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Date: 20/02/2014

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

***IN THE CASE OF THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO,
AIMÉ KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE
BABALA WANDU and NARCISSE ARIDO***

Public Document

Defence request for disclosure

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

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REGISTRY

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The Defence for Jean-Pierre Bemba Gombo ("the Suspect") hereby requests that the Single Judge order the Prosecutor to disclose information pertaining to an "anonymous informant" who provided her with information concerning an alleged witness "bribery" scheme orchestrated by the Suspect.

Relevant Procedural Background

1. On 4 December 2013, the Single Judge ruled as follows: "... the evidence collected until 23rd November 2013, on which she intends to rely for the purpose of the confirmation hearing, no later than Friday, 20 December 2013, the Prosecutor shall disclose it to the Defence or submit to the Chamber requests for redactions or other protective measures".

2. On 11 December 2013, Counsel for the Suspect wrote to the Prosecutor's representative and asked him to clarify his position as regards article 54(3)(e) of the Rome Statute. Counsel for the Suspect also asked to know whether the Prosecutor intended to take, *proprio motu*, "necessary measures" under article 54(3)(f) [of the Rome Statute] to "ensure the confidentiality of information, the protection of any person or the preservation of evidence".

3. On 12 December 2013, the Prosecutor's representative replied to Counsel for the Suspect and denied that there were any existing agreements pursuant to article 54(3)(e) of the Rome Statute. The Prosecutor's representative further declined to clarify when, and in what circumstances, he would seek an order for the protective measures afforded by article 54(3)(f) of the Rome Statute.

4. On 13 February 2014, the Defence was notified of the Prosecutor's "*Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70*" dated 3 May 2013.¹ In this request, the Prosecutor asserted that she was first alerted to an alleged

¹ ICC-01/05-44-Red

scheme to bribe and corrupt defence witnesses by an "anonymous informant" who, thereafter, engaged in an email exchange with her representatives.² The anonymous informant purportedly provided the Prosecutor with verifiable information concerning the methods by which money was transferred through Western Union to witnesses and with knowledge of the fact that the Suspect's "Congolese" lawyer was, allegedly, behind the payments.

5. On 13 February 2014, Counsel for the Suspect wrote to the Prosecutor's representative and requested that he disclose the name by which the informant identified himself, the Email address from which he wrote and the IP addresses from which the relevant E-mails were sent to the Office of the Prosecutor.

6. On 15 February 2014, the Prosecutor's representative replied to Counsel for the Suspect declining to provide him with the above mentioned information.

7. On 17 February 2014, Counsel for the Suspect requested that the Prosecutor's representative disclose a redacted version of the Email exchange between the anonymous informant and the Office of the Prosecutor.

8. On 18 February 2014, the Prosecutor's representative replied to Counsel stating that he was, indeed, considering the release of a redacted version of the Email exchange with the anonymous informant and, as a consequence, needed time to review the information.

9. On 19 February 2014, the Prosecutor's representative returned to Counsel declining to release a redacted version of the Email exchange adding that "the information provided by the anonymous source is not being relied on or used either directly or indirectly as evidence in the case".

² *ibid* at paragraphs 9 and 10.

Submission

10. The Suspect has the right to check the veracity of the very information which led to his being investigated for offences against the administration of justice. The anonymous informant could, so it is submitted, be motivated by political considerations and could, in some way, be connected to those witnesses who will testify for the Prosecutor. Alternatively, it is more than feasible that the anonymous informant could possess information which could exonerate the Suspect. Whatever the case may be, Counsel for the Suspect wishes to contact the informant and to interview him.

11. It is firmly submitted that the Suspect is not obliged to explain his defence strategy so long as his request for disclosure or assistance is directly relevant to the charges which have been presented by the Prosecutor. Having said that, the information sought will be of extreme use to the Suspect. Knowing, for example, the IP address of the internet connection used by the anonymous informant will allow the Suspect to petition the Single Judge for an order requesting that a State Party reveal the owner of that IP address and, thereby, the person who communicated with the Prosecutor. Knowing the exact nature of the Email exchange between the informant and the Prosecutor will permit the Suspect to independently assess whether all exonerating circumstances have been considered and investigated.

12. The Suspect bases his request on rule 77 of the Rules of Procedure and Evidence because the information sought is material to the preparation of his defence. In considering the application of rule 77, the Appeals Chamber has held that the term "material to the preparation of the defence" must be interpreted broadly. The Appeals Chamber has further ruled that documents that are "not directly linked to exonerating or incriminating evidence" can nevertheless be material to the preparation of an accused's defence.³ The Prosecutor's representative apparently

³ ICC-02/05-03/09-501.

agreed that the information could be deemed "material" since he initially considered releasing a redacted version of the correspondence to the Suspect.

13. The Suspect, furthermore, bases his request on article 57(3)(b) of the Rome Statute which permits the Single Judge "[u]pon the request of a person who has been arrested ... [to] issue such orders, ... as may be necessary to assist the person in the preparation of his or her defence". It will be recalled that the Single Judge has rendered a generously broad interpretation of article 57(3)(a) of the Rome Statute in granting a recent Prosecution request for the provision of information concerning the accounts managed on behalf of the Suspect at the ICC detention facility. In that decision, the Single Judge ruled that "ordering the provision of information for the purposes of an investigation falls squarely within the powers vested in the Chamber pursuant to article 57(3)(a) of the Statute".⁴ The Single Judge thus ordered disclosure after satisfying himself that the information was necessary to assist the Prosecutor in "establishing the truth". The Defence now requests that the Single Judge grant equal investigative latitude to the Suspect and allow him, similarly, to "establish the truth".

14. The Prosecutor has no legal standing to object to the disclosure of the information sought so long as it is "material" to the defence. The only possible statutory objections to disclosure do not apply in the present instance as will be argued below.

15. Firstly, at the status conference held on 4 December 2013, the Prosecutor's representative stated as follows: "There are no 54(iii)(e) agreements that I am aware of, and certainly even if there were it wouldn't be dispositive of any salient issue before the Chamber".⁵ The Prosecutor's representative clarified this matter in an Email sent to Counsel on 12 December 2013 asserting that "...regarding any article 53(4)(3)(e) agreements, there are none in this case".

⁴ ICC-01/05-01/13-185.

⁵ ICC-01/05-01/13-T-2-Red-ENG WT 04-12-2013 9/33 SZ PT lines 5-7.

16. Secondly, and in the same Email, the Prosecutor's representative stated as follows: "as concerns article 54(3)(f), be advised that decisions on the necessity of requesting measures to protect the confidentiality of evidence, to protect persons, or to preserve evidence will be taken on a case by case basis, as the need arises. I will not speculate on the evidence at this stage whether such measures may be required". The Prosecution has not, to date, submitted a request under article 54(3)(f) asking for protective measures to be applied to the anonymous informant's identifying details or to the information that he supplied.

Regulation 35(2) of the Regulations of the Court

17. In order to avoid any delay to the schedule fixed for the confirmation proceedings, Counsel submits that "good cause" is shown to reduce the time limit for the Prosecutor's response to this application.

Relief Sought

17. In light of all the aforementioned, the Single Judge is requested to order the Prosecutor to disclose the following information:

- 1) The Emails sent by the anonymous informant to the Office of the Prosecutor and the responses thereto in a non-redacted format;
- 2) All identifying information pertaining to the "anonymous informant" including the Email address/es from which he or she corresponded with the Prosecutor and the IP addresses contained in the raw data accompanying the Emails sent to her.



Nicholas Kaufman

Counsel for Jean-Pierre Bemba Gombo

Jerusalem, Israel
Thursday, February 20, 2014