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**International
Criminal
Court**



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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 Redacted Document

**Public Redacted Version of "Prosecution's Response to "Defence Request for
Interim Relief", 10 February 2014, ICC-01/05-01/08-2965-Conf**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. Introduction

1. The Office of the Prosecutor ("Prosecution") opposes the "Defence Request for Interim Relief" ("Defence Request")¹ which alleges prejudice to Mr Jean-Pierre Bemba Gombo's ("Accused") right to a fair and expeditious trial, and seeks urgent interim orders from the Trial Chamber III ("this Chamber" or "TC III").² The Defence claim to prejudice is predicated on the flawed premise that "... 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 incorrect. Moreover, the Defence wrongly contends that the TC III is the only competent authority to adjudicate issues concerning the scope of the Accused's right to legal privilege in the ICC-01/05-01/08 Case ("Main Case").

2. The Prosecution is not privy to any information that is protected by legitimate professional privilege. Judge Cuno Tarfusser, Single Judge of PTC II, expressly stated that he could "... assure that we have done it until now, all the privileged documents, we made sure that no privileged document came in the possession of the Prosecution". The Defence has chosen to disregard that statement and to advance a set of unsubstantiated and speculative allegations instead.

3. In essence, the Defence Request is speculative and devoid of any merit. It is based on an erroneously broad interpretation of legal professional privilege that advances impunity for crimes contrary to the legal instruments of the International Criminal Court ("ICC" or "Court"); improperly places certain issues before this Chamber that ought to be brought by the Accused before Pre-Trial Chamber II ("PTC II") in the Article 70 proceedings where he is equally assisted by counsel; and seeks relief that is either not legally supported or beyond the powers of this Chamber.

¹ ICC-01/05-01/08-2945-Conf, Defence Request for Interim Relief, 24 January 2014.

² ICC-01/05-01/08-2945-Conf, paras. 9 and 10.

³ ICC-01/05-01/08-2945-Conf, para. 2.

II. Submissions

The Defence Submissions on professional legal privilege are erroneous and too broad

4. Contrary to the Defence assertion, the Prosecution is not in possession of materials emanating from the Accused and members of the Defence team that is protected by professional legal privilege. The Defence lacks any concrete factual basis to support its allegation. But in addition, its construction of the scope of the legal privilege is fundamentally flawed.

5. The Accused's right to communicate freely with counsel of his choosing in confidence as enshrined in Article 67(1)(b) of the Rome Statute ("Statute") is further guaranteed by Article 69(5) of the Statute, which vests such authority regarding privileges on confidentiality in the Rules of Procedure and Evidence ("Rules").

6. Rule 73 of Rules, the operative provision governing the scope of privileged communications and information, protects from disclosure "communications made in the context of the professional relationship between a person and his or her legal counsel".⁴ This qualifier, "in the context of the professional relationship", narrows the scope of communications that can be legitimately protected as privilege. These words "in the context of the professional relationship" are to be interpreted as lawful communications inherent in the professional functions of counsel.⁵ This does not include the commission of crimes.⁶

⁴ Emphasis added.

⁵ See, Leeds Magistrates' Court, *ex parte* Dumbleton [1993] Crim LR 866, in which a warrant was issued to search for and seize documents held by a solicitor and allegedly forged by him and another. It was held that the documents were not covered by s. 10(1) because the phrase "made in connection with ... Legal proceedings" meant lawfully made, and did not extend to forged documents or copies thereof.

⁶ *Ibid.*

7. The Defence view that privilege attaches to “any communications which are intrinsically linked to the professional relationship between a Counsel and his or her client”⁷ cannot be expanded to include the furtherance of criminal activity.⁸ The drafters of the ICC’s Rules deliberately chose not to duplicate verbatim part of International Criminal Tribunal for the former Yugoslavia (“ICTY”)’s Rule 97 text,⁹ which regards as privilege “[a]ll communications between lawyer and client”.¹⁰ In fact, “some concerns were expressed that the proposal was too broad in stating that all communications between lawyer and client shall be regarded as privileged. Some communications might not be made in the context of a professional relationship or might be made as part of a criminal scheme involving the lawyer as an accomplice. In these cases, the privilege should not attach to the communication.”¹¹ The Defence’s reliance on ICTY jurisprudence related to Rule 97 of the ICTY Rules is thus misplaced,¹² as it fails to highlight the fundamental difference between that text and ICC’s Rule 73 of Rules which calls for a different approach to privilege.

8. Although the drafters of the Rules decided not to expressly state that privilege would only be attached to communications made for the purpose of giving or

⁷ ICC-01/05-01/08-2945-Conf, para. 13.

⁸ See, ICC-01/05-52-Red2, Decision on the Prosecutor’s “Request for judicial order to obtain evidence for investigation under Article 70”, 3 February 2014, para. 3: “... the Single Judge is satisfied that at least some of the communications between the Accused and his counsel, overlapping as they are with calls made to individuals the Prosecutor has grounds to suspect involved in a bribery scheme aimed at perturbing the course of justice, might indeed not qualify as being “made in the context of the professional relationship between a person and his or her legal counsel” within the meaning and for the purposes of Rule 73 of the Rules of Procedure and Evidence. The statutory right to communicate freely and in confidence with counsel of his own choosing, as set forth in Article 67(1)(b) of the Statute, is obviously forfeit whenever an accused uses such right with a view to furthering a criminal scheme, rather than to obtaining legal advice, the more so when – as in the present case – the counsel seems to be an accomplice in the scheme. This behaviour is to be regarded as an abuse of the statutory right and entails that neither the accused nor the lawyer are any longer entitled to the confidentiality which otherwise pertains to lawyer-client communications as a matter of course.”

⁹ “International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence” by Roy S. Lee, Chapter 4, “Evidence” by Donald K. Piragoff, pages 359-360.

¹⁰ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“ICTY”), Rule 97 of the Rules of Procedure and Evidence: “All communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial, unless: (i) the client consents to such disclosure; or (ii) the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.”

http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev44_en.pdf

¹¹ Ibid. [Emphasis added]

¹² ICC-01/05-01/08-2945-Conf, para. 72.

receiving advice, it was agreed that Rule 73 of Rules would be re-phrased to include "... in the context of the professional relationship ...", which "would subtly enable the Court not to recognize a privilege if the communication was outside the bounds of a professional relationship; e.g., it was not made for the purpose of giving or receiving legal advice. A reference to Article 67, paragraph 1(b), was also added in order to ensure that any exceptions to the recognition of a privilege at a hearing of a Chamber did not prejudice the statutory right of an accused to communicate with counsel in confidence."¹³ By opting to exclude "communication not for the purpose of giving and receiving legal advice" as part of the exceptions under Rule 73 of the Rules, in reality, the drafters appear to favour a broader approach towards communications that fall outside the scope of privilege. This gives Chambers a degree of discretion to determine the scope of privilege whilst respecting the Accused's right under Article 67(1)(b) of the Statute – a balance that can be struck with appropriate judicial oversight. Recently, two other international tribunals have accepted that communication effected in furtherance of a crime or fraud is an exception to the principle of professional privilege.¹⁴

9. Rule 22(3) of the Rules states that "in the performance of their duties, counsel for the Defence shall be subject to the Statute, the Rules, the Regulations, the Code of Professional Conduct for Counsel ..." This provision makes it abundantly clear that *even* Defence counsel is subjected to Article 70, which enumerates various offences against the administration of justice. The Prosecution agrees with the Defence assertion that the objective of Article 70 proceedings "... is to ensure the integrity of

¹³ *Ibid.*

¹⁴ See, ICC-01/05-52-Red2, para. 4: "Rule 163 of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon, under the heading "Legal Professional Privilege", specifically lists the fact that "the client intended to perpetrate a crime and the communications were in furtherance of that crime" as an exception to the general principle of the privileged nature of communications between a person and his or her legal counsel. The Special Court for Sierra Leone has also recently upheld the exception in the case of *The Prosecutor v. Bangura et al.* and highlighted that such exception is "well-recognised" in the common law jurisdictions." [citing SCSL-11-02-T, Trial Chamber II, Decision on the Prosecutor's request for Subpoenas, 28 June 2012, paras. 13 to 14.]

the proceedings ..."¹⁵ However, allowing every communication between counsel and Accused, legitimate or not, to fall within the scope of legal professional privilege will undermine the integrity of the very proceedings that Counsel is called upon to advance. Additionally, Article 24 of the Code of Professional Conduct for Counsel ("Code") states that "[c]ounsel shall take all necessary steps to ensure that his or her actions or those of counsel's assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute." Engaging in communications that serve to further the commission of Article 70 offences cannot be said to be "in the context of the professional relationship" between counsel and his client. This position is supported by the Defence acknowledgment that "[l]egal privilege is a measure which protects the right of the defendant to give instructions and obtain advice from his Counsel in a confidential setting."¹⁶ However this professional relationship of providing legal advice and giving instructions cannot be construed to include criminal activity and undermine the very same criminal justice system that protects these rights.

10. The alternative interpretation proposed by the Defence, which considers as privileged all communications between counsel and client, regardless of their content and nature, would allow for abuse of this right. With regard to telephone calls from the ICC Detention Centre, the Single Judge of PTC II ruled that "[r]ecordings of telephone conversations are made and maintained for purposes which are other than those of establishing a complete documentation of all relevant facts pertaining to the custody of the accused, and which can easily be appreciated precisely under the circumstances evoked by the Prosecutor's Request. Whenever a suspicion as to the behaviour of an accused arises, recordings of telephone

¹⁵ ICC-01/05-01/08-2945-Conf, para. 4.

¹⁶ ICC-01/05-01/08-2945-Conf, para. 42.

conversations can be of the essence in allowing the relevant authorities to properly investigate and determine the matter.”¹⁷

11. In turn, the Defence submission that prior notification to it of any such monitoring is a *sine qua non* procedural requirement¹⁸ is plainly inconsistent with the object and purpose of Article 70. If accepted, this position would effectively lead to impunity for Article 70 offences for illegal communications made under the cloak of professional privilege. In the instant case, prior disclosure of information regarding allegations of possible Article 70 violations against former Defence lead counsel and case manager would have enabled them to take measures to hide their criminal activity and frustrate on-going investigations.

12. Since the materials accessed by the Prosecution do not constitute legitimate privileged communications within the scope of Rule 73 of the Rules, the exceptions in Rule 73(1)(a) and (b) of the Rules do not apply. The Single Judge of Pre-Trial Chamber II ruled that “... since such communications are ordinarily privileged unless an abuse is suspected or shown, the need for safeguards aimed at duly circumscribing the exception to the privilege now arises. Whenever an exception to the general principle of the privileged nature of the communications between an accused and her [*sic*] or her counsel is made, the scope of such exception must be determined in light of, and limited by, the specific reasons warranting such exception.”¹⁹ The Single Judge’s ruling on this matter is dispositive of the issue. The Accused, not the Defence, has a right to challenge this decision in the Article 70 proceedings. This Trial Chamber cannot be asked to sit as an appeals court on decisions issued by Pre-Trial Chamber II.²⁰

¹⁷ ICC-01/05-46, Decision on the Prosecutor’s “Request for judicial assistance to obtain evidence for investigation under Article 70”, 8 May 2013, para. 9.

¹⁸ ICC-01/05-01/08-2945-Conf, paras. 25 to 32.

¹⁹ ICC-01/05-52-Red2, para. 6.

²⁰ ICC-01/04-01/06-1084, Decision on the status before the Trial Chamber of the evidence heard by the Pre-

13. Despite the fact that some of these communications were in furtherance of criminal conduct and therefore not privileged, safeguards were implemented to ensure that the Accused's right to legitimate privilege was protected. The potentially privileged materials were reviewed by independent counsel under the close supervision of national judicial authorities in accordance with applicable national laws. This non-privileged material was additionally vetted by the Single Judge of PTC II prior to disclosure to the Prosecution to ensure that no privilege information was included. Under the scrutiny of the Single Judge, an independent counsel was mandated 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. Any question or issue which may arise in connection with the aforementioned review would have to be promptly submitted to the Single Judge for determination."²¹ These procedural safeguards were implemented in order to maintain the integrity of proceedings in the Main Case. It is evident from court documents recently provided to the Defence that the desire to protect legitimately privileged information was a central issue guiding the Prosecution's requests for judicial oversight in the Article 70 investigations.²² The Defence fails to show that the Prosecution has access to privileged material, let alone advance a sound argument

Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, para. 43: "The Pre-Trial Chamber and the Trial Chamber have separate functions at different stages of the proceedings, and there is no hierarchy of status between them. The Trial Chamber has not been given an appellate jurisdiction over any decision of the Pre-Trial Chamber (although as set out above the Trial Chamber is not bound by decisions of the Pre-Trial Chamber on evidential or procedural issues) ..."

²¹ ICC-01/05-52-Red2, para. 7.

²² See, for example, [REDACTED]

that any member of the Prosecution team in the Main Case has accessed information that it should not otherwise have.²³

The Pre-Trial Chamber II has jurisdiction to determine issues related to Mr Bemba's right to legal privilege

14. The Defence Request submits that PTC II, or the Single Judge, has no legal competence to issue any orders or decisions concerning the Accused's legal privilege because this right is intrinsically linked to the professional relationship created in the Main Case.²⁴ It argues that "[t]he Trial Chamber is also the only judicial entity which can pronounce, at first instance, on the scope of the professional relationship concerning this case."²⁵ The Defence further states that "[l]egal 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."²⁶ This is incorrect. Legal privilege, as articulated in Rule 73 of the Rules, is guaranteed by the legal provisions of the Court and therefore capable of enforcement by all ICC judges.

15. Privilege is attached to "communications made in the context of the professional relationship between a person and his or her legal counsel";²⁷ this is not confined to the particular context of a case. The professional function of counsel is to give legal advice; such advice is not limited to one particular case. Legal privilege cannot be equated to, as the Defence attempts,²⁸ specific protective measures granted by a particular chamber based on the individual circumstances of a witness. A Chamber need not know the facts of a case in order to determine what falls under the scope of legal privilege. Privilege was neither awarded by the TC III nor guided

²³ ICC-01/05-01/08-2945-Conf, para. 55.

²⁴ ICC-01/05-01/08-2945-Conf, para. 38.

²⁵ ICC-01/05-01/08-2945-Conf, para. 40.

²⁶ ICC-01/05-01/08-2945-Conf, para. 39. [Emphasis added]

²⁷ See, Rule 73(1) of the Rules.

²⁸ ICC-01/05-01/08-2945-Conf, para. 41.

by any fact-specific considerations in the Main Case, which would hamper PTC II's legal competence to exercising this authority. The Defence fails to show otherwise.

16. [REDACTED] The Defence submission that the TC III is the only competent authority to determine the scope of legal privilege contradicts its position that "... 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 ..." ²⁹ On the one hand, the Defence supports a determination of legal privilege by the TC III for the purposes of Article 70 investigations or proceedings; on the other hand, it resists any attempt to introduce any Article 70 information and argues potential contamination. This position is illogical; the Defence cannot have it both ways.

The Defence improperly places certain issues before TC III that should be addressed to the PTC II by the Accused in the context of the Article 70 proceedings

17. The Defence effectively seeks to litigate Article 70 issues that have already been decided by a competent PTC under the guise of rights of the Defence in the Main Case.³⁰ Article 67 refers to the "Rights of the accused", not of Defence counsel.³¹ Any issues related to the rights of the Accused in the context of the Article 70 proceedings can and should be dealt with by the Chamber intervening in those proceedings. In contrast, the only issues related to the Article 70 investigation that can be addressed by this Chamber are (i) whether or not the Prosecution is in possession of any "privileged information setting out Defence strategy and information" in this case; and (ii) whether or not the Chamber will allow applications to admit additional evidence of witness credibility arising from Article 70 investigations into the Main Case. These are the matters that have a direct bearing on proceedings in this trial. Where it concerns issues related to the legality of the search, seizures and monitoring

²⁹ ICC-01/05-01/08-2945-Conf, para. 58.

³⁰ ICC-01/05-01/08-2945-Conf, paras. 34 to 36.

³¹ [Emphasis added]

of Defence communications in the context of Article 70 investigations, such matters fall squarely within the competence of Pre-Trial Chamber II, and not this Trial Chamber as the Defence seeks to argue.

The Interim relief requested is either not legally supported and/ or beyond the powers of TC
III

18. The Defence Request seeks urgent interim relief without any concrete evidentiary foundation or sound legal basis. The Defence requests this Chamber to order the Prosecution to desist from accessing or using material that emanated from the Accused or his Defence team.³² To the extent that the Defence is referring to privilege material, then not only it fails to provide any evidence supporting the allegation that the Prosecution is in possession of privileged materials; it also disregards a clear judicial finding from a Chamber of this Court pronouncing the contrary.³³ As a result of this failure to establish the factual basis of its request, this Chamber should not entertain the request for a log of persons who have accessed the material or any other additional information in this regard.³⁴ The Defence should not be allowed to make serious allegations of prosecutorial misconduct without producing some evidence to support such aspersions.

19. If the Defence simply seeks an injunction preventing the Prosecution to use in criminal proceedings before this Court any material emanating from the Defence and the Accused, regardless of its nature, then this should be rejected *in limine*. There is no legal basis which could justify a bar on the use of material establishing the commission of Article 70 offences because it comes from a defence team. The contrary interpretation would effectively carve niche of immunity for accused

³² ICC-01/05-01/08-2945-Conf, para. 78(i)(a).

³³ See, ICC-01/05-01/13-T-2-Red-ENG, 4 December 2013, page 6, lines 7 to 11; and ICC-01/05-01/13-T-1-ENG CT, 27 November 2013, page 23, lines 7 to 19.

³⁴ ICC-01/05-01/08-2945-Conf, para. 78(i)(b).

persons and defence team in the context of Article 70 investigations and proceedings.

20. The Defence request for the Trial Chamber to order states "... to immediately desist from taking any steps concerning the seizure, monitoring and disclosure of information concerning the Defence of Mr Bemba"³⁵ is *ultra vires* the Statute and the Rules. The Trial Chamber has no authority to override a decision from another Chamber of this Court – in the instant case, Pre-Trial Chamber II.³⁶ It is inappropriate for the Defence to seek undermine or nullify Pre-Trial Chamber II's orders through this Chamber. There is no hierarchy between Pre-trial and Trial Chambers. Nor does the Trial Chamber sit as an appellate court in relation to decisions rendered by Pre-Trial Chambers in other cases. The approach suggested by the Defence would paralyse the effective functioning of this Court.

21. Lastly, the Defence requests the Chamber to "[r]equest 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."³⁷ The Defence equates this request, which effectively seeks to interfere with the Prosecution's independence and duty to investigate and prosecute crimes, to a decision requesting the Prosecution to seek variation of protective measures awarded by one chamber for the benefit of another proceeding before a different chamber.³⁸ The Defence fails to show any authority granting the Trial Chamber the power to make such an order against the Prosecution's independence and authority to bring cases before Chambers of this Court. With this Request, the Defence is in fact seeking to frustrate a judicially

³⁵ ICC-01/05-01/08-2945-Conf, para. 78(ii).

³⁶ See, for example, ICC-01/05-52-Red2, Decision on the Prosecutor's "Request for judicial order to obtain evidence for investigation under Article 70"; and ICC-01/05-01/13-1-Red2-tENG, Warrant of arrest for Jean-Pierre BEMBA GOMBO, Aimé KILOLO MUSAMBA, Jean-Jacques MANGENDA KABONGO, Fidèle BABALA WANDU and Narcisse ARIDO, 5 December 2013.

³⁷ ICC-01/05-01/08-2945-Conf, para. 78(iii).

³⁸ ICC-01/05-01/08-2945-Conf, para. 75 and footnote 34.

authorised investigative activity into offences committed against the administration of justice. Another distinguishing feature is the fact that, in the illustration relied upon by the Defence,³⁹ the Prosecution was the only party with standing in both cases. Those circumstances are different from the present situation where the Accused has standing to request a stay of the Article 70 proceedings before the Chamber hearing the Article 70 case. Furthermore, a stay of proceedings is a measure of last resort that should be used sparingly, only after exhausting all other possible remedies;⁴⁰ and establishing that it is no longer possible to piece together the constituents of a fair trial in the circumstances.⁴¹ The Defence has failed to meet this burden.

III. Relief sought

22. For the reasons set out above, the Prosecution respectfully requests Trial Chamber III to reject the Defence Request in its entirety.



Fatou Bensouda, Prosecutor

Dated this 12th Day of February 2014

At The Hague, The Netherlands

³⁹ See, ICC-01/05-01/08-2945-Conf, footnote 29, referring to ICC-01/04-01/06-2521-Red, Redacted Decision on the "Prosecution's request for non-disclosure of information in transcripts of the Lubanga case to defence in the Katanga and Ngudjolo case" and the "Joint Application for maintaining discrete redactions to transcripts of witness DRC-OTP-WWWW-0007", 11 November 2010.

⁴⁰ See, *Prosecutor v. Lubanga*, Judgment on Jurisdiction Appeal, ICC-01/04-01/06-772 OA4, 14 December 2006, paras. 30-31.

⁴¹ See, for example, *Prosecutor v. Lubanga*, Judgment on Jurisdiction Appeal, ICC-01/04-01/06-772 OA4, 14 December 2006, para. 37-39.