

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 14 August 2014

TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
*v. JEAN-PIERRE BEMBA GOMBO***

Public

**Decision on "Defence Request for Leave to Appeal 'Decision on Defence
Motion on Privileged Communications'"**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

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Counsel for the Defence

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Ms Kate Gibson

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Amicus Curiae

Registrar

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber III ("Chamber") of the International Criminal Court ("Court") in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* ("Bemba case") issues the following "Decision on 'Defence Request for Leave to Appeal the 'Decision on Defence Motion on Privileged Communications'" ("Decision").

I. Background and Submissions

1. On 3 June 2014, the Chamber issued its "Decision on Defence Motion on Privileged Communications" ("Impugned Decision"),¹ in which it rejected all requests by the defence of Mr Jean-Pierre Bemba Gombo ("defence"),² including, *inter alia*, the request that the Chamber order that Mr Bemba should enjoy privileged communications with all members of his current defence team.³
2. On 9 June 2014, the defence filed its "Defence Request for Leave to Appeal 'Decision on Defence Motion on Privileged Communications'" ("Request for Leave to Appeal"),⁴ in which it seeks leave to appeal the following issue ("Issue"):⁵

whether the Trial Chamber erred by restricting legal privilege to Counsel and Legal Assistants.
3. The defence submits that "[r]ather 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

¹ Decision on "Defence Motion on Privileged Communications", 3 June 2014, ICC-01/05-01/08-3080.

² ICC-01/05-01/08-3080, paragraph 50.

³ ICC-01/05-01/08-3080, paragraphs 14 to 26, and 50.

⁴ Defence Request for Leave to Appeal 'Decision on Defence Motion on Privileged Communications', 9 June 2014, ICC-01/05-01/08-3084.

⁵ ICC-01/05-01/08-3084, paragraph 8.

assistant””.⁶ The defence argues that the Chamber restricted legal privilege to Counsel and Legal Assistants on this basis.⁷

4. First, to show that the Issue arises from the Impugned Decision, the defence refers to the Chamber’s interpretation of the scope of privileged communications.⁸ Referring to the ICC legal framework, the jurisprudence of the Court and of the Special Court for Sierra Leone, the legal provisions applied before the *ad hoc* International Criminal Tribunal for the former Yugoslavia, and the “United States notion of legal privilege”,⁹ the defence sets out its definition of legal privilege.¹⁰ The defence argues that legal privilege should apply to “all communications made in the context of the professional relationship between Counsel and client” and that legal privilege should depend on the content of the communications rather than on the status of the person exchanging confidential information with the accused.¹¹ The defence further submits that the absence of explicit reference in the ICC legal framework to communications involving other members of the defence team as privileged does not prevent these communications from falling within the protection of Rule 73(1).¹² The defence concludes that the Chamber adopted an overly narrow approach that is “wholly contrary to the object and purposes of Rule 73(1)”.¹³
5. The defence further submits that the prejudice engendered by the disclosure of information concerning defence strategy or evidence to the prosecution is the same whether such information is conveyed by the Counsel or by the Case Manager, acting under the direction of Counsel.¹⁴ In addition, the defence

⁶ ICC-01/05-01/08-3084, paragraph 10.

⁷ ICC-01/05-01/08-3084, paragraph 11.

⁸ ICC-01/05-01/08-3084, paragraph 11, citing ICC-01/05-01/08-3080, paragraph 19.

⁹ ICC-01/05-01/08-3084, paragraph 24.

¹⁰ ICC-01/05-01/08-3084, paragraphs 12 to 25.

¹¹ ICC-01/05-01/08-3084, paragraphs 19 and 22.

¹² ICC-01/05-01/08-3084, paragraphs 13 and 14.

¹³ ICC-01/05-01/08-3084, paragraph 28.

¹⁴ ICC-01/05-01/08-3084, paragraph 27.

submits that the Impugned Decision leaves it with no ability to ensure that privileged information concerning the *Bemba* case is not disclosed to the prosecution on an *ex parte* basis.¹⁵

6. Turning to the question of whether the Issue significantly affects the fairness and expeditiousness of the proceedings, the defence argues that it did not have “the freedom or effective ability to compose its team with a specific view to ensuring the effective protection of legal privilege”.¹⁶ It submits that the Impugned Decision 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 [d]efence”.¹⁷ It further argues that, because of the Impugned Decision, the defence “cannot confide any confidential information or documents to Case Managers and Legal Consultants”, which conflicts with reality and the requirements of defence practice.¹⁸
7. In addition, the defence argues that the Impugned Decision significantly affects the accused’s protection against self-incrimination and that the Chamber “fail[ed] 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”.¹⁹
8. The defence submits that an immediate resolution 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”.²⁰ The defence argues in

¹⁵ ICC-01/05-01/08-3084, paragraphs 29 to 33.

¹⁶ ICC-01/05-01/08-3084, paragraph 37.

¹⁷ ICC-01/05-01/08-3084, paragraphs 36 to 42.

¹⁸ ICC-01/05-01/08-3084, paragraphs 43 to 45.

¹⁹ ICC-01/05-01/08-3084, paragraphs 46 to 48.

²⁰ ICC-01/05-01/08-3084, paragraph 51.

particular that if the Chamber “had resolved the issue incorrectly, and [the Impugned] Decision formed the basis for the provision of communication 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”.²¹ The defence further argues that the Impugned Decision “has engendered significant practical impediments as concerns the ability of the Defence to organise its preparation for the Final Trial Brief” and submits that, were leave to be granted, “[a]n immediate decision would serve to remove doubts about the correctness of the course of action to be followed by the Defence”.²²

9. On 13 June 2014, the prosecution filed its response to the defence Request for Leave to Appeal (“Response”),²³ in which it submits that the Issue as framed by the defence is a hypothetical concern and not an appealable issue within the terms of Article 82(1)(d) of the Statute.²⁴
10. As a preliminary issue, the prosecution asserts that the defence discusses the merits of the Issue at length, but the prosecution states that the correctness of a decision is irrelevant in assessing an application for leave to appeal.²⁵ Accordingly, the prosecution states that it has not addressed the defence arguments on the merits of the Issue.²⁶
11. The prosecution supports its contention that the Issue is a hypothetical concern by noting that none of the communications referred to in the Request for Leave to Appeal are being monitored or provided to the prosecution.²⁷

²¹ ICC-01/05-01/08-3084, paragraph 52.

²² ICC-01/05-01/08-3084, paragraphs 53 and 54.

²³ Prosecution’s Response to the Defence Request for Leave to Appeal the “Decision on Defence Motion on Privileged Communications”, 13 June 2014, ICC-01/05-01/08-3090.

²⁴ ICC-01/05-01/08-3090, paragraph 2.

²⁵ ICC-01/05-01/08-3090, paragraph 3.

²⁶ ICC-01/05-01/08-3090, paragraph 3.

²⁷ ICC-01/05-01/08-3090, paragraphs 5 to 11

12. The prosecution further clarifies that it is not privy to any privileged information pertaining to the current defence's preparation in the *Bemba* case, as monitoring of conversations took place prior to 24 November 2013 and only concerned a limited number of former members of the defence team, namely Mr Kilolo and Mr Mangenda. The prosecution therefore submits that the Impugned Decision has no practical consequence for the current members of the defence team.²⁸ Finally, the prosecution argues that since the Issue is an abstract one, it would not impact on the fair and expeditious conduct of the proceedings, nor would an immediate resolution by the Appeals Chamber materially advance the proceedings.²⁹

III. Analysis and Conclusion

13. For the purpose of the present Decision and in accordance with Article 21(1) of the Statute the Chamber has considered Articles 67 and 82(1)(d) of the Statute.

14. In deciding on the Request for Leave to Appeal, the Chamber is guided by the established jurisprudence of this Chamber and of the Court regarding the interpretation of Article 82(1)(d) of the Statute. In line with this jurisprudence, for a request for leave to appeal to be granted, the party seeking leave to appeal should identify specific "issues" which were dealt with in the relevant decision and which constitute the appealable subject.³⁰

15. The Appeals Chamber has held that "[o]nly an 'issue' may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic

²⁸ ICC-01/05-01/08-3090, paragraphs 9 to 11.

²⁹ ICC-01/05-01/08-3090, paragraphs 12 and 13

³⁰ Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168 OA3, paragraph 9; *see also* Decision on the "Defence Request for Leave to Appeal the Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute", 30 October 2012, ICC-01/05-01/08-2399, paragraph 9.

requiring a decision for its resolution, not merely a question over which there is a disagreement or conflicting opinion [...]. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one.”³¹ In addition, Article 82(1)(d) of the Statute cannot be used to litigate abstract or hypothetical issues.³²

16. Accordingly, the Chamber has examined the Request for Leave to Appeal according to the following criteria:

- a) Whether the matter is an “appealable issue”;
- b) Whether the issue at hand would significantly affect:
 - i. the fair and expeditious conduct of the proceedings; or
 - ii. the outcome of the trial; and
- c) Whether, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.³³

17. The three criteria mentioned above are cumulative and therefore, failure to fulfil one or more of these criteria is fatal to an application for leave to appeal.³⁴

³¹ ICC-01/04-168, paragraph 9; *see also* ICC-01/05-01/08-2399, paragraph 10.

³² Decision on the Prosecutor’s Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 18 September 2009, ICC-01/05-01/08-532, paragraph 17; Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure, 25 August 2008, ICC-01/05-01/08-75, paragraph 11; Decision on the Defence Request for leave to appeal the 21 November 2008 Decision, 10 February 2009, ICC-02/04-01/05-367, paragraph 22; Decision on the “Defence Request for Leave to Appeal the ‘Urgent Decision on the ‘Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence’ (ICC-01/09-01/11-260)”, 29 August 2011, ICC-01/09-01/11-301, paragraph 34; Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges, 9 March 2012, ICC-01/09-02/11-406, paragraphs 50 and 61.

³³ Decision on the prosecution and defence applications for leave to appeal the “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 26 January 2011, ICC-01/05-01/08-1169, paragraph 23; *see also* ICC-01/05-01/08-2399, paragraph 11.

³⁴ ICC-01/05-01/08-1169, paragraph 24; *see also* ICC-01/05-01/08-2399, paragraph 12.

18. The Issue identified by the defence is “[w]hether the Trial Chamber erred by restricting legal privilege to Counsel and Legal Assistants”.³⁵
19. The defence argues that “[r]ather than considering the proper interpretation or drafting history of Article 67(1) or Rule 73(1), the Trial Chamber resolved the issue [of the scope of legal privilege] by relying on the specific Regulations of the Registry”.³⁶
20. Contrary to the defence’s submission, the Chamber analysed the relevant legal provisions from the Statute, the Rules, the Regulations, and the Regulations of the Registry, including Article 67(1) of the Statute and Rule 73(1) of the Rules.³⁷ Then, rather than “restricting” the scope of legal privilege, the Chamber found that a plain reading of the relevant legal provisions “ma[d]e it clear that privilege is afforded to (i) counsel, whether lead counsel or co-counsel, and (ii) assistants to counsel”.³⁸
21. Despite the defence’s misrepresentation of the Impugned Decision, there still exists a disagreement on the part of the defence with the Chamber’s interpretation of the relevant provisions. According to the defence, “[i]n 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 ... 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’”.³⁹ However, the defence fails to identify any legal error on the part of the Chamber in its interpretation of Rule 73(1). At paragraphs 17 to 19 of the Impugned Decision, the Chamber considered all relevant legal provisions, including Rule 73(1) of

³⁵ ICC-01/05-01/08-3084, paragraphs 8, 35, and 55.

³⁶ ICC-01/05-01/08-3084, paragraph 10.

³⁷ ICC-01/05-01/08-3080, paragraphs 17 to 18.

³⁸ ICC-01/05-01/08-3080, paragraph 19.

³⁹ ICC-01/05-01/08-3084, paragraph 18.

the Rules, and reached a finding as to their meaning. The defence merely sets out a different interpretation of Rule 73(1),⁴⁰ which it argues is supported by ICC jurisprudence⁴¹ and various supplementary means of interpretation.⁴² In view of the above, the Chamber finds that in the Issue the defence merely expresses a disagreement with the Chamber's finding, which does not constitute an appealable issue.

22. In addition to the above, the Chamber notes the defence's general assertion that, as a result of the Impugned Decision, the accused is prejudiced as counsel cannot share "confidential information" with other members of the team.⁴³ The Chamber considers that this assertion is based on a confusion between confidential information and privileged communications. Pursuant to Article 8(3) of the Code of Professional Conduct for counsel, a counsel may, under certain conditions, reveal to other members of his or her team confidential information that he or she may have acquired through privileged communication with the accused. Therefore, the defence's argument that the Impugned Decision prevents counsel from sharing "confidential information" with other members of the defence team is incorrect.

23. In addition, the Chamber concurs with the prosecution's argument that the Issue raised by the defence is of a hypothetical nature. The Chamber considers that the defence starts from the premise that the scope of legal privilege

⁴⁰ ICC-01/05-01/08-3084, paragraphs 19 to 25.

⁴¹ The Chamber observes that the defence refers to *The Prosecutor v. Callixte Mbarushimana* to support its definition of legal privilege, albeit without citing any specific reference: ICC-01/05-01/08-3084, paragraph 22. The defence asserts that "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 defence then argues that "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". The Chamber considers that the defence's reference to the *Mbarushimana* case is misleading. In that case, the Single Judge had to determine which communications from among a larger body of communications between an accused and his legal counsel were privileged: see ICC-01/04-01/10-237; ICC-01/04-01/10-277; ICC-01/04-01/10-286; and ICC-01/04-01/10-314. The Single Judge at no point addressed the question of whether case managers or persons other than counsel enjoy privileged communication.

⁴² ICC-01/05-01/08-3084, paragraphs 21 and 23 to 25.

⁴³ ICC-01/05-01/08-3084, paragraph 43.

should be extended in order to prevent the content of privileged communications from being monitored and potentially communicated to the prosecution. For example, the defence states that “privileged information concerning the Main Case ... *might* be within the communications of case managers and consultants”.⁴⁴ However, in its submissions underlying the Impugned Decision,⁴⁵ and also in its Response,⁴⁶ the prosecution explained that it had not requested monitoring of conversations between the accused and any members of the current defence team and that it had only been granted limited access to conversations collected by the Registry prior to 24 November 2013.

24. In the Impugned Decision, the Chamber considered the defence’s concerns that information exchanged during privileged communication might be monitored and communicated to the prosecution. Recalling the prosecution’s submission that it was not aware of any monitoring of the current defence team, the Chamber found that the prosecution’s “representations adequately address[ed] any uncertainty in respect of this matter...”⁴⁷ In light of the above, the Chamber considers that the alleged prejudicial impact of the Impugned Decision is hypothetical and therefore cannot be taken into consideration in the present Request.

25. As the Issue identified in the Request for Leave to Appeal is not an appealable issue, the Chamber does not need to address the remaining criteria set out in paragraph 16 above.

26. For the foregoing reasons, the Chamber hereby DENIES the Request for Leave to Appeal.

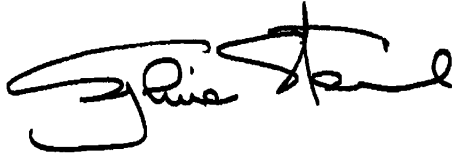
⁴⁴ ICC-01/05-01/08-3084, paragraph 33 (emphasis added).

⁴⁵ ICC-01/05-01/08-3080, paragraph 39 citing the Prosecution’s Response to the “Defence Motion on Privileged Communication”.

⁴⁶ ICC-01/05-01/08-3090, paragraphs 8 to 10.

⁴⁷ ICC-01/05-01/08-3080, paragraph 39.

Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 14 August 2014

At The Hague, the Netherlands