, the VWU obtained a visa in [REDACTED] for ARIDO to travel to the Netherlands. ARIDO failed to travel to The Hague and did not testify. Trial Chamber III ordered the VWU to cancel the visa once it was aware that ARIDO had failed to travel from [REDACTED] with a representative from the VWU to The Netherlands.[12] The Prosecution strongly suspects that ARIDO used the visa obtained for him by VWU to travel to [REDACTED] instead of The Netherlands.

13. On the basis of the information indicating that payments were being made to Defence witnesses through Western Union, the Prosecution requested [REDACTED] to release information on the financial transactions of suspected individuals.

14. [REDACTED].[13] [REDACTED].[14]

15. The information obtained from Western Union shows money transfers to Defence witnesses from individuals close to the Accused including: Aimé KILOLO (lead counsel for the Accused), Fidele BABALA (a close confidant of the Accused within the *Mouvement de Libération du Congo* (''MLC'') political leadership and his chef-de-cabinet during his tenure as vice-president of the Democratic Republic of Congo (''DRC'')), [REDACTED], [REDACTED], and [REDACTED]. The recipients of the money via Western Union include the following Defence witnesses:

[10] ICC-01/05-01/08-2329, Decision on the amended order of witnesses to be called by the defence, 3 October 2012, para. 4.
[11] ICC-01/05-01/08-T-251 ENG ET, 24 September 2012, page 1, line 21 to page 3 line 20.
[12] ICC-01/05-01/08-T-252-ENG-ET, 2 October 2012, p. 4, lines 12-16.
[13] [REDACTED].
[14] [REDACTED].

[REDACTED] (D04-52),[15] Narcisse ARIDO (D04-11), [REDACTED] (D04-7), [REDACTED] (D04-64), [REDACTED] (D04-57), [REDACTED] (D04-59), [REDACTED] (D04-38), [REDACTED] (D04-55), [REDACTED] (D04-45). The information from Western Union also shows payments from [REDACTED] to two other Defence witnesses. Annex A sets forth all of the payments made to the witnesses in this case.

16. Additionally the Prosecution identified payments that were made to relatives of Defence witnesses on two occasions. [REDACTED] (D04-64) and [REDACTED] (D04-57), both in [REDACTED], were paid once directly and then again when their relatives in [REDACTED] received money while the witnesses were in The Hague prior to their respective testimonies.[16] Also the Western Union records show that Defence witness [REDACTED] filtered funds to other Defence witnesses after being paid by those apparently acting as the main financiers – KILOLO, [REDACTED] and BABALA.[17]

17. The Prosecution asked Defence witnesses under oath in Court about funds provided by the Defence to ascertain both whether witnesses have been paid or compensated and whether there could be a legitimate reason for such payments.[18] No witness, except expert witnesses, admitted to being paid by the Defence.

18. The Prosecution is currently requesting cooperation from a number of states to obtain further evidence of the scheme. Among other steps, the Prosecution has [REDACTED], through their [REDACTED]. The Prosecution has taken steps to

[15] [REDACTED] (D04-0052) received a total of $14.317,22.
[16] See Annex A at pages 3, 5, and 6.
[17] See Annex A with transfers from [REDACTED] to ARIDO (D04-0011) and [REDACTED] (D04-0038)
[18] See e.g. Testimonies of [REDACTED] (ICC-01/05-01/08-T-258-CONF-ENG CT, 19 October2012, page 2 line 25 until page 3 line 10), [REDACTED] (ICC-01/05-01/08-T-260-CONF-ENG ET, 23 October 2012, page 6, lines 14-23), [REDACTED] (ICC-01/05-01/08-T-249-CONF-ENG ET, 20 September 2012, page 10, line 15 to page 11, line 2), [REDACTED] (ICC-01/05-01/08-T-265-CONF-ENG ET, 30 October 2012, page 15, lines 1-18).

obtain a judicial order from the [REDACTED] to release any relevant information. It expects the results of this enquiry to be available in the coming weeks. However, these additional investigative steps offer only the possibility of further circumstantial evidence. Authorisation of the specific investigative steps requested by the Prosecution will provide more direct evidence to support or disprove allegations of possible offences against the administration of justice.

19. At this stage there is no evidence that any of the financiers named above had pre-existing financial or other relationships with witnesses prior to the commencement of the trial.[19] Moreover, since acceptance of a Western Union payment requires physical presence at a Western Union location and valid identification by the person to whom the payment is addressed, it seems likely that each witness, testifying under oath and under Prosecution questioning, lied in response to questions about payments from the Defence; the alternative and far less reasonable inference is that each witness *forgot* that he took affirmative active steps to receive funds wired to him by members of the Defence.

20. The evidence from Western Union also suggests that KILOLO is providing the identities of witnesses purportedly requiring protection to those involved in the scheme in order for payments to be made.

21. KILOLO and Jean-Jacques MANGENDA (case manager for the Accused), are also receiving funds from BABALA, [REDACTED], and [REDACTED], possibly on behalf of the Accused, which would belie his official status as indigent.

Evidence of the Accused's Facilitation of the Scheme

[19] There is one payment of $83.20 from a [REDACTED] to Narcisse ARIDO on 28.07.2007 ([REDACTED]).

22. The Prosecution suspects that the Accused is orchestrating the scheme, possibly through the telephone provided at the International Criminal Court Detention Centre. Firstly, all of the individuals making the payments to witnesses have strong and close personal ties to the Accused, who would clearly benefit from coached testimony calculated to exonerate him. Given the nature of the relationships between the Accused, his close associates, and [REDACTED], it is doubtful that the Accused's associates would transfer money to witnesses without the knowledge of the Accused himself. The sources of the money paid to witnesses appear to be managed by BABALA, [REDACTED], and [REDACTED]. [REDACTED], apparently unaware of the bribery scheme, told the Prosecution [REDACTED] that BABALA and [REDACTED] are among the few individuals Bemba has authorized to handle his finances. Thus, it appears reasonable to suspect that the money paid to the witnesses comes ultimately from the Accused.

23. Further, on 5 November 2012 the Prosecution interviewed a [REDACTED] who is not willing to have his identity disclosed at this time.[20] Despite this, the Prosecution submits that the Chamber may rely on his information to corroborate the other information contained in this filing and to permit further investigation. [REDACTED] has previously provided the Prosecution with reliable information related to the investigation of the Accused. Without being prompted, [REDACTED] volunteered that BABALA [REDACTED]. BABALA would then enter into a three-way call ("conference call") with [REDACTED] and the Accused, who was calling from the Detention Centre. [REDACTED]. [REDACTED] stated that the Accused used "a phone number registered to KILOLO" to call BABALA, who then entered into the conference call. [REDACTED] states that the Accused has called many other third parties [REDACTED] using the same conference call method, noting that the Accused is careful only to call the particular phone number (registered to KILOLO)

[20] This individual offered to be a source and provide information under the condition that his identity remain confidential under Article 54(3)(e) of the Statute.

when KILOLO is not known to be in The Hague to avoid suspicion that the Accused is circumventing the monitoring system. [REDACTED].

24. [REDACTED] the Accused has registered a telephone number belonging to BABALA under KILOLO's name at the Detention Centre. Such a step would conceal the true recipient of the call and would also evade monitoring, since KILOLO is listed as his counsel. [21]

25. Although [REDACTED] has a phone number for BABALA, he stated that BABALA's phone number was concealed when BABALA called to transfer Accused's calls to him. The phone number provided by several sources as belonging to BABALA is [REDACTED].[22] This number is also confirmed as belonging to BABALA by CAR-OTP-0044-0071 and CAR OTP-0044-0037, and by reports of forensic analyses of BEMBA's [REDACTED] SIM cards[23] that show that the Accused's SIM cards contained three numbers for BABALA: [REDACTED],[24] [REDACTED],[25] and [REDACTED].[26] The Western Union records indicate one additional number for BABALA: [REDACTED].

26. In addition to the evidence [REDACTED], the Prosecution received information from [REDACTED] on the KILOLO-BABALA connection. [REDACTED] says that he learned from [REDACTED][27] that KILOLO was releasing confidential information about the case to BABALA. [REDACTED].[28] In response,

[21] Regulation 174(1) of Regulations of the Registry provides that "[a]ll telephone conversations of detained persons shall be passively monitored other than those with counsel, diplomatic or consular representatives, representatives of the independent inspecting authority, or officers of the Court."
[22] The Western Union spreadsheets list this number as one of the numbers belonging to BABALA.
[23] [REDACTED]. On BEMBA's SIM cards he has three numbers for BABALA: [REDACTED].
[24] *See* CAR-OTP-0044-0071 at 0085.
[25] *See* CAR-OTP-0044-0071 at 0080.
[26] *See* CAR-OTP-0044-0037 at 0060.
[27] Close political associate of the accused. [REDACTED] is also implicated in the Western Union records ([REDACTED] paid money to Mangenda).
[28] [REDACTED].

[REDACTED]."[29] However, the Western Union records corroborate that someone within the Defence team must have given BABALA confidential Defence information in order for BABALA to know which individuals to pay.

27. Additionally, the Prosecution has evidence that partially corroborates the source's account of the Accused's practice of speaking to unapproved interlocutors by forwarded or three-way conference calls, evading the Detention Centre's regulations. This evidence shows that in January 2013, the Accused called MLC party members in Brussels and spoke to third parties, apparently without the knowledge of the Detention Centre authorities. In a YouTube video downloaded from the internet, an unidentified Accused supporter states that, "He isn't a symbolic President, we keep reminding people of that, he's an active President … who, on a daily basis, follows the party's activities […]."[30] Another supporter states, "[i]t is true that we are very happy today, because the President telephoned us here. He talked to all the representatives of our party who were present; he gave us messages."[31] The Prosecution seriously doubts that the detention facility authorized the Accused to place a call to a group of supporters, rather than to a specific individual, yet once the authorized call was placed, likely to one individual, it was relatively easy for his supporters, all co-located, to have unauthorized conversations with the Accused.

28. In sum, there exists evidence that payments have been made by KILOLO, BABALA, and other persons closely associated with the Accused to Defence witnesses and that the Accused communicates with BABALA and other unapproved persons, leading to a legitimate suspicion that the Accused himself may be directing the payments to the witnesses. If established, these acts would constitute violations

[29] [REDACTED].
[30] CAR-OTP-0070-0096 with English translation: CAR-OTP-0070-0149 at 0151, lines 24-25.
[31] CAR-OTP-0070-0096 with English translation: CAR-OTP-0070-0149.The Prosecution has informed the Registry by email of the apparently unauthorized conversation.

of Article 70 of the Statute, in particular Article 70(1)(a) ("Giving false testimony"), Article 70(1)(b) ("Presenting evidence that the party knows is false or forged"), and Article 70(1)(c) ("Corruptly influencing a witness"). This evidence is sufficient to warrant the additional investigative steps outlined below.

V. Additional Investigation

29. The Prosecution seeks authorization from the Chamber to take the following additional investigative steps in order to obtain further information concerning the purpose of the payments made to Defence witnesses: (1) obtain verification from the Registry as to whether any of BABALA's known numbers are included within the telephone numbers on file with the Detention Centre as belonging to counsel; (2) obtain telephone recordings and logs in the possession of the Registry from the Detention Centre that may be pertinent to this investigation; (3) interview Defence witnesses who have received payments as reflected in the Western Union records without prior notice to the Defence. These steps are minimally intrusive, and are likely to produce direct information relevant to the Prosecution's investigation.

30. Article 54(1) of the Statute mandates that "[t]he Prosecutor shall: (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute and, in doing so, investigate incriminating and exonerating circumstances equally." Article 57(3)(a) of the Statute empowers the Pre-Trial Chamber to, "[a]t the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation."

31. The Prosecution has reason to believe that the Registry may be in possession of audio recordings of telephone calls between the Accused and BABALA and third parties. Accordingly, the Prosecution seeks an order from the Chamber instructing

the Registry to provide access to all recordings of the Accused's calls to BABALA or calls to third parties through BABALA to an independent reviewer as set forth in more detail below.

32. Regulation 174(1) of the Regulations of the Registry (''RoR'') provides that "all telephone conversations of detained persons shall be passively monitored, other than those with counsel, diplomatic or consular representatives, representatives of the independent inspecting authority, or officers of the Court."[32]

33. The Prosecution's understanding is that only calls made by the Accused to persons other than persons exempted by Regulation 174(1) of the RoR are recorded, and are subject to monitoring. Accordingly, any conversations that the Accused has had with BABALA may have been recorded (unless he disguised all of them as calls to his counsel).

34. The evidence gathered to date indicates that recorded calls between the Accused and BABALA have the greatest potential to provide further information regarding the apparent scheme to pay Defence witnesses. The Prosecution, and not the Registry, is tasked with investigating the potential misconduct at issue here.[33] At the same time, the Prosecution is aware that the Accused retains privacy rights and further is permitted to have privileged communications with counsel that cannot be breached by the Prosecution.[34] In order to protect those interests and to ensure that its inquiry is as narrowly focused as possible, the Prosecution proposes contracting

[32] *Emphasis added.*
[33] ICC-01/04-01/06-T-350-Red2-ENG CT3, page 11, line 22 onwards "The Registrar is not given any authority to investigate alleged offences in this or any other context and the role of the Pre-Trial and Trial Chambers as regards Article 70 offences, is essentially limited to the opportunity to communicate relevant information to the Prosecutor for his consideration. Given the extent to which this scheme has been regulated in the Rome Statute framework, it is clear that the Judges have not been given power to remove responsibility from the Prosecution by appointing an independent investigator. Clearly, if a team prosecuting a case were to find itself placed in a position of conflict when investigating or prosecuting alleged Article 70 offences, it would then be necessary to refer the issue either to members of the OTP who were uninvolved with the proceedings or, in an extreme situation, to an independent investigator."
[34] See Rule 73 of Rules.

with an independent counsel who can review the Accused's telephone logs and recorded calls. In cooperation with the Registry, the counsel will first be instructed to review the telephone logs to determine if there appear to be calls to parties connected to this investigation. Second, through a review of the logs and the telephone recordings, the counsel will be instructed to identify calls to BABALA and to third parties through BABALA. If any such calls are identified, the counsel will review them to determine if they are relevant to the investigation described in this filing. The counsel will only provide to the Prosecution material from the logs and the recordings of calls that is relevant to this investigation. Through this process, the independent counsel will ensure that no conversations between the Accused and counsel, and no conversations that are otherwise irrelevant to this investigation, are provided to the Prosecution. The independent counsel will have no other interaction with the Prosecution regarding this investigation.

35. The proposed investigative steps are justified and does not unduly infringe on the rights of the Accused. The Accused is aware that his calls from the Detention Centre are recorded and so any expectations of privacy he might have in the calls are highly attenuated. The Prosecution has set forth sufficient grounds to believe that the Accused is likely to be using the telephone system to participate in the scheme to pay Defence witnesses, and the telephone logs and the conversations with BABALA and third parties through BABALA are likely to provide relevant information bearing on this investigation. The Prosecution's request is particularized and focused, and proposes a procedure that insures that it will be minimally intrusive.

36. Regulation 92 of the Regulations of the Court (''Regulations''), which governs the confidentiality of the detention record, does not appear to apply to this request since it does not appear that telephone recordings or telephone logs form part of the

detention record.[35] Regulation 92 of the Regulations provides, *inter alia*, that "a Chamber may […] order that the detention record or part thereof be withheld or disclosed". During pre-trial proceedings in the instant case the Single Judge issued a decision on 16 December 2008 recalling that transcripts of telephone conversations "fall […] outside the scope of the detention record as such".[36] The Prosecution submits that the Single Judge's interpretation of Regulation 92 of Regulations is correct and it does not govern recordings of telephone conversations or telephone logs.

37. However, should the Chamber hold that Regulation 92 applies to this situation, the Prosecution would request the Chamber to order, under Regulation 92(4), that the release of the requested information not be made known to the Accused until such time that the Prosecution can avoid compromising the Article 70 investigation. Regulation 92 should be read in conjunction with the Prosecutor's duties under Articles 54(1) and Article 70 to avoid the creation of an untenable legal loophole which would provide an Accused and his counsel with an opportunity to influence further investigations.[37]

38. The Prosecution further requests that the Chamber vary the terms of the protocol governing the Prosecution's contact with Defence witnesses. That protocol mandates that the Prosecution may make contact with Defence witnesses only through Defence counsel.[38] At an appropriate time in its investigation, however, the Prosecution will seek to interview, simultaneously to the extent possible, those key

[35] The term "detention records" is not defined by the Rome Statute legal regime, however Regulation 189 of the Regulations of the Registry provides a non-exhaustive list of what is contained in the detention record. Telephone records and telephone logs are not mentioned in Regulation 189.
[36] ICC-01/05-01/08-325, Decision on Re-classification of Monitoring Reports, 16 December 2008, paras. 8 and 12.
[37] The Chamber should be aware of a confidential *ex parte* Appeals Chamber decision on a related but distinguishable issue in ICC-01/04-01/07 OA 9, 9 December 2009.
[38] 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, para. 68 and 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, para. 13.

Defence witnesses who received payments as reflected in the Western Union records, as well as key persons involved in making the payments. Through this investigative step, the Prosecution will attempt to ascertain the reason for the payments. If the Prosecution is required to inform Defence counsel of its wish to interview the Defence witnesses, however, then the purpose of the interviews would likely be defeated. When the Prosecution undertakes to conduct these interviews it will (1) notify the Chamber immediately before doing so, and (2) will restrict all questioning to the subject of the payments to Defence witnesses only and will not touch on any other subjects during the interviews.

39. The Prosecution recognizes that ordinarily it would not be within the authority of the Pre-Trial Chamber to allow a variance to an order of the Trial Chamber. However, in this case, the Prosecution made the specific request to the Trial Chamber to vary its order concerning contact with witnesses, and the Trial Chamber instructed the Prosecution to bring the matter to the Pre-Trial Chamber. Implicitly, therefore, the Trial Chamber has given the Pre-Trial Chamber the authority to decide on this matter. Further, the Pre-Trial Chamber has the authority to "issue such orders and warrants as may be required for the purposes of an investigation." In this instance, the investigation will require the Prosecution to interview Defence witnesses, and therefore an order authorizing these interviews is fully within the authority of the Pre-Trial Chamber.

40. The Prosecution remains at the Chamber's disposal for a status conference or to respond to further questions.

VI. Relief Requested

41. The Prosecution respectfully requests that the Chamber:

a) Order the Registry to verify whether any of the following telephone numbers -- [REDACTED], [REDACTED], [REDACTED] and [REDACTED] – are listed in Registry records and, if so, to whom they belong;

b) Order the Registry to provide to an independent counsel appointed by the Prosecution access to the Accused's telephone logs and to existing recordings of (1) all calls made to BABALA and (2) all calls made to third parties through BABALA. Further order the independent counsel to provide only relevant information to the Prosecution from his or her review of the telephone logs and pertinent recordings of telephone calls;

c) Should the Chamber find that Regulation 92 of Regulations applies, order pursuant to Regulation 92(4) that there be no disclosure to the Accused until such time that disclosure would not prejudice the investigation;

d) Vary the terms of the protocol governing contact with Defence witnesses to allow the Prosecution to conduct interviews with Defence witnesses who received payments as set forth in the Western Union records without prior notice to the Defence.

VII. Conclusion

42. These are serious allegations of offences against the administration of justice. The Prosecution is aware of the far-reaching implications of these allegations. The Prosecution therefore respectfully requests both confidentiality and urgency and that the Chamber grant the relief requested.

Fatou Bensouda, Prosecutor

Dated this 12th day of February, 2014

At The Hague, The Netherlands