

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 2 May 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

**Public Redacted version of "Decision on the prosecution's request relating to
Article 70 investigation" of 26 April 2013**

Order 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

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

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber III (“Chamber”) of the International Criminal Court (“Court”) in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (“Bemba Case”) issues the following Decision on the prosecution’s request relating to Article 70 investigation (“Decision”).

I. Background and submissions

1. On 15 November 2012, the Office of the Prosecutor (“prosecution”) filed its “Prosecution Request for Record of Payments made by the Registry to Witnesses called by the Defence of Mr Jean-Pierre Bemba Gombo (“First Request”),¹ in which it informed the Chamber that it had been conducting an investigation pursuant to Article 70 of the Rome Statute (“Statute”). To this end, the prosecution requested that the Chamber order the Registry to: (i) provide the prosecution with the record of the payments effected by the Registry to defence witnesses who had testified or who were testifying in the future, including the three expert witnesses, on any ground related to their testimonies, either directly or through any intermediary person or persons; and (ii) provide the prosecution with information as to the amount of professional fees that the three defence expert witnesses were granted and paid.²

2. On 26 November 2012, further to the Chamber’s instruction,³ the Registry filed its submissions on the prosecution’s First Request.⁴ In relation to the payments made by the Victims and Witnesses Unit (“VWU”), it indicated, *inter alia*, the types of expenses incurred in relation to all witnesses,

¹ Prosecution Request for Record of Payments made by the Registry to Witnesses called by the Defence of Mr Jean-Pierre Bemba Gombo, 15 November 2012, ICC-01/05-01/08-2412-Conf-Exp.

² ICC-01/05-01/08-2412-Conf-Exp, paragraph 5.

³ Decision requesting the Registry’s observations on the prosecution’s request relating to Article 70 investigation, 19 November 2012, ICC-01/05-01/08-2421-Conf-Exp.

⁴ Registry’s Observations relating to the “Decision requesting the Registry’s observations on the prosecution’s request relating to Article 70 investigations”, Confidential *ex parte* Prosecution and Registry only, 26 November 2012, ICC-01/05-01/08-2441-Conf Exp, with Annex 1, confidential *ex parte*, VWU only, and Annexes 2 to 6, confidential *ex parte* Registry only.

irrespective of the calling party, and stressed that financial decisions are made independently by the VWU and approved by the Registrar.⁵

3. On 2 December 2012, the Chamber issued its “Decision on the Registry’s observations on the prosecution’s request relating to Article 70 investigations”,⁶ in which it noted that the Registry had already addressed the First Request, providing the prosecution with most of the information sought in relation to witnesses called by the defence including the type of expenses incurred, the instances in which payments were made through the defence team, and the professional fees to be paid to the expert witnesses. The Chamber therefore found that a decision on the prosecution’s First Request was no longer required. The Chamber further specified that, in the event that the prosecution required more detailed information than that already at its disposal, it should request it directly from the Registry.⁷

4. On 20 March 2013, the prosecution filed its confidential *ex parte* “Notice to the Trial Chamber of Article 70 Investigation and Request for Judicial Assistance to Obtain Evidence” (“Second Request”),⁸ in which it requests that the Chamber:
 - a) Order the Registry to verify whether any of the following telephone numbers – [REDACTED], [REDACTED], [REDACTED] – are listed in Registry records and, if so, to whom they belong;

 - b) Order the Registry to provide to an independent counsel appointed by the Prosecution access to (1) all calls made to BABALA and (2) all calls made to third parties through BABALA. The Registry should make available to the independent counsel all calls of the Accused that could potentially be to BABALA, including calls made to numbers identified as KILOLO but in fact to BABALA;

⁵ ICC-01/05-01/08-2441-Conf-Exp, paragraphs 2 to 6.

⁶ Decision on the Registry’s observations on the prosecution’s request relating to Article 70 investigations, 3 December 2012, ICC-01/05-01/08-2461-Conf-Exp.

⁷ ICC-01/05-01/08-2461-Conf-Exp, paragraph 4.

⁸ Notice to the Trial Chamber of Article 70 Investigation and Request for Judicial Assistance to Obtain Evidence, 20 March 2013, ICC-01/05-01/08-2548-Conf-Exp.

c) Order the Registry to provide to the independent counsel all telephone log information pertaining to calls identified as “relevant” by the independent counsel;

d) Should the Chamber apply Regulation 92 of Regulations the Prosecution applies under Regulation 92(4) of Regulations for an Order not requiring the disclosure of requested information until such time that disclosure would not prejudice the investigation; especially interviews with Defence witnesses; and

e) Vary the terms of the protocol governing contact with Defence witnesses to allow the Prosecution to conduct interviews with Defence witnesses who received payments as set forth in the Western Union records without prior notice to the Defence.⁹

5. The prosecution appends a confidential *ex parte* Annex A to its Second Request, containing an internal prosecution memorandum entitled “Break down of the money paid using Western Union”.¹⁰ The memorandum consists of a table that shows money transfers originating from Mr Kilolo and Mr Jean-Jacques Mangenda, members of the defence team, and from acquaintances or relatives of Mr Bemba, including a certain Mr Babala.
6. On 9 April 2013, the Chamber held a confidential *ex parte* prosecution and Registry only status conference (“9 April 2013 Status Conference”)¹¹ in order, *inter alia*, to obtain additional information relating to the Second Request and to hear the Registry’s views on the technical implications of the investigative steps requested by the prosecution.

II. Analysis and Conclusion

7. In accordance with Article 21(1) of the Rome Statute (“Statute”), the Chamber, in making its determination, has considered Articles 39(4), 41, 45, 54 to 58, 60, 61, 64(2), 67, 70 of the Statute, Rules 73, 162 to 169 of the Rules of Procedure and Evidence (“Rules”).

⁹ ICC-01/05-01/08-2548-Conf-Exp, paragraph 38.

¹⁰ Confidential *ex parte* Annex A to the Notice to the Trial Chamber of Article 70 Investigation and Request for Judicial Assistance to Obtain Evidence, 20 March 2013, ICC-01/05-01/08-2548-Conf-Exp-AnxA.

¹¹ Public redacted version of “Order convening a confidential *ex parte* prosecution and Registry only status conference” of 22 March 2013, 8 April 2013, ICC-01/05-01/08-2560-Red.

8. A preliminary matter which needs to be addressed is whether *this* Trial Chamber has competence to deal with the prosecution's Second Request. To this end, the Chamber has considered the legal framework applicable to an investigation under Article 70 of the Statute.
9. Pursuant to Article 70(2) of the Statute, the principles and procedures governing the Court's exercise of jurisdiction over "[O]ffences against the administration of justice" are provided for in Rules 162 to 169 of the Rules.
10. As to the procedure applicable to Article 70 offences, Rule 163(1) of the Rules states:
1. Unless otherwise provided in sub-rules 2 and 3, rule 162 and rules 164 to 169, the Statute and the Rules shall apply *mutatis mutandis* to the Court's investigation, prosecution and punishment of offences defined in article 70.
11. Rule 165(3) and (4) of the Rules states as follows:
3. For purposes of article 61, *the Pre-Trial Chamber* may make any of the determinations set forth in that article on the basis of written submissions, without a hearing, unless the interests of justice otherwise require. [emphasis added]
 4. *A Trial Chamber* may, as appropriate and taking into account the rights of the defence, direct that there be joinder of charges under article 70 with charges under articles 5 to 8. [emphasis added]
12. A literal interpretation of the above provisions makes it clear that Article 70 investigations are governed by the same rules of procedure – with some specific rules excluded¹² – as those which govern investigations into the commission of crimes under Articles 5 to 8 of the Statute. Indeed, in accordance with Rule 163(1) of the Rules, the Statute and the Rules shall apply *mutatis mutandis*. The Chamber is therefore of the view that, at the investigation and prosecution stage of Article 70 offences, Articles 54 to 58, 60 and 61 of the Statute shall apply. In particular, Article 57 shall apply *mutatis*

¹² See the exclusion of Articles 53 and 59 of the Statute in accordance with Rule 165(2) of the Rules.

mutandis to an Article 70 investigation. This article provides that it is a Pre-Trial Chamber that is the competent Chamber to issue “such orders and warrants as may be required for the purposes of an investigation”. Indeed, these powers, as described under Article 57(3)(a) of the Statute, are at the core of the judicial functions of a Pre-Trial Chamber under the Court’s legal framework. The Chamber notes that the measures requested in the prosecution’s Second Request are of an investigative nature and are aimed at collecting evidence pertaining to individuals identified by the prosecution.¹³

13. In addition, paragraph 4 of Rule 165 of the Rules only makes reference to a “Trial Chamber” in relation to a possible determination as to whether there should be a joinder of charges under Article 70 with charges under Articles 5 to 8 of the Statute, a procedure which would only occur *after* any charges were confirmed.
14. Therefore, in line with Articles 54 to 58, 60 and 61 of the Statute, applicable in accordance with Rule 163(1) of the Rules, a combined reading of paragraphs 3 and 4 of Rule 165 of the Rules demonstrates that any requests in relation to an investigation into alleged Article 70 offences should *first* be brought before a Pre-Trial Chamber.
15. In the view of the Chamber, the procedure contemplated in Article 64(4) of the Statute is not applicable to the issue at hand. This provision applies to instances where, during trial proceedings, a Trial Chamber’s determination is required on a “preliminary issue” which arises out of the case and situation of which a Trial Chamber is already seised. In the present circumstances, however, the Chamber is requested to issue orders related to an Article 70 investigation, based on allegations and potential charges which are of a different order from those involved in the Bemba Case. In addition, the

¹³ ICC-01/05-01/08-2548-Conf-Exp, paragraph 38.

prosecution's allegations in the context of its Article 70 investigation potentially involve different suspects in different countries, as well as events which may have occurred outside the Central African Republic.

16. Hence, the Chamber is of the view that "preliminary issues", within the meaning of Article 64(4) of the Statute, cannot be interpreted as encompassing the issuance of judicial orders in the context of an Article 70 investigation and prosecution. As such, the issuance of such orders falls squarely within the core responsibility of a Pre-Trial Chamber. This reading of Article 64(4) points to the need for the Second Request to be addressed by a Chamber other than the present one. Along the same lines, as the investigative steps envisaged by the prosecution under Article 70 are to be dealt with separately from the trial proceedings in the Bemba Case, Articles 61(11) and 64(6)(a) of the Statute do not apply.

17. Furthermore, the drafting history of the relevant provisions confirms the above interpretation of Rules 163(1), 165(3) and (4) of the Rules, and the Chamber's understanding of the statutory framework which governs the investigation and prosecution of Article 70 offences. Proposals for setting up procedures related to the investigation, prosecution and trial of alleged Article 70 offences were initially made by the French Delegation and the Working Group of the American Bar Association.¹⁴ Both proposals made it clear that proceedings for Article 70 offences should be governed by the same rules – though in somewhat simplified form – as set forth in the Statute for the

¹⁴ H. Friman, "Offences and Misconduct against the Court", in R.S. Lee (ed.), *The International Criminal Court, Elements of crimes and Rules of Procedure & Evidence*, (Transitional Publishers, 2001), page 614. For instance, with regard to the proposal of the American Bar Association's Working Group, the commentary on the proposed rule applicable to an Article 70 procedure was as follows: "This rule sets forth the provisions required by article 70. In general, this rule is designed to route the handling of offenses against the administration of justice into the standard procedures for criminal matters under these rules. Thus, it directs potential cases to the prosecutor's office for investigation and charging [...]. Such cases then proceed through the standard pre-trial, trial, and appellate phases." Working Group of the American Bar Association, Draft Rules of Procedure and Evidence of the International Criminal Court: Parts 7 (Evidence) and 10 (Offences Against the Administration of Justice), 2 June 1999, Rule 126ter. [emphasis added]

“core crimes”, namely the crimes set out in Articles 5 to 8 of the Statute. Both proposals remained unchanged throughout the drafting process which led to the adoption of the existing rules relating to Article 70 offences.¹⁵

18. As outlined by academic observers, the fact that, with limited exceptions, “[t]he procedures set forth in the Statute on investigation, prosecution and trial, and the rules underpinning them shall also govern proceedings under Article 70”, ensures that “the same high international standards apply to both proceedings.”¹⁶ Included among these high international standards is the structure of the proceedings before the Court, which ensures a fair trial for an accused.¹⁷

19. The importance of ensuring a separation of responsibilities between the Pre-Trial Chamber and the Trial Chamber is made manifest in Article 39(4) of the Statute, which provides that while judges from the Trial Division may be temporarily attached to the Pre-Trial Division, or *vice versa*, this may only occur “*provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.*” (emphasis added) The Chamber is of the view that the fact that Article 70 proceedings must first be dealt with by a Pre-Trial Chamber rather than this Trial Chamber, which is seised of the merits of a related, though by no means identical, matter, serves to ensure that the impartiality of the Trial Chamber judges may not “reasonably be doubted”.¹⁸

¹⁵ Preparatory Commission for the International Criminal Court, *Report of the Working Group*, 27 June 2000, PCNICC/2000/WGRPE/L.10, Rule 6.35; *See also* H. Friman, “Offences and Misconduct against the Court”, in R.S. Lee (ed.), *The International Criminal Court, Elements of crimes and Rules of Procedure & Evidence*, (Transitional Publishers, 2001), pages 614 and 615.

¹⁶ *See* H. Friman, “Offences and Misconduct against the Court”, in R.S. Lee (ed.), *The International Criminal Court, Elements of crimes and Rules of Procedure & Evidence*, (Transitional Publishers, 2001), page 615.

¹⁷ The structure, *inter alia*, provides that it falls to a Pre-Trial Chamber to “determine whether there is sufficient evidence to establish substantial ground to believe” that an accused committed each of the crimes charged” (Article 61(7) of the Statute) and, only where such a finding is made, does it then fall to a Trial Chamber to make a determination as to whether or not it is “convinced of the guilt the accused beyond reasonable doubt.” (Article 67(3) of the Statute).

¹⁸ *See* Article 41(2)(a) of the Statute. In making this observation, the Trial Chamber in no way offers a view on the question of whether or not bias would have arisen in this case had it acted as requested by the prosecution.

20. Furthermore, should the prosecution proceed with an Article 70 prosecution and should the charges be confirmed by a Pre-Trial Chamber, it may fall to this Trial Chamber, pursuant to Rule 165(4) of the Rules, to decide whether to direct that there be joinder of charges under Article 70 of the Statute with charges under Articles 5 to 8 of the Statute. As emphasised in Rule 165(4) of the Rules, in making such a determination this Trial Chamber must “tak[e] into account the rights of the defence.” The fact that this Trial Chamber has not been previously involved in an Article 70 investigation and prosecution will serve to ensure that the Trial Chamber may make such a decision with due regard of the rights of the defence.¹⁹

21. In light of the above, the Chamber finds that the interpretation of the Court’s legal framework, in accordance with Article 21 of the Statute, and as confirmed by the *travaux préparatoires*,²⁰ makes it clear that a Pre-Trial Chamber is the competent judicial authority to make determinations on any investigative measures requested by the prosecution in relation to an Article 70 investigation.

22. Considering the above, the Chamber :

- (i) DECIDES that it has no competence over the prosecution Second Request; and

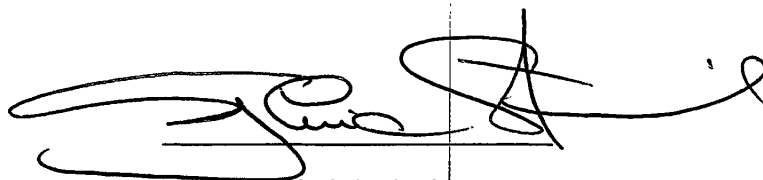
The case law as regards the level of involvement a judge must have had in one proceeding for his or her impartiality to reasonably be doubted in subsequent related proceedings is complex and beyond the scope of this decision. Suffice it to observe that the jurisprudence of this Court and the European Court of Human Rights has decided such matters on a case-by-case basis, taking into account the scope and nature of measures taken by a judge in any prior involvement (see ECtHR, *Deplets v. France*, Judgement, 10 February 2004, application no. 52971/00, paragraphs 40-41; ECtHR, *Morel v. France*, Judgement, 6 June 2000, application no. 34130/96, paragraphs 48-49), including the standards of proof required with each involvement. (ECtHR, *Hauschildt v. Denmark*, Judgement, 24 May 1989, application no. 10486/83, paragraph 50; see also ECtHR, *Jasiński v. Poland*, Judgement, 20 December 2005, application no. 30865/96, paragraph 55).

¹⁹ An approach which emphasises the importance of ensuring the separation of responsibilities between the Pre-Trial Chamber and the Trial Chamber in relation to an Article 70 prosecution is fully in keeping with the decision taken by this Trial Chamber in relation to the prosecution’s First Request, discussed in paragraphs 1 to 3 of the present Decision. In this respect, this Trial Chamber limited its involvement to ordering the Registry to file observations on the prosecution’s First Request.


²⁰ Cf *Vienna Convention on the Law of Treaties*, 22 May 1969, 1155 United Nations treaty Series 331, Article 32.

- (ii) INVITES the prosecution to inform the Chamber when the present Decision can be issued in redacted form.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 2 May 2014

At The Hague, The Netherlands