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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

**Defence Reply to the 'Prosecution's Response to the "Defence Motion on
Privileged Communications"'**

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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A. BACKGROUND

1. On 6 February 2014, the Defence filed its 'Motion on Privileged Communication' ("Defence Motion"). Noting the monitoring and recording of privileged phone calls between Mr. Bemba and members of his Defence team,¹ the Defence seized Trial Chamber III ("the Chamber") with a request for the following order:²

- (i) **ORDER** that Mr. Bemba should enjoy privileged communications with members of his current Defence team;
- (ii) **ORDER** the cessation of any monitoring or recording of communication between Mr. Bemba and his current Defence team, including but not limited to the monitoring or recording of phone conversations, meetings at the UNDU or the holding cell at the ICC premises;
- (iii) **ORDER** the cessation of any monitoring of communication devices of members of the current team whether by the Registry, the Prosecution or any national authorities; and
- (iv) **ORDER** the Prosecution to respond to the questions set out in the Letter of 16 January 2014 concerning the monitoring of privileged communications and or communications devices of the members of the current Defence team.

¹ ICC-01/05-01/08-2963, para. 1.

² ICC-01/05-01/08-2963.

2. On 19 February 2014, the Prosecution filed its 'Prosecution's Response to the "Defence Motion on Privileged Communications"' ("Prosecution Response").³ The Prosecution argued generally that the Chamber should reject the Defence Motion on the basis that "it rests on the false premise that privileged communications of the current Defence team are monitored or recorded."⁴

3. In particular, the Prosecution argued that:

- (i) No further order of the Chamber is required to protect the legitimately privileged communications between the Accused and his counsel and thus the order sought is superfluous;⁵
- (ii) The second and third requests are moot. The Defence requests the cessation of monitoring or recording of its communications. As far as the Prosecution is aware, no entity is currently monitoring or recording the communications between the Accused and members of the Defence team entitled to legal privilege;⁶ and
- (iii) The fourth request is moot since, as far as the Prosecution is aware, no entity is monitoring privileged communications or the communication devices of the members of the current Defence team.⁷

4. On 26 February, Trial Chamber III ("the Chamber") granted the Defence Request for Leave to Reply to the 'Prosecution's Response to the "Defence Motion

³ ICC-01/05-01/08-2984.

⁴ ICC-01/05-01/08-2984, para. 2.

⁵ ICC-01/05-01/08-2984, para. 4.

⁶ ICC-01/05-01/08-2984, para. 5.

⁷ ICC-01/05-01/08-2984, para. 6.

on Privileged Communications”,⁸ which had been filed the same day.⁹ The Chamber was “of the view that it may benefit from the defence's views on the three discrete issues”.¹⁰ Pursuant to this decision, the Defence files the present submissions.

C. DEFENCE REPLY

5. The three arguments set forth by the Prosecution are equivocal, and potentially disingenuous. The Prosecution has asserted that the requested order is superfluous because “no further order is required to protect the legitimately protected privileged communications between the Accused and his Counsel”, “no entity is currently monitoring or recording the communications between the Accused and members of the Defence team entitled to legal privilege”, and “no entity is monitoring privileged communications or the communication devices of the members of the current Defence team”.¹¹

6. The Prosecution response therefore leaves open the possibility that the Prosecution may have requested the Registry or other States or entities to monitor:

- (a) Privileged communications which the Prosecution deems to be ‘illegitimate’;
- (b) Communications of Defence team members, whom either the Prosecution or the Registrar consider to fall outside the scope of legal professional privilege (such as Case Managers and Legal Consultants); and

⁸ ICC-01/05-01/08-2993.

⁹ ICC-01/05-01/08-2996.

¹⁰ ICC-01/05-01/08-2996, para. 5.

¹¹ ICC-01/05-01/08-2984, paras. 4-6.

- (c) The communication devices of persons who communicate with the Defence.

7. Moreover, the use of the current tense - “monitoring” – does not exclude the possibility that the Prosecution could have requested States or entities to monitor the communications or devices of the current members of the Defence team at some point in the past.

8. The protection afforded by Rule 73(1) must be interpreted in a manner which is effective and not illusory.¹² The object and purpose of Article 67(1)(b) and Rule 73(1) is to afford the defendant with an effective opportunity to obtain legal advice, whilst preserving his or her privilege against self-incrimination. The question as to whether someone has the administrative status of ‘Case Manager’ or ‘Consultant’ is irrelevant to the overarching issue of whether the person’s role and tasks concern the provision or transmission of legal advice to or the receipt of instructions from the defendant. If that is the case, then the communications must be protected.

9. Similarly, a defendant must have the ability to seek legal advice and converse freely in relation to all issues pertaining to the case; that is the very purpose of legal representation and legal privilege – to ensure that a defendant can seek advice concerning his or her legal obligations and duties in a confidential setting, without fear of adverse consequences or that his or her privilege against self-incrimination will be waived.

10. For this reason, the definition and scope of legal privilege should not be determined unilaterally by the Prosecution based on what it, as a party to the proceedings, considers to be ‘legitimate’. The Registrar is also precluded from making any determinations on judicial matters, and as such, had no competence to

¹² ICC-01/05-01/08-2991-Red, paras. 19-39.

determine which members of the Defence team should be entitled to benefit from privileged communications.

11. Any dispute concerning what is and is not privileged should therefore be determined by the Chamber, after having heard from the Defence, which is best placed to evaluate whether the communication in question falls within the context of the professional relationship between Mr. Bemba and his Counsel.

12. It is, however, impossible for the Chamber or the Defence to address this issue in a meaningful manner if the Prosecution refuses to provide clear information concerning exactly who and what has been and is being monitored.

13. In contradistinction to the assertion of the Prosecution,¹³ given the existence of a dispute between the Defence and the Prosecution concerning the nature and scope of privilege, Defence communications both require and deserve the protection of this particular Chamber.

14. The existence of *ex parte* decisions and orders issued in a different case does not eliminate or even mitigate the prejudice that would ensue from any actual or potential interference with Mr. Bemba's right to freely communicate in confidence with his Defence team.

15. The need for vigorous judicial intervention to protect legal privilege is particularly warranted in light of the fact that the Prosecution appears to have obtained the Call Data Records of the mobile phones of his former Lead Counsel and Case Manager directly from the Dutch and Belgian authorities (i.e. without first

¹³ The Prosecution has asserted that "if the relevant communications do not fall within the scope of the protection provided by Rule 73 of the Rules, they are not in fact "privileged". Thus, such communications do not require, nor deserve, the protection of the Chamber." ICC-01/05-01/08-2984, para. 4.

being filtered by the Independent Counsel), for time periods which pre-date the Single Judge's rulings concerning the definition and scope of privilege.¹⁴

16. In the absence of a judicial order in this case protecting legal privilege in all of its manifestations, it cannot be excluded that the Prosecution has not requested or will not request State authorities to obtain access to other types of confidential or privileged Defence information, which the Prosecution considers to fall outside of the scope of Rule 73(1).

17. The Defence simply cannot continue to represent Mr. Bemba under circumstances in which they have no clarity or foreseeability as to whether and when their communications with their client could be monitored. It would be impossible for the Defence to discuss any confidential or sensitive strategic issues with Mr. Bemba, given the risk that such communications could be monitored by third parties and subsequently disclosed to the Prosecution.

18. It would also be untenable to finalise this case if legal privilege continues to be defined through the prism of the Prosecution's Article 70 investigations such that any information, which is relevant to the Article 70 case, falls outside the scope of Rule 73(1) and is potentially disclosable to the Prosecution for possible use in the instant case.

19. Under such a narrow definition of privilege, it would be impossible for the Defence to communicate with Mr. Bemba in connection with any issues pertaining to Defence witnesses, whose credibility has been impugned *via* the Article 70 case.

¹⁴ ICC-01/05-60-Red, paras. 10-11.

20. If these issues are not resolved clearly and expeditiously in an *inter partes* manner, then Mr. Bemba will be deprived of the benefit of effective legal assistance, which in turn, will render it impossible for him to exercise his fair trial rights.

(i) “No further order of the Chamber is required to protect the legitimately privileged communications between the Accused and his counsel and thus the order sought is superfluous”¹⁵

21. The Prosecution takes the position that legitimately privileged communications are safe from monitoring or recording, and no further order is needed to protect these communications.

22. The Prosecution asserts that “[t]hrough the filters of a judicially-appointed independent counsel, the Single Judge and an Investigating Judge of The Netherlands, the Prosecution obtained only intercepted communications which contained evidence of crimes or fraud and none that contained legitimately privileged material.”¹⁶

23. Unfortunately, the accuracy of this assertion is rather undermined by the Prosecution’s own admission in Case ICC-01/05-01/13 that the audio files of phone conversations in the possession of the Prosecution between Mr. Bemba and his former case manager Mr. Mangenda “could nevertheless contain privileged information related to the Main Case”,¹⁷ and that “it is not sufficiently clear whether the Mangenda Calls are in fact legally non-privileged”.¹⁸ The Single Judge in the Article 70 case nonetheless ordered that there was no need for these conversations

¹⁵ ICC-01/05-01/08-2984, para. 4.

¹⁶ ICC-01/05-01/08-2984, para. 3.

¹⁷ ICC-01/05-01/13-48, para. 1.

¹⁸ ICC-01/05-01/13-48, para. 4.

to go through the filter of a judicially-appointed independent counsel, and could be listened to by the Office of the Prosecutor.¹⁹

24. In such circumstances, the Defence maintains its request for an order from the Chamber that privilege should attach to and protect communications between Mr. Bemba and all members of his Defence team.

(ii) “The second and third requests are moot. The Defence requests the cessation of monitoring or recording of its communications. As far as the Prosecution is aware, no entity is currently monitoring or recording the communications between the Accused and members of the Defence team entitled to legal privilege”²⁰

25. The Prosecution confines its submissions to the Defence’s second and third requests to “communications between the Accused and members of the Defence team entitled to legal privilege”. The Defence presumes (although it is not stated), that the Prosecution’s submissions are couched in these terms given the Registry’s confirmation that it performs “passive monitoring” pursuant to Regulation 174 of the Regulations of the Registry of “all telephone conversations of detained persons” apart from those which attract privilege.²¹

26. However, by its own admission, the Prosecution’s knowledge of whether Defence team communications are being monitored is limited. The Prosecution is certainly not in a position to know whether national authorities are still monitoring the Defence team communications, as has been previously authorized.²²

27. Moreover, that the fact that passive monitoring of non-privileged phone calls is permitted by the Regulations of the Registry has no bearing on the question of

¹⁹ ICC-01/05-01/13-48, para. 6.

²⁰ ICC-01/05-01/08-2984, para. 5.

²¹ See also ICC-01/05-01/08-2987.

²² ICC-01/05-52-Red2, page 7.

whether the **physical communication devices** of members of the current Defence team are being tapped or intercepted by national authorities, whether at the request of the Prosecution or otherwise. This is the subject matter of the third request, which is accordingly not “moot”. The phones of the members of the Defence team are not only used in connection with this case. They are used for confidential and personal communication unconnected to the International Criminal Court. Defence team members are entitled to use their telephones without being monitored or recorded. At the present time, whether the phones of the present Defence team have been (or are still being) monitored is a question without a clear answer, particularly given that the Prosecution’s knowledge does not extend to monitoring by national authorities.

28. In such circumstances, there can be no prejudice to the Prosecution or indeed anyone else at the Court who themselves have a reasonable expectation of privacy when speaking, for example, with their families, arising from an order from the Chamber in the terms requested.

(iii) “The fourth request is moot since, as far as the Prosecution is aware, no entity is monitoring privileged communications or the communication devices of the members of the current Defence team”²³

29. In its fourth request, the Defence sought an order that the Prosecution respond to the questions set out in the Letter of 16 January 2014 concerning the monitoring of privileged communications and/or communications devices of the members of the current Defence team. The vast majority of questions in the Letter of 16 January concerning the monitoring of privileged communications and communications devices of the current Defence team are in no way answered by the Prosecution’s broad statement.²⁴ The Defence notes, in particular, that the

²³ ICC-01/05-01/08-2984, para. 6.

²⁴ ICC-01/05-01/08-2963-AnxA.

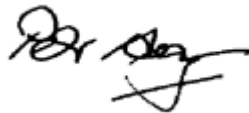
Prosecution's Response is limited only to the present ("is monitoring"), thereby avoiding all questions in the Letter of 16 January concerning any previous monitoring of members of the current Defence team, and the legal basis for having done so. The Defence accordingly submits that the fourth request is not "moot", and reiterates its request to have these questions answered.

D. REQUESTED RELIEF

30. In light of the above submissions, the Defence respectfully requests that the Chamber:

GRANT the relief requested in the 'Defence Motion on Privileged Communications.'

The whole respectfully submitted.



Peter Haynes QC

Counsel for Mr. Jean-Pierre Bemba

Done at The Hague, the Netherlands

3 March 2014