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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**

Public

**Public Redacted Version of Defence Request for leave to appeal decision ICC-
01/05-01/08-3101**

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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A. INTRODUCTION

1. The Defence for Mr. Jean-Pierre Bemba Gombo respectfully seeks leave to appeal the 'Decision on "Defence Urgent Request for Disclosure and Injunctive Relief concerning Privileged Defence Communications" and Addendum' (the Decision),¹ in relation to the following issues:

- i. Whether the Trial Chamber erred by finding that it had no competence either to order the Prosecution to disclose information, which was the property of the Defence in this case, or to refrain from accessing information which was the property of the Defence in the Main Case; and
- ii. Whether the Trial Chamber erred by imposing too high an evidential threshold in a request for provisional measures/injunctive relief.

B. SUBMISSIONS

(a) *The first issue arises from the Decision*

2. At paragraph 22 of the Decision, the Trial Chamber found that,

In relation to the relief sought by the defence in its First and Alternate First Requests, the Chamber notes that ordering the prosecution to "deliver" the email accounts to the defence, or to refrain from accessing the contents of the email accounts until further order, and to disclose the accounts to the defence for an initial review, would interfere with the competence of the Single Judge in case ICC-01/05-01/13, and Decision ICC-01/05-01/13-366-Red.

3. The Trial Chamber thus failed to address or grapple with the fact that the materials in question are protected by a specific form of confidentiality, which inheres in the Main Case.

¹ ICC-01/05-01/08-3101.

4. In precisely the same way that the Prosecution was obliged firstly to seek the consent of the Trial Chamber in the Main Case before disclosing protected Defence materials in the Article 70 case,² the Trial Chamber had both the competence and the duty to ensure that the introduction of Defence materials in the Article 70 case would not undermine the protection afforded by Rule 73(1) in the Main Case.

5. The Trial Chamber's belief that it was precluded from doing so by virtue of the Single Judge's decisions is misconceived. The Single Judge had no legal competence and no practical ability to assess whether the disclosure of the Defence materials – to the very same Prosecution prosecuting Mr. Bemba in the Main Case – would violate Mr. Bemba's rights in the Main Case.

6. The only thing assessed by the Independent Counsel and the Single Judge is whether the information in question was relevant to the Article 70 investigation. Given the narrow scope of this assessment, the Single Judge had not actually ruled on the additional and separate question as to whether, notwithstanding the relevance of specific portions of the communications identified by the Independent Counsel to the Article 70 case, the disclosure of other aspects of the conversations/emails or the disclosure of the conversation/email *in toto* would be overly prejudicial to the right of Mr. Bemba in the Main Case.

7. There was thus no legal ruling for the Trial Chamber to disturb.

8. The Single Judge never ordered that the Prosecution must access the documents – the Prosecution was under no positive duty to do so. Again, the terms of the Single Judge's rulings thus did not prevent the Trial Chamber from injuncting the Prosecution in whole or in part from accessing the materials, until such time that the Defence could conduct a proper assessment in relation to the potential prejudice to Mr. Bemba's rights in the Main Case that would be occasioned through disclosure to the Prosecution.

² ICC-01/05-01/08-3014.

9. Similarly, the fact that one particular CD rom had been sealed by order of the Single Judge did not prevent either the Chamber or the Prosecution from obtaining further copies, which could have been disclosed to the Defence, as required by the Prosecution's disclosure obligations.

10. As acknowledged by the Trial Chamber, the case law on this point is clear: the existence of protective measures in one case does not exempt the Prosecution from taking the necessary steps to fulfill its disclosure obligations in another case.³

11. The contents of the email accounts contain correspondence and drafts, which are the property of the Defence and Mr. Bemba,⁴ and internal work product protected by Rule 81(1). Information or items belonging to the defendant falls within the Prosecution's Rule 77 disclosure obligations, even if there is no direct relevance to the charges.⁵ The Defence's lack of access to this material has already impeded its ability to track important procedural developments in the case, and related correspondence, which was addressed either to Me. Kilolo or Mr. Mangenda.

12. Although the Defence is now able to receive the same materials as the Defence in the Article 70 case, since the Independent Counsel should, in theory, screen out privileged materials, the disclosure regime in the Article 70 case will fail to give full effect to the right of the Defence to obtain all materials, which are the property of the Defence.

13. The fact that the Prosecution has failed to disclose a single document or item of evidence from the Article 70 investigations or case to the Defence in the Main Case speaks

³³ ICC-01/05-01/08, footnote 59.

⁴ Article 19 of the Code of Conduct. It was disingenuous for the Prosecution to cite Me. Kilolo's 'privacy concerns' as a basis for opposing the Defence requests (ICC-01/05-01/08-3058, para. 14) when the Prosecution was aware of the fact that the Defence for Me. Kilolo had proposed that the Bemba Main Defence should conduct an initial review of the contents of the email accounts.

⁵ Rule 77 obliges the Prosecution to disclose any information or evidence obtained from or which belonged to the accused, irrespective as to whether it is material to the preparation of the Chamber and irrespective as to whether the Prosecution intends to use the information as evidence.

volumes concerning the extent to which the Prosecution is in fact carrying out its duty to implement its disclosure obligations.⁶

14. It is also not acceptable that the Trial Chamber appears to have delegated its duty to oversee the Prosecution's timely execution of its disclosure obligations in this case, to another Chamber (or rather the Single Judge),⁷ who has neither the legal duty nor the factual knowledge required to protect Mr. Bemba's rights in the Main Case.

15. Moreover, apart from the fact that timely disclosure of the contents of the accounts could have enabled the Defence to meet the overly rigorous evidential threshold imposed by the Trial Chamber (i.e. that the Defence must establish specific examples of privileged information), it would also have enabled the Defence to draw the attention of the Trial Chamber to specific categories of privileged information, internal work product privilege, or *ex parte* matters, of which the Pre-Trial Chamber may have been unaware .

16. The Trial Chamber acknowledges that it does have the power to advise the Single Judge in relation to the existence of information covered by confidentiality measures in the Main Case.⁸

17. Ordering the Prosecution to disclose the contents of the CD roms to the Defence (from a copy or other source) would have facilitated the ability of the Trial Chamber to have all relevant information at its disposal to do so. In this regard, it would be unfair and arbitrary for the Trial Chamber to play such a role as concerns the protection of witnesses,

⁶ As the Trial Chamber is aware, the Prosecution has stated categorically that it will not disclose any information concerning the Article 70 case to the Bemba Main Defence due to *inter alia*, the existence of protective measures in that case. The position is plainly wrong, as reflected in the case law cited by the Trial Chamber at footnote 59 of the Decision. The Trial Chamber has a clear duty to address this issue, and sanction the Prosecution for its failure to abide by its duties. The Trial Chamber also cannot exempt the Prosecution for such non-disclosure on the grounds that the Defence can now access the materials through Mr. Bemba. Both the Trial Chamber and the Prosecution initially indicated that such an approach was not permissible. The duty to effect disclosure also lies with the Prosecution and not Mr. Bemba.

⁷ ICC-01/05-01/08-3101, para. 25.

⁸ ICC-01/05-01/08-3101, para. 27.

whilst refraining to do so in relation to information, which is central to the rights of the Defence.

18. The Defence further respectfully notes that it is not a matter of the Trial Chamber simply giving its 'views' to the Single Judge in relation to the existence of *ex parte* protective measures, if 'invited' to do so; the Prosecution or the Single Judge were in fact obliged to apply to the Trial Chamber to vary such measures.

19. The Trial Chamber confirmed that this was the appropriate procedure in its decision of 12 March 2014 concerning the ability of participants in the Article 70 case to access material covered by protective measures in the Main Case.⁹

20. The jurisprudence cited by the Trial Chamber at footnote 59 of the Decision also confirms that a party in case A has to apply to the Trial Chamber in case B in order to access materials covered by protective measures in case B.¹⁰ Before the material is disclosed to the applying party in case A, the parties in case B also have the right to insist on the imposition of further protective measures, before the material is released for use in case A.¹¹

21. The case law cited by the Trial Chamber itself therefore supports the fact that the Defence in the Main Case should have been given the right to vet the contents of the email accounts, with a view to suggesting whether particular information should not be transmitted to the Prosecution in the Article 70 case due to the fact it was protected by legal privilege, internal work product privilege, other forms of confidentiality under Rule 73, or *ex parte* measures required to protect Defence witnesses.

⁹ ICC-01/05-01/08-3014.

¹⁰ For example, in ICC-0/04-01/06-2471, in order to obtain access to transcripts in the Lubanga case, the Katanga Defence was obliged to apply for access to the Lubanga Trial Chamber.

¹¹ ICC-01/04-01/06-2521-Red.

22. Finally, at the time that the Defence filed its 'Urgent Request' on 9 April 2014, the Single Judge had not yet established a system for the review of the materials. It is therefore incorrect for the Trial Chamber to state that "the Single Judge already considered and rejected a request from the defence in case ICC-01/05-01/13 that it be permitted, together with Counsel for Mr Bemba in the Bemba case, to review the DVDs and filter out any potentially privileged material."¹²

23. When the Single Judge did eventually issue his decision on 25 April 2014, he rejected the proposal that the Bemba Defence be permitted to conduct an initial review on the grounds that it would "entail significant delays", and thereby impede the ability of the Prosecution to use the contents in the Article 70 proceedings.¹³ The Single Judge did not, however, consider whether the proposal would be more consistent with the rights of Mr. Bemba in the Main Case.

24. The rights of Mr. Bemba should not be thrown by the wayside, nor should priority be given to assisting the Prosecution to obtain quick access to evidence over the need to establish an effective and vigorous system for vetting legal privilege. Nor should such crucial issues be resolved by virtue of the happenstance as to which Chamber rules first.

25. In sum, the Trial Chamber had complementary jurisdiction to rule on such matters. Its failure to do so has created an unacceptable lacuna as concerns the effective enforcement and protection of Mr. Bemba's rights. The Chamber's resolution of this issue has therefore significantly impacted on the fairness and expeditiousness of the proceedings, and the outcome of the trial, as will be discussed below.¹⁴

(b) The second issue: Whether the Trial Chamber erred by imposing too high an evidential threshold in a request for provisional measures/injunctive relief

¹² ICC-01/05-01/08-3101, para. 25.

¹³ ICC-01/05-01/13-366-Red.

¹⁴ ICC-01/05-01/08-3101, para. 26.

26. The Decision is predicated on a “Catch-22”: the Trial Chamber rejected the various requests for interim relief on the grounds that the Defence failed to adduce specific examples of privileged information, from the very materials to which the Defence was seeking access.¹⁵

27. For example, in rejecting the Defence request that it be disclosed the contents of the email accounts of Messrs. Kilolo and Mangenda, the Trial Chamber ruled that the Defence submissions were “impermissibly speculative”.¹⁶

28. As acknowledged in the Decision, the Defence had explicitly stated, in a submission signed by Counsel bound by the Code of Conduct, that the Independent Counsel had previously allowed to be transmitted to the Prosecution information containing conversations regarding the draft Defence Final Brief, and information, which originally emanated from Ms. Gibson and Mr. Haynes.¹⁷ The Prosecution did not dispute that the Independent Counsel had transmitted information concerning the Final Brief, and information that emanated initially from Mr. Haynes and Ms. Gibson.

29. On this point, the Prosecution confirmed that it was in fact in possession of “communications between Messrs. Kilolo and Mangenda referencing Mr. Haynes and Dr Mettraux”.¹⁸ The fact that the Prosecution prefaces this confession with the term ‘non-privileged’ should not have allayed the Trial Chamber’s concerns that such communications must have been privileged, or at the very least, touched on Defence strategy and matters pertaining to the Final Brief.

30. Neither Mr. Haynes nor Dr. Mettraux is part of the alleged Article 70 investigation. Dr. Mettraux played no role in relation to investigation, but was primarily tasked with formulating strategy and legal submissions for the Final Brief.

¹⁵ ICC-01/05-01/08-3101, paras. 24, 33.

¹⁶ ICC-01/05-01/08-3101, para. 26.

¹⁷ ICC-01/05-01/08-3101, para. 24.

¹⁸ ICC-01/05-01/08-3058, para. 4.

31. Such information had no relevance to the Article 70 investigation. It was transmitted to the Prosecution due to the fact that the Single Judge authorised the recordings of entire conversations to be transmitted to the Prosecution, notwithstanding the fact that the Independent Counsel had only summarised or translated a small component of the conversation from Lingala, and notwithstanding the fact that in many instances, only a small fraction of the conversation bore any relevance to the Article 70 investigations.¹⁹

32. Since the Single Judge does not understand Lingala, he had no ability to verify whether the untranslated components of the recordings included information that should not be transmitted to the Prosecution.

33. It is not 'speculative' to assert that the same risk exists in relation to emails. In particular, since the Single Judge has not ordered the Independent Counsel to vary his methodology, if the Independent Counsel designates certain emails for transmission to the Prosecution on the basis that the emails appear to contain some element of information that is 'relevant' to the Prosecution's investigations, but does not specifically redact 'privileged' or 'irrelevant' information from the designated emails, then privileged or sensitive information will be transmitted as well.

34. Apart from describing the information that had been transmitted in the past (which the Defence did), it would not have been possible for the Defence to establish that privileged information had not been filtered out by the Independent Counsel's review without filing examples before the Trial Chamber. However, if the Defence were to have done so, it would have aggravated the very prejudice that it was seeking to minimise – that is, it would have increased the radius of persons who have had access to privileged information.

¹⁹ [REDACTED].

35. It would also be unfair and inappropriate for the Trial Chamber to require the Defence to file information containing discussions on Defence strategies, and internal Defence views regarding the draft Final Brief, in advance of the submission of the Defence Final Brief.

36. At its crux though, the standard imposed by the Trial Chamber “puts the cart before the horse”. The Defence requested that the contents of the email accounts of Messrs. Kilolo, Mangenda and Arido be transmitted to it on the grounds that the Defence had reason to believe that they contained privileged information, and that the Defence would be in the best position to identify such privileged information.

37. The Defence cannot ‘prove’ that is the case unless and until it is granted access. Similarly, the Defence cannot ‘prove’ that privileged information from these email accounts will be transmitted by the Independent Counsel to the Prosecution unless and until that occurs, by which time it will be too late – the very harm that the Defence request will have sought to avoid, will have occurred.

38. The evidential threshold established by the Trial Chamber is thus one that was incapable of being met, without frustrating the very objective of the Request. It is also notable in this regard that the Trial Chamber fails to cite any legal authority for its position or methodology in resolving a request for ‘interim relief’.

39. For the purposes of a request for leave to appeal, it is not necessary for the Defence to establish that the particular evidential threshold adopted by the Trial Chamber was incorrect, but only that the issue as to whether it was incorrect arises from the Decision.

(c) *The issues impact on the fairness and expeditiousness of the proceedings, or the outcome of the trial*

40. The fact that there are unconfirmed charges against Mr. Bemba and his former Defence in relation to Article 70 should not mean that Mr. Bemba is no longer able to avail himself of his rights in the Main Case. Nor should it mean that the Prosecution is able to exploit the Article 70 case to obtain information that it would not otherwise be entitled to receive in the Main Case.

41. Nonetheless, the direct effect of the Trial Chamber's refusal to exercise effective control over the Prosecution's access to Defence materials is that the principle of equality of arms is no longer respected in this case insofar as the Prosecution has received access to internal Defence work product and strategy without being under any obligation to effect reciprocal disclosure, and the rights of Mr. Bemba under Article 67 in the Main Case have been suborned to the Single Judge's objective of expediting and facilitating the ability of the Prosecution to meet the requisite evidential threshold in the Article 70 case.

42. Rights must be implemented in a manner, which is effective. The evidential threshold established by the Trial Chamber for obtaining interim relief renders the right to a remedy illusory.

43. The Trial Chamber also cannot divest itself of its duty under Article 64(2) to ensure that the trial is fair and expeditious and is conducted with full respect for the rights of Mr. Bemba. It is not sufficient for the Trial Chamber to rely on the Single Judge to perform this task on its behalf, particularly in the face of indicia that the Single Judge has reviewed Defence materials in a completely hermetic manner, with no regard for the potential prejudice that would accrue to the Defence in the Main Case.²⁰

²⁰ ICC-1/05-01/13-Anx1. In his decision of 15 April 2014, the Single Judge stated explicitly that, "the determination of the extent to which, if any, the materials and information relating to these proceedings (to which Jean-Pierre Bemba has access by virtue of his position as a defendant and might, or might not, decide to share with Counsel) might be relevant in the context of the proceedings related to the Main Case, as well as of the "repercussions" on it that might be entailed by these proceedings, falls entirely within the discretion of Trial Chamber III" (ICC-01/05-01/13-338, page 4).

44. In this regard, the Trial Chamber has the competence firstly, to issue requests for assistance to States and their domestic judicial authorities, and secondly, to consider whether the implementation of such requests was in accordance with domestic law and the rights of the defendant enshrined therein.²¹ It is therefore entirely illogical and arbitrary for the Trial Chamber to limit its power to considering the legality of decisions impacting on fundamental trial rights, simply because the decision in question was issued by a Single Judge of the ICC, and not an external Court.

45. The approach taken by the Trial Chamber also leaves Mr. Bemba with no remedy in relation to a situation in which the Single Judge may have wrongly exercised jurisdiction over matters falling under the purview of the Trial Chamber.

46. In particular, the Defence asserted that Mr. Bemba's right to privileged communications is a right which attaches to the Main Case, and that as such, the Trial Chamber has both the competence and the duty to take steps to ensure the effective protection of such privilege. Similarly, the Trial Chamber has the duty to oversee and enforce the protection of *ex parte* protective measures. The Single Judge thus had no competence to authorise the Independent Counsel or the Prosecution to access such materials.

47. The Trial Chamber's resolution of the two issues therefore significantly impacts on the fairness of the proceedings by firstly, leaving the Defence with no mechanism for contesting the illegal, *ultra vires*, or arbitrary application of the law to matters concerning the Main Case, and secondly, imposing an impossible threshold as concerns the ability of the Defence to seek relief in relation to the prejudice emanating from the illegal, arbitrary or *ultra vires* application of the law in the Article 70 case, which renders the right to seek relief, illusory.

²¹ ICC-01/04-01/06-772, para. 41.

48. The Trial Chamber's resolution of the two issues also significantly impacts on the expeditiousness of the proceedings by deferring the ability of the Defence to litigate and seek relief for such violations in a timely and proactive manner.

49. In this regard, for the purpose of assessing whether the Article 82(1)(d) criteria are met, the Trial Chamber cannot base its assessment on their own views as to the correctness of the Decision.²² Rather, the Trial Chamber must take into consideration the possible impact on the fairness of the proceedings if its determination was incorrect. This assessment is necessarily 'speculative' in nature, as the Trial Chamber is required to forecast the consequences for fairness and expeditiousness of the proceedings.²³

50. A request for interim and injunctive relief is, by its nature, designed to facilitate the expeditiousness of the proceedings by limiting the occurrence of further prejudice and damage to Defence rights, which could occasion a mistrial or vitiate key parts of the proceedings (such as the submission of the Final Trial Briefs).

51. The Defence filed its request for interim relief as soon as it became aware that the Prosecution in the Article 70 case had filed a request to submit the contents of the email accounts to the review of the Independent Counsel. At this point (9 April 2014), the Defence had not received any access to confidential materials in the Article 70 case.²⁴ The evidential threshold imposed by the Trial Chamber would have required the Defence to ignore its duty of diligence in order to wait until it was in a position to adduce sufficiently concrete examples, demonstrating that the Independent Counsel had transmitted privileged information to the Prosecution.

²² ICC-01/05-01/08-1169, para 21.

²³ ICC-01/04-168, paras. 10 and 13.

²⁴ The Single Judge only granted the Defence access on 15 April 2014 (ICC-01/05-01/13-338), and the modalities of such access took several days to implement.

52. Apart from the fact that it would be inappropriate to require the Defence to do so (for the reason set out above), it would also be contrary to the jurisprudence of the Appeals Chamber, which ties the duty of parties to exercise their rights in a diligent manner to the overarching emphasis of the Statute on ensuring the expeditiousness of the proceedings.²⁵ The evidential threshold set by the Trial Chamber is contrary to, and thus undermines, the expeditiousness of the proceedings.

(d) The Trial Chamber's resolution of the two issues impacts on the outcome of the trial

53. It is the position of the Defence that the system established by the Single Judge for reviewing the contents of the email accounts of Messrs. Kilolo and Mangenda fails to provide effective protection of the rights of the Defence in the Main Case, and allows the Prosecution to access highly sensitive information concerning Defence strategy and internal work product, to which it would not otherwise be entitled.

54. If the Trial Chamber was wrong to reject these submissions, then the Main Case proceedings from the point of their access to such documents onwards will be irretrievably tainted.

55. To allow the Prosecution access to internal Defence discussions on the strengths and weaknesses of the respective Prosecution and Defence case is fundamentally incompatible with Mr. Bemba's privilege against self-incrimination, and gives the Prosecution an unfair and improper advantage in crafting its submissions in order to address what it now knows to be the Defence position on these matters.²⁶

²⁵ ICC-01/04-01/07-2259, para. 43.

²⁶ Whereas the Prosecution has an obligation pursuant to Article 67(2) and Rule 77 to lift internal work product privilege as concerns specific information falling with these disclosure obligations, the drafters deliberately refrained from imposing any reciprocal disclosure obligation or broad inspection obligation on the Defence. ICC-01/04-01/06-T-254-Red-ENG, page 68; ICC-01/04-01/06-2192-Red, para. 63. The Prosecution therefore has no entitlement to receive internal Defence documents, which address the credibility of Prosecution or Defence witnesses.

56. In particular, it is standard practice for Defence teams to discuss the performance of their witnesses. The fact that the Defence might internally consider certain aspects of witness testimony to be 'strong' or 'weak' does not in any way mean that the Defence has reason to believe that the witness is not speaking the truth. The appearance of credibility is, unfortunately, not always linked to veracity.

57. [REDACTED].²⁷

58. In accordance with the standard employed by the Independent Counsel thus far, any and all internal discussions and communications relating to witness credibility would be, without exception, transmitted to the Prosecution, irrespective of whether there is specific evidence that the witness in question is implicated in any wrongdoing.

59. If internal Defence documents concerning the credibility of its case are transmitted to the very same Prosecution which is prosecuting the Main Case, this will have obvious implications for the ability of the Defence to defend the charges against Mr. Bemba.

60. Indeed, since the Trial Chamber has failed to grant any interim relief in this matter, the Defence has no certainty as to what will or will not be transmitted to the Prosecution. The Defence will not be in a position to make informed decisions regarding the best interests of Mr. Bemba whilst it is drafting the Final Brief and preparing its closing submissions.

61. The final contours of this case will thus be shaped by the Trial Chamber's failure to provide immediate and effective relief as concerns these matters.

(e) *An immediate decision of the Appeals Chamber will materially advance the proceedings*

²⁷ [REDACTED].

62. To the knowledge of the Defence, the Prosecution has not yet received any documents from the contents of the email accounts of Messrs. Kilolo and Mangenda. To put it bluntly, it is not too late.

63. If leave to appeal is granted, the Defence can request suspensive effect as concerns the ability of the Prosecution (in whole or in part) to access the accounts. This will protect the integrity of this case whilst the question as to whether the Trial Chamber correctly resolved these issues is adjudicated.

64. The gravity of an unlawful or unwarranted violation of privilege is such that these issues cannot and should not be deferred to the final judgment or appeal.

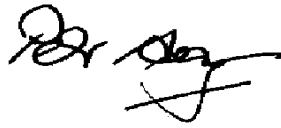
C. RELIEF SOUGHT

65. For the reasons set out above, the Defence for Mr. Jean Pierre Bemba Gombo respectfully requests the Honourable Trial Chamber to

AUTHORISE the Defence to appeal the Decision in relation to

- (i) Whether the Trial Chamber erred by finding that it had no competence to either order the Prosecution to disclose information, which was the property of the Defence in this case, or to refrain from accessing information which was the property of the Defence in the Main Case; and
- (ii) Whether the Trial Chamber erred by imposing too high an evidential threshold in a request for provisional measures/injunctive relief.

The whole respectfully submitted.

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

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

The Hague, The Netherlands

9 July 2014