

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-01/05-01/08

Date: 1 May 2014

**TRIAL CHAMBER III**

**Before:** Judge Sylvia Steiner, Presiding Judge  
Judge Joyce Aluoch  
Judge Kuniko Ozaki

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC  
IN THE CASE OF  
*THE PROSECUTOR*  
*V. JEAN-PIERRE BEMBA GOMBO***

**Public**

**Prosecution Response to “Defence Urgent Request for Disclosure and Injunctive Relief concerning Privileged Defence Communications”**

**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”) opposes the “*Defence Urgent Request for Disclosure and Injunctive Relief concerning Privileged Defence Communications*”<sup>1</sup> (“Request”). The Trial Chamber III (“Chamber”) should reject the Request, which purely concerns Article 70 related matters in *Prosecutor v. Bemba et al*, of which Pre-Trial Chamber II is singularly seized. Further, the Single Judge has issued decisions and orders: (1) rendering moot the concerns related to the review of emails that the Defence raises in its Request<sup>2</sup>; and (2) ensuring that any potentially privileged information is protected in the review of all materials seized in the course of the Article 70 investigation.<sup>3</sup> As such, the Request should be dismissed in its entirety.

2. The Request reveals Counsel’s obvious misimpression that the Defence does not have access to materials disclosed to Mr. Bemba in the Article 70 case, which Counsel believes are relevant and material to the preparation of the defence of this case. However, the Single Judge has expressly disabused Counsel of this erroneous assumption and provided him clear guidance, explaining in essence, that nothing prevents him from obtaining any such materials from Mr. Bemba, as conditioned on Mr. Bemba’s agreement to share such information with Counsel.<sup>4</sup>

3. The Request is also repetitive of previous Defence filings requesting the Chamber to order the Prosecution’s disclosure of information regarding Defence

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<sup>1</sup> ICC-01/05-01/08-3036, Defence Urgent Request for Disclosure and Injunctive Relief concerning Privileged Defence Communications, 9 April 2014.

<sup>2</sup> ICC-01/05-01/13-366-Red, Decision on the “Prosecution’s Request to Refer Potentially Privileged Materials to Independent Counsel”, 25 April 2014 and ICC-01/05-01/13-338, Decision on the “Defence Request for access to confidential transcripts and filings” dated 1 April 2014 submitted by the Defence for Jean-Pierre Bemba Gombo in case ICC-01/05-01/08, 15 April 2014.

<sup>3</sup> See *e.g.* ICC-01/05-01/13-366-Red.

<sup>4</sup> ICC-01/05-01/13-338.

witnesses.<sup>5</sup> The Prosecution has already responded to these requests<sup>6</sup> and reiterates that “[n]othing in the materials related to Narcisse Arido bears on any Article 67(2) or Rule 77 matter for the Accused in this case and is thus not subject to disclosure in this case.”<sup>7</sup> Nothing has changed since this 10 April 2014 Prosecution Response: the Arido Article 70 materials are not subject to disclosure in these proceedings and, in any case, are already in Mr. Bemba’s hands.

4. Lastly, the Prosecution has already clarified and responded to the questions posed by Defence regarding its communications for which it seeks a stipulation. As the Prosecution has stated, it had, *inter alia*, “... legal grounds to seek and obtain judicial authority to intercept the telecommunications, not of the entire Defence team, as falsely asserted in the Defence Motion, but rather of suspects Kilolo and Mangenda.”<sup>8</sup> To be clear, the Prosecution confirms that it:

- a. has no reason to believe that Mr. Haynes’, Ms. Gibson’s, or Dr. Mettraux’s communications were intercepted;
- b. neither possesses or has knowledge of all communications intercepted by the national authorities, but only of the non-privileged communications provided through the Single Judge, relevant to the alleged Article 70 offences;
- c. received only non-privileged communications after they were subject to multiple layers of judicial review (i.e., under the domestic law of The Netherlands, as applied by the Investigating Judge, and the *Raadkamer* (a panel composed of three Judges in The Netherlands), and the review protocol established by the Single Judge at the ICC, inclusive of appointment of an

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<sup>5</sup> ICC-01/05-01/08-3020-Red, Public redacted version of “Defence Request for Disclosure”, 20 March 2014 and ICC-01/05-01/08-3033-Red, Public redacted version of “Defence Further Request for Disclosure”, 7 April 2014.

<sup>6</sup> ICC-01/05-01/08-3039-Conf, Consolidated Prosecution Response in Opposition to “Defence Request for Disclosure” and “Defence Further Request for Disclosure”, 10 April 2014 and ICC-01/05-01/08-2984, Prosecution’s Response to the “Defence Motion on Privileged Communications”, 19 February 2014.

<sup>7</sup> ICC-01/05-01/08-3039-Conf, para. 4.

<sup>8</sup> ICC-01/05-01/08-2984, Prosecution’s Response to the “Defence Motion on Privileged Communications” 19 February 2014, para. 3.

Independent Counsel working directly under the Chamber's supervision);

d. neither possesses nor has knowledge of any intercepted communications of Mr. Haynes, Ms. Gibson, or Dr. Mettraux;

e. possesses non-privileged communications between Messrs. Kilolo and Mangenda referencing Mr. Haynes and Dr. Mettraux.

## II. Procedural History

5. On 6 February 2014, the Defence filed its *Defence Motion on Privileged Communications*.<sup>9</sup>

6. On 19 February 2014, the Prosecution filed its *Prosecution's Response to the "Defence Motion on Privileged Communications"*.<sup>10</sup>

7. On 20 March 2014, the Defence filed its *Defence Request for Disclosure*.<sup>11</sup>

8. On 7 April 2014, the Defence filed its *Defence Further Request for Disclosure*.<sup>12</sup>

9. On 9 April 2014, the Defence filed its *Defence Urgent Request for Disclosure and Injunctive Relief concerning Privileged Defence Communications*.<sup>13</sup>

10. On 10 April 2014, the Prosecution filed its *Consolidated Prosecution Response in Opposition to "Defence Request for Disclosure" and "Defence Further Request for Disclosure"*.<sup>14</sup>

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<sup>9</sup> ICC-01/05-01/08-2963, Defence Motion on Privileged Communications, 7 February 2014.

<sup>10</sup> ICC-01/05-01/08-2984, Prosecution's Response to the "Defence Motion on Privileged Communications", 19 February 2014.

<sup>11</sup> ICC-01/05-01/08-3020-Red.

<sup>12</sup> ICC-01/05-01/08-3033-Red.

<sup>13</sup> ICC-01/05-01/08-3036.

<sup>14</sup> ICC-01/05-01/08-3039-Conf.

### III. Submissions

11. The Chamber should reject the Request as it is not seized of matters related to the proceedings in *Prosecutor v. Bemba et al.* Accordingly, the Chamber lacks jurisdiction to rule on matters that are squarely before a different Chamber of this Court, in the context of a different case. To entertain the motion and grant the relief that the Defence seeks would thus directly intrude into the sphere of authority of Pre-Trial Chamber II and the Single Judge appointed by it. The Prosecution notes that this is not the first time that the Defence has inappropriately requested the Trial Chamber to act well beyond the boundaries of its jurisdiction and interfere with the authority of Pre-Trial Chamber II. It is respectfully submitted that these attempts should be firmly rejected by the Trial Chamber.

12. The Single Judge of Pre-Trial Chamber II is seized of matters related to *Bemba et al.*, and it was to this Judge that the Prosecution logically requested the appointment of an Independent Counsel to review the seized email accounts of Mangenda and Kilolo for potentially privileged and/or legal protected confidential information. The Single Judge ruled on that request, establishing a protocol to safeguard any potentially privileged information and identify evidence relevant to the Article 70 case among those materials.

13. The Single Judge's Decision thus precludes any possibility that the Prosecution could disclose the emails the Defence seeks to obtain in advance of their unsealing in accordance with the terms of the Single Judge's order.

14. The Defence team, as such, does not have standing to assert ownership of the Mangenda and Kilolo email accounts. Rather, suspects Mangenda and Kilolo, who have privacy interests in these accounts, have submitted their views to the Single Judge, who in turn, decided on the appropriate protocol for identifying relevant

material and safeguarding privileged material.

15. Materials related to Narcisse Arido do not contain privileged information. The Defence contends that Mr. Arido's email account may contain draft expert submissions characterised by the Defence as being privileged.<sup>15</sup> This assertion is puzzling since it was the Defence that held Mr. Arido out to be a fact witness and provided no hint that it ever intended on calling him as an expert witness.<sup>16</sup> The Prosecution is not aware of what steps the Defence took, if any, to request that Mr. Arido be recognised as an expert witness before the Court. That the Defence contends that it engaged in strategy discussions with and sent case documents to a fact witness, such as Mr. Arido, is very concerning. The Defence cannot plausibly argue that the attorney-client privilege on communications extends to fact witnesses and that all communications with its fact witnesses would be privileged. Were that the case, the Defence could have validly objected, on grounds of privilege, to Prosecution questioning of its witness with regard to communications they may have had with the Defence about the case – a perfectly valid line of inquiry during witness examination.

16. The Request shows Counsel's apparent misapprehension of his ability to access Article 70 materials. The Single Judge's recent ruling however, clearly points this out and clarifies that Counsel has always had access to disclosed Article 70 materials through Mr. Bemba, subject to his consent to share these materials with Counsel. For this reason, Counsel's access to the Article 70 case is not necessary, as is a second separate disclosure to the very same Accused in this case.

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<sup>15</sup> ICC-01/05-01/08-3036, paras. 84-89.

<sup>16</sup> CAR-D04-0003-0186.

17. It is perhaps this misapprehension that lies at the root of many incorrect assumptions and inaccuracies in the Request. Several of these inaccurate accusations, insinuations, and assertions are set out below:

- a. that the Prosecution has access to “all potential Defence strategies, research, and arguments”.<sup>17</sup> The Prosecution does not have access to such material;
- b. that the Prosecution “liaised directly with the Independent Counsel on several occasions.”<sup>18</sup> All Prosecution contacts and communications with the Independent Counsel have been under the judicial supervision of the Single Judge and are on the record of the case. The Prosecution has never liaised directly with the Independent Counsel;
- c. that the Single Judge authorised the Prosecution investigators to “promptly transmit to the ‘Court’ any evidence collected during searches [subsequent to arrest]”.<sup>19</sup> The Single Judge’s order refers to concerned States that will be expected to “promptly transmit to the Court any evidence seized on the occasion” and not Prosecution Investigators as suggested by the Defence.<sup>20</sup> Prosecution Investigators never took direct possession of any seized material;
- d. that “the Prosecution provided clear evidence that the Independent Counsel has transmitted privileged information to the Prosecution.”<sup>21</sup> The Defence cites, without mentioning a specific paragraph, to ICC-01/05-01/13-237-Red, but no such information is contained in that entire document and furthermore, the assertion is plainly false;
- e. that “[s]ince the inception of the Article 70 case, the Prosecution has had

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<sup>17</sup> ICC-01/05-01/08-3036, para. 5.

<sup>18</sup> *Ibid.*, para. 21.

<sup>19</sup> *Ibid.*, para. 24.

<sup>20</sup> ICC-01/05-01/13-1-Red2-tENG, Public redacted version of “Warrant of arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido”, 20 November 2013, para. 26.

<sup>21</sup> *Ibid.*, para. 36.

access to reams of privileged, *ex parte*, and sensitive information concerning the Defence main case”.<sup>22</sup> This entirely unsupported assertion is untrue.

f. that “it would seem that the Independent Counsel acted as a *de facto* Prosecutor acting on the basis of instructions from the Prosecution ...”. The Independent Counsel acts under judicial supervision and does not take any instructions from the Prosecution;

g. that the Independent Counsel “transmits”<sup>23</sup> information to the Prosecution or that the “Independent Counsel was instructed to transmit any information, which is relevant to the Article 70 case, to the Prosecution.”<sup>24</sup> The Defence cannot cite to a source for this proposition because the proposition is simply untrue. The Independent Counsel has never transmitted any information directly to the Prosecution. The Single Judge, as part of his duties as an independent check on the investigation to ensure the integrity of the identification of privilege, reviews and transmits information to the Prosecution;

h. that “any information concerning Defence witnesses and Defence evidence can be transmitted to the Prosecution, including draft submissions, which are intended for us in the final Defence brief.”<sup>25</sup> This Defence insinuation is incorrect. The Independent Counsel cannot transfer any information to the Prosecution, let alone privileged documents;

i. that “if information is ‘exculpatory’, then it is also privileged, and should never have been disclosed to the Prosecution”.<sup>26</sup> Potentially exculpatory information with regard to *Bemba et al.* in the possession of the Prosecution is not privileged, and one does not follow from the other.

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<sup>22</sup> *Ibid.*, para. 51.

<sup>23</sup> *Ibid.*, para. 55.

<sup>24</sup> *Ibid.*, para. 57.

<sup>25</sup> *Ibid.*, para. 58.

<sup>26</sup> *Ibid.*, para. 60.

18. The Defence Request and the relief sought are therefore based on false assertions. The fact that the Defence repeatedly makes the same false assertions does not make them any less false. The Prosecution would expect that, once rightly apprised of the information held by the Accused, the Defence would seek to correct the above-referred assertions.

19. The sustained and unsubstantiated misrepresentations of the Defence presume that the Prosecution, after several years of work on this case, is strangely uninterested in the integrity of these proceedings. For no apparent reason, the Defence in this case not only seems to be more focused on the development of the Article 70 case than in the efficient conclusion of its own case; it also seems to be determined to portray a false picture, where the Prosecution has uncontrolled access to confidential information regarding Defence strategy in this case beyond evidence of witness corruption. These baseless contentions have been advanced without any regard to explanations provided by the Prosecution, rulings (including public ones) made by the Single Judge and without any effort to verify whether there was any support for them. Rather, they appear to be guided by the objective of mischaracterising the conduct of the Prosecution – and by necessary implication, the intervention and decisions of the Single Judge – in the Article 70 investigation and case. They ignore the Prosecution's careful investigation into alleged corrupt activities affecting this trial, the strict judicial supervision under which the Prosecution acted, and the deliberate exclusion of access to any privileged material in order to protect the very thing that the Defence insinuates the Prosecution has violated: the integrity of these proceedings.

#### IV. Relief Requested

20. The Prosecution respectfully requests that the Chamber deny the Defence Request.



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Fatou Bensouda, Prosecutor

Dated this 1<sup>st</sup> Day of May 2014

At The Hague, the Netherlands