

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **17/02/2014**

**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**

*Confidential with Confidential Annex A (Prosecution, Defence, OPCD, OPCV)*

**Defence Motion for 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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**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Herman von Hebel

**Defence Support Section**

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section Other**

## A. INTRODUCTION

1. Pursuant to Articles 64(7) and 67(1) of the Rome Statute ("the Statute") and Rule 20(1) of the Rules of Procedure and Evidence ("the Rules"), the Defence seeks the reclassification as public of the documents listed in the attached Annex A.

## B. PROCEDURAL BACKGROUND

2. On 15 November 2012, by way of its confidential ex parte *Prosecution Request for Record of Payments made by the Registry to Witnesses called by the Defence of Mr Jean-Pierre Bemba Gombo*, the Prosecution informed Trial Chamber III ("the Trial Chamber") that it was conducting an investigation pursuant to Article 70 of the Statute into alleged payments to Defence witnesses.<sup>1</sup>

3. On 20 March 2013, the Prosecution filed its confidential ex parte *Notice to the Trial Chamber of Article 70 Investigation and Request for Judicial Assistance to Obtain Evidence*, in front of the Trial Chamber, which contained information concerning the Prosecution investigation into Defence witnesses and members of the Defence team.<sup>2</sup>

4. On 9 April 2013, the Trial Chamber convened an ex parte Prosecution and Registry only status conference ("9 April 2013 Status Conference") "in order, *inter alia*, to obtain additional information relating to the Second Request and to hear the Registry's views on the technical implications of the investigative steps requested by the prosecution."<sup>3</sup> At this Status Conference, the Prosecution discussed in detail the steps which had been taken in relation to its investigation into allegations of bribery of Defence witnesses; the type of evidence collected thus far and what - in the view of

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<sup>1</sup> ICC-01/05-01/08-2606-Conf, para. 1.

<sup>2</sup> ICC-01/05-01/08-2606-Conf, para. 5.

<sup>3</sup> ICC-01/05-01/08-2606-Conf, para. 6.

the Prosecution - this evidence tended to prove; and the steps the Prosecution was proposing to take to continue its investigation.<sup>4</sup>

5. On 26 April 2013, the Chamber issued its confidential ex parte (Prosecution and Registry only) "*Decision on the prosecution's request relating to Article 70 investigation*" ("Decision-2606-Corr-Exp"). This decision was preceded by a number of confidential and ex parte decisions and documents:

- a. ICC-01/05-01/08-2412-Conf-Exp ("Document 2412-Conf-Exp");
- b. ICC-01/05-01/08-2421-Conf-Exp ("Decision 2421-Conf-Exp");
- c. ICC-01/05-01/08-2441-Conf-Exp ("Document 2441-Conf-Exp");
- d. ICC-01/05-01/08-2461-Conf-Exp ("Decision 2461-Conf-Exp");
- e. ICC-01/05-01/08-2462-Conf-Exp ("Document 2462-Conf-Exp"); and
- f. ICC-01/05-01/08-2548-Conf-Exp ("Document 2548-Conf-Exp").<sup>5</sup>

6. Following the arrests of the five suspects in the ICC-01/05-01/13 case ("Article 70 Case") on 23 November 2013, by its Order of 6 December 2013, the Trial Chamber decided on the reclassification of a number of documents related to the "*Decision on the prosecution's request relating to Article 70 investigation*" ("Decision 2606-Conf-Exp"). Specifically, the Trial Chamber, *inter alia*, decided that the transcript of the 9 April Status Conference "should be made available to all parties and participants, subject to the application of any necessary redactions."<sup>6</sup> It ordered "the Registry to submit for the Chamber's approval proposed confidential redacted versions of [...] Transcript T-303-CONF-EXP. These proposals shall be communicated to the Chamber by email by 13 December 2013."

7. In the same Order, the Trial Chamber decided that the same approach should be followed in relation to Decisions 2421-Conf-Exp, 2461-Conf-Exp and 2606-Conf-

<sup>4</sup> ICC-01/05-01/08-T-303-CONF-Red, pages 8 – 9; page 18 lines 4-15; page 23, line 14 – page 24, line 7.

<sup>5</sup> ICC-01/05-01/08-2920-Conf, para. 1.

<sup>6</sup> ICC-01/05-01/08-2920-Conf, para. 5.

Exp, as well as documents 2412-Conf-Exp, 2441-Conf-Exp, 2462-Conf-Exp and 2548-Conf-Exp. It ordered the Registry and the Prosecution to submit for the Trial Chamber's approval proposed confidential redacted versions of the latter, which were to be communicated to the Trial Chamber by email by 13 December 2013.<sup>7</sup>

8. On 20 January 2014, the Trial Chamber issued its *"Second Order on the reclassification of documents"*, in which it decided on the reclassification of three more documents related to the *"Decision on the prosecution's request relating to Article 70 investigation"* ("Decision 2606-Conf-Exp"). Specifically, the Trial Chamber ordered the reclassification as confidential without redactions of documents 2441-Conf-Exp, 2441-Conf-Exp-Anx2, 2441-Conf-Exp-Anx3, 2441-Conf-Exp-Anx4, 2441-Conf-Exp-Anx5, 2548-Conf-Exp-AnxA, 2412-Conf-Exp, and 2462-Conf-Exp.<sup>8</sup> The Prosecution was ordered to prepare a confidential redacted version of document 2548-Conf-Exp and to file the document by 31 January 2014; and the Registry was ordered to prepare a confidential redacted versions of documents 2441-Conf-Exp-Anx1-Red, 2441-Conf-Exp-Anx6, 2462-Conf-Exp-Anx1, and T-303-CONF-Exp ("9 April Transcript") to be filed by 31 January 2014.<sup>9</sup>

9. The Defence received confidential versions of documents 2441-Conf, 2441-Conf-Anx2, 2441-Conf-Anx3, 2441-Conf-Anx4, 2441-Conf-Anx5, 2462-Conf, 2548-Conf-AnxA and 2412-Conf on 23 January 2014. On 30 January 2014, the Defence was provided with redacted versions of the 9 April Transcript, 2441-Conf-Red-Anx6 and 2441-Conf-Anx1-Red2.

### C. CONFIDENTIAL NATURE OF THE PRESENT FILING

10. The present request concerns the reclassification of documents which are currently confidential. As such, the Defence files this request confidentially.

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<sup>7</sup> ICC-01/05-01/08-2920-Conf, para. 5.

<sup>8</sup> ICC-01/05-01/08-2943-Conf, para. 4.

<sup>9</sup> ICC-01/05-01/08-2943-Conf, para. 4.

#### D. APPLICABLE LAW

11. Article 64(7) of the Rome Statute stipulates that: “the trial shall be held in public”; thus setting publicity of hearings and proceedings as the rule. Resort to closed sessions or confidential filings is characterised as an exception to the right to a public hearing, requiring “special circumstances” before being implemented.

12. Trial Chamber II in the *Katanga* case has addressed the importance of the publicity of proceedings, and was explicit that: “the public nature of proceedings is a fundamental principle which, furthermore, is enshrined by Article 64(7) of the Statute. This principle constitutes, for the Defence, a safeguard, an essential safeguard. It contributes to preserving the trust that all those subject to the law have to have in justice, and it is one of the best means of controlling the way in which such justice is rendered.”<sup>10</sup>

13. Article 67(1) of the Statute also provides that: “[i]n the determination of any charge, **the accused shall be entitled to a public hearing**,<sup>11</sup> having regard to the provisions of this Statute, to a fair hearing conducted impartially and to the following minimum guarantees, in full equality [...]”. The provisions of the Statute concerning the importance of the publicity of the proceedings, like every provision, must be interpreted and applied in accordance with “internationally recognized human rights”.<sup>12</sup>

14. To this end, Article 14(1) of the International Covenant on Civil and Political Rights (“ICCPR”) also provides that the accused shall be entitled to a public hearing, this right being regarded as an essential element of the concept of a fair

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<sup>10</sup> Transcript, *Katanga & Ngudjolo Chui* (ICC-01/04-01/07-T-189-ENG ET WT 20-09-2010), page 10.

<sup>11</sup> Emphasis added.

<sup>12</sup> ICC-01-04-01-06-722, paras. 36 and 37.

trial.<sup>13</sup> The right to a public hearing is also guaranteed by the European Convention on human Rights in its Article 6(1) and the American Convention on Human Rights in its Article 8(5).

15. The European Court of Human Rights ("ECHR") has left no doubt as to the importance of public proceedings, finding that the public nature of trials:

"protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of article 6(1), namely a fair trial".<sup>14</sup>

16. In addition to being a right afforded to an accused, the ECHR recognises that public proceedings have a more general benefit to the public at large, holding that:

"[p]ublicity is seen as one guarantee of fairness of trial; it offers protection against arbitrary decisions and builds confidence by allowing the public to see justice administered".<sup>15</sup>

17. Articles 20(2) and 21(2) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia ("ICTR" and "ICTY") also guarantee the right of an accused to a fair and public hearing in the determination of charges against him or her. In a decision on a motion for the redaction of public records, an ICTY Trial Chamber held that:

"The proceedings before the International Tribunal are, in essence, public. The right of every accused to a public hearing is a fundamental principle of justice and a basic human right of every accused person".<sup>16</sup>

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<sup>13</sup> "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

<sup>14</sup> *Werner v. Austria*, 24 November 1997, para. 45.

<sup>15</sup> *Pretto & Ors v. Italy*, (Series A, No. 71 (1984) 6 EHRR 182).

<sup>16</sup> *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Decision on the Prosecution's No. ICC-01/05-01/08

18. The Chamber also stated that:

“Subject to the provisions of The Directive for the Registry, Judicial Support Services (IT-121) public access to the records of the International Tribunal is allowed in furtherance of the public interest in the proceedings before the International Tribunal. Thus, it is evident that the Judges of the International Tribunal place considerable importance on the need to ensure a public and transparent judicial process”.<sup>17</sup>

19. In ordering the Registrar to reclassify exhibits and transcripts, the Trial Chamber I of the ICTY held that:

“The principle of publicity of the proceedings is of paramount importance to the public perception of the judicial process in ensuring not only that justice is done but also that it is seen to be done”.<sup>18</sup>

20. The importance of the publicity of proceedings is not limited to international criminal trials, but is also an important component of the fairness of domestic criminal proceedings. The United States Supreme Court, having the opportunity to rule on the importance of the publicity of proceedings, held that:

“There can be no blinking the fact that there is a strong societal interest in public trials. Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously [. . .].”<sup>19</sup>

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motion for the redaction of the public record, IT-96-21, 5 June 1997, para. 23.

<sup>17</sup> *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Decision on the Prosecution's motion for the redaction of the public record, IT-96-21, 5 June 1997, para. 26.

<sup>18</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Decision on prosecution's motion to change private/closed session testimony and 92<sup>ter</sup> statements admitted under seal to public status, IT-98-3 2/1-T, 10 July 2009, page 3.

<sup>19</sup> *Estes v Texas*, 381 U.S. 532 at 583 (1965).

## E. SUBMISSIONS

21. For the reasons set out below, the Defence requests that the documents listed in Annex A be reclassified as public.

### (a) The Prosecution has publicised the allegations against Mr. Bemba in the Article 70 Case

22. Almost since the moment of the arrest of the suspects in the Article 70 Case, the Prosecution has been consistent in ensuring the allegations against them are the public.<sup>20</sup> The particular allegations levelled against Mr. Bemba in the Article 70 Case have been in the public domain since his initial appearance on 27 November 2013.<sup>21</sup> The arrest warrant, which was also made public on 5 December 2013, details the counts against Mr Bemba:

#### Count 1

Presenting evidence that the party knows is false or forged, within the meaning of article 70(1)(b) of the Statute, read with article 25(3)(b), by ordering, soliciting or inducing his associates to present such evidence

#### Count 2

Corruptly influencing witnesses, within the meaning of article 70(1)(c) of the Statute read with article 25(3)(b), by ordering, soliciting or inducing his associates to commit an offence against the administration of justice consisting of the transfer of money to and the coaching of witnesses;<sup>22</sup>

23. The public arrest warrant also claims, for example, that Mr. Bemba is the head of:

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<sup>20</sup> ICC-01/05-01/13-1-Red2-tENG; ICC-01/05-46-Conf-Exp; ICC-01/05-50-Conf-Exp; See also: Press Release ICC website: Bemba Case: Four suspects arrested for corruptly influencing witnesses; same charges served on Jean-Pierre Bemba Gombo, 24 November 2013.

[http://www.icc-cpi.int/EN\\_Menus/icc/press%20and%20media/press%20releases/pages/pr962.aspx](http://www.icc-cpi.int/EN_Menus/icc/press%20and%20media/press%20releases/pages/pr962.aspx)

<sup>21</sup> ICC-01/05-01/13-T-1-ENG ET WT 27-11-2013, pages 5-7.

<sup>22</sup> ICC-01/05-01/13-1-Red2-tENG, pages 3-4.

“the said criminal scheme and that from the detention centre he orchestrates the activities undertaken by his associates in respect of its implementation. In particular, there are reasonable grounds to believe that: i) he makes available the financial resources enabling the transfers to be effected, approves the amounts and the recipients of the transfers and issues specific instruction, enabling his associates to locate and access the financial resources; ii) he circumvents the telephone monitoring system introduced by the Court’s detention Centre, by using his counsels’ telephone numbers so that the conversations are privileged; iii) he is able to speak to witnesses and his associates under the guise of conference calls with counsel; iv) he uses codes during non-privileged conversation concerning the trial or money transfers, particularly with Fidèle Babala [REDACTED]; v) he issues instructions concerning contact with the Defence witnesses and the coaching of such witnesses for the purposed of their court appearance.<sup>23</sup>

24. The Prosecution has therefore adopted the approach of publicising the purported outcome of its investigations, while its requests for assistance which detail the gaps in its investigations have consistently been filed confidentially. This has lead to a one-sided picture being presented to the public.

25. It is for this reason that publicity of the proceedings is an important safeguard to the right of an accused to a fair trial, as the public is given a realistic picture of the Prosecution’s case and the status of the proceedings, rather than only having access to alleged incriminating material. Ensuring filings are in the public domain assists in giving interested third parties a realistic impression of the case as a whole, which contributes to expectations being managed in the event of acquittals. While, as detailed below, a wealth of information concerning the Article 70 investigation is now in the public domain due to a consistent practice of reclassification on the part of the Single Judge in the Article 70 Case, the Defence submits that the same approach should be adopted in the present proceedings to redress the imbalance which exists in this case.

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<sup>23</sup> ICC-01/05-01/13-1-Red2-tENG, page 10.

**(b) No justification exists for a different approach to confidentiality as between Trial Chamber III and Pre-Trial Chamber II**

26. The public version of the arrest warrant contained a procedural history of the events preceding the arrests in the Article 70 Case. This procedural history referred to *ex parte* filings and confidential annexes which remained out of the public domain.<sup>24</sup> Given that alleged incriminating material and references to confidential filings were then in the public *fora*, the next logical step was the reclassification of these filings. The Single Judge accordingly ordered that public versions of these filings promptly be made available.<sup>25</sup>

27. This practice of ordering the reclassification of filings as public has continued in the Article 70 Case.<sup>26</sup> As such, there is now a wealth of information in the public domain concerning the alleged basis of the Prosecution's case; the nature of the allegations against the five suspects; the requests for investigative assistance made by the Prosecution in attempting to build its Article 70 case; and the orders made by the Single Judge of Pre-Trial Chamber II in order to assist the Prosecution in its investigation.

28. For example, it is now publicly known that the Prosecution has been investigating allegations of alleged bribery of witnesses in the *Bemba* case since June

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<sup>24</sup> ICC-01/05-01/13-1-Red2-tENG, page 6. The filings that the arrest warrant refers to are, *inter alia*, ICC-01/05-46-Conf-Exp; ICC-01/05-50-Conf-Exp; ICC-01/05-52-Conf-Exp.

<sup>25</sup> ICC-01/05-01/13-147, para. 14 where Single Judge Tarfusser reclassifies as public: ICC-01/05-45-Conf-Exp; ICC-01/05-46-Conf-Exp; ICC-01/05-50-Conf-Exp; ICC-01/05-01/13-20-Conf; ICC-01/05-01/13-48-Conf; ICC-01/05-01/13-50-Conf; ICC-01/05-01/13-51-Conf; ICC-01/05-01/13-103-Conf and as public redacted: ICC-01/05-62-Conf-Red and ICC-01/05-01/13-41-Conf-Red.

<sup>26</sup> ICC-01/05-01/13-20-Conf; ICC-01/05-01/13-41-Conf-Red; ICC-01/05-44-Conf-Exp; ICC-01/05-44-Conf-Exp-AnxA; ICC-01/05-45-Conf-Exp; ICC-01/05-46-Conf-Exp; ICC-01/05-01/13-48-Conf; ICC-01/05-49-Conf-Exp; ICC-01/05-49-Conf-Exp; ICC-01/05-50-Conf-Exp; ICC-01/05-51-Conf-Exp; ICC-01/05-51-Conf-Exp-AnxA; ICC-01/05-51-Conf-Exp-AnxB; ICC-01/05-52-Conf-Exp; ICC-01/05-56-Red; ICC-01/05-58-Conf-Exp; ICC-01/05-58-Conf-Exp-AnxA; ICC-01/05-58-Conf-Exp-AnxB; ICC-01/05-60-Conf-Exp; ICC-01/05-60-Conf-Exp-AnxA; ICC-01/05-60-Conf-Exp-AnxB; ICC-01/05-62-Conf-Red; ICC-01/05-63-Conf-Exp; ICC-01/05-63-Conf-Exp-AnxA; ICC-01/05-63-Conf-Exp-AnxB; ICC-01/05-71-Conf-Exp; ICC-01/05-71-Conf-Exp-AnxA; ICC-01/05-01/13-103-Conf.

2012;<sup>27</sup> that the Prosecution claims that its investigations were triggered by an anonymous informant;<sup>28</sup> that the Prosecution claims to have obtained access to records of Western Union transfers between some of the suspects and other individuals associated with the case;<sup>29</sup> that an independent counsel has been appointed to assist the Prosecution in its investigations;<sup>30</sup> that the Victims and Witnesses Unit of the ICC ("VWU") has provided the Prosecution with all the contact details of the Defence witnesses in the present proceedings;<sup>31</sup> that the Single Judge has authorised the Prosecution to directly contact Defence witnesses without informing the Defence;<sup>32</sup> that the Registrar has provided the Prosecution with a complete log of telephone calls made by Mr. Bemba during his time in the UNDU, as well as all available recordings of non-privileged calls either placed or received by him;<sup>33</sup> that phone calls between Mr. Bemba and members of his Defence team were recorded and monitored;<sup>34</sup> that the Single Judge has ruled that the Prosecution itself can access directly the recordings of phone calls between Mr. Bemba and his former case manager, rejecting a Prosecution request that an independent counsel be so tasked;<sup>35</sup> that the Prosecution sought the assistance of the relevant authorities in Belgium and The Netherlands in monitoring phone calls between Mr. Bemba and former members of his Defence team;<sup>36</sup> that the Prosecution accessed the phone records of the suspect Mr Babala;<sup>37</sup> that the Prosecution claims that Mr. Bemba's former Lead Counsel had unauthorised contact with Defence witnesses;<sup>38</sup> that the Prosecution claims that Mr. Bemba is the facilitator of the alleged scheme to bribe

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<sup>27</sup> ICC-01/05-44-Red, para. 3.

<sup>28</sup> ICC-01/05-44-Red, para.9.

<sup>29</sup> ICC-01/05-44-Red, paras.3, 15-16.

<sup>30</sup> ICC-01/05-52-Red2, pages 7-8.

<sup>31</sup> ICC-01/05-50.

<sup>32</sup> ICC-01/05-46.

<sup>33</sup> ICC-01/05-50.

<sup>34</sup> ICC-01-05-46-Red; ICC-01/05-01/13-48, ICC-01/05-50; ICC-01-05-51-Red; ICC-01/05-52-Red2; ICC-01/05-01/13-129-Anx.

<sup>35</sup> ICC-01/05-01/13-48.

<sup>36</sup> ICC-01/05-52-Red2, 3 February 2013, pages 7-8.

<sup>37</sup> ICC-01/05-51-Red, para. 15.

<sup>38</sup> ICC-01/05-61-Red, page 4.

witnesses to give false testimony;<sup>39</sup> and that he uses “coded” language in French and Lingala when discussing the trial or financial matters with other co-suspects in the case.<sup>40</sup> Also public are extensive details of the Prosecution’s allegations that Mr. Bemba and his former counsel are “circumventing the Registry’s monitoring system to discuss matters with third parties under the cloak of the lawyer-client communication privilege”.<sup>41</sup>

29. In these circumstances, the Defence submits that there is no basis for maintaining confidentiality of filings in the main case which concern the same subject matter.

30. To give a concrete example, on 12 February 2014, the Single Judge reclassified as public the Prosecution’s “*Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70*”, 3 May 2013, ICC-01/05-44-Conf-Exp.<sup>42</sup> Paragraph 8 of this Prosecution filing states:

On 20 March 2013 the Prosecution submitted **the instant request**, on an urgent basis, to Trial Chamber III. On 26 April 2013 Trial Chamber III decided that did not have competence over the request and ruled that such requests should be brought before a Pre-Trial Chamber.

There can be no reason for the same Prosecution request being public in the Article 70 Case, and confidential in the present proceedings.<sup>43</sup>

31. Similarly, given the wealth of information now in the public domain concerning the investigative steps taken by the Prosecution, the Defence submits that the 9 April Transcript should also be made public. The information discussed in the 9

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<sup>39</sup> ICC-01/05-44-Red, para.22.

<sup>40</sup> ICC-01/05-51-Red, para.17.

<sup>41</sup> ICC-01/05-44-Red, paras. 22-28.

<sup>42</sup> ICC-01/05-44-Red.

<sup>43</sup> The Prosecution referred to: ICC-01/05-01/08-2548-Conf-Exp, Notice to the Trial Chamber of Article 70 Investigation and Request for Judicial Assistance to Obtain Evidence, 20 March 2013.

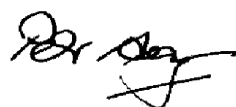
April Status Conference between the Registry, the Prosecution and the Trial Chamber is now in the public domain, and as such there can be no prejudice to any ongoing investigations, particularly given that the five suspects are now in custody. The Defence notes, in particular that the discussions during the 9 April Status Conference concerning the procedures for monitoring of phone calls and visits at the UNDU<sup>44</sup> is also publicly available information.<sup>45</sup>

**F. RELIEF SOUGHT**

32. In light of all of the above, the Defence requests that the Chamber:

**ORDER** the reclassification of the documents set out in Annex A as public.

The whole respectfully submitted.



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

The Hague, The Netherlands

17 February 2014

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<sup>44</sup> T-303-Conf, page 10 line 3- page 11 line 18; page 13 line 22- page 17 line 18; page 20 line 15- page 21 line 10.

<sup>45</sup> See, for example, Regulations of the Court, Chapter 6.