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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 Annexes I, II, III, X*  
*Public Redacted Annexes IV, V, VI, VII, VIII*  
*And Confidential Annex IX*

**Public Redacted Version of Defence Request for Relief for Abuse of Process**

**Source:** Defence for Mr. Jean-Pierre Bemba Gombo

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

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Other  
Section**

## A. INTRODUCTION

1. The current request concerns at least three years of abuse compressed into forty pages. Through a combination of different actions over this time period, the constituent elements of Mr. Jean Pierre Bemba Gombo's right to a fair, impartial and independent trial have been ruptured, irreparably.

2. Privileges and immunities have been stamped on, documents and casefiles seized, privileged phone conversations recorded and listened to, Mr. Bemba's cell and his Defence Office raided, and his lawyers arrested. And the trial continued as if nothing had happened.

3. For several months in 2012 and 2013, the Prosecution and the Trial Chamber engaged in a secret dialogue concerning the credibility of Defence witnesses, while those witnesses were testifying. The Defence was kept in the dark.

4. Although the Prosecution had the power to initiate an Article 70 investigation, it also had a corresponding duty under Article 54(1)(c) to ensure that its investigations and prosecutorial actions were consistent with Mr. Bemba's right to a fair trial in the Main Case. The Prosecution did not comply with this duty.

5. Rather than attempting to establish "Chinese walls", the Prosecution mined the results of its Article 70 investigation to obtain a litigation advantage in the Main Case. All the while, it sat on clearly disclosable information that could have had a fundamental impact on the future strategy of the Defence and the effective representation of Mr. Bemba. Its goal was not to preserve the integrity of the proceedings but merely to win.

6. The Prosecution's investigative powers are strictly circumscribed by its duty to respect the Statute and Rules (including Articles 48 and 67(2) and Rule 73(1)), and to "fully respect the rights of persons arising under the Statute", as per Article 54(1)(c) of the Statute. The permissibility of investigative acts cannot be construed in a vacuum; rather, "the Prosecution is bound to act with due care to ensure that investigative techniques will by no

means affect at a later stage the right of accused persons to a fair trial.”<sup>1</sup> Notwithstanding prosecutorial independence, the Chamber is empowered and indeed required to intervene to provide a remedy in circumstances in which the actions of the Prosecution have violated the rights of the Defence.<sup>2</sup>

7. In conducting its investigations into the credibility of Defence witnesses and evidence, the Prosecution:

- a. Requested States to perform actions which violated the privileges and immunities of the Defence;
- b. Received privileged information concerning Defence strategy and instructions from Mr. Bemba, internal work product, and *ex parte* information;
- c. Employed sharp trial tactics by failing to disclose information concerning the credibility of Defence witnesses and evidence, and failing to put its case to these witnesses; and
- d. Repeatedly attempted to contaminate the ability of the Trial Chamber to adjudicate the case impartially.

8. The actions mandate only one response: a permanent stay of the proceedings and release of Mr. Bemba. Apart from the fact that the constituent elements of a fair trial have been destroyed, a strong judicial response is required to ensure that the halls of the ICC are never again contaminated by such illegal and abusive conduct.

## **B. PROCEDURAL HISTORY**

9. Two months into the Defence case, on 15 November 2012, the Prosecution submitted an *ex parte* request for the record of payments made by the Registry to Defence witnesses.<sup>3</sup> In so doing, the Prosecution informed the bench that it was conducting parallel Article 70 investigations concerning these witnesses.<sup>4</sup>

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<sup>1</sup> ICC-01/04-01/07-621, para. 39.

<sup>2</sup> ICC-01/04-01/07-621, para. 55. See also ICC-01/04-01/06-2582, paras. 47-48.

<sup>3</sup> ICC-01/05-01/08-2412, para. 1.

<sup>4</sup> ICC-01/05-01/08-2412, para. 1.

10. The Trial Chamber did not dismiss the request as falling outside its competence, but instead, ordered the Registry to provide observations.<sup>5</sup> The Registry's resultant observations provided detailed information that formed the implicit underpinning of the Prosecution's future interrogation of Defence witnesses.<sup>6</sup>

11. On 20 March 2013, the Prosecution submitted a new *ex parte* Article 70 request, which included information regarding Western Union financial transactions from a certain "Babala" to various Defence witnesses.<sup>7</sup>

12. Three weeks later, the Trial Chamber convened an *ex parte* Status Conference with the Prosecution.<sup>8</sup> The Prosecution informed the Chamber that it planned to obtain assistance from a number of States in order to access Defence information,<sup>9</sup> and requested authorisation to monitor Defence calls.<sup>10</sup> In turn, the Chamber requested further particulars concerning the Prosecution's strategy and past investigative actions.<sup>11</sup>

13. On 26 April 2013, the Chamber finally ruled that it had "no competence on the request of the Prosecution of 20 March 2014", and directed the matter to the Pre-Trial Chamber.<sup>12</sup>

14. On 3 May 2013, the Prosecution filed a confidential *ex parte* request in the CAR situation,<sup>13</sup> in which the Prosecution requested the Chamber to order the Registry to i) verify

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<sup>5</sup> ICC-01/05-01/08-2421, para.3.

<sup>6</sup> [REDACTED]; T-258-Red-ENG-WT, p.2, line 25 – p.3, line 9; T-260-Red-ENG-WT, p.6, lines 14-23; T-263-Red-WT, p.14, lines 6-20; T-265-Red-ENG-WT, p.15, lines 7-18; T-268-Red-ENG-WT, p.78, line 22 – p.79, line 12; T-274-Red-ENG-WT, p.34, lines 2-14; [REDACTED]; T-277-Red-ENG-WT, p.39, lines 4-11; T-297-Red-ENG-WT, p.18, line 17 – p.20, line 5; T-299-Red-ENG-WT, p.24, lines 11-16; T-322-Red-ENG-WT, p.27, line 24 – p.28, line 21; T-323bis-Red-ENG-WT, p.21, lines 22-23; T-334-Red-ENG-WT, p.17, lines 23-25; T-335-Red-ENG-WT, p.19, lines 8-13; T-337-Red-ENG-WT, p.40, lines 3-6; T-337-Red-ENG-WT, p.40, lines 13-20; T-339-Red-ENG-WT, p.41, lines 18-19; T-342-Red-ENG-WT, p.13, lines 1-10; T-345-Red-ENG-WT, p.12, line 4 – p.15, line 6.

<sup>7</sup> ICC-01/05-01/08-2548-Red4, para. 11.

<sup>8</sup> ICC-01/05-01/08-T-303-Conf-Red3-ENG-ET.

<sup>9</sup> ICC-01/05-01/08-T-303-Conf-Red3-ENG-ET, pp. 6-7; CAR-OTP-0071-0529 (money allegations); CAR-OTP-0077-1483 (money allegations); CAR-OTP-0073-0615 (money allegations).

<sup>10</sup> ICC-01/05-01/08-T-303-Conf-Red3-ENG-ET, p.4.

<sup>11</sup> ICC-01/05-01/08-T-303-Conf-Red3-ENG-ET, p.5.

<sup>12</sup> ICC-01/08-01/05-2606-Red.

the identity of persons corresponding to telephone numbers; ii) provide – via an Independent Counsel – all logs and recordings of communications between Mr. Bemba and Mr. Babala that could be relevant to the Prosecution. The Prosecution also requested that the disclosure of such records should not be notified to Mr. Bemba, and that it be granted authorisation to contact Defence witnesses directly (without the knowledge of the Defence).

15. Two days after being designated as Single Judge, Judge Tarfusser granted all four requests, albeit without the imposition of an Independent Counsel at this stage.<sup>14</sup>

16. On 27 May 2014, the Single Judge ordered the Registry to give the Prosecution the complete log of all telephone calls placed or received by Mr. Bemba at the Detention Centre, as well as any available recording of all non-privileged calls either placed or received by him.<sup>15</sup>

17. On 19 July 2014, the Prosecution requested recordings of telephone intercepts from the Dutch and Belgian governments of Mr. Bemba's Lead Counsel Aimé Kilolo, and Jean-Jacques Mangenda, his Case Manager.<sup>16</sup> The Single Judge granted this on 29 July 2013, and ordered the Registrar to appoint an Independent Counsel to review such recordings and to transmit to the Prosecutor the relevant portions of all calls, which might be relevant to the investigation.<sup>17</sup>

18. [REDACTED].<sup>18</sup>

19. On 10 October 2013, pursuant to a Prosecution request,<sup>19</sup> the Single Judge ordered the VWU to provide the Prosecutor with all available telephone contact information for all 62 Defence witnesses, all available telephone contact information for VWU mobile phones issued to Defence witnesses during their stay in the Netherlands, and clarification as to

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<sup>13</sup> ICC-01/05-01-46, para. 1.

<sup>14</sup> ICC-01/05-46.

<sup>15</sup> ICC-01/05-50-Red.

<sup>16</sup> ICC-01/05-52-Red2, para. 2.

<sup>17</sup> ICC-01/05-52-Red2, pp. 7-8.

<sup>18</sup> [REDACTED].

<sup>19</sup> ICC-01/05-60-Red, quoted in ICC-01/05-61-Red, p.4.

whether Me. Kilolo had specific authorisation to contact Defence witnesses D04-23 and D04-26 during overnight adjournments in their testimonies.<sup>20</sup>

20. On 20 November 2013, the privileges and immunities of Me. Kilolo and Mr. Mangenda were lifted by the Presidency at the request of the Single Judge.<sup>21</sup>

21. On 24 November 2013, Jean-Pierre Bemba, Me. Kilolo, Mr. Mangenda and Fidèle Babala were arrested.<sup>22</sup>

## C. SUBMISSIONS

### 1. The Prosecution requested States to perform actions which violated Defence privileges and immunities

22. Breaches of privileges and immunities do not constitute technical infringements: they go to the heart of the ability of the Defence to perform its work.<sup>23</sup> They ensure the ability of the Defence to perform its functions in an independent manner, which is also consistent with Defence confidentiality, as set out in Article 67(1)(b) and (g) and Rule 73(1).

23. Although these immunities apply vis-à-vis States and not the Prosecution itself, the Prosecution cannot arrogate to itself the right to assess, on a completely *ex parte* basis, whether activities fall within the proper remit of the Defence or their witnesses and whether privileges and immunities should attach vis-à-vis States. The Prosecution cannot play the roles of investigator, prosecutor and judge on such matters. The Court would be unable to function in the environment that it does unless the power to confirm the scope of immunities and to lift them is vested in an impartial entity. To put it one way, if the Trial Chamber or ICC were to ratify the right of any entity, other than the entity designated by the Statute or APIC, to determine the proper scope and content of immunities, then it would open a

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<sup>20</sup> ICC-01/05-62-Red, p.5.

<sup>21</sup> ICC-01/05-68.

<sup>22</sup> <http://www.icc-cpi.int/EN/Menu/icc/press%20and%20media/press%20releases/pages/pr962.aspx>.

<sup>23</sup> *Prosecutor v. Gotovina et al.*, Decision on Gotovina Defence Appeal Against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, (Gotovina Immunities Decision), 14 February 2011, para. 31.

Pandora's Box to States to do exactly the same in other cases, which would vitiate the very purpose of the Court's immunities.<sup>24</sup>

24. The Prosecution failed to request any such waiver during the course of its investigations and was thus aware that Defence immunities applied in full force. It is an abuse of power for the Prosecution to request States to undertake investigative steps, which contravene their own legal obligations. This is particularly the case where those legal obligations protect fundamental rights of the Defence. In such circumstances, it does not matter that the immunities *could* have been waived, what matters is that they were not waived at the time the investigative actions occurred. It is an abuse of process for the executive to take shortcuts to further its own objectives at the expense of respect for the law.<sup>25</sup>

25. Inviolability of Defence information ensures the protection of Defence witnesses and investigations from arbitrary interference from national authorities.<sup>26</sup> Eroding this principle will erode the confidence of potential witnesses and sources that their cooperation with the Defence will remain strictly confidential, and expose actual witnesses and sources to risk.

26. From 2012 onwards, the Prosecution was aware of incidents of unlawful violations of Defence immunities by national authorities. The first incident concerned an attempt by Cameroonian authorities to search the baggage of Ms. Kate Gibson, apparently at the behest of the French and Belgian authorities.<sup>27</sup> The Cameroonian authorities had received information that Ms. Gibson was working for the Defence of Mr. Bemba, although this information had never been disclosed by the Defence or the ICC.<sup>28</sup>

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<sup>24</sup> *Case concerning United States diplomatic and consular staff in Tehran*, Judgment, 24 May 1980, ICJ Reports 3, paras. 83-85.

<sup>25</sup> *R v. Horseferry Road Magistrates' Court, Ex parte Bennett*, [1994] 1 A.C. 42. Lord Lane CJ, citing *Reg. v. Hartley* [1978] 2 N.Z.L.R. 199, 216-217.

<sup>26</sup> Gotovina Immunities Decision, para. 31 and fn. 88.

<sup>27</sup> Email from Mr. Mangenda, 5 March 2012, Subject: Confidentiel-Rapport Mission de la Défense au Cameroun (Annex IV).

<sup>28</sup> Defence Report on Mission to Cameroon, 1 March 2012, addressed to the Registrar, Deputy Registrar, Counsel Support Section, Special Adviser to the Registrar on External Relations, Trial Chamber III (Annex V).

27. Although the Defence requested the Registry to conduct an urgent inquiry into the incident, no substantive response was received. [REDACTED].<sup>29</sup>

28. [REDACTED].<sup>30</sup>

29. The Trial Chamber and the Prosecution also heard evidence of the intimidation of Defence witnesses at the hands of the [REDACTED].<sup>31</sup>

30. However, rather than condemning these acts, and investigating the perpetrators, the Prosecution requested the very same implicated States (DRC, Belgium, [REDACTED]) to continue such illegal activity. The Prosecution also widened the net to others, by:

- i. Requesting Austria to transmit financial records from Western Union concerning both Defence team members, and protected Defence witnesses or person related to them;<sup>32</sup>
- ii. [REDACTED];<sup>33</sup>
- iii. [REDACTED];<sup>34</sup> and
- iv. Requesting Belgium and The Netherlands to record and transmit the telephone communications of Me. Kilolo and Mr. Mangenda.<sup>35</sup>

31. Article 18 (1)(c) of APIC establishes the inviolability of any information, documents, and materials in whatever form which relate to the functions of the Defence. This provision enshrines the confidentiality of all forms of Defence correspondence – including emails and telephone communications with potential witnesses. Information concerning bank records is

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<sup>29</sup> [REDACTED].

<sup>30</sup> [REDACTED].

<sup>31</sup> [REDACTED].

<sup>32</sup> ICC-01/05-01/08-2548; T-303-Conf-Red3.

<sup>33</sup> [REDACTED], attached as Annex I: the last page has been redacted in order to avoid possible further contamination of the Chamber.

<sup>34</sup> [REDACTED] (Annex II) – Cooperation request dated 15 November 2013.

<sup>35</sup> The Prosecution requested the Dutch authorities to record all communications involving the telephone numbers: 0032-495483939; 06-87128918; 070-5159252; 06-10231183; 06-5901751; 070-5158302: ICC-01/05-01/13-424-Annex1, p.3. [REDACTED] (Annex III).

also considered to fall within the type of information, which is covered by diplomatic and functional immunity.<sup>36</sup>

32. Mr. Bemba is not an indigent accused.<sup>37</sup> There is no prohibition as concerns the ability of his Defence team to receive and utilise any funds in connection with either Defence activities.<sup>38</sup> Mr. Bemba also has a right to receive money to make purchases at the detention unit,<sup>39</sup> and to have such funds transferred to him by members of his defence team.<sup>40</sup>

33. Accordingly, there is a presumption that any transfers between the Defence or persons associated with the Defence fall within the investigative functions of the Defence and, in the absence of a waiver from the Presidency, were protected from any form of domestic legal process or seizure by Article 18(1)(c) of APIC.

34. The Prosecution cannot in good faith assert that the mere occurrence of small payments between a party and persons connected to the case is inherently improper or outside the functions of Counsel, given its practice of providing money to intermediaries (some of whom were witnesses) in other cases before this Court,<sup>41</sup> and the current case.<sup>42</sup>

35. It is also apparent from the Prosecutor's submissions to the Trial Chamber that it only attempted to ascertain whether there was any link between these payments and Defence activity after it obtained the records.<sup>43</sup> The Prosecution thus requested States, which are parties to the Statute and APIC, to intrude into areas protected by Defence immunities, on the basis of a fishing expedition.

36. The Prosecution was also complicit in violations of Article 19(d) and (e) of APIC by requesting States to take measures to monitor the communications of Defence witnesses (such as the email accounts of Narcisse Arido), which would inevitably expose the national

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<sup>36</sup> *Liberian E. Timber Corp. v. Gov't. of Republic of Liberia*, 659 F. Supp. 606, 608 (D.D.C. 1987).

<sup>37</sup> ICC-01/05-01/08-76; [REDACTED] and [REDACTED]; ICC-RoC85-01/08-3.

<sup>38</sup> The prohibition under Article 22(1) of the Code of Conduct does not apply.

<sup>39</sup> Regulation 166(9) of the Regulations of the Registry.

<sup>40</sup> Article 18(4) of APIC extends the privileges and immunities of Counsel to persons assisting Counsel.

<sup>41</sup> See for example, ICC-01/04-01/06-2482, paras. 198-202; 308.

<sup>42</sup> See Annex IX.

<sup>43</sup> ICC-01/05-01/08-2548-Conf-Red, para. 4.

authorities to confidential information concerning Defence witnesses, their testimony, and their communications with Counsel concerning such testimony.<sup>44</sup>

37. Apart from the fact that the disclosure of such information to an entity outside the Court violated the Trial Chamber's protective measures,<sup>45</sup> the specific involvement of national authorities from [REDACTED], [REDACTED], Belgium and [REDACTED] compromised the confidentiality and security of the Defence. Yet, at no point in time did the Prosecution seek a judicial variation of the protective measures or consult with the VWU in order to ensure that the execution of such requests would not endanger or prejudice the witnesses' security.

38. In the absence of an explicit waiver of Defence immunity, the principle of inviolability of the information fully stands, and the information must be returned to the Defence.<sup>46</sup> In violation of this principle, the Prosecution put the fruits of its illegal investigation squarely before the Trial Chamber during an *ex parte* Status Conference.<sup>47</sup> It is also apparent that this information formed a key plank in the Prosecutor's subsequent requests to obtain further access to confidential Defence information.<sup>48</sup>

39. The Chamber's duty to uphold Mr. Bemba's right to a fair trial includes a positive obligation to take measures to ensure the confidentiality of Defence information.<sup>49</sup> Throughout this case, the Trial Chamber has evinced a vigorous concern to protect Prosecution witnesses from any form of exposure or threat, even going so far as to suggest that [REDACTED] were not being sufficiently vigilant in their assessment of Prosecution witnesses,<sup>50</sup> and [REDACTED].<sup>51</sup> Equality of arms (in particular, Article 67(1)(e)), demanded that the same concern should have been applied to Defence witnesses. The Prosecutor's abusive conduct has, however, shielded such matters from adversarial scrutiny and judicial oversight and thus ensured that this would not be the case.

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<sup>44</sup> [REDACTED].

<sup>45</sup> [REDACTED].

<sup>46</sup> Gotovina Immunities Decision; ICC-01/11-01/11-291.

<sup>47</sup> ICC-01/05-01/08-2548; T-303-Conf-Red3-ENG-ET.

<sup>48</sup> ICC-01/05-46, para. 1.

<sup>49</sup> Gotovina Immunities Decision, para. 68.

<sup>50</sup> [REDACTED].

<sup>51</sup> [REDACTED].

**2. The Prosecution received privileged information, including information concerning Defence strategy and instructions from Mr. Bemba**

40. For the last two years of this case, Mr. Bemba's right to maintain the privileged status of Defence communications was rendered meaningless. The Prosecution team in this case enjoyed virtually unfettered access to the communications between Mr. Bemba and his former lead counsel and case manager.

41. At a minimum, the Prosecution has received and is continuing to receive:

- a. Privileged internal work product, which had been communicated to potential witnesses under conditions of confidentiality; and
- b. Privileged communications between Mr. Bemba and members of his Defence, and between such Defence team members.

*a) Privileged internal work product, which had been communicated to potential witnesses and potential experts under conditions of strict confidentiality.*

42. The Prosecution confirmed that it received the contents of the email account of Mr. Arido directly from the French authorities on 23 January 2014, that is, without any prior vetting by the Independent Counsel, the Single Judge or the Registry.<sup>52</sup>

43. The Prosecution commenced reviewing the contents immediately, notwithstanding the fact that it had previously conceded that [REDACTED].<sup>53</sup>

44. Although he did not testify due to security concerns, Mr. Arido was a Defence witness, and was also instructed as a potential expert witness. In this capacity, he received information concerning Defence lines of inquiry, and potential Defence exhibits, which unless tendered in Court, remain protected by Defence privilege.

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<sup>52</sup> ICC-01/05-01/13-234-Red, para. 9.

<sup>53</sup> [REDACTED].

45. According to Prosecution disclosure in the Article 70 case, Mr. Arido's email account included correspondence with the VWU and Counsel detailing *ex parte* security concerns, and correspondence with Ms. Gibson (who is not the subject of the Article 70 investigations).<sup>54</sup> This information is privileged.<sup>55</sup>

46. Moreover, Defence materials and lines of inquiry shared with Mr. Arido should have remained privileged unless such aspects were incorporated into his testimony before the Court, or a finalised expert report.<sup>56</sup> Since Mr. Arido never testified or tendered an expert report, the privilege should have remained intact.

47. Even if the contents of Mr. Arido's email included correspondence that was not privileged, the absence of any mechanism for excluding privileged and *ex parte* material from the purview of the Prosecution constituted a fundamental violation of Mr. Bemba's rights, and once again, enabled the Prosecution to obtain improper access to information concerning Defence strategy and future arguments.

*b) Privileged communications between Mr. Bemba and members of his Defence, and between such Defence team members*

48. Notwithstanding its repeated protestations to the contrary, the Prosecution has received "legitimate" privileged Defence information through at least three different avenues:

- i. Requests for assistance directed to State authorities;
- ii. Information disclosed directly from the Detention unit; and
- iii. Information disclosed *via* the Independent Counsel.

49. Each will be addressed in turn.

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<sup>54</sup> Neither Mr. Bemba nor the Defence have ever waived privilege. To require the Defence to "prove" privilege by placing it before the Chamber would undermine the very protection that privilege serves to achieve.

<sup>55</sup> See ICC-01/05-01/08-3036, paras. 83-91; ICC-01/05-01/08-3084, paras. 22-25.

<sup>56</sup> This is the position regarding draft legal submissions, ICC-01/04-01/10-286, at p.7.

(i) *Requests for assistance directed to State authorities*

50. It can be extrapolated that the Prosecution requested, and obtained access from States to privileged communications from States for time periods, which predated the Single Judge's decision to lift privilege for specific communications.

51. [REDACTED].<sup>57</sup>

52. [REDCATED].<sup>58</sup> The only inference which can be drawn is that the Prosecution directed requests for assistance to other countries (for example the DRC or Cameroon when Me. Kilolo was on mission there) in order to circumvent legal safeguards in Belgium.<sup>59</sup>

53. [REDACTED]:<sup>60</sup>

[REDACTED].

54. And,<sup>61</sup>

[REDACTED].

55. [REDACTED].

56. [REDCATED].<sup>62</sup> [REDACTED].<sup>63</sup>

57. As a result, the Prosecution obtained access to confidential Defence sources, the contact details of protected Defence witnesses (and their precise location), and the details of all persons contacted by the Defence throughout the Defence case. The fact that the Prosecution was able to use its Article 70 powers in order to obtain such information is

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<sup>57</sup> [REDACTED].

<sup>58</sup> [REDACTED].

<sup>59</sup> See A/69/397, para. 44.

<sup>60</sup> [REDACTED].

<sup>61</sup> [REDACTED].

<sup>62</sup> [REDACTED].

<sup>63</sup> [REDACTED].

evidence of the fundamental inequality of arms between the Prosecution and the Defence in this case.

58. This inequality is evidenced by the disparate treatment afforded to the Defence in relation to its multiple attempts to obtain information and investigative assistance in relation to P-169 and P-178, in order to enable the Defence to explore the possibility of witness collusion and the provision of financial incentives in exchange for testimony.<sup>64</sup>

*(ii) Information transmitted via the Detention Unit*

59. Pursuant to the Single Judge's order, the Registry transmitted to the Prosecution the call data records of all communications between Mr. Bemba and other persons (including all members of his Defence), and the recordings of all "non-privileged" communications.<sup>65</sup>

60. Although the Prosecution's requests and the decisions of the Single Judge up until that point had categorised Mr. Mangenda as falling within the same category as Mr. Kilolo (in that it was presumed that his calls were covered by privilege),<sup>66</sup> [REDACTED].<sup>67</sup>

61. The Trim folder granting the Prosecution access was created on 3 June 2013.<sup>68</sup> It is therefore reasonable to assume that the Prosecution had access to all the communications between Mr. Bemba and Mr. Mangenda from this point onwards, and were thus privy to communications concerning potential strategy for any Defence witnesses called during this time period, and the formulation of legal arguments intended for the Defence Closing Brief.

62. Although the Prosecution has, themselves, described the contents as 'privileged',<sup>69</sup> the recordings were not notified to the Defence prior to their transmission to the Prosecution (as

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<sup>64</sup> [REDACTED]; ICC-01/05-01/08-2827, para. 15; ICC-01/05-01/08-3186-Red.

<sup>65</sup> ICC-01/05-50.

<sup>66</sup> In ICC-01/05-52-Red2, the Single Judge accepted the premise that Mr. Mangenda's communications with Mr. Bemba were governed by Rule 73(1) and that any recordings or transcripts should first be submitted to the Independent Counsel for review.

<sup>67</sup> [REDACTED].

<sup>68</sup> ICC-01/05-46.

<sup>69</sup> ICC-01/05-01/13-48, para. 1.

required by Regulation 175(10) of the Regulations of the Court). As such, the Defence had no opportunity to assert privilege over specific communications that might have been intimately tied to strategy devised by Counsel. The immediate transmission of the entirety of Mr. Mangenda's communications had the effect of revealing the content of communications between Mr. Bemba and his Defence, "thereby depriving rule 73(1) of the Rules of any practical effect".<sup>70</sup>

63. Apart from the fact that such information fell within the parameters of Rule 73(1), it should also have been protected from direct disclosure to the Prosecution by virtue of the fact that it constitutes 'internal work product', which is protected from disclosure by virtue of Rule 81(1), and includes reports, internal communications, analysis and subjective opinions of all members of the team.<sup>71</sup>

64. Whereas the Prosecution has an obligation pursuant to Article 67(2) and Rule 77 to lift internal work product privilege as concerns specific information falling within these disclosure obligations, the drafters deliberately refrained from imposing any reciprocal disclosure obligation or broad inspection obligation on the Defence.<sup>72</sup> Moreover, even if there might have been grounds to disclose specific information to the Prosecution, "[a]t all times, the Chamber has an absolute duty to ensure that any discretionary order it makes regarding defence disclosure does not derogate from the accused's right to a fair and impartial hearing in which his rights are fully safeguarded."<sup>73</sup>

65. If the Chamber had such a duty, then Mr. Bemba had a corollary right to expect that the Chamber would exercise this duty, and take steps to ensure that the disclosure of the recordings to the Prosecution did not prejudice Mr. Bemba's right to a fair and impartial hearing. This simply did not occur at any juncture of the proceedings.

66. The right to maintain the confidentiality of internal Defence work product is intrinsically tied to fair trial rights, including the right to silence and the defendant's privilege

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<sup>70</sup> ICC-01/04-01/10-314, p.6.

<sup>71</sup> ICC-01/04-01/06-2656-Red, para.17.

<sup>72</sup> ICC-01/04-01/06-T-254-Red-ENG, p.68; ICC-01/04-01/06-2192-Red, para. 63.

<sup>73</sup> ICC-01/04-01/06-1235, para. 33.

against self-incrimination.<sup>74</sup> The disproportionate transmission of hundreds of conversations including such information thus constitutes a fundamental breach of such rights.

(iii) *Information transmitted via the Independent Counsel*

67. The Independent Counsel failed to act as an effective mechanism for vetting legal privilege due to:

- a. insufficient judicial supervision over the performance of his tasks;
- b. lack of sufficient legal clarity concerning his mandate and the notion of ‘legal privilege’; and
- c. issues concerning the ‘independence’ and impartiality of the person tasked with this role.

68. Although the legal responsibility for appointing the Independent Counsel rests with the Article 70 Single Judge, the prejudice accrued in the Main Case. Such prejudice is therefore justiciable in the Main Case.

a) *Insufficient judicial supervision over vetting of privileged information*

69. The notion of an “Independent Counsel” is not supported by the texts of the ICC, or its jurisprudence. The Statute and Rules do not permit Judges to divest their judicial powers to an independent entity, particularly one, who is not subject to any obligations or professional controls. The establishment of such an entity therefore constitutes an “abuse of judicial discretion”.<sup>75</sup> In practical terms, it also resulted in a complete absence of effective scrutiny as concerns the impact of the transmission of certain information on the rights of Mr. Bemba.

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<sup>74</sup>ICC-01/04-01/06-1235, para. 27.

<sup>75</sup> Gotovina Immunities Decision, para. 69.

70. [REDACTED],<sup>76</sup> [REDACTED]. Although the Independent Counsel Reports were submitted to the Single Judge before transmission to the Prosecution, the communications were mostly in Lingala, and had not been translated into English or French prior to their transmission to the Prosecution.<sup>77</sup> The Single Judge clearly could not vet what he could not understand.

71. [REDACTED],<sup>78</sup> [REDACTED].<sup>79</sup>

72. As a result, the Prosecution received a plethora of information concerning Defence strategy in the Main Case, and the internal views of the Defence on the conduct of the proceedings and weight of evidence. Moreover, notwithstanding the fact that the Single Judge never made any findings that any other members of the Defence were involved in improper conduct, the Independent Counsel transmitted communications which relayed information explicitly attributed to Mr. Peter Haynes QC, Ms. Kate Gibson and Dr. Guenael Mettraux on matters pertaining to Defence strategy, thereby violating Mr. Bemba's right to privileged communications with these persons.

73. [REDACTED].<sup>80</sup> It further appears that the Second Report of the Independent Counsel might have been initially filed directly to the Prosecution, rather than on an *ex parte* Chamber, Independent Counsel only basis.<sup>81</sup>

74. In such circumstances, even if the Single Judge had been inclined to reject the Independent Counsel's suggestion to transmit the information in question to the Prosecution, it would have been impossible for the Single Judge to have done so due to the fact that the transmission was a *fait accompli*.

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<sup>76</sup> [REDACTED].

<sup>77</sup> ICC-01/05-01/13-108.

<sup>78</sup> [REDACTED].

<sup>79</sup> [REDACTED].

<sup>80</sup> [REDACTED].

<sup>81</sup> The Defence does not have access to the cover filing. The annex nonetheless states that it is "CONFIDENTIELLE ET EX PARTE RESERVEE AU CONSEIL INDEPENDENTE ET AU BUREAU PROCUREUR". The filing number also indicates that a corrigendum was issued at some point, which suggests that the mistake in addressees was only noticed after the document was distributed.

*b) Insufficient/inadequate legal guidance concerning the role of the Independent Counsel and the parameters of legal privilege*

75. Although the Chamber had the power to appoint a Counsel to act in the interests of the Defence, the Single Judge declined to do so. At the same time, the Single Judge failed to instruct the Independent Counsel to take measures to safeguard the rights of the Defence. To the contrary, it is apparent from the Single Judge's own description of the Independent Counsel's mandate that he was more analogous to a Second Prosecutor acting pursuant to Article 54, rather than an *ad hoc* Counsel for the Defence.<sup>82</sup>

76. The Single Judge further confirmed that the Independent Counsel's mandate was predicated on the "underlying assumption [...] that no professional privilege could be legitimately claimed whenever crimes were committed by the beneficiaries of such privilege".<sup>83</sup> in line with this proposition, if the Independent Counsel was of the view that the participants in the conversation were implicated in 'crimes', then any conversation involving these persons could be relayed to the Prosecution if it was relevant to their investigations.

77. The 'independence' of the Independent Counsel was further undermined by the fact that he sought and received directions from the Prosecution in relation to the execution of his tasks.

78. [REDACTED].<sup>84</sup> [REDACTED],<sup>85</sup> [REDACTED].<sup>86</sup>

79. [REDACTED].<sup>87</sup>

80. Relevance to the Prosecution ultimately trumped all else, including the rights of Mr. Bemba. For example, the Independent Counsel and Single Judge concluded that a draft

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<sup>82</sup> ICC-01/05-01/13-419-Anx, para. 7.

<sup>83</sup> ICC-01/05-01/13-419-Anx, para 7.

<sup>84</sup> [REDACTED].

<sup>85</sup> [REDACTED].

<sup>86</sup> [REDACTED].

<sup>87</sup> [REDACTED].

questionnaire for witnesses could be transmitted to the Prosecution, not because it did not fall within the context of the professional relationship between Mr. Bemba and his Defence as *per* Rule 73(1), but because it might “assist” the parties and the Chamber.<sup>88</sup>

81. Similarly, due to their ‘usefulness’, the Single Judge authorised the transmission of the contact details of potential witnesses and sources, and information concerning the finances of Defence investigations, notwithstanding the absence of any apparent evidence of illegality or specific link to the Article 70 allegation.<sup>89</sup>

*c) Lack of independence and impartiality of the Independent Counsel*

82. [REDACTED]. [REDACTED].<sup>90</sup> [REDACTED].

83. [REDACTED].<sup>91</sup>

84. However, apart from the fact that Mr. Badibanga continued actively to participate in Article 70 hearings after the Independent Counsel’s appointment, it would also appear that neither the Independent Counsel nor Mr. Badibanga disclosed the existence of this prior relationship to the Registry, the Prosecutor, or the Single Judge.<sup>92</sup>

85. The failure of both parties to disclose what was, at the very least, a factor that was relevant to the appointment of the Independent Counsel, creates a presumption of impropriety, from which adverse inferences should be drawn.

86. The existence of a potential conflict of interest impacts on the integrity and fairness of the proceedings, and potentially accords one party an unfair advantage over the other.<sup>93</sup> For these reasons, Counsel have a duty to “err on the side of caution” and disclose all information

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<sup>88</sup> ICC-01/05-01/13-408, p.6.

<sup>89</sup> ICC-01/05-01/13-408, p.6.

<sup>90</sup> [REDACTED].

<sup>91</sup> [REDACTED].

<sup>92</sup> Annex VI, Annex VII.

<sup>93</sup> ICC-01/09-02/11-365, para. 51.

that could be relevant to the possible existence of an impediment to acting as Counsel.<sup>94</sup> Failing to disclose a potential impediment, in itself, constitutes a violation of Counsel's duty of candour and good faith.<sup>95</sup> Due to Mr. Badibanga's unique position as a participant in both the Article 70 case and the Main Case, it was also incumbent on him to comport to the highest standards of professional conduct and to minimise any possibility of conflicts.<sup>96</sup>

87. If the prior relationship had no impact on the person's independence, this raises the question of why neither the Independent Counsel nor the Prosecution brought it to the attention of the Single Judge or the Registry, and why the Prosecution refused to disclose information concerning the potential existence of conflicts of interest in such a vigorous manner.<sup>97</sup>

88. [REDACTED].<sup>98</sup>

89. This appearance of impropriety is heightened by the fact that it appears that the Prosecution liaised directly with the Independent Counsel,<sup>99</sup> and provided the Independent Counsel with a list of codes, formulated by the Prosecution, in order to determine which calls were "relevant" to the Article 70 investigations, and should thus be transmitted to the Prosecution.<sup>100</sup> [REDACTED].<sup>101</sup> As noted above, the Independent Counsel intentionally broadened the scope of information that should be transmitted to the Prosecution due to his confidence that the Prosecution was best placed to determine relevance.

90. There is thus an ineluctable appearance that the Independent Counsel's performance of his mandate was influenced by his rapport with Mr. Badibanga. As a result, there was an "objective appearance of bias" or impropriety which vitiated the legality of the vetting process.<sup>102</sup>

<sup>94</sup> ICC-01/09-02/11-365, para. 55.

<sup>95</sup> *The Registrar v. Mr Hervé Diakiese* - Decision of the Disciplinary Board, DO-01-2010, paras. 47 and 48.

<sup>96</sup> ICC-01/05-01/13-648-Anx1, para. 7.

<sup>97</sup> ICC-01/05-01/13-237-Red, para. 8.

<sup>98</sup> [REDACTED].

<sup>99</sup> ICC-01/05-58-Red2, ICC-01/05-63-Red.

<sup>100</sup> ICC-01/05-63-Red.

<sup>101</sup> [REDACTED].

<sup>102</sup> ICC-02/05-01/09-76-Anx2, pp.4-5.

### **3. The Prosecution employed sharp trial tactics by failing to disclose crucial information in a timely manner**

91. Although the Prosecution is vested with a parallel mandate to investigate allegations of contempt, this mandate aims to ensure the integrity of the main proceedings,<sup>103</sup> not to frustrate or impede them.

92. As soon as the Prosecution received information concerning alleged improprieties that impacted on the credibility of Defence witnesses, it should have disclosed such information to the Defence pursuant to Rule 77.<sup>104</sup>

93. This did not occur. Although the Prosecution obtained evidence as early as 14 June 2012 concerning Defence witnesses,<sup>105</sup> the Prosecution waited until after the Defence case had closed, and then ambushed the Defence by the revelation of an Article 70 case.

94. If the material had been disclosed contemporaneously, the Defence could have put the allegations to the witnesses, and thereby tested their veracity. As a result of the fact that it was not in a position to do so (and given that the Prosecution had contaminated the Trial Chamber's appreciation of such testimony), the Defence was compelled to abandon its reliance on a raft of exculpatory testimony.<sup>106</sup> These "sharp trial tactics"<sup>107</sup> were thus unfair and prejudicial.<sup>108</sup>

95. Similarly, if the Prosecution suspected any wrongdoing on the part of the Defence, rather than allowing the integrity of the proceedings to be compromised through the continuation of such acts, the Prosecution should have requested the Trial Chamber to suspend the proceedings until the matter could be addressed. The Prosecution's failure to

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<sup>103</sup> ICC-01/09-01/13-1-Red2, para.20; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-A-R77.4, Decision on Interlocutory Appeals on Kosta Bulatović Contempt Proceedings, 29 August 2005, para. 21.

<sup>104</sup> ICC-01/04-01/06-2624.

<sup>105</sup> ICC-01/05-44-Red, para. 9.

<sup>106</sup> [REDACTED].

<sup>107</sup> *Prosecutor v. Krstić*, Appeals Judgment of 19 April 2004, para. 174.

<sup>108</sup> ICC-01/04-01/06-2693, para. 47.

seek an immediate resolution of issues that were central to the effective representation of Mr. Bemba compromised the integrity of the proceedings.<sup>109</sup>

#### **4. The Prosecution repeatedly contaminated the appearance of the impartiality of the proceedings**

96. The Prosecution first approached the Trial Chamber with *ex parte* information concerning “potential payments to Defence witnesses” on 15 November 2012:<sup>110</sup> that is, three months into the Defence case.

97. It was legally incorrect for the Prosecution to seize the Trial Chamber. This is beyond dispute.<sup>111</sup> Following this error, the Trial Chamber should immediately have directed the Prosecution to seize the Pre-Trial Chamber with its request. It did not. Instead, the Trial Chamber and Prosecution interacted on multiple occasions, and exchanged viewpoints as to how best to facilitate the Prosecution’s investigations.<sup>112</sup> At no point were measures taken to preserve Mr. Bemba’s rights.

98. For example, on 20 March 2013,<sup>113</sup> the Prosecution inundated the Trial Chamber with information concerning (a) its dealings with an anonymous informant concerning an alleged bribery scheme;<sup>114</sup> (b) alleged promises of benefits to Defence witnesses;<sup>115</sup> (c) allegations of false documents;<sup>116</sup> (d) details of money transfers between Me. Kilolo and Mr. Mangenda to nine Defence witnesses, all of whom are named;<sup>117</sup> (e) the alleged link between the results of the Prosecution’s investigation and the testimony of Defence witnesses;<sup>118</sup> (f) further

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<sup>109</sup> ICC-01/09-02/11-365, para. 46.

<sup>110</sup> ICC-01/05-01/08-2412, para. 1.

<sup>111</sup> See, Article 57(3)(a), Article 64(4), Article 70(2) of the Statute, and Rules 162 to 169.

<sup>112</sup> T-303-Conf-Red3-ENG-ET p.8, lines 16-20; p.24, lines 8-10.

<sup>113</sup> T-303-Conf-Red3-ENG-ET, p.8, lines 16-20.

<sup>114</sup> T-303-Conf-Red3-ENG-ET, p.4, line 25 – p.5, line 5, p.11, lines 5-8, p.13, lines 18 – p.17, line 22, p.19, line 24 – p.20, line 14, p.22, lines 3-8.

<sup>115</sup> ICC-01/05-01/08-2548-Red4.

<sup>116</sup> ICC-01/05-01/08-2548-Red4, para. 8.

<sup>117</sup> ICC-01/05-01/08-2548-Red4, para. 9.

<sup>118</sup> ICC-01/05-01/08-2548-Red4, para. 10.

<sup>119</sup> ICC-01/05-01/08-2548-Red4, para. 13.

<sup>120</sup> ICC-01/05-01/08-2548-Red4, para. 15.

investigative avenues the Prosecution was intending to pursue;<sup>119</sup> (g) the alleged role of the accused in facilitating the alleged “bribery scheme”;<sup>120</sup> and (h) allegations concerning Mr. Bemba and Me. Kilolo’s practice of circumventing the Registry’s telephone monitoring system.<sup>121</sup> Many of these issues (such as the authenticity of documents) concerned *sub judice* issues, which should have been litigated and resolved on an *inter partes* basis.

99. The subsequent 9 April *ex parte* Status Conference lasted 1.5 hours. The Prosecution was represented by Mr. Badibanga.<sup>122</sup> No argument can be made that the discussion was limited to technical or jurisdictional questions concerning judicial assistance. The Presiding Judge demonstrated an extensive knowledge of the Prosecution’s Article 70 investigation and its potential impact on the Main Case, and even proffered suggestions as to further investigative avenues.<sup>123</sup> The Chamber and the Prosecution engaged in a direct dialogue as concerns questions that were directly linked to the substance of the Prosecution’s allegations.<sup>124</sup> Most egregiously, the Prosecution used this *ex parte* conference as a forum for impugning the credibility and testimony of specific Defence witnesses on the basis of evidence that was never put to the witnesses.<sup>125</sup>

100. By the time that the Trial Chamber decided that it had “no competence” over the Prosecution’s request,<sup>126</sup> that is, five months after the first Article 70 request was filed, the damage had been done.

101. The Prosecution nonetheless continued to exhibit a deliberate disregard as concerns the need to preserve the rights of Mr. Bemba by peppering its submissions in **this case** with references to Article 70 allegations that are based on evidence that it is not admitted in this case.<sup>127</sup>

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<sup>119</sup> ICC-01/05-01/08-2548-Red4, para. 16.

<sup>120</sup> ICC-01/05-01/08-2548-Red4, para. 16.

<sup>121</sup> ICC-01/05-01/08-2548-Red4, paras. 21-23.

<sup>122</sup> ICC-01/05-01/08-T-303-Conf-Red3-ENG-ET, p.1.

<sup>123</sup> ICC-01/05-01/08-T-303-Conf-Red3-ENG-ET, p.8.

<sup>124</sup> See, for example, ICC-01/05-01/08-T-303-Conf-Red3-ENG-ET, p.16.

<sup>125</sup> ICC-01/05-01/08-T-303-Conf-Red3-ENG-ET, pp.26-27.

<sup>126</sup> ICC-01/05-01/08-2606-Red, para. 22.

<sup>127</sup> See for example, [REDACTED]; ICC-01/05-01/08-2940, p.4.

102. In particular, notwithstanding the fact that the Prosecutor itself recognised that placing specific information concerning the details of its Article 70 allegations could contaminate the impartiality of the Trial Chamber,<sup>128</sup> the Prosecution proceeded to do exactly that.<sup>129</sup>

103. Under the cloak of secrecy provided by an *ex parte* Status Conference in the Article 70 case, the Prosecution also intimated to the Single Judge (who was privy to the entire contents of the Article 70 case-file) that there was “space” to influence the Trial Chamber.<sup>130</sup> Having impressed on the Single Judge the importance of acquainting the Trial Chamber with the specific relevance of the Defence witness statements to the Article 70 case, the Prosecution then requested the Trial Chamber to consult with the Single Judge for the purpose of resolving a *sub judice* decision.<sup>131</sup> In essence, unbeknownst to the Defence, the Prosecution utilised the Single Judge as a mechanism for tainting the Trial Chamber, without leaving any footprint in the Main Case.

104. In terms of further instances of deliberate contamination, having been rebuffed in their attempts to introduce Article 70 as additional evidence after the Defence case had closed,<sup>132</sup> the Prosecutor exploited the discrete recall of P-169 in order to place further privileged information before the Trial Chamber. The Prosecutor submitted extracts from the third Report of the Independent Counsel, setting out a purported conversation between Me. Kilolo and Mr. Mangenda, which did not contain evidence pertaining to ICC payments to P-169, or alleged threats to P-169. Its lack of relevance to the hearing was born out by the fact that the Prosecutor did not tender the document or question P-169 in relation to it. The Prosecution was not even able to explain the potential relevance of the document in advance of the hearing, submitting only that its use was ‘to be determined’.<sup>133</sup>

105. The lack of an objective foundation for placing this document on its list creates the impression that the Prosecutor’s objective for doing so was to taint the re-examination of P-169 with the specter of the Article 70 case: i.e. to impugn any current Defence strategy that

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<sup>128</sup> ICC-01/05-01/13-T-5-Red2-ENG-ET, p.8 lines 14-25.

<sup>129</sup> ICC-01/05-01/08-3052-Red.

<sup>130</sup> ICC-01/05-01/13-T-5-Red2-ENG-ET, p.8, lines 1-14.

<sup>131</sup> ICC-01/05-01/08-3052-Red, p.12.

<sup>132</sup> ICC-01/05-01/08-3029.

<sup>133</sup> [REDACTED].

might have also been proposed by former Counsel, or imply that any deficiencies in the Prosecution case are somehow attributable to Defence misconduct. By placing these irrelevant and inadmissible documents on its list, the Prosecution ensured that the Chamber would read them, thus topping and tailing the Defence case with express prejudice.

106. The Prosecution has also placed privileged and sensitive information concerning the Defence case before the Plenary of Judges and the Appeals Chamber. In its response to the request to disqualify Judge Tarfusser from the Article 70 case, the Prosecutor cited its application for the arrest warrant.<sup>134</sup> Judge Tarfusser's response also cites virtually the entire gamut of evidence collected by the Independent Counsel.<sup>135</sup> As a consequence, in order to resolve the request, these materials would have been transmitted to the Plenary of Judges, which includes this Trial Chamber.<sup>136</sup>

107. The Prosecution engaged in similar conduct as concerns its submissions before the Appeals Chamber.<sup>137</sup>

108. As a result, almost every ICC Judge has been exposed to privileged information and substantial Prosecution accusations on the Defence case, whilst at the same time, the Defence in the Main Case has had no opportunity to assert its privilege of this information, or to respond to such arguments.

109. The presumption of judicial professionalism is rebuttable, and must be "viewed in the eyes of a reasonable observer".<sup>138</sup> The Prosecution fed the Trial Chamber a wealth of *ex parte* unproven and unsubstantiated allegations concerning the credibility of the Defence evidence, at a time when it was actually hearing the evidence of these witnesses. The Judges faced almost daily reminders from the Prosecution about the Article 70 investigation. Although the Defence was in the dark at the time, a retrospective reading of the transcripts reveals that the Prosecution was determined that the Chamber should not forget that the Defence evidence

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<sup>134</sup> ICC-01/05-01/13-404, footnote 57, citing paras. 16, 21, 27, 35, 49, 51, 60, 61, 116, 117.

<sup>135</sup> ICC-01/05-01/13-419-Anx, fn.7.

<sup>136</sup> See also ICC-01/05-01/13-511-Anx, para. 9.

<sup>137</sup> ICC-01/05-01/13-481-Red, paras. 7-8.

<sup>138</sup> ICC-02/05-03/09-344-Anx, para. 14.

was allegedly tainted. Each Defence witness was asked about payments made to them.<sup>139</sup> The Prosecution consistently asked witnesses whether they knew, or had been in contact with other witnesses on the Western Union list.<sup>140</sup> Indeed, the Prosecutor specifically informed the Single Judge in the Article 70 case that steps were needed to collect evidence concerning Defence communications on an urgent basis as the Defence case was coming to a close.<sup>141</sup>

110. As emphasised by Trial Chamber I, where questions have arisen concerning “a highly contentious and potentially important matter”, it would be “incompatible with the accused’s fair-trial right”, to resolve the matter “in the absence of the accused”.<sup>142</sup>

111. The ECHR has also repeatedly found that it is inimical to the right to a fair trial and equality of arms to exclude a party from proceedings or deny them the opportunity to comment on submissions that could influence the Chamber’s determination.<sup>143</sup> In assessing whether there has been a violation of the right to adversarial proceedings, “it is immaterial whether the documents or observations in issue are important for the outcome of the proceedings,<sup>144</sup> [...] [or] whether the omission to communicate the document [...] has caused any prejudice”.<sup>145</sup> “What is particularly at stake here is litigants’ confidence in the workings of justice, which is based on, *inter alia*, the knowledge that they have had the opportunity to express their views on every document in the file.”<sup>146</sup>

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<sup>139</sup> [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; D-48, T-268-Red-Eng-WT, p.78, line 22 – p.79, line 12; D-49, T-274-Red-Eng-WT, p.34, lines 2-14; 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; D-23, T-334-Red-Eng-WT, p.17, lines 23-25; D-26, T-335-Red-Eng-WT, p.19, lines 8-13; D-25, T-337-Red-Eng-WT, p.40, lines 3-6, 13-20; D-29, T-339-Red-Eng-WT, p.41, lines 18-19; D-30, T-342-Red-Eng-WT, p.13, lines 1-10; D-15, T-345-Red-Eng-WT, p.12, line 4 – p.15, line 6.

<sup>140</sup> [REDACTED].

<sup>141</sup> ICC-01/05-44-Red.

<sup>142</sup> ICC-01/04-01/06-2434-Red2, para. 137.

<sup>143</sup> *Lanz v. Austria*, 24430/94, 31 January 2002, para. 62; *Brandstetter v. Austria*, 11170/84; 12876/87; 13468/87, 28 August 1991, para. 67.

<sup>144</sup> Pieter van Dijk, Fried van Hoof, Arjen van Rijn & Leo Zwaak, *Theory and Practice of the European Convention on Human Rights*, 4<sup>th</sup> ed. (Intersentia, 2006), p. 584, citing ECtHR, *F.R. v. Swtitzerland*, 37292/97, Judgment, 28 June 2001, para. 37.

<sup>145</sup> *Ibid.*, citing ECtHR, *Walston (No. 1) v. Norway*, 37372/97, Judgment, 3 June 2003, para. 58.

<sup>146</sup> ECtHR, *Niderost-Huber v. Switzerland*, 18990/91, Judgment, 18 February 1997, para. 29.

112. A reasonable observer could only conclude that there was a deliberate effort to taint the entirety of the Defence case, and that this would inevitably impact on the objective appearance of the Judges' ability to assess the credibility of Defence witnesses in a fair manner.

## **5. The Prosecution aggravated this conduct by withholding relevant information and providing misleading information**

113. The ability of the Defence to assess the extent of the prejudice or to seek timely relief was hampered by the fact that the Prosecution advanced positions that they knew or should have known to be incorrect. The Prosecution's omissions, or misleading submissions on questions of fact were, in many cases, determinative or had a significant influence on the Chamber's decision.

114. [REDACTED].<sup>147</sup> The Prosecutor also withheld key contextual information, which would not have been otherwise available to the Trial Chamber or the Single Judge in the Article 70 case, such as the fact that Prosecution witnesses had been paid expenses directly by the Prosecution, and had, nonetheless, denied receiving such funds when testifying in Court.<sup>148</sup>

115. The Prosecution exploited the division between the two cases in order to advance different, and incompatible positions. During the Article 70 investigation, the Prosecution averred that the information from the anonymous informant appeared to be relevant because the person knew about protected Defence witnesses, and Defence missions.<sup>149</sup> Nonetheless, in response to a Defence inquiry, the Prosecution denied that the anonymous informant had given them information on any "confidential Defence matters", or that the Prosecution ever transmitted any information concerning Defence witnesses.<sup>150</sup>

116. When confronted with the relevant section from its Article 70 filing, the Prosecution qualified their response to acknowledge that the informant had provided identifying

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<sup>147</sup> [REDACTED].

<sup>148</sup> [REDACTED] and Annex IX.

<sup>149</sup> ICC-01/05-44-Red, para. 10.

<sup>150</sup> ICC-01/05-01/08-3016-AnxB-Red, p.15.

information concerning a Defence witness, albeit not the name itself.<sup>151</sup> [REDACTED].<sup>152</sup> [REDACTED],<sup>153</sup> [REDACTED]:<sup>154</sup> [REDACTED].

117. [REDACTED].<sup>155</sup> [REDACTED]:

[REDACTED].<sup>156</sup>

118. The Prosecution has also repeatedly claimed that it has had no access to privileged Defence information.<sup>157</sup> The Trial Chamber relied on this assertion in order to reject the Defence request for interim relief.<sup>158</sup> This claim was simply not true,<sup>159</sup> [REDACTED].<sup>160</sup>

119. It would also appear that the Prosecution misinformed the Appeals Chamber by claiming that “staff members working on the Main Case do not access the Mangenda’s conversations audio recorded by the Registry”.<sup>161</sup>

120. [REDACTED].<sup>162</sup> Given the fact that the recordings of Mr. Mangenda were transmitted in Lingala and were not translated or transcribed,<sup>163</sup> it is reasonable to conclude that Mr. Badibanga accessed and reviewed their contents at some point. The Defence in the Main Case was also directed to address all Article 70 disclosure queries to Mr. Badibanga,<sup>164</sup> which would have been an ineffectual and improper suggestion if Mr. Badibanga were not familiar with the Article 70 dossier.

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<sup>151</sup> ICC-01/05-01/08-3016-AnxB-Red, p.18.

<sup>152</sup> [REDACTED].

<sup>153</sup> [REDACTED].

<sup>154</sup> [REDACTED].

<sup>155</sup> [REDACTED].

<sup>156</sup> [REDACTED].

<sup>157</sup> See for example, ICC-01/05-01/08-2965-Red, paras. 2-3.

<sup>158</sup> ICC-01/05-01/08-3059, paras. 16, 19 and 24.

<sup>159</sup> See ICC-01/05-01/08-3103-Red2, paras. 28-32.

<sup>160</sup> [REDACTED].

<sup>161</sup> ICC-01/05-01/13-314-Red, para. 43.

<sup>162</sup> [REDACTED].

<sup>163</sup> ICC-01/05-01/13-177.

<sup>164</sup> ICC-1/05-01/08-2945-AnxA-Red.

121. In terms of matters concerning the credibility of Prosecution witnesses, the Prosecution averred that all contact with P-169 had ‘involved’ the VWU.<sup>165</sup> In response to a Defence query as to whether the Prosecutor had contacted P-169 at any point after his testimony, the Prosecution asserted that “contacts with witnesses were made jointly with the VWU following Trial Chamber III’s instruction”.<sup>166</sup> It was only after the Defence requested access to the covering email that the Prosecution acknowledged that it had set up a non-ICC account for the purpose of communicating with this witness, and that it had in fact communicated with the witness on multiple occasions without any involvement of the VWU.<sup>167</sup>

122. The Prosecution also provided misleading information concerning the modalities of payment to P-169. Before being ordered to disclose all relevant particulars concerning the payment of P-169, the Prosecutor asserted that the September 2011 payment to P-169 was “made on behalf of the Victims and Witnesses Unit (“VWU”).”<sup>168</sup> In a 2 April 2014 filing, the Prosecution asserted that all payments to P-169 referenced by the Defence “represent payments from the VWU.”<sup>169</sup> The Prosecution further stressed the importance of considering each payment in its proper context,<sup>170</sup> whilst at the same time, failing to disclose that context to the Defence – namely, that the Prosecution had advanced payments directly to P-169 without seeking prior authorisation from the Registry.<sup>171</sup> At the time these extraordinary payments were made, there had been no neutral determination that the witness was entitled to receive them – his entitlement rested entirely within the discretionary powers of the Prosecution.

123. The Defence only became aware of this ‘context’ on the eve of P-169’s scheduled recall after the Chamber ordered the Prosecution to reclassify a VWU email.<sup>172</sup>

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<sup>165</sup> ICC-01/05-01/08-2897-Red, para. 17.

<sup>166</sup> Annex VIII.

<sup>167</sup> [REDACTED].

<sup>168</sup> [REDACTED].

<sup>169</sup> [REDACTED].

<sup>170</sup> [REDACTED].

<sup>171</sup> [REDACTED].

<sup>172</sup> [REDACTED].

124. In its 10 September 2014 filing, the Prosecution further asserted that it had disclosed the information requested by the Defence in relation to expenses paid to P-169.<sup>173</sup> This was untrue, as reflected by the later disclosures in October 2014 concerning extremely significant payments that had been made to P-169.<sup>174</sup>

125. Further Prosecution misstatements concerning P-169 are set out in the Defence filing of 17 September 2014.<sup>175</sup>

126. Both the Defence and the Trial Chamber depend on the Prosecution to exercise its duties in good faith and honesty. In many instances, the Trial Chamber relied on undertakings from the Prosecution that it had disclosed all relevant information in order to dismiss Defence requests for disclosure of specific categories of information.<sup>176</sup>

127. This presumption of good faith has, however, been irreparably ruptured in this case. Even where corrected, as a result of initial omissions and misdirects, disclosure occurred in a piecemeal and partial manner throughout the proceedings. Several documents of key importance to the credibility of Prosecution witnesses were disclosed after the close of the case, such as expense receipts which indicate that the Prosecution met with witnesses (who were implicated in the “marché de dupes”) on multiple occasions, paid them significant expenses (from a local context), but failed to disclose any notes or statements concerning such meetings.<sup>177</sup> This deprived the Defence of the ability to put their contents to the concerned witnesses, or to conduct follow up investigations. Key material remains undisclosed.<sup>178</sup>

## **6. Mr. Bemba has been denied any effective remedy for these violations**

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<sup>173</sup> [REDACTED].

<sup>174</sup> [REDACTED].

<sup>175</sup> [REDACTED].

<sup>176</sup> [REDACTED]; ICC-01/05-01/08-3154-Red; [REDACTED].

<sup>177</sup> Annex IX. The Prosecution disclosed the direct payments that they had made to the 22 witnesses in October 2014 - several months after the case closed. Disclosure was effected while P-169 was testifying. An analysis of the receipts later demonstrated that the Prosecutor met these witnesses on several occasions for which no notes or statements have been disclosed to the Defence. Adverse inferences must be drawn from the absence of disclosed records concerning these meetings.

<sup>178</sup> Annex X.

128. The right to a remedy is recognised by all human rights instruments,<sup>179</sup> and has been described as a “peremptory norm”, which “an international court [...] may not derogate from or fail to comply with”.<sup>180</sup>

129. The Defence acted diligently to attempt to minimise the prejudice to Mr. Bemba stemming from the above violations. As soon as it became aware that the Prosecution had or was in the process of accessing privileged information, it sought interim relief from the Trial Chamber to prevent further prejudice.<sup>181</sup>

130. The Trial Chamber declined to act,<sup>182</sup> and refused to authorise an appeal.<sup>183</sup>

131. The right to a remedy applies even if the persons violating the defendant’s rights were acting in an official capacity.<sup>184</sup> Whilst the author of the violation can be an aggravating factor (in light of the particular responsibilities of the entity in question), “under the abuse of process doctrine, it is irrelevant which entity or entities were responsible for the alleged violations of the Appellant’s rights.”<sup>185</sup> It is therefore no answer to rely on the existence of judicial orders in the Article 70 case, if the judicial order in question violated the law, and Mr. Bemba’s rights in the Main Case.

132. This is particularly the case where the Single Judge has prevented the Defence from being able to seek any remedy as concerns Article 70 decisions, which impacted on the Main Case. Apart from the fact that the Single Judge found that the individual Article 70 teams did not possess standing to seek leave to appeal as concerns his decision to lift Mr. Bemba’s legal privilege, the Single Judge also found that that the Defence in the Main Case possessed no standing to appeal decisions which concerned Mr. Bemba’s right to privilege in the Main Case.<sup>186</sup>

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<sup>179</sup> Article 8 of the UDHR, and Article 2 of the ICCPR.

<sup>180</sup> *In the matter of El Sayed*, ‘Order Assigning the Matter to the Pre-Trial Judge’, CH/PRES/2010/01, paras. 26 and 35.

<sup>181</sup> ICC-01/05-01/08-2945-Red, ICC-01/05-01/08-2991-Red, ICC-01/05-01/08-3036.

<sup>182</sup> ICC-01/05-01/08-3059, para. 25.

<sup>183</sup> ICC-01/05-01/08-3122.

<sup>184</sup> Article 2(3)(a) of the ICCPR.

<sup>185</sup> *Barayagwiza v. the Prosecutor*, Decision, Case No. ICTR-97-19-AR72, 3 November 1999, para. 73.

<sup>186</sup> ICC-01/05-01/13-456.

133. Having been refused standing to address the legality of these Article 70 orders, the Defence also attempted to raise the issue with the Dutch authorities responsible for implementing these orders. The Dutch rejected such arguments *in limine* on the grounds that they had no competence to consider the legality of requests from the ICC.<sup>187</sup>

134. Similarly, when the Defence attempted to exercise Mr. Bemba's right to submit a complaint in relation to measures impacting on his right to privileged communications in the detention unit, the complaint was dismissed by the Presidency on the grounds that the complaint mechanism was not applicable.<sup>188</sup> Yet, when Mr. Bemba attempted to obtain relief from the Trial Chamber in relation to the fact that his right to privilege was not being respected, the Trial Chamber directed Mr. Bemba to file a complaint using the very mechanism which the Presidency had deemed to be inapplicable.<sup>189</sup>

135. The division of judicial tasks on matters concerning Mr. Bemba has operated to create a vicious cycle of deniability, in which no judicial forum is willing to hear and consider issues concerning the impact of the Article 70 case on Mr. Bemba's rights in the Main Case. The fact that the ICC has collectively refused to provide Mr. Bemba with an effective avenue to contest the legality of the monitoring, has denied him the right to an effective remedy, which in itself, violates Mr. Bemba's rights.<sup>190</sup>

136. In terms of the Trial Chamber's insistence that the Defence should have substantiated the existence of prejudice, it is manifestly incorrect to require the Defence to do so in filings requesting *interim* relief in order to avoid such prejudice.

137. The facts should have spoken for themselves.<sup>191</sup> There is an obvious appearance of impropriety as concerns any access by the Prosecution in this case to internal Defence communications (written and oral) concerning this case. Otherwise, proof of prejudice could

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<sup>187</sup> ICC-01/05-01/13-424-Annex1, p.7.

<sup>188</sup> ICC-RoR221-03/14-3.

<sup>189</sup> ICC-01/05-01/08-3059.

<sup>190</sup> Human Rights Committee, General Comment no. 31, para. 15, CCPR/C/21/Rev.1/Add.13.

<sup>191</sup> See also A/69/397, para. 50.

only be met by putting privileged information before the Chamber, which would vitiate the very purpose of the request.

138. It is also no answer to claim that these issues have been litigated in circumstances where no remedy has been provided. The abuse of process doctrines mandate a stay of the proceedings if the constituent elements of a fair trial have disappeared, and there is insufficient indication that this will be resolved during the trial process.<sup>192</sup> The Chamber's prior rulings have in themselves satisfied the second criterion – the Defence has attempted to utilise the trial processes to minimise or remedy these violations, but has been unable to do so. The very fact that a stay of proceedings is a measure of “last resort”<sup>193</sup> requires the Defence first to request alternative measures; however, if the cumulative impact of the Chamber's rejection of such individual requests is that “no fair trial can be held, the object of the judicial process is frustrated and the process **must** be stopped”(emphasis added).<sup>194</sup>

139. The decision to file for a permanent stay of the proceedings has not been taken lightly. However, there is no basis upon which an outsider could reasonably comprehend that Mr. Bemba would receive a fair trial before the present Trial Chamber, and no prospect that the deficiencies will or could be corrected.<sup>195</sup>

140. The cumulative and protracted nature of the violations have irreparably eliminated the notion of equality of arms, Mr. Bemba's right to silence and privilege against self-incrimination, and his right to be judged in relation to the Main Case allegations in an impartial manner.

141. Since Mr. Bemba has already been in detention for over six years, it would also be contrary to his right to expeditious proceedings to order a retrial with a new Chamber and Prosecution.

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<sup>192</sup>ICC-01/09-02/11-868-Red, para. 14, citing ICC-01/09-02/11-868-Red, , ICC-01/09-02/11-728, para. 76; ICC-01/04-01/06-1401, para. 91. See also S. Bafadhel, 'Abuse of Process Doctrine in International Criminal Proceedings' in D. Young, M. Summers & D. Corker (eds), *Abuse of Process in Criminal Proceedings* (4<sup>th</sup> ed., 2014), pp. 448-484.

<sup>193</sup> ICC-01/09-02/11-868-Red, para. 14.

<sup>194</sup> ICC-01/04-01/06-772, para. 37.

<sup>195</sup> See ICC-01/05-01/13-456; ICC-01/05-01/08-3059; ICC-RoR221-03/14-3.

142. Even if the threshold for issuing a permanent stay of the proceedings has not been met, the duty to provide an effective remedy for such violations remains. The existence and extent of the prejudice suffered by Mr. Bemba may be relevant to the nature of the remedy, but prejudice is not in itself, a precondition for a remedy. Given that the violations have prolonged Mr. Bemba's detention, prejudiced the effectiveness of the Defence, and occasioned undue mental harm, then it would be appropriate as an alternative remedy for the Trial Chamber to grant interim release.

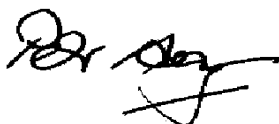
**D. RELIEF SOUGHT**

143. For the reasons set above, the Defence for Mr. Bemba requests the Trial Chamber to

**STAY** the proceedings; and

**ORDER** the immediate release of Mr. Bemba to Portugal or the Kingdom of Belgium.

The whole respectfully submitted.



Peter Haynes QC  
Lead Counsel of Mr. Jean-Pierre Bemba

The Hague, The Netherlands  
30 January 2015