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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 with Confidential Ex parte Prosecution and Defence Annexes A and B,
Confidential Annex C*

Public Redacted Version of Defence Reply for the Abuse of Process Motion

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

Fatou Bensouda

Jean-Jacques Badibanga

Counsel for the Defence

Peter Haynes QC

Kate Gibson

Melinda Taylor

Legal Representatives of the Victims

Marie-Edith Douzima-Lawson

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for the Victims

Paolina Massidda

The Office of Public Counsel for the Defence

Xavier-Jean Keita

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and Reparations Other
Section**

A. INTRODUCTION

1. The Prosecution “Response to the Defence Request for Relief for Abuse of Process” (the Response) only serves to confirm the existence of an egregious abuse of process, which warrants an unconditional stay of the proceedings. In its Response, Prosecution has not contested the following:

- i. That the Prosecution disseminated confidential information concerning protected Defence witnesses to national authorities, without seeking prior authorisation from the Trial Chamber to do so;
- ii. That the Prosecution did not disclose timeously information within its possession concerning the credibility of Defence witnesses;
- iii. [REDACTED];
- iv. That the Prosecution obtained a litigation advantage in the Main Case *via* the Article 70 case, it obtained information concerning Defence witnesses and Defence strategy that it would not have otherwise received, and this informed its strategy and conduct in the Main Case.

2. Where such violations are not contested, the question is not whether Mr. Bemba has the right to a remedy, but what the remedy should be. The Prosecution has also attempted to:

- i. Mitigate the gravity of its conduct by attributing responsibility to the Trial Chamber and the Single Judge in the Article 70 case, and/or ring-fence Article 70 matters from any form of judicial scrutiny in the Main Case;
- ii. Rely on definitions for lifting privileges and immunities, and legal privilege, which are not supported by the ICC legal framework, and which it has failed to substantiate;
- iii. Advance a definition of conflict of interests based on legal presumptions rather than factual realities; and
- iv. Claim that the Defence suffered no prejudice, notwithstanding clear examples to the contrary.

3. The Prosecution’s attempt to rely on Mr. Bemba’s alleged conduct must be dismissed. Until a final judgment is rendered in the Article 70 case, it is inappropriate to rely

on unproved accusations before another Chamber. In any case, the Chamber's duty to ensure the fairness of the trial, pursuant to Article 64(2) is not dependent on the conduct of the defendant; the defendant cannot waive the fairness and impartiality of the proceedings.¹

4. Unless this case is stayed, there will remain an appearance that justice was not served, that this was not an adversarial trial, and that from the minute that the Prosecution first seized the Trial Chamber with Article 70 allegations, the Defence case became nothing more than a façade, whilst the real trial was conducted behind closed doors between the Prosecution and the Chamber.

B. SUBMISSIONS

The Prosecutor cannot rely on findings of Pre-Trial Chamber II in order to shield its conduct from accountability in the Main Case

5. Since the Article 70 case became public, almost every Prosecution filing has either directly or indirectly referenced the Article 70 allegations against Mr. Bemba. The Prosecution has, on multiple occasions, utilised or sought to utilise information in the Main Case, which consisted of the fruits of its investigation in the Article 70 case.² Almost every Defence witness was questioned in relation to matters that came within the knowledge of the Prosecution as a result of its Article 70 investigations.³ The Prosecution has, moreover, quite blatantly continued to utilise the Article 70 case to obtain access to information that it concedes falls outside the scope of the confirmed charges in the Article 70 case, and to which it would not have access under the regular Main Case disclosure regime.⁴

6. Legal privilege is, moreover, intrinsically tied to Mr. Bemba's rights in the Main Case. It derives from Articles 67(1)(b) and (g) and serves to protect the right to effective representation in the Main Case, and Mr. Bemba's privilege against self-incrimination as concerns allegations in the Main Case.

¹ *Prosecutor v. Milošević*, 'Reasons for Decision on Assignment of Defence Counsel', 22 September 2004, paras. 29-33.

² ICC-01/05-01/08-2548-Red4; [REDACTED].

³ [REDACTED].

⁴ ICC-01/05-01/08-2412; ICC-01/05-01/08-2548; [REDACTED].

7. Article 21(3) further requires the Trial Chamber to respect internationally recognised human rights, which demand that every violation of a right must be justiciable and remedied,⁵ and also require a judicial remedy as concerns all monitoring of communications.⁶ As conceded by the Prosecution,⁷ no judicial order was issued in domestic courts or at the ICC, to monitor the privileged communications of Mr. Bemba. Given that the Prosecution circumvented the Detention rules and regulations by obtaining indirect access to Mr. Bemba's communications *via* the telephone calls of Me. Kilolo and Mr. Manganda, Mr. Bemba was denied standing in the domestic proceedings which reviewed these actions,⁸ denied the right to invoke the remedies for detention monitoring set out in the ICC Regulations,⁹ and has never been accorded the right to contest at first instance, or to seek appeal or reconsideration regarding these decisions in the Article 70 case.¹⁰

8. In formulating Rule 73(1), the drafters also deliberately included an explicit reference to Article 67(1)(b) in order to ensure that the process for identifying and protecting privilege should not encroach upon the confidentiality of Defence communications.¹¹ Since Mr. Bemba's privilege pertains to the Main Case, it follows that Rule 73(1) requires that measures be taken to protect Mr. Bemba's rights in the Main Case. Rule 73(1) was binding on both the Pre-Trial Chamber and the Trial Chamber: the Court was obliged to take measures to ensure the protection of Mr. Bemba's rights in the Main Case.

9. Rule 73(1) vests privilege in the client; only the client can waive it. Yet, Mr. Bemba has been denied any standing to assert privilege or take steps to protect the Defence file,¹² and, apart from one limited occasion, both the Single Judge and the Trial Chamber rejected requests from the Defence to allow involvement in the process for identifying privilege so that he could suggest redactions or raise issues otherwise unknown to the Independent Counsel or Single Judge.¹³

⁵ Human Rights Committee, General Comment no. 31, para. 15, CCPR/C/21/Rev.1/Add.13

⁶ A/HRC/27/37, para. 41.

⁷ See Annex A.

⁸ ICC-01/05-01/13-424-Annex1, p.7.

⁹ ICC-RoR221-03/14-3.

¹⁰ The Single Judge found that the Defence had no standing to contest decisions that had been issued on an *ex parte* basis in the situation phase (ICC-01/05-01/13-787). The Pre-Trial Chamber refused to consider its impact on the admissibility of the evidence on the grounds that it "cannot review previous decisions issued by the Single Judge or by other organs of the Court": ICC-01/05-01/13-749, para. 10.

¹¹ D Piragoff, *Evidence* in R. Lee (ed) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, pp.359-360.

¹² ICC-01/05-01/13-41-Red; [REDACTED]; ICC-01/05-01-13-51.

¹³ ICC-01/05-01/13-41-Red; [REDACTED]; ICC-01/05-01-13-51.

10. Notwithstanding the fact that the emails of Me. Kilolo and Mr. Mangenda contain privileged correspondence, drafts, and information affecting Mr. Bemba's privilege against self-incrimination, and this privilege vests in Mr. Bemba and not his former Counsel (who has a potential conflict of interest as concerns the identification and assertion of privilege in relation to allegations pertaining to his own alleged culpability), the Single Judge has allowed the Defence of Me. Kilolo to vet the contents in relation to privacy issues but refused to allow Mr. Bemba standing to assert privilege, or identify material that was part of the Defence casefile, and which should thus be transmitted to his current Defence team irrespective of the personal wishes of Me. Kilolo.¹⁴

11. The Trial Chamber's duty to remedy any unfairness emanating from the Article 70 case extends to the actions of the Independent Counsel. The Independent Counsel is not a judge: he is an individual, who was granted access to a range of sensitive privileged and *ex parte* materials in the Main Case.

12. The fact that at least some of this material was subject to Main Case protective measures in itself brought his actions within the jurisdiction of this Trial Chamber. To give another example, if the Prosecution incorrectly names a protected witness from case A in open session in case B, the fact that the Trial Chamber in case B allowed this to occur does not exclude the duty of the Trial Chamber in case A to request that this information be redacted, or take measures in connection with that improper disclosure.¹⁵ The Trial Chamber's duty to scrutinise the actions of the Independent Counsel was heightened by the lack of Defence involvement in the vetting process and fact that neither the Single Judge nor Independent Counsel was in a position to be apprised as to what might be *ex parte*, or to assess the impact or prejudice to the rights of Mr. Bemba in the Main Case.

13. The Trial Chamber's overarching duty to redress any negative consequences linked to the flawed vetting process conducted by the Independent Counsel is also in line with the Appeals Chamber's finding that even if the Chamber cannot disturb the existence of a confidentiality agreement between the Prosecution and third parties under Article 54(3)(e), it

¹⁴ ICC-01/05-01-13-51; Article 19 of the Code of Conduct.

¹⁵ *Prosecutor v. Aleksovski*, 'Finding of Contempt by the Tribunal', 11 December 1998, which concerned measures taken by the Aleksovski Chamber in connection with the fact the Counsel for Mr. Blaškić had disclosed the name of a person (who was a protected witness in the Aleksovski case) in the Blaškić case.

is still required to assess the implications of such an agreement on the trial and to take measures to counteract any prejudice.¹⁶

14. The right to a fair trial is a “concept broadly perceived and applied, embracing the judicial process in its entirety”;¹⁷ it cannot be confined to discrete aspects of the proceedings, nor can it be excluded from aspects (such as the Article 70 investigations), which have a direct influence and impact on the course of bringing Mr. Bemba to justice in the Main Case.

15. The Appeals Chamber also based its conclusion that the abuse of process doctrine applies to the ICC on ECHR decisions issued in relation to fair trial violations under Article 6 of the ECHR.¹⁸ In reaching its conclusions in these cases, the ECHR was required to rule on decisions issued by another judicial entity. The Appeals Chamber therefore envisaged that the duty to ensure a fair trial could necessarily entail a duty to review and consider the impact of decisions issued by another judicial entity on the overall fairness of the proceedings. This jurisdiction to determine collateral issues that affect the fairness of the criminal case before it, even if the issues are the subject of pending litigation in another court, also exists in domestic jurisdictions.¹⁹

16. In the seminal *Barayagwiza* decision, the ICTR Appeals Chamber also found that it had competence to consider the cumulative impact of violations committed by the Prosecution, the Registry and the Pre-Trial Chamber. In so doing, it was not sitting in appeal in relation to the individual decisions of the Pre-Trial Chamber (which had not been appealed at the time by the Defence), but was rather assessing the cumulative effect of the prejudice caused by them.²⁰

The Prosecution cannot unilaterally violate Defence privilege and immunities on the basis of suspicions, conjecture, or unverifiable allegations.

17. The Prosecution’s hypothesis that the information requested from States concerned criminal activity was never verified in advance by an independent and impartial judicial entity. The Prosecution requests for assistance in relation to money transfers were issued in

¹⁶ ICC-01/04-01/06-1486, paras. 3, 48.

¹⁷ ICC-01/04-01/06-1486, para. 37.

¹⁸ ICC-01/04-01/06-1486, para. 38.

¹⁹ See Article 18 of the Kosovo Criminal Procedure Code.

²⁰ *Barayagwiza*, Appeals Chamber, ICTR, 3 November 1999, para. 109.

2012.²¹ [REDACTED].²² On the contrary, the requests were processed by the executive – such as the Ministry of Justice.²³ The Presidency decision on waiver, which was issued approximately a year after States accessed confidential information concerning Defence finances and interactions with witnesses, did not address these investigative actions.

18. There is no indication that the Prosecution was in possession of evidence that the recipients of the specific transfers of Western Union funds *etc.*, were engaged in any criminal activity at the time that it requested States to access and monitor the accounts of Defence team members, and protected Defence witnesses. The Prosecution advanced funds to its own witnesses in this case;²⁴ it cannot claim that transfers between Defence and potential witnesses is therefore *ipso facto* criminal. As demonstrated by the Defence, transfers between third parties and members of the Defence could also be for legitimate purposes, such as the provision of funds for Mr. Bemba's detention unit expenses.²⁵

19. The dearth of concrete evidence in the Prosecution's possession at this juncture is underscored by a finding of the Single Judge, eight months after the first requests for assistance to States were issued, that:

The very premise of the Prosecutor's Request - i.e., the fact that the Prosecutor needed the assistance of the Chamber in accessing information - shows that the [OTP], whilst working on an investigative scenario, has not yet come to a determination as to whether there are reasonable grounds to believe that an offence within the context of article 70 has indeed been committed...²⁶

20. In a decision on Defence requests for access to particulars concerning the anonymous informant, the Single Judge also declared that the information provided by this person could not be considered to be evidence;²⁷ if that is so, then it follows that it would not have constituted an appropriate foundation for investigative measures impacting on fundamental rights of the Defence.

²¹ [REDACTED].

²² [REDACTED].

²³ See Confidential Ex parte Annex B.

²⁴ [REDACTED]; CAR-OTP-0065-0017; CAR-OTP-0065-0018; CAR-OTP-0065-0900; CAR-OTP-0065-0923.

²⁵ ICC-01/05-01/13-71, para. 15.

²⁶ ICC-01/05-50, para. 9.

²⁷ ICC-01/05-01/13-337, p.5.

21. The Prosecution accordingly embarked on a fishing expedition; requesting States to violate Defence privileges and immunities at a time when there was no actual evidence of criminal activity, only a mere suspicion. The abuse of process doctrine is predicated on the principle that the end does not justify the means.²⁸ The fact that the Prosecution might have eventually obtained incriminating evidence does not justify the fact that the prosecuting authorities broke or disregarded enforcement rules and regulations in order to obtain it.

22. Customary international law does not support such a low threshold for the delineation or the lifting of functional immunity.²⁹ The fact that the Prosecution, on a unilateral basis, considers that conduct falls outside the scope of functional immunity because it is criminal, does not exclude the application of APIC. Article 26(1) of APIC contemplates that functional immunities entrusted to the Defence must be lifted where “they would impede the course of justice.” If acts, otherwise covered by Article 18, automatically fall outside the scope of Article 18 if the acts are linked to a criminal activity, then it would not have been necessary to have incorporated the Article 26(1) waiver process. The obligation to lift in Article 26(1) cuts both ways: there is an obligation to lift in order to ensure that the course of justice is not frustrated, but this obligation is predicated on a presumption that immunities continue to apply until such time as they are lifted.³⁰ This presumption of functional immunity, which can only be rebutted by the entity conferring immunity, was confirmed by the International Court of Justice in its Advisory Opinion of 29 April 1999.³¹

23. The analogy with *Rašić* is inapposite. The Prosecution requested States to access confidential and privileged information concerning the Defence. This falls within the factual parameters of the *Gotovina* case, where, upon suggestion of the ICTY Prosecution, the

²⁸ ICC-01/04-01/06-722, para. 29.

²⁹ See for example, Press Release, “Statement on Immunities of UN Staff”, 1 December 1998 (allegations must be detailed, and substantiated by investigation by specific evidence) <http://www.un.org/press/en/1998/19981201.gaab3275.html>; Anthony J. Miller, “Privileges and Immunities of United Nations Officials”, *International Organizations Law Review* 169 (2007), 247, regarding requirement of investigation substantiating credible allegations of criminal conduct.

³⁰ See also UNDT/NY/2010/027/UNAT/1659, para. 26 that immunities must be lifted before UN officials can be prosecuted for corruption charges; UNDT/2010/175, paras. 55-56, whether acts fall within functional immunity must be vested in the UN, and not the State seeking to displace immunity, even if there is an allegation that the acts fall outside the scope of the person’s duties.

³¹ Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion of 29 April 1999, I.C.J. Reports 1999, p.62 at paras. 57-65. See also Separate Opinion of Judge Weeramantry, pp.96-97.

Croatian authorities seized documents from Defence investigators.³² That the Prosecution considered that the seizure would help it to demonstrate that the Defence had engaged in wrongdoing was not a basis to ignore functional immunity.³³ The Appeals Chamber affirmed that unless functional immunity was waived, State parties were obliged to respect it when implementing orders of the Chamber or requests for assistance,³⁴ and that it could have been prosecutorial misconduct if the Defence had established that the Prosecution had explicitly requested Croatia to undertake the investigative steps in question.³⁵ In contrast, in *Rašić* (and *Vujin*), no investigative acts were undertaken by States; the issue of immunity did not arise because States were not requested by the Prosecution to engage in conduct that would have violated Defence immunity.

It is unnecessary for the Defence to demonstrate the impact of the access to information by national authorities?

24. International customary law sets out a right to a remedy *whenever* privileges and immunities are breached,³⁶ as is the case with the disclosure of confidential Defence information to States. Moreover, given that the Chamber evinced great concern, and [REDACTED],³⁷ [REDACTED],³⁸ it would be completely unfair and discriminatory to apply a higher evidential threshold as concerns the Chamber's assessment of the risk which has resulted to the Defence.

The "crime fraud" exception is inapplicable, and the criteria for its application were not satisfied

25. The text of Rule 73(1) and its drafting history do not support the existence of an independent "crime fraud" exception. The rule is drafted in an exhaustive manner, and the possibility of including a separate crime fraud exception was considered, but rejected.³⁹ The ASP expressly declined to include a fraud exception to privileged communications in the

³² Gotovina immunity decision, paras. 2-5, 40.

³³ Gotovina immunity decision, paras. 2-5.

³⁴ Gotovina immunity decision, paras. 38-45.

³⁵ Gotovina immunity decision, paras. 56-59.

³⁶ *Case concerning United States diplomatic and consular staff in Tehran*, Judgment 24 May 1980, ICJ Reports 3, para. 90.

³⁷ [REDACTED].

³⁸ [REDACTED].

³⁹ D. Piragoff, *Evidence* in R. Lee (ed) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, p.359.

Code of Conduct. It is also notable that neither the Regulations of the Court nor those of the Registry provide for a crime-fraud exception to privileged detention communications.⁴⁰

26. The Prosecution's attempt to rely on the STL framework undermines its argument. The wording of Rule 163(iii) of the STL RPE replicates the ICC rule, except for the explicit inclusion of a crime fraud exception. If the crime fraud exception could be read into the current wording of Rule 73(1) then it would not have been considered necessary to add an exception to Rule 163(iii). The *Bangura* case did not concern covert surveillance of privileged communications, and the crime fraud exception referred to therein was far narrower than that adopted by the Single Judge.⁴¹ Adoption of this precedent would have also required the Court to adopt a more flexible interpretation of privilege, which would have encompassed the former Case Manager.⁴²

27. In any event, this exception does not lift privilege unless it can be shown that the specific communications have been made in furtherance of a crime: mere relevance is insufficient. The evidential threshold for such a finding is high.⁴³ Given that the ICC regulations require the Prosecution/Registrar to establish "reasonable grounds to believe" that the defendant has engaged in misconduct in order to obtaining monitoring of non-privileged communications,⁴⁴ a similar if not more vigorous threshold should have applied to privileged communications. By the Single Judge's own concession, this threshold was not met at the time that the Prosecution obtained access to this information.⁴⁵

28. Moreover, the safeguards set out by the STL concerning the application for such an exception were not met.⁴⁶ At the time Mr. Bemba's privileged communications were monitored and disclosed to the Prosecution on an *ex parte* basis, there were no ICC regulations or case law envisaging such a possibility or such a manner of proceeding. No attempt was made to respect the principles of necessity or proportionality or otherwise to circumscribe the monitoring of those communications which were in themselves, criminal in

⁴⁰ See Regulation 97 of the Regulations of the Court and Regulation 175(2) of the Regulations of the Registry.

⁴¹ Privilege would only be lifted in extremely compelling or exceptional circumstances, and there would need to be evidence that the specific discussion itself directly concerned the alleged crime, as opposed to being "relevant" to it: Decision on Prosecutor's Additional Statement of Anticipated Trial Issues and Request for Subpoena in relation to the Principal Defender', 3 September 2012, para. 24.

⁴² *Ibid.*, paras. 13-23.

⁴³ *Liberty v. United Kingdom*, Application no. 58243/00, Judgment, 1 July 2008, paras. 60-69; *Bangura supra*.

⁴⁴ Regulation 101 of the ROC; Regulation 175(1) of the RoR.

⁴⁵ ICC-01/05-50, para. 9.

⁴⁶ 'Order on Conditions of Detention', Case No. CH/PRES/2009/01/rev, 21 April 2009, paras. 19-20.

nature or made in furtherance of a crime. Rather, the Single Judge instructed the Independent Counsel to transmit all evidence which was relevant to the Article 70 investigation.⁴⁷ As a result, huge swathes of information concerning Defence strategy and legal advice were included, even though they related to the professional relationship between Mr. Bemba and his Defence, and did not involve any criminality *per se*, such as the draft witness questionnaires.⁴⁸

29. The Single Judge reasoned that privilege cannot be claimed if it would impede the Prosecution's investigations,⁴⁹ subverting the notion of privilege and the protection against self-incrimination. Rather than assessing the scope of privilege on an objective basis by reference to the professional relationship between Mr. Bemba and his Defence, and the rights of Mr. Bemba under Article 67(1)(b), the Single Judge determined privilege *ex post facto* by reference to the relevance and utility of the information to the Prosecution's Article 70 investigations.

30. For example, in the Article 70 Confirmation Decision, the Pre-Trial Chamber cites one conversation between former Lead-Counsel and Case Manager on the basis that it 'contextualised' the allegations against the defendants.⁵⁰ Apart from the fact that 'contextualisation' does not equate to furtherance of a crime, the conversation in question contains an account of the views of the present Lead Counsel concerning the credibility of a witness. Clearly the strict necessity and proportionality criteria as concerns the application of the crime-fraud exception is not met concerning such views.

31. [REDACTED]⁵¹ [REDACTED],⁵² [REDACTED].

32. In terms of the date and manner in which the Prosecution accessed the detention unit communications of Mr. Mangenda, Regulation 32(3) sets out a presumption of access once a party has been notified with the electronic links to a document. If the Prosecution wishes to assert that it did not access these records, it was required to adduce concrete evidence or

⁴⁷ ICC-01/05-52-Red2, p.8.

⁴⁸ ICC-01/05-01/13-408, p.6.

⁴⁹ ICC-01/05-01/13-408, p.5.

⁵⁰ ICC-01/05-01/13-749, para. 67.

⁵¹ [REDACTED].

⁵² [REDACTED].

affidavits as to this fact.⁵³ [REDACTED]⁵⁴ without explaining what those means were, particularly given that previous assertions concerning, for example, the purpose of payments to Mr. Bemba in the UNDU, have had no factual basis.

33. [REDACTED].⁵⁵

The fact that Article 70 charges can, in theory, be joined to the Main Case, does not mean that no conflict of interest arose in this case

34. A legal possibility does not equate to a factual reality. It is obvious that not-every situation involving article 70 offences will trigger a conflict of interest. Examples include disclosure of confidential information by journalists or third parties not linked to the participant in the case. This is different from the current situation, in which the Prosecution accessed information in the Article 70 case that it would not have otherwise been entitled to through the disclosure regime and jurisprudence in the Main Case,⁵⁶ and used that information to its advantage in the Main Case.⁵⁷

The existence of the Article 70 case does not justify the Prosecution's failure to disclose information concerning the credibility of Defence witnesses

35. The spirit underpinning Rule 77 is clearly violated in circumstances where the Defence is ambushed with material, which could have had an impact on its trial strategy, after the close of the Defence case.⁵⁸

36. It is erroneous to claim that the defendant's alleged knowledge of matters allegedly affecting the credibility of Defence witnesses absolved the Prosecution from its disclosure obligations. Firstly, it is for the Chamber to determine whether disclosure should take place. At a minimum, the Prosecution should have put the matter to the Chamber to decide; the above-mentioned Article 54(3)(e) judgment requires the Chamber to adjudicate such matters, notwithstanding the fact that the Prosecution might have extrinsic confidentiality obligations. Indeed, if the Prosecution was unable to effect disclosure at that point in time without compromising its Article 70 confidentiality obligations, as in the *Lubanga* case, the

⁵³ ICC-01/09-01/11-1312.

⁵⁴ [REDACTED].

⁵⁵ [REDACTED].

⁵⁶ ICC-01/05-01/46; ICC-01/05-50; ICC-01/05-01/13-52-Red2; ICC-01/05-01/13-48; ICC-01/05-01/13-62-Red; ICC-01/05-01/13-140-Red; ICC-01/05-01/13-179; ICC-01/05-01/13-181; ICC-01/05-01/13-182; ICC-01/05-01/13-185.

⁵⁷ ICC-01/05-01/08-2910; [REDACTED] and Annex C.

⁵⁸ Cf. ICC-01/04-01/07-2617, para. 4.

appropriate response might have been to stay the proceedings, rather than compromising the fairness of the trial.

37. Secondly, Mr. Bemba is presumed innocent, and his alleged role in such matters has not been established. Thirdly, the fact that a person might know of a fact does not exempt the Prosecution from its duty to disclose material in its possession concerning that fact. In *Krstić*, for example, the Prosecution was criticised for failing to disclose intercepted conversations of the accused, even though he was presumably aware of their contents.⁵⁹ There is no obligation on the Defence to request the material; the Prosecution must fulfil its obligations independently of such requests.⁶⁰ Indeed, in a 23 August 2012 filing, the Prosecution expressly undertook to disclose material concerning the credibility of Defence witnesses on an ongoing basis.⁶¹

38. The Prosecution's obligations were also not fulfilled by putting the existence of its suspicions to the witnesses and not the evidential foundation. The case law is clear. Firstly, it is patently inadequate for the Prosecution to disclose the existence of information and not the evidence concerning that information.⁶² The disclosure of some information also does not (and certainly without prior judicial approval) exempt it from the general obligation to disclose other evidence on this point.⁶³ Secondly, in order to confront a witness with allegations of impropriety, fairness dictates that both the witness and the Defence must be disclosed the foundation for such allegations, or the allegation must be withdrawn.⁶⁴

The Trial Chamber's referral of the matter to the Single Judge did not cure the contamination caused by the nature and timing of its exposure to the allegations

39. The Prosecution Response fails to address the principle of open justice and the damage done to this principle when key evidential discussions take place during closed doors over a prolonged period. Between September 2012 and November 2013, the Chamber

⁵⁹ *Krstić Appeals Judgment*, 19 April 2004, paras. 173-174.

⁶⁰ ICC-02/05-03/09-501, para. 34.

⁶¹ ICC-01/05-01/08-2283, paras. 4, 14.

⁶² "The fair trial concept demands not only that the Prosecution, pursuant to the plain language of the Rule, disclose to the Defence in sufficient time "the existence of evidence", but also, as the Prosecution has rightly pointed out, that it actually provide the Defence with all of the exculpatory evidence in question "as soon as practicable"", *Prosecutor v Brđanin and Talić*, Decision on "motion for relief from rule 68 violations by the prosecutor and for sanctions to be imposed pursuant to rule 68bis and motion for adjournment while matters affecting justice and a fair trial can be resolved", 30 October 2002, para. 24.

⁶³ ICC-02/05-03/09-501, para. 40.

⁶⁴ *Prosecutor v. Krajišnik*, Decision on Cross-Examination of Milorad Davidovic, 15 December 2005; *Prosecutor v. Gotovina et al*, Transcript of 30 September 2009, T.22352-T.22355.

received at least 12 *ex parte* submissions,⁶⁵ which have never been reclassified to allow Defence access.

40. The record demonstrates the impact of such submissions on the appearance of the Chamber's impartiality. After having received extensive *ex parte* Prosecution submissions which sought to attribute contradictions and inconsistencies in witness testimony to threats by the MLC and/or the Defence (which were not disclosed to the Defence until a year later),⁶⁶ the Chamber implemented stringent measures which prevented the Defence from questioning witnesses on key issues regarding witness payments and [REDACTED].⁶⁷

41. [REDACTED].⁶⁸ [REDACTED],⁶⁹ [REDACTED],⁷⁰ [REDACTED].⁷¹

42. In such circumstances, there is an objective appearance that the Chamber's decision to prevent the Defence from pursuing a relevant line of inquiry was influenced by *ex parte* proceedings, including the Prosecution's blatant attempts to rehabilitate the credibility of P-178, and *ex parte* arguments that it was important that the witness not be stressed by the Defence's cross-examination.⁷²

43. In contrast to the rigorous manner in which the Chamber restricted the cross-examination of Prosecution witnesses, the Prosecution was given unfettered licence to cross-examine Defence witnesses on this question,⁷³ notwithstanding the absence of any evidential foundation for doing so.

44. There is also an objective appearance that after the Chamber was exposed to *ex parte* submissions impugning the credibility of the Defence and Defence witnesses, Defence witnesses were accorded disparate treatment to their Prosecution counterparts.

⁶⁵ Filings no. 2875, 2871, 2849, 2826, 2730, 2589, 2587, 2563, 2515, 2487, 2430, 2325.

⁶⁶ [REDACTED].

⁶⁷ [REDACTED].

⁶⁸ [REDACTED].

⁶⁹ [REDACTED].

⁷⁰ [REDACTED].

⁷¹ [REDACTED].

⁷² [REDACTED].

⁷³ [REDACTED]; D-57, T-258-Red-ENG-WT, p.2, line 25–p.3, line 10; D-64, T-260-Red-ENG-WT, p.6, lines 14-23; D-51, T-263-Red-ENG-WT, p.14, lines 6-20; D-55, T-265-Red-ENG-WT, p.15, lines 7-18; [REDACTED]; D-16, T-277-Red-ENG-WT, [REDACTED], p.39, lines 4-11; D-45, T-297-Red-ENG-WT, p.18, line 17–p.20, line 5; T-299-Red-ENG-WT, p.24, lines 11-16; D-2, T-322-Red-ENG-WT, p.26, line 6–p.27, line 9; D-9, T-323bis-Red-ENG-WT, p.21, lines 22-23; [REDACTED].

45. As examples, although the Presiding Judge had opined that it was appropriate to inform a Victim-Witness that the Chamber was confident she was speaking the truth,⁷⁴ due to the fact *inter alia*, that she was ‘vulnerable’,⁷⁵ Judge Aluoch intervened to question the veracity of D-51,⁷⁶ notwithstanding the fact that as someone who had suffered horrendously during the conflict,⁷⁷ he was also ‘vulnerable’.

46. Moreover, whereas the Chamber assumed that the notes in P-178’s possession were recorded during the hearing and permitted him to testify with them in front of him without disclosure,⁷⁸ the Chamber confiscated notes from D-45, and ordered that they be transmitted to the Prosecution for use in cross-examination.⁷⁹ The only difference in the two scenarios is that in the second, the Chamber had by then been exposed to *ex parte* submissions regarding the Article 70 allegations.

47. Prejudice must be presumed whenever the principle of open justice is violated, without any procedural guarantees having been put in place to protect the interests of the Defence.⁸⁰ As poignantly remarked by the Registry,⁸¹ the Defence chair was empty throughout these crucial hearings. [REDACTED]. Given the uniquely *ex parte* nature of the Prosecution’s allegations tendered during the Defence case, there will always be an appearance of reasonable doubt as to what the outcome would have been if the Defence had been accorded a contemporaneous opportunity to address and rebut them, ensuring that any preconceptions did not calcify.

48. In line with *Hartman*,⁸² the appearance of an objective lack of impartiality also inheres in the manner in which the Trial Chamber oversaw, and provided direct guidance to the Prosecution in connection with its *ex parte* investigations into the Defence.⁸³

⁷⁴ T-221-Red-ENG-WT, p.14, lines 22-24.

⁷⁵ T-222-Red-ENG-WT, p.3, lines 15-25.

⁷⁶ ICC-01/05-01/08-T-263-Red-ENG-WT, pp.21-22.

⁷⁷ [REDACTED].

⁷⁸ [REDACTED].

⁷⁹ [REDACTED].

⁸⁰ *Piersack v. Belgium*, ECHR, judgment of 1 October 1982, Series A No. 53, para. 30; *Hauschildt v. Denmark* (1990) 12 EHRR 266, para. 48; *Bulut v. Austria*, ECHR, judgment of 22 February 1996, Reports of Judgments and Decisions 1996-II-347, at 356 (paras. 31-33); *Du Cubber v. Belgium* (1984) 7 EHRR 236, at 243, para. 24; and *Gregory v. United Kingdom* (1997) 25 EHRR 577, at 593, para. 45.

⁸¹ T-303-Red3-ENG-WT, p.10.

⁸² *In the case against Hartmann*, IT-02-S4-R77.5, Report of Decision on Defence Motion Pertaining to the Nullification of the Trial Chamber’s Orders and Decisions, 19 May 2009, paras. 5, 53.

⁸³ [REDACTED].

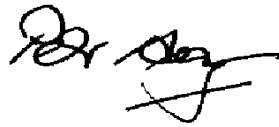
C. RELIEF SOUGHT

49. The Defence for Mr. Bemba requests the Trial Chamber to:

STAY the proceedings; and

RELEASE Mr. Bemba to Belgium or Portugal.

The whole respectfully submitted.

A handwritten signature in black ink, appearing to read 'Peter Haynes', with a stylized flourish at the end.

Peter Haynes QC

Lead Counsel of Mr. Jean-Pierre Bemba

The Hague, The Netherlands

30 January 2015