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

Date: 06/02/2014

TRIAL CHAMBER III

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

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

Public with Public Annex A

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:

The Office of the Prosecutor

Fatou Bensouda

Jean-Jacques Badibanga

Counsel for the Defence

Peter Haynes QC

Kate Gibson

Legal Representatives of the Victims

Marie-Edith Douzima-Lawson

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented

(Participation/Reparation)

Applicants

**The Office of Public Counsel for
Victims**

Paolina Massida

**The Office of Public Counsel for the
Defence**

Xavier-Jean Keita

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

A. BACKGROUND

1. The International Criminal Court has authorised the recording and monitoring of privileged communications between Mr. Bemba and members of his former Defence team.¹

2. On 7 January 2014, the Registrar of the ICC appointed or confirmed the appointment of current Defence team members to represent Mr. Bemba in the present proceedings.

3. On 16 January 2014, the Defence wrote to Ms. Fatou Bensouda, Prosecutor of the International Criminal Court, addressing the question of the ongoing monitoring privileged Defence communications with Mr. Bemba (see Annex A).

The letter asked, *inter alia*:

[...] 15. Is the monitoring of Mr Bemba's communications from the UNDU ongoing?

16. If so, which communications are being monitored? Are his communications with his current legal team being monitored? If so, which members, and why?

17. Are his meetings with his lawyers at the DU being monitored? What about the holding cell of the ICC courtrooms? If so, for how long has that been occurring?

18. *Mutatis mutandis*, who has monitored these meetings, determined relevance, and who has had access to the materials etc.? [...]

27. Is the monitoring of other communication devices ongoing? Does it involve the monitoring of any current member of the Bemba defence team?

4. On 22 January 2014, the Prosecution replied to the Letter. (see Annex B). The Prosecution did not respond to the questions concerning the ongoing monitoring of the Defence team, noting only that:

¹ ICC-01/05-52-Red2.

All steps taken during the Article 70 investigation were taken subject to the judicial control and review of the Single Judge of PTC II and, when required, the relevant judicial authorities of the countries involved.

The Office of the Prosecutor did not desire, or gain access to, any privileged communication or material. The Single Judge appointed an Independent Counsel to exclude any privileged information from the material which was then further reviewed by the Single Judge before it was made accessible to the OTP.

5. On 3 February 2014, the Defence received the public redacted version of the *Decision on the Prosecutor's "Request for judicial order to obtain evidence for investigation under Article 70"*,² originally issued on 29 July 2013, which authorised the monitoring of otherwise privileged communications between members of the Defence team and Mr. Jean-Pierre Bemba.

B. APPLICABLE LAW

6. Each of the international tribunals protects legal professional privilege, and ensures that counsels are able to communicate with their clients in a confidential manner.³ Legal professional privilege recognises that “these relationships are founded in trust and that a court of law should not be empowered to impinge upon that trust.”⁴ Both the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), and the Special Tribunal for Lebanon (“STL”) have relied on principles established by the European Court of Human Rights, namely “[i]f a lawyer were unable to confer with his client and receive confidential instructions from him without [...] surveillance, his assistance would lose much of its usefulness”; the rights of the defence, of which this right is an indispensable component, are one of

² ICC-01/05-52-Red2.

³ Sluiter et al., *International Criminal Procedure*, (OUP 2013), p. 873.

⁴ *Ibid.*, p. 876.

the foundations of the concept of a fair trial.⁵ His Honour Judge Cassese held that this right has achieved the status of customary international law that “the right is now accepted in customary international law as one of the fundamental human rights relating to due process”.⁶

7. At the International Criminal Court, Article 67(1)(b) of the Rome Statute (“the Statute”) provides that accused before the Court will have the ability “to communicate freely with counsel of the accused's choosing in confidence”. Article 69(5) of the Statute provides that “the Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.”

8. Rule 73 of the Rules of Procedure and Evidence (“the Rules”) concerns “Privileged communications and information” and provides:

1. Without prejudice to article 67, paragraph 1 (b), communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure, unless:

- (a) The person consents in writing to such disclosure; or
- (b) The person voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

2. Having regard to rule 63, sub-rule 5, communications made in the context of a class of professional or other confidential relationships shall be regarded as privileged, and consequently not subject to

⁵ *Before the President*, CH/PRES/2009/01/rev, Order on Conditions of Detention (“STL Order”), 21 April 2009, para. 16; *Prosecutor v. Seselj*, 17 Dec 2008, para. 22 citing *Case of Ocalan v. Turkey*, ECRH, Appeals Judgement of 12 May 2005, para. 133, citing *Brennan v. the United Kingdom*, ECRH Appeals Judgement of 16 October 2001, paras. 38-40 recalling that Article 8(2)(d) of the American Convention on Human Rights provides that anyone accused of a criminal offence has the right to communicate freely and privately with counsel of his choice; Article 93 of the Standard Minimum Rules for the Treatment of Prisoners (Council of Europe) provides that a detainee must be able to prepare and hand to his attorney and to receive confidential instructions and that interviews between a detainee and his legal adviser may be within sight but not within hearing, either direct or indirect, of a police or institution official; Article 3(2)(c) of the European Agreement Relating to Persons Participating in Proceedings of the Court of Human Rights sets the principle whereby detainees have the right to communicate with their counsel out of hearing of other persons.

⁶ STL Order, para. 16.

disclosure, under the same terms as in sub-rules 1 (a) and 1 (b) if a Chamber decides in respect of that class that:

- (a) Communications occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure;
- (b) Confidentiality is essential to the nature and type of relationship between the person and the confidant; and
- (c) Recognition of the privilege would further the objectives of the Statute and the Rules.

9. Ensuring that counsel can communicate with their client in a privileged manner is accordingly an essential component of fair trials before the ICC. In the *Lubanga* case, the Pre-Trial Chamber held that legal professional privilege dictates that the Registry can neither listen to conversations between counsel and accused nor can they visually monitor such meetings.⁷ This need for privileged communication was reiterated in a decision by the *Lubanga* Trial Chamber, which ordered the Registry to ensure resources necessary to the functioning of the team. The Trial Chamber held that the Defence must be provided with appropriate means as regards to offices, electronic access, and access to the accused on a privileged basis.⁸

C. SUBMISSIONS

10. It is impossible for members of the current team to continue to represent Mr. Bemba without the ability to take instructions and provide advice in a confidential setting.

11. Having sought specific information as to whether privileged communications between members of the current Defence team and Mr. Bemba are or have been monitored, recorded, or provided to the Prosecution, independent

⁷ Pre-Trial Chamber I, *Prosecutor v. Lubanga*, Transcript, ICC-01/04-01/06-T-30-EN, 9 November 2006.

⁸ *Prosecutor v. Lubanga*, Decision reviewing the Registry's decision on the legal assistance for Mr Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry, ICC-01/04-01/06-2800, 30 August 2011. *But see* Appeal Chamber rejecting "Decision on the "Registrar's Submissions under Regulation 24bis of the Regulations of the Court In Relation to Trial Chamber I's Decision ICC-01/04-01/06-2800" of 5 October 2011", ICC-01/04-01/06-2823, 21 November 2011.

investigators/counsel or other third parties, the Defence has still no clarity on this point. As such, the Defence makes the request set out below.

D. RELIEF REQUESTED

12. The Defence requests that the Chamber

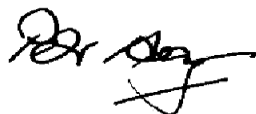
ORDER that Mr. Bemba should enjoy privileged communications with members of his current Defence team;

ORDER the cessation of any monitoring or recording of communication between Mr. Bemba and his current Defence team, including but not limited to the monitoring or recording of phone conversations, meetings at the UNDU or the holding cell at the ICC premises;

ORDER the cessation of any monitoring of communication devices of members of the current team whether by the Registry, the Prosecution or any national authorities; and

ORDER the Prosecution to respond to the questions set out in the Letter of 16 January 2014 concerning the monitoring of privileged communications and or communications devices of the members of the current Defence team.

The whole respectfully submitted:

A handwritten signature in black ink, appearing to be 'Dr. [unclear]', written in a cursive style.

Peter Haynes QC
Lead Counsel of Mr. Jean-Pierre Bemba

The Hague, The Netherlands

6 February 2014