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Date: **19 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 Redacted Document
With
Confidential Annex A

Public Redacted Version of "Notice to the Trial Chamber of Article 70 Investigation and Request for Judicial Assistance to Obtain Evidence", 20 March 2013, ICC-01/05-01/08-2548-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") hereby notifies the Trial Chamber III ("Chamber'') that on the basis of information that has come to its attention, it 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"). The available evidence so far would indicate that close associates of Jean-Pierre Bemba Gombo (''Accused''), members of the 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 the 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 [REDACTED], 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 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 and thus has the opportunity also to further the bribery scheme in this way.

4. The Prosecution also inquired with the Registrar to determine if these payments represent legitimate disbursements from the [REDACTED], through persons associated with the Defence. After receiving information from the Registrar concerning the [REDACTED], 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 telephone conversations currently in the possession of the Registry. Additionally, the Prosecution [REDACTED].

II. Confidentiality

6. 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. Investigation Background

[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.

Anonymous Informant Leads to Western Union Evidence

7. On 14 June 2012 an anonymous informant ("informant") identifying [REDACTED] as a [REDACTED] sent an unsolicited email to the OTP Information Desk alleging a bribery scheme involving Defence witnesses in the instant case. The informant stated that four Defence witnesses would provide false testimony after a Central African Republic citizen in France had paid them money. The informant further stated that [REDACTED] could provide details about the purported bribery scheme.

8. From June 2012 to September 2012, the Prosecution exchanged emails with the informant seeking verifiable information, including the basis of the informant's 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][4] and [REDACTED][5], and the Defence disclosure on 13 July 2012. The informant identified [REDACTED] as the Central African Republic citizen paying bribes to other witnesses. 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.

9. 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

[4] [REDACTED].
[5] [REDACTED].

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].

10. At the same time the Prosecution was receiving this information about the Defence procuring fraudulent evidence, it noted (1) evidence of false documents included on the exhibit list of the Defence[6], (2) that the witness who may have played a role in forging those documents -- Narcisse ARIDO (D04-11) [7] – failed to travel to The Hague[8], and (3) that witness [REDACTED] (D04-7)[9] disappeared from The Hague in the middle of his testimony.

11. On the basis of the information indicating that payments were being made to Defence witnesses through Western Union, the Prosecution requested Austrian authorities to judicially order Western Union European Headquarters in Vienna, Austria to release information on the financial transactions of suspected individuals.

12. On 15 November 2012, the Prosecution also requested the Chamber to order the Registry to release information on [REDACTED].[10] On 13 December 2012, the [REDACTED].[11]

13. The information obtained from Western Union shows money transfers to Defence witnesses from individuals close to the Accused including: Aimé KILOLO,

[6] 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.
[7] 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.
[8] ICC-01/05-01/08-2329, Decision on the amended order of witnesses to be called by the defence, 3 October 2012, para. 4.
[9] ICC-01/05-01/08-T-251 ENG ET, 24 September 2012, page 1, line 21 to page 3 line 20.
[10] ICC-01/05-01/08-2412-Conf-Exp, Prosecution's Request for Record of Payments made by the Registry to Witnesses called by the Defence of Mr. Jean-Pierre Bemba Gombo, 15 November 2012.
[11] ICC-01/05-01/08-2481-Conf-Exp, [REDACTED].

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]. The recipients of the money via Western Union include the following witnesses: [REDACTED] (D04-52),[12] 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.

14. 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.[13] 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.[14]

15. 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.[15] No witness, except expert witnesses, has admitted to being paid by the Defence.

[12] [REDACTED].
[13] See Annex A at pages 3, 5, and 6.
[14] See Annex A with transfers from [REDACTED] to ARIDO (D04-0011) and [REDACTED] (D04-0038)
[15] See e.g. Testimonies of [REDACTED] (ICC-01/05-01/08-T-258-CONF-ENG CT, page 2 line 25 until page 3 line 10), [REDACTED] (ICC-01/05-01/08-T-260-CONF-ENG ET, page 6, lines 14-23), [REDACTED] (ICC-01/05-01/08-T-249-CONF-ENG ET, page 10, line 15 to page 11, line 2), [REDACTED] (ICC-01/05-01/08-T-265-CONF-ENG ET, page 15, lines 1-18).

16. 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 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.

17. 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.[16] 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.

18. The evidence from Western Union also suggests that KILOLO is providing the identities of witnesses [REDACTED] to those involved in the scheme in order for payments to be made.

19. KILOLO and MANGENDA are also receiving funds from BABALA, [REDACTED], possibly on behalf of the Accused, which would belie his official status as indigent.

[16] There is one payment of $83.2 from a [REDACTED] on 28.07.2007 (the relationship to the Accused, if any, is unknown to the OTP).

Evidence of the Accused's Facilitation of the Scheme

20. The Prosecution suspects that the Accused is orchestrating the scheme, [REDACTED]. Firstly, all of the individuals making the payments to witnesses have strong and close personal ties to the Accused, who would clearly benefit from prepared testimony calculated to exonerate him. Given the nature of the relationships between the Accused, his close associates, and his [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]. [REDACTED], apparently unaware of the bribery scheme, told the Prosecution in [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.

21. Further, on 5 November 2012 the Prosecution interviewed a [REDACTED] ("source") who is not willing to have his identity disclosed at this time.[17] 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. Without being prompted, the source volunteered that BABALA had contacted him in [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

22. The information from the source indicates that 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

[17] 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.

monitoring, since KILOLO is listed as his counsel. [18]

23. Although the source has a phone number for BABALA, he stated that BABALA's phone number was concealed when BABALA called to [REDACTED]. The phone number provided by several sources as belonging to BABALA is [REDACTED]. This number is also confirmed as belonging to BABALA by CAR-OTP-0044-0071 and CAR OTP-0044-0037, reports of forensic analyses of BEMBA's seized SIM cards[19] that show that the Accused's SIM cards contained three numbers for BABALA: [REDACTED],[20] [REDACTED],[21] [REDACTED].[22]

24. In addition to the evidence from the source, the Prosecution received information from [REDACTED] on the KILOLO-BABALA connection. [REDACTED] says that he learned from [REDACTED][23] that KILOLO was releasing confidential information about the case to BABALA, and included that information in a filing.[24] In response, the Defence strenuously denied [REDACTED] 's claim and denounced it as an "outrageous slur on [KILOLO's] professional character."[25] 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.

25. [REDACTED]. [REDACTED]. 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

[18] 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."
[19] Authorities in Belgium and Portugal seized the Accused's SIM cards at the time of his arrest. On BEMBA's SIM cards he has three numbers for BABALA: [REDACTED].
[20] *See* CAR-OTP-0044-0071 at 0085.
[21] *See* CAR-OTP-0044-0071 at 0080.
[22] *See* CAR-OTP-0044-0037 at 0060.
[23] [REDACTED].
[24] [REDACTED].
[25] [REDACTED].

daily basis, follows the party's activities […]."[26] 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."[27] [REDACTED].

26. In sum, there exists evidence that payments have been made by KILOLO, BABALA, and other persons associated with the Accused to Defence witnesses; that the Accused communicates with BABALA; which leads to a legitimate suspicion that the Accused, himself may be directing the payments to the witnesses; and that efforts are being made, including through the use of [REDACTED]. If established, these acts would constitute violations 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.

IV. Additional Investigation

27. The Prosecution seeks authorization from the Chamber to take the following two 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) [REDACTED]. These steps are minimally intrusive, and are likely to produce direct information relevant to the Prosecution's investigation.

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

28. 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." Pursuant to Articles 61(11) and 64(6)(a) of the Statute, the Trial Chamber may exercise any function of the Pre-Trial Chamber. 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."

29. 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 an independent reviewer as set forth in more detail below.

30. Regulation 174(1) of the Regulations of the Registry (''RoR'') provides that "all telephone conversations of detained persons <u>shall</u> be passively monitored, other than those with counsel, diplomatic or consular representatives, representatives of the independent inspecting authority, or officers of the Court."[28]

31. The Prosecution's understanding is that in fact all calls made by the Accused are recorded, but that recordings of calls made with counsel are never reviewed in order to comply with Regulation 174(1) of RoR. Accordingly, any conversations that the Accused has had with BABALA will have been recorded, whether they were identified to the Detention Centre authorities as calls being made to BABALA or were disguised as calls being made to KILOLO, as described above in paragraphs 21 to 24.

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[28] *Emphasis added.*

32. The evidence gathered to date indicates that the 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.[29] 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.[30] In order to protect those interests and to ensure that its inquiry is as narrowly focused as possible, the Prosecution proposes contracting with an independent counsel who can review the recorded calls. In cooperation with the Registry, the counsel will be instructed (1) to identify calls to BABALA, whether made directly and openly or in a disguised manner through a phone registered to KILOLO; and (2) calls made to BABALA (or even legitimately to a member of the defence team) [REDACTED]. From those calls, the independent counsel will be instructed to identify any calls that are relevant to the investigation described in this filing. In addition, the independent counsel should have access to the telephone log to determine the date and time of relevant calls. 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.

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[29] 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."

[30] See Rule 73 of Rules.

33. The proposed investigative step to obtain the Accused's calls to BABALA and to third parties is 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. To the extent the Accused is disguising his calls to BABALA by registering the telephone number as belonging to KILOLO, the Accused cannot claim that the calls are privileged and/or immune from monitoring. 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 conversations with 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.

34. 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.[31] 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".[32] 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.

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[31] 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.

[32] ICC-01/05-01/08-325, Decision on Re-classification of Monitoring Reports, 16 December 2008, paras. 8 and 12.

35. However, should the Chamber hold that Regulation 92 of Regulations 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 of Regulations 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.[33]

36. The Prosecution further requests that the Chamber [REDACTED].[34] At an appropriate time in its investigation, however, [REDACTED].

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

V. Relief Requested

38. The Prosecution respectfully requests that the Chamber:

a) Order the Registry to verify whether any of the following telephone numbers -- [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 (1) all calls made to BABALA and (2) all calls made to third parties through BABALA. The Registry should make available to the independent counsel all calls of the Accused that could potentially be to BABALA, including calls made to numbers identified as KILOLO but in fact to BABALA.

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[33] 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.
[34] [REDACTED].

c) Order the Registry to provide to the independent counsel all telephone log information pertaining to calls identified as "relevant" by the independent counsel.

d) Should the Chamber apply Regulation 92 of Regulations the Prosecution applies under Regulation 92(4) of Regulations for an Order not requiring the disclosure of requested information until such time that disclosure would not prejudice the investigation; [REDACTED].

e) [REDACTED].

VI. Conclusion

39. These are serious allegations of offences against the administration of justice. The Prosecution is aware of the far-reaching implications of these allegations on the instant case and with regard to the protection of witness. The Prosecution therefore respectfully requests both confidentiality and urgency. The Prosecution respectfully requests that the Chamber grant the relief requested.

Fatou Bensouda, Prosecutor

Dated this 19th Day of May 2014

At The Hague, The Netherlands