

Annex A

**DEFENCE MOTION ON PRIVILEGED
COMMUNICATIONS**

Mr Peter Haynes, QC
Lead Counsel for Mr Bemba
International Criminal Court
Maanweg 174
2516 AB Den Haag
The Netherlands

Ms Fatou Bensouda
Chief Prosecutor of the International Criminal Court
International Criminal Court
Maanweg 174
2516 BA Den Haag
The Netherlands

The Hague, 16 January 2014

Subject: Prosecutor – v- Jean-Pierre Bemba Gombo

Dear Madam Prosecutor,

As you are aware, I have recently been assigned as Lead Counsel to the above-named accused whose case is in trial before Trial Chamber III. The circumstances leading to my appointment need little amplification. They arose from the arrest of the accused, together with 4 others, including his former Lead Counsel and Case Manager on 23 November 2013 for offences allegedly committed contrary to Article 70 of the Rome Statute relating to the administration of justice.

Although, I am not instructed to represent the accused in relation to the Article 70 investigation, there is an inevitable overlap, and I assume that the Office of the Prosecutor has no objection to the accused sharing and discussing with me the materials disclosed to him thereunder. To date, I wish to make it plain, save in the most general sense, that has not occurred. Nonetheless, it does seem to me that the conduct of that investigation, both to date and ongoing, may potentially impact upon the fairness of the proceedings currently before Trial Chamber III.

Unless, the proceedings before Trial Chamber III are to be stayed, pending a full resolution of the Article 70 investigation, it seems inevitable that they will conclude before all the details of the conduct and fruits of the latter are known. To that end, I would be obliged, insofar as you are able, if you would assist me with a number of enquiries.

The Monitoring of Mr Bemba's telephone calls from the UNDU

1. Have Mr Bemba's telephone calls from the DU been monitored?
2. Over what period of time?
3. Who applied for the monitoring, and who authorised it, and on what basis?
4. Was Mr Bemba or his counsel informed that his calls would be monitored?
5. Which calls were monitored? Privileged calls as well as non-privileged calls?
6. How was Legal professional privilege defined to distinguish between the two types of communication?
7. Specifically, were Mr Bemba's communications with the following monitored:
[REDACTED]?
8. By whom were the calls monitored?
9. Who had access to the tapes or transcripts of monitored communications?
10. Who retained custody of the tapes and/or transcripts of the monitored communications? Were they copied, and if so, to whom?
11. Who retained the records of custody of the tapes or transcripts?
12. Did anybody within the OTP team concerned with the prosecution of Mr Bemba in relation to the situation in the Central African Republic have access to the tapes or transcripts of monitored communications?
13. What, if any, mechanisms were put in place to determine relevance to the Article 70 investigations? What criteria or threshold was applied and by whom?
14. Who was responsible for separating out irrelevant material?
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.?

Monitoring of Other Communications

19. Have the communications devices of any other persons been monitored?
20. In particular, have any communications devices used or belonging to the following been monitored: [REDACTED]?
21. If so, what national authorities were involved in conducting such surveillance?
22. Did the relevant national authorities obtain judicial orders to carry out this monitoring?
23. If so, can we please be provided with copies (redacted if necessary) of the orders, applications, and supporting material?
24. Were the relevant domestic bar associations or batonnier informed of the monitoring in [REDACTED]?
25. Did the ICC obtain confidentiality undertakings from the states concerned relating to the non-disclosure of materials to third parties or other states?
26. *Mutatis mutandis* questions 8-14 *supra*.
27. Is the monitoring of other communication devices ongoing? Does it involve the monitoring of any current member of the Bemba defence team?

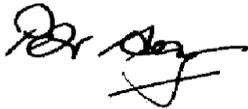
Third Parties and the Trial Chamber

28. Did the OTP ever disclose any information to VWU or any other organ of the Registry of the ICC information concerning the Article 70 investigation?
29. To the knowledge of the OTP did VWU or other organ of the Registry communicate any part of that information to Trial Chamber III?
30. Did the OTP ever disclose to the Legal Representative of Victims in the case of the Prosecutor –v- Jean Pierre Bemba Gombo any information concerning the Article 70 investigation?
31. To the knowledge of the OTP, did the Legal Representative of Victims ever communicate any part of that information to Trial Chamber III?
32. Did the OTP ever refer in any *ex parte* hearing, filing, response or other communication to Trial Chamber III to the Article 70 investigation? If so, please provide us with the filing reference or transcript date, and apply forthwith to the Trial Chamber for the reclassification of the same.
33. Has the Prosecution been provided with any information or material concerning defence team members, defence witnesses or their counsel in relation to the Article 70 investigation by the Registry of the ICC, whether upon request, voluntary filing or order of the court? If so, please specify what material has been provided and the date of its provision.

34. Has any member of the OTP, independent counsel or any OTP intermediary had any contact with any defence witness or their counsel in connection with the Article 70 investigation? If so, please provide the dates of such contact, a description of the form of contact and any notes, transcripts or statements arising therefrom.

Given the fact that the evidence in the trial is almost closed and that the Trial Chamber is currently seized of a prosecution application to extend time limits and present fresh evidence, this is a matter of some urgency. Accordingly, I would be obliged if you could respond within 7 days to this letter.

Yours Faithfully,

A handwritten signature in black ink, appearing to read 'Peter Haynes', with a stylized flourish underneath.

Peter Haynes, QC

RE: Letter from Peter Haynes, QC
Badibanga, Jean-Jacques [REDACTED]

Sent: 21 January 2014 20:23

To: [REDACTED]

Cc: [REDACTED]

Dear Mr Haynes,

The Prosecutor acknowledges receipt of your letter of 16 January 2014 and has asked me to respond. She also insists that such correspondence should in future be addressed to me as the senior counsel leading the Prosecution team in the case of Jean-Pierre Bemba Gombo.

Please note that all proceedings in relation to the Article 70 case are confidential. Judge Cuno Tarfusser was appointed by Pre-Trial Chamber II to be the Single Judge dealing with the Article 70 matter. Moreover, Mr Bemba appointed [REDACTED] as his lawyer and he is the designated recipient of the disclosure of all evidence and material relevant to the Article 70 case. If you find it necessary for the representation of Mr Bemba in the main case to have access to information related to the Article 70 case, you should convey your request through a proper filing before TCIII or PTCII.

By way of general response to the points raised in your letter, please note the following:

- * 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.
- * TC III was not involved in the conduct of the Article 70 investigation. The only information ever shared with the Chamber was made available to the Defence on 6 December 2013 (see, TCIII's order 2920). You also are aware of what was communicated to TC III in our recent application, to which you responded, concerning the reception of further evidence.
- * The OTP has never disclosed any information to any third parties regarding the Article 70 case, beyond what was strictly necessary to further the investigation, and it is not aware of whether any information respecting the Article 70 evidence has been disclosed to the Chamber by third parties.

As indicated, if you have the intention to pursue any discussions pertaining to the art 70 case, we would appreciate that you doing so via formal request to the TCIII or the PTCII.

Best regards

Jean-Jacques Badibanga

Substitut du Procureur / Trial Lawyer
[REDACTED]