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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 Request for Leave to Appeal “Decision on 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. INTRODUCTION

1. The Defence for Mr. Jean-Pierre Bemba Gombo respectfully seeks leave to appeal the ‘Decision on “Defence Motion on Privileged Communications” (the Decision), which was issued by the Trial Chamber on 3 June 2014.¹

2. The Decision’s finding that legal privilege is confined to Counsel and Legal Assistants will have profound implications for the confidentiality of the Defence, and its ability to prepare its case in an effective manner, within its limited resources and time.

3. In particular, in light of the role of Case Managers in storing, organising and analysing Defence documents and evidence, the Decision has profound implications concerning the ability of the Defence to entrust any analysis, potential exhibits, investigative notes, or draft submissions (which are privileged up until they are filed) to them.

4. Given the payment and experience differential between Case Managers and Legal Assistants, it is not a realistic choice to staff Defence teams with only legal assistants and Counsel.

5. The Trial Chamber’s reliance on the specific Regulations of the Registry to curtail the scope of legal privilege is also not consistent with the drafting history of Rule 73(1), and creates an insuperable lacuna as concerns the ability of the Defence to assert privilege over sensitive information that will necessarily be conveyed to or from Case Managers and Legal Consultants on the team.

6. Rule 73(1) protects communications, not persons. Whilst the identity of a Defence team member might in itself, create a presumption of privilege, the Trial Chamber erred by failing to consider whether there was a need to determine, on a case by case basis, whether communications of other team members might be privileged.

¹ ICC-01/05-01/08-3080.

7. Such an approach would have been consistent with legal precedent from the SCSL, which has 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 detainees, even if the Rules or Regulations do not expressly include this particular category of lawyers within its definition.²

8. The issue as to whether the Trial Chamber erred by restricting legal privilege to Counsel and Legal Assistants therefore arises from the Decision, and affects significantly the fair and expeditious conduct of the proceedings. An immediate resolution of the issue would materially advance the proceedings.

B. SUBMISSIONS

The issue arises from the Decision

9. The Defence requested the Trial Chamber to issue an order that all current members of the Defence team are entitled to privileged communications with Mr. Bemba.

10. Rather than considering the proper interpretation or drafting history of Article 67(1) or Rule 73(1), the Trial Chamber resolved the issue by relying on the specific Regulations of the Registry, which define and establish the administrative requirements for being designated a ‘legal assistant’.³

11. On this basis, the Trial Chamber determined that these provisions make,

“it clear that privilege is afforded to (i) counsel, whether lead counsel or co-counsel, and (ii) assistants to counsel, as referred to in Regulation 68 of the Regulations, who satisfy the requirements of Regulations 124 to 127 of the Regulations of the Registry. Nothing in the legal framework of the Court extends legal privilege to an accused's communication with persons who do not meet these

² *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.

³ ICC-01/05-01/08-3080, para. 18.

requirements, regardless of whether they "assist" counsel in the broad sense of the word."⁴

12. Regulation 1(1) of the Regulations of the Court specifies that the Regulations must be read in a manner which is subject to the Statute and Rules. Accordingly, whereas Regulation 97(1) of the Regulations of the Court sets out an absolute prohibition as concerns monitoring the communications of Counsel, interpreters and legal assistants, there is nothing in the Regulation which excludes the extension of privilege to other persons, if their communications fall within the framework of Rule 73(1).

13. Regulation 97(1) stipulates that the defendant shall be informed of his right to communicate fully with Counsel and assistants. It does not stipulate that the defendant may only communicate fully with Counsel and assistants.

14. The absence of a presumption of protection from Regulation 97(1) for communications involving other members of the Defence does not eliminate privilege from their communications, if they would otherwise fall within the protection of Rule 73(1).

15. Whereas communications between case managers and consultants might be passively monitored, it is clear from the criteria set out in Regulation 175 that communications between the defendant and case managers and consultants on matters protected by Rule 73(1) should never trigger the threshold for active monitoring *per* Regulation 175(1).

16. Similarly, Regulation 175(8) only permits the Registrar to disclose the transcripts of recordings if firstly, the transcripts are evidence of contempt (in that the call itself has breached the Regulations or a Court order), and secondly, the Defence has first been accorded an opportunity to receive the transcripts and thus raise any issues of privilege.

⁴ ICC-01/05-01/08-3080, para. 19.

17. Accordingly, the absence of a presumption of absolute confidentiality as concerns the communications between case managers and consultants and the defendant does not in any way displace the expectation that firstly, communications on privileged issues would never be actively monitored, and secondly, the Defence would be provided with an opportunity to assert privilege over the contents of any communications before their disclosure to the Prosecution.

18. In the absence of any restrictive wording in Regulation 97(1) which excludes Rule 73(1) from the ambit of the communications of case managers and consultants, the Trial Chamber was thus obliged to consider the precise meaning of “communications made in the context of the professional relationship between a person and his or her legal counsel”, and ensure that its interpretation was consistent with Article 67(1)(b), the sources of law set out in Article 21, and past decisions concerning privilege.

19. Of particular concern, by noting at paragraph 21 that Counsel should consider not revealing protected information to other members of the team in order to preserve privilege, the Trial Chamber appears to conflate ‘legal privilege’ with a right to communicate directly and confidentially with the defendant, and fails to consider that the protection under Rule 73(1) aims to ensure the confidentiality of all communications made in the context of the professional relationship between a defendant and his Counsel, and not just communications directly between Counsel and client.

20. It is thus broader than just the right to communicate with the defendant without being monitored: it conveys legal professional privilege on all Defence communications made in the context of the professional relationship between Counsel and client (i.e. for the purpose of defending Mr. Bemba before the ICC).

21. As observed in a Human Rights Watch commentary on the draft rule concerning privileges, “[t]he Rule should clarify that that the privilege attaches not to certain persons, but to certain types of matters: the privilege prevents disclosure of information

communicated for the purpose of facilitating the provision of the service or support, be it legal, medical, psycho-therapeutic, or spiritual”.⁵

22. This interpretation of privilege was applied in the *Mbarushimana* case, in which the Single Judge confirmed that legal privilege under Rule 73(1) extends to “documents setting out factual and background information which were prepared for use in the defence of Mr. Mbarushimana in criminal legal proceedings instituted against him”. The overarching criteria are thus the content of the communications, the purpose for which the communication was prepared, and the expectation of confidentiality pending use of the information in litigation.

23. In construing the protection afforded by Rule 73(1), it is necessary to take into consideration that Rule 73(1) was modelled on Rule 97 of the ICTY Rules of Procedure and Evidence, which in turn, appears to have been based on a proposal from Lawyers Committee for Human Rights (an American NGO).⁶

24. Rule 73(1) is thus ultimately derived from the United States notion of legal privilege, which includes both legal advice between the Defence and the client, and litigation privilege, which protects documents prepared for litigation from disclosure.

25. According to US commentators, this notion of privilege includes “reports, memoranda, or other internal defence memoranda’ which may contain an attorney’s mental impressions, conclusions, opinions, or legal theories”⁷ and further recognises that “lawyers must act through investigators and other agents who prepare and aid in preparing documents and document summaries for trial preparation and their reports and

⁵ HRW Commentary to the Preparatory Commission Rules of Evidence and Procedure for the International Criminal Court, Part 1, February 1999, (Draft Rule 108) <http://www.hrw.org/legacy/campaigns/icc/docs/prepcom-feb99.htm>

⁶ V. Morris and M. Scharf, An Insider’s Guide to the International Criminal Tribunal for the former Yugoslavia (Transnational Publishers 1995) Vol. 2, page 566.

⁷ J. Wesley Hall Jr, Professional Responsibility in Criminal Defense Practice, (Thomson West, 1996, 2nd ed), page 1089.

memoranda are privileged”.⁸ Privilege therefore attaches to communications prepared by agents or employees prepared under the direction of the lawyer, for the purpose of legal advice.⁹

26. To hold, point blank, that because of a legal aid technicality, communications between case managers and consultants and the defendant cannot be considered as privileged, and can therefore be disclosed to the Prosecution, creates a prejudice that far outweighs any administrative or technical advantage in excluding privilege from such persons.

27. If a Case Manager, acting under the direction of Counsel, conveys information concerning Defence strategy or evidence to the defendant, then the prejudice engendered by the disclosure of such information to the Prosecution is the same whether such information had been conveyed by Counsel or the Case Manager.

28. The overly narrow approach adopted by the Trial Chamber is this wholly contrary to the object and purposes of Rule 73(1).

29. It is also no answer to simply recall that the

“the surveillance regime applied by the Registry, which is in accordance with the scope of legal privilege set out in the relevant legal provisions and discussed above, has been applied throughout the present case and every other case before the Court. The Chamber notes the proper recourse for the accused to challenge a decision by the Registrar would have been through an application to the Presidency for review of the Registrar's decision, pursuant to Regulations 220bis and 221 of the Regulations of the Registry.”¹⁰

⁸ J. Wesley Hall Jr, Professional Responsibility in Criminal Defense Practice, (Thomson West, 1996, 2nd ed), page 1090.

⁹ J. Wesley Hall Jr, Professional Responsibility in Criminal Defense Practice, (Thomson West, 1996, 2nd ed), page 1037.

¹⁰ ICC-01/05-01/08-3080, para. 23.

30. The Trial Chamber is well aware that the surveillance regime applied by the Registry, as set out in the applicable legal provisions, has not been applied in every case before the ICC. Specifically, it was not applied in the Article 70 investigation concerning Mr. Bemba, which is the very reason why the Defence request was filed.

31. The particular protections of the Regulations concerning active monitoring and the Regulation 175 requirement of notice and prior disclosure to the Defence were completely circumvented, and as a result, the Defence had no opportunity to contest the transmission of highly sensitive and confidential information concerning Defence strategy (including its strategy concerning Mr. Bemba's Final Trial Brief) to the Prosecution.¹¹

32. It is also no answer to recall that the Defence can raise such an issue before the Presidency. The Defence did attempt to avail itself of this mechanism, only to have its complaint dismissed *in limine*.¹² At the same time, due to the fact that the monitoring measures were ordered in the CAR situation, the Article 70 Single Judge ruled that the Defence had no standing to contest the monitoring measures.¹³

33. For this reason, the Decision leaves the Defence with no protection as concerns its ability to ensure that privileged information concerning the Main Case, that might be within the communications of case managers and consultants, is not disclosed to the Prosecution on an *ex parte* basis, i.e. without prior notice and disclosure to the Defence.

34. Since it is illogical to rule that the communications between case managers and consultants with Mr. Bemba are not privileged, but any internal records or documents prepared by them are, the Decision also creates a gaping lacuna as concerns the ability of the Defence to ensure confidentiality in an effective manner. For example, if a Case Manager, who attends a meeting with the defendant, prepares minutes of such a

¹¹ ICC-RoR221-03/14-1, paras. 44-63.

¹² ICC-RoR221-03/14-3-Conf-Exp.

¹³ ICC-01/05-01/13-187, page 8.

meetings– is that document privileged? If Mr. Bemba calls a legal consultant to discuss a particular legal issues related to the Final Brief, does the lifting of privilege for that call mean that any related documents that were discussed during the call are also no longer privileged?

35. The issue as to whether the Trial Chamber erred by restricting legal privilege to Counsel and Legal Assistants therefore clearly arises from the Decision

The issue significantly affects the fairness and expeditiousness of the proceedings

36. The Decision states that,

“While counsel is free to employ staff of different qualifications to work under his or her direction, the fact that counsel opts to be assisted by persons other than legal assistants who meet the criteria set out in Regulations 124 to 127 does not entitle him or her to an extension of the scope of privileged communication beyond what is provided for in the Court's legal framework.”¹⁴

37. The Defence respectfully disagrees with the notion that it had the freedom or effective ability to compose its team with a specific view to ensuring the effective protection of legal privilege.

38. As a result of the events of last year, the Defence was compelled to compose the team, at short notice, in a manner that ensure to the extent possible, continuity and expertise within its limited budget. That was achieved by hiring interns, who were familiar with the case, to perform the role of Case Manager between them.

39. Regrettably, these persons do not meet the criteria for Legal Assistant as they do not possess the five year requirement. Due to the volume of work that needed to be done, it was also more efficient to recruit three persons at a lower rate, than one legal assistant.

¹⁴ ICC-01/05-01/08-3080, para. 21.

40. It bears noting that notwithstanding the fact that both Counsel and Case Manager were withdrawn with no notice or handover period, the Defence never requested an extension of time to adjust to such circumstances.

41. It is therefore fundamentally unfair to rule that the Defence right to privilege should be sacrificed as a result of its good faith efforts to do everything within its power to ensure Mr. Bemba's right to an expeditious trial.

42. The Decision thus creates a conflict between the right of the Defence to communicate with Mr. Bemba in confidence, and its right to adequate time and resources to prepare its Defence (Article 67(1)(b)). It also discriminates between Defence teams which have the means and time to compose their teams of Counsel and Legal Assistants, and those which do not.

43. The concrete result of the Decision –if unmodified – will be that the Defence cannot confide any confidential information or documents to Case Managers and Legal Consultants. In fact, according to the terms of the Decision, such persons should perform only administrative tasks or purely legal tasks.

44. Not only does this not reflect the reality and requirements of Defence practice before the ICC, it creates an impossible burden for Counsel, in terms of their ability to monitor and restrict the distribution of information to other members of the team, and to delegate tasks accordingly.

45. For this reason, domestic systems 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, whilst limiting legal aid

costs.¹⁵ 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”.¹⁶

46. The Decision also significantly affects the ability of Mr. Bemba to protect his incrimination against self-incrimination. Legal privilege is a fundamental aspect of this privilege – without it, a defendant cannot consult with his Defence in confidence without the real fear that his queries and concerns could be communicated to the Court.

47. An overly technical definition of privilege fails to recognise the overarching importance of this right, and the impact on the administration of justice which is caused through the disclosure of such information to the Prosecution.

48. Irrespective of the correct interpretation of specific legal aid provisions concerning the definition of “persons assisting Counsel”, the Trial Chamber’s duty to ensure the fairness of the proceedings in this case is not achieved under circumstances in which the Trial Chamber fails to address the broader question as to whether the information in question should be protected from disclosure to the Prosecution, and whether Defence confidentiality and Mr. Bemba’s protection against self-incrimination would be prejudiced through disclosure to the Prosecution.

An immediate decision would materially advance the proceedings

¹⁵ “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.

¹⁶ *Chancey v. Dharmadi*, 86 OR (3d) 612, Ontario Superior Court of Justice, Master Dash, 20 July 2007, O.J. No. 2852, para. 46.

49. As noted by the Appeals Chamber in its “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”,¹⁷

“A wrong decision on an issue in the context of Article 82(1)(d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process. In those circumstances, the proceedings will not be advanced but on the contrary they will be set back.”

50. In deciding upon a request under article 82(1)(d), the Trial Chamber “must ponder the possible implications of a given issue being wrongly decided on the outcome of the case [which] involves a forecast of the consequences of such an occurrence”.¹⁸

51. In the present case, an immediate resolution of the issues by the Appeals Chamber is required to ensure that the defendant’s protection against self-incrimination under article 67(1)(g), and right to adequate time and facilities (Article 67(1)(b) are fully and effectively implemented.

52. If the Trial Chamber had resolved the issue incorrectly, and this Decision formed the basis for the provision of communications from Case Managers or Consultants to the Prosecution, such improper access to privileged information could constitute an abuse of process, which could require the proceedings to be stayed on a permanent basis.¹⁹ The

¹⁷ ICC-01/04-168, para. 16.

¹⁸ ICC-01/04-168, para. 13.

¹⁹ See for example, *HKSAR v Wong Hung Ki* (黃洪基) [2010] 4 HKC 118, 11 May 2010, in which the Court ordered a permanent stay of the proceedings due to the fact that the Prosecution had inappropriately listened to intercepts of privileged conversations. The Court found that “The adversarial system could not work justly if lawful confidential communications between client and legal adviser were not insulated from law enforcement authorities responsible for investigating and prosecuting a case. But for the astute preservation of that confidentiality, the process by which we determined guilt or innocence was undermined. In general, therefore, where there was a deliberate violation of a suspected person’s right to legal professional privilege, that constituted an affront so great to the integrity of the system of justice and therefore the rule of law that the associated prosecution was rendered abusive and ought not to be countenanced by the court.”

gravity of an unlawful or unwarranted violation of privilege is such that these issues cannot and should not be deferred to the final judgment or appeal.

53. The Decision has engendered significant practical impediments as concerns the ability of the Defence to organise its preparation for the Final Trial Brief. According to the clear terms of the Decision, if Counsel delegate confidential tasks to Case Managers or Consultants, or even request them to handle or store internal work product, they risk lifting privilege and violating their duty under Article 8 of the Code of Conduct.

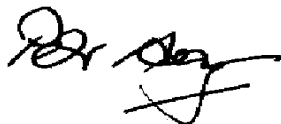
54. An immediate decision would serve to remove doubts about the correctness of the course of action to be followed by the Defence, and “map a course of action along the right lines [thereby providing] a safety net for the integrity of the proceedings.”²⁰

C. RELIEF SOUGHT

55. For the reasons set out above, the Defence for Mr. Jean-Pierre Bemba Gombo respectfully requests the Single Judge to,

GRANT leave to appeal, pursuant to Article 82(1)(d), in relation to the issue as to whether the Trial Chamber erred by restricting legal privilege to Counsel and Legal Assistants.

The whole respectfully submitted.



Peter Haynes, QC

Lead Counsel of Mr. Jean-Pierre Bemba

²⁰ ICC-01/04-168, para. 15.

Done this day 09 June 2014

In The Hague, The Netherlands