



Original: **English**

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

Date: 21/02/2014

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 Defence Reply to the “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:

The Office of the Prosecutor

Fatou Bensouda

Jean-Jacques Badibanga

Counsel for the Defence

Peter Haynes QC

Kate Gibson

Legal Representatives of the Victims

Marie-Edith Douzima-Lawson

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented

(Participation/Reparation)

Applicants

The Office of Public Counsel for the Victims

Paolina Massida

The Office of Public Counsel for the Defence

Xavier-Jean Keita

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Other Section

A. INTRODUCTION

1. On 24 January 2014, the Defence for Mr. Jean Pierre Gombo-Bemba filed a *Request for Interim Relief* (“the Request”), in which the Defence requested Trial Chamber III (“the Chamber”) to:

- i. Order the Prosecution to:
 - i. 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
 - ii. 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.¹

2. In its Response, the Prosecution asserted, *inter alia*, that:

- i. The Defence assertion that the Prosecution is in possession of privileged materials is factually erroneous;
- ii. The definition of legal privilege employed by the Defence is too broad;
- iii. The Trial Chamber has no competence to adjudicate on the legality of measures to monitor the communications of the Defence and Mr. Bemba, or search and seizures pertaining to Defence property; and
- iv. The Defence has requested a stay rather than a suspension of the Article 70 proceedings, and is in any case, not prejudiced by its lack of standing as Mr. Bemba has standing in both cases.²

¹ ICC-01/05-01/08-2945-Conf.

3. Pursuant to the Trial Chamber's Decision of 19 February 2014,³ the Defence respectfully submits in reply that:

- i. The Prosecution has advanced a factually incorrect position concerning its possession of privileged material, and relies on an erroneously broad definition;
- ii. The definition and scope of privilege has been framed in impermissibly broad terms by the Single Judge;
- iii. The Prosecution, composed of the same lawyers across both cases, has advanced contradictory positions in the two cases and used its powers under Article 70 as a means of circumventing judicial rulings in the present case; and
- iv. The Prosecution has advanced an incorrect standard concerning a temporary suspension of the Article 70 proceedings, and incorrect information concerning Mr. Bemba's standing to contest the relevant monitoring decisions.

B. SUBMISSIONS

The Prosecution has advanced a factually incorrect position concerning its possession of privileged material, and relies on an erroneously broad definition

4. The Prosecution has attempted to exclude the possibility that the Defence may have been prejudiced by contending that the Prosecution "is not privy to any information that is protected by legitimate professional privilege".⁴ This argument is both factually incorrect, and disingenuous as it relies on an overly narrow definition of 'privilege', which was adopted in an *ex parte* setting, in separate proceedings.

5. Recently reclassified filings in the CAR situation confirm that, at a minimum, the following violations of privilege have occurred:

- i. Mr. Mangenda's documents and communications were transmitted to the Prosecution without any prior vetting by the Defence or Independent

² ICC-01/05-01/08-2965-Red.

³ ICC-01/95-01/08-2985.

⁴ ICC-01/05-01/08-Red, para. 2.

Counsel. The Prosecution itself expressed the view that these materials appear to contain privileged information;⁵

- ii. The Prosecution does not appear to possess transcripts of the intercepted conversations from the detention unit, which were conducted in Lingala.⁶ Accordingly, in order to determine whether any communications were relevant to the Article 70 investigation, it would presumably have been necessary for the Prosecution to have first listened to all of the communications;
- iii. Before rendering his decision setting out the definition and exceptions to privilege, the Single Judge had already granted the Prosecution direct access to phone logs and call data records concerning Defence team members (including Counsel) and Mr. Bemba.⁷ Such information attracts protection from unlawful or arbitrary monitoring in the same manner as the contents of phone calls;⁸
- iv. The Prosecution also obtained the Call Data Records of Mr. Kilolo and Mr. Mangenda from August 2012 onwards directly from the Belgium and Dutch authorities (i.e. without prior vetting by the Independent Counsel).⁹ It appears that these were obtained pursuant to a request from the Prosecution, rather than pursuant to the implementation of an ICC judicial order.

6. It would also appear that the Single Judge granted the Independent Counsel access to all of the monitored communications between Mr. Bemba, Me. Kilolo, and Mr. Mangenda, and not just those specific communications in which it was suspected that a participant had violated the relevant regulations governing the proper use of the privileged phone line.¹⁰

⁵ ICC-01/05-01/13-48, para. 1.

⁶ ICC-01/05-01/13-177.

⁷ ICC-01/05-46.

⁸ “The Court does not accept, however, that the use of data obtained from metering, whatever the circumstances and purposes, cannot give rise to an issue under Article 8 (art. 8). The records of metering contain information, in particular the numbers dialled, which is an integral element in the communications made by telephone. Consequently, release of that information to the police without the consent of the subscriber also amounts, in the opinion of the Court, to an interference with a right guaranteed by Article 8 (art. 8)”: *Malone v. United Kingdom*, Application no. 8691/79, Judgment of 2 August 1984, para. 84.

⁹ ICC-01/05-60-Red, paras. 10-11.

¹⁰ ICC-01/05-52-Red2.

7. The Single Judge further instructed the Independent Counsel to transmit to the Prosecution “the relevant portions of any and all such calls which might be of relevance for the purposes of the investigation”.¹¹

8. Even if it were to be accepted that “communications effected in furtherance of crime or fraud provide an exception to the principle of professional privilege”,¹² it does not follow that information, which is relevant to an Article 70 investigation, is itself a communication “effected in furtherance of crime or fraud” – relevance does not denote complicity.

9. In any case, the possibility that there might have been indicia to consider that some communications were effected in pursuance of an alleged crime or fraud does not eliminate the possibility that the communications in question could have also contained information concerning privileged aspects of Defence strategy or preparation. If that was the case, then the disclosure of such information would irremediably prejudice the Defence.

10. For this reason, Regulation 184(10) of the Regulations of the Registry specifies that the transcripts of privileged communications should not be transmitted to the Prosecution without prior notice and disclosure to the Defence. This requirement plays an instrumental role in ensuring that adequate safeguards are erected so that disclosure does not prejudice key Defence rights.

11. The Prosecution’s attempt to carve out a new exception to rule 73 by referring to ‘legitimate legal privilege’ lacks any coherence. Communications between a Counsel and a Client would only fall outside the scope of Rule 73 if they did not concern the context of the professional relationship. This would be the case if the conversation concerned matters, which have no direct or tangential relationship to the case, Defence strategy, or the rights of Mr. Bemba.¹³

12. If, however, the communications concerns matters pertaining to Mr. Bemba’s Defence, then they fell squarely within the protection of Rule 73 irrespective of whether they were relevant to the Prosecution’s investigation or not. The fact that such

¹¹ ICC-01/05-52-Red2, page 8.

¹² ICC-01/05-52-Red2, para. 4.

¹³ In such scenarios, domestic jurisdictions apply a ‘pre-dominant purpose’ test in order to assess whether the overall character of the communication or document concerned issues relating to the professional relationship between counsel and client: *Tchenguz & anor v Rawlinson and Hunter Trustees SA & ors* [2013] EWHC 2297 (QB). *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart* [1985] 1 NZLR 596; *R v Hawker Siddeley Canada Ltd* (1976) 73 DLR (3d) 453; *Waugh v British Railways Board* [1980] AC 521.

communications may have been relevant to the Prosecution's Article 70 investigations does not displace the privilege, or mitigate the prejudice which would ensue if information concerning privileged Defence matters were to be disclosed to the Prosecution.

13. To give a hypothetical example, a conversation between Mr. Bemba and Me. Kilolo could have concerned a Defence witness, whom the Prosecution believes to be part of the alleged 'scheme'. Such a conversation is *prima facie* relevant to the Article 70 investigations. However, by virtue of the fact that the conversation concerned a Defence witness, there is a high probability that Mr. Bemba may have also provided legal instructions or observations protected by his privilege against self-incrimination.

14. However, in the present case, there is no indication that the Single Judge provided any instructions to the Independent Counsel to ring-fence communications if their transmission to the Prosecution could reveal details of Defence strategy or preparation; or if these communications consisted of information which was (a) subject to protective measures under Article 68(1); (b) work product privilege which is protected from disclosure under Rule 81(1); or (c) fell within other forms of privilege under Rule 73(2).

15. [REDACTED].¹⁴ It is therefore a matter of the utmost concern that whereas this protection was afforded to Prosecution witnesses, the Prosecution appears to have been given virtually unfettered access to information within VWU concerning Defence witnesses, and confidential Defence communications touching on the logistics of their protection.

16. Apart from the fact that the Single Judge did not adhere to Regulation 184(10), he also declined to adopt proposals from the Registry to appoint the OPCD or an *ad hoc* Counsel for the Defence.¹⁵

17. The role of the Independent Counsel was to assist the Prosecution through the identification of material, which was relevant to the Article 70 investigation. There is a fundamental conflict of interest between performing such a task, and vetting the materials or suggesting redactions with a view to protecting the rights of the Defence. There is also no indication that the Independent Counsel was disclosed contextual information concerning the procedural or legal developments in the main case. It would therefore have been

¹⁴ [REDACTED].

¹⁵ ICC-01/05-50.

impossible for the Independent Counsel to identify potential prejudice to the Defence in such a factual and legal vacuum.

The definition and scope of privilege has been framed in impermissibly broad terms by the Single Judge

18. Apart from the fact that the first ICC decision concerning exceptions to privilege was adopted on an *ex parte* basis, and was thus unforeseeable to the Defence and Mr. Bemba, the reasoning of the Single Judge was also legally and factually flawed.

19. The Single Judge's determination that Mr. Mangenda's communications with Mr. Bemba were not protected by privilege appears to have rested on an abstract conception regarding the scope of Mr. Mangenda's tasks, rather than his actual tasks.¹⁶

20. The reasoning employed by the Single Judge is also extremely ambiguous: it is unclear whether he ruled that Mr. Bemba's communications were not protected by legal privilege because they were not made within the context of a professional relationship with Mr. Bemba's Defence, or because he considered there were exceptions to privilege other than those set out in the Rules. The curtailment of such a fundamental right as privilege should not rest on such an ambiguity.

21. If the Single Judge's reasoning rests on the former approach, then it does not necessarily follow that "communications effected in furtherance of crime or fraud" cannot be considered to be "communications made in the context of professional relationship between a person and his or her legal counsel". The term 'furtherance' is extraordinarily broad, and could conceivably encompass communications in which an accused has sought legal advice in connection with an arguable question of law.

22. As noted above, it would also appear that the Single Judge conflated information which could be relevant to the Prosecution's Article 70 investigations, with information that should be classified as "communications effected in furtherance of crime or fraud". The

¹⁶ ICC-01/05-01/13-48, para. 5.

Single Judge thus failed to appreciate that all privileged communications – by their nature – could be relevant to Prosecution investigations.

23. The fact that it could assist the Prosecution to know potentially incriminating information does not suffice to lift privilege – otherwise privilege would be meaningless, and the defendant would never be able to seek advice concerning his or her liability in a confidential setting.

24. It is also notable that the Rule 163(iii) of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon, couch “communications in furtherance of a crime” as an exception, which warrants the lifting of privilege, rather than a category of communications which fall outside the scope of “communications made in the context of a professional relationship between a counsel and his or legal counsel”.

25. Indeed, the fact that it was considered necessary to add such an explicit exception to Rule 163(iii) undermines, rather than supports the findings of the Single Judge that such an exception can be read into the current text of Rule 73(1) of the ICC Rules of Procedure and Evidence. Theoretical rules, which are adopted to regulate the hypothetical detention of persons being tried for terrorism offences *in absentia*, are also not a sound basis for comparison under Article 21(2).

26. In any case, the STL has interpreted this ‘crime exception rule’ narrowly, and emphasised that it can only be applied after strict procedural protections are respected:

restrictions of the right [to privilege] may only be admissible if they fulfil certain conditions, namely, that: (i) they are envisaged by law; (ii) they are necessary (that is, they are rendered indispensable by the need to countervail possible negative effects); (iii) they are proportionate to the exigency that warrants them (that is, they are commensurate to and do not exceed the fulfilment of such exigency – this may imply that the restriction be of limited duration); and (iv) they are submitted to regular and judicial scrutiny.

20. Likewise, for any detained person, this fundamental right can be restricted only if such conditions as set out above in relation to accused persons are fulfilled. This notion is clearly spelled out in Principle 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which states that:

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.
2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.
3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with

his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.¹⁷

27. In the absence of full disclosure regarding the Article 70 proceedings, the ability of the Defence to ascertain the factual basis for the monitoring is still hampered. Nonetheless, it would appear that on the basis of the information presently available, no attempt was made to circumscribe the monitoring to those communications which were in themselves, criminal in nature. Rather, the Single Judge instructed the Independent Counsel to transmit all evidence which was relevant to the Article 70 investigation.

28. The Prosecution also failed to demonstrate that access to privileged communication was necessary, as opposed to merely useful.

29. The allegations concerned attempts to influence the testimony of witnesses as opposed to allegations regarding threats to the security of persons. The Prosecution was aware of these allegations during the Defence case and was in a position to explore these issues with Defence witnesses, and to thereby make any necessary submissions concerning the credibility of either the witnesses or any evidence tendered through them.

30. Indeed, if access to privileged communications was necessary in order to assess or verify these issues, then the Prosecution could have sought an adjournment from the Trial Chamber in order to gather this evidence (or evidence from non-privileged recordings) before concluding its cross-examination of the witnesses in question.

31. Apart from the fact that the criteria established by the STL for invoking the exception to privilege has not been met in this case, it is also notable that the Assembly of State Parties expressly declined to include a fraud exception to privileged communications in the Code of Conduct. Thus, whilst an initial draft of the Code required Counsel to report any requests from the Client to enter into a fee-splitting arrangement, this provision appears to have been dropped in light of concerns that it would be incompatible with legal privilege.¹⁸

¹⁷ 'Order on Conditions of Detention', Case No. CH/PRES/2009/01/rev, 21 April 2009, paras. 19-20.

¹⁸ ADC-ICTY Report on Draft Code, page 12, http://adc-icty.org/Documents/icc_code_report.pdf.

'The Legal Representation Team of the Coalition for the International Criminal Court (CICC) Submission to the 4th session of the Assembly of States Parties Comments on Article 22 of the Draft Code of Professional Conduct for Counsel acting before the ICC', November 2005.

32. The Special Court for Sierra Leone (“SCSL”) case law relied upon by the Single Judge also does not support his broad approach. It is notable that the issue in the *Bangura* case concerned whether the Judge possessed the power to subpoena members of the Defence office to testify in connection with advice that they had provided to convicted persons – it did not concern covert monitoring of a person, who is presumed innocent, which was ordered on an *ex parte* basis.

33. In a later decision in that case, and after having received *amicus* submissions on this issue, the Judge also declined to lift the privilege. The Judge accepted *amicus* submissions concerning the need to respect privilege unless there is an extremely compelling or exceptional basis to lift it, and ruled that she would not lift privilege in the absence of any evidence that the participants were complicit in the alleged crime, and the discussion itself directly concerned the alleged crime, as opposed to issues concerning the detainee’s Defence strategy.¹⁹

34. The Single Judge also adopted an impermissibly narrow definition of legal privilege by excluding Mr. Mangenda from its ambit. The right to legal privilege must be interpreted in a manner which is effective and not illusory.²⁰ The fact that the Registry has made an administrative determination that communications with a case manager are not automatically privileged does not mean that the substantive protection afforded to Mr. Bemba by virtue of Rule 73(1) does not apply to such communications. Rather, a case by case assessment should have been made in order to determine whether the communications in question were made in the context of Mr. Bemba’s professional relationship with Counsel.

35. This would have been the case if the case manager had been instructed to convey certain information to Mr. Bemba upon the instructions of Counsel or under the supervision of Counsel, or if Mr. Bemba had requested the case manager to do the same. The Single Judge failed to give any consideration to the fact that Mr. Mangenda speaks Mr. Bemba’s native language, and in conveying information from Counsel, performed the same role as an

http://www.iccnw.org/documents/LR_article22_teampaper_Nov05.pdf.

¹⁹ *Prosecutor v. Bangura et al.*, ‘Decision on Prosecutor’s Additional Statement of Anticipated Trial Issues and Request for Subpoena in relation to the Principal Defender’, 3 September 2012, para. 24.

²⁰ *Campbell v. United Kingdom*, Application no. 13590/88, 25 March 1992, para. 46.

interpreter (who is also afforded an ancillary right to privilege under Regulation 97 of the Regulations of the Court).

36. Rule 73(2) also creates a broader form of privilege under the same terms as Rule 73(1) if certain criteria are met: if the communications occurred within a class of relationship producing a reasonable expectation of privacy and non-disclosure, if confidentiality is essential to the nature and type of relationship, and recognition of the privilege would further the objectives of the Statute.

37. The SCSL case relied upon by the Single Judge also expressly recognised that legal privilege could be extended to cover the communications of certain lawyers with detainees, even if the Rules or Regulations did not expressly include this particular category of lawyers within its definition.²¹

38. Mr. Mangenda is a lawyer with more than five years of experience, who is admitted to his domestic bar. As a former ICC staff member, he had been subjected to rigorous vetting procedures prior to his appointment to the Defence of Mr. Bemba. Even if he was not conversing with Mr. Bemba on a privileged line, the Regulations clearly state the procedures for monitoring calls, and require that the Defence be notified in advance. In the absence of such a notification, both Mr. Mangenda and Mr. Bemba had a reasonable expectation of privacy.

39. Similarly, the Regulations stipulate that Mr. Bemba's communications can only be transcribed if certain criteria had been met. It therefore follows that there is a right to expect that any communications which did not meet such criteria, would not be transcribed.

40. The jurisprudence of the ICC has repeatedly found that the Defence cannot be compelled to disclose anything other than witness summaries and evidence, which it intends to rely upon.²² Internal documents or communications are considered to be protected from disclosure. Even if the Registrar possessed a limited power to monitor these calls for security purposes, both Mr. Mangenda and Mr. Bemba had a right to expect that the Court would not grant the Prosecution access to the transcripts of any calls concerning Defence strategy or internal Defence preparation issues.

²¹ *Prosecutor v. Bangura et al.*, 'Decision on Prosecutor's Additional Statement of Anticipated Trial Issues and Request for Subpoena in relation to the Principal Defender', 3 September 2012, paras. 13-23.

²² See for example, ICC-01/04-01/06-2192-Red, para. 72.

41. Finally, adopting an overly formal or technical approach to privilege could render its protections illusory. Case managers, by their role, are required to have access to all Defence materials and to be the focal point for all evidential analysis. They are, by necessity, aware of all confidential aspects of the case. Denying them the protection of legal privilege would make it impossible for them to perform their tasks in an effective and secure manner. It would also make Defence teams vulnerable and denude Counsel's privilege of any force: for example, the Prosecution or national authorities could evade the restrictions on questioning Counsel or seeking disclosure from Counsel by simply targeting the Case manager. For this reason, the 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.²³

42. Even if it is not appropriate to grant such communications a blanket form of privilege, the Single Judge clearly erred by failing to implement any safeguards to ensure firstly, that any potential interest that the Prosecution could have in receiving these transcripts was not outweighed by the potential prejudice to the Defence, and secondly, that disclosure would not reveal information protected by confidentiality orders issued by the Trial Chamber.

43. Given that the transcripts of these recordings were not provided to the Prosecution prior to the Article 70 arrests, there was also no pressing exigency which would have justified excluding the Defence from the process of reviewing the materials in order to assert privilege or to ensure that appropriate steps were taken to protect other forms of Defence confidentiality. Moreover, for the reasons that will be elaborated below, Counsel representing Mr. Bemba in the Article 70 proceedings is not in a position to represent Mr. Bemba's interests in connection with the main trial in an effective manner.

44. Finally, the Defence would like to express its concern regarding the Prosecution's attempts to portray the Defence's legitimate attempts to uphold a fundamental right as an

²³ *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.

attempt to “carve niche of immunity for accused persons and defence team [sic]”.²⁴ Legal privilege is a necessary corollary of the right to silence and the right to effective legal representation. It is based on the premise that:

“a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests”.²⁵

45. The damage occasioned by unwarranted or arbitrary breaches of privilege cannot be overstated. The possibility that the Defence could at any time be monitored on an *ex parte* basis, without recourse to predetermined legislation or safeguards, renders the right to communicate with Counsel in confidence illusory, and thus deprives Mr. Bemba of the right to an effective Defence.²⁶

The Prosecution, composed of the same lawyers across both cases, has advanced contradictory positions in the two cases and used its powers under Article 70 as a means of circumventing judicial rulings in the present case

46. In advancing the position that the Trial Chamber does not possess the competence to adjudicate upon the legality of measures taken in connection with the Article 70 proceedings, it would appear that the Prosecution has adopted an entirely contradictory approach on a range of issues. In so doing, the Prosecution has benefitted from the confidentiality of the Article 70 proceedings to shield its assertions from proper scrutiny in this case.

47. In particular, it would appear from recently reclassified filings that the Prosecution allowed the Single Judge to proceed under the assumption that the Article 70 proceedings

²⁴ ICC-01/05-01/08-2965-Red, para 19.

²⁵ *R. v Derby Magistrates Court*, Ex p. B. [1996] 1 AC 487, para. 58.

²⁶ The ECHR has found that the right to effective representation will be rendered illusory in such circumstances irrespective as to whether the defendant is monitored in each instance: *Castravet v. Moldavia*, ECHR, (Application no. 23393/05) 13 March 2007, para 51.

were completely “separate and autonomous” of the main trial,²⁷ and that there were ‘Chinese walls’ between the two cases.²⁸

48. In reality, this is not the case. Both cases appear to be overseen by the same Senior Trial Attorney.²⁹ [REDACTED].³⁰ [REDACTED]. The Prosecution also conceded that the “possibility of the ICC-01/05-01/13 Case having an impact on the present case [the trial] was reasonably foreseeable” as of April 2013,³¹ and has, moreover, relied on the linkage between the two cases in order to justify the admission of evidence from one to the other.³²

49. It is also concerning that on the one hand, the Prosecution has relied on protective measures issued in the Article 70 proceedings in order to justify the non-disclosure of information, which derives from and is intrinsically linked to this particular Defence case.³³ On the other hand, the Prosecution also appears to have utilised the Article 70 case as a vehicle for obtaining access to confidential *ex parte* Defence information, which is subject to protective measures issued by the Trial Chamber in this case.³⁴

50. In this connection, the Prosecution has strenuously objected to what it has characterised as an attempt by the Defence “to seek undermine or nullify Pre-Trial Chamber II’s orders through this Chamber”.³⁵ In making such a disingenuous objection, the Prosecution has in fact struck at the heart of the Defence complaint - that the Prosecution has itself used its Article 70 powers as a vehicle for circumventing judicial rulings in the main case, in particular:

- i. decisions concerning the scope of prosecution disclosure, insofar as they would have obliged the Prosecution to disclose any evidence concerning the credibility of Defence witnesses to the Defence as soon as practicable;³⁶
- ii. decisions limiting the scope of Defence disclosure;

²⁷ ICC-01/05-50, para. 9.

²⁸ “As regards the need to preserve the integrity of the Main Case, the Single Judge takes the view that this need is adequately taken care of by the fact that the prosecution teams respectively in charge of the Main Case and of the present proceedings are composed by different lawyers and professional staff.” ICC-01/05-01/13-48, para. 7.

²⁹ ICC-01/05-01/08-2945-AnxA-Red.

³⁰ [REDACTED].

³¹ ICC-01/05-01/08-2910, para.2, citing ICC-01/05-01/08-2606-Conf-Exp, para. 20.

³² ICC-01/05-01/08-2945-Red, para. 55.

³³ ICC-01/05-01/08-2945-AnxA-Red.

³⁴ For example, ICC-01/05-01/13-172-Red, ICC-01/05-60-Red, ICC-01/05-44-Red, para. 5.

³⁵ Para. 20.

³⁶ In a filing dated 23 August 2012 in this case, the Prosecutor acknowledged its obligation to disclose information concerning the credibility of Defence witnesses and expressly undertook to disclose such material on an ongoing basis: ICC-01/05-01/08-2283, paras. 4 and 14.

- iii. decisions restricting the ability of parties to access information in the possession of the VWU;³⁷ and
- iv. the protocol concerning contacts with another party's witnesses.³⁸

51. The Trial Chamber decisions were in force before the Pre-Trial Chamber improperly overrode them. Contrary to the submissions of the Prosecution, there is a hierarchy insofar as Regulation 42(1) clearly states that:

“Protective measures once ordered in any proceedings in respect of a victim or witness shall continue to have full force and effect in relation to any other proceedings before the Court [...]”.

52. These principles are not just enacted for the benefit of Prosecution witnesses vis-à-vis the Defence. Regulation 42 does not exempt the Prosecution from its ambit, as reflected by Regulation 42(2). It would also be a violation of the principle of equality of arms if the Prosecution were to benefit from any special presumptions or procedural advantages in relation to the regime for protective measures, as compared to those which are accorded to the Defence:

“the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant”.³⁹

53. The ICC Appeals Chamber has also confirmed that the Prosecution's powers under Article 54 do not exempt the Prosecution from the obligation to adhere to a Chamber's ruling on protective measures.⁴⁰ It follows from this that the Prosecution cannot invoke its investigative powers under Article 54 – irrespective as to whether they are directed at the same case, or other cases (including Article 70 cases) - in order to circumvent judicial rulings on protective measures.

54. This Court has repeatedly recognised that Prosecutorial powers are intrinsically tied to Prosecutorial duties. A key such duty is the obligation to “fully respect the rights of

³⁷ ICC-01/05-01/08-1011-Conf.

³⁸ For Defence submissions on this point see, ICC-01/05-01/08-2971-Red.

³⁹ Human Rights Committee, General Comment no. 32,

<http://www1.umn.edu/humanrts/gencomm/hrcom32.html> See also *Prosecutor v. Simić et al.*, ‘Decision on (1) Application by Steven Todorović to Re-Open the Decision of 27 July 1999 (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999 and (3) Conditions for Access to Material’, 28 February 2000, “*It should be clearly understood that, as a party before the Tribunal, the prosecution is not treated in any special way. Nor, it is hoped, would the prosecution claim such a special position*”.

⁴⁰ ICC-01/04-01/06-2582.

persons arising under the Statute”, as *per* Article 54(1)(c) of the Statute. For this reason, Judge Steiner has stated that,

“As the title of article 54 of the Statute expressly states, investigative powers are concomitant with investigative duties and, as the organ primarily in charge of the investigation, the Prosecution is bound to act with due care to ensure that investigative techniques will by no means affect at a later stage the right of accused persons to a fair trial.”⁴¹

55. Contrary to the position advanced in the Prosecution Response, Prosecutorial independence is not a license to take investigative steps, which are contrary to fundamental rights of the accused, or to evade its disclosure obligations, nor does it shield the Prosecution from accountability or judicial scrutiny.

56. In line with Article 54(1)(c), the Prosecution should have endeavoured to conduct its Article 70 investigations in the manner that was least disruptive to the rights of Mr. Bemba.⁴² As soon as the Prosecution had any concerns regarding the integrity of the proceedings, or was of the belief that it was necessary to investigate the credibility of Defence witnesses further, then it could have applied for an immediate adjournment of the main trial. The Prosecution elected not to do so.

57. The duty of the Trial Chamber is not to protect the strategic choices of the Prosecution, but to ensure that the trial proceedings are fair. To that end, the Chamber is empowered and indeed required to intervene to provide a remedy in circumstances in which the actions of the Prosecution have prejudiced the rights of the Defence.⁴³

The Prosecution has advanced an incorrect standard concerning a temporary suspension of the Article 70 proceedings, and incorrect information concerning Mr. Bemba’s standing to contest the relevant monitoring decisions

58. In arguing that the threshold for judicial intervention has not been met, the Prosecution has incorrectly employed the standards which apply to a stay of the proceedings, rather than a temporary suspension/regulatory stay.

⁴¹ ICC-01/04-01/07-621, para. 39.

⁴² ICC-01/04-01/07-621, paras. 36, 38.

⁴³ “[i]n the view of the Single Judge, the competent Chamber, as the organ of the Court which has ultimate responsibility for interpreting and applying the different provisions of the Statute and the Rules, has always the competence to determine whether the Prosecution’s practices, as well as agreements concluded by the Prosecution pursuant to article 54(3)(e) of the Statute, are consistent with the Statute and the Rules” ICC-01/04-01/07-621, para. 55. See also ICC-01/04-01/06-2582, paras. 47-48.

59. The ICC Appeals Chamber has distinguished between “a distinct aspect of stay, notably the stopping of proceedings, where justice could not be done”, which was linked to the abuse of process doctrine, and the “other aspects of stay of proceedings of a nature regulatory of the progress and fruition of the judicial process.”⁴⁴

60. In line with the latter category of stays, the Appeals Chamber has invoked Regulation 35(2) in order to suspend proceedings in order to give effect to the defendant’s right to effective representation and adequate time and facilities to prepare his Defence.⁴⁵

61. The *ad hoc* Tribunals have also issued regulatory stays in situations where the continuance of proceedings before one Chamber could prejudice the outcome of proceedings before another Chamber. In such a case, the Defence has only been required to demonstrate the existence of potential prejudice, or that a continuance of the proceedings would be contrary to fairness or efficiency.

62. For example, in the *Blagojević* case, the Appeals Chamber held that if the Defence has filed a request concerning legal aid issues before the Presidency, then the Pre-Trial or Trial Chamber could stay the proceedings to ensure that the defendant is not prejudiced in the interim.⁴⁶ Subsequent case law has elaborated the circumstances in which it would be appropriate to issue such a stay.

63. In the *Pavković* case, the Appeals Chamber found that in order to justify a suspension of the proceedings pending the resolution of a legal aid matter before the Presidency, it was necessary for the Defence to demonstrate “good cause” or that “a stay in proceedings is required to ensure the fairness thereof”.⁴⁷ Notably, it was not necessary for the Defence to demonstrate that the issue in question before the Presidency could impact upon the outcome of the proceedings before the Appeals Chamber; it was sufficient to demonstrate that it would impact upon the fairness of these proceedings.

⁴⁴ *Prosecutor v. Lubanga*, Reasons for "Decision of the Appeals Chamber on the Defence application 'Demande de suspension de toute action ou procédure afin de permettre la désignation d'un nouveau Conseil de la Défense' filed on 20 February 2007" issued on 23 February 2007, 9 March 2007, ICC-01/04-01/06-844, para. 11.

⁴⁵ ICC-01/04-01/06-844, para. 13.

⁴⁶ *Prosecutor v. Blagojević*, ‘Public and Redacted Reasons for the Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003.

⁴⁷ *Prosecutor v. Pavković et al.*, ‘Decision on Nebojša Pavković’s Motion for Stay of Proceedings’, 2 March 2010, at para. 13.

64. The Defence very clearly stated in its Request that at this juncture, it is not in a position to advance submissions concerning the full extent to which its case may have been prejudiced. There is a range of issues about which the Defence remains completely in the dark. This is not due to a lack of diligence by the Defence, but rather the Prosecution's failure to disclose relevant information.⁴⁸ For this reason, the Defence Request was explicitly framed as a request for interim relief.

65. It is, however, apparent that decisions are being taken in the Article 70 proceedings at a rapid pace, and that these decisions have significant implications for the main trial. The ability of the Trial Chamber to rule on certain matters is also being rendered obsolete by decisions which have been issued in the Article 70 case. In contrast, the continuation of the main trial has not occasioned any prejudice to the Article 70 proceedings. When considered in light of the fact that the trial has been ongoing for several years and Mr. Bemba has been detained since 2008, it would be more appropriate and effective to seek a suspension of the Article 70 proceedings rather than *vice versa*.

66. In its Response, the Prosecution has nonetheless claimed that the Defence rights are adequately protected in the Article 70 proceedings as Mr. Bemba has standing in that case. At the same time that the Prosecution advanced this position to the Trial Chamber, the Prosecution successfully argued before the Article 70 Single Judge that Mr. Bemba's request to appeal the various decisions which resulted in the monitoring of his communications should be rejected on the grounds that the Article 70 Defence have no *locus standi* to seek leave to appeal decisions issued in the situation phase.⁴⁹

67. Mr. Bemba's Counsel in the Article 70 proceedings has also been prevented from raising issues concerning the impact of Article 70 decisions on the main case on the grounds that as he does not have access to confidential information in the main case, his concerns are 'entirely speculative'.⁵⁰

68. There therefore appears to be a significant lacuna as concerns the ability of the Defence to effectively enforce its rights, and to seek judicial review of decisions which have a significant impact on Mr. Bemba's right to a fair trial.

⁴⁸ ICC-01/05-01/08-2963, ICC-01/05-01/08-2945-Red.

⁴⁹ See for example, ICC-01/05-01/13-174, and ICC-01/05-01/13-187.

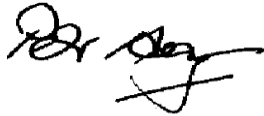
⁵⁰ ICC-01/05-01/13-182, page 4.

C. RELIEF SOUGHT

69. The Defence for Mr. Bemba respectfully requests that the Trial Chamber:

GRANT the Defence Request for Interim Relief.

The whole respectfully submitted.

A handwritten signature in black ink, appearing to read 'Peter Haynes', with a stylized flourish at the end.

Peter Haynes, QC

Lead Counsel for Mr Jean-Pierre Bemba Gombo

The Hague, The Netherlands

21 February 2014