

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/05-01/08

Date: 3 July 2014

**TRIAL CHAMBER III**

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

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC  
IN THE CASE OF  
THE PROSECUTOR  
*v. JEAN-PIERRE BEMBA GOMBO***

**Public**

**Decision on “Defence Urgent Request for Disclosure and Injunctive Relief  
concerning Privileged Defence Communications” and Addendum**

No. ICC-01/05-01/08

1/23

3 July 2014

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

**The Office of the Prosecutor**

Ms Fatou Bensouda

Mr Jean-Jacques Badibanga

**Counsel for the Defence**

Mr Peter Haynes

Ms Kate Gibson

Ms Melinda Taylor

**Legal Representatives of the Victims**

Ms Marie-Edith Douzima Lawson

**Legal Representatives of the 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 Keïta

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

Trial Chamber III ("Trial Chamber" or "Chamber") of the International Criminal Court ("ICC" or "Court"), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* ("Bemba case"), hereby issues the Decision on "Defence Urgent Request for Disclosure and Injunctive Relief concerning Privileged Defence Communications" and Addendum ("Decision").

## I. Background

1. On 3 April 2014, the prosecution in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu and Narcisse Arido* ("case ICC-01/05-01/13") filed a "Public Redacted version of "Prosecution's Request to Refer Potentially Privileged Materials to Independent Counsel" ("ICC-01/05-01/13 Prosecution Request").<sup>1</sup> The prosecution requested the Single Judge of Pre-Trial Chamber II ("Single Judge") to issue an order:<sup>2</sup>

(i) appointing an independent counsel to review the email accounts of Mangenda and Kilolo for potentially privileged and/or legally protected confidential information, and to provide all non-privileged information contained therein to the Prosecution on a rolling basis as and when they are reviewed; and

(ii) instructing the Registry to copy/extract Arido's and Babala's email accounts in the presence of the independent counsel, and to promptly transmit the copied/extracted material to the Prosecution.

2. On 9 April 2014, the defence for Mr Jean-Pierre Bemba Gombo in the *Bemba* case ("defence") filed its "Defence Urgent Request for Disclosure and Injunctive Relief concerning Privileged Defence Communications"

<sup>1</sup> Public Redacted version of "Prosecution's Request to Refer Potentially Privileged Materials to Independent Counsel", 2 April 2014, ICC-01/05-01/13-310-Conf, 3 April 2014, ICC-01/05-01/13-310-Red.

<sup>2</sup> ICC-01/05-01/13-310-Red, paragraph 10.

("Defence Request" or "Request"),<sup>3</sup> in which it requests that the Chamber:<sup>4</sup>

ORDER the Prosecution immediately to deliver to the Defence the email accounts of Me. Aimé Kilolo, Mr. Jean-Jacques Mangenda and Mr. Narcisso Arido; ["First Request"] or, in the alternative

ORDER the Prosecution and the Registry to refrain from accessing the contents of the email accounts until further order; and

ORDER the Prosecution to disclose copies of the email accounts to the Defence so that the Defence can conduct an initial review, and identify materials which are:

- a. privileged;
- b. subject to ex parte classifications; or
- c. constitute internal work product; [together "Alternate First Request"]

ORDER the Prosecution to disclose all information emanating from Mr. Arido which is in the custody of the Prosecution (including particulars concerning the date the information was transmitted to the custody of the Prosecution, and the source); ["Second Request"]

ORDER the Prosecution to

i. Stipulate as to whether it has any reasons to believe that the communications (email or oral) of Mr. Haynes, Ms. Gibson, or Dr. Mettraux were ever recorded (directly or indirectly) by national authorities; ["Third Request"] and

ii. Disclose all communications (including recordings, transcripts or emails and particulars concerning the date the information was transmitted to the custody of the Prosecution and the source) in its custody (even if the Prosecution has not reviewed them), which

- a. Were addressed or copied to Mr. Haynes, Ms. Gibson or Dr. Mettraux;
- b. Include information forwarded from or emanating from Mr. Haynes, Ms. Gibson or Dr. Mettraux;
- c. Involve Mr. Haynes, Ms. Gibson or Dr. Mettraux as a participant in the recording; or
- d. Refer to Mr. Haynes, Ms. Gibson or Dr. Mettraux, in particular, as concerns any tasks performed by them in the Bemba case. ["Fourth Request"].

<sup>3</sup> Defence Urgent Request for Disclosure and Injunctive Relief concerning Privileged Defence Communications, 9 April 2014, ICC-01/05-01/08-3036 and public annexes A, B, C and D, containing copies of correspondence between the defence and the prosecution.

<sup>4</sup> ICC-01/05-01/08-3036, paragraph 108.

3. On 25 April 2014, the Single Judge in case ICC-01/05-01/13 issued the public redacted “Decision on the ‘Prosecution’s Request to Refer Potentially Privileged Materials to Independent Counsel’” (“Decision ICC-01/05-01/13-366-Red”). In this decision, the Single Judge granted the ICC-01/05-01/13 Prosecution Request and ordered the appointment of an Independent Counsel tasked with reviewing the email accounts with a view to identifying “any item which is privileged or otherwise obviously irrelevant for the purposes of these proceedings (...) and promptly submitting a report to the Single Judge as to the results of such review”.<sup>5</sup>
4. On 1 May 2014, the prosecution filed its “Prosecution Response to ‘Defence Urgent Request for Disclosure and Injunctive Relief concerning Privileged Defence Communications’” (“Prosecution Response”),<sup>6</sup> in which it urges the Chamber to deny the Defence Request.<sup>7</sup>
5. On 2 May 2014, the defence filed a “Defence Addendum to Defence urgent request for disclosure and injunctive relief concerning privileged Defence communications” (“Addendum”),<sup>8</sup> in order to “update the Trial Chamber in relation to developments in the Article 70 case which will compromise the enforceability of protective measures emanating from

<sup>5</sup> Decision on the “Prosecution’s Request to Refer Potentially Privileged Materials to Independent Counsel”, 25 April 2014, ICC-01/05-01/13-366-Red, page 10.

<sup>6</sup> Prosecution Response to “Defence Urgent Request for Disclosure and Injunctive Relief concerning Privileged Defence Communications”, 1 May 2014, ICC-01/05-01/08-3058.

<sup>7</sup> ICC-01/05-01/08-3058, paragraph 20.

<sup>8</sup> Defence Addendum to Defence urgent request for disclosure and injunctive relief concerning privileged Defence communications, 2 May 2014, ICC-01/05-01/08-3062-Conf-Exp and Public Redacted Version of Defence Addendum to Defence urgent request for disclosure and injunctive relief concerning privileged Defence communications, 2 May 2014, ICC-01/05-01/08-3062-Red.

the Main Case, and, secondly, reiterate the urgent necessity of obtaining relief on this issue”.<sup>9</sup>

6. On 26 May 2014, the prosecution filed its “Prosecution’s response to Public Redacted Version of Defence Addendum to Defence urgent request for disclosure and injunctive relief concerning privileged Defence communications”,<sup>10</sup> in which it requests that the Chamber dismiss the Request and the Addendum.<sup>11</sup>

## II. Submissions and Analysis

7. For the purpose of the present Decision and in accordance with Article 21(1) of the Rome Statute (“Statute”), the Chamber has considered Articles 64(2), 67, and 68(1) of the Statute, Rule 77 of the Rules of the Rules of Procedure and Evidence (“Rules”) and Regulation 42 of the Regulations of the Court (“Regulations”).
8. As a preliminary issue, the Chamber notes that 23 days after the notification of its Request, the defence filed an Addendum, providing updated information on the developments in case ICC-01/05-01/13 and reiterating the relief sought in the Request. The Chamber stresses that in principle, and in the interest of efficiency and certainty, parties and participants should refrain from filing addenda to reiterate or complement their original requests. However, in the present

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<sup>9</sup> ICC-01/05-01/08-2062-Red, paragraph 6.

<sup>10</sup> Prosecution’s response to Public Redacted Version of Defence Addendum to Defence urgent request for disclosure and injunctive relief concerning privileged Defence communications, 26 May 2014, ICC-01/05-01/08-3073.

<sup>11</sup> ICC-01/05-01/08-3073, paragraph 8.

circumstances, the Chamber notes that the Addendum is based on information received by the defence after the submission of its Request. As this information may be relevant for the Chamber's analysis, and on an exceptional basis, the Chamber will consider the Addendum and the prosecution's response thereto for the purpose of the present Decision.

*The First Request and the Alternate First Request*

9. At the outset, the defence posits that "[s]ince the inception of the Article 70 case, the Prosecution has had access to reams of privileged, *ex parte*, and sensitive information concerning the Defence main case",<sup>12</sup> and that the "manifest linkage between the Article 70 case and the main case has never been disputed".<sup>13</sup> It describes the Independent Counsel as being "a patently insufficient mechanism for identifying and filtering out privileged and sensitive Defence information",<sup>14</sup> and argues that the Independent Counsel has been acting as a "*de facto* Prosecutor".<sup>15</sup>
10. The defence purports that as a result of the "broad nature" of the information transmitted to the Independent Counsel,<sup>16</sup> it is "certain" that the email accounts of Mr Kilolo and Mr Mangenda contain (i) "correspondence directed to and copied to the current members of the

<sup>12</sup> ICC-01/05-01/08-3036, paragraph 51.

<sup>13</sup> ICC-01/05-01/08-3036, paragraph 52.

<sup>14</sup> ICC-01/05-01/08-3036, paragraph 53.

<sup>15</sup> ICC-01/05-01/08-3036, paragraph 54.

<sup>16</sup> The defence asserts that the public records in case ICC-01/05-01/13 indicate that the Independent Counsel was instructed to transmit "any information which is relevant to the Article 70 case, to the Prosecution", ICC-01/05-01/08-3036, paragraph 57. It further stresses that "the Prosecution has expressly confirmed the broad nature of the information transmitted by the Independent Counsel, which includes the transmission of exculpatory information". This information, according to the defence, is "privileged, and should never have been disclosed to the Prosecution", ICC-01/05-01/08-3036, paragraphs 59 and 60.

Defence in the main case”; (ii) “draft submissions pertaining to the close of the case/final pre-trial brief, strategy documents and internal Defence comments, opinions, and evaluations of its case”; (iii) “minutes and reports of privileged meetings and discussions with Mr. Bemba”; (iv) “information concerning matters, which were raised in *ex parte* Status Conferences, *ex parte* hearings, or which are otherwise protected from any form of disclosure to the Prosecution”.<sup>17</sup> The defence further argues that the email accounts could include information subject to *ex parte* protective measures or orders,<sup>18</sup> as well as information pertaining to cases other than the *Bemba* case.<sup>19</sup>

11. In the view of the defence, such information is “the ‘property’ of the Defence”<sup>20</sup> and the defence should be given an opportunity to identify which information is privileged and which information is not.<sup>21</sup> For that purpose, the defence submits that the Trial Chamber has (i) “the power and duty to step in to take measures to ensure that Mr. Bemba’s right to a fair trial is not irretrievably prejudiced by tandem litigation”;<sup>22</sup> as well as (ii) “the competence to order the Prosecution to disclose the contents of the email accounts [of Mr Kilolo and Mr Mangenda] to the Defence in the main case”<sup>23</sup> and to “refrain from accessing their contents until such time as the Defence has been able to review them, and prepare a table

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<sup>17</sup> ICC-01/05-01/08-3036, paragraph 61.

<sup>18</sup> ICC-01/05-01/08-3036, paragraphs 62 to 64.

<sup>19</sup> In this regard, the defence stresses that from 2006 to 2008, Mr Mangenda assisted the OPCD to review victim applications in the DRC situation, ICC-01/05-01/08-3036, paragraphs 65 and 66.

<sup>20</sup> ICC-01/05-01/08-3036, paragraph 68.

<sup>21</sup> ICC-01/05-01/08-3036, paragraphs 68 to 70.

<sup>22</sup> ICC-01/05-01/08-3036, paragraph 79.

<sup>23</sup> ICC-01/05-01/08-3036, paragraph 80.



setting out which documents are privileged, or contain information which cannot be disclosed to the Prosecution for other reasons”.<sup>24</sup>

12. The prosecution responds, firstly, that the Chamber lacks jurisdiction to rule on the matters raised in the Defence Request because they are “squarely before a different Chamber of this Court, in the context of a different case”.<sup>25</sup> Should the Trial Chamber rule on these matters, it would, according to the prosecution, “directly intrude into the sphere of authority of Pre-Trial Chamber II and the Single Judge appointed by it”.<sup>26</sup>

13. Moreover, the prosecution submits that the Defence Request “shows Counsel’s apparent misapprehension of his ability to access Article 70 materials” because “[t]he Single Judge’s recent ruling [...] clarifies that Counsel has always had access to disclosed Article 70 materials through Mr. Bemba, subject to his consent to share these materials with Counsel”.<sup>27</sup>

14. Finally, the prosecution lists a number of “incorrect assumptions and inaccuracies in the Request”,<sup>28</sup> and clarifies, *inter alia*, that (i) the prosecution does not have access to “all potential Defence strategies, research and arguments”;<sup>29</sup> (ii) the defence’s assertion that “the Prosecution provided clear evidence that the Independent Counsel has transmitted privileged information to the Prosecution” is “plainly

<sup>24</sup> ICC-01/05-01/08-3036, paragraph 82.

<sup>25</sup> ICC-01/05-01/08-3058, paragraph 11.

<sup>26</sup> ICC-01/05-01/08-3058, paragraph 11.

<sup>27</sup> ICC-01/05-01/08-3058, paragraph 16.

<sup>28</sup> ICC-01/05-01/08-3058, paragraph 17.

<sup>29</sup> ICC-01/05-01/08-3058, paragraph 17(a).

false”;<sup>30</sup> and (iii) the defence’s assertion that “[s]ince the inception of the Article 70 case, the Prosecution has had access to reams of privileged, *ex parte*, and sensitive information concerning the Defence main case’ [is] entirely unsupported [and] untrue”.<sup>31</sup>

15. In relation to the review of the email accounts of Mr Kilolo and Mr Mangenda, the prosecution stresses that when ruling on the ICC-01/05-01/13 Prosecution Request, the Single Judge established a protocol “to safeguard any potentially privileged information and identify evidence relevant to the Article 70 case among those materials”.<sup>32</sup> According to the prosecution, this mechanism “precludes any possibility that the Prosecution could disclose the emails the Defence seeks to obtain in advance of their unsealing in accordance with the terms of the Single Judge’s order”.<sup>33</sup>

16. In its Addendum, the defence contends that the Single Judge has failed to address:<sup>34</sup>

- significant Defence concerns regarding the appearance of independence and impartiality of the Independent Counsel;
- uniform requests by the Article 70 Defence teams to the effect that the Defence representing Mr. Bemba in the Main Case should first be accorded an opportunity to identify privileged and *ex parte* information; and
- Defence concerns regarding the fact that the Independent Counsel did not possess the capacity to identify whether information might be protected by *ex parte* protective orders issued by the Trial Chamber.

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<sup>30</sup> ICC-01/05-01/08-3058, paragraph 17(d).

<sup>31</sup> ICC-01/05-01/08-3058, paragraph 17(e).

<sup>32</sup> ICC-01/05-01/08-3058, paragraph 12.

<sup>33</sup> ICC-01/05-01/08-3058, paragraph 13.

<sup>34</sup> ICC-01/05-01/08-3062-Red, paragraph 9 (internal citations omitted).

17. According to the defence, “[t]hrough its recently granted access to confidential filings and disclosure in the Article 70 case, [it] has been able to verify that privileged information, information protected by *ex parte* protective measures, and internal work product have been impermissibly transmitted to the Prosecution *via* the Article 70 proceedings”,<sup>35</sup> including, for example, information emanating from Mr Haynes and Ms Gibson and transcripts of conversations concerning the draft Defence Final Brief.<sup>36</sup>

18. Moreover, the defence contends that the fact that the reports of the Independent Counsel are first transmitted to the Single Judge “does not constitute an effective safeguard as concerns the protection of privilege or *ex parte* information”<sup>37</sup> and that “[t]he mere fact that the DVDs containing the contents of the email accounts are being transmitted to a person, outside of the Defence, in itself constitutes a violation of the Trial Chamber’s protective measures”.<sup>38</sup> As a result, the defence submits that it is “imperative that the Trial Chamber takes immediate measures to ensure the continued enforceability of protective measures issued under its legal authority”.<sup>39</sup>

19. Finally, the defence asserts that “[i]f the Trial Chamber remains silent, the Trial Chamber will also be abrogating its positive duty under Article 64(2) of the Statute to ‘ensure that a trial is fair and expeditious and is

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<sup>35</sup> ICC-01/05-01/08-3062-Red, paragraph 12 (internal citations omitted).

<sup>36</sup> ICC-01/05-01/08-3062-Red, paragraphs 17 and 18.

<sup>37</sup> ICC-01/05-01/08-3062-Red, paragraph 19.

<sup>38</sup> ICC-01/05-01/08-3062-Red, paragraph 22.

<sup>39</sup> ICC-01/05-01/08-3062-Red, paragraph 25.

conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses’”.<sup>40</sup>

20. The prosecution responds that (i) the Addendum raises further alleged issues in relation to the appointment and work of the Independent Counsel in case ICC-01/05-01/13, which fall under the sole authority of Pre-Trial Chamber II and the Single Judge;<sup>41</sup> (ii) “the Defence’s argument that the mere transfer of email accounts to a person outside of the Defence ‘in itself constitutes a violation of Trial Chamber’s protective measures’ cannot be entertained for the simple reason that the Independent Counsel is not just ‘a person’, but a judicially appointed and supervised expert tasked with filtering potentially privileged information from information that cannot be so designated”;<sup>42</sup> (iii) the defence’s arguments concerning the lack of safeguards and “independent means” for containing privilege, contestations of the Independent Counsel’s impartiality and/or independence and allegedly deficient instructions to the Independent Counsel are speculative and/or baseless;<sup>43</sup> and (iv) due to the guarantees that have been put in place to protect privileged information, the prosecution is unable to disclose the contents of the email accounts until after they are extracted from the DVDs, transferred to the Independent Counsel pursuant to the extraction protocol in the Article 70 case, and released by the Single Judge.<sup>44</sup>

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<sup>40</sup> ICC-01/05-01/08-3062-Red, paragraph 24.

<sup>41</sup> ICC-01/05-01/08-3073, paragraph 3.

<sup>42</sup> ICC-01/05-01/08-3073, paragraph 5 (internal citations omitted).

<sup>43</sup> ICC-01/05-01/08-3073, paragraphs 6 and 7.

<sup>44</sup> ICC-01/05-01/08-3073, paragraph 7 (internal citations omitted).

21. The Chamber notes that the parties make detailed submissions in relation to the measures taken in case ICC-01/05-01/13, in particular concerning the appointment and work of the Independent Counsel. In this regard, the Chamber recalls its previous finding that such measures fall under the competence of the Single Judge of Pre-Trial Chamber II and that the Trial Chamber lacks competence in relation to matters arising from that case.<sup>45</sup> In this context, the Chamber held that “it would be inappropriate for it to review the legality of investigative measures ordered by the Single Judge of Pre-Trial Chamber II” which would “allow an accused to challenge the legality of decisions of a Chamber through a route not envisioned in the statutory framework, with the effect that the same concrete legal and factual issue could come to be addressed before two different chambers of the Court simultaneously”.<sup>46</sup>

22. In relation to the relief sought by the defence in its First and Alternate First Requests, the Chamber notes that ordering the prosecution to “deliver”<sup>47</sup> the email accounts to the defence, or to refrain from accessing the contents of the email accounts until further order, and to disclose the accounts to the defence for an initial review, would interfere with the competence of the Single Judge in case ICC-01/05-01/13, and Decision ICC-01/05-01/13-366-Red.

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<sup>45</sup> See Decision on “Defence Motion on Privileged Communications”, 3 June 2014, ICC-01/05-01/08-3080, paragraph 35; Decision on the prosecution’s request relating to Article 70 investigation, 26 April 2013, ICC-01/05-01/08-2606-Red, paragraph 21; and Decision on the Defence Request for Interim Relief, 2 May 2014, ICC-01/05-01/08-3059, paragraphs 15 to 18.

<sup>46</sup> ICC-01/05-01/08-3059, paragraph 16, referring to *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06-1084, paragraph 44.

<sup>47</sup> ICC-01/05-01/08-3036, paragraph 108, sub-paragraph 1.

23. However, the Chamber recalls that it is nevertheless “bound by 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 and due regard for the protection of victims and witnesses, as provided for in Article 64(2) of the Statute”.<sup>48</sup>

24. In this regard, the Chamber notes the defence’s contention that “potential prejudice will accrue in the Main Case” and that “[t]he Trial Chamber has thus the power and the duty to step in to take measures to ensure that Mr. Bemba’s right to a fair trial is not irretrievably prejudiced by tandem litigation”.<sup>49</sup> In relation to its contention as to “potential prejudice”, the defence asserts that the email accounts of Mr Kilolo and Mr Mangenda must contain privileged information, including draft submissions pertaining to the close of the case, strategy documents and internal defence comments, opinions, and evaluations of its case.<sup>50</sup> In its Addendum, the defence claims that information emanating from Mr Haynes and Ms Gibson has been directly affected and that the prosecution has received transcripts of conversations concerning the draft Defence Final Brief.<sup>51</sup>

25. However, the Chamber notes that the prosecution in case ICC-01/05-01/13 submits that it has preserved “packaged and sealed as received” the DVDs with the email accounts, since they “might contain potentially privileged or legally protected confidential information”.<sup>52</sup> The Chamber

<sup>48</sup> Decision on the Defence Request for Interim Relief, 2 May 2014, ICC-01/05-01/08-3059, paragraph 18.

<sup>49</sup> ICC-01/05-01/08-3036, paragraph 79.

<sup>50</sup> ICC-01/05-01/08-3036, paragraph 61.

<sup>51</sup> ICC-01/05-01/08-3062- Red, paragraphs 17 and 18.

<sup>52</sup> ICC-01/05-01/13-366-Red, referring to ICC-01/05-01/13-310-Red, paragraphs 6 and 9.

further notes that pursuant to Decision ICC-01/05-01/13-366-Red, the transmission of the email accounts to the prosecution is subject to a specific review by an Independent Counsel under supervision of the Single Judge for the purpose of filtering out potentially privileged material.<sup>53</sup> In addition, the Chamber observes that in the context of Decision ICC-01/05-01/13-366-Red, the Single Judge already considered and rejected a request from the defence in case ICC-01/05-01/13 that it be permitted, together with Counsel for Mr Bemba in the *Bemba* case, to review the DVDs and filter out any potentially privileged materials.<sup>54</sup>

26. In these circumstances, the Chamber finds that the defence's submissions are impermissibly speculative and that the relief sought in the context of the First and Alternate First Request is not warranted. Moreover, given that the email accounts are to undergo a specific review by an Independent Counsel under supervision of the Single Judge for the purpose of filtering out potentially privileged material,<sup>55</sup> and in view of its approach set out in paragraphs 21 and 22 above, the Chamber does not consider it appropriate to interfere with the regime of review established by the Single Judge.

27. Turning to its duties under Articles 64(2) and 68(1) of the Statute to provide for the protection of witnesses, victims and "[other] persons at risk on account of the activities of the Court",<sup>56</sup> the Chamber notes the defence's concern that the information transmitted to the prosecution

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<sup>53</sup> ICC-01/05-01/13-366-Red.

<sup>54</sup> ICC-01/05-01/13-366-Red.

<sup>55</sup> ICC-01/05-01/13-366-Red.

<sup>56</sup> See Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, ICC-01/04-01/07-475, paragraph 56.

through the Independent Counsel could include information subject to *ex parte* protective measures or orders.<sup>57</sup> In this regard, the Chamber observes that before being transmitted to the prosecution, the material extracted by the Independent Counsel needs to be released by the Single Judge, a judicial authority who is bound by the general obligation under Article 68(1) of the Statute to provide for the protection of victims, witnesses and other individuals at risk on count of the activities of the Court. The Chamber further recalls that pursuant to Regulation 42(1) of the Regulations, protective measures granted in the *Bemba* case continue to have full force and effect in case ICC-01/05-01/13.<sup>58</sup> In this regard, the Chamber emphasises that if the Single Judge considers it necessary to receive the Trial Chamber's views on the appropriateness of a possible variation of protective measures and the disclosure of material in case ICC-01/05-01/13, or in case of uncertainty, the Trial Chamber is available to provide all relevant information on the matter.<sup>59</sup>

28. In light of the above, the Chamber rejects the First Request and the Alternate First Request.

<sup>57</sup> ICC-01/05-01/08-3036, paragraphs 62 to 64.

<sup>58</sup> See also Redacted Version of "Decision on 'Prosecution's Second Further Request for Disclosure of Evidence in a Related Article 70 Proceeding'", 26 June 2014, ICC-01/05-01/08-3098-Red, paragraph 20; Decision on "Prosecution's Urgent Further Request for Disclosure of Evidence in a Related Article 70 Proceeding", 27 May 2014, ICC-01/05-01/08-3074-Conf, paragraphs 17 to 18.

<sup>59</sup> The relevant jurisprudence of Trial Chamber I indicates that the second Chamber takes an independent decision as to whether disclosure is warranted in its case, guided as appropriate by the views of the Chamber which first ordered the relevant protective measures. See for example *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the request from the defence in the *Katanga and Ngudjolo* case for disclosure of transcripts in the *Lubanga* case, 11 June 2010, ICC-01/04-01/06-2471, paragraphs 27 to 28 and 34; *The Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on the "Prosecution's request for non-disclosure of information in transcripts of the *Lubanga* case to defence in the *Katanga and Ngudjolo* case" and the "Joint Application for maintaining discrete redactions to transcripts of witness DRC-OTP-WWWW-0007", 11 November 2010, ICC-01/04-01/06-2521-Red.



## *The Second Request*

29. In relation to its request for disclosure of information emanating from Mr Narcisse Arido ("Mr Arido"), the defence contends that "[a]lthough he did not testify due to security concerns, Mr. Arido was a Defence witness" in the *Bemba* case and that "[h]is email account almost certainly contains *ex parte* information detailing these security concerns".<sup>60</sup> In addition, the defence asserts that it "contemplated calling him as an expert witness, and to that end, engaged in communications with him concerning overall Defence strategy".<sup>61</sup> As a result, the defence submits that it is "probable that his email account may have contained draft expert submissions, which were not submitted to the Court"<sup>62</sup> and "continue to be protected by legal privilege".<sup>63</sup>

30. In order to remedy any "potential for prejudice" resulting from the prosecution's review of the information from Mr Arido's email accounts, the defence considers it "necessary [...] to [be] provided with all communications (recordings and emails) emanating from Mr. Arido so that it can identify whether any of the materials are privileged, subject to *ex parte* protective measures, or otherwise concern information which could be relevant to the security and confidentiality of Defence witnesses".<sup>64</sup>

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<sup>60</sup> ICC-01/05-01/08-3036, paragraph 83.

<sup>61</sup> ICC-01/05-01/08-3036, paragraph 84.

<sup>62</sup> ICC-01/05-01/08-3036, paragraph 84.

<sup>63</sup> ICC-01/05-01/08-3036, paragraph 87.

<sup>64</sup> ICC-01/05-01/08-3036, paragraph 91.

31. The prosecution submits that “[m]aterials related to Narcisse Arido do not contain privileged information” or any material falling under Article 67(2) of the Statute or Rule 77 of the Rules.<sup>65</sup> The prosecution further stresses that the defence “held Mr. Arido out to be a fact witness and provided no hint that it ever intended on calling him as an expert witness”.<sup>66</sup> It adds that “the Defence cannot plausibly argue that the attorney-client privilege on communications extends to fact witnesses and that all communications with its fact witnesses would be privileged”.<sup>67</sup>

32. The Chamber recently entertained a defence request for disclosure – submitted pursuant to Rule 77 of the Rules and Article 67(2) of the Statute – of material related to Mr Arido.<sup>68</sup> In that context, the Chamber held that “the prosecution is of course obligated to disclose materials related to Mr Arido if they (i) could undermine the prosecution case, (ii) support a line of argument of the defence, or (iii) significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the *Bemba* case”.<sup>69</sup> However, considering the specific request before it, the Chamber found that the defence failed to demonstrate that the requested items related to Mr Arido in case ICC-01/05-01/13 were *prima facie* material to the preparation of the defence or

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<sup>65</sup> ICC-01/05-01/08-3058, paragraph 15.

<sup>66</sup> ICC-01/05-01/08-3058, paragraph 15.

<sup>67</sup> ICC-01/05-01/08-3058, paragraph 15.

<sup>68</sup> Defence Further Request for Disclosure, 7 April 2014, ICC-01/05-01/08-3033-Conf, with Annex A and confidential Annex B. The defence filed public versions of these filings on the same day: ICC-01/05-01/08-3033-Red, with Annex A and public redacted Annex B.

<sup>69</sup> Decision on defence requests for disclosure, 2 July 2014, ICC-01/05-01/08-3100, paragraph 42.

should be considered exculpatory for the purposes of Article 67(2) disclosure in the *Bemba* case.<sup>70</sup>

33. In the Request addressed in the present Decision, the defence argues that disclosure of information emanating from Mr Arido is necessary to allow the defence to identify whether any of the materials are privileged. The Chamber considers that the defence's assertions that materials related to Mr Arido may contain privileged information are speculative. In addition, the Chamber notes the prosecution's submission that materials related to Mr Arido do not contain privileged information.<sup>71</sup> Moreover, the Chamber notes that an assertion of an interest in identifying whether specific material contains privileged information does not, in itself, constitute an adequate ground for disclosure.

34. Finally, the Chamber recalls 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.<sup>72</sup>

35. In view of the above, the Chamber rejects the Second Request.

#### *The Third and Fourth Request*

36. In support of its Third Request, the defence asserts that monitored communications may have "captured" communications involving Mr

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<sup>70</sup> Decision on defence requests for disclosure, 2 July 2014, ICC-01/05-01/08-3100, paragraph 42.

<sup>71</sup> ICC-01/05-01/08-3058, paragraph 15.

<sup>72</sup> ICC-01/05-01/13-338, page 3.

Haynes, Ms Gibson, Mr Mettraux, interns or members of the Office of the Public Counsel for the Defence or information relayed from Mr Kilolo and Mr Mangenda to other persons, but which originated from Mr Haynes, Ms Gibson or Mr Mettraux.<sup>73</sup> As a result, the defence submits that it is “imperative” that it be “informed as to whether its communications were monitored, and secondly, provided with any information in the custody of the Prosecution which contains information emanating directly or indirectly from current members of the Defence, or concerns research or tasks undertaken by current members of the Defence as part of their representation of Mr. Bemba”.<sup>74</sup>

37. In its Fourth Request, the defence seeks to obtain disclosure of all communications which: <sup>75</sup>

- a. Were addressed or copied to Mr. Haynes, Ms. Gibson or Dr. Mettraux;
- b. Include information forwarded from or emanating from Mr. Haynes, Ms. Gibson or Dr. Mettraux;
- c. Involve Mr. Haynes, Ms. Gibson or Dr. Mettraux as a participant in the recording; or
- d. Refer to Mr. Haynes, Ms. Gibson or Dr. Mettraux, in particular, as concerns any tasks performed by them in the Bemba case (together “Relevant Communications”).

38. The prosecution responds that it has already clarified and responded to these questions and confirms that it:<sup>76</sup>

- a. has no reason to believe that Mr. Haynes’, Ms. Gibson’s, or Dr. Mettraux’s communications were intercepted;
- b. neither possesses or has knowledge of all communications intercepted by the national authorities, but only of the non-privileged communications provided through the Single Judge, relevant to the alleged Article 70 offences;
- c. received only non-privileged communications after they were subject to multiple layers of judicial review [...];

<sup>73</sup> ICC-01/05-01/08-3036, paragraphs 95 to 96.

<sup>74</sup> ICC-01/05-01/08-3036, paragraph 105.

<sup>75</sup> ICC-01/05-01/08-3036, paragraph 108.

<sup>76</sup> ICC-01/05-01/08-3058, paragraph 4.

- d. neither possesses nor has knowledge of any intercepted communications of Mr. Haynes, Ms. Gibson, or Dr. Mettraux;
- e. possesses non-privileged communications between Messrs Kilolo and Mangenda referencing Mr. Haynes and Dr. Mettraux.

39. The Chamber recalls that in relation to a previous defence request, it found that the defence had presented “nothing to suggest that the communications of the current defence team have, at any time, been monitored”.<sup>77</sup> In relation to the specific information sought in the Third Request, the Chamber is of the view that the prosecution’s submissions set out in paragraph 38 above sufficiently respond to the defence’s enquiry. Accordingly, the order sought in the Third Request is not required.

40. In relation to the Fourth Request, the Chamber notes that the defence does not base its request for disclosure of the Relevant Communications on Rule 77 of the Rules. Rather, the defence submits that it “cannot proceed to drafting its final brief under the shadow of concern that the Prosecution might already be familiar with its arguments, strategy and research on these points, or a range of other Defence matters”.<sup>78</sup> The defence further avers that “[t]he [P]rosecution’s equivocation has failed to dispel the possibility that privileged information from the current members of the Defence may have been monitored, albeit indirectly through the monitoring of Me. Kilolo and Mr. Mangenda”.<sup>79</sup>

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<sup>77</sup> ICC-01/05-01/08-3080, paragraph 33.

<sup>78</sup> ICC-01/05-01/08-3036, paragraph 99.

<sup>79</sup> ICC-01/05-01/08-3036, paragraph 101.

41. In this regard, the Chamber recalls its aforementioned observations<sup>80</sup> that (i) the prosecution in case ICC-01/05-01/13 submits that it has preserved “packaged and sealed as received” the DVDs with the email accounts, since they “might contain potentially privileged or legally protected confidential information”;<sup>81</sup> and (ii) pursuant to Decision ICC-01/05-01/13-366-Red, the transmission of the email accounts to the prosecution is subject to a specific review by an Independent Counsel under supervision of the Single Judge for the purpose of filtering out potentially privileged material.<sup>82</sup>

42. The Chamber again notes its finding that an assertion of an interest in identifying whether specific material contains privileged information does not, in itself, constitute an adequate ground for disclosure.<sup>83</sup> However, the Chamber recalls that the prosecution is of course bound by its disclosure obligations as set out in paragraph 32 above.

43. Finally, the Chamber stresses once more 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.<sup>84</sup>

44. Consequently, the Chamber considers that the broad order for disclosure sought by the defence in its Fourth Request is not warranted. The Chamber therefore rejects the Fourth Request.

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<sup>80</sup> Cf paragraph 25 above.

<sup>81</sup> ICC-01/05-01/13-366-Red, referring to ICC-01/05-01/13-310-Red, paragraphs 6 and 9.

<sup>82</sup> ICC-01/05-01/13-366-Red.

<sup>83</sup> See paragraph 33 above.

<sup>84</sup> ICC-01/05-01/13-338, page 3.

### III. Conclusions

45. In view of the above, the Chamber hereby **REJECTS** the Defence Request and the Defence Addendum.

Done in both English and French, the English version being authoritative.

  
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Judge Sylvia Steiner

  
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Judge Joyce Aluoch

  
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Judge Kuniko Ozaki

Dated this 3 July 2014

At The Hague, the Netherlands