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PRE TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

Public Redacted document

With

Confidential, *EX PARTE*, only available to Prosecution, Annexes A and B

Public Redacted version of "Request for Judicial Order to Obtain Evidence for Investigation under Article 70", 19 July 2013, ICC- 01/05-51-Conf-Exp

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I. Introduction

1. The Office of the Prosecutor ("Prosecution") continues to investigate offences against the administration of justice under Article 70 of the Rome Statute ("Statute") and Rule 165 of the Rules of Procedure and Evidence ("Rules") in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*. The available evidence strongly indicates that close associates of Jean-Pierre Bemba Gombo ("Accused"), members of the Accused's Defence team, and the Accused are involved in a scheme to provide benefits to Defence witnesses in exchange for false testimony and false documents, in violation of Article 70(1)(a)-(c) of the Statute.

2. Since 3 June 2013 the Prosecution has received from the Registry, on a rolling basis, complete logs and partial non-privileged recordings of telephone calls of the Accused. The logs and recordings strongly support the previously collected evidence of the scheme to bribe witnesses in exchange for false testimony and false documents. The logs and recordings indicate that the Accused is orchestrating the scheme, employing Aime KILOLO, Jean-Jacques MANGENDA, Fidèle BABALA, and [REDACTED] to facilitate the scheme.

3. The Prosecution now seeks from the Single Judge of Pre-Trial Chamber II ("Chamber") judicial authorization for the Prosecution to collect recordings of telephone intercepts from the Dutch and Belgian governments of Messrs. KILOLO, lead counsel and MANGENDA case manager. Under Article 54(3) the Prosecution may collect and examine evidence and seek the cooperation of States to obtain evidence. Generally the Prosecution need not seek judicial approval for the routine collection of evidence. Furthermore, the investigative action that the Prosecution is seeking would ordinarily involve judicial overview as part of the process of execution of the request for assistance in the requested State. However the intended

collection of evidence in this instance implicates members of a defence team acting in a case currently at trial before the Court and consequently the likely collateral collection of privileged communications between lawyer and client. In these exceptional circumstances, the Prosecution considers it appropriate to seek independent judicial approval within the Court for the intended evidence collection plan. The Prosecution notes the sensitive and serious nature of this investigation and thus will erect sufficient safeguards, described below, in the collection of the above evidence to ensure that no recordings of legitimate lawyer-client privileged communications comes into the possession or knowledge of the Prosecution.

4. The evidence that has come to light since the Prosecution's 3 May 2013 request indicates that the Accused is in constant communication with the financiers of the scheme, is aware of the Western Union payments, uses codes on the detention centre telephone to conceal discussions about the case and finances, and uses KILOLO's status as counsel to circumvent telephone monitoring from the Registry.

5. Article 57 (3) (a) of the Statute provides that a Pre-Trial Chamber is competent to issue "orders and warrants as may be required for the purposes of an investigation". Pursuant to Regulation 46 of the Regulations of the Court, the Prosecution is filing the instant request with the Chamber, as it is responsible for any matter arising out of the situation in the Central African Republic.

II. Confidentiality

6. The Prosecution submits this request as confidential, *Ex parte*, only available to the Prosecution since it contains sensitive information that, if disclosed, would compromise an ongoing investigation.

III. Procedural Background

7. On 3 May 2013, the Prosecution filed its “Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70.”¹

8. On 6 May 2013, Pre-Trial Chamber II designated Judge Cuno Tarfusser as the Single Judge responsible for addressing and determining the issues arising in connection with the above-mentioned Prosecution request.²

9. On 8 May 2013, upon request of the Prosecution, the Chamber ordered the Registrar to:

- a. verify whether telephone numbers belonging to BABALA were included in the Registry’s records and to provide the Prosecution with all available information pertaining to those numbers;
- b. make available to the Prosecution a complete log of all telephone calls placed or received by the Accused while at the detention centre, as well as available recordings of non-privileged calls placed or received by him.

Additionally, the Chamber authorized the Prosecution to contact and interview Defence witnesses for the limited purposes of the investigation of offenses against the administration of justice, without prejudice to all the limitations set forth in the protocol for contact with witnesses established by Trial Chamber III.³

10. [REDACTED].⁴

¹ ICC-01/05-44-Conf-Exp, Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70, 3 May 2013.

² ICC-01/05-45-Conf-Exp, Decision Designating a Single Judge, 6 May 2013.

³ ICC-01/05-46-Conf-Exp, Decision on the Prosecutor’s “Request for judicial assistance to obtain evidence for investigation under Article 70, 8 May 2013.

⁴ [REDACTED].

11. On 22 May 2013 the Prosecution opposed, *inter alia*, the Registry's relief requested from the Chamber's orders.⁵

12. On 27 May 2013 the Chamber declined to grant the Registry its requested relief and ordered the Registry to comply with its 8 May 2013 order.⁶

13. On 3 June 2013, 26 days after the Chamber's Decision, the Registry initiated compliance with the Decision and the Prosecution began to receive telephone logs and recordings, which it continues to receive to date.

IV. Findings from the investigation since 3 June 2013

14. Since 3 June 2013 the Prosecution has analysed the telephone logs and listened to a number of recordings of the Accused. The evidence from the logs and recordings significantly strengthens the Prosecution's initial suspicion that the Accused is orchestrating the scheme to bribe Defence witnesses in exchange for false testimony and false documents. The Accused frequently speaks to the very individuals, including KILOLO and MANGENDA, who have sent Western Union payments to Defence witnesses, at times for hours a day and several times a day.⁷ The evidence also strongly indicates that the Accused is using both KILOLO and MANGENDA to facilitate the scheme.

⁵ ICC-01/05-49-Conf-Exp, Prosecution's Submissions on the Registry's Observations on the Implementation of the "Decision on the Prosecutor's Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70", 22 May 2013.

⁶ ICC-01/05-50-Conf-Exp, Decision on the "Registry's Observations pursuant to regulation 24 bis of the Regulations of the Court on the implementation of the 'Decision on the Prosecutor's "Request for judicial assistance to obtain evidence for investigation, 27 May 2013.

⁷ Fidèle BABALA, [REDACTED], Jean-Jacques MANGENDA and Aime KILOLO. To date, the Prosecution cannot conclusively state [REDACTED]'s relation to BABALA but evidence of [REDACTED]'s involvement is found in BABALA telephone records and the Western Union spreadsheets, which show payments to witnesses where no prior financial relationship existed.

15. Since the 3 May 2013 request to this Chamber the Prosecution has also obtained the mobile phone records of BABALA [REDACTED] for the period of 6 November 2012 – 11 February 2013. BABALA's records show frequent communication between KILOLO, MANGENDA, [REDACTED], [REDACTED], and Defence witnesses. The Prosecution has cross-referenced available information contained in BABALA's records with the logs from the Registry, examples of which are contained in the annexes accompanying this request.⁸ These two pieces of evidence together confirm that the Accused and KILOLO are circumventing the Registry's monitoring system to discuss matters with third parties under the cloak of the lawyer-client communication privilege. The Prosecution was able to discern from the two logs that calls of the Accused to KILOLO and the calls of KILOLO to BABALA coincide on 13 occasions during the period of November 2012-February 2013, showing that the Accused is speaking to BABALA in concealed conference calls initiated on KILOLO's phone line, despite being able to directly call BABALA.⁹

16. The records also show that the Accused has used the above method to speak to at least one identifiable Defence witness – [REDACTED] (CAR-D04-PPPP-0021). On 13 January 2013 the Accused called KILOLO who then entered into a privileged non-monitored call with BABALA, [REDACTED], and a fourth unidentified person. During this period the Accused was also routinely calling BABALA on non-privileged calls. BABALA's phone records show BABALA's frequent contact with KILOLO, MANGENDA, [REDACTED], [REDACTED], and Defence witnesses, on dates that suggest possible arrangements for payments.

⁸ Should the Chamber need further explanation, the Prosecution can provide the raw evidence to the Chamber and is available for a status conference to show the analysis it has conducted.

⁹ The current available evidence may represent a variance from the information received from the confidential informant in [REDACTED]. It is not clear whether BABALA ever used a telephone number registered to KILOLO. Rather, the evidence indicates that the Accused initiates a call with KILOLO and subsequently speaks to others thus being able to cloak his conversations in non-monitored and unrecorded calls.

17. The content of the recorded calls clearly demonstrates that the Accused uses codes in Lingala and French. The codes are used when it appears that the Accused discusses aspects of the instant trial with BABALA and [REDACTED].¹⁰ The Accused apparently also uses codes when discussing any matters related to finances (it should be recalled there is a joint Prosecution-Registry investigation to locate the assets of the Accused).¹¹ On several occasions the Accused abruptly warned his interlocutors to use codes in place of names or to talk in a way that they cannot be understood since he assumed the telephone conversations would be monitored.¹² In discussing matters other than the trial or finances the Accused and his interlocutors speak in plain language. On many occasions the Accused speaks to [REDACTED] in plain language about [REDACTED] matters but will switch to code to discuss the trial or finances. Similarly, the Accused speaks to BABALA about DRC politics and other topics in plain language but strictly uses code to conceal trial and financial topics from monitoring.

18. The Prosecution has been able to decrypt very few words of the Accused's code by using available independent evidence such as the information from Western Union and BABALA's phone records. For example, the Accused often speaks to BABALA about "[REDACTED]", which is code for "KILOLO." On 13 January 2013 at about 13:45¹³, during a conversation with the Accused BABALA mentioned "[REDACTED]"¹⁴. The Accused told BABALA to share the information about

¹⁰ [REDACTED].

¹¹ The Accused uses varying codes to refer to amounts of money. For example:

[REDACTED]: "Such person asked me to read 14 [REDACTED]."

Accused: "Ok, but do it in two times of 7 [REDACTED] each as you are not allowed to pass that limit."

And

[REDACTED]: "The individual asked me to read 25 [REDACTED]."

Accused: "It's a lot, do you mean [REDACTED] or [REDACTED]?"

And

BABALA: "I gave the person 3 [REDACTED]."

And

BABALA: "Letters have been delivered."

¹² E.g. Conversations with BABALA on 20 April 2012, 11 June 2013, and 18 January 2013.

¹³ All times are Central European Time.

¹⁴ "[REDACTED]" likely refers to [REDACTED].

[REDACTED] with “the colleague from high” and that the Accused would call them back after one hour. BABALA’s telephone records show that after his conversation with the Accused, BABALA sent a text message to KILOLO and received a text message from KILOLO. The Accused’s next phone call was to KILOLO approximately one hour later, at 15:22, which lasted for 1 hour and 28 minutes. The Accused then again called KILOLO at 18:02 and spoke for 48 minutes and 33 seconds. BABALA’s telephone records show that at 18:29 BABALA spoke to KILOLO, overlapping with the Accused’s call for 15 minutes. At 18:39 [REDACTED], who testified on 8 to 12 April 2013, entered the same call for 37 seconds. At 18:39 another unidentified caller also entered the call for 37 seconds. The Accused spoke to KILOLO and likely other individuals on four additional times for a grand total of 3 hours 35 minutes on 13 January 2013. [REDACTED] testified for the Defence via video-link from [REDACTED] from 25 February to 13 March 2013.

19. The decryption of the code for KILOLO allowed the Prosecution understand the code’s use in other calls. For instance, on 25 May 2012, BABALA sent \$3,189.00 to KILOLO and \$4,744.00 to Narcisse ARIDO¹⁵ at 13:40 and 13:43, respectively. At 16:53 on 25 May 2012, BABALA and the Accused had a very short conversation where the Accused asked BABALA: “and on the side of the people from Charlie also, it’s OK?” BABALA answered the Accused with “For Charlie, it’s OK. It was sent and already withdrawn and for the colleague on high, it’s OK.” Though ARIDO did not actually withdraw his Western Union payment until 23:33 on 25 May 2012, there is no evidence that BABALA sent any other payments during this time period. The Prosecution believes that the code “[REDACTED]” may refer to the country where

¹⁵ Narcisse ARIDO is a Central African Republic national and, at the time of the transfer of funds, resided in [REDACTED]. The Defence included ARIDO on their witness list as CAR-D04-PPPP-0011 but ARIDO failed to appear for his flight to Schiphol on or about 26 September 2012 and on 2 October 2012 Trial Chamber III ordered that his visa be cancelled. On 27 June 2013 The Defence subsequently removed ARIDO from their witness list. The Prosecution discovered that ARIDO is currently residing in [REDACTED] and it is suspected that he used his visa issued for his testimony at the Court to instead travel to [REDACTED]. The Prosecution suspects that ARIDO was involved in the production of false documents submitted by KILOLO into evidence. ARIDO was listed as the last person in the chain of custody of a number of documents the Prosecution later discovered were fabrications.

ARIDO was residing at the time – [REDACTED].¹⁶ The short conversation on 25 May 2012 is a strong indication that the Accused is aware of payments made by BABALA and that he is using code to conceal his role in the payments. This conversation and the 13 January 2013 conversation also confirm that the code words for KILOLO are “[REDACTED].”

20. The review of the telephone conversations between BABALA and the Accused are on-going and the Prosecution continues to learn new information about the scheme from the calls. However, though the use of a code clearly indicates an attempt to conceal activities from monitoring, the code also prevents the Prosecution from fully understanding the scope of the conversations and thus the scheme.

21. MANGENDA has received a total of USD \$21,595.77 from BABALA and [REDACTED] via Western Union. Both KILOLO and MANGENDA have received large Western Union payments on dates that coincide with the dates of testimony of several witnesses in The Hague. The payments coincide with the end of the witnesses’ testimonies. [REDACTED] (CAR-D04-PPPP-0057), whose relative received \$655 from BABALA on 16 October 2012, started testified from 17-19 October 2012. MANGENDA received \$1,866 from [REDACTED] on 20 October 2012. [REDACTED] (CAR-D04-PPPP-0049) testified from 19-23 November 2012. MANGENDA received \$1,866 from BABALA on 22 November 2012. [REDACTED] (CAR-D04-PPPP-0065) testified from 14-18 September 2012. MANGENDA received \$1,866 from [REDACTED] on 17 September 2012. The times and dates of the transfers of exact sums of money suggest that KILOLO and MANGENDA may be paying witnesses while they are at the seat of the Court.

¹⁶ There are at least 8 Defence witnesses who [REDACTED].

22. Although the above evidence strongly indicates that the Accused, KILOLO, BABALA, [REDACTED], [REDACTED] and MANGENDA are all involved in the scheme to bribe witnesses to testify falsely, the evidence is largely circumstantial and the Prosecution has a fair but incomplete understanding of the scheme. Therefore the Prosecution aims to collect direct evidence of the scheme through the collection of electronic communications between the participants of the scheme and KILOLO and MANGENDA.

V. Proposed Additional Investigation

23. The Prosecution seeks from the Chamber authorization for the Prosecution to collect recordings of telephone intercepts from the Dutch and Belgian governments of Messrs. KILOLO and MANGENDA. The special guarantees that a defence counsel is granted with a view to performing his functions cannot and should not prevent investigation activities against him, particularly phone interception, when defence counsel himself is under investigation. In this case, there should be no bar to the listening of phone conversations that do not relate to the defence counsel's functions, but rather amount to the commission of crimes against the administration of justice, either in association with his client or with other individuals, provided that there exists serious indicia that such crimes have been committed.

24. Article 54(1) of the Statute mandates that "[t]he Prosecutor shall: (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute and, in doing so, investigate incriminating and exonerating circumstances equally." Article 57(3)(a) of the Statute empowers the Pre-Trial Chamber to, "[a]t the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation."

25. Under Article 67(1)(b) an Accused has the right to "... communicate freely with counsel of the accused's choosing in confidence." Further in Rule 73(1) of the Rules states:

Without prejudice to article 67, paragraph 1 (b), communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure, unless:

- (a) The person consents in writing to such disclosure; or
- (b) The person voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

26. Generally privileged communications between lawyer and client are protected from intrusion under the Rome Statute legal regime. However, this protection should not be construed as also encompassing communications that, due to their criminal nature, squarely fall outside the proper scope of the privilege. An accused person has no right under the Statute to plan and/or instruct the commission of crimes against the integrity of the Court's process jointly with his or her counsel. Nor does the privilege confer a safe environment to carry out such criminal conduct. Where there are serious indicia that the lawyer and client are engaging in a continuing course of criminal misconduct and use privileged communications to further that misconduct, as in the instant case, the law should be read to recognize an exception to the general inviolability of lawyer-client communications.¹⁷

27. If the Chamber authorizes the Prosecution to collect recordings of the telephone conversations of Messrs. KILOLO and MANGENDA from the Belgian and Dutch authorities, the Prosecution will immediately proceed with requests for assistance to the competent national authorities of Belgium and the Netherlands. [REDACTED].

¹⁷ The Special Court for Sierra Leone, which has similar rules (*i.e.* Article 17(4)(b) and Rule 97 of the Statute and Rules of Procedure and Evidence of the Special Court for Sierra Leone) to the Rome Statute legal regime on lawyer-client privilege, has recognized such an exception to the lawyer-client privilege in *Prosecutor v. Bangura et al.*, SCSL-11-02-T, Decision on the Prosecutor's Request for Subpoenas, at para. 15, 28 June 2012 (holding that the lawyer-client communication privilege is not absolute and may be overcome when the communications are in furtherance of a crime or fraud).

28. The Prosecution will erect safeguards to ensure that no legitimate lawyer-client privileged material comes into the possession or knowledge of the Prosecution. The evidence gathered to date indicates that recorded and uncoded calls between the Accused, KILOLO, and MANGENDA have the greatest potential to provide further information regarding the apparent scheme to pay Defence witnesses. In order to protect those interests and to ensure that its inquiry is as narrowly focused as possible, the Prosecution proposes contracting with an independent counsel who can review the recordings provided by the Belgian and Dutch authorities. In cooperation with the Prosecution, the counsel will first be instructed to review the recordings to determine if there appear to be calls to parties connected to this investigation. Second, the counsel will screen calls of interest for legitimate privileged communications and withhold those calls from the Prosecution. The counsel will only provide to the Prosecution recordings of calls that are relevant to this investigation. If counsel has questions or concerns about whether a certain recording contains legitimate privileged communications he will seek an *in camera* review and ruling from the Single Judge of Pre-Trial Chamber II. Through this process, the independent counsel will ensure that no legitimate privileged communications, and no conversations that are otherwise irrelevant to this investigation, are provided to the Prosecution. The independent counsel will have no other interaction with the Prosecution regarding this investigation.

29. The proposed investigative steps are justified and do not unduly infringe on the rights of the Accused, KILOLO or MANGENDA. The Prosecution has set forth sufficient grounds to believe that the Accused, KILOLO and MANGENDA are likely to be using telephone calls to participate in the scheme to pay Defence witnesses, and the recorded calls from Belgium and The Netherlands are likely to be the source of further relevant information bearing on this investigation. The Prosecution's

request is particularized and focused, proposes a procedure that insures that it will be minimally intrusive and contains adequate safeguards.

30. The Prosecution incorporates the facts contained in paragraphs 9-28 of ICC-01/05-44-Conf-Exp for this request.

31. The Prosecution remains at the Chamber's disposal for a status conference or to respond to further questions.

VI. Relief Requested

32. The Prosecution respectfully requests that the Chamber authorize the Prosecution to collect recordings of the telephone conversations of Messrs. KILOLO and MANGENDA from the Belgian and Dutch authorities.

VII. Conclusion

33. These are serious allegations of offences against the administration of justice. The Prosecution is aware of the far-reaching implications of these allegations. The Prosecution therefore respectfully requests both confidentiality and urgency and that the Chamber grants the relief requested.



Fatou Bensouda, Prosecutor

Dated this 12th day of February, 2014

At The Hague, The Netherlands