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

Date: 25/11/2014

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 Redacted

**Public Redacted Version of Addendum to Defence Request for Relief for Abuse
of Process, ICC-01/05-01/08-3203**

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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I. Introduction

1. On Friday 7 November 2014, the Single Judge in the Article 70 case issued his 'Decision on filings requesting access to the transcript of the 26 March 2014 Status Conference (ICC-01/05-01/13-734-Anx1, ICC-01/05-01/13-736)' (the Decision).¹

2. In the Decision, the Single Judge authorised the issuance of a public redacted version of the Transcript of 26 March 2014, which had been prepared by the Single Judge.

3. Although it is the practice of the Registry to distribute a notification email concerning the distribution of reclassified or redacted versions of filings and transcripts, no such notification email was distributed in the Article 70 case.²

4. The Defence was not aware until late afternoon on 11 November 2014 that the transcript had been uploaded onto court records directly, without such a notification email.

5. Upon review, it is clear that the transcript is of direct relevance to the abuse of process motion filed by the Defence on 11 November 2014 (the Motion).³

6. The Defence therefore submits a discrete addendum to its Motion in order to address the relevance of this transcript to the Motion. At the same time, the Defence also includes a discrete retraction to paragraphs 139 and 326 of the Motion.⁴

¹ ICC-01/05-01/13-746.

² The Defence for Mr. Bemba in the Main Case receives all the filings in the Article 70 case by notification email.

³ ICC-01/05-01/08-3203-Conf-Exp.

⁴ This motion has been filed on a confidential *ex parte* basis due to the fact that it cites from a confidential *ex parte* motion. As soon as a redacted version of the motion is filed, the current addendum can be reclassified accordingly.

II. Submissions

The Prosecution's submissions at the Status Conference of 26 March 2014 evidence a direct intent to contaminate the Main Case

7. During the first component of the Status Conference, the Prosecution proposed redactions to protect the identity of the “anonymous informant”.⁵ The specifics of this particular discussion are redacted, although it would appear that it concerns the anonymous informant’s knowledge of issues concerning Defence witnesses and Defence missions – which should have been disclosed to the Defence in the Main Case.

8. In its submissions, the Prosecutor concedes that although there is information in the emails that could identify the anonymous informant, the Prosecution has not sought to identify who the person is.⁶ This concession underscores the dereliction of their duty to investigate possible breaches of confidentiality, protective measures, and security as concerns Defence witnesses.

9. Under the Statute, only the Prosecution can investigate Article 70 matters. Moreover, by virtue of the redactions actively pursued by the Prosecution, only the Prosecution had the means to investigate the probability that the anonymous information had come into possession of confidential information concerning the Defence through illicit means (or at least means that were incompatible with court orders protecting the confidentiality of the Defence case).

10. Once again, it appears that Prosecution’s powers have been used for the purpose of advancing the Prosecution case rather than for the Statutory purpose of searching for the truth in an independent and impartial manner, and protecting the rights of all persons (including defendants).

⁵ ICC-01/05-01/13-T-5-Red2-ENG-ET, p.2, lines 2-22.

⁶ ICC-01/05-01/13-T-5-Red2-ENG-ET, p.2, lines 5-15.

11. Of further concern, although the Defence in the Main Case had requested the Prosecution to disclose further particulars concerning the Anonymous Informant and the contents of the emails between the Informant and the Prosecution,⁷ the Prosecution completely failed to draw the attention of the Single Judge to such requests. The Prosecution refers to its disclosure obligations towards the Article 70 Defence teams, but its submissions on this matter are strictly shaped by the parameters of the Article 70 case.⁸

12. The Prosecution thus carved out a barrier concerning the right of the Defence in the Main case to receive disclosure of materials from the Article 70 case, which might not fall within the scope of Article 67(2) or Rule 77 in the Article 70 case, but which might affect fall under Article 67(2) or otherwise be material to its preparation in the Main Case.

13. As noted above, the identity of a person who has knowledge of confidential information concerning Defence missions and Defence witnesses in the Main Case is of direct relevance to the Defence in the Main Case. Where information could fall within the scope of Article 67(2) or Rule 77, the Prosecution has a direct duty to request the Single Judge for authorisation to disclose it in the Main Case.

14. Yet, notwithstanding Defence requests for such particulars, the Prosecution and the Single Judge agreed to maintain the redactions that concern the identity of the Informant on the grounds that this information does not fall within the scope of Rule 77 in the Article 70 case.⁹

15. Finally, and of greater concern, is the manner in which the Prosecution and the Single Judge address a *sub judice* issue before the Trial Chamber in the Main

⁷ ICC-01/05-01/08-3016-AnxB-Red, pp.13-14.

⁸ ICC-01/05-01/13-T-5-Red2-ENG-ET, p.5, lines 6-23.

⁹ ICC-01/05-01/13-T-5-Red2-ENG-ET, p.4, line 2 – p. 5, line 23.

Case, namely, the Prosecution's request to obtain access to transcripts concerning Defence witnesses in the Main Case for use in the Article 70 case.¹⁰

16. Although Judge Tarfusser had no competence over this request, the Prosecution nonetheless raised this issue before the Single Judge. Moreover, both the Prosecution and the Single Judge appear to suggest in their interventions that the *sub judice* decision of the Trial Chamber on the 'appropriateness' of the redactions can and should be influenced by the needs of the Prosecution in the Article 70 case:¹¹

MR VANDERPUYE: Yes. But what the Trial Chamber did is they said: As it is now, you can disclose it. And the reason for it is, the reason for it was because at the time they made the decision, it was very close to the deadline in order to file the DCC, so I think they just released it so that we would be able to at least disclose something by the time that the DCC was due. So I'm not sure how much of that was the impetus for the decision or whether that's what their final position was, but in any event, they have not ruled on the proposed disclosures as such, only to say that you can disclose it as it has been proposed to be redacted, and then we will evaluate it. And if you evaluate it and determine that the redactions are inappropriate, then you can then come back to us and explain to us why it is inappropriate.

SINGLE JUDGE TARFUSSER: Well, there is still some, there is still some place at this point in time.

MR VANDERPUYE: There is space.

17. Having opined that there was still "space" to influence the Trial Chamber's decision on the appropriateness of the proposed redactions, the Prosecution then lays out its plan for doing so:¹²

¹⁰ ICC-01/05-01/13-T-5-Red2-ENG-ET, p.7 line 1 et seq.

¹¹ ICC-01/05-01/13-T-5-Red2-ENG-ET, p.8, lines 1-14.

¹² ICC-01/05-01/13-T-5-Red2-ENG-ET, p.8 lines 14-25.

MR VANDERPUYE: There is space. The problem is though that the space is such that by - one of the reasons why we didn't articulate specifically the basis for each potential variation or basis for disclosure in the case was to avoid contaminating or tainting the Trial Chamber by identifying those witnesses that have serious problems in - before that Chamber to say we're going to use that evidence in the Article 70 case to prove that the accused before you in Trial Chamber II has tampered with these specific witnesses. But in a sense what they have done now by this decision is invited us to make exactly that representation, which is quite problematic, and we'll have to figure out a way to do it. **But if it has to be done, it has to be done.** So I just wanted to let you know that that's where we are. Hopefully we'll formulate something and be filing I guess within a week or two to kind of clarify this (emphasis added).

18. The Prosecution was fully aware that placing information concerning their specific allegations concerning Defence witnesses would contaminate or taint the Trial Chamber. But, on 22 April 2014, that is exactly what they did. The Prosecution filed a renewed request to disclose information from the Main Case in the Article 70 case, in which the Prosecution listed the specific names of Defence witnesss, and tied them to specific allegations arising from the Article 70 case.¹³

19. The Prosecution also ended their filing by averring that:¹⁴

the Chamber may consider it helpful to consult with Pre-Trial Chamber I pursuant to Article 64(4) in its determination or implementation of this matter.

20. This was not inadvertent contamination: it was knowing and deliberate. The Prosecution expressed their clear understanding that the information could contaminate the Chamber, and in being aware of such, that there would at the very least, be an objective appearance of contamination.

¹³ ICC-01/05-01/08-3052-Red.

¹⁴ ICC-01/05-01/08-3052-Red, p.12.

21. The Prosecution further aggravated the taint by firstly, raising the *sub judice* issue before the Single Judge during an *ex parte* Status Conference, and secondly, requesting the Trial Chamber to base its decision on information obtained from the Single Judge, who had been exposed to privileged Defence information in the Article 70 case.

22. As a result, there is an ineluctable appearance that the independence and impartiality of the Main Case was suborned to the exigencies of the Prosecution's strategy in the Article 70 case.

III. Retraction

23. At paragraph 139 of the Motion, [REDACTED].¹⁵

24. [REDACTED].¹⁶

25. Finally, and without prejudice to the Chamber's duty to ensure that an appropriate remedy must be provided for any violation of Mr. Bemba's rights (irrespective as to the gravity), the Defence withdraws the following words from paragraph 326: "and in the event of an acquittal, monetary compensation, and in the event of a conviction, a significant reduction in sentence." In the event of interim release, the Defence further includes Portugal as an appropriate Host State.

IV. Relief Sought

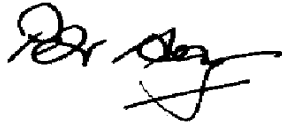
26. The Defence for Mr. Jean Pierre Bemba-Gombo hereby:

¹⁵ [REDACTED].

¹⁶ [REDACTED].

MODIFIES its Abuse of Process Motion through the present Addendum and
Retraction

The whole respectfully submitted.

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

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

The Hague, The Netherlands

25 November 2014