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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 Version of Defence Request for Interim Relief

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. The Defence for Mr. Jean-Pierre Bemba Gombo has grounds to believe that its rights in relation to this trial may have been, and may continue to be gravely prejudiced by *ex parte* decisions, and litigation before a Chamber before which the Defence has no standing.
2. In particular, it would appear that under the cloak of an *ex parte* Article 70 investigation, the Prosecution has obtained access to privileged information setting out Defence strategy and information, which should have been protected by Mr. Bemba's privilege against self-incrimination.
3. This is an unacceptable situation.
4. Article 70 proceedings, are, by their very nature, ancillary to the main criminal proceedings. Their objective is to ensure the integrity of the proceedings,¹ not to undermine it. It would be completely counterproductive if actions taken in the name of the Article 70 proceedings were to undermine the ability of the ICC to render a fair and impartial verdict in the very trial, which Article 70 should serve to protect.
5. Given the ancillary nature of Article 70 proceedings and the length of the proceedings thus far in the main case, Mr. Bemba's right to an expeditious verdict must take precedence over the Article 70 proceedings.
6. The Defence also has a fundamental right to be heard in connection with any measures which infringe upon Mr. Bemba's fair trial rights. It is difficult to identify a scenario which is likely to infringe on fair trial rights more than the seizure and review of privileged Defence materials by the Prosecution.
7. This Trial Chamber is the guardian of Mr. Bemba's fair trial rights, which include his right to privileged communications. The Trial Chamber thus has the duty and power to take such measures as are necessary to protect Mr. Bemba's right to a fair trial.

¹ ICC-01/09-01/13-1-Red2, para.20; Prosecutor v. Slobodan Milošević, Case No. IT-02-54-A-R77.4, Decision on Interlocutory Appeals on Kosta Bulatović Contempt Proceedings, 29 August 2005, para. 21.

8. Given the lack of information disclosed to the Defence thus far, the Defence is not yet in a position to litigate the legality of the measures taken in connection with the Article 70 case, or the extent of the prejudice to the defendant in this trial.
9. Nonetheless, in light of the potential implications for Mr. Bemba's right to a fair trial, there is an immediate need to take steps to prevent or at least, mitigate any further prejudice to this right.
10. In the present circumstances, the only appropriate interim remedies are to:
 - i. Injunct the Prosecution from accessing or utilising any materials or information obtained directly or indirectly from monitoring the Defence, or from search and seizures concerning the Defence;
 - ii. Order States to desist from taking any legal steps in connection with materials seized from the Defence, or information obtained from monitoring the Defence; and
 - iii. Request the Prosecution to request a suspension of the Article 70 proceedings in their entirety or in part pending full litigation as to the legality of the seizure of Defence material and the monitoring of Defence communications.

B. SUBMISSIONS

There are grounds to believe that fundamental aspects of Mr. Bemba's fair trial rights have been, and are continuing to be violated through the seizure of privileged materials, and the monitoring of Defence communications

11. The Trial Chamber has an overriding duty to ensure the defendant's right to a fair and expeditious trial. This duty is enshrined in Article 64(2) of the Statute, which specifies that the "Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused".
12. The defendant's right to communicate freely with counsel in confidence is included within the fundamental rights of the accused set out in Article 67(1)(b). It follows that the Trial Chamber has a positive duty to ensure that the defendant can enjoy this right in an effective manner throughout the proceedings.

13. Rule 73(1) of the Rules of Procedure and Evidence both reinforces Article 67(1)(b) , and provides a broader range of privilege to “communications made in the context of the professional relationship between a person and his or her legal counsel”. The deliberate use of the term ‘context’ clarifies that the privilege set out in Article 67(1)(b) extends to any communications which are intrinsically linked to the professional relationship between a Counsel and his or her client.
14. For example, it is self-evident that the protection afforded by Article 67(1)(b) would be undermined if it did not extend to include interpreters or translators who communicate between counsel and client, or communications between the client and other defence team members which occur under the instruction or supervision of Counsel, and which directly pertain to this professional relationship.²
15. Notably, if the communications fall within the scope of privileged communications set out in rule 73(1), the privilege can only be lifted in two scenarios: firstly, if the defendant consented in writing to such disclosure, and secondly, if the person voluntarily disclosed content of the communication to a third party, and that party then gives evidence of that disclosure. There are no other exceptions.³
16. Indeed, by expressly including such exhaustive exceptions, the drafters precluded the need to resort to any subsidiary sources of law as concerns the existence of exceptions to the rule. There is no ambiguity or vacuum in the Rule, and as such, there is no basis for resorting to other sources of law pursuant to Article 21 of the Statute.
17. The European Court of Human Rights has also emphasised that the possibility that national authorities could monitor privileged communications must be foreseeable; even if the defendant is not notified at the specific time when he is monitored, the established law must clearly set out the possibility that the defendant’s privileged communications *could* be monitored, and the circumstances which could trigger such

²The ICTY Appeals Chamber has held that persons facilitating the right of Defence Counsel have a derivative right to protections which are necessary for Counsel to perform their work: *Prosecutor v. Gotovina*, ‘Decision on Gotovina Defence Appeal Against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia’, 14 February 2011, para. 27. Notably, the Appeals Chamber also accepted that documents, which were located at the office of Defence investigators, were protected by legal professional privilege. See also advice from the United Nations Office of Legal Affairs to the ICTR Registrar to the effect that the purpose of the privileges and immunities of Defence Counsel would be undermined if the persons assisting Counsel do not benefit from the same immunity during the course of such assistance. Memorandum filed at ICC-01/11-01/11-284-AnxA.

³ ICC-01/04-01/10, p. 7.

monitoring.⁴ It would therefore be impermissible for the Chamber to resort to analogy or sources of law outside of the framework of the Rome Statute, Rules or Regulation in order to create exceptions which would not have been foreseeable to either Counsel or the defendant.

18. Article 67(1)(b) and Rule 73(1) must therefore be construed in a manner which is similar to the privilege set out in Article 54(3)(e), namely, if the criteria for its protection are triggered, then the Court has no power to lift the privilege –it may only issue orders to counterbalance any ensuing prejudice to the parties.⁵

19. Indeed, given that Article 54(3)(e) could encompass information central to either the guilt or innocence of a defendant in connection with serious charges such as genocide, there does not appear to be any logical reason why the privilege protected by Article 54(3)(e) should be stronger than that which is afforded to a defendant, pursuant to Article 67(1)(b) and Rule 73(1).

20. The respective Regulations of the Court and the Registry, which govern access to the detention record or the monitoring of communications, also set out strict procedural requirements to protect the interests of the Defence.

21. Regulation 97 of the Regulations of the Court does not allow for any exceptions to be made as concerns the right of Counsel or Counsel's assistants to communicate fully with the defendant, outside of the hearing of any detention staff.

22. Regulation 101 of the Regulations of the Court specifies that the Prosecution may only request the Chamber to regulate contact between a detained person and “any other person, with the exception of counsel” [...]. The explicit exclusion of Counsel communications from this provision creates a clear legal prohibition as concerns the

⁴ “the relevant rule must be “formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able-if need be with appropriate advice-to-foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail”: *Case of Malone v. The United Kingdom*, Application no. 8691/79 Judgment 2 August 1994, para 66. See also paras. 67-69. [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57533#{"itemid":\["001-57533"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57533#{)

⁵ “In situations such as the present, where the material in question was obtained on the condition of confidentiality, the Trial Chamber (as well as any other Chamber of this Court, including this Appeals Chamber) will have to respect the confidentiality agreement concluded by the Prosecutor under article 54 (3) (e) of the Statute and cannot order the disclosure of the material to the defence without the prior consent of the information provider (see article 64 (6) (c) of the Statute and rule 81 (3), first sentence, of the Rules of Procedure and Evidence).” ICC-01/04-01/06-1486, para. 48.

ability of the Prosecution to request the monitoring of communications between Counsel and client. This prohibition is not modified elsewhere in the Statute, Rules and Regulations.

23. In any case, Regulation 101 further provides that the defendant must, in principle, be informed of requests for non-contact and given an opportunity to submit his or her views. In emergencies, the Judge may issue an order prior to the detained person being informed of the request. The detained person must nonetheless be given an opportunity to be heard and to contest the decision as soon as practicable. Regulation 91 of the Regulations of the Registry contains similar protections concerning the ability of third persons or entities to access any aspect of the defendant's detention record.

24. The Regulations of the Registry further elaborate on the procedure for monitoring the telephone calls of a detainee. Regulation 175(2) only allows the Registrar to order the monitoring of phone calls "to and from the detained person, other than those with counsel".

25. Moreover, even though Regulation 175 regulates the regime applicable to interferences with or intimidation of witnesses, or offences against the administration of justice, Regulation 175 (10) expressly requires the Registrar to notify Counsel for the detained person prior to any disclosure of the transcripts of monitored conversations as evidence of contempt. There is no exception to this requirement. The explicit reference to offences against the administration of justice also evidences the clear intention that the protections afforded by the regulation should continue to apply in connection with Article 70 investigations.

26. It follows that the fact that the Prosecution has grounds to believe that the defendant might be engaging in an offence against the administration does not, in itself, create a basis for monitoring privileged communications with Counsel, nor does it create a basis for the Registrar to disclose the transcripts of any other conversations to the Prosecution without prior notice and disclosure to the Defence.

27. This is in line with the fact that the detention facilities should be governed in accordance with the principles of neutrality, and should not be transformed into a

partial evidence-gathering organ for the Prosecution. Detention regulations aim to ensure the good security and order of the detention unit, and to protect the integrity of the proceedings; any modification or incursions into the rights of the defendant must also comport with the requirements of necessity and proportionality.⁶

28. It would be entirely inappropriate for the Prosecution to go beyond this purpose, and take advantage of the defendant's pre-trial detention to use the detention facility as a means for gathering evidence against the defendant, in violation of his protection against self-incrimination.⁷
29. For this reason, in circumstances in which it has become apparent that the defendant may have misused his right to privileged communications, including for the suspected purpose of witness intimidation, other International Tribunals have found that the appropriate remedy is to suspend or cut-off the right to conduct privileged communications with the offending counsel in a transparent and *inter partes* manner,⁸ rather than to undermine the very purpose of the privilege by covertly monitoring future conversations.
30. The President of the ICTY has also emphasised that since the purpose of the detention monitoring regime is to ensure that the detainee's actions do not frustrate the good administration of justice, it is incumbent on the Registrar to notify the defendant of any suspected breaches or misconduct, so that the detainee can correct his behaviour and avoid future breaches.⁹
31. In this particular case, if the Prosecution's actions were indeed motivated by a desire to protect the integrity of the proceedings and safeguard the well-being of witnesses, then this begs the question as to why the Prosecution did not raise its concerns in an *inter partes* manner as soon as the Prosecution became aware of potential breaches, in order to ensure that the Chamber would be in a position to take steps to prevent any further wrongdoing or prejudice.

⁶ ICC-01/04-01/07-322, 13 March 2008, p.9.

⁷ *Prosecutor v. Taylor*, Decision on Public with Annex A and B and Confidential Annex C Urgent Prosecution Request for an Order to Direct the Registry to Disclose Non-Privileged Information, 22 January 2010.

⁸ See for example, *Prosecutor v. Seselj*, 'Redacted Version of the "Decision on Monitoring the Privileged Communications of the Accused with Dissenting Opinion by Judge Harhoff in Annex" 1 December 2008, para. 30.

⁹ *Prosecutor v. Milan Lukic*, Decision on Milan Lukic's Appeal Against the Registrar's Decision of 18 November 2008', 28 November 2004, para. 14.

32. The aforementioned Articles, Rules and Regulations set out strict protections as concerns the ability of counsel to communicate with the defendant in a confidential manner. This rights are inextricably linked to the ability of the defendant to enjoy his fair trial protections under Article 67(1) in an effective manner. These Articles, Rules and Regulations also set out a strict right for the Defence of Mr. Bemba to be notified of any requests or orders, which impact on either the ability of Counsel to communicate with the defendant in a confidential manner, or the ability of the defendant to communicate with other persons.
33. Although it has become apparent from recently reclassified decisions that the Article 70 case appears to be predicated on information obtained from communications between the Defence and Mr. Bemba, the Defence for Mr. Bemba has never been notified of any Prosecution request to monitor the communications or contacts of Mr. Bemba. The Defence has never been notified that the transcripts of monitored calls might be or were transmitted to the Prosecution. The Defence for Mr. Bemba has never been given any opportunity to make submissions concerning the scope of legal professional privilege and the extent to which the privilege can be lifted, nor has the Defence been heard in relation to the procedures adopted for the review of potentially privileged materials.
34. The Defence for Mr. Bemba continues to remain in the dark concerning the legal basis for any such monitoring or disclosure. Given the date set for the confirmation hearing in the Article 70 case, it is to be expected that decisions have been and will continue to be issued, which could have significant consequences for the rights of Mr. Bemba in his main trial.
35. None of the Counsel appearing for the four defendants in the Article 70 proceedings are instructed in connection with the main proceedings. These Counsel therefore have no legal mandate to raise issues concerning the proper scope of privilege, or the impact of its waiver on Mr. Bemba's rights concerning the main proceeding. Indeed, the ability of the defendant to construct a unitary defence between the two proceedings was directly hampered by the announcement by the Prosecution that its investigations against the two current Counsel of Mr. Bemba were not completed, and

that they could be the potential subject of disciplinary inquiries.¹⁰ Counsel also cannot exclude the possibility that they might be called as a witness in the Article 70 proceedings, which would be incompatible with the role of Counsel in that case.

36. There is thus an egregious legal vacuum concerning the right of the Defence to be heard in connection with issues which directly or indirectly impact on his fair trial rights in relation to the main case.

The Trial Chamber is the competent entity for adjudicating issues concerning the scope of legal professional privilege. The Pre-Trial Chamber's rulings on this matter are both ultra vires, and contrary to the Defence's right to be heard

37. [REDACTED].¹¹ This decision was issued on an entirely *ex parte* basis.

38. Although the Defence does not dispute the competence of the Pre-Trial Chamber to hear the Article 70 proceedings, the Defence does dispute that firstly, the referral of the Article 70 investigation to the Pre-Trial Chamber exempted the Trial Chamber from its overriding duty under Article 64(2) to ensure that Mr. Bemba's main trial would be conducted in a fair and expeditious manner, with full respect for his rights under Article 67(1) of the Statute, and secondly, that the Pre-Trial Chamber or Single Judge had any legal competence to issue any orders or decisions concerning Mr. Bemba's legal privilege, which is intrinsically linked to the professional relationship created by the main trial.

39. In this regard, given the linkage of legal professional privilege to the main trial if the Prosecution wished to lift it, or make submissions concerning its scope, it should have made such submissions before the Trial Chamber. Legal professional privilege serves to protect the right of the defendant to confer with his Defence in connection with the charges filed in this particular case. Even if the review of potentially privileged materials is conducted by another body, the Trial Chamber must retain an oversight power to ensure that any modification or elimination of this right does not prejudice Defence preparation, or violate the defendant's privilege against self-incrimination.¹²

¹⁰ ICC-01/05-01/08-T-359-ENG pp. 7-9.

¹¹ [REDACTED]

¹² "the Chamber has a responsibility for the protection of the rights of the Suspect and it is therefore its duty to ensure that privileged communications of Mr Mbarushimana are not disclosed to the Prosecutor;" ICC-01/04-01/10-67, p. 6

40. The Trial Chamber is also the only judicial entity which can pronounce, at first instance, on the scope of the professional relationship concerning this case.
41. This approach would also be in line with regulation 42(1) of the Regulations of the Court, which provides that protective measures ordered in one case continue to have full force and effect in all other cases before the Court. In order to lift protective measures in one case in order to effect disclosure in another case, the Prosecution must apply to the Chamber which ordered the protective measure in the first place.¹³
42. Legal privilege is a measure which protects the right of the defendant to give instructions and obtain advice from his Counsel in a confidential setting. There is no legal or procedural basis for treating applications to lift legal privilege any differently than other form of privilege or confidentiality.
43. At present, there are serious questions as to whether the Article 70 proceedings have been predicated on illegal evidence, or improper procedures. Although the Defence has requested information from the Prosecution in relation to this matter, the Prosecution has refused to disclose the requested information,¹⁴ notwithstanding the fact that the information falls squarely within well-recognised categories of disclosure.¹⁵
44. Accordingly, as a result of the Prosecution's non-compliance, the Defence is not yet in a position to fully assess or elaborate on the extent of the prejudice, which has flowed from this unparalleled incursion into a defendant's right to legal professional privilege.
45. There is, however, sufficient information available to determine that there is an immediate risk that Mr. Bemba's rights as concerns the main trial could be prejudiced irremediably by actions that are being undertaken in the Article 70 proceedings.
46. For example, it would appear from the public redacted transcript of 4 December 2012 that materials seized in the DRC, Belgium and the ICC detention unit have already

¹³ Regulation 42(2).

¹⁴ Letter from the Prosecutor, Annex A.

¹⁵ See for example, ICC-01/04-01/06-649, ICC-01/05-01/08-632, ICC-01/04-01/10-47, para. 16

been transmitted to the ICC Registry, and that discussions have taken place concerning the procedure for reviewing these materials.¹⁶

47. In terms of the latter aspect, given the fact that another ICC Judge has previously upheld the importance and right of the Defence and the defendant to be involved in the identification and review of privileged material,¹⁷ it is extremely problematic that the very Defence team, which is supposed to be the beneficiary of this privilege, was excluded from these legal discussions.
48. The Registry also appeared to have made an entirely *ex parte* determination at some point in time that the records of Mr. Mangenda were not covered by legal privilege, and to have provided the records to the Prosecution without any prior notification to the Defence.¹⁸
49. There does not appear to have been any exigency which warranted the Registry bypassing the requirement that Counsel for the Defence should be notified prior to the disclosure of such information to the Prosecution, nor does there appear to have been any consideration as to whether the Prosecution was legally entitled to receive such records *en masse*.
50. In terms of this latter aspect, even if the documents were not covered by privilege (which the Defence disputes), the Prosecution does not have a general entitlement to access any Defence documents or records, which could be relevant to its Article 70 investigations. The Rome Statute and Rules deliberately limit the circumstances under which the Defence can be compelled to disclose documents within its possession to the Prosecution, and further protects documents which could contain work product (Rule 81(1). These limitations are an inherent by-product of the defendant's privilege against self-incrimination, and apply equally to Article 70 investigations. The fact that the Defence is compelled to rely upon the services of the Registrar to conduct its preparation should not create a mechanism for the Prosecution to bypass the disclosure limitations set out in the Statute and thereby obtain unfettered access to the innermost strategies and internal communications concerning the Defence case.

¹⁶ICC-01/05-01/13-T-2-Red, pp. 4-5.

¹⁷ ICC-01/04-01/10-129, p. 3; ICC-01/04-01/10-105, p.5.

¹⁸ ICC-01/05-01/13-T-2-Red-ENG, p. 8 lines 15-24.

51. The need for vigilant Defence representation was further underlined by the Prosecution's concession at the Status Conference that although the national authorities might have gathered a considerable amount of material, they anticipated that only a small amount of collected information would be relevant to the Article 70 proceedings.¹⁹ It would therefore appear that precautions were not taken to ensure that the actions of the national authorities comported with the principles of necessity and proportionality.²⁰

52. Mr. Bemba was represented by a duty counsel at both his initial appearance and the subsequent Status Conference. The current Defence team members were never approached by the Registry in order to ascertain whether they would be willing to represent Mr. Bemba in connection with the Article 70 proceedings, nor was their consent sought before this duty counsel was appointed. The duty counsel did not liaise with any member of the Defence either before or after these hearings, and Mr. Bemba was interdicted from speaking to his lead counsel of record at the time – Mr. Kilolo. The Trial Chamber also did not confirm who had standing to act as Mr. Bemba's lead counsel until 6 December 2013.²¹

53. In such circumstances, it cannot be said that Mr. Bemba's rights related to his trial before the Trial Chamber were protected or represented during the course of the Article 70 proceedings.

It is necessary for the Trial Chamber to issue interim orders on an urgent basis in order to ensure that the rights of Mr. Bemba are not further prejudiced.

54. Given that the Prosecution urged the Pre-Trial Chamber to issue orders, which would enable the Prosecution to commence its review of the seized material as soon as possible,²² it is reasonable to expect that the Pre-Trial Chamber may have already done so or is in the process of doing so.

¹⁹ "There are limited selections of material that we expect to--to call from the searched items. And as my colleague indicated just a moment ago, we do not yet have information about the amount of the information, particularly digital or electronic records, hard drives, and so on, that were seized by the Belgian or the Dutch authorities, and that may be quite a substantial amount of material", ICC-01/05-01/13-T-2-Red, p. 7, lines 19-24.

²⁰ The Defence notes the extraordinarily broad and vague language employed by the Prosecution in its Request of 20 March 2014 (cited in [REDACTED]).

²¹ ICC-01/05-01/08-2918.

²² ICC-01/05-01/13-T-2-Red-ENG, p. 10.

55. It is also apparent that the Prosecution does not appear to have erected any ‘Chinese walls’ between the two proceedings - by submitting an application to admit material from the Article 70 proceedings into the main case, the Prosecution has confirmed that materials are shared between the two teams. Indeed, the Prosecutor informed the Defence that all matters touching on the Article 70 proceedings should be addressed to Mr. Badibanga,²³ who is also the Senior Trial Attorney on this case. It must therefore be presumed that Mr. Badibanga is familiar with and has access to all aspects of the Article 70 proceedings (at a time, when the Defence has no such access).
56. In the absence of information concerning the credentials or methods adopted by the ‘independent counsel’, it cannot be discounted that privileged information, which may have been illegally monitored or seized, has already been disclosed to the team prosecuting the main case, and will have informed their strategy thus far. At the very least, it is apparent that records concerning the Defence case manager (who is a lawyer, whose communications should have fallen within the ambit of Rule 73(1)) have been transmitted to the Prosecution.
57. The Prosecution in this case has even sought to rely upon completely unsubstantiated and unproven allegations regarding “witness bribery” and “coaching” in order to compensate for its failure to comply with its disclosure obligation and paucity of argumentation as concerns its recent Application to Submit Additional Evidence!²⁴
58. Indeed, the very real possibility that the Article 70 proceedings could contaminate the ability of the Trial Chamber to evaluate Defence evidence in an impartial manner is highlighted by the Prosecution’s averral in this case that the defendant and members of the Defence team had “consciously and knowingly based their case on false evidence”.²⁵ The Trial Chamber should have no regard to such unproven and unsubstantiated allegations; in effect, the Prosecution is seeking by improper innuendo to have the Trial Chamber take judicial notice of allegations which are yet to be the subject of charges, let alone a conviction. It is also entirely circular logic to assert that the Prosecution should be authorised (after the close of its case and without

²³ Annex A.

²⁴ ICC-01/05-01/08-2940, para. 3.

²⁵ ICC-01/05-01/08-2940, p. 4.

prior disclosure) to introduce evidence of improper conduct because (according to the Prosecution) “members of the Defence” and the defendant engaged in such conduct.

59. The complexity and sensitivity of the issues raised in these hearings also underscore the concrete prejudice incurred by Mr. Bemba in trying to defend himself in connection with two contemporaneous criminal proceedings.

60. Although the defendant has a right to participate actively in the proceedings, it is impossible for him to do so in an effective manner in connection with multiple proceedings. Apart from the main trial and the Article 70 proceedings, Mr. Bemba might also have a right to contest the legality of measures taken by domestic authorities, or the procedures utilised by them to implement ICC requests and orders. The protection of Mr. Bemba’s rights should not be contingent on whether he has the time and resources to instruct Counsel to take measures to enforce or protect these rights.

61. The diversion of time and resources to ancillary and domestic proceedings will inevitably prejudice Mr. Bemba’s right to have adequate time and resources concerning the main trial, and his right to expeditious proceedings. The Statute imposes an obligation on the Trial Chamber to organise the proceedings in such a manner that the defendant can benefit from both rights.

62. This multiplication of legal proceedings is particularly concerning in light of the stage that has been reached in the main trial. Mr. Bemba was arrested and transferred to the ICC on 24 May 2008, that is, almost six years ago. Mr. Bemba has been detained throughout this entire time. His right to focus fully on the main trial, and to have the case proceed to an expeditious judgment must therefore take precedence over all ancillary proceedings.²⁶

63. As noted above, pursuant to Articles 64 and 67, the Trial Chamber has a positive duty to protect Mr Bemba’s right to privileged communications, and to take any steps

²⁶ The Defence notes that the co-defendants in the Article 70 proceedings have filed requests for interim release.

within the Chamber's competence to ensure that the fairness of his trial is not prejudiced or impacted, including by external factors.²⁷

64. Article 64(6) specifically empowers the Trial Chamber to provide for the protection of confidential information, and to provide for the protection of the accused *inter alia*. The Appeals Chamber has cited this power to protect confidential information in support of its finding that the Trial Chamber does not possess the power to order the Prosecution to divulge material protected by Article 54(3)(e) in the absence of the consent of the information provider.²⁸

65. The power to protect Mr. Bemba must also encompass the power to take steps to ensure that Mr. Bemba's ability and right to effectively participate in the last steps in his trial are not frustrated by the physical and mental toll arising from the fact that he is the subject of multiple criminal proceeding before different judicial entities.

66. In terms of the specific relief requested by the Defence, although the Trial Chamber cannot not necessarily issue orders to another ICC Chamber, Chambers have nonetheless conveyed requests to other Chambers sitting in flipside cases in order to coordinate proceedings and ensure that the rights of the Defence were respected.²⁹

67. The Trial Chamber is also empowered to issue orders to the Prosecution, which is one organ, and which has standing before both the Trial Chamber and the Pre-Trial Chamber. Moreover, as noted above, members of the Prosecution team in this case are directly involved in the Article 70 proceedings. Notwithstanding the independence vested in the Prosecution by the Statute, the Trial Chamber has a direct power and indeed, obligation, to ensure that the conduct of the Prosecution does not frustrate the fairness and impartiality of the proceedings:

“Under the Statute, the Trial Chamber, subject only to the powers of the Appeals Chamber, is the ultimate guardian of a fair and expeditious trial. Article 64 (2) of the Statute provides that it is the Trial Chamber which shall ensure that the trial is conducted fairly, expeditiously and with full respect for the rights of the accused. As correctly noted in the Impugned Decision, the Appeals Chamber has previously confirmed that “[t]he ultimate responsibility for securing justice and ensuring fairness has been given to the Chamber (Article 64(2) of the Statute) and these responsibilities cannot be delegated by, or removed from, the judges” .

²⁷ The particular nature of international criminal proceedings requires that the “Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case”, *Prosecutor v. Tadic*, Appeals Judgment 19 July 1999, para. 52.

²⁸ ICC-01/04-01/06-1486, para. 48.

²⁹ ICC-01/04-01/06-T-337-Red, pp. 78-79.

The authority of the judges over the parties within the context of the trial does not negate any Statutory duties of the Prosecutor, but, as Mr Lubanga Dyilo correctly notes, it does mean that when there is a conflict between the Prosecutor's perception of his duties and the orders of the Trial Chamber, the Trial Chamber's orders must prevail. This is a fundamental criterion for any trial to be fair.”³⁰

68. The Trial Chamber thus the power (and the duty) to order the Prosecution to desist from accessing any materials, which emanated from Mr. Bemba or the defence team, or from utilising the contents of this material or the Prosecution’s knowledge of the contents of this material in any manner.³¹ This includes materials which have already been disclosed to the Prosecution.
69. In order to assess the extent of the prejudice and to limit any further prejudice, the Prosecution should also be directed to prepare a log of any persons who have had access to the material, and to stipulate whether this material has served as the basis for any investigative actions or submissions before the ICC or domestic authorities.
70. Pending the resolution of the legality of the seizure or monitoring of Defence communications, the Trial Chamber also possesses the power *via* Part 9 of the Statute (either Article 93(1)(h), (j), or (l)) to issue orders to State Parties to desist from undertaking any actions in the interim which could prejudice the rights of Mr. Bemba as concerns his case before this Trial Chamber.
71. It is the position of the Defence that this Trial Chamber must be the ultimate arbiter as to the scope of Mr. Bemba’s privilege concerning this case. This Trial Chamber is, moreover, responsible for taking such steps as are necessary to ensure that any contrary interpretations adopted by other Chambers or jurisdictions do not denude Mr. Bemba of the protection afforded to him by Article 67(1)(b) and Rule 73(1).
72. This would be consistent with the following findings of the ICTY in the Gotovina case:³²

“16. Rule 97 of the Rules enshrines the principle that all communications between lawyer and client are privileged. This privilege is central to the functioning of the defence of an accused. Cule provided the Chamber with some information about the guarantees under Croatian law of the lawyer-client privilege. However, he also stated that police had searched the computer of Ribicic, whom the Gotovina Defence identified as one of its members. This illustrates the

³⁰, ICC-01/04-01/06-2582, paras. 47-48.

³¹ ICC-01/04-01/10-67, p. 6. See also ICC-01/04-01/10-63.

³² ‘Decision on Requests for Temporary Restraining Orders Directed to the Republic of Croatia and Reasons for the Chamber’s Order of 11 December 2009’, 18 December 2009, paras. 16-17.

risks inherent in different scopes and interpretations of the lawyer-client privilege in different jurisdictions. The Chamber therefore found that, depending on the procedures applied, searches of some of the materials seized from Gotovina Defence members or offices could result in a violation of lawyer-client privilege under Rule 97 of the Rules, which could impact on the fairness of the proceedings before the Chamber. Although neither the Gotovina Defence nor the Markac Defence could confirm that privileged information was actually contained on the seized computers, the Chamber considered a certain level of speculation to be understandable in the circumstances and found that the likelihood of privileged information being contained on the seized Gotovina Defence computers had been sufficiently established for the purpose of seeking temporary relief.

17. Under Article 20 of the Statute, the Chamber shall ensure that a trial is fair. The Chamber found that the above-mentioned developments, if not immediately addressed by a temporary order of the Chamber, could lead to an infringement of the right to a fair trial of the Accused Gotovina and Markac, and constituted exceptional circumstances in which the Chamber is competent to grant a request for a significant intervention in a domestic jurisdiction. The Chamber further considered that the temporal scope of the intervention would be limited and that the order was necessary for the purposes of the conduct of trial, until the Chamber issues a final decision, based on the serious risk of infringing the right to a fair trial of the Accused Gotovina and Markac.”

73. The Defence has also hereby raised its concerns regarding the legal competence of the Pre-Trial Chamber or Judge Tarfusser to make any legal rulings directly or indirectly concerning the scope or lifting of Mr. Bemba’s right to communicate in confidence with his Counsel and assistants as concerns this trial.

74. The Defence has no *locus* to raise this matter directly before the Pre-Trial Chamber, but nonetheless observes that where an issue of legal competence has been raised, it is appropriate to suspend the merits of the proceedings until such a matter can be resolved.³³

75. In previous inter-related cases, ICC Trial Chambers have directed the Prosecution to raise an issue or to seek relief before a second Chamber, in order to enable the Prosecution to fulfil its duties before the first Chamber.³⁴ In the present case, given that the Prosecution is required to act as an independent Minister of Justice and has standing before both the Pre-Trial Chamber and the Trial Chamber, it would be appropriate for the Trial Chamber to direct the Prosecution to request the Pre-Trial Chamber to suspend the Article 70 proceedings (or at the very least, any components of the proceedings which concern seized or monitored Defence communications and materials) pending this Trial Chamber’s ruling on both this Request, and future

³³ The ICC Appeals Chamber has found that “[b]efore addressing any other issue in the cause of the appeal, the Appeals Chamber considers it necessary and pertinent to examine *in limine* whether the appeal is Admissible”: ICC-01/04-01/06-800, para. 1. See also *Prosecutor v. Bagosora et al.*, ‘Order on Motion by the Defence in the Matter of Prosecutor v. Anatole Nsengiyumva Seeking Orders for Joinder of Leave to Appear As Amicus Curiae in an Appeal’, 29 April 1998; *Prosecutor v. Hartmann*, ‘Order Postponing the Commencement of the Trial’, 3 February 2008.

³⁴ ICC-01/04-01/06-2521-Red, para. 25.

litigation concerning the legality of the seizure of Defence materials and the monitoring of Defence communications.

76. As noted *infra*, given that the defendants in the Article 70 proceedings have requested interim release, any prejudice occasioned to them by a suspension of the Article 70 proceeding could be cured by their interim release.

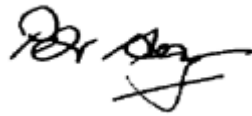
77. The Prosecution has also hereby been put on notice concerning the potential illegality of the search and seizures, and monitoring of Defence communications. If the Prosecution were to continue accessing Defence materials pending the Court's adjudication of this matter, than this is a factor which would be directly relevant to any future abuse of process motion.

C. RELIEF SOUGHT

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

- i. Order the Prosecution to:
 - a. desist from accessing any materials, which emanated from Mr. Bemba or the defence team, or from utilising the contents of this material or the Prosecution's knowledge of the contents of this material in any manner; and
 - b. to prepare a log of any persons who have had access to the material, and whether this material has served as the basis for any investigative actions or submissions before the ICC or domestic authorities.
- ii. Order all States which have been requested to monitor Defence communications or seize Defence property, including but not limited to Belgium, France, the Democratic Republic of Congo, The Netherlands, and the United Kingdom, to immediately desist from taking any steps concerning the seizure, monitoring or disclosure of information concerning the Defence of Mr. Bemba; and

- iii. Request the Prosecution to request a suspension of the Article 70 proceedings in their entirety or in part pending full litigation as to the legality of the seizure of Defence material and the monitoring of Defence communications.



Peter Haynes

Lead Counsel for Mr. Jean-Pierre Bemba

Done at The Hague, the Netherlands

23 January 2014