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Court

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No.: **ICC-01/05-01/08**
Date:**28/03/2014**

PRESIDENCY

Before: **Judge Sang-Hyun Song, President**
Judge Sanji Mmasenono Monageng, First Vice-President
Judge Cuno Tarfusser, Second Vice-President

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF
THE PROSECUTOR
***v.* Jean-Pierre Bemba Gombo**

Public with Confidential Annex A, Public Redacted Annex A, Confidential ex parte Annex B, Confidential Annex C, Public Redacted Annex C and Public Annex D.

Defence Appeal pursuant to Regulation 221 of the Regulations of the Registry

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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States' Representatives	**Amicus Curiae**

REGISTRY

Registrar Herman von Hebel	**Defence Support Section**
Deputy Registrar	
Victims and Witnesses Unit	**Detention Section**
Victims Participation and Reparations Section	**Other**

A. INTRODUCTION

1. The Defence for Mr. Jean-Pierre Bemba Gombo hereby submits this appeal against the decision of the Registrar to reject the detention complaint of Mr. Bemba concerning the illegal monitoring of his communications.

2. The Registrar's decision to reject the complaint *in limine* is incompatible with Mr. Bemba's right to a file a complaint against any matter impacting on his detention, and his ability to exercise and enjoy the detention rights set out in the relevant Regulations of the Court and the Registry.

3. The gravamen of Mr. Bemba's complaint concerns the fact that it was illegal and *ultra vires* to bypass the specific procedures and protections set out in the regulations governing his detention.

4. If the illegal act of bypassing these provisions were in turn, used to exclude Mr. Bemba's right to seek recourse through the detention complaints procedure, then the absence of an effective remedy would itself constitute a violation of his detention rights. This would trigger an independent right to a remedy.

5. It also is not correct that the Registry bears no responsibility for the above violations.

6. The Registrar and his representatives had a duty to inform the Trial Chamber and the Single Judge of the Pre-Trial Chamber of all relevant provisions governing the detention of Mr. Bemba, which include the restrictions governing the monitoring of his communications, and the prohibition on overriding these detention regulations.

7. The transmission of communications from the case manager of Mr. Bemba also occurred pursuant to a Registry determination concerning the scope of privilege.

8. The Defence for Mr. Bemba therefore requests the Presidency to firstly, exercise jurisdiction over this complaint, and secondly, find that had the complaint been examined on the merits, then the only reasonable conclusion would be that the monitoring, transcription and disclosure of Mr. Bemba's communications was illegal and *ultra vires* because:

i. The procedure for monitoring, transcribing and transmitting non-privileged communications to the Prosecution was not complied with;

ii. The procedure for monitoring Mr. Bemba's communications violated procedural fairness, and was inconsistent with internationally recognised human rights law;

iii. The protections afforded by the Statute, Rules and Regulations to privileged communications were not complied with;

iv. The characterisation of Mr. Mangenda's communications as 'non-privileged' was legally incorrect, failed to take into consideration relevant factors, and was unreasonable;

v. The wholesale disclosure of the transcripts of all non-privileged communications during this time period did not comport with Regulations of the Court and the Registry, or the general principles of necessity and proportionality; and

vi. The disclosure of call logs concerning communications with the Defence at the detention unit violated privilege.

B. PROCEDURAL HISTORY

9. The factual background is set out at paragraphs 9-31 of Annex A.

10. On 6 March 2014, Mr. Jean-Pierre Bemba Gombo submitted a complaint to the Registrar in accordance with Regulation 106 of the Regulations of the Court.[1]

11. The Registrar dismissed the complaint as being 'irreceivable'.[2] This decision was notified to the Defence on 20 March 2014, at 5.40pm.[3]

12. In accordance with the deadline set out in Regulation 221 of the Regulations of the Registry, the Defence hereby submits an appeal to the Presidency.

13. The Defence also notes with concern the language used in the Registrar's decision, accusing the Defence of *inter alia*, "untruths" and of acting with "turpitude".

[1] Annex A.
[2] Annex B.
[3] Annex C.

14. To address personal accusations of such gravity against the Defence, which has done nothing more than fulfill its role of ensuring that the rights of the accused are protected, reflects a deep sense of unwarranted suspicion, and alleges bad faith on the part of the Defence when no basis exists to do so.

15. The Defence recalls, to this end, the finding of Trial Chamber I in *Lubanga* in response to similarly unwarranted language on the part of the Registrar that "the extreme nature of the language tends to obscure the real issues: the Chamber has to look behind the hyperbole to establish if an argument of merit is being advanced. Submissions instead should be restrained, to the point and appropriately persuasive".[4]

16. The Defence has raised these concerns with the Registry,[5] and invites the Presidency to deprecate the inappropriate use of language in the Registrar's decision.

17. Finally, the Defence respectfully requests a modest extension of the page limit. The complaint was comprised of an aggregation of several complaints concerning violations of Mr. Bemba's rights, which occurred over a prolonged period. It was in the interests of judicial economy and efficiency to combine these complaints. This should not, however, operate to the detriment of the ability of the Defence to elaborate and elucidate the nature of the violations in question.

C. SUBMISSIONS

a. The Standard of Review

18. A review of a decision by the Registry "involves a consideration of whether the Registrar has: acted without jurisdiction, committed an error of law, failed to act with procedural fairness, acted in a disproportionate manner, taken into account irrelevant factors, failed to take into account relevant factors, or reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached".[6]

b. The Registrar committed an error of law by dismissing the complaint *in limine*

19. Regulation 89 of the Regulations of the Court stipulates that Mr. Bemba's detention "shall be governed by the provisions of [Chapter 6 of the Regulations of the Court]".

[4] ICC-01/04-01/06-2800, paras. 64 and 65.
[5] Annex D.
[6] ICC-01/05-01/08-310, para. 12.

20. Regulation 96(1) of the Regulations of the Court further specifies that the regulations on detention may only be suspended "[i]n the event of a serious disturbance, or other emergency occurring within the detention center", and in accordance with the procedure set out in Regulation 96.

21. Regulation 106(1) enshrines Mr. Bemba's right to "file a complaint against any administrative decision or order or with regard to any other matter concerning his or her detention".

22. Irrespective as to which body or entity at the ICC authorised the measures in question, the monitoring of Mr. Bemba's communications and the disclosure of information from the detention unit to the Prosecution and Independent Counsel (including recordings and call logs), are clearly matter which concern Mr. Bemba's detention. The implementation of such measures therefore triggers a corollary right to file a complaint.

23. Regulation 175(11) of the Regulations of the Registry specifically states that a "detained person whose calls have been actively monitored may file a complaint in accordance with the complaints procedure set out in section 5 of this Chapter"; this right is not conditional on <u>who</u> has ordered the monitoring – it suffices that the detainee's calls have been actively monitored.

24. The cumulative effect of these provisions is that Mr. Bemba has an absolute right to seek a remedy in relation to "any other matter concerning his […] detention", which includes the right to submit a complaint concerning the monitoring of his phone calls.

25. Mr. Bemba's complaint is founded on the question as to whether the provisions of Chapter 6 were correctly applied or wrongly excluded in relation to the monitoring of his communications.

26. Regulation 106(1) by its very nature and purpose must allow for a detainee to be heard in relation to a complaint that the relevant provisions of Chapter 6 have not been applied, or have been incorrectly interpreted.

27. To hold otherwise would create a Catch-22 to the detriment of the detainee's rights: it would allow the Commanding Officer or Registrar to circumvent the complaints regime by simply circumventing the detention regime itself.

28. In the present case, if the provisions of Chapter 6 and their attendant safeguards had been applied, the Defence would have been notified of any decision to monitor the communications of Mr. Bemba, prior to its implementation.[7] The Defence would therefore have had an opportunity to contest the monitoring in a timely manner, and to seek a remedy through the complaints procedure or, to the extent that the monitoring impacts on the fairness of the judicial proceedings, before the Chamber.

29. However, by virtue of the fact that the notification regime in Regulation 175 was not applied, the Defence were excluded from the process. This exclusion – apart from being illegal in itself – has subsequently been relied upon by the Single Judge to deny the Defence any recourse through judicial avenues.

30. In particular, the Single Judge determined that the Defence have no right to seek leave to appeal or reconsideration of *ex parte* measures, issued in the situation phase – notwithstanding the fact that such measures directly impacted on the rights of the defendants in question.[8]

31. If the Defence were also prevented from seeking recourse through the complaints regime, this would mean that Mr. Bemba has absolutely no ability to either contest or be heard in relation to decisions, which strike at the heart of his Defence and detention rights.

32. The jurisprudence of both the ICC and the ad hoc Tribunals recognise that the principles of natural justice dictate that a detainee should have a right to be heard and to have recourse against measures impacting on detention rights.[9]

33. Dismissing Mr. Bemba's complaint *in limine* would also be fundamentally incompatible with the duty of the Court to apply the Statute, Rules and Regulations in a manner, which is consistent with internationally recognised human rights law, as *per* Article 21(3) of the Statute.

34. The right to a remedy is recognised by all human rights instruments, including the Universal Declaration of Human Rights (UDHR), and the International Covenant on Civil and Political Rights

[7] Regulation 175(3).
[8] "neither the Defence for Mr Mangenda nor the Defence for Mr Kilolo have locus standi to request leave to appeal the 8 May 2013, 27 May 2013 and 29 July 2013 Decisions under article 82(l)(d) of the Statute", ICC-01/05-01/13-187, p. 8.
[9] ICC-RoR221-02/09-6-Corr, para. 14; *Prosecutor v. Seselj*, ' Decision on Appeal Against the Registrar's Decision of 19 October 2006', 23 November 2006, http://www.icty.org/x/cases/seselj/presdec/en/061123.htm.

(ICCPR).[10] The right to an effective remedy has been described as a ‘peremptory norm’ of international law, and that it is "axiomatic that an international court […] may not derogate from or fail to comply with such a general norm".[11]

35. The right to a remedy applies even if the persons violating the defendant's rights were acting in an official capacity.[12] It is therefore no answer to rely on the existence of a judicial order, if the judicial order in question violated the law, and Mr. Bemba's rights.

36. If the ICC collectively refuses to provide Mr. Bemba with any avenue to contest the legality of the monitoring, this absence of an effective remedy would in itself, violate Mr. Bemba's rights.[13]

37. Accordingly, even if the Presidency were to find that it cannot exercise jurisdiction over the substance of the Single Judge's orders concerning the monitoring of Mr. Bemba's communications, the Presidency would still retain the competence to issue a finding that Mr. Bemba's right to seek a remedy through the complaints mechanism has been violated.

38. It would also appear that the Registry transmitted transcripts of Mr. Bemba's communications with Mr. Mangenda directly to the Prosecution, in the absence of a judicial order either lifting privilege, or excluding these communications from the scope of the independent counsel's review process.[14]

39. To the contrary, the prior decisions of the Single Judge accepted the premise that Mr. Mangenda's communications with Mr. Bemba were in principle, governed by Rule 73(1) and that any recordings or transcripts should first be submitted to the Independent Counsel for review.[15]

40. In so doing, the Registrar expressly relied on his interpretation of Regulation 97 of the Regulations of the Court, which falls within the Chapter 6 detention provisions.[16]

41. Either Chapter 6 governed the monitoring of Mr. Bemba's communications, or it did not – the law cannot be applied in an arbitrary and unpredictable manner.

[10] Article 8 of the UDHR, and Article 2 of the ICCPR.
[11] In the matter of El Sayed, ‘Order Assigning the Matter to the Pre-Trial Judge', CH/PRES/2010/01, paras. 26 and 35.
[12] Article 2(3)(a) of the ICCPR.
[13] Human Rights Committee, General Comment no. 31, para. 15, CCPR/C/21/Rev.1/Add.13
[14] ICC-01/05-01/13-T-2-Red-ENG, p. 8 lines 15-24.
[15] ICC-01/05-52-Red2.
[16] The Registrar confirms this in his response to the complaint: Annex B, para. 8.

42. It is not permissible to 'cherry pick' from the detention regulations: i.e. to exclude their application in order to avoid the explicit safeguards and restrictions that apply to monitoring Mr. Bemba's communications, whilst invoking them for the purpose of applying a narrower definition of legal privilege than that which might apply pursuant to Rule 73 or customary international law.

43. In any case, the Registrar's refusal to include Mr. Mangenda's communications with Mr. Bemba within the scope of privileged communications was wrong, and triggers a corollary right of review through the detention complaints mechanism.

c. The monitoring, transcription and disclosure of Mr. Bemba's communications was illegal and *ultra vires*

i. The procedure for monitoring, transcribing and transmitting non-privileged communications to the Prosecution was not complied with

44. Neither the Single Judge nor the Registrar had the power to monitor Mr. Bemba's communications without any reference to the applicable regulations, which govern detention.

45. The use of the mandatory term 'shall' in Regulation 89 displaces any judicial discretion to craft an alternative legal regime for detention, or one which conflicts with the regime set out in Chapter 6 of the Regulations of the Court.

46. As noted above, the procedure for suspending the application of the detention regulations was not invoked.

47. When the Judges adopted the Regulations of the Court, they specifically conferred particular powers and duties in the Registrar and the Presidency to regulate detention matters, and thereby excluded the power of the Chamber to otherwise intervene,[17] particularly if it is for a purpose other than securing the rights of the Defence.

48. There was also no lacuna in the Regulations, which would have justified such judicial law making.

[17] ICC-01/04-01/06-87. See also Prosecutor v. Seselj, 'Decision on the Registry Submission Pursuant to Rule 33(b) following the President's Decision of 17 December 2008'4 April 2009.

49. Although the Single Judge briefly considered and rejected the applicability of Regulation 92,[18] he did not consider that the Regulations of the Court and the Registry include specific provisions, which govern the scenario in which there may be grounds to believe that the detainee is engaged in an offence against the administration of justice.

50. Regulation 101 of the Regulations of the Court empowers the Prosecutor to apply to the Chamber to regulate the contacts of a detainee and any other person other than Counsel, including for the purpose of ensuring that such contact does not prejudice the outcome of any proceedings or investigation.

51. Accordingly, if the Prosecution was of the belief that Mr. Bemba was engaged in a scheme to 'bribe witnesses' through his detention communications, then the Prosecution could have applied to the Chamber to order that his right to communicate with such persons be terminated. The Prosecution could have also requested the Chamber to order the Registrar to 'regulate' such contacts through the adoption of ' active monitoring' *per* Regulation 175 of the Regulations of the Registry, in which case, the additional protections of Regulation 175 would have applied.

52. It is notable that a virtually identical request was addressed in the Taylor case at the Special Court for Sierra Leone. The Prosecution requested access to detention logs and the records of Mr. Taylor for the purpose of assisting it with a contempt investigation, and to investigate the possibility that privileged communications may have been misused for the purpose of contacting third persons. The Chamber confirmed that such a situation was governed by Rule 47 of the SCSL Rules of Detention, which is the equivalent provision to Regulation 101 of the ICC Regulations of the Court.[19]

53. Regulation 175(10) further sets out an absolute prohibition on transmitting such transcriptions as evidence of contempt "without prior notice and disclosure to counsel for the detained person".

54. Given that Regulation 175(10) expressly regulates the scenario where the transcribed communication might be relevant to an offence against the administration of justice, it must be

[18] ICC-01/05-46, paras. 7-9.
[19] *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.

considered to be *lex specialis*, which should have governed the Prosecution's request for access to the transcripts of communications.

55. It was therefore illegal and *ultra vires* for any entity within the Court to have monitored and transcribed Mr. Bemba's communications outside of the framework of these provisions.

ii. The procedure for monitoring Mr. Bemba's communications violated procedural fairness, and was inconsistent with internationally recognised human rights law

56. The ICC Presidency has emphasised the importance of respecting the detainee's right to be heard in connection with matters impacting on his detention rights. Even where the Regulations do not require the Registrar to hear the detainee in advance, a detainee should still be afforded a right to be heard prior to the making of a decision affecting detention rights.[20]

57. ICTY case law also emphasises that any decisions, which impact on a defendant's detention rights, should comport with natural justice, and be grounded on credible evidence. Even if there was no legal requirement in the applicable Rules that the detainee must be informed of a request from the Prosecution to regulate contacts, natural justice requires that he be so informed and accorded an opportunity to respond.[21]

58. Had the Defence been afforded a right to be heard at the time when the Prosecution first alleged that the Western Union transfers were evidence of a 'bribery scheme', it could have confirmed the entirely innocent nature of such transactions,[22] and avoided the significant prejudice associated with the Article 70 arrests and irremediably negative impact of the publicity surrounding the Article 70 case.

59. The ICC Presidency has also recognised that by virtue of the operation of Article 21(3), any decision to monitor the communications of a detainee must be firstly, in accordance with the law, secondly, directed at a legitimate aim, and thirdly, consistent with the principles of necessity and proportionality.[23]

60. The Presidency has further elaborated that,

[20] ICC-RoR221-02/09-6-Corr, para. 14.
[21] *Prosecutor v. Seselj*, 'Decision on Appeal Against the Registrar's Decision of 19 October 2006', 23 November 2006, http://www.icty.org/x/cases/seselj/presdec/en/061123.htm
[22] ICC-01/05-01/08-3016, paras. 12, 21, 24.
[23] ICC-RoR221-02/09-6-Corr, para. 45.

> "In considering whether the interference in question is "in accordance with the law", a three-fold test of foreseeability is applied, whereby: the interference must have some basis in law; the law must be accessible; and the law must be formulated with sufficient precision to enable an individual to regulate his or her conduct. In addition, the law "must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, in order to give the individual adequate protection against arbitrary interference"."[24]

61. The European Court of Human Rights has also specified that the particular procedures (and threshold) for the imposition of monitoring must be publicly available.[25]

62. Given the extraordinarily vague terms of Article 57(3)(b) of the Statute, the mere existence of a power to issue investigative orders did not suffice to put Mr. Bemba on notice concerning the specific circumstances under which such a power could be invoked to monitor his communications, or the evidential threshold.[26] His right to privacy (and indeed, legal privilege) cannot be curtailed by an unfettered power, which can be employed on a purely *ex parte* basis.[27]

63. The monitoring of Mr. Bemba's communications cannot therefore be considered to be "in accordance with the law".

iii. The protections afforded by the Statute, Rules and Regulations to privileged communications were not complied with

64. The reasoning employed by the Single Judge to grant the Prosecution access to privileged information was also extremely ambiguous: it is unclear whether he had 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 the 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.

65. The lack of clarity therefore constitutes a failure to provide adequate reasons, which is of heightened importance in proceedings conducted in an *ex parte* manner.[28]

"[24] ICC-01/05-01/08-310, para. 38.
[25] Liberty v. United Kingdom, Application no. 58243/00, Judgment, 1 July 2008, paras 60-69.
[26] Kruslin v France, Application no. 11801/85, Judgment 24 April 1990, paras. 32-36.
[27] Malone v. United Kingdom, Application no. 8691/79, Judgment, 2 August 1984, para.68.
[28] ICC-01/04-01/06-773.

66. 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", which are protected by Rule 73(1). 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.

67. It would 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".[29] The Single Judge thus failed to appreciate that all privileged communications – by their nature – could be relevant to Prosecution investigations. 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.

68. 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".

69. Indeed, the fact that it was considered necessary to add such an explicit exception to Rule 163(iii) of the STL Rules of Procedure and Evidence 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.

70. In this regard, only exceptions to Rule 73(1) privilege are if Mr. Bemba consents in writing to disclosure, or if Mr. Bemba voluntarily discloses the contents to a third party, who then gives evidence of such disclosure.

71. These exceptions are drafted in an unambiguous, and closed manner ("shall be regarded as privileged, and consequently, not subject to disclosure, unless: a)[…]; or b) […]"). If the drafters

[29] ICC-01/05-52-Red2, p. 8.

had intended the rule to provide for an open ended exception, or to confer the Chamber with the discretion to devise other exceptions, then the rule would have so stated.

72. Regulation 97 of the Regulations of the Court also does not provide for any exceptions to the right of the Defence to communicate with the detainee without any form of direct or indirect audio monitoring.

73. Furthermore, Regulation 175(2) of the Regulations of the Registry expressly excludes from the competence of the Registrar the ability to monitor communications between the detained person and his or her counsel.

74. As noted above, the detention provisions were explicitly crafted to accommodate the exigencies and requirements of Article 70 investigations. The existence of an Article 70 investigation therefore does not justify the exclusion of the relevant detention provisions governing privileged communications, nor should it permit the Court to resort to alternative means (such as monitoring by national authorities) in order to evade the protections set out therein.

75. The above regulations on privilege impose a dual obligation on the Registrar: to both respect the privilege set out therein, and to take measures to ensure it was respected.[30]

76. Whilst it may have seemed like a means of circumventing the prohibition on monitoring privileged communications at the detention unit, the fact that States monitored communications between Mr. Bemba's Counsel and Mr. Bemba rendered the protections set out in these regulations illusory.[31]

77. On the basis of the above legal framework, it was not foreseeable that Mr. Bemba's communications with his Defence could be monitored. Mr. Bemba was also never cautioned or notified that any entity within the Court was of the view that he had misused his communication facilities, and that his communications could be monitored as a result.

78. At the time that Mr. Bemba's right to conduct privileged communications his Defence was violated (through monitoring of Counsel by external entities), there were no ICC regulations or case law envisaging such a possibility or such a manner of proceeding.

[30] Human Rights Committee, General Comment no. 31, para. 8 , CCPR/C/21/Rev.1/Add.13
[31] Campbell v. United Kingdom, Application no. 13590/88, 25 March 1992, para. 46.

79. This incursion into Mr. Bemba's right to privileged communications with his Defence was therefore neither certain, accessible or foreseeable.

80. There was also no basis under Article 21 to adopt additional exceptions to legal privilege.

81. In terms of the existence of such an exception at the STL, theoretical rules, which are adopted to regulate the hypothetical detention of persons being tried for terrorism offences *in absentia*, are not a sound basis for comparison under Article 21(2). 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." (emphasised added).[32]

82. Notably, the legal basis relied upon by the Single Judge to lift privilege clearly specified that this exception to legal privilege cannot be applied unless it is explicitly provided for in the law (or regulations). Rather than supporting the legality of monitoring Mr. Bemba's privileged communications, the STL precedents underscores the illegality of doing so in the absence of explicit legislation to this effect.

83. The legal position at the STL also qualifies that any such monitoring must be subject to the principles of necessity and proportionality. However, in the case of Mr. Bemba, 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.[33] 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.

84. 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

[32] ' Order on Conditions of Detention', Case No. CH/PRES/2009/01/rev, 21 April 2009, paras. 19-20.
[33] ICC-01/05-52-Red2, p. 8.

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 was dropped in light of concerns from bar associations that it would be incompatible with legal privilege.[34]

85. The SCSL case law cited by the Single Judge also does not support the broad monitoring of the privileged communications between Mr. Bemba and members of his Defence. 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.

86. 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 was 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.[35]

87. In the present case, when the Prosecution applied for authorisation to access privileged communications, the Prosecution completely failed to demonstrate that Mr. Bemba's communications with his legal team directly discussed such crimes, or that there was evidence that Mr. Bemba was complicit in these crimes. The application to access the recordings between Mr. Bemba and Me. Kilolo was based solely on the assertion that Mr. Bemba had allegedly used "KILOLO's status as counsel to circumvent telephone monitoring from the Registry".[36]

88. If this were correct, it would constitute a violation of Regulations – not a crime in itself, which would justify granting the Prosecution access to <u>all</u> of M. Bemba's communications with Me. Kilolo and Mr. Mangenda during the relevant time period.

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[34] ADC-ICTY Report on Draft Code, p 12, <u>http://adc-icty.org/Documents/icc_code_report.pdf.</u>
'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.
http://www.iccnow.org/documents/LR_article22_teampaper_Nov05.pdf.
[35] *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.
[36] ICC-01/05-52-Red2, para. 1.

89. The clear implication of the Prosecution's submissions at this juncture is that it had no actual evidence that Mr. Bemba had misused his telephone privileges for the purpose of furthering the 'bribery scheme' or that he was involved in any other way involved in the ' bribery scheme'. Rather, the Prosecution sought access to Mr. Bemba's privileged communications in order to obtain the evidence, which it should have had in order to justify lifting privilege in the first place.

90. The Prosecution's request for such access was, by its nature, a fishing expedition, which would have not met the threshold for *inter partes* disclosure,[37] let alone the lifting of privilege.

91. 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. Given Mr. Bemba's presumption of innocence and protection against self-incrimination, it would be entirely inappropriate for the Prosecution to take advantage of Mr. Bemba's detention by using the detention facility as a means for gathering evidence against him, in violation of his protection against self-incrimination.[38]

92. 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,[39] rather than to undermine the very purpose of the privilege by covertly monitoring future conversations.

iv. The characterisation of Mr. Mangenda's communications as 'non-privileged' was legally incorrect, failed to take into consideration relevant factors, and was unreasonable

93. As noted above, the transmission of Mr. Mangenda's communications directly to the Prosecution occurred by virtue of an administrative determination by the Registrar that Mr. Mangenda's communications were not 'privileged'.

[37] See for example, ICC-01/04-01/06-2434-Red2, in which Trial Chamber I held that in order to obtain information concerning the identity of Prosecution intermediaries, it was necessary for the Defence to first demonstrate the existence of evidence that there were *prima facie* grounds to believe that the intermediary was involved in collusion (para. 139).
[38] *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.
[39] 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.

94. Regulation 97 of the Regulations of the Court provides for privileged communications between the detainee, his counsel, assistants to counsel as referred to in regulation 68, and interpreters.

95. The scope of this privilege must be considered in light of the fact that the Regulations of the Court only refer to two types of lawyers in Defence teams – Counsel, and persons assisting Counsel (as per regulation 68).

96. Regulation 68 in turn, provides that "persons assisting counsel […] may include persons who can assist counsel in the presentation of the case before a Chamber. The criteria to be met by these persons shall be determined in the Regulations of the Registry". The words "may include" indicates that persons assisting counsel could include persons who assist in the presentation of the case before the Chamber, and it could also include persons who do not. The word 'include' explicitly denotes that this is not a closed list of categories. Regulation 68 therefore includes in its ambit all persons who assist Counsel, whether they assist in the presentation of the case before the Chamber or not.

97. By including both counsel and persons assisting counsel (and interpreters) in Regulation 97, it would appear that the intention of the drafters was to ensure a broad form of privilege, which would encompass all lawyers working for the Defence.

98. 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. There is absolutely no legal or factual justification for excluding his communications from the protection of Regulation 97 simply because he was called a 'case manager', which is a term which is not employed anywhere in the Regulations of the Court or the Registry. The only legal provision which applied to him was in fact, Regulation 68 in that he was a person who assisted Counsel.

99. A broad definition of Regulation 97 is also consistent with Rule 73(1) of the Rules of Procedure and Evidence, which protects information made in the context of the professional relationship with Counsel.

100. Clearly, Rule 73(1) should have applied if Mr. Mangeda had been instructed by Counsel to convey certain information to Mr. Bemba, or if Mr. Bemba had requested the case manager to do

the same, or if the communications concerned matters related to Mr. Bemba's professional relationship with Counsel.

101. The fact that this was indeed the case is evidenced by the Prosecution's explicit recognition that the communications between Mr. Bemba and Mr. Mangenda appeared to contained privileged information.[40]

102. The Registrar also failed to give any consideration to the fact that Mr. Mangenda speaks Mr. Bemba's native language, and in conveying information from different Counsel and team members, performed a role analogous to that of an interpreter (who is also afforded an ancillary right to privilege under Regulation 97 of the Regulations of the Court).

103. Adopting an overly formal or narrow approach to privilege could render its protections illusory, rather than effective.[41] Case managers, by their role, are required to have access to all Defence materials and to be the focal point for all evidential analysis and disclosure. They are, by necessity, aware of all aspects of the case, and involved in all aspects of the case.

104. 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 could evade the restrictions on questioning Counsel or seeking disclosure from Counsel by simply targeting the case manager.

105. For this reason, the ICTY Appeals Chamber has held that persons facilitating the right of Defence Counsel have a derivate right to those protections, which are necessary for Counsel to perform their work.[42]

106. The SCSL has also recognised that the notion of legal privilege cannot be defined in a formal or static manner but must be extended to cover the communications of certain lawyers with

[40] ICC-01/05-01/13-48, para. 1.
[41] Campbell v. United Kingdom, Application no. 13590/88, 25 March 1992, para. 46.
[42] *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. See also advice from the United Nations Office of Legal Affairs to the ICTR Registrar, ICC-01/11-01/11-284-AnxA.

detainees, even if the Rules or Regulations do not expressly include this particular category of lawyers within its definition.[43]

107. Domestic jurisdictions also include junior lawyers and paralegals within the scope of legal privilege, in order to protect the overarching objective of protecting the client's ability to confide in and seek advice from his legal team.[44] Notably, in extending privilege to paralegals in Canada, Master Dash remarked that paralegals fill an "affordability gap in the justice system", and that "[s]ince the client would not be candid with the paralegal if fearful that the communications might be disclosed, the element of confidentiality is essential to the full and satisfactory maintenance of the relation between client and paralegal".[45]

108. Similarly, a narrow definition of privilege for the purposes of Rule 73(1) or Regulation 97 would have significant implications on the ICC's legal aid scheme as it would mean that Counsel would be unable to any tasks of a confidential nature to case managers – in effect, case manager would be unable to store, process or access Defence evidence, or the Defence file for fear of waiving privilege.

109. Even if Regulation 97 can be interpreted to exclude Mr. Mangenda from its ambit, it was unfair and arbitrary to invoke the provisions of Chapter 6 to the detriment of Mr. Bemba's rights, whilst refusing to apply any of the accompanying safeguards.

110. It would be unreasonable to claim that Mr. Mangenda should have known that he could be monitored when the relevant detention regulations specifically stipulate firstly, that the Defence must be notified in advance that the detainee is being actively monitored, and secondly, that the Defence must first be notified and provided any transcripts of monitoring before they are disclosed to the Prosecution, as *per* Regulation 175(10) of the Regulations of the Registry.

111. Even if Mr. Mangenda should have been aware that his communications with Mr. Bemba were not privileged, he still had a legitimate expectation that they were confidential, and would not

[43] *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.
[44] "We hold that a lawyer does not forfeit the attorney-client privilege by receiving otherwise privileged client communications through the conduct of a properly supervised paralegal employee." *Samaritan Foundation v. Superior Court*, 844 P.2d 593 (Ariz. App. Div. 1 1992) at 599.[1]. See also In re French, 145 B.R. 991 (Bankr. S.D. 1992), 162 B.R. 541 (Bankr. S.D. 1994), concerning the fact a paralegal can be considered as an extension of an attorney.
[45] Chancey v. Dharmadi, 86 OR (3d) 612, Ontario Superior Court of Justice, Master Dash, 20 July2007, O.J. No. 2852, para. 46.

be disclosed to the Prosecution without first giving the Defence a right to be heard, and opportunity to assert other forms of confidentiality or privilege.

112. In this regard, 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. Even if case managers do not fall within the ambit of Rule 73(1), they clearly do so as concerns Rule 73(2).

113. Apart from Rule 73(1) and (2) or Regulation 97, there are also a number of articles and rules, which protect material from disclosure to the Prosecution, and which must be respected by the Registrar.

114. Given his role in the case, it was foreseeable that Mr. Bemba would have had discussions with Mr. Mangenda in relation to logistical issues concerning Defence witnesses, matters pertaining the identity and security of those persons and issues concerning ongoing investigations.

115. Article 68(1) of Statute empowers the Chamber to take measures in order to ensure the safety and security of witnesses – including Defence witnesses. Such measures can include ordering the non-disclosure of certain information to the Prosecution pursuant to Rule 81. If such orders emanated from the Trial Chamber, neither the Single Judge nor the Registrar would have had the competence to vary, overrule, or disregard them.[46]

116. Rule 81(1) also creates an internal work product privilege as concerns oral reports provided to Mr. Bemba by any member of the Defence (including Mr. Mangenda) in relation to ongoing Defence discussions on legal, investigative and strategic issues. The jurisprudence of the ICC has also repeatedly found that the Defence cannot be compelled to disclose anything other than witness summaries and evidence, which it intends to rely upon.[47]

117. It was therefore a clear error to fail to give any consideration to the existence of prevailing confidentiality obligations, or to establish any mechanism for ensuring that communications falling within the above categories were not disclosed to the Prosecution.

[46] Regulation 42 of the Regulations of the Court.
[47] See for example, ICC-01/04-01/06-2192-Red, para. 72.

v. The wholesale disclosure of the transcripts of all non-privileged communications during this time period did not comport with Regulations of the Court and the Registry, or the general principles of necessity and proportionality

118. The Prosecution was granted access to all non-privileged communications,[48] irrespective as to whether the material or persons being monitored had any link to the Prosecution's investigations.

119. The Prosecution has confirmed that it only possesses recordings and not transcripts of the intercepted conversations from the detention unit, which were conducted in Lingala.[49] Since no prior translations or transcriptions were prepared by the Registry, it would appear that the recordings were given to the Prosecution *en masse* irrespective of their relevance to the investigation, or potential prejudice to the Defence.

120. The ECHR has emphasised that the procedure for storing, transcribing and using data obtained from phone tapping must be clearly set out in existing legislation.[50] The only such legislation at the ICC is Regulation 175(8) of the Regulations of the Registry. Any transcription or disclosure of Mr. Bemba's communications outside of this legal framework and the safeguards set out therein was therefore *per se* illegal and *ultra vires.*

121. Regulation 175(8) specifies that the Registrar may only transcribe calls which in themselves, breach the Regulations of the Court or the Registry or a Court order –there is no general power to transcribe all monitored communications.

122. Regulation 175(10) then stipulates that the Registrar may only hand over conversations, which have been transcribed (according to the procedure set out in Regulation 175(8)).

123. It therefore follows that the legal regime of the ICC does not permit the Prosecution to access detention communications unless the communication in question meets the criteria set out in Regulation 175(8).

124. The existence of an Article 70 investigation does not justify the abrogation of these safeguards: to the contrary, the explicit referenced to 'evidence of contempt' in Regulation 175(10) underscores the intention that these legal provisions would apply to Article 70 investigations.

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[48] ICC-01/05-44-Red, para. 3.
[49] ICC-01/05-01/13-177.
[50] Weber and Saravia v. Germany, 54934/00, Admissibility decision of 29 June 2006, para. 95.

125. As noted above, the ICC Presidency has also held that any measures taken in connection with a detainee's right to privacy must adhere to the requirements of necessity and proportionality.

126. Neither the Single Judge nor the Prosecution explained or justified why it was necessary for the Prosecution to obtain access to all non-privileged communications. The absence of any legal restrictions in terms of the categories of communications or the identity of the person communicating with Mr. Bemba, in itself, violates the above-mentioned requirement that measures concerning the transcription, use and disclosure of data must be foreseeable.

vi. The disclosure of call logs concerning communications with the Defence at the detention unit violated privilege

127. The European Court of Human Rights has confirmed that not just the content of communications is protected from unwarranted monitoring, but also metadata concerning the communications. [51]

128. Any call logs between Mr. Bemba and members of his Defence was therefore privileged. It would therefore have been illegal and *ultra vires* for the Registrar to transmit this information to the Prosecution in the absence of an explicit judicial ruling lifting or excluding legal privilege.

129. It is, however, clear that the Single Judge did not make such a ruling until 29 July 2013 – that is, after the call data records were disclosed to the Prosecution.[52] The Single Judge's ruling concerning privilege applied to future communications and not past communications.[53] The exclusion of privilege as of the date of 29 July 2013 therefore did not provide a *post facto* guise of legality as concerns the earlier transmission of the call data records.

130. The Single Judge also relied on the call data records to reach his decision to exclude privilege for future communications,[54] thus compounding the initial illegality. But for the illegal transmission of the call data records to the Prosecution, the Single Judge would not have possessed sufficient evidence to lift or exclude privilege. The subsequent monitoring of Me. Kilolo was thus irrevocably tainted by this initial illegality.

[51] Malone v. United Kingdom, Application no. 8691/79, Judgment of 2 August 1984, para. 84.
[52] ICC-01/05-52-Red2.
[53] ICC-01/05-52-Red2, para. 7.
[54] ICC-01/05-52-Red2, para. 3.

D. RELIEF SOUGHT

131. In light of the gravity of the violations and the impact on Mr. Bemba's right to effective legal representation and his privacy rights, it is necessary for there to be an immediate cessation of any additional or continued measures concerning his detention rights, a declaration concerning the illegality of the measures implemented thus far, and to the extent possible, restoration to the *status quo ante*.

132. The Defence for Mr. Bemba therefore requests:

i. A declaration that the monitoring of Mr. Bemba's privileged and non-privileged communications, and the disclosure of recordings, transcripts and calls logs concerning Mr. Bemba's communications were illegal;

ii. The immediate cessation of any active monitoring of Mr. Bemba's communications, or the disclosure of any further information to the Prosecution or Independent Counsel; and

iii. The immediate return to the Defence of the originals of any recordings, transcripts or call logs concerning Mr. Bemba's communications with any person, and the destruction of any copies in the possession of any person or entities other than his Defence.

The whole respectfully submitted.

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The Hague, The Netherlands
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