



Original: **English**

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

Date: 30/10/2018

**TRIAL CHAMBER III**

**Before:** Judge Geoffrey Henderson, Presiding Judge  
Judge Chang-ho Chung  
Judge Kimberly Prost

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC**

*Public Redacted*

*With confidential ex parte Annexes A and B*

**Public Redacted version of "Response to Redacted version of the Registry's Observations on Mr. Bemba's Request for Reclassification of Information relating to Mr Jean-Pierre Bemba Gombo's Assets"**

**Source:** 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**

**Counsel for Mr. Bemba**

Peter Haynes QC

Kate Gibson

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented**

**Applicants**

**(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

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

**States' Representatives**

**Amicus Curiae**

## **REGISTRY**

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**Registrar**

Peter Lewis

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Trust Fund for Victims**

1. Those who take possession of other people's property, thereby hold that property on trust for that other person, the beneficiary or legal owner of the property.<sup>1</sup> As trustees, they have duties to account for the property they have taken (which cannot be derogated), and to protect and preserve it until it is returned.<sup>2</sup> Those basic and fundamental principles are reflected in the rules and protocols that apply to prosecuting authorities who take possession of property within the context of criminal proceedings.<sup>3</sup> By way of illustration of this point, Mr. Bemba points to the way in which his property of lesser value has been accounted for by the Court and the very same states that we are now concerned with, Belgium, Portugal and the Democratic Republic of Congo (DRC).

2. When he was arrested in May 2008, the police forces of Belgium and Portugal seized certain items of his personal property.<sup>4</sup> Inventories of those seizures were made by the local police forces, passed with the property to the ICC Prosecution, and disclosed as material in the case. No part of the process was conducted *ex parte* or under seal. Following his acquittal, that property has been (or is about to be) returned. Every item can be checked against the original inventories.

3. The same principles apply to all property effectively taken from Mr. Bemba, whether it be [REDACTED]. Those who freeze and seize assets thereby become

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<sup>1</sup> See, e.g. (UK) The Law of Property Act 1925, s53(2); *Westdeutsche Landesbank Girozentral -v- Islington LBC* [1996] 2 WLR 802; *Omojole -v- HSBC Bank PLC* [2012] EWHC 3102; *Re Gillingham Bus Disaster Fund* [1958] Ch 300; (US) *Harvard Law Review* vol. 27 pp. 437-463; (Can) see e.g. <http://www.duhaime.org/LegalResources/ElderLawWillsTrustsEstates/LawArticle-341/Constructive-and-Resulting-Trusts.aspx>.

<sup>2</sup> See, e.g. (all US) *Ferguson v. Mueller*, 115 Colo. 139, 169 P.2d 610 (1946) (every trust beneficiary is entitled to a court accounting from his trustee, and this right cannot be barred by a term of the trust instrument); *Salter v. Salter*, 209 Ga. 90, 70 S.E.2d 453 (1952) (a provision in a trust instrument that the trustee need not account or file an inventory does not relieve the trustee from accounting in a court of equity); *In re Porter's Estate*, 164 Kan. 92, 187 P.2d 520 (1947) (clause stating that trustees for charity are not to give bond or be under obligation to account to any person or court does not deprive the court of jurisdiction to hold the trustees to account).

<sup>3</sup> Article 57(3) explicitly mentions requests for "protective measures"; see also Regulations 76-78 of the Regulations of the Registry; see also, e.g. Police and Criminal Evidence Act 1984, section 19; Proceeds of Crime Act 2002, section 40 (UK); Criminal Procedure Confiscation Act 2000 (WA).

<sup>4</sup> See, e.g. CAR-OTP-0022-0118; CAR-OTP-0022-0122; CAR-OTP-0022-0144; and CAR-OTP-0022-0148.

trustees of those assets for the lawful owner of them with all the ancillary fiduciary responsibilities to account for what has been seized and to preserve and protect it.

4. In exactly the same way that local police forces and the ICC Prosecution bore and carried out those responsibilities in relation to Mr. Bemba's telephones, computers, fax machines and documents, local authorities and the Court bear responsibility in relation to his houses, cars and bank accounts.

5. The Court bears the central responsibility of accounting for Mr. Bemba's property. The states did not act in isolation. They only froze assets because the Court asked them to.<sup>5</sup> Without the legal authority of a request for cooperation under article 57 or 93 of the Statute, the states had no right to seize Mr. Bemba's property. The Court's responsibility in this instance is borne by the Registry. It is simply not good enough for the Registry to hide behind the fact that the Prosecution originally made the applications for freezing orders, or that the states which responded to Requests for Assistance applied local law.<sup>6</sup>

6. It is the Registry that has reported on Mr. Bemba's assets to multiple Chambers of the Court throughout the last ten years, and not only on the issue of his legal aid or legal assistance funding, but also on the issue of sentence.<sup>7</sup> It is the Registry, through its External Operations section who deals with the states in relation to such matters. The Prosecution and the states are not party to these proceedings. The Registry had the responsibility to preserve Mr. Bemba's assets so that they could be used in any reparations process. OPCV and VPRS are sections of

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<sup>5</sup> See e.g. ICC-01/05-01/08-8.

<sup>6</sup> ICC-01/05-01/08-3656-US-Exp-Red, paras. 7-8.

<sup>7</sup> See e.g. ICC-01/05-01/08-76-tENG; ICC-01/05-01/08-545-Conf-Exp-Anx1; ICC-01/05-01/08-553-Conf-Exp; ICC-01/05-01/08-863-Conf-Exp-Red; ICC-01/05-01/08-1596; ICC-01/05-01/08-3375-Conf; ICC-01/05-01/08-3375-Conf-AnxII; ICC-01/05-01/08-3650-Conf-Exp+Conf-Exp-Anx.

the Registry. The Chamber asked for the Registry's observations on this matter precisely because this is the Registry's job.<sup>8</sup>

7. The Registry's records are, however, unfortunately insufficient for Mr. Bemba to identify what assets are frozen. Mr. Bemba has already, within the context of this very limited application for discharge of the freezing orders, pointed to obvious shortcomings of the "Registry's Updated Solvency Report on Mr Jean-Pierre Bemba Gombo's assets",<sup>9</sup> in relation to an asset [REDACTED], and the fact that the report is equivocal about which assets are frozen and which are not.<sup>10</sup> This fact attracts no comment in the Registry's observations, which is surprising, since it lies at the very heart of the applications for disclosure.

8. However, the deficiencies do not end there. Domestic court documents available to Mr. Bemba, as well as his own observations and experiences, suggest that there is a wealth of other frozen property of which the Registry is not aware. This property includes items in the names of [REDACTED].<sup>11</sup> Accordingly, a direction for the states to account for the property they have frozen is essential to full and expedient discharge of the orders made at national levels.

9. Mr. Bemba cannot be expected to trace his own assets and make multiple requests for the release of freezing orders either to Chambers of the ICC or in national jurisdictions. It is the duty of the Court to undo what it has done. The Registry's formal notification of the judgement of acquittal and final determination of case ICC-01/05-01/08 to the DRC, Portugal and Belgium,<sup>12</sup> was one step towards meeting this duty. Other steps must now be taken.

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<sup>8</sup> ICC-01/05-01/08-3655-US-Exp, paras. 7, 9; Regulations 53, 54, 76, 77, 78, 110 and 118 of the Regulations of the Registry.

<sup>9</sup> ICC-01/05-01/08-3650-Conf-Exp-Anx.

<sup>10</sup> ICC-01/05-01/08-3654-Conf-Exp, fn. 5, paras. 45-47.

<sup>11</sup> Annex A hereto is [REDACTED].

<sup>12</sup> See Annex B. [REDACTED]."

10. It is, moreover, incorrect to suggest that the freezing orders are not being executed by the states.<sup>13</sup> They are being executed. Not just Mr. Bemba, but also his wife and his brother are unable to exercise their proprietary rights over real estate and bank accounts because the states and institutions continue to freeze those assets under local orders made with the apparent authority of cooperation with the Court based upon the need to freeze or protect assets for the purposes of reparations in relation to this case, and for no other purpose.

11. The Registry's observations do not suggest that there is a lawful basis to continue to freeze the assets. Indeed, they rather concede that the orders are now "null and void".<sup>14</sup> If that is correct, the states should be informed forthwith.

12. There is no continuing basis for not giving Mr. Bemba access to the filings. The Registry's observations in this regard are illogical and unpersuasive. Firstly, it is his property, and he has a fundamental entitlement to access the audit trail as to how it has been dealt with by others. In any domestic application, there can be no doubt that all applications, orders and accounts would be disclosable in any motion for discharge of a freezing order at national level.

13. Secondly, as the Registry observes,<sup>15</sup> there is no mystery here. Mr. Bemba is substantially aware of the assets concerned. He disclosed many of them and has made copious submissions about them to the Chamber and the Registry, both in relation to sentence and legal funding.<sup>16</sup> He also has access to information from

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<sup>13</sup> ICC-01/05-01/08-3656-US-Exp-Red, para. 7.

<sup>14</sup> ICC-01/05-01/08-3656-US-Exp-Red, para. 7.

<sup>15</sup> ICC-01/05-01/08-3656-US-Exp-Red, para. 6.

<sup>16</sup> *See, e.g.* ICC-01/05-01/08-76-Conf-Exp-Anx1; ICC-01/05-01/08-81-Conf-tENG; ICC-RoC85-01/08-1-Conf-tENG; T-7-Conf-Exp; ICC-01/05-01/08-193-Conf-tENG; T-13-CONF-ENG; ICC-01/05-01/08-337-Conf; ICC-01/05-01/08-452-Corr; ICC-01/05-01/08-505-Conf; ICC-01/05-01/08-551; ICC-01/05-01/08-583-US; ICC-01/05-01/08-596-US, para. 2; ICC-01/05-01/08-3381-Conf; ICC-01/05-01/08-3381-Conf-Exp-AnxA; ICC-01/05-01/08-3381-Conf-Exp;AnxB; ICC-01/05-01/08-3376-Conf, paras. 99-104.

advisers and financial institutions in the relevant states. Denying him access to the “full picture” is, in the circumstances, nonsensical. Indeed, arguably, many of the filings should never have been made *ex parte* the Defence in the first place.

14. Thirdly, the suggestion that the states have some interest in concealing their cooperation with the ICC<sup>17</sup> is both speculative and worrying. Of course the states acted legally in freezing the assets. In doing so, they have nothing to hide. They invoked, presumably, proper legal procedures to freeze the assets within their respective jurisdictions, and Mr. Bemba is already aware of many, but not all, of those applications and orders. If there is concern about revealing the identities of ICC or local personalities’ identities, or ICC operational tactics, then appropriate redactions can be made, but there is no legal justification for denying Mr. Bemba access to the audit trail relating to how his assets have been dealt with.

15. Lastly, the suggestion that it is too “time-consuming” to secure the agreement of the states to disclose this information to Mr. Bemba<sup>18</sup> is similarly unpersuasive. Mr. Bemba was acquitted on 8 June 2018.<sup>19</sup> The Court, through the offices of the Registry, has already had 3 months to close this case, and yet it has taken no meaningful step to unravel its interference with Mr. Bemba’s rights to access his own property. Moreover, in the 21<sup>st</sup> Century, it requires no more than a telephone call or an email to ask the appropriate focal point to three states whether there is any objection to disclosing the details of their cooperation with the ICC. As already pointed out, the likelihood of their having any such objection is remote.

16. The Registry’s three reasons for objecting to disclosure of *all* documents (Registry’s own emphasis) are, with respect, inscrutable. The central purpose of this preliminary application does not concern the contractual relationship between Mr.

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<sup>17</sup> ICC-01/05-01/08-3656-US-Exp-Red, para. 8.

<sup>18</sup> ICC-01/05-01/08-3656-US-Exp-Red, para. 8.

<sup>19</sup> ICC-01/05-01/08-3636-Red.

Bemba and the Court concerning the advance of his Defence legal fees, but rather the continued unlawful interference with his proprietary rights over his assets and his right to an accurate account of the same. As the Chamber has made clear, the resolution of the advance is not a matter with which it is primarily concerned. That is a matter for negotiation and agreement between the Registry and Mr. Bemba.<sup>20</sup> The unfreezing of his assets, however, may be a matter for the Court. That process should have begun three months ago, however, the Registry's position is clear that an order of a Chamber is a prerequisite in its view to any progress in that regard.<sup>21</sup>

17. Neither does the relationship between the value of the property frozen and the amount of money advanced to Mr. Bemba have any bearing on the classification of filings or the duty to account for his property. Put simply, the Registry suggests that no duty to account for seized property worth \$100 exists where the owner of that property allegedly owes the seizer \$10. The submission is illogical and untenable. Moreover, the values attributed to the items in the "Registry's Updated Solvency Report on Mr Jean-Pierre Bemba Gombo's assets",<sup>22</sup> are either seriously out-of-date or wildly inaccurate. To highlight the principal example, [REDACTED].<sup>23</sup> This item did not appear in earlier versions of the report provided to both Trial Chamber III and Trial Chamber VII for the purposes of sentence in 2016 and 2017,<sup>24</sup> despite Mr. Bemba disclosing its existence in 2009.<sup>25</sup> It appeared only this year when the current updated report was prepared for Trial Chamber VII in relation to the re-sentencing exercise.<sup>26</sup> The value placed on [REDACTED] is not, so far as the Defence is aware, the product of any professional valuation, but rather, just a guess.

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<sup>20</sup> ICC-01/05-01/08-3655-US-Exp, para. 9.

<sup>21</sup> ICC-01/05-01/08-3656-US-Exp-Red, para. 6.

<sup>22</sup> ICC-01/05-01/08-3650-Conf-Exp-Anx.

<sup>23</sup> ICC-01/05-01/08-3650-Conf-Exp-Anx, p. 3.

<sup>24</sup> ICC-01/05-01/08-3375-Conf-AnxII; ICC-01/05-01/13-2119-Conf-Exp-AnxI.

<sup>25</sup> ICC-01/05-01/13-2295-Conf-Exp-AnxII.

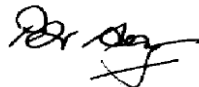
<sup>26</sup> ICC-01/05-01/13-2295-Conf-Exp-AnxII.



18. Three final observations: repeated reference to “the Defence”<sup>27</sup> are inapposite. Mr. Bemba is not a defendant and is due appropriate respect in that regard. Secondly, the Registry’s observations concerning [REDACTED]<sup>28</sup> are irrelevant and unfortunate. [REDACTED]<sup>29</sup> [REDACTED]. In filings, the Registry has acknowledged Mr. Bemba’s cooperation in [REDACTED].<sup>30</sup> The current *volte face* in the instant observations in this respect is disappointing. Moreover, Mr. Bemba does not accept the simplicity of the Registry’s account concerning the possible [REDACTED].<sup>31</sup> At the time, nobody could have foreseen that this case would take a further decade to resolve. [REDACTED] and Mr. Bemba proposed that [REDACTED] in order to provide for his legal fees and to create a fund for any subsequent reparations.<sup>32</sup> The Court’s refusal to entertain that proposal simply destroyed that asset and closed off a valuable income stream. In any event, neither issue has any bearing on the discrete matter on which the Registry’s observations were invited, namely, whether Mr. Bemba should be allowed access to filings and accounts concerning his assets.

19. In accordance with regulation 23 *bis*(2) of the Regulations of the Court, this filing and its annexes are classified as confidential *ex parte* only available to the Registry and Mr. Bemba, as they refer to information about the personal situation of Mr. Bemba and respond to a filing with that same level of classification.

The whole respectfully submitted.



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<sup>27</sup> ICC-01/05-01/08-3656-US-Exp-Red and ICC-01/05-01/08-3655-US-Exp.

<sup>28</sup> ICC-01/05-01/08-3656-US-Exp-Red, paras. 11-12.

<sup>29</sup> See Annex A, p. 3.

<sup>30</sup> See, e.g. ICC-01/05-01/08-3232-Conf-Exp-Corr, para. 6; CAR-D04-0005-0501, para. 8.

<sup>31</sup> ICC-01/05-01/08-3656-US-Exp-Red, para. 11.

<sup>32</sup> ICC-01/05-01/08-583-US, p. 8 cited in EVD-T-D04-00110/CAR-D04-0005-0501, para. 25.

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Done at The Hague, The Netherlands, 30 October 2018