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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

Public Redacted Version of Defence Addendum to Defence urgent request for disclosure and injunctive relief concerning privileged Defence communications

Source: Defence for Mr. Jean-Pierre Bemba Gombo

Document to be notified in accordance with regulation 31 of the *Regulations of the****Court to:*****The Office of the Prosecutor**

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A. INTRODUCTION

1. The Defence for Mr. Jean Pierre Bemba Gombo hereby files this urgent addendum concerning its request for the Trial Chamber to take measures to ensure the protection and integrity of confidential *ex parte* and privileged material (the Request).¹

2. As set out in the Request, information and documents in the email accounts of Messrs. Kilolo and Mangenda concern privileged and *ex parte* matters, directly linked to the Main Case.

3. In particular, it is certain that these email accounts contain information and documents, which are the subject of *ex parte* protective measures issued by this Trial Chamber.

4. The Trial Chamber has recognised that it is the sole judicial entity with the competence to lift or vary these protective measures.²

5. The Trial Chamber has both the power and the duty to ensure that such measures are not violated or rendered otiose by virtue of the Prosecution accessing this information *via* Article 70 proceedings.

6. The Defence therefore files this Addendum to its Request in order to firstly, update the Trial Chamber in relation to developments in the Article 70 case which will compromise the enforceability of protective measures emanating from the Main Case, and secondly, reiterate the urgent necessity of obtaining relief on this issue.

B. SUBMISSIONS

¹ ICC-01/05-01/08-3036.

² ICC-01/05-01/08-3014, at para. 13.

7. On 25 April 2014, the Single Judge issued his decision on the Prosecution request to appoint an Independent Counsel to review the email accounts of Messrs. Kilolo and Mangenda.³

8. The Single Judge granted the Prosecution request, and re-appointed the same Independent Counsel to perform this task, as had been appointed on a previous occasions.

9. In so doing, the Single Judge failed to address:

- significant Defence concerns regarding the appearance of independence and impartiality of the Independent Counsel;⁴
- uniform requests by the Article 70 Defence teams to the effect that the Defence representing Mr. Bemba in the Main Case should first be accorded an opportunity to identify privileged and *ex parte* information;⁵ and
- Defence concerns regarding the fact that the Independent Counsel did not possess the capacity to identify whether information might be protected by *ex parte* protective orders issued by the Trial Chamber.⁶

10. The Single Judge's sole justification for vesting the responsibility for vetting privileged material with the Independent Counsel was that,

establishing a system of acquisition, review and transmission of the DVDs other than the one devised in the 13 December 2013 Decision, including by adhering to either of the alternative models proposed by the Defence for Narcisse Arido and the Defence for Aime Kilolo, would inevitably entail significant delay.⁷

³ ICC-01/05-01/13-366-Red.

⁴ ICC-01/05-01/08-48; ICC-01/05-01/13-50; ICC-01/05-01/13-209; ICC-01/05-01/13-311-Red; ICC-01/05-01/13-316; ICC-01/05-01/13-329; ICC-01/05-01/13-334; ICC-01/05-01/13-361.

⁵ ICC-01/05-01/13-311-Red; ICC-01/05-01/13-334.

⁶ ICC-01/05-01/13-311-Red; ICC-01/05-13-361.

⁷ ICC-01/05-01/13-366-Red, page 8.

11. The Single Judge failed to explain how or why the alternative models would engender “significant” delay. It is also self-evident that protective measures – which were granted by the Trial Chamber on the basis that they were necessary to ensure the security and protection of witnesses – should not be sacrificed or compromised in order to accommodate the schedule of a different case.

12. Through its recently granted access to confidential filings and disclosure in the Article 70 case,⁸ the Defence has been able to verify that privileged information, information protected by *ex parte* protective measures, and internal work product have been impermissibly transmitted to the Prosecution *via* the Article 70 proceedings.

13. [REDACTED].

14. It is also apparent that the only instruction provided to the Independent Counsel was to transmit information that was “relevant” to the Article 70 proceedings.

15. As has been repeatedly stressed by the Defence, relevance does not denote complicity or illegality. The mere fact that it might “assist” the Prosecution to obtain certain information does not mean that there is an objective basis for determining that the information in question is not protected by legal professional privilege.

16. It is therefore disturbing that several conversations between Mr. Bemba and his Counsel and case manager were transmitted to the Prosecution *via* the Independent Counsel, notwithstanding the absence of any basis for determining that the specific conversations should not have been protected by legal privilege.

17. Moreover, even though the Single Judge only pronounced on the legal status of the communications of Messrs. Kilolo and Mangenda, information emanating from Mr. Haynes and Ms. Gibson has been directly affected. [REDACTED].

⁸ ICC-01/05-01/13-388.

18. The Prosecution has also received transcripts of conversations concerning the draft Defence Final Brief.

19. The fact that the Reports of the Independent Counsel are first transmitted to the Single Judge also does not constitute an effective safeguard as concerns the protection of privilege or *ex parte* information.

20. A significant proportion of the materials reviewed by the Independent Counsel are in Lingala, and have not been translated into one of the working languages of the Court. The Single Judge is thus completely dependent on the Independent Counsel's summary and assessment of the communications in question, and has no independent means of verifying whether the original versions of the summarised information contains specific details, which should not be transmitted to the Prosecution

21. The Single Judge is also unaware of the specific protective measures implemented in the Main Case. Due to their legitimate expectation that the contents of their email accounts were private and confidential, Messrs. Kilolo and Mangenda are unlikely to have designated certain communications as being "*ex parte*", nor would it necessarily be apparent from the contents of the emails that their subject matter concerned issues, covered by *ex parte* protective measures.

22. The mere fact that the DVDs containing the contents of the email accounts are being transmitted to a person, outside of the Defence, in itself constitutes a violation of the Trial Chamber's protective measures.

23. If the Trial Chamber continues to remain silent on this issue, it will create an appearance that Defence protective measures can be ignored or flouted at will.

24. If the Trial Chamber remains silent, the Trial Chamber will also be abrogating its positive duty under Article 64(2) of the Statute to "ensure that a trial is fair and

expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses”.

25. It is therefore imperative that the Trial Chamber takes immediate measures to ensure the continued enforceability of protective measures issued under its legal authority, in particular, by:

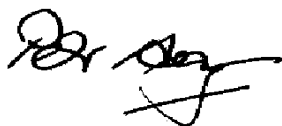
- ordering the Prosecution to deliver immediately the contents of the email accounts to the Defence; or in the alternative,
- ordering the Prosecution and the Registry to refrain from accessing the contents of the email accounts until further order; and
- ordering the Prosecution to disclose copies of the email accounts to the Defence so that the Defence can conduct an initial review, and identify materials which are privileged, subject to *ex parte* classifications, or constitute internal work product.

C. RELIEF SOUGHT

26. The Defence for Mr. Jean Pierre Bemba Gombo respectfully requests the Trial Chamber to

GRANT the Defence Request of 9 April 2014.

The whole respectfully submitted.



Peter Haynes QC
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The Hague, The Netherlands

2 May 2014