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

Date: **09/04/2018**

**TRIAL CHAMBER III**

**Before: Judge Goeffrey Hendersen, Presiding Judge  
Judge Chang-ho Chung  
Judge Kimberly Prost**

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC**

**IN THE CASE OF**

**THE PROSECUTOR  
v. JEAN-PIERRE BEMBA GOMBO**

*Public with Confidential Annex B, Confidential Ex Parte Annexes A and C,  
Only Available to the Office of the Prosecutor, the Bemba Defence in ICC-01/05-  
01/08 and the Article 70 Bemba Defence*

**Request for Access to Filings in case ICC-01/05-01/08**

**Source: Defence for Mr. Jean-Pierre Bemba Gombo in ICC-01/05-01/13**

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**

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**REGISTRY**

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**Registrar**

Herman von Hebel

**Defence Support Section**

**Deputy Registrar**

**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations Section**

Mr Philipp Ambach

**Trust fund for Victims**

Mr Pieter de Baan

**Others**

Trial Chamber VII

## 1. Introduction

1. Mr. Jean-Pierre Bemba hereby requests access to all confidential and confidential *ex parte* filings<sup>1</sup> in ICC-01/05-01/18 that concern his assets and financial status for the purpose of assisting the preparation of his Defence in connection with sentencing proceedings in ICC-01/05/-01/13.
2. On 8 March 2018, the Appeals Chamber upheld Mr. Bemba's convictions under Articles 70(1)(a) and (c) of the Statute, and remitted the case back to Trial Chamber to determine a new sentence in light of its findings.<sup>2</sup>
3. The Single Judge of Trial Chamber VII subsequently issued a scheduling order, which requested:
  - the Registry to file observations concerning solvency of the defendants by 13 April 2018;
  - the Prosecutor to file its submissions by 30 April 2018; and
  - the Defence to file its observations by 30 May 2018.<sup>3</sup>
4. The Single Judge further underscored that the parties were expected to address the "amounts required to satisfy the financial needs of the convicted persons and their dependents".<sup>4</sup>
5. As parts of its preparation for this sentencing phase, it will therefore be necessary for the Defence to have an accurate picture of:
  - a. The specific assets that have been attributed to Mr. Bemba and/or members of his household;

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<sup>1</sup> The term 'filings' should be consider to comprise all motions, requests, responses, replies, annexes, decisions, orders, transcripts and reports filed in the court record, whether it be in the context of legal aid litigation, indigence assessments, the asset freeze, or reparations.

<sup>2</sup> ICC-01/05-01/13-2276, para. 361.

<sup>3</sup> ICC-01/05-01/13-2277

<sup>4</sup> ICC-01/05-01/13-2277, fn. 3.

- b. The legal and factual basis for attributing ownership to specific persons;
  - c. The current value of these assets;
  - d. The status of the asset freeze as concerns these assets;
  - e. Any legal impediments/liens/debts to *bona fide* third persons or States; and
  - f. Whether the asset in question is capable of generating an income (including whether sources of income related to Mr. Bemba's status as Senator will continue to be provided after the elections).
6. As a result of the fact that Mr. Bemba's assets were frozen by Trial Chamber III, a significant amount of this information is subject to confidentiality orders in this case, dating from 2008 onwards, and is thus unavailable to Mr. Bemba's Article 70 Defence team. Both the Registry and the Prosecution have indicated that it would be necessary for the Article 70 Defence to obtain an order from Trial Chamber III in order to access confidential information in their possession that may have been filed before Trial Chamber III.
7. The Defence therefore submits the current request to obtain access to all confidential and *ex parte* filings concerning Mr. Bemba's financial status and the related asset freeze, that are likely to be of assistance to the current sentencing phase of the Article 70 case. The current request is justified insofar as:
- a. The filings concern live issues before Trial Chamber VII, and are therefore relevant to the preparation of the Defence;
  - b. The Defence has, to the extent possible, identified the category of information to which access is being sought; and
  - c. There are no countervailing reasons that would justify denying the Article 70 Defence access to these filings, at this stage of the proceedings in either Case No. ICC-01/05-01/08 or the Article 70 case.

## 2. Submissions

8. The filings sought by the Defence fall into three categories as concerns their confidentiality level:
- a. Filings concerning Mr. Bemba's assets/financial status that can only be accessed by the Registry and/or experts appointed by the Registry (Category 1);
  - b. Filings concerning Mr. Bemba's assets/financial status that can only be accessed by the Prosecution and the Registry in this case (Category 2);
  - c. Filings concerning Mr. Bemba's assets/financial status that can be accessed by the Main Case Defence, but which are not accessible to the Article 70 Defence due to their confidentiality level (Category 3).

### *Category 1*

9. From the date of his arrest until the current day, there have been multiple Registry filings in Case No. ICC-01/05-01/08 concerning Mr. Bemba's financial status, the Registry's assessment as to his potential entitlement to legal aid and financial obligations to his dependents, and the related freeze of his assets. Although some of these filings were disclosed to the Defence, many were not, including filings that concern the basis for the Registry's conclusions concerning the ownership of particular assets, and whether Mr. Bemba has the means to freely dispose of them.<sup>5</sup>
10. In its 2016 Main Case sentencing report, the Registry informed the Trial Chamber that "information classified under seal are known to the accused and, upon the Chamber's order via email of 7 April 2016, can be shared at

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<sup>5</sup> See for example, ICC-01/05-01/08-3375-Conf-AnxII, which refers to a number of filings which are still classified as 'under seal'.

this stage with the parties for the purpose of the sentencing phase.”<sup>6</sup> However, although this appears to constitute an express admission that the under seal classification for these filings was no longer justified, the underlying filings themselves have yet to be reclassified or otherwise made available to the Defence.

11. In the context of its Article 70 sentencing observations, the Registry provided its overall conclusions, but not the legal or factual basis for these ultimate conclusions.<sup>7</sup> The Article 70 Defence consequently lacks the means to assess the reliability and accuracy of the Registry’s calculations, or to otherwise conduct meaningful consultations with the defendant and his family in relation to which assets can be easily and expeditiously disposed of in order to fulfil judicial orders issued in the Article 70 case.

12. Although the Statute and Rules do not impose any disclosure obligations *per se* on the Registry, the ICTY Appeals Chamber found, in the *Zigic et al* case, that:<sup>8</sup>

procedural fairness dictates that the accused be afforded the right to be heard. Bearing in mind that the withdrawal of legal aid may well impact negatively upon the accused's ability to conduct his defence in the relevant criminal proceedings in the Tribunal, such a right entitles the accused to be given (a) notice of the allegations against him, (b) notice in reasonable detail of the nature of the material upon which the contemplated action is to be based, and (C) the opportunity to respond to that material.

13. The ICTY President has further underscored that “[a]dministrative decisions are not pronouncements of Delphic oracles, and should be comprehensible on their face”.<sup>9</sup>

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<sup>6</sup> ICC-01/05-01/08-3375-Conf-AnxII, p. 4.

<sup>7</sup> ICC-01/05-01/13-2081-Conf-Exp-AnxI-B

<sup>8</sup> *Prosecutor v. Kvočka et al.*, Decision on Review of Registrar’s Decision to Withdraw Legal Aid from Zoran Zigic, 7 February, 2003, Case No. IT-98-30/1-A at para. 39

14. The ICC Presidency has endorsed the *Zigic* standards concerning the contours of judicial review of a decision of the Registry.<sup>10</sup> In the Article 70 case itself, Mr. Bemba's co-defendants have been authorised to receive documentation transmitted to the Registry from national authorities concerning the implementation of ICC requests to seize or freeze financial assets.<sup>11</sup>
15. For these reason, in 2016, in the context of submissions concerning Mr. Bemba's indigence, the Defence requested the Registry to transmit any information in its possession that were relevant to Mr. Bemba's financial status. The Registry did not respond to these requests,<sup>12</sup> and confirmed verbally that the Defence would need to seize Trial Chamber III with a request to access the information in question.<sup>13</sup>
16. Trial Chamber VII has also granted multiple requests from the Defence to access confidential information concerning Mr. Bemba and his Defence, even if the information in question is otherwise known to Mr. Bemba or could be collected independently.<sup>14</sup> Indeed, the fact that the information is 'known' to Mr. Bemba eliminates the justification for restricting access in the first place.
17. The possibility that the information is unknown to the Defence also should not operate as a bar to its transmission to the Defence for the purposes of preparation for sentencing. Trial Chamber VII granted a Prosecution request to obtain access to financial information collected by the Registry in relation

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<sup>9</sup> *Prosecutor v. Karadzic*, 'Decision on the Request for Review of Registrar Decision and for Summary Reversal', 7 May 2012, para. 10.

<sup>10</sup> ICC-RoC85-01/08-3-Conf, para. 21.

<sup>11</sup> ICC-01/05-01/13-893, para.23; ICC-01/05-01/13-411-Red, p. 4 (reclassifying relevant information in order to enable access to the Defence for Mr. Kilolo).

<sup>12</sup> ICC-01/05-01/13-1997-Conf-Exp-Anx1-Red2, paras. 5-6.

<sup>13</sup> Meeting of 9 April 2018 with the Director of Judicial Services.

<sup>14</sup> ICC-01/05-01/13-2028-Corr, para. 7; ICC-01/05-01/13-1095, para. 6.

to the costs associated with Defence witnesses in the Main case,<sup>15</sup> and a significant portion of the evidence relied upon to convict Mr. Bemba also emanated originally from the Registry. Provided that the requested information is relevant to Defence preparation (which it is), the fact it emanates from the Registry should not, therefore, operate as a bar to Defence access.

18. It would also be in the interests of justice and judicial economy to make this information available before, rather than after the Registry files its observations in the Article 70 case. The Article 70 Defence recently met with the Registry in order to determine which factual matters are, or are not in dispute, whether there is relevant information available to the Defence which can be communicated to the Registry, without violating the privacy rights of third parties, and the manner in which the defendant can best assist with the timely payment of the fine imposed by Trial Chamber VII.<sup>16</sup> These are complex issues, which will require considered analysis and consultations with Mr. Bemba and his family members, and potential research into domestic law. Bearing in mind that the Defence must also respond to the sentencing submissions of the Prosecution, it would be unfair and inefficient to postpone the ability of the Defence to review the relevant information further.

19. The timely transmission of such information would also be consistent with the ICTY President's caution that the duty to disclose the underlying factual and evidential foundation for administrative determinations cannot be satisfied through *post hoc* rationalisation to the Chambers seised of any request for review.<sup>17</sup>

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<sup>15</sup> ICC-01/05-01/13-2026.

<sup>16</sup> Annex C.

<sup>17</sup> *Prosecutor v. Karadzic*, 'Decision on the Request for Review of Registrar Decision and for Summary Reversal', 7 May 2012, paras. 9, 11,



20. A judicial order mandating the transmission of the requested information is therefore required to ensure that Mr. Bemba can exercise his right to be heard in an effective manner in relation to the Registry's determination of the value of his assets, and the Trial Chamber's subsequent decision as to whether to base its judgment on this determination.

*Category 2*

21. The Defence is aware of at least one *ex parte* Prosecution filing that concerns Mr. Bemba's assets, and which would be likely to assist the Article 70 Defence preparation for sentencing. The Defence also has grounds to believe that several more exist.

22. Specifically, in 2017, in order to ensure that Mr. Bemba would be in a position to pay any fine upheld by the Appeals Chamber, the Defence requested the Main Case Appeals Chamber to direct the Registry to take steps to preserve the value of funds in Mr. Bemba's DRC bank account, and ensure the availability of these funds if and when the sentence became final.<sup>18</sup>

23. In response to this application, the Prosecution filed *ex parte* submissions concerning proceedings in the DRC regarding the contents of this bank account.<sup>19</sup> The existence of these submissions were revealed to the Defence through the Appeals Chamber's decision, which noted that:<sup>20</sup>

proceedings relating to the specific bank account to which the Request refers are currently pending before the Trial Chamber, on a confidential *ex parte*, only available to the Prosecutor and the Registry basis. With respect to the classification of this and other proceedings

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<sup>18</sup> ICC-01/05-01/08-3548-Red.

<sup>19</sup> ICC-01/05-01/08-3551-Conf-Exp.

<sup>20</sup> ICC-01/05-01/08-3560, para. 8.

concerning the freezing of Mr Bemba's assets, whether or not all or some of them should be or remain confidential *ex parte* or under seal is for now a question for the Trial Chamber to consider, without prejudice to any eventual appellate jurisdiction of the Appeals Chamber.

24. The wording of this decision, namely "whether or not all or some of them should be or remain confidential *ex parte* or under seal", confirms the existence of multiple *ex parte* filings that relate to Mr. Bemba's assets, or proceedings concerning these assets.

25. After this decision was notified, the Article 70 Defence requested the Prosecution to disclose any information or documentation in its custody concerning Mr. Bemba's assets that had not been disclosed previously.<sup>21</sup> And, if such information was subject to protective measures in the Main case, the Defence further requested the Prosecution to seek the necessary authorisations to disclose the information to the Bemba Defence. This request fell squarely within the four corners of Trial Chamber III decisions, which affirmed the Prosecution's ongoing duty to disclose materials from other cases that might fall within the scope of article 67(2) or Rule 77.<sup>22</sup> Logically, if the Prosecution collects information that falls within the scope of either Article 67(2) or Rule 77, the duty to disclose this information also does not disappear merely because the Prosecution subsequently refers to the underlying information in confidential filings in a different case.<sup>23</sup>

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<sup>21</sup> Annex A.

<sup>22</sup> ICC-01/05-01/08-3336, para. 50 ; ICC-01/05-01/08-3100, para. 44; ICC-01/05-01/08-3255, para. 84; ICC-01/05-01/08-3070, paras 19, 24, and 27. Trial Chamber III further clarified that in order to rely on ongoing investigations in one case in order to avoid disclosure in another, the Prosecution was requested to file a specific application to the Chamber in the second case, in order to be exempted from disclosure: ICC-01/05-01/08-3255, para. 83. Given that the Prosecution filed multiple requests to Trial Chamber III to vary the confidentiality level of Main Case filings and documents in order to enable the Prosecution to comply with its disclosure obligations in the Article 70 case (see for example, ICC-01/05-01/08-3098-Red; ICC-01/05-01/08-3074-Conf) the Prosecution also adduced no cogent reason as to why it would not do so in relation to the information requested by the Defence.

<sup>23</sup> In the *Banda & Jerbo* case, the ICC Appeals Chamber confirmed that the Prosecution remained obliged to disclose information filed confidentially in the *Bashir* case, to the Defence in the *Banda &*

26. The Prosecution nonetheless refused to disclose the underlying information, averring that the duty fell on the Defence to seek access to the information in question from Trial Chamber III. This position conflates, erroneously, the procedure for requesting the disclosure of Article 67(2) and Rule 77 information with the procedure for requesting judicial access to confidential filings.<sup>24</sup> It also dilutes, unfairly, the Appeals Chamber's repeated findings that the Prosecution's responsibility for identifying and disclosing relevant information should not be shifted entirely from the Prosecution to the Defence.<sup>25</sup>

27. Without prejudice to the right of the Defence to seek a remedy for any prejudice occasioned by the Prosecution's failure to disclose this information in the Article 70 case, the Defence requests the Chamber to grant the Defence access to any filings and documentation submitted by the Prosecution in this case, which concern Mr. Bemba's assets or financial situation.

28. The Prosecution has itself recognised that the even if the burden for disclosure under Article 67(2) or Rule 77 has not been met, the Defence may still seek judicial authorization to access the same information, since the burden for justifying such access is lower.<sup>26</sup>

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*Jerbo* case, and further referred to the Prosecution's duty to review and revise the classification levels of filings in other cases in order to enable it to fulfil its disclosure obligations in a timely and efficient manner: ICC-02/05-03/09-501, paras. 42, 43.

<sup>24</sup> In its response to previous Defence requests to access Main case filings, the Prosecution acknowledged that the legal basis, and threshold for access to filings was different from disclosure: ICC-01/05-01/13-1162, para. 37: "The ad hoc Tribunals have allowed a somewhat lower level of demonstration of materiality and specificity for "access requests" compared with "disclosure requests" under provisions substantially similar to the Court's article 67(2) and rule 77".

<sup>25</sup> ICC-02/05-03/09-501, para. 34: "The Prosecutor has an obligation to disclose information that is material to the preparation of the defence pursuant to rule 77 independently of any request from the defence. In this regard, the Appeals Chamber notes the difference in wording between rule 77 and its equivalent at the ICTY and the International Criminal Tribunal for Rwanda (hereinafter: "ICTR"), in which specific provision is included for a request by the defence to be made. No such requirement appears in rule 77."

<sup>26</sup> ICC-01/05-01/13-1162, para. 37.

29. That burden is fully met in relation to the current application. Since the parties have been directed to file submissions concerning the amount of Mr. Bemba's assets and his ongoing financial obligations, the requested information is directly relevant to such submissions and the Defence therefore has a legitimate forensic basis to access it. The fact that the Prosecution and Registry are aware of information that has not been disclosed to the Defence places the Defence at a distinct disadvantage as concerns its ability to respond to their observations. Even if the Prosecution does not intend to use this information itself, the Defence should be afforded the opportunity to do so, or to consider whether it might impact on the observations of the Registry or the Prosecutor on these issues.

30. Most importantly, and bearing in mind the "low burden" that applies (i.e. that it is "likely" to assist the Defence), there is no countervailing reason not to grant the Defence access. Trial Chamber III did not impose a fine or order for forfeiture. Although reparation proceedings are ongoing, the Prosecution is not a "party" to these proceedings, and therefore has no legitimate basis for withholding access so as to preserve its rights in ongoing investigations or prosecutions.

31. The Appeals Chamber has stressed that the purpose of the Prosecution's investigative functions is to collect information that can be disclosed, and used in adversarial proceedings, not hoarded away.<sup>27</sup> Since Mr. Bemba intends to pay the fine through the funds in this account, it is critical that any information that could be relevant to this account is disclosed as soon as possible so that the Defence can obtain meaningful instructions as to how

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<sup>27</sup> ICC-01/04-01/06-1486, para. 41: "It follows from article 54 (1) of the Statute that the investigatory activities of the Prosecutor must be directed towards the identification of evidence that can eventually be presented in open court, in order to establish the truth and to assess whether there is criminal responsibility under the Statute."

best to pay the fine in a timely manner. Essentially, if Defence is not granted access to this information now, the question is, then when? Once again, since the purpose of disclosure is to enable the Defence to prepare its case and to have adequate time and facilities to do so, the Prosecution cannot simply sit on this information, and only reveal it when it is strategically apposite to do so.<sup>28</sup>

### *Category 3*

32. The Registry's Article 70 assessment of the value of Mr. Bemba's assets referred to information provided by Mr. Bemba or his Defence in the Main Case at various points in time, including in 2008 and 2009, although the exact reference to particular filings was not provided.<sup>29</sup> Since the information emanates from Mr. Bemba or his lawyers, he clearly has the right to discuss it with his lawyers, including in the Article 70 case.

33. Both Judge Tarfusser, in the Article 70 case, and Trial Chamber III have recognised as such. In response to a request from the Main Case Defence to access filings in the Article 70 case, Judge Tarfusser observed that there was no separation between the defendant and Counsel; thus, if Mr. Bemba was entitled to access filings, he was also entitled to share such filings with his

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<sup>28</sup> See also *Prosecutor v. Hadzihasanovic et al.*, 'Decision on Motion by Mario Cerkez for Access to Confidential Supporting Material', IT-01-47, 10 October 2001, para. 13: "The prosecution appears to be concerned that the Motion is a disguised attempt to circumvent the prosecution's initial discretion under Rule 68. The Trial Chamber does not accept that this is so. It rejects the prosecution's submission that, where the purposes for which access is sought to confidential material are the same or coincide with the purposes of a Rule 68 review, a party cannot be granted access to the remaining material unless it is shown that the prosecution abused its discretion under that Rule. The prosecution does *not* control the access which a party may have to material available within the Tribunal. Nor, unfortunately, has the prosecution always complied with its obligations under Rule 68 in a timely manner. In any event, the range of material within the Tribunal to which a party may legitimately seek access may well be wider in the particular case than the class of documents which must be disclosed pursuant to Rule 68. It is certainly not for the prosecution to attempt to categorise them in a way which avoids its obligation, as a Minister of Justice, to assist the defence to present its case where a legitimate forensic purpose has been established."

<sup>29</sup> ICC-01/05-01/13-2081-Conf-Exp-AnxI-B

lawyers, in both cases.<sup>30</sup> Trial Chamber III subsequently approved of this ruling, and further relied on the absence of any barrier between Counsel and Client in order to assess whether the Prosecution's failure to disclose Article 70 materials in the Main Case, which were available to Mr. Bemba in the Article 70 case, had occasioned prejudice to the Defence.<sup>31</sup>

34. The Prosecution has also expressed its understanding that "that Mr Bemba has access to all disclosure made in both cases and that it is for him to determine the extent to which this material is shared with counsel."<sup>32</sup> Although this position applied to disclosure, the logic underpinning it also applies to filings, as reflected by the fact that pursuant to a written request from Mr. Bemba, the Main Case Defence were granted access to all confidential and confidential *ex parte* (Bemba Defence only) filings in the Main Case.

35. Irrespective as to whether this approach should apply reciprocally to the Article 70 Defence, the Article 70 Defence have a clear forensic interest in receiving all confidential filings, including those submitted by the Defence, that concern Mr. Bemba's financial status. Given that there are multiple such filings and oral submissions, spanning from 2008 until the present, submitted by a variety of different Counsel,<sup>33</sup> it would be extremely difficult for the Defence to identify all such filings and transcripts by date and title, without access to the court records themselves.

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<sup>30</sup> "Jean Pierre Bemba has indeed access to all of documents which his Counsel in the Main Case wishes to access and is therefore entitled to decide whether, and to what extent, he shall or shall not share such access with his Counsel": ICC-01/05-01/13-338, p.4.

<sup>31</sup> ICC-01/05-01/08-3070, para. 26.

<sup>32</sup> ICC-01/05-01/08-3255, para. 78.

<sup>33</sup> Mr. Bemba has been represented by Mr. Tjarda Van der Spoel, Mr. Karim Khan QC (as Co-Lead Counsel), Mr. Nkwebe Liriss, Mr. Kilolo, and Mr. Peter Haynes QC.

36. Mr. Bemba has indicated that he consents to the Article 70 Defence accessing confidential and confidential *ex parte* (Defence only, or Defence and Prosecution only) filings.<sup>34</sup> The Appeals Chamber has also confirmed that it is not necessary to vary the confidentiality level of Main Case filings in order to enable the Article 70 Defence to use such filings in the Article 70 case, provided that the parties, who have access to the filing, remain the same as the Main Case (that is, either Bemba Defence only, or Bemba Defence and Prosecution only).<sup>35</sup> Conversely, an order would be required if the Defence intended to transmit the filings to other participants in the Article 70 case (such as the Defence teams for Mr. Kilolo and Mr. Mangenda).<sup>36</sup> Since Trial Chamber VII has indicated that sentencing submissions concerning Mr. Bemba's assets should only be notified to the Prosecution and the Bemba Defence,<sup>37</sup> the Defence does not anticipate that it would be necessary to transmit the contents of any Main Case filings to any other parties.

37. Given this backdrop, the Defence requests the Trial Chamber to grant the Defence access to all filings that can be accessed by the Main Case Defence, subject to the two following provisos:

- a. The Article 70 Defence will only rely on, or cite to information in filings that concern Mr. Bemba's financial status or financial obligations;
- b. The Article 70 Defence will not transmit the filings (or any information in the filings) to any person outside of the Article 70 Defence, and, if citing to information in such filings, will do so on a Bemba Defence, Prosecution only basis.

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<sup>34</sup> Annex B.

<sup>35</sup> ICC-01/05-01/08-3560, para. 9.

<sup>36</sup> Trial Chamber III issued an order allowing the Article 70 Bemba Defence to transmit confidential filings to other parties in the Article 70 case, but did not require the Article 70 Bemba Defence to seek an order for prior access to the content of the filings (see ICC-01/05-01/08-3331-Corr, para. 36, which addresses the Defence request as a request for transmission. In contrast, the Chamber addressed the request of other Defence teams as a request for access (see, for example, para. 11).

<sup>37</sup> ICC-01/05-01/13-2277, para. 4.

### 3. Relief Sought

38. For the reasons set out above, the Article 70 Defence for Mr. Bemba requests the Honourable Trial Chamber to grant the Defence access to the requested filings.



Melinda Taylor  
Counsel for Mr. Jean-Pierre Bemba

Dated this 9<sup>th</sup> day of April 2018

The Hague, The Netherlands