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TRIAL CHAMBER III

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF
THE PROSECUTOR
v. Jean-Pierre Bemba Gombo**

Public with Public Annex A, Public Redacted Annex B, Public Annex C and Public Annex D

**Defence Urgent Request for Disclosure and Injunctive Relief concerning
Privileged Defence Communications**

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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**Other
Pre-Trial Chamber II**

A. INTRODUCTION

1. On 3 April 2014, the Prosecution in the Article 70 case filed a request for:

- i. the Single Judge to appoint the Independent Counsel to review the email accounts of Me. Kilolo and Mr. Mangenda; and
- ii. the Registry to separate out the email accounts of Mr. Arido and Mr. Babala and then transmit the contents in their entirety to the Prosecution (“the Request”).¹

2. The Request directly concerns privileged Defence information and materials, which are the property of the Defence in the main case. The Defence is not aware by what lawful authority the Prosecution purports to have seized and copied the entire private email accounts of the relevant individuals, nor by what mechanism. Self-evidently, even if lawfully obtained, the entire contents of an email account cannot possibly be relevant to the narrow investigation of the alleged offences under Article 70. The property in those emails vests in the account holder. Moreover, any legal professional privilege in correspondence written on behalf of Mr. Jean-Pierre Bemba, vests with him.

3. Even though Mr. Arido was not part of the Defence team, it is also foreseeable that he received emails from the Defence containing privileged information concerning Defence strategy.

4. The Prosecution has no right to receive such information. The initiation of an Article 70 investigation should not mean that all rules concerning disclosure, Defence confidentiality and protective measures are thrown out the window.

5. The Defence in the main case cannot proceed under circumstances in which its litigation adversary has access to information concerning all potential Defence strategies, research and arguments.

6. Mr. Bemba’s right to silence and right to seek advice from his lawyers are also meaningless if the Prosecution has accessed information from the defendant, which the Defence has chosen not to put forward in the proceedings.

¹ ICC-01/05-01/13-310-Red.

7. In light of the likelihood of irremediable prejudice to the Defence case, it is necessary for the Trial Chamber to:

- i. issue an order to the Prosecution to deliver immediately the contents of the email accounts to the Defence; or in the alternative
- ii. issue an order to the Prosecution and the Registry to refrain from accessing the contents of the email accounts until further order; and
- iii. 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.
- iv. 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).

8. The Prosecution has also provided equivocal responses in relation to repeated Defence requests to be informed as to whether the Prosecution is in possession of any communications emanating from current members of the Defence, including Mr. Haynes, Ms. Gibson and Dr. Mettraux.

9. In the same manner that correspondence from Me. Kilolo and Mr. Mangenda could be addressed to or copied to other members of the Defence, it is foreseeable that the monitored communications of Me. Kilolo and Mr. Mangenda would have ‘captured’ their communications with Mr. Haynes, Ms. Gibson or Dr. Mettraux.

10. The Defence has an absolute entitlement to know whether that is the case, and to be apprised as to what specific Defence communications may have been in the custody of the Prosecution at any point in time.

11. The Defence therefore seeks a further order for 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; 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.

B. PROCEDURAL HISTORY

12. On 3 May 2013, the Prosecution requested the Single Judge to authorise the Prosecution to have access to all non-privileged communications between Mr. Bemba and other persons.²

13. The Single Judge granted the request, and further held that “[a]s long as the calls are not directed to counsel for the Accused, however, they can be legitimately directly accessed by the Prosecutor for the purposes of her investigation and there is accordingly no need for an “independent counsel” to be appointed.”³

14. As part of its ongoing Article 70 investigation, the Prosecution subsequently requested the Single Judge to authorise the Prosecution to “collect recordings of telephone intercepts from the Dutch and Belgian governments of Messrs. KILOLO, lead counsel and MANGENDA, case manager”.⁴

15. The public redacted version of this request does not indicate the time period during which the recordings were requested.

16. The Single Judge authorised the requested, and issued an *ex parte* order for the Registrar to appoint an Independent Counsel, who was tasked with:

² ICC-01/05-44-Red.

³ ICC-01/05-46, para. 4.

⁴ ICC-01/05-51-Red, para. 3.

- i. identifying whether the logs of recorded communications of Me. Kilolo and Mr. Mangenda show calls to parties connected to the investigation; and
- ii. reviewing the recordings of any such calls.⁵

17. The Single Judge further elaborated that the

“appointed counsel would have to review and screen all relevant recordings, with a view to identifying those providing elements which might be relevant for the limited purposes of the Prosecutor's investigation and delivering them to the Prosecutor. Accordingly, privilege would be strictly maintained on all such recordings which would not offer elements of interest or relevance for the purposes of the Prosecutor's investigation”.⁶

18. The Single Judge confirmed that the Independent Counsel was appointed by the Counsel Support Section (and must therefore have been on the list of Counsel), and is fluent in Lingala.⁷

19. After the Independent Counsel was appointed, the Single Judge convened several Status Conferences in order to firstly, allow the Independent Counsel to update both the Single Judge and the Prosecution in relation to the progress of his or her work, and secondly, to provide a forum for the Prosecution to advise the Single Judge concerning its Article 70 strategy.⁸

20. The Prosecution has also indicated that the appointment of an Independent Counsel formed part of the Single Judge's ‘approval’ of the Prosecution's ‘investigation plan’.⁹

21. Although the Independent Counsel was supposed to perform his tasks ‘independently’ of the Prosecution, it appears that the Prosecution liaised directly with the Independent Counsel on several occasions,¹⁰ and provided the Independent Counsel with a list of codes, formulated by the Prosecution, in order to determine which calls were ‘relevant’ to the Article 70 investigations, and should thus be transmitted to the Prosecution.¹¹

⁵ ICC-01/05-52-Red2, para. 7.

⁶ ICC-01/05-52-Red2, para. 7.

⁷ ICC-01/05-52-Red2, para. 8.

⁸ See for example, ICC-01/05-61-Red.

⁹ ICC-01/05-60-Red, at para. 9, citing a redacted reference.

¹⁰ ICC-01/05-58-Red2, ICC-01/05-63-Red.

¹¹ ICC-01/05-63-Red.

22. In the public redacted version of the Single Judge's decision on the issuance of arrest warrants, the Single Judge provided more information concerning the scope of the Independent Counsel's role.¹²

23. In particular, the Single Judge noted that he had relied on the 'Independent Counsel's work',¹³ that the Independent Counsel had "furnished a wealth of material to support the Prosecutor's claims".¹⁴

24. In granting the arrest warrant requests, the Single Judge also granted the Prosecution's request that orders be directed to the arresting States to search "any site connected to them (offices at the Court, work-place offices and homes)", to allow Prosecution investigators to be present during such searches, and to promptly transmit to the 'Court' any evidence collected during such searches.¹⁵

25. In the same decision, the Single Judge expressly referred to the "close and manifest connections between the investigation which gave rise to the Prosecutor's Application and the trial in the Case before the Court".¹⁶

26. The Single Judge also remarked (in a public decision) that,

Trial Chamber III ("the Trial Chamber") is about to embark on its deliberation on the Case, and, were the Prosecutor's allegations to be correct, several pieces of evidence tendered at trial would be vitiated to the extent that their reliability would be seriously compromised.¹⁷

27. In a Status Conference, which was convened after the arrests warrants were made public, the Prosecutor updated the Single Judge in relation to the process of receiving and reviewing materials, which had been seized or monitored by domestic authorities. In so doing, the Prosecution observed that,

The ability to vet those materials for any potentially privileged information which may apply to -- well, will clearly apply to Mr Bemba, clearly apply to Mr Kilolo, clearly will apply to Mr Mangenda, may apply to Mr Arido,

¹² ICC-01/05-01/13-1-Red2-tENG.

¹³ At para. 11.

¹⁴ At para. 12.

¹⁵ ICC-01/05-01/13-1-Red2-tENG, para. 26.

¹⁶ ICC-01/05-01/13-1-Red2-tENG, para. 8.

¹⁷ ICC-01/05-01/13-1-Red2-tENG, para. 8.

and likely does not apply to Mr Babala but in any event, all of that material I would submit probably needs to be vetted for potential privilege.¹⁸

28. In terms of materials seized by the Dutch authorities, according to a filing which was reclassified as public on 29 January 2014, the Prosecution proposed that the parties submit key words to assist the Dutch authorities to vet the materials.¹⁹

29. The Prosecution also indicated that the Dutch intended to perform the searches on 30 January 2014 (that is, the day after the Prosecution filing was reclassified as public).²⁰

30. In a further reclassified filing, the Prosecution clarified that the purpose of collating key words was to assist the Dutch authorities to identify ‘relevant information’ as opposed to assisting the Dutch authorities to screen out privileged or *ex parte* information.²¹

31. In his decision on this request, the Single Judge recalled that,

during a meeting, the Dutch magistrate in charge informed the Single Judge that the Dutch authorities are proceeding in accordance with their applicable laws and procedures, which provide for specific guarantees as to the protection of confidential and privileged information, and that, therefore, the concerns expressed by the Defence for Mr Mangenda are adequately taken into account.²²

32. The Single Judge did not provide any information as to the ‘specific guarantees as to the protection of confidential and privileged information’ available under Dutch law. In particular, the Single Judge did not address the fact that Mr. Bemba had been given no standing to participate in the Dutch proceedings or any avenue to assert privilege before the Dutch Courts.

33. The Single Judge also did not cite any legal basis under the Rome Statute, which would allow an ICC Judge to conduct an *ex parte* ‘meeting’ with a domestic judge, and to base a decision, which affects fundamental Defence rights, on information, which is not recorded in the ICC court records, or provided during an ICC hearing.

¹⁸ ICC-01/05-01/13-T-2-Red-ENG, p. 12, lines 12-17.

¹⁹ ICC-01/05-01/13-77, para. 4.

²⁰ ICC-01/05-01/13-77, para. 4.

²¹ ICC-01/05-01/13-116, para. 8.

²² ICC-01/05-01/13-135, page 5.

34. According to a public redacted filing, which was initially submitted on 3 March 2014, the Prosecution indicated that it had received information from the emails accounts of Mr. Babala and Mr. Arido on 23 January 2014.²³

35. In the same filing, the Prosecution also characterised the reports of the Independent Counsel as Prosecution evidence: “The Independent Counsel’s reports have yielded evidence critical to the case and will form a part of the basis upon which the DCC rests”.²⁴

36. In a contemporaneous Prosecution response to a Defence request for disclosure of information concerning the identity of the Independent Counsel, the Prosecution provided clear evidence that the Independent Counsel has transmitted privileged information to the Prosecution.²⁵

37. Specifically, the Prosecution ‘confirmed’ that the reports prepared by the Independent Counsel identify all information, which is relevant to the Article 70 investigation, including exculpatory information.²⁶

38. On 3 April 2014, the Prosecution filed a public redacted request for the Single Judge to appoint an independent counsel to review the contents of the email accounts from Me. Kilolo and Mr. Mangenda.²⁷

39. The Prosecution also indicated that the email accounts were copied onto the same DVD as the email accounts of Mr. Babala and Mr. Arido, and therefore requested the Registrar to separate the accounts, and transmit those of Mr. Babala and Mr. Arido to the Prosecution in their entirety.²⁸

40. The Prosecution has been in possession of the contents of the email accounts since 21 March 2014, and confirmed that the DVDs includes contacts, calendar date entries, emails and drafts.²⁹

41. In its submission, the Prosecution recognises the possibility of prejudice ensuing to “Jean-Pierre Bemba Gombo (as the privilege holder) in the Main Case”.³⁰

²³ ICC-01/05-01/13-234-Red, para. 9.

²⁴ ICC-01/05-01/13-234-Red, para. 25.

²⁵ ICC-01/05-01/13-237-Red.

²⁶ ICC-01/05-01/13-237-Red, para. 7.

²⁷ ICC-01/05-01/13-310-Red, para. 2.

²⁸ ICC-01/05-01/13-310-Red, para. 2.

²⁹ ICC-01/05-01/13-310-Red, para. 5.

42. It does not, however, explain how an ‘independent counsel’ (who is self-evidently not the privilege holder) would be equipped to identify such prejudice or indeed, identify “potentially privileged and/or legally protected confidential information”.

43. In tandem to this litigation, the Defence has submitted several requests to the Prosecution for information concerning whether the communications of any current members of the Defence have been monitored.

44. In particular, since January 2014, the Defence has been attempting to determine whether the Prosecution has listened to, or accessed, or has the transcripts in its possessions of phone conversations involving Mr. Peter Haynes, Ms. Kate Gibson, or Dr. Guenael Mettraux.

45. The Prosecution refused to respond to direct questions posed in a letter of 16 January 2014, and in fact deliberately limited subsequent submissions to the present tense, stating that:³¹

“...no entity is monitoring privileged communications or the communication devices of the members of the current Defence team.”

46. As such, on 25 March 2014, the Defence renewed its request to the Prosecution “to inform us whether the communication devices of Mr. Peter Haynes, Ms. Kate Gibson or Dr. Guenael Mettraux were monitored and over which period. If monitoring has occurred, we request the disclosure of any recordings, in whatever form, that were sought or obtained by you or any authority acting on your behalf.”³²

47. The Prosecution response was to merely repeat the statement in a previous filing that it had “legal grounds to seek and obtain judicial authority to intercept the telecommunications, not of the entire Defence team, as falsely asserted in the Defence Motion, but rather of suspects Kilolo and Mangenda individually.”³³

³⁰ ICC-01/05-01/13-310-Red, para. 8.

³¹ ICC-01/05-01/08-2984.

³² ANNEX A.

³³ ANNEX B.

48. Given the failure of this response to address the valid Defence concerns, the Defence again wrote to the Prosecution on 26 March 2014, asking the following direct questions:³⁴

- i. Do you have recordings of any phone conversations involving Mr. Peter Haynes, Ms. Kate Gibson, or Dr. Guenael Mettraux?
- ii. If so, on what basis were they made?
- iii. Who had access to these recordings, if anyone, within the Office of the Prosecutor?
- iv. Please provide a complete record of any transcripts or call data records in the possession of the Prosecution

49. The Defence also asked for “the immediate disclosure of any email correspondence from any of the accused in the Article 70 case addressed to Mr. Peter Haynes, Ms. Kate Gibson, or Dr. Guenael Mettraux, or to which Mr. Peter Haynes, Ms. Kate Gibson or Dr. Guenael Mettraux or were copied.”

50. This letter went unanswered, as did a follow-up letter of 4 April 2014.³⁵

C. SUBMISSIONS

(a) *The Email Accounts of Me. Kilolo and Mr. Mangenda*

51. The above procedural history speaks for itself. Since 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.

52. The manifest linkage between the Article 70 case and the main case has never been disputed.

53. At the same time, the ‘Independent Counsel’ has been a patently insufficient mechanism for identifying and filtering out privileged and sensitive Defence information.

54. Rather than acting as a device to ensure that the interests and rights of the Defence were protected during this process, it would seem that the Independent Counsel acted as a *de facto*

³⁴ ANNEX C.

³⁵ ANNEX D.

Prosecutor – acting on the basis of instructions from the Prosecution, and actively assisting the Prosecution in its investigation by filtering the material for the purpose of identifying material which was relevant to the Prosecution.

55. Whist it is apparent that there were numerous initiatives to guide the Independent Counsel as to what he or she should transmit to the Prosecution, there is no indication that the Independent Counsel was ever instructed or guided as to what he or she should not transmit to the Prosecution.

56. The identity of the Independent Counsel has not been disclosed to the Defence. Nonetheless, the mere fact that the Independent Counsel has had absolutely no contact with the Defence underscores his or her inability to act as an effective filter as concerns the transmission of material to the Prosecution.

57. According to the public records from the Article 70 case, the Independent Counsel was instructed to transmit any information, which is relevant to the Article 70 case, to the Prosecution.

58. It therefore follows that any information concerning Defence witnesses and Defence evidence can be transmitted to the Prosecution, including draft submissions, which are intended for use in the final Defence brief.

59. As noted above, the Prosecution has expressly confirmed the broad nature of the information transmitted by the Independent Counsel, which includes the transmission of exculpatory information.

60. If information extracted from Counsel communications or devices is ‘exculpatory’, then it follows that it does not exhibit evidence of criminality or an attempt to circumvent the regime for privilege. Put simply, if the information is ‘exculpatory’, then it is also privileged, and should never have been disclosed to the Prosecution.

61. It is certain that the email accounts of Me. Kilolo and Mr. Mangenda will contain:

- i. correspondence directed to and copied to the current members of the 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.

62. The existence of calendar entries and ‘contacts’ could also alert the Prosecution to information, which is the subject of *ex parte* protective measures.

63. In the absence of any instructions from the Defence or information concerning what could be the subject of *ex parte* orders, the Independent Counsel simply does not possess the ability to ring fence information, which should not be transmitted to the Prosecution.

64. Similarly, the very nature of *ex parte* procedures mandates that the Prosecution should not and will not be aware if it has been transmitted information, which is the subject of *ex parte* rulings or classifications.

65. It also cannot be excluded that the Independent Counsel is involved in other cases before the ICC. From 2006 until the end of 2008, Mr. Mangenda worked in the OPCD, in which capacity he assisted the OPCD to review victim applications in the DRC situation, and provided support and assistance to the Defence teams appearing before the ICC during that time period.

66. It is self-evident that it would be highly inappropriate for the Independent Counsel to review correspondence, which could include information pertaining to cases in which he or she is appearing.

67. Now that the Article 70 arrests warrants are public, it is neither necessary nor proportionate to entrust the task of reviewing privileged material to an ‘Independent Counsel’.

68. The information in question is the ‘property’ of the Defence – privilege inheres in Mr. Bemba. The Prosecution has explicitly referred to “Jean-Pierre Bemba Gombo (as the privilege holder) in the Main Case”.³⁶

³⁶ ICC-01/05-01/13-310-Red, para. 8.

69. Mr. Bemba's Article 70 Counsel has also recognised that privilege should be vetted and asserted by Mr. Bemba's Defence in the Main Case.³⁷

70. It follows that Mr. Bemba's Defence in the Main Case must be accorded an effective opportunity to assert this privilege on his behalf. An Independent Counsel cannot and should not assert it on his behalf – any pretext that the Independent Counsel can 'safeguard' the rights of the Defence is illusory.

71. The provision of the information to the Defence – for the purpose of creating an index, which items are subject to privilege, or *ex parte* classifications - causes no prejudice to the Prosecution or its ongoing investigations.

72. The Single Judge also anticipated in his earlier Article 70 decisions that once that arrest warrants have been publicly issued, the right of the Defence to participate in any decisions or processes affecting their rights would be triggered.³⁸

73. It is both arbitrary and illogical to continue to utilise a procedure, which was devised to protect the *ex parte* nature of ongoing investigations, once these investigations have culminated in a case.

74. The emails are the property of former Defence team members. There is nothing in their contents, which the Defence is not entitled to view.

75. In contrast, since the emails are the property of the Defence, there may be information in their contents, which persons outside of the Defence are not entitled to view.

76. Designating the Defence with the responsibility for asserting privilege and identifying information, which should not be transmitted to the Prosecution, is also consistent with the practice of the ICC, and the *ad hoc* Tribunals.

77. In the *Mbarushimana* case, the Single Judge explicitly noted that the defendant was best placed to review the seized materials, and to identify which materials were subject to privilege.³⁹

³⁷ ICC-01/05-01/13-311-Red, para. 4.

³⁸ ICC-01/05-50, at para. 9.

³⁹ ICC-01/04-01/10-105, page 5.

78. Similarly, in the *Gotovina* case, the Trial Chamber vested the Defence with the responsibility for conducting a review of the seized material, and asserting privilege.⁴⁰

79. Although this issue has arisen in the Article 70 case, the potential prejudice will accrue in the Main Case. The 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.

80. Moreover, irrespective as to what decision is taken by the Single Judge, the Trial Chamber has the competence to order the Prosecution to disclose the contents of the email accounts to the Defence in the main case.

81. Indeed, given the relevance of the documents to ability of the Defence to assess whether and to what extent its rights may have been privileged, the Trial Chamber could order the national authorities, which transmitted the emails to the Prosecution, to transmit copies to the Defence.

82. It is, however, more expeditious and less circuitous to simply order the Prosecution to disclose the same to the Defence in the main case, and to refrain from accessing their contents until such time as the Defence has been able to review them, and prepare a table setting out which documents are privileged, or contain information which cannot be disclosed to the Prosecution for other reasons (such as *ex parte* protective orders).

(b) The email accounts and recordings of Mr Arido

⁴⁰ *Prosecutor v. Gotovina*, Decision On Requests For Permanent Restraining Orders Directed To The Republic Of Croatia, 12 May 2010; "41. Croatia shall initially desist from inspection of the contents of the seized materials and keep the materials in its custody and under seal. Croatia shall further provide the Gotovina Defence with access to the seized materials, in such a manner that the Gotovina Defence can review their content and that the integrity of the seized materials is protected. Croatia may temporarily lift the seal on the seized materials only to the extent necessary to provide such access. The Gotovina Defence and Croatia shall then communicate with a view to seeking agreement on which items are and which are not protected under Rules 70 (A); or

97. Croatia shall not inspect the contents of the materials during such communications. Instead, the Gotovina Defence shall provide brief descriptions of the items it considers protected under those Rules. The Chamber notes that the Gotovina Defence may seek the assistance of an independent third party, such as the Tribunal's Association of Defence Counsel, to assist the communications with Croatia, for instance by confirming that the Defence's descriptions match the contents of seized materials.

42. Croatia may lift the seal on and inspect any seized materials the Gotovina Defence does not consider protected under those Rules. Croatia shall return to the Gotovina Defence any items that the Gotovina Defence and Croatia agree are protected under those Rules.

43. With regard to items the Gotovina Defence considers to be protected under Rules 70

(A) or 97, but which Croatia does not consider to be protected under those Rules, the Gotovina Defence shall contact the President of the Tribunal with a view to seeking a determination of the matter by an independent body. Croatia must return to the Gotovina Defence the items which an independent body has determined fall within the scope of Rules 70 (A) or 97. Croatia may lift the seal on and inspect items which an independent body has determined fall outside of the scope of those Rules."

83. Although he did not testify due to security concerns, Mr. Arido was a Defence witness. His email account almost certainly contains *ex parte* information detailing these security concerns.

84. The Defence also contemplated calling him as an expert witness, and to that end, engaged in communications with him concerning overall Defence strategy. It is probable that his email account may have contained draft expert submissions, which were not submitted to the Court.

85. Rule 73(1) of the Rules of Procedure and Evidence clarifies that Defence privilege is only waived if confidential information is provided to a third party, and the third party then provides evidence of that disclosure.

86. Privilege is not waived if privileged information is disseminated to a third party under conditions of confidentiality for the purpose of conducting Defence investigations, or considering Defence strategy concerning expert testimony.

87. ICC jurisprudence also confirms that draft submissions, which were not submitted in Court, continue to be protected by legal privilege, and that “were these files disclosed, the content of communications made in the-context of the professional relationship between Mr. Mbarushimana and his lawyers would be revealed, thereby depriving rule 73(1) of the Rules of any practical effect”.⁴¹

88. Notwithstanding the fact that the Prosecution expressly recognised that material concerning Mr. Arido could be privileged,⁴² it does not appear that any steps were taken within the Article 70 proceedings to prevent the disclosure of privileged information to the Prosecution.

89. It is arbitrary and illogical to recognise that safeguards are required to filter the communications which are in the email accounts of Me. Kilolo and Mr. Mangenda, without similarly recognizing the need to protect communications in the email account of Mr. Arido which may have been addressed to or received from Me. Kilolo and Mr. Mangenda.

90. Given the amount of time that the Prosecution has been in possession of this information, the Defence must assume that the Prosecution has already reviewed the material.

⁴¹ ICC-01/04-01/10-286, at p. 7.

⁴² ICC-01/05-01/13-T-2-Red-ENG, p. 12, lines 12-17.

91. The potential for prejudice, nonetheless, still exists and will need to be remedied. It is therefore necessary for the Defence 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.

(c) Communications, recordings and transcripts, which directly or indirectly concern the current members of the Defence

92. The Prosecution has failed to provide a clear and unequivocal response to repeated Defence queries as to whether the communications of any current members of the Defence teams were ever monitored.

93. It is essential for the Trial Chamber to intervene to cut the Gordian knot of Prosecution equivocation concerning whether the monitoring of the communications of Me. Kilolo and Mr. Mangenda ‘captured’ communications with Mr. Haynes, Ms. Gibson, or Dr. Mettraux.

94. The Defence team was in contact with each other on a regular basis, and discussed information concerning instructions from Mr. Bemba and privileged Defence strategy.

95. It is therefore impossible to believe that in the course of monitoring the communications (written and oral) of Me. Kilolo and Mr. Mangenda, domestic authorities would not have captured communications involving Mr. Haynes, Ms. Gibson, Dr. Mettraux (or temporary interns or indeed, members of the Office of Public Counsel for the Defence).

96. It is equally possible that the monitored communications may have ‘captured’ information relayed from Me. Kilolo and Mr. Mangenda to other persons, but which originated from Mr. Haynes, Ms. Gibson or Dr. Mettraux.

97. This information might be intrinsically linked to information, which the Independent Counsel has considered as ‘relevant’ to the Article 70 investigations, in particular, as concerns evidentiary items which the Prosecution has asserted are fabricated or otherwise tainted, or Defence witnesses, whom the Prosecution has alleged are part of a ‘bribery’ conspiracy.

98. These exhibits and the testimony of these witnesses are part of the evidential record in this case.

99. The Defence 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.

100. The ECHR has recognised that the mere possibility that a lawyer may have been monitored can undermine the ability of a defendant to confide in that lawyer in confidence.⁴³

101. The Prosecution'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.

102. Given the broad nature of the Prosecution's investigative requests (for example, their request to "collect recordings of telephone intercepts from the Dutch and Belgian governments of Messrs. KILOLO, lead counsel and MANGENDA case manager")⁴⁴, it is impossible to believe that they were not.

103. Even if these communications are not in the possession of the Prosecution, the mere fact that these communications were monitored invites the possibility that their content could be transmitted to the Prosecution at some future juncture.

104. The Defence wishes for an expeditious resolution to these proceedings but the case cannot proceed unless this ambiguity is resolved in a definitive and non-equivocal manner.

105. It is therefore imperative that the Defence be firstly, 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.

⁴³ *Castravet v. Moldova*, ECHR, (Application no. 23393/05) 13 March 2007, para. 51.

⁴⁴ ICC-01/05-51-Red, para. 3.

106. The Prosecution is under an ongoing obligation to disclose information, which concern potential violations of the rights of the Defence.⁴⁵

107. The ICTY has also confirmed that any information concerning the defendant, which is the possession of the Prosecution, is disclosable, including statements which refer to his name.⁴⁶ Since the integrity and actions of members of the Defence is a ‘live issue’, the Defence has a similar right to receive any information within the custody of the Prosecution which concerns or refers to members of the Defence.

D. RELIEF SOUGHT

108. For the reasons set out above, the Defence for Mr. Jean-Pierre Bemba Gombo respectfully requests the Trial Chamber to

ORDER the Prosecution immediately to deliver to the Defence the email accounts of Me. Aime Kilolo, Mr. Jean-Jacques Mangenda and Mr. Narcisso Arido; 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;

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);

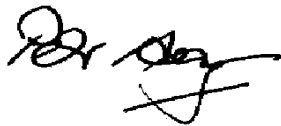
ORDER the Prosecution to

⁴⁵ ICC-01/04-01/10-47, para. 14; ICC-01/04-01/10-275.

⁴⁶ *Prosecutor v. Seselj*, ‘Decision on form of disclosure’, 4 July 2006, at page 7.

- 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; 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.

The whole respectfully submitted.



Peter Haynes, Q.C.

Lead Counsel for Mr Jean-Pierre Bemba Gombo

The Hague, The Netherlands

9 April 2014