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

Date: 3 August 2011

THE APPEALS CHAMBER

Before: Judge Erkki Kourula, Presiding Judge
Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Anita Ušacka
Judge Daniel David Ntanda Nsereko

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

Public redacted version

Defence response to the Order relating to the reclassification of documents

Source: Defence for Mr Jean-Pierre Bemba Gombo

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

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**Unrepresented Applicants for
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Defence Support Section

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Detention Section

**Victims Participation and Reparations
Section**

Other

A. BACKGROUND

1. On 27 June 2011, Trial Chamber III rendered its *Decision on Applications for Provisional Release*,¹ in which it ruled on three applications for provisional release by the Defence. Both the Defence applications and the Decision were filed confidentially.

2. On 29 June 2011, the Defence filed its confidential *Notification de l'acte d'appel*.² This was followed by the *Document in support of Defence Appeal against Trial Chamber III's Decision on Applications for Provisional Release, dated 27 June 2011* which was filed on 1 July 2011 and which was also confidential.³ Finally, on 26 July 2011, the Defence filed its *Defence Response to the "Observations du Représentative légal Maître Zarambaud Assingambi sur le "Document of Defence Appeal against Trial Chamber III's Decision on Applications of Provisional Release dated 27 June 2011", présenté par la Défense du Jean-Pierre Bemba Gombo"*.⁴ Again, this response was confidential.

3. On 28 July 2011, the Appeals Chamber issued its *Order relating to the re-classification of documents*.⁵ The Appeals Chamber ordered that Mr. Bemba provide reasons, if any, why his Notification of Appeal, Document in Support of Appeal, and the Defence Response should not be reclassified as public.

4. The Defence submits that the three documents cited by the Appeals Chamber should remain confidential, for the reasons set out below.

B. APPLICABLE LAW

5. Regulation 23 *bis* (2) of the Regulations of the Court provides as follows:

¹ ICC-01/05-01/08-1565-Conf ("Impugned Decision").

² ICC-01/05-01/08-1573-Conf ("Notification of Appeal").

³ ICC-01/05-01/08-1586-Conf ("Document in Support of Appeal").

⁴ ICC-01/05-01/08-1608-Conf ("Defence Response").

⁵ ICC-01/05-01/08-1617-Conf ("Order").

Filing of documents marked *ex parte*, under seal or confidential.

2. Unless otherwise ordered by a Chamber, any response, reply or other document referring to a document, decision or order marked “*ex parte*” or “under seal” or “confidential” shall be filed with the same classification. If there are additional reasons why a response, reply or other document filed by the Registrar or a participant should be classified as “*ex parte*”, “under seal”, or “confidential”, or reasons why the original document or other related documents should not so be classified, they shall be provided in the same document

3. Where the basis for the classification no longer exists, whoever instigated the classification, be it the Registrar or a participant may apply to the Chamber to reclassify the document. A Chamber may also reclassify a document upon request by any other participant or by its own motion. ...

C. SUBMISSIONS

6. The three documents cited by the Appeals Chamber being; (a) the Notice of Appeal; (b) the Defence Document in Support of the Appeal, and (c) the Defence Response, each contain at their heart a discussion and analysis of a **confidential** Trial Chamber decision. As such, the Defence notes that pursuant to Regulation 23 *bis*, the three documents cited by the Appeals Chamber in its Order are required also to be confidential.

7. The Defence also notes that, even above this technical requirement in the Regulations, the arguments made by the Defence in the three documents cited by the Appeals Chamber are inextricably linked back to the content of the confidential decision. These three filings are based almost completely on an analysis and discussion of the confidential decision, and therefore should not themselves be rendered public while the decision remains confidential.

8. Maintaining the confidentiality of the Impugned Decision and the three filings cited by the Appeals Chamber is, moreover, consistent with previous practice as to the confidentiality of provisional release decisions in this case. The Defence submits that the confidentiality of these filings should be maintained in order to facilitate the

proper and orderly execution of any orders in the event that provisional release is granted. It was for this reason that the *Decision on the Defence's Urgent Request concerning Mr. Jean-Pierre Bemba's attendance at his Father's Funeral*⁶ and the *Decision on Defence Request for Mr. Jean-Pierre Bemba to attend his Stepmother's Funeral*⁷ were rendered as confidential decisions, and all parties and participants were ordered to "respect the confidentiality" of these decisions.⁸ Although these decisions were subsequently reclassified as public,⁹ this was only done after the period of provisional release had been completed and Mr. Bemba had been returned to custody in The Hague.

9. The Defence also notes that even if this were not the case, the three documents cited by the Appeals Chamber would still need to remain confidential as they refer in significant part to (a) correspondence between the Defence and [REDACTED];¹⁰ and (b) an Order from Trial Chamber II and a response from [REDACTED], all of which are confidential.¹¹

10. The Defence does not have the ability to waive the confidentiality of these communications on the part of [REDACTED], who the Defence respectfully suggests should be consulted by the Chamber or the Registry before the content of its confidential communications are revealed to the public. The extent to which the Defence refers to and relies upon these communications with [REDACTED] in the three documents cited by the Appeals Chamber, provides further support for the Defence position that the documents retain their confidential status.

11. Similarly, the Defence is currently undertaking several confidential initiatives with [REDACTED], and the Democratic Republic of Congo. Publicising the issues

⁶ ICC-01/05-01/08-437-Conf

⁷ ICC-01/05-01/08-1099-Conf.

⁸ See ICC-01/05-01/08-437-Conf, page 6; and ICC-01/05-01/08-1099-Conf, para. 19.

⁹ ICC-01/05-01/08-437, reclassified pursuant to ICC-01/05-01/08-528; and ICC-01/05-01/08-1099

¹⁰ ICC-01/05-01/08-1479-Conf; Letter, Maitre Aime Kilolo Musamba to Chef de [REDACTED], 20

September 2010, ICC-01/05-01/08-1479-Conf-AnxB; Letter, Minister of Foreign Affairs [REDACTED] to Maitre Aime Kilolo Musamba, dated 26 Mai 2011, ICC-01/05-01/08-1479-Conf-AnxA.

¹¹ ICC-01/05-01/08-1492-Conf; ICC-01/05-01/08-1556-Conf-Anx2.

involved could compromise these initiatives as the Defence has committed to respecting the confidentiality of the information being exchanged with these states concerning the security of Mr. Bemba and the measures and surveillance to be put in place to satisfy the court's concerns regarding risk of flight and intimidation of witnesses.

12. As a final point, it is also of utmost concern to the Defence that should Mr. Bemba be authorised to travel to the Democratic Republic of the Congo, this should be done with the greatest discretion and out of the public eye, in the interest of the maintenance of public order. Maintaining the confidentiality of the three filings cited by the Appeals Chamber would contribute to this aim.

13. In light of all of the aforementioned, the Defence respectfully submits that the documents identified by the Appeals Chamber, namely

1. ICC-01/05-01/08-1573-Conf
2. ICC-01/05-01/08-1586-Conf
3. ICC-01/05-01/08-1608-Conf

should remain confidential.



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Dated this Wednesday, 3rd of August 2011

At The Hague, The Netherlands