

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: ICC-01/05-01/08
Date: 30 January 2015

TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO

**Public Redacted Document
with**

Confidential, *EX PARTE*, only available to Prosecution and Defence Annex A

Public Redacted version of "Prosecution Response to Refiled Defence Request for Relief for Abuse of Process", 07 January 2015, ICC-01/05-01/08-3229-Conf-Exp

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr James Stewart
Mr Jean-Jacques Badibanga

Counsel for the Defence

Mr Peter Haynes
Ms Kate Gibson
Ms Melinda Taylor

Legal Representatives of Victims

Ms Marie-Edith Douzima-Lawson

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keita

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

I. Overview

1. The Defence request to stay the proceedings for abuse of process¹ lacks merit and must be dismissed. It is no more than a last throw of the dice.

2. Jean-Pierre Bemba Gombo (“Mr Bemba” or “the Accused”) has had a fair trial. The Trial Chamber has heard the parties in full equality, steered astutely between potentially competing concerns, guarded the integrity of the proceedings to the extent possible, and focused properly and squarely on the charges and evidence before it. It will now deliberate and render judgement.

3. The attempt by the Defence to recast a collection of individual incidents and complaints, each adjudicated or debunked during the course of trial, as a narrative of misconduct, bias, or impropriety is false and unpersuasive. It is unsupported by fact or law, as is the criticism levelled against the Trial Chamber and the Office of the Prosecutor (“Prosecution”).

4. Likewise, the Defence’s claims of prejudice to the integrity of the trial are factually unsupported. The arguments advanced simply rehash those already rightly rejected by the Trial Chamber.

5. The Motion’s focus on present Defence Counsel’s surprise concerning the offences against the administration of justice committed in this case is largely irrelevant, given Mr Bemba’s alleged involvement in those offences. Indeed, Pre-Trial Chamber II has determined that there are substantial grounds to believe that Mr Bemba (together with former lead Counsel, Mr Kilolo, and former case manager, Mr Mangenda) knowingly and intentionally sought to pervert the course of justice in this trial through the commission of such offences.² Mr Bemba should

¹ See ICC-01/05-01/08-3217-Conf-Exp (“Motion”). See also ICC-01/05-01/08-3210 (ordering the Defence to re-file the previous version of its motion); ICC-01/05-01/08-3203-Conf-Exp (“Mis-Filed Motion”).

² See ICC-01/05-01/13-749.

not profit from his unlawful conduct (including potentially by keeping some members of his Defence team 'in the dark'), nor can he reasonably claim an abuse of process as a result of legitimate, Court-sanctioned activities undertaken by the Prosecution to investigate and stop his attempt to subvert these proceedings. An accused must not be allowed to dictate, through criminal means, that the process of this Court results in either an unfair trial or a mistrial.

6. The Motion further misapprehends the nature of the privileges and immunities afforded to counsel to discharge their responsibilities to the Court. These protections are no shield against the investigation or prosecution by the Court of offences against its administration of justice. Any other conclusion would transform the Court's law on immunity from a mechanism intended to protect the Court's process into one that ultimately defeats it.

7. For these reasons, granting the relief sought in the Motion would be repugnant to the administration of justice. The fairness of the trial has been preserved, despite the Accused's own attempt to undermine it.

II. Confidentiality

8. This response is filed confidentially and *ex parte* to reflect the confidential and *ex parte* status of the Motion, in accord with regulation 23bis(2) of the Regulations of the Court. The Prosecution will file a confidential redacted version shortly.³

³ The Defence has not yet filed a public redacted version of the Motion. When it does, the Prosecution will file a public redacted version of its response.

III. Submissions

9. The Motion fails to meet the high threshold required to stay the proceedings for an abuse of process.⁴ It does not demonstrate that it would be repugnant to the administration of justice to allow the proceedings to continue, or that it is impossible for the trial to be fair.⁵ To the contrary, the record of these proceedings shows that they are, and have been, scrupulously fair.

10. The Motion fails to show the prejudice necessary for the relief sought, and is in any event manifestly ill-founded. Specific complaints are incorrect and speculative, and represent a tacit and unjustified request for reconsideration *en masse* of various procedural decisions. The Motion distorts the established facts and relies on tenuous chains of reasoning, depending on strained interpretations of the procedural history. This is not new. For example, the Trial Chamber has previously rejected Defence criticisms of its 2 May 2014 decision on interim relief⁶ as arising solely from misinterpretations of its reasoning.⁷ The renewed suggestion that the Interim Relief Decision was incorrect⁸—although now presented more moderately than in the Mis-Filed Motion⁹—is likewise based on misinterpretation, [REDACTED].¹⁰

⁴ See *e.g.* ICC-01/04-01/06-2690-Red2, paras.160-166; ICC-01/04-01/06-772 OA4, paras.30-33, 39; ICC-01/04-01/06-2582 OA18, para.55; ICC-01/09-02/11-868-Red, paras.14-15.

⁵ See *e.g.* ICC-01/04-01/06-2690-Red2, para.166. *Contra* Motion, paras.1, 7-8, 138.

⁶ See ICC-01/05-01/08-3059 (“Interim Relief Decision”).

⁷ See ICC-01/05-01/08-3122, paras.20-29. See also ICC-01/05-01/08-3114 (“Decision on Leave to Appeal the First Privileged Communications Decision”), para.21; ICC-01/05-01/08-3204-Conf (“P-178 Recall Reconsideration Decision”), para.20.

⁸ See Motion, para.118; see also paras.136-138.

⁹ See Mis-Filed Motion, paras.320-323 (suggesting that the Interim Relief Decision betrayed either unconscious prejudice or partisan bias).

¹⁰ [REDACTED]. Moreover, the Defence sought to make the same incorrect allegation in the Mis-Filed Motion but on a different basis, that time misinterpreting the plain words of the Interim Relief Decision: *compare* Mis-Filed Motion, para.321 *with* Interim Relief Decision, para.19.

11. Contrary to the Defence's contentions, there is no basis to conclude that "the Chamber's rejection of [previous] individual requests" renders the trial unfair.¹¹ These arguments cannot establish the Defence's claim when neither the Motion nor the Mis-Filed Motion¹² addresses or cites many of the key decisions. The Motion simply ignores relevant parts of the trial record.

12. Notably, the Motion does not pursue significant arguments raised in the Mis-Filed Motion¹³ and the Defence also appears to have reconsidered some of its more extravagant claims.¹⁴ As such this response is confined only to those issues raised in the Motion. To the extent an issue is not addressed in the Motion, the Prosecution understands that it is no longer a live issue in these proceedings.

13. The Prosecution nevertheless notes that, despite the extensive and repeated ventilation in previous filings of the issues raised in the Motion, the Defence has not only failed to correct its misapprehensions but persists in many of them.¹⁵ The

¹¹ *Contra* Motion, para.138.

¹² See e.g. ICC-01/05-01/08-3101 ("Second Privileged Communications Decision"); ICC-01/05-01/08-3100 ("Disclosure Requests Decision"); ICC-01/05-01/08-3080 ("First Privileged Communications Decision"); ICC-01/05-01/08-3070 ("Witness Contact Decision"). In the article 70 proceedings, see also ICC-01/05-01/13-648-Red3; ICC-01/05-01/13-362-Red ("Independent Counsel Disqualification Decision").

¹³ The Prosecution refutes the allegation (whether its accuracy, relevance, or significance), although it does not do so in this response on the understanding that the allegations are no longer in issue. 1.) Improper disclosures by the Registry (Mis-Filed Motion, paras.103-119). 2.) The Prosecution used privileged information in cross-examining Defence witnesses (Mis-Filed Motion, paras.124-125). 3.) Litigation concerning Witnesses P-169 and P-178 was unfairly decided (Mis-Filed Motion, paras.136-156). 4.) The Defence was prevented from addressing appropriate matters in re-examination (Mis-Filed Motion, para.278). 5.) The First Privileged Communications Decision was wrongly decided with respect to Mr Mangenda's communications (Mis-Filed Motion, paras.163-170). 6.) [REDACTED] 7.) Call data records receive equal protection under legal professional privilege as the communications themselves (Mis-Filed Motion, paras.134-136). 8.) Beyond its continuing power and duty to ensure the fairness of its own proceedings, the Trial Chamber was obliged to seek to control the article 70 proceedings before Pre-Trial Chamber II (Mis-Filed Motion, paras.95-100). 9.) The Prosecution made knowing or negligent misrepresentations before the Court on unspecified matters concerning the fairness of the trial (Mis-Filed Motion, para.281). 10.) The Prosecution failed to bring confidential legal authorities to the attention of the Trial Chamber (Mis-Filed Motion, para.283). 11.) The Prosecution acted improperly in not seeking to identify the 'anonymous informant', and failed to meet its disclosure obligations (ICC-01/05-01/08-3207-Conf, paras.7-14).

¹⁴ See e.g. Mis-Filed Motion, paras.264 (a reasonable observer would understand "that the Judges *had in fact been poisoned* by the Prosecution's extensive submissions", emphasis added), 277 (it was "inevitabl[e]" that the Trial Chamber would be impacted by "a deliberate effort to taint the entirety of the Defence case"). Compare Motion, para.112 (only "the objective *appearance* of the Judges' ability to assess the credibility of Defence witnesses in a fair manner" was affected, emphasis added).

¹⁵ See ICC-01/05-01/08-3058, para.18 ("The fact that the Defence repeatedly makes the same false assertions does not make them any less false. The Prosecution would expect that, once rightly apprised [...], the Defence would seek to correct the above-referred assertions").

Prosecution defers to the Trial Chamber's assessment as to the extent to which this conduct is appropriate,¹⁶ having regard to the issues at stake and the Trial Chamber's ultimate resolution of the merits of the Motion.

No prejudice is shown to the integrity of this trial

14. Just like its request for interim relief¹⁷—which the Defence concedes to have raised many similar arguments¹⁸—“the defence has failed to substantiate its claim that the accused has suffered or is suffering prejudice in the *Bemba* case, caused by the proceedings related to case ICC-01/05-01/13” (“article 70 proceedings”).¹⁹

15. An abuse of process application must be “properly substantiated” in showing either that the continuation of proceedings is odious or repugnant, or that a fair trial is impossible.²⁰ Prejudice must at least be shown to the good conscience or integrity of the trial process itself to justify any remedy for abuse of process.²¹ The importance of this requirement is consistent with the “drastic” and “exceptional” nature of a permanent stay of proceedings, which may potentially frustrate the delivery of justice in a particular case and affect the broader purposes expressed in the preamble to the Rome Statute (“Statute”).²² Nothing stated in the Motion establishes this high threshold.

16. Whether individually or cumulatively, the Motion fails to show any prejudice to the integrity of this trial, or indeed to Mr Bemba's rights to equality of arms, to protection against self-incrimination, and to a fair and impartial hearing.²³ The

¹⁶ See further P-178 Recall Reconsideration Decision, para.28 (cautioning “the defence against making such serious allegations regarding the conduct and fairness of the proceedings in such an unconsidered and factually unsubstantiated manner”).

¹⁷ See ICC-01/05-01/08-2945-Conf.

¹⁸ See Motion, paras.129-130.

¹⁹ Interim Relief Decision, para.24.

²⁰ See ICC-01/04-01/06-2690-Red2, para.169.

²¹ *Contra* Motion, paras.136-137, 142 (“prejudice is not in itself, a precondition for a remedy”).

²² ICC-01-04-01/06-2582 OA18, para.55. See also ICC-01/04-01/10-264, p.5.

²³ *Contra* Motion, para.140.

Defence fails adequately or fairly to address the various measures by which Mr Bemba's rights in these proceedings were protected, including but not only by:

- the Trial Chamber's order that matters associated with the investigation of any offences under article 70 of the Statute should be addressed by Pre-Trial Chamber II (in order to preserve the appearance of fairness as well as its substance);²⁴
- the measures ordered by the Single Judge of Pre-Trial Chamber II ("Single Judge") to ensure that the Prosecution did not have access to potentially privileged material emanating from the Defence in this case;²⁵
- the Single Judge's confirmation that Mr Bemba has access to the *inter partes* material which concerns him, both in this case and case ICC-01/05-01/13, and that the extent to which this material is provided to Counsel in this case is a matter of Mr Bemba's discretion;²⁶
- the Trial Chamber's reasoned consideration and adjudication of relevant Defence motions concerning the article 70 proceedings before Pre-Trial Chamber II and any impact they might have on the integrity of this trial;²⁷ and
- the Trial Chamber's strict control over the matters presented to it by the Parties in the course of closing arguments.²⁸

²⁴ See ICC-01/05-01/08-2606-Conf.

²⁵ See e.g. ICC-01/05-52-Red2; ICC-01/05-01/13-41-Red; ICC-01/05-01/13-366-Red.

²⁶ See ICC-01/05-01/13-338, p.3. See also Second Privileged Communications Decision, paras.34 ("recall[ing] that the Single Judge of Pre-Trial Chamber II has authorised Mr. Bemba to share his access to the record of case ICC-01/05-01/13 with his Counsel in the *Bemba* case"), 43; Disclosure Requests Decision, para.34; First Privileged Communications Decision, para.46.

²⁷ See e.g. Interim Relief Decision; ICC-01/05-01/08-3103 ("Privileged Communications Decision").

²⁸ See e.g. ICC-01/05-01/08-T-364-ENG, p.5; ICC-01/05-01/08-3191, para.7.

17. Moreover, specific Defence arguments are unsubstantiated and irrelevant to the issues at stake in this case, and so must be dismissed. The speculative and generalised nature of Defence claims are illustrated by their own terms.²⁹ Likewise, the Motion fails to demonstrate exactly what material was affected by alleged misconduct, what aspect of the Defence's functioning was actually affected as a result, and the specific consequences of any such effect on the integrity of the trial. This renders wholly deficient the key claims of prejudice—which are in any event refuted³⁰—concerning the alleged violation of Defence immunities,³¹ improper access to privileged materials,³² and failure to meet disclosure obligations.³³ Certain claims also appear to be immaterial to the proceedings before the Trial Chamber. For example, it is not demonstrated how claims that the Dutch, Belgian, DRC, [REDACTED], and [REDACTED] authorities had access to privileged Defence communications have any impact on this case.³⁴

18. The Defence's claims of prejudice fail to take account of relevant previous decisions. Thus, to illustrate the supposed "fundamental inequality of arms" between the parties, the Defence refers (very briefly) to the well-trodden arguments concerning Witnesses P-169 and P-178.³⁵ The Trial Chamber has issued repeated decisions on these and related matters,³⁶ and its present assessment (subject to its ultimate weighing of the evidence) remains that "the defence's allegations of collusion among witnesses called by the prosecution is unsubstantiated."³⁷ The Defence ignores this. The same blinkered view is apparent in the acknowledged

²⁹ See Motion, paras.5, 28, 86, 94.

³⁰ See below paras.19-64.

³¹ See Motion, paras.22, 25, 28. See also para.38 (asserting that information obtained in alleged violation of Defence privileges and immunities formed a "key plank" in requests to obtain further information, but still failing to explain the ultimate impact on these trial proceedings).

³² See Motion, paras.36, 61, 72.

³³ See Motion, paras.94-95.

³⁴ [REDACTED].

³⁵ See Motion, paras.57-58.

³⁶ See e.g. P-178 Recall Reconsideration Decision; ICC-01/05-01/08-3196-Conf; ICC-01/05-01/08-3186-Conf ("P-178 Recall Decision"); ICC-01/05-01/08-3167-Conf; ICC-01/05-01/08-3154-Red; ICC-01/05-01/08-2924-Conf ("Decision on Information concerning P-169 and P-178").

³⁷ P-178 Recall Decision, para.22; Decision on Information concerning P-169 and P-178, para.34.

“assum[ption]” that the Prosecution accessed certain communications between Mr Bemba and Mr Mangenda,³⁸ without any reference to the repeated judicial acknowledgements of the Prosecution’s cautious approach to such material,³⁹ despite its non-privileged status.⁴⁰

The Court has effectively guarded the privileges and immunities of the Defence

19. The notion that, through the conduct of the article 70 investigation, the Prosecution has violated the privileges and immunities of the Defence—and that the Trial Chamber has condoned this—lies at the heart of the Motion. But that premise is mistaken. The functional immunity of the Defence has not been breached, nor has legal professional privilege been violated. The Defence misapprehends the scope of both principles. It also consistently overlooks the extensive body of decisions by which the Trial Chamber, the Single Judge, and other judicial organs have supervised the conduct of the investigation.

Functional immunity has not been breached

20. The Defence incorrectly suggests that the functional immunity conferred on Defence teams⁴¹ was breached.⁴² This claim rests on a misinterpretation of the procedural history of this case and the relevant judicial decisions, as well as a misunderstanding of the general legal principles concerned. Article 70 of the Statute and rule 165 of the Rules of Procedure and Evidence (“Rules”) specifically mandate the Prosecution to detect and to investigate offences against the administration of

³⁸ See [REDACTED].

³⁹ See e.g. ICC-01/05-01/13-48, paras.2, 4, 8; ICC-01/05-01/13-648-Red3, paras.58-59.

⁴⁰ See e.g. ICC-01/05-01/13-48, para.3 (“the parties to the Mangenda Calls were not entitled to any legitimate expectation of privacy or confidentiality”). See further below para.32.

⁴¹ See Statute, Art.48(4); Agreement on the Privileges and Immunities of the International Criminal Court, ICC-ASP/1/3, 2002 (“Immunities Agreement”), Arts.18, 26(1); Headquarters Agreement between the International Criminal Court and the Host State, ICC-BD/04-01-08, 2008 (“Headquarters Agreement”), Arts.25, 30(1).

⁴² Contra Motion, paras.7, 24, 26-28, 30, 35-36, 38.

justice—and thus to assess for that purpose “whether certain acts fall within the proper remit of the Defence or their witnesses”.⁴³ This mandate is not inconsistent with the principle of functional immunity, but rather is consistent with the necessary limitations of its scope.

21. The Motion assumes the incorrect premise that functional immunity was “lift[ed]” by the Presidency⁴⁴ and, therefore, that any relevant investigative activity occurring before the date of that decision violated immunity.⁴⁵ However, the Presidency affirmed that counsel and persons assisting counsel only receive immunity “to the extent necessary for the performance of their functions” and that this does not extend to “the types of conduct depicted in articles 70(1)(b) and [...] 70(1)(c) of the Rome Statute, which the persons concerned are alleged to have undertaken.”⁴⁶ As a result,

there is no immunity attaching *to the acts allegedly committed* by the persons concerned which presents a bar to their arrest and potential detention [...] for *alleged* article 70 offences [...] and it follows, therefore, that no waiver need be granted.⁴⁷

22. The Presidency did not need to lift Defence functional immunity because it never applied to the alleged criminal conduct.⁴⁸ It is implicit that immunity likewise cannot bar (genuine) investigative measures in respect of acts alleged to have been committed which might constitute article 70 offences.⁴⁹ Indeed, Counsel for Mr

⁴³ *Contra* Motion, para.23. See also Statute, Art.27.

⁴⁴ See e.g. Motion, para.20. ICC-01/05-68 and ICC-01/05-01/08-3001 (“Immunity Decision”) are the same document.

⁴⁵ See Motion, para.24 (“what matters is that [immunities] were not waived at the time the investigative actions occurred”).

⁴⁶ Immunity Decision, para.10.

⁴⁷ Immunity Decision, para.10 (emphasis added).

⁴⁸ See also ICTY, *Prosecutor v. Gotovina et al*, IT-06-90-AR73.5, Decision on Gotovina Defence Appeal against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, 14 February 2011 (“*Gotovina Appeal Decision*”), para.34.

⁴⁹ See also ICC-01/05-01/13-648-Red3, paras.60-62 (noting without comment the Prosecution submission that she “was not obliged to seek a waiver of immunity to investigate [Mr [Mangenda] Kabongo] and the other suspects [...], given that there were ‘grounds to suspect’ that they had committed offences against the

Bemba in the article 70 proceedings seems to have acknowledged this view.⁵⁰ Moreover, to the extent that it was necessary to lift any immunity, the Presidency determined that the facts of this case meet the criteria for doing so.⁵¹

23. Furthermore, the Presidency's Immunity Decision may even have been narrower than it needed to be. Functional immunity preserves the legal process of this Court from *external* interference; it does not bar the operation of this Court's *own* process. Indeed, the Defence now recognises that "these immunities apply *vis-à-vis* States and not the Prosecution itself".⁵² To the extent therefore that relevant activities to investigate suspected article 70 offences were carried out by the Prosecution, or other actors on its behalf, functional immunity was neither necessary nor applicable. This follows from the reasoning of the ICTY Appeals Chamber in *Gotovina*.⁵³ This limited scope of functional immunity is likewise demonstrated by a close reading of the Immunities Agreement⁵⁴ and the Headquarters Agreement.⁵⁵ Crucially, moreover, the Vienna Convention on Diplomatic Relations expressly states that:

administration of justice" and finding only "the scope of immunity enjoyed by members of defence teams" was "not at issue in the matter at hand").

⁵⁰ See ICC-01/05-01/13-170-Corr, para.14, fn.8 ("the privileges and immunities stipulated elsewhere in the Headquarters agreement are a defence to prosecution [...] but not a bar to initiation of an investigation").

⁵¹ Immunity Decision, paras.11-13.

⁵² Motion, para.23. *Compare e.g.* Mis-Filed Motion, para.72.

⁵³ See *Gotovina* Appeal Decision, paras.30-31. Functional immunity for counsel appearing before international courts is justified because of "the fundamental differences between a domestic court and an international criminal tribunal", potentially making Defence tasks "more difficult without the grant of functional immunity, as there is always a risk that a State could interfere" (emphasis added). Such protections are unnecessary in a purely domestic context because domestic practitioners "can rely upon the State's judicial apparatus and other entities", of which they are a part, "to protect their ability to perform their functions in a criminal trial". See also ICTY, *Prosecutor v. Gotovina et al*, IT-06-90-T, Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, 12 March 2010, para.58.

⁵⁴ See Immunities Agreement, Art.18(1) (conferring immunity from various activities which are within the competence of the receiving).

⁵⁵ See Headquarters Agreement, Art.25(1) (conferring immunity from various activities which are within the competence of the host). *Compare also* Art.25 with Art.17(1) (granting similar, although more extensive, privileges and immunities to Judges, the Prosecutor, the Deputy Prosecutors and the Registrar "*in the host State*, when engaged on or with respect to the business of the Court", emphasis added).

The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.⁵⁶

24. For the functional immunity conferred by the Immunities and Headquarters Agreements, the Court is analogous to the sending State.⁵⁷ Functional immunity was never conceived to be broader than diplomatic immunity⁵⁸—and not even diplomatic immunity was intended to create a legal vacuum in which no person could be investigated (by neither receiving State nor sending State) without some kind of additional formal waiver.

25. That the scope of functional immunity is limited in some way may be confirmed by the practice of the ICTY in prosecuting members of Defence teams for contempt of court, notwithstanding the affirmation of the principle of functional immunity by the ICTY Appeals Chamber in *Gotovina*. If such an immunity applied to the ICTY's own process, it would necessarily require an express waiver. Yet in *Rašić*, decided after *Gotovina*, a Defence case manager was investigated for (and pleaded guilty to) five counts of contempt, and no question of immunity was raised.⁵⁹ Similarly, in *Vujin*, an earlier case, former Defence counsel was convicted of

⁵⁶ Vienna Convention on Diplomatic Relations ("Vienna Convention"), Art.31(4).

⁵⁷ See e.g. Immunities Agreement, Art.26(2)(f); Headquarters Agreement, Art.30(2)(b)(ii). Compare Vienna Convention, Art.32(1).

⁵⁸ See also Motion, para.31 (referring, apparently interchangeably, to "diplomatic and functional immunity"). See further e.g. Immunities Agreement, Arts.13(1)(g) and (h) (referring to the Vienna Convention), 13(1)(i) (referring to diplomatic agents), 15(2) and (4) (referring to the privileges, immunities and facilities granted to diplomatic agents under the Vienna Convention), 16(i) and 18(h) and 19(g) and 21(g) (referring to diplomatic agents under the Vienna Convention).

⁵⁹ See ICTY, *Prosecutor v. Rašić*, IT-98-32/1-R77.2-A, Judgement, 16 November 2012, paras.58, 65-71 (expressly noting for the purposes of sentencing that Rašić was "Milan Lukić's Case Manager when she committed the crimes"). See also ICTY, *Prosecutor v. Rašić*, IT-98-31/1-R77.2, Written Reasons for Oral Sentencing Judgement, 6 March 2012, para.18. By contrast, on both occasions when the immunity issue has been raised in contempt prosecutions, the relevant conduct lay outside the temporal scope of the immunity: see ICTY, *In the Case against Florence Hartmann*, IT-02-54-R77.5, Reasons for Decision on the Defence Motion for Stay of Proceedings for Abuse of Process, 3 February 2009, para.7; ICTR, *Prosecutor v. Nshogoza*, ICTR-2007-91-PT, Decision on Defence Judicial and Administrative Application for Deferral in Favour of the ICTR, 5 November 2008, para.10.

contempt without discussion of the need for any waiver.⁶⁰

26. By asserting that the Court would be “unable to function” unless “the power to confirm the scope of immunities and to lift them is vested in an impartial entity” (the Presidency),⁶¹ the Defence seems to assume that the Presidency must necessarily be consulted before *any* form of action is taken concerning an immunity holder. This cannot be correct. The Presidency’s competence to determine the scope of the functional immunity established for counsel and other relevant persons does not mean either that it is obliged to provide advisory opinions every time a State or other actor wishes to undertake any kind of action *vis-à-vis* an immunity holder, or that such an opinion must necessarily be sought before action is taken. To the contrary, States (and other relevant actors) are obliged only to refrain from actually violating any relevant immunity. Whereas it is correct that a margin of caution will usually be appropriate for States Parties in assessing whether a person may be functionally immune from certain action, such a margin may be less necessary for organs of the Court exercising their statutory functions.⁶² Indeed, the presumption that organs of the Court will respect and serve the Court’s mandate constitutes much of the rationale for the ‘international rule of non-inquiry’ to which the Defence refers.⁶³

Legal professional privilege has not been breached

27. The Defence’s claim that legal professional privilege has been breached rests on a misinterpretation of the scope of that privilege, as provided in rules 73(1) and 81(1) of the Rules, and an inaccurate account of the proceedings in this case and in

⁶⁰ See ICTY, *Prosecutor v. Tadić*, IT-94-1-A-AR77, Appeal Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin, 27 February 2001; ICTY, *Prosecutor v. Tadić*, IT-94-1-A-R77, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin, 31 January 2000.

⁶¹ Motion, para.23.

⁶² *Contra* Motion, para.23.

⁶³ [REDACTED].

the separate article 70 proceedings.⁶⁴ To the contrary, legal professional privilege has been carefully preserved. There has in any event been no conceivable prejudice to Mr Bemba in this trial.

28. In the Motion, the Defence overstates the scope of the relevant privileged material, failing to take account of the recognised exception for ‘communications made in furtherance of a crime’. This exception, also known as the ‘crime-fraud exception’, is well established in many domestic jurisdictions, and recognised in the practice of the STL, SCSL, ICTY, and ICTR.⁶⁵ Such an exception also applies at this Court by operation of article 21 of the Statute, even if there is any lacuna in rule 73(1) (which would in any event be contrary to generally accepted public policy). The Single Judge properly found that:

The statutory right to communicate freely and in confidence with counsel of his own choosing, as set forth in article 67(1)(b) of the Statute, is obviously forfeit whenever an accused uses such right with a view to furthering a criminal scheme, rather than to obtaining legal advice, the more so when—as in the present case—the counsel seems to be an accomplice in the scheme. This behaviour is to be regarded as an abuse of the statutory right and entails that neither the accused nor the lawyer are any longer entitled to the confidentiality which otherwise pertains to lawyer-client communications as a matter of course.

⁶⁴ *Contra e.g.* Motion, paras.7, 40-42, 48.

⁶⁵ *See e.g.* STL, Rules of Procedure and Evidence, STL-BD-2009-01-Rev.6-Corr.1, 2014 (“STL Rules”), Rule 163(iii) (including the crime-fraud exception to legal professional privilege); SCSL, *Independent Counsel v. Bangura et al*, SCSL-2011-02-T, Decision on Prosecutor’s Additional Statement of Anticipated Trial Issues and Request for Subpoena in Relation to the Principal Defender, 3 September 2012 (“*Bangura Decision*”), para.11 (“all communications between the Principal Defender when acting as a lawyer and an accused or suspect who is, in effect, a client, are regarded as privileged. It must follow therefore the exception for communications made in furtherance of a crime also apply”). The SCSL Rules of Procedure and Evidence, like the Rules of this Court, do not expressly provide for this exception, although it is referred to in the SCSL Code of Conduct as well as certain domestic jurisdictions: *see Bangura Decision*, pp.2-3. A similar regime applies at the ICTY and ICTR: *see Khan and Azarnia*, ‘Evidentiary privileges’ in Khan et al, *Principles of Evidence in International Criminal Justice* (Oxford: OUP, 2010), p.587.

Although not explicitly stated in the Statute or the Rules, the fact that communications effected in furtherance of crime or fraud provide an exception to the principle of professional privilege is broadly accepted both at the national and the international level.⁶⁶

29. The material for which the Defence purports to claim privilege includes material within the crime-fraud exception. For example, the Defence identifies a telephone conversation between Mr Kilolo and Mr Mangenda as being an example of “privileged information” placed before the Trial Chamber.⁶⁷ Yet this conversation—to which the Defence expressly referred the Trial Chamber in the Mis-Filed Motion⁶⁸—apparently contemplates criminal activity in plain terms.⁶⁹ The Defence assertion that such a conversation is “privileged” suggests, at the least, a grave loss of perspective. Certainly, the Prosecution’s use of this material was not improper.⁷⁰

30. In any event, the Defence fails to address the fact that the Trial Chamber has already ruled multiple times with regard to potentially privileged material.⁷¹ The Single Judge has also issued relevant decisions for the purpose of the article 70 proceedings.⁷² In stark contrast to the Defence’s general characterisation of the Prosecution conduct, both the Single Judge and the Appeals Chamber have noted the cautious and responsible approach taken by the Prosecution to potentially privileged material.⁷³ The Defence fails to identify any specific privileged material

⁶⁶ ICC-01/05-52-Red2 (“article 70 Investigative Order”), paras.3-4 (citing *Bangura* Decision; STL Rule 163).

⁶⁷ Motion, para.104. *See further* Mis-Filed Motion, para.253 (asserting expressly that this conversation “set out potential legal strategy in relation to the credibility of Prosecution witnesses” and was “privileged within the terms of Rule 73(1)”).

⁶⁸ *See* Mis-Filed Motion, para.253, fn.252 (citing *inter alia* CAR-OTP-0082-1140).

⁶⁹ *See* CAR-OTP-0082-1140 at 1143, 1145-1148.

⁷⁰ *Contra* Motion, para.104.

⁷¹ *See e.g.* Interim Relief Decision; First Privileged Communications Decision; Second Privileged Communications Decision.

⁷² *See below* paras.40-45.

⁷³ *See above* fn.39.

supposedly accessed by the Prosecution, much less substantiated that such access occurred.

31. In the Interim Relief Decision, the Trial Chamber rejected the Defence's submissions that the Prosecution had "gained access to privileged information 'setting out Defence strategy and information'" that "may have" informed its strategy.⁷⁴ The Trial Chamber found no reason to doubt the Prosecution's assertion that it was not privy to any privileged material, having regard to the procedure ordered by the Single Judge,⁷⁵ and noted that the Defence provided "little to support" its claims.⁷⁶ The Defence merely repeats similar claims in the Motion, with similar deficiencies.⁷⁷

32. In the First Privileged Communications Decision, which the Motion fails to cite, the Trial Chamber also rejected as "speculative" requests for orders to re-affirm the legal professional privilege for members of the current Defence team.⁷⁸ It emphasised that there is no evidence that the protection offered by the ordinary legal framework of the Statute and Rules is insufficient, or that the communications of the current Defence team were being monitored.⁷⁹ The Trial Chamber further ruled that the communications of persons who are not "counsel" or "assistants to counsel" (as defined in regulations 124 to 127 of the Regulations of the Registry) are not legally privileged.⁸⁰ This decision, which is consistent with a separately reasoned decision by the Single Judge,⁸¹ establishes that Mr Mangenda's communications, as a case manager, were not legally privileged.⁸² Although the Prosecution nonetheless treated such communications as being potentially

⁷⁴ See Interim Relief Decision, para.17.

⁷⁵ Interim Relief Decision, para.19.

⁷⁶ Interim Relief Decision, para.20.

⁷⁷ *Contra e.g.* Motion, paras.5, 7, 61, 72.

⁷⁸ See First Privileged Communications Decision, para.3.

⁷⁹ See First Privileged Communications Decision, paras.25-26, 32-36, 39-43, 46-49.

⁸⁰ See First Privileged Communications Decision, paras.17-22, 24, 28, 38.

⁸¹ ICC-01/05-01/13-48, paras.4-6.

⁸² *Contra* Motion, paras.60-66.

privileged, out of an abundance of caution,⁸³ this only re-emphasises the integrity of these proceedings and does not undercut the clear legal ruling given by this Trial Chamber and Pre-Trial Chamber II. It verges on the disingenuous to rely on the Prosecution's professional care to argue that the Prosecution acted in bad faith, especially when this is contradicted by relevant judicial rulings.⁸⁴ There has been no breach of privilege with respect to Mr Mangenda's communications.

33. The Trial Chamber denied leave to appeal the First Privileged Communications Decision, observing that "the defence merely expresses a disagreement with the Chamber's finding, which does not constitute an appealable issue."⁸⁵ It also reaffirmed its view that "the alleged prejudicial impact" of its decision was "hypothetical",⁸⁶ in light of the Prosecution's affirmation that it had not sought to monitor the communications of the current Defence team and that it had only received access to conversations collected by the Registry prior to 24 November 2013.⁸⁷ In the Motion, the Defence now seems to have dropped arguments tacitly seeking reconsideration of the First Privileged Communications Decision.⁸⁸

34. In the Second Privileged Communications Decision, which the Motion also fails to cite, the Trial Chamber rejected further Defence requests pertaining to alleged Prosecution access to privileged information.⁸⁹ The Motion repeats many arguments adjudicated by that decision.⁹⁰ The Second Privileged Communications

⁸³ See above fns.39-40.

⁸⁴ *Contra* Motion, para.62 ("the Prosecution has, themselves, described the contents as 'privileged'", citing ICC-01/05-01/13-48, para.1). Although it is true that the Single Judge in an earlier order treated communications concerning both Mr Kilolo and Mr Mangenda alike, this appears to have been done as a matter of convenience: compare Motion, para.60, fn.66, with article 70 Investigative Order, para.6 (referring to "communications at least partly involving Counsel for the accused").

⁸⁵ Decision on Leave to Appeal the First Privileged Communications Decision, para.21.

⁸⁶ Decision on Leave to Appeal the First Privileged Communications Decision, para.24.

⁸⁷ Decision on Leave to Appeal the First Privileged Communications Decision, para.23.

⁸⁸ See above fn.13.

⁸⁹ See Second Privileged Communications Decision, para.2.

⁹⁰ See e.g. Second Privileged Communications Decision, para.9 (noting the Defence contention that the Prosecution has "had access to reams of privileged, *ex parte*, and sensitive information concerning the Defence

Decision demonstrates the Trial Chamber's effective stewardship of this trial. For example, although it recalled its decision to defer matters associated with the article 70 investigation to Pre-Trial Chamber II,⁹¹ it reaffirmed that it would nevertheless consider relevant Defence arguments in light of "its duty to ensure that the trial in the *Bemba* case is fair, expeditious, and conducted with full respect for the rights of the accused [...]"⁹² Accordingly,

- the Trial Chamber determined that it was unnecessary to order the Prosecution to disclose the e-mail accounts of Mr Kilolo, Mr Mangenda, and Mr Arido because the Defence's submissions that these "must contain privileged information" were "impermissibly speculative" and in light of the special handling procedure in place;⁹³ and
- the Trial Chamber determined that it was unnecessary to order the Prosecution to disclose communications concerning members of the current Defence team (requested out of concern that the Prosecution might "be familiar with Defence arguments, strategy and research [...] or a range of other matters"⁹⁴) because of the special handling procedure in place.⁹⁵

main case", and the Defence criticism of the Independent Counsel, including the claim that "the Independent Counsel has been acting as a '*de facto* Prosecutor'"). *Compare e.g.* Motion, para.75.

⁹¹ Second Privileged Communications Decision, paras.21-22. *See also above* fn.24.

⁹² Second Privileged Communications Decision, para.23. *See also* Interim Relief Decision, para.18; ICC-01/05-01/08-3113 ("Decision on Leave to Appeal the Second Privileged Communications Decision"), para.32.

⁹³ Second Privileged Communications Decision, paras.24-26, 28. Specifically, the Trial Chamber noted the Prosecution submission that the DVDs containing the e-mail accounts were preserved "packaged and sealed as received" and that access to those accounts was "subject to a specific review by an Independent Counsel under supervision of the Single Judge [of Pre-Trial Chamber II] for the purpose of filtering out potentially privileged material": para.25. *See also* paras.29-35 (rejecting a further request for disclosure of information from Mr Arido's e-mail account, in order to ascertain whether it contained privileged material, as "speculative").

⁹⁴ Second Privileged Communications Decision, para.40.

⁹⁵ Second Privileged Communications Decision, paras.37, 41, 44. *Contra* Motion, para.72.

35. The Trial Chamber denied leave to appeal the Second Privileged Communications Decision.⁹⁶

36. Other arguments raised in the Motion supposedly concerning privilege are devoid of merit.

37. The Prosecution has accessed Mr Arido's e-mail account. The Trial Chamber has previously rejected as "speculative"⁹⁷ the argument that the account may contain privileged work product shared with Mr Arido as a "potential expert witness".⁹⁸ The Motion simply repeats this assertion.⁹⁹ It fails to address the reasonableness of treating Mr Arido as a potential *fact* witness (in respect of whom any work product disclosed would be unprivileged and, indeed, an appropriate subject for cross-examination¹⁰⁰) based on the Defence indication of 13 July 2012.¹⁰¹ Given the vague nature of the relevant Defence submission, and in such circumstances, the Defence cannot now assert that the approach to Mr Arido's e-mail account was improper.

38. [REDACTED].¹⁰² [REDACTED].¹⁰³

39. Throughout the Motion, the Defence ignores the fact that two Chambers of this Court actively sought to ensure that the Prosecution's approach to potentially privileged material neither prejudiced this trial or the article 70 proceedings.¹⁰⁴ The Trial Chamber repeatedly affirmed that it would take the measures necessary to

⁹⁶ Decision on Leave to Appeal the Second Privileged Communications Decision, paras.32-33, 36.

⁹⁷ Second Privileged Communications Decision, para.33.

⁹⁸ *Contra* Motion, paras.36, 42-47.

⁹⁹ *Compare e.g.* Motion, paras.44, 46, with Second Privileged Communications Decision, para.29.

¹⁰⁰ Second Privileged Communications Decision, para.33 ("the Chamber notes the prosecution's submission that materials related to Mr. Arido do not contain privileged information", citing ICC-01/05-01/08-3058, para.15).

¹⁰¹ See ICC-01/05-01/08-2243-Conf; ICC-01/05-01/08-2243-Conf-AnxA. The Prosecution notes, likewise, that there is no indication that the Defence ever sought to remunerate Mr Arido as a (potential) expert witness: see *e.g.* ICC-01/05-01/08-2441, paras.8-12, but see also paras.3-4.

¹⁰² [REDACTED].

¹⁰³ [REDACTED]. [REDACTED].

¹⁰⁴ *Contra* Motion, paras.132, 135.

safeguard the fairness of its own proceedings,¹⁰⁵ notwithstanding its view — again in the interest of fairness and the appearance of fairness — that the appropriate judicial authority for matters pertaining to the article 70 proceedings should be Pre-Trial Chamber II.¹⁰⁶ Likewise, not only did the Trial Chamber properly guard the integrity of these proceedings, as described above, but so too did Pre-Trial Chamber II.

Pre-Trial Chamber II implemented appropriate measures to address potentially privileged material and to respect the process of this trial

40. In addition to the measures taken by the Trial Chamber, the Single Judge took lawful and appropriate measures to preserve legal professional privilege, including expressly for the benefit of proceedings in this trial.¹⁰⁷ The appointment of Independent Counsel was not unlawful,¹⁰⁸ nor is the Motion an appropriate forum for challenging that decision (which, in any event, has been exhaustively litigated in the article 70 proceedings).

41. The Defence is incorrect to assert that the Single Judge “divest[ed]” his judicial powers to Independent Counsel.¹⁰⁹ To the contrary, the Single Judge repeatedly emphasised that his assistance by such counsel was only a means of supporting him in discharging his judicial responsibilities.¹¹⁰ The Single Judge’s decision appointing Independent Counsel was adequately tested by the appellate mechanisms of this

¹⁰⁵ See above fn.92.

¹⁰⁶ See ICC-01/05-01/08-2606-Conf, para.19.

¹⁰⁷ See e.g. article 70 Investigative Order, para.6; ICC-01/05-01/13-41-Red, p.4; ICC-01/05-01/13-366-Red, p.7. See also ICC-01/05-01/13-50, p.5; ICC-01/05-01/13-51, p.4.

¹⁰⁸ Contra Motion, para.69.

¹⁰⁹ Contra Motion, para.69.

¹¹⁰ See Independent Counsel Disqualification Decision, p.5. See also ICC-01/05-01/13-457, p.3. Nothing in decisions of other courts, such as the ICTY, shows that judicial discretion in this respect is limited, even if the ultimate disposition may be different: see e.g. ICTY, *Prosecutor v. Popović et al*, IT-05-88-A, Decision on Prosecution Motion for the Appointment of Independent Counsel to Review Material Potentially Subject to Lawyer-Client Privilege, 16 July 2012.

Court,¹¹¹ including by Counsel for Mr Bemba in the article 70 proceedings.¹¹² Furthermore, even once materials had been approved for disclosure to the Prosecution by the Independent Counsel, the Single Judge ensured that this was subject to his own review and, in some instances, review by Counsel for Mr Bemba.¹¹³ Although the Defence acknowledges the Single Judge's review, they omit Mr Bemba's participation in this process through Counsel¹¹⁴—which extended to waiving privilege on occasion.¹¹⁵

42. The Defence likewise wrongly asserts that [REDACTED].¹¹⁶ The record of the article 70 proceedings—to which the Defence has access through Mr Bemba—shows this to be incorrect.¹¹⁷ The suggestion that an Independent Counsel's report “might have been inadvertently transmitted directly to the Prosecution” is likewise incorrect,¹¹⁸ and the basis for the Defence assertion that it “does not have access to the cover filing” unclear.¹¹⁹

43. Yet again, the Motion repeats previously adjudicated arguments, and fails to address or even to cite the relevant decisions. Thus, the Defence's claim that the Independent Counsel was improperly instructed, and acted as a *de facto* or “second Prosecutor”,¹²⁰ was rejected by the Trial Chamber in the Interim Relief Decision and the Second Privileged Communications Decision. The argument that the

¹¹¹ See ICC-01/05-01/13-50; ICC-01/05-01/13-56. See also ICC-01/05-01/13-511-Anx, paras.36-41.

¹¹² See ICC-01/05-01/13-51.

¹¹³ See ICC-01/05-01/13-347-Red, p.5; Independent Counsel Disqualification Decision, p.4.

¹¹⁴ See Motion, paras.70-71.

¹¹⁵ See e.g. ICC-01/05-01/13-408, p.6. Compare Motion, para.45, fn.54 (“Neither Mr. Bemba nor the Defence have ever waived privilege”).

¹¹⁶ [REDACTED].

¹¹⁷ See e.g. ICC-01/05-01/13-347-Red, pp.4-5 (ordering Independent Counsel to prepare appropriate redactions); ICC-01/05-01/13-408, pp.4, 6-7 (confirming that redactions are warranted and adequate); [REDACTED]

¹¹⁸ *Contra* Motion, para.73. Each Independent Counsel report was filed confidentially and *ex parte*, as the cover pages demonstrate, and then reclassified by the Single Judge to grant access to the Prosecution: see [REDACTED]; [REDACTED]; [REDACTED].

¹¹⁹ See Motion, para.73, fn.81.

¹²⁰ See Motion, paras.75-81.

Independent Counsel was at least potentially biased¹²¹ was rejected by the Single Judge in the Independent Counsel Disqualification Decision.

44. In the Second Privileged Communications Decision, the Trial Chamber emphasised that “the appointment and work of the Independent Counsel” falls “under the competence of the Single Judge”.¹²² Accordingly, “it would be inappropriate for it to review the legality of investigative measures ordered by the Single Judge [...]’ which would ‘allow an accused to challenge the legality of decisions of a Chamber through a route not envisioned in the statutory framework [...]’.”¹²³ The Defence does not show why it is necessary for the Trial Chamber to revisit this stance. To the contrary, the fact that Independent Counsel was aware of the crime-fraud exception to legal professional privilege is no basis to question the performance of his mandate.¹²⁴ No error is shown in the Single Judge’s view that the investigative purpose of the article 70 proceedings would be frustrated if a document needed to contain express and overt reference to criminal activity for it to be exempted from privilege.¹²⁵ Nor did the Independent Counsel seek “directions from the Prosecution in relation to the execution of his tasks”.¹²⁶ Rather, the Single Judge ensured that the review of potentially privileged material was conducted effectively. For example, the Single Judge instructed the Prosecution to provide [REDACTED] to the Independent Counsel to assist their review [REDACTED].¹²⁷ Likewise, all parties (including the Prosecution and the Defence) were invited to “submit a list of properly motivated keywords” to assist “in identifying material of a privileged nature” seized during the arrests of the Accused in the article 70 proceedings.¹²⁸

¹²¹ See Motion, paras.82-90.

¹²² Second Privileged Communications Decision, para.21.

¹²³ Second Privileged Communications Decision, para.21; Interim Relief Decision, para.16. See also ICC-01/05-01/08-3029, para.26 (parallel litigation in different Chambers may not be in the interests of justice).

¹²⁴ *Contra* Motion, para.76.

¹²⁵ *Contra* Motion, para.76. See e.g. article 70 Investigative Order, paras.3-4; ICC-01/05-01/13-408, pp.5-6.

¹²⁶ *Contra* Motion, para.77. See further below paras.63-64.

¹²⁷ [REDACTED]; [REDACTED]; [REDACTED].

¹²⁸ See e.g. ICC-01/05-01/13-41-Red, p.5.

45. In the Independent Counsel Disqualification Decision, the Single Judge determined that “the Defence fails to show any concrete fact (as opposed to mere speculation) suitable to undermine” the independence of Independent Counsel “or even [the] appearance thereof”.¹²⁹ Specifically, the Single Judge observed that “the mere existence of a past working relationship” casts no relevant doubt,¹³⁰ nor was the fact that the relevant Prosecution Counsel “did not mention the existence of such past working experience [...] an indication of bad faith”.¹³¹ The Single Judge denied leave to appeal.¹³² The Defence fails to show any error in the Single Judge’s approach, and merely disagrees with the decision. Intervention by the Trial Chamber is neither appropriate nor necessary.¹³³

The Prosecution at all times acted fairly, ethically, and professionally

46. The Motion contains broad allegations of unfair or unethical conduct by the Prosecution which are without merit, and verge on the frivolous and melodramatic. The Prosecution has not committed any of the various forms of misconduct alleged, nor failed to satisfy its disclosure obligations under the Statute and Rules, nor acted improperly in specific instances (such as its approach to the information provided by the anonymous informant or its characterisation of Mr Bemba’s financial status). To the contrary, the Prosecution has at all times protected the integrity of the trial proceedings and executed its statutory mandate.

¹²⁹ Independent Counsel Disqualification Decision, p.6; *see also* p.7.

¹³⁰ Independent Counsel Disqualification Decision, p.6. *Contra* Motion, paras.83-90.

¹³¹ Independent Counsel Disqualification Decision, p.6. *Contra* Motion, paras.85, 87-88.

¹³² *See* ICC-01/05-01/13-502.

¹³³ *See above* fn.123.

There has been no Prosecution misconduct

47. The Defence fails to substantiate the claims that the Prosecution sought “merely to win” at the expense of the integrity of the proceedings,¹³⁴ “stamped on” privileges and immunities,¹³⁵ “contaminated” the Court with “illegal and abusive conduct”,¹³⁶ or withheld relevant information.¹³⁷ At no point has the Prosecution violated the rights of Mr Bemba.¹³⁸

48. The Defence suggests not only that the Prosecution violated its disclosure obligations—refuted in detail below¹³⁹—but that this may have contained some element of bad faith, in the sense of a “sharp” trial tactic designed to obtain partisan advantage.¹⁴⁰ No evidence is provided in support of this implication, which should be rejected. Nor is the *Krstić* case a remotely useful analogy.¹⁴¹ The article 70 investigation was not a “trial tactic,” but rather a careful and deliberate investigation into suspected offences against the administration of justice, consistent with the requirements of the Statute. At all times, the Prosecution discharged its duties under articles 5, 54 and 70 of the Statute meticulously and appropriately.

49. The facts well known to the Trial Chamber make clear that the Prosecution conducted itself appropriately at all times. The Prosecution did not seek (nor in any event would it have succeeded) to taint the Trial Chamber by alerting it appropriately to its suspicions of article 70 offences committed in the context of the

¹³⁴ *Contra* Motion, para.5.

¹³⁵ *Contra* Motion, para.2.

¹³⁶ *Contra* Motion, para.8.

¹³⁷ *Contra* Motion, para.5.

¹³⁸ *Contra* Motion, para.6.

¹³⁹ *See below* paras.54-59.

¹⁴⁰ *See* Motion, paras.91-94.

¹⁴¹ *See* ICTY, *Prosecutor v. Krstić*, IT-98-33-A, Judgement, 19 April 2004, paras.171, 173-175, 215 (addressing a different factual scenario, and in any event determining not only that the Defence had not been materially prejudiced but that any prejudice could have been adequately remedied on appeal).

trial.¹⁴² The Prosecution never concealed the fact that the Senior Trial Lawyer in this trial was also originally responsible for the direction of the article 70 investigation.¹⁴³

50. The Defence wrongly implies that ‘Chinese walls’ must be established within the Prosecution,¹⁴⁴ and fails to address the relevant decision in which the Appeals Chamber stated:

[T]he Prosecutor has merely acted in compliance with the Court’s legal framework and pursuant to the duties it imposes upon her. Pursuant to articles 40 and 54 (1) (b) of the Statute, the Prosecutor has the duty to investigate and prosecute crimes within the jurisdiction of the Court, including offences against the administration of justice under article 70 of the Statute. As pointed out by the Prosecutor, such offences will almost always be related to other cases that she is investigating or prosecuting. In this context, the Appeals Chamber notes that rules 162 (2) (c) and 165 (4) [...], in fact, allow for the ‘joinder of charges under article 70 with charges under articles 5 to 8’. This suggests that the drafters of the Rules [...] envisaged that charges under article 70 may be dealt with in the same proceedings as charges for crimes under articles 6 to 8, including by the same Prosecutor, without this necessarily giving rise to a conflict of interest.¹⁴⁵

51. The Appeals Chamber further determined that the employment of Prosecution staff “already familiar with the *Bemba* case” in the “initial phases of article 70 proceedings” does not, on its own, “give rise to reasonable doubts as to

¹⁴² *Contra* Motion, para.112. *See below* para.56.

¹⁴³ *Contra* Motion, para.120; *see also* para.86.

¹⁴⁴ *Contra e.g.* Motion, para.5.

¹⁴⁵ ICC-01/05-01/13-648-Red3, para.35.

the Prosecutor's impartiality."¹⁴⁶ Nevertheless, as the prospect of joining the article 70 proceedings to this case diminished, the Prosecution chose to implement an appropriate and practicable degree of separation between counsel working on the two cases.

52. In a confidential decision in the article 70 proceedings (to which the Defence has access through Mr Bemba), the Presidency likewise confirmed that "allegations of serious misconduct and serious breach of duty" brought against members of the Prosecution are "manifestly unfounded".¹⁴⁷ It further determined that:

[T]he allegation of a conflict of interest on the part of the Prosecutor in respect of concurrent investigations into offences against the administration of justice and crimes within the jurisdiction of the Court fails to disclose an appearance of partiality, given the duty of the Prosecutor to investigate and prosecute both crimes.¹⁴⁸

53. The assertion that members of the Prosecution "advanced positions that they knew or should have known to be incorrect" is also manifestly unfounded.¹⁴⁹ The specific claims made by the Defence are each inaccurate. Thus:

- The Prosecution did not mislead the Court concerning the anonymous informant or [REDACTED], as explained below.¹⁵⁰
- The Prosecution did not mislead the Trial Chamber concerning its approach to potentially privileged material, [REDACTED].¹⁵¹

¹⁴⁶ ICC-01/05-01/13-648-Red3, para.40. The Appeals Chamber further stressed, however, that it would be "generally preferable" if "staff members involved in a case are not assigned to related article 70 proceedings of this kind."

¹⁴⁷ ICC-01/05-01/13-750-Conf, para.24. *See also* para.23 ("the Presidency concurs entirely with the findings and recommendations of the Panel. The Presidency finds that the Complaint does not contain any evidence that would substantiate the allegations").

¹⁴⁸ ICC-01/05-01/13-750-Conf, para.24.

¹⁴⁹ *Contra* Motion, para.113.

¹⁵⁰ *Contra* Motion, paras.114-117. *See below* paras.60-62 (concerning the anonymous informant), 63-64 [REDACTED].

- The Prosecution did not mislead the Trial Chamber with regard to any matter associated with Witness P-169, a subject that has been extensively litigated and adjudicated.¹⁵²

The Prosecution made appropriate disclosure in compliance with its obligations

54. The Prosecution did not violate its rule 77 obligation “to disclose any information within its possession relevant to the credibility of Defence witnesses”,¹⁵³ nor did it seek to “ambush[] the Defence by the revelation of an Article 70 case”.¹⁵⁴ These unfounded allegations disregard, yet again, relevant previous litigation and decisions. Moreover, the Defence’s view of the proper implementation of rule 77 would frustrate any article 70 investigation connected to the conduct of a Defence team or an accused, requiring disclosure of the material triggering the Prosecution’s suspicions before appropriate measures could be implemented to secure relevant evidence. Such a view is contrary to the established principles underlying rule 77.

55. It is well established that disclosure under rule 77 requires, first, the identification of whether items in the possession or control of the Prosecution are “material to the preparation of the defence” and, second, whether disclosure is nonetheless prohibited by the Statute or the Rules.¹⁵⁵ In particular, rule 81(2) provides that (*prima facie*¹⁵⁶) rule 77 material need not be disclosed where that disclosure “may prejudice further or ongoing investigations”, provided that such material is not “introduce[d] into evidence during the [...] trial without adequate prior disclosure”. Applications to a Chamber under rule 81(2) are to be made *ex parte*.

¹⁵¹ *Contra* Motion, paras.118-120. *See above* para.36 and text accompanying fn.103.

¹⁵² *Contra* Motion, paras.121-125. *See above* para.18.

¹⁵³ *Contra* Motion, para.92.

¹⁵⁴ *Contra* Motion, para.93.

¹⁵⁵ *See* ICC-02/05-03/09-501 OA4, para.35.

¹⁵⁶ *See* ICC-02/05-03/09-501 OA4, para.42.

56. As the Defence itself notes, the Prosecution brought the existence of the article 70 investigation (and, by implication, its supporting materials) to the attention of the Trial Chamber promptly, soon after the Defence case opened.¹⁵⁷ Consistent with the spirit of rule 81(2), this was done on an *ex parte* basis. The Prosecution did not expressly seek the Trial Chamber's assistance with regard to its disclosure obligations at that time, having regard to the preliminary stage of its investigation.¹⁵⁸ Nor did the Trial Chamber issue any direction to the Prosecution in that regard.

57. The Defence subsequently and repeatedly sought disclosure of materials relating to the article 70 investigation pursuant to rule 77,¹⁵⁹ yet the Motion again neither cites nor addresses the relevant decisions.¹⁶⁰

- On 22 May 2014, the Trial Chamber authorised the Defence to inspect “all interview notes, statements, or transcripts of interviews” generated by any Prosecution contact with Defence witnesses,¹⁶¹ subject to “the restrictions on disclosure provided for in the Statute and Rules 81 and 82 of the Rules, which should be assessed by the Prosecution on a case-by-case basis, or to any restrictions ordered by the Single Judge”.¹⁶² The Prosecution promptly complied.
- On 2 July 2014, the Trial Chamber rejected requests for disclosure of “other information relating to such contacts”,¹⁶³ RFAs to

¹⁵⁷ See Motion, paras.9, 96; *see also* para.93.

¹⁵⁸ *See further above* para.54.

¹⁵⁹ See ICC-01/05-01/08-2971-Red; ICC-01/05-01/08-3020-Red; ICC-01/05-01/08-3033-Red.

¹⁶⁰ See Witness Contact Decision; Disclosure Requests Decision.

¹⁶¹ Witness Contact Decision, paras.19, 23-24. *See also* Disclosure Requests Decision, para.27.

¹⁶² Witness Contact Decision, para.27; *see also* para.25.

¹⁶³ Disclosure Requests Decision, para.28 (although noting that the reasoning and the relief granted in the Witness Contact Decision is not limited specifically to “statements taken for case ICC-01/05-01/13 of witnesses previously called in the *Bemba* case”).

national authorities,¹⁶⁴ and materials relating to “the strength of Mr Arido’s consciousness of guilt”.¹⁶⁵ The Trial Chamber also considered Defence submissions concerning alleged prejudice to the Defence from the ‘late’ disclosure of rule 77 material,¹⁶⁶ but found the claims of prejudice to be “undermine[d]” and the relief requested to be “a hypothetical concern”.¹⁶⁷

58. Furthermore, consistent with the reasoning of the Single Judge concerning access to filings,¹⁶⁸ and as the Trial Chamber has found, Mr Bemba has access to all disclosure made in both this trial and the article 70 proceedings, and it is for him to determine the extent to which this material is shared with Counsel.¹⁶⁹ This remains, however, “without prejudice to Jean-Pierre Bemba’s and his Counsel’s duties to fully comply with any and all protective measures which are applicable and in force *vis-à-vis* the materials to be accessed”.¹⁷⁰

59. The Trial Chamber has already ruled as a general matter that “[t]he defence’s access to materials in case ICC-01/05-01/13 undermines its allegations of prejudice to the accused’s interests”.¹⁷¹ Furthermore, the Defence argument that “contemporaneous[]” disclosure “could” have enabled it to “put the allegations to the witnesses and thereby tested their veracity” is unrealistic, and shows no prejudice.¹⁷² Indeed, the Prosecution consistently put appropriate questions to Defence witnesses in cross-examination in order to assess their credibility (such as whether they had received payments or benefits related to their testimony).¹⁷³ This

¹⁶⁴ Disclosure Requests Decision, para.29.

¹⁶⁵ Disclosure Requests Decision, para.42.

¹⁶⁶ See ICC-01/05-01/08-3020-Red, p.18 (sub-title).

¹⁶⁷ Disclosure Requests Decision, paras.34-35.

¹⁶⁸ See *above* fn.26.

¹⁶⁹ See Witness Contact Decision, para.26 (“As such, the requested Items, if any, should already have been subject to disclosure in case ICC-01/05-01/13, and both the accused and his counsel in the present proceedings should have already been given access to them”); Disclosure Requests Decision, para.34.

¹⁷⁰ ICC-01/05-01/13-338, p.4. See also Second Privileged Communications Decision, para.27.

¹⁷¹ Disclosure Requests Decision, para.34.

¹⁷² *Contra* Motion, para.94.

¹⁷³ See *e.g.* Motion, para.109.

enabled the Defence to address such issues in re-examination if they wished¹⁷⁴— and, indeed, on one occasion the Defence pre-emptively raised the issue in direct examination.¹⁷⁵ The Prosecution was not obliged to put its broader suspicions concerning the origin of payments or benefits provided to witnesses. Furthermore, the Defence appears to contradict itself as to the nature of the prejudice it alleges. Whereas formerly it maintained that disclosure might have allowed it to make “an informed decision to focus its time and resources on other evidence or witnesses”,¹⁷⁶ now it alleges that it was “compelled to abandon its reliance on a raft of exculpatory testimony”.¹⁷⁷ Yet there could have been no compulsion, nor indeed any genuinely exculpatory testimony, if the facts ultimately prove that the evidence so provided was false.

The Prosecution dealt appropriately with the anonymous informant

60. The Defence’s contention that the Prosecution “exploited the division” between this trial and the proceedings before Pre-Trial Chamber II “to advance different, and incompatible[,] positions” is unfounded, and fails in any event to establish either misconduct or prejudice.¹⁷⁸

61. Mr Bemba, like the Prosecution, has access to all *inter partes* material both in this case and the article 70 proceedings before Pre-Trial Chamber II.¹⁷⁹ This includes certain material regarding the anonymous informant.¹⁸⁰ Consequently, the Defence

¹⁷⁴ *Contra* Motion, para.94. The Defence fails to explain how re-examination would have been insufficient, given the limited nature of the Prosecution questioning.

¹⁷⁵ See ICC-01/05-01/08-T-328-CONF-ENG, pp.28, ln.25, to 29, ln.2 (to witness D-6, “Q. Sir. Did Maître Kilolo offer you any money to come and give evidence for Jean-Pierre Bemba? A. Never.”).

¹⁷⁶ See Mis-Filed Motion, para.233.

¹⁷⁷ See Motion, para.94.

¹⁷⁸ *Contra* Motion, paras.115-117.

¹⁷⁹ See *above* fn.26.

¹⁸⁰ See e.g. ICC-01/05-01/13-298, p.5 (considering it “appropriate that the information provided by the anonymous informant be disclosed to all of the Defence teams” in the article 70 proceedings); ICC-01/05-01/13-337, p.5 (rejecting a request by Mr Bemba in the article 70 proceedings to gather additional information on the whereabouts of the anonymous informant); ICC-01/05-01/13-356, pp.3, 5 (noting additional information provided by the Prosecution in response to a request by Mr Kilolo).

has always been able to consider the Prosecution position in both cases and—as the Motion notes—did in fact seek to “confront[]” the Prosecution in this trial with its position in the article 70 proceedings where it deemed necessary.¹⁸¹ The Trial Chamber has already expressly noted the Defence’s concern in this respect¹⁸²—uncited in the Motion—but declined to order the requested disclosure concerning the anonymous informant.¹⁸³

62. Nothing in the procedural history recounted in the Motion shows any Prosecution misconduct or indeed any inconsistency. To the contrary, as the documents cited in the Motion show, the Prosecution has consistently acknowledged that the anonymous informant provided lead information which could help to identify certain Defence witnesses but did not name them. Investigation of such information is consistent with the Prosecution’s mandate under articles 58(1)(b), 68(1) and 70 of the Statute.¹⁸⁴ [REDACTED].¹⁸⁵ The implication in the Motion that the Prosecution may deliberately have sought to [REDACTED] lacks any foundation.¹⁸⁶

The Prosecution [REDACTED] accurately and appropriately

63. The Prosecution was neither inaccurate nor inappropriate in [REDACTED].¹⁸⁷ Notwithstanding the determination that the costs of Mr Bemba’s defence for this trial should be recouped from his frozen assets, Mr Bemba himself has consistently

¹⁸¹ See e.g. Motion, para.116.

¹⁸² Disclosure Requests Decision, paras.12-13 (“the defence alleges a discrepancy between information the prosecution provided to the defence [...] and to Pre-Trial Chamber II”).

¹⁸³ Disclosure Requests Decision, paras.25-27, 47. The Trial Chamber noted that, as a result of the information provided by the anonymous informant, the Prosecution had initiated investigative steps, and that nothing suggested that it had violated its duties under articles 54(1)(b) or 68(1) of the Statute.

¹⁸⁴ See above fn.183.

¹⁸⁵ [REDACTED].

¹⁸⁶ [REDACTED].

¹⁸⁷ [REDACTED].

maintained his indigence for the purpose of this trial¹⁸⁸ and the article 70 proceedings.¹⁸⁹ Mr Bemba was not, and is not, directly funding his defence in the sense of voluntarily making payments to cover his expenses, and has “always refused to cooperate with the Court in clarifying the status of his assets”.¹⁹⁰ For this reason, the Prosecution was reasonable to consider that [REDACTED] may indicate criminal activity.¹⁹¹

64. The Defence’s claim that the Prosecution’s own conduct with regard to witness expenses was “key contextual information” for the purpose of identifying potentially criminal transactions by Mr Bemba—and that this was improperly “withheld”—is nonsensical.¹⁹² Matters allegedly going to the credibility of Prosecution witnesses in this trial are entirely unrelated to the article 70 proceedings. Nor is the Motion the appropriate forum for the Defence to make claims about the credibility of trial witnesses, which have been fully addressed by the Parties during the trial and in the context of their closing arguments.

The Trial Chamber is fair and impartial

65. No reasonable observer would consider that the Trial Chamber no longer has the appearance of being able to render a fair decision on the evidence in this case.¹⁹³ The Defence’s suggestion to the contrary is incorrect, relying on nothing more than a catalogue of subjective complaints and disagreements.¹⁹⁴

¹⁸⁸ See e.g. ICC-01/05-01/08-76-tENG, pp.3, 8; ICC-01/05-01/08-567-Red, para.105; ICC-01/05-01/08-596-Red, paras.15-16; ICC-01/05-01/08-897-Red, para.16.

¹⁸⁹ See e.g. ICC-RoC85-01/13-21-Corr-Red, paras.1, 76-77; ICC-01/05-01/13-446, p.3; ICC-01/05-01/13-783, para.7. See also ICC-01/05-01/13-57.

¹⁹⁰ ICC-RoC85-01/13-21-Corr-Red, para.39.

¹⁹¹ *Contra* Motion, paras.32-34, 78, 114.

¹⁹² *Contra* Motion, para.114.

¹⁹³ *Contra* Motion, para.112.

¹⁹⁴ *Contra* Motion, paras.98-107, 109.

66. In the specific context of the article 70 issues associated with this case, the Trial Chamber has already noted that “it is composed of professional judges who, unlike a lay jury, will be sufficiently capable of evaluating the value of any allegations brought before it and to disregard them as necessary”.¹⁹⁵ This view is consistent with the recognition by the Appeals Chamber and the Presidency that the Statute and Rules expressly contemplate the possibility of article 70 proceedings being joined to a trial for article 5 crimes.¹⁹⁶ The practice of other courts and tribunals also recognises that a Trial Chamber may be competent to hear allegations of contempt ancillary to the trial of which it is seised.¹⁹⁷ There is no basis to infer that professional Judges may be ‘tainted’ by mere exposure to allegations of the commission of offences under article 70 of the Statute, especially at the initial stages of an investigation.

67. The parties are not only obliged to respect the strong presumption of judicial fairness and impartiality but they are entitled to do so. Accordingly, the Prosecution made no error in alerting the Trial Chamber to its suspicions of the commission of article 70 offences risking the integrity of this trial.¹⁹⁸ It necessarily did so on an *ex parte* basis, to preserve the confidentiality of the article 70 investigation.¹⁹⁹ For its part, the Trial Chamber, having considered the matter, ordered the Prosecution to address the relevant investigative concerns with Pre-Trial Chamber II.²⁰⁰ When matters associated with the article 70 proceedings have subsequently come before the Trial Chamber, it has further reminded the Parties that its judgement “will be

¹⁹⁵ Witness Contact Decision, para.29.

¹⁹⁶ See *above* paras.50-52.

¹⁹⁷ See e.g. ICTY, Practice Direction on Procedure for the Investigation and Prosecution of Contempt before the International Tribunal, IT/227, 6 May 2004, paras.5, 13; ICTY, *Prosecutor v. Milošević, Contempt Proceedings against Kosta Bulatović*, IT-02-54-T-R-77.4, Judgement, Separate Opinion of Judge Bonomy on Contempt of the Tribunal, 13 May 2005, para.7; RSCSL, Rules of Procedure and Evidence, 4 December 2013, Rule 77(D). But see STL Rule 60bis(C); MICT, Rules of Procedure and Evidence, MICT/1, 8 June 2012, Rule 90(C); SCSL, Rules of Procedure and Evidence, 31 May 2012, Rule 77(D).

¹⁹⁸ *Contra* Motion, paras.97-104, 112.

¹⁹⁹ Once the need for that confidentiality had passed, the relevant records were duly made available to the Defence.

²⁰⁰ See e.g. ICC-01/05-01/08-2606-Red, paras.19, 21-22.

based solely on evidence submitted and discussed before it at the trial”.²⁰¹ Likewise, the Trial Chamber directed the Parties to limit their closing arguments to issues arising from evidence in these proceedings.²⁰²

68. The Defence’s efforts to recount the procedural history of this trial in the most sensational way do not mean that a reasonable observer would reach the same conclusion. Not only is there no reasonable basis to apprehend unfairness either in the conduct of the Prosecution or the Trial Chamber in addressing matters relevant to the article 70 investigation,²⁰³ there is likewise no merit in the claim that the Prosecution sought to place privileged material before the Trial Chamber when P-169 was recalled²⁰⁴ or that it “peppered its submissions in this case with reference to Article 70 allegations” not based on evidence in this case.²⁰⁵

69. There is no support in the law or practice of any court or tribunal for the notion that fairness requires professional Judges to be sequestered, as the Defence seems to imply, in order to preserve the integrity of a trial or their own impartiality. There is no prejudice or impropriety in members of the Trial Chamber participating in the Plenary²⁰⁶—which necessarily contemplates the involvement of *all* Judges and whose proceedings were in any event public.²⁰⁷ Nor was the Prosecution obliged to refrain from making public arguments in another case, even if they happen to touch on a witness in this case.²⁰⁸ None of these incidents raises any concern as to the independence, impartiality, or fairness of the Trial Chamber.

²⁰¹ ICC-01/05-01/08-3098-Red, para.18.

²⁰² See above fn.28.

²⁰³ *Contra* Motion, paras.97, 99, 101-105, 112.

²⁰⁴ *Contra* Motion, para.104. See above para.29.

²⁰⁵ *Contra* Motion, para.101. In support of that assertion, the Defence cites only “ICC-01/05-01/08-3141-Conf, paras.119, 287, 289, 291” and “ICC-01/05-01/08-2940, p.4”. Neither of these citations appears to support the proposition.

²⁰⁶ *Contra* Motion, para.106.

²⁰⁷ See e.g. ICC-01/05-01/13-367, ICC-01/05-01/13-372, ICC-01/05-01/13-380, ICC-01/05-01/13-419, ICC-01/05-01/13-433.

²⁰⁸ *Contra* Motion, paras.106-107.

The Defence retains an adequate remedy

70. The Defence does not lack an adequate remedy.²⁰⁹ The Trial Chamber has already rejected the assertion that there is an “egregious legal vacuum” occasioned by the relationship between this trial and the article 70 proceedings.²¹⁰ Rather, as has previously been noted, Mr Bemba is represented by (different) Counsel in each case in which he is accused, and “counsel in both cases have a number of procedural remedies available to them before the competent Chamber to ensure that the accused’s rights and interests are fully protected.”²¹¹

71. In this case, as this response and the decisions of the Trial Chamber show, Mr Bemba’s rights have been carefully protected. The evidence has been fairly heard, and the Prosecution and Defence have now closed their cases. The proceedings are adjourned for the Trial Chamber’s deliberations. As the Motion shows, there is no prejudice to Mr Bemba’s interests in the proceedings to date. Nor is there any reason to grant the Motion for fear that a fair trial may be impossible in the future. Once the Trial Chamber renders its judgement, Mr Bemba will be entitled to appeal any guilty verdict, and the Appeals Chamber will be able to assess and remedy any prejudice he then claims.

72. Having failed to establish any basis for the Trial Chamber to stay the proceedings for abuse of process, no lesser remedy is warranted or indeed justified.²¹²

²⁰⁹ *Contra* Motion, paras.128-142.

²¹⁰ Interim Relief Decision, paras.23, 26.

²¹¹ Interim Relief Decision, para.23.

²¹² *Contra* Motion, para.142.

IV. Conclusion

73. For the reasons above, the Motion should be dismissed. The Prosecution further requests the Trial Chamber to consider whether the Motion's content and mode of expression is appropriate—having regard to the issues at stake, the existing procedural history, and the Trial Chamber's resolution of the Motion on its merits²¹³—and to make any consequential order.



Fatou Bensouda, Prosecutor

Dated this 30th day of January 2015

At The Hague, The Netherlands

²¹³ See above para.13.