



Original: English

No.: ICC-01/05-01/13

Date: 08/05/2017

THE APPEALS CHAMBER

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Geoffrey A. Henderson
Judge Piotr Hofmański

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR

*v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO MUSAMBA, JEAN-JACQUES
MANGENDA KABONGO, FIDÈLE BABALA WANDU AND NARCISSE ARIDO*

Public

**Request for Leave to Reply to the ‘Prosecution’s Response to Bemba’s “Request
for Judicial Notice”’**

Source: Art. 70 Defence for 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

Fatou Bensouda

James Stewart

Helen Brady

Counsel for the Defence of Mr Jean-Pierre Bemba Gombo

Melinda Taylor

Mylène Dimitri

Counsel for the Defence of Mr Aimé Kilolo Musamba

Michael G. Karnavas

Steve Powles

Counsel for the Defence of Jean-Jacques Mangenda Kabongo

Christopher Gosnell

Peter Robinson

Counsel for the Defence of Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Prof. Jean-Pierre Fofe Djofia Malewa

Counsel for the Defence of Mr Narcisse Arido

Charles Achaleke Taku

Beth Lyons

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

Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section**Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations
Section****Other**

1. Pursuant to Regulation 24(5) of the Regulations of the Court,¹ the Defence for Mr. Jean-Pierre Bemba Gombo respectfully requests the leave of the Honourable Appeals Chamber to file a reply to the 'Prosecution's Response to Bemba's "Request for Judicial Notice"' ('the Response').²

Submissions

2. The Defence seeks leave to file a reply in relation to the following issues arising from the Response.
3. Firstly, the Response characterises the Defence request as a motion to admit additional material on appeal.³ In so doing, the Prosecution implicitly suggests that the existence of the two decisions and their findings are matters that must be established through the admission of evidence or information.
4. If it is the case that the existence of the two decisions and their findings are a matter which must be established through the admission of evidence, then the corollary of this position is that since this evidence has yet to be 'admitted', the two decisions and their findings do not exist, at the present time, for the purposes of this case. If the Appeals Chamber adopts the position of the Prosecution and declines to admit the decisions into evidence, the decisions and their findings cannot, as a result, be taken into consideration for the purposes of adjudicating the appeal.

¹ The Appeals Chamber has confirmed that unless otherwise provided, this provision applies to procedural requests before the Appeals Chamber: ICC-01/11-01/11-387, para. 15.

² ICC-01/05-01/13-2152-Conf

³ ICC-01/05-01/13-2152-Conf, para. 1-3.

5. The Defence therefore submits that there is good cause to authorise the Defence to submit limited observations concerning the implications of the Prosecution's stance for the appellate proceedings. In particular, if the two District Court decisions and their findings are deemed not to exist for the purposes of the appeal, then the legality of the transmission of the materials to the ICC has not been satisfied for the purposes of Section 52(3) of the International Criminal Court Implementation Act.⁴ This is an issue of direct relevance to the Trial Chamber's findings concerning the legality of the collection of evidence in The Netherlands (which were predicated on the existence of 'a' decision).⁵

6. Secondly, rather than addressing the merits of the Defence application under Article 69(6), the Prosecution asserted that the Defence has failed to satisfy the test for the admission of evidence under Regulation 62(1) of the Regulations of the Court, whilst reserving the right to address the issue as to whether the decisions are facts of common knowledge, at a later stage.⁶ The Prosecution has raised a new, and unforeseen procedural issue; namely, should the Appeals Chamber first establish whether the decisions fall within the category of materials that can be recognised through Article 69(6), or, following the arguments of the Prosecution, should it first examine whether the threshold, concerning a different source of admission on appeal, applies and has been fulfilled.

7. This distinction has significant ramifications for the Defence. If the former approach is adopted, the Appeals Chamber's rejection of the Article 69(6) application would leave intact the Defence's right to then seek the admission of the decisions as new evidence on appeal, whereas the latter approach

⁴ Section 52(3) provides that stipulates that the records of domestic investigations cannot be transmitted to the ICC without prior leave from the District Court; ICC-01/05-01/13-1799-Conf, para. 19.

⁵ ICC-01/05-01/13-2150-Conf, para. 29.

⁶ Response, para. 3.

could preclude the Defence from seeking to rely on the decisions through an application under Regulation 62(1). Given the potentially adverse result for the Defence, it would be consistent with the right to adversarial proceedings to receive submissions from the Defence before resolving this procedural question.

8. Thirdly, the Prosecution appears to suggest that the application should be dismissed on the basis that ‘allowing additional material on appeal without any restriction “entails a real risk of litigation strategies” that contemplate the presentation of such material for the first time on appeal’.⁷
9. In making this point, the Prosecution is essentially positing that the Bemba Defence was aware of the existence and content of the decision, but chose not to introduce them at first instance as part of its ‘litigation strategy’. No evidence or information is cited in support of such a claim, but if the Appeals Chamber were to give any weight to this bald assertion, the Defence requests leave to submit a discrete reply in relation to whether such a claim is applicable, in circumstances in which:
 - i. the Prosecution’s litigation strategy at first instance appears to have been informed by its knowledge of the existence (and presumably content) of the two decisions; and
 - ii. the ability of the Defence to obtain and locate the two decisions in a timely manner was impeded by tardy and piecemeal disclosure on the part of the Prosecution, and the Prosecution’s failure to fulfil its twin duties under Article 54(1)(a) and Rule

⁷ Response, para. 2.

77 to obtain and disclose crucial information concerning the legality of the transmission of the Dutch materials.⁸

Relief Sought

10. For the reasons set out above, the Defence respectfully seeks leave to file a reply in relation to the following three issues:

- a. The implications for the appellate process if the decisions and related findings are not deemed to exist through judicial notice;
- b. The correct procedure for determining a judicial notice application on appeal; and
- c. Whether there is any basis for concluding that the Bemba Defence omitted to tender or introduce the decisions at first instance as part of a 'litigation strategy', as opposed to reasons that were beyond the control (and resources) of the Defence.



Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba

Dated this 8th day of May 2017

The Hague, The Netherlands

Word count: 1121

⁸ In the absence of such information, the fact that the Defence belatedly obtained access (*via* a co-defendant who had no disclosure obligations) to a voluminous unindexed dossier in Dutch was the equivalent of being given a "key to a storage closet" in which relevant materials may or may not be lurking under piles of irrelevant materials: ICTR Prosecutor v. Karemera, Decision on Interlocutory Appeal on EDS 30 June 2006, para. 13.