

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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Date: 26 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's response to the Public Redacted Version of Defence Addendum 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 “Public Redacted Version of Defence Addendum to the Defence Urgent Request for Disclosure and Injunctive relief concerning Privileged Defence communications” (“Addendum”).¹ The Addendum, like its preceding Request,² should be dismissed as it solely concerns the *Prosecutor v. Bemba et al.* case (“Article 70 case”) and the powers of Pre-Trial Chamber II, and provides no cogent arguments in support of the Request.

II. Submissions

2. As the Prosecution has previously indicated,³ the Chamber should reject both the Request and the Addendum, as it is not seized of the matters related to the Article 70 case.⁴

3. The Addendum, purporting to “update the Chamber with the new developments in the Article 70 case”,⁵ raises further alleged issues in relation to the appointment and work of the Independent Counsel in the Article 70 case, which cannot be properly decided by Trial Chamber III (“Chamber”). Pre-trial Chamber II and its Single Judge are vested with the sole authority to issue orders for the purposes of the Article 70 investigation, including the appointment of an Independent Counsel. This Chamber cannot decide on the validity of such orders, legitimately issued in accordance with the legal framework of the Court. The only body with the authority to review orders issued by a Chamber of this Court is the Appeals Chamber.

¹ ICC-01/05-01/08-3062-Red.

² Defence Urgent Request for Disclosure and Injunctive relief concerning Privileged Defence communications, ICC-01/05-01/08-3036, 9 April 2014.

³ ICC-01/05-01/08-3058.

⁴ ICC-01/05-01/08-3058, paras. 11-12.

⁵ ICC-01/05-01/08-3062-Red, para. 6.

4. From this, it follows that the Single Judge's justification for referring the email accounts of suspects Kilolo and Mangenda to the Independent Counsel⁶ is irrelevant here; and so is the Defence's assessment of the "fail[ure]" of the Single Judge to address various factors listed in the Addendum.⁷ As the Chamber has no power to review decisions issued by another Chamber it cannot make determinations regarding these issues.⁸ The suspects in the Article 70 case have had the opportunity to submit their views regarding the referral of these materials before the Single Judge.⁹

5. The Defence continues to make unclear, unspecific and unsubstantiated allegations regarding the alleged transmissions of privileged information to the Prosecution in the Article 70 proceedings.¹⁰ In so doing, the Defence refuses to acknowledge that the actions the Single Judge took in appointing the Independent Counsel were not made in disregard of the rights that Mr. Bemba enjoys in this case, but to protect them. Moreover, these measures were taken in the context of an authorised and clearly delineated investigation into allegations of offences against the administration of justice committed in relation to this case, and in order to protect the integrity of these proceedings. Thus, the Defence's argument that the mere transfer of email accounts to a person outside of the Defence "in itself constitutes a violation of Trial Chamber's protective measures"¹¹ cannot be entertained for the simple reason that the Independent Counsel is not just "a person", but a judicially appointed and supervised expert tasked with filtering potentially privileged information from information that cannot be so designated.

⁶ See ICC-01/05-01/08-3062-Red, para. 10.

⁷ ICC-01/05-01/08-3062-Red, para. 9.

⁸ See ICC-01/05-01/08-3062-Red, para. 9.

⁹ See, e.g., 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-01/05-01/13-335, ICC-01/05-01/13-343.

¹⁰ See ICC-01/05-01/08-3062-Red, paras. 11-18.

¹¹ ICC-01/05-01/08-3062-Red, para. 22.

6. Specifically, the Single Judge has noted that “counsel should be a really independent one, as opposed to one to be appointed by or acting in cooperation with the prosecution.”¹² The Single Judge has further clarified that the Independent Counsel will not report to the Prosecution, or transmit any materials to it, but to the Chamber.¹³ The fact that the Defence in *this* case does not accept the Single Judge’s appropriate exercise of his discretion in appointing the Independent Counsel in *another* case, does nothing to transform the matter into a cognizable issue. This is even more so, as the Addendum fails to advance any legal grounds calling into question the Single Judge’s assessment of the Independent Counsel’s suitability to perform his specific tasks. The Defence’s arguments concerning the lack of safeguards and “independent means” for containing privilege are thus speculative and baseless.¹⁴ The Addendum also asserts no substantive basis upon which the Independent Counsel’s impartiality and/or independence are legitimately contestable.

7. The Defence submissions regarding the allegedly deficient instructions to the Independent Counsel are also baseless.¹⁵ In the Decision referring the review of the DVDs containing the said email accounts to the Independent Counsel, the Single Judge observed that “appropriate measures need to be taken, *with a view to preventing undue access by either party to information of a privileged nature, as well as to ensuring that information of a private nature, or otherwise obviously irrelevant for the purposes of these proceedings, be promptly returned to their legitimate owners*”.¹⁶ He tasked the Independent Counsel “with reviewing the DVDs, with a view to identifying any item which is privileged or otherwise obviously irrelevant for the purposes of these proceedings.”¹⁷ Article 54(1) of the Rome Statute is inherent in the notion of

¹² ICC-01/05-52-Red2, para. 7.

¹³ ICC-01/05-52-Red2, para. 7; ICC-01/05-01/13-366-Red, para. 10.

¹⁴ ICC-01/05-01/08-3062-Red, paras. 19-20.

¹⁵ ICC-01/05-01/08-3062-Red, paras. 14-15.

¹⁶ ICC-01/05-01/13-366-Red, p. 7 (emphasis added).

¹⁷ ICC-01/05-01/13-366-Red, pp. 7-8.

“relevant” materials for the purpose of the proceedings, and denotes the inclusion of both incriminating and exonerating material. Thus, contrary to the Defence’s assertions, sufficient guarantees have been put in place to protect privileged information in the case. For the same reasons, the Prosecution reiterates that it is unable to disclose the contents of the email accounts until after they are extracted from the DVDs, transferred to the Independent Counsel pursuant to the extraction protocol in the Article 70 case, and released by the Single Judge.¹⁸

III. Relief Requested

8. The Prosecution requests the Chamber to dismiss the Request and the Addendum.



Fatou Bensouda, Prosecutor

Dated this 26th Day of May 2014

At The Hague, the Netherlands

¹⁸ See ICC-01/05-01/13-366-Red, p. 10.