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**International
Criminal
Court**

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No.: ICC-01/05-01/13
Date: 14 February 2018

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 Redacted Version

**Public Redacted Version of "Prosecution's Response to Mr Bemba's "Defence
Request for Leave to Reply to the Prosecution's Response to Bemba's
'Consolidated Request for Disclosure and Judicial Assistance'"", 11 October 2017,
ICC-01/05-01/13-2238-Conf**

Source: Office of the Prosecutor

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

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Introduction

1. Mr Jean-Pierre Bemba's request for leave to reply to the Prosecution's Response to his Consolidated Request for Disclosure and Judicial Assistance should be rejected.¹ Bemba advances substantive submissions without having first obtained the required leave from the Appeals Chamber. On this basis alone, Bemba's Reply Request should be summarily dismissed. In addition, Bemba's submissions on the four issues that he identifies would not assist the Appeals Chamber in its determination since Bemba fundamentally misunderstands the Prosecution's Response and makes unfounded speculations.

Level of Confidentiality

2. The Prosecution files this submission as "Confidential" pursuant to regulation 23*bis*(2) of the Regulations of the Court, since it responds to a submission with the same level of classification.

Submissions

3. Regulation 24(5) of the Regulations of the Court provides that a Chamber's leave is *required* to reply to a response.² The Appeals Chamber has disapproved the practice of parties filing substantive replies before leave is granted, stating that this "in and of itself may also give rise to the rejection of an application for leave".³ In a similar context (*amicus* observations pursuant to rule 103, which also require leave), the Appeals Chamber has disregarded substantive submissions made without leave.⁴

4. Further, whether leave should be granted is a discretionary decision that must be considered on a case-by-case basis.⁵ Leave to reply will generally be granted only after a showing of good cause.⁶ If permitted, replies must be "narrowly tailored to only address new

¹ ICC-01/05-01/13-2236-Conf-Corr ("Bemba's Reply Request"). See also ICC-01/05-01/13-2233-Conf ("Prosecution's Response") and ICC-01/05-01/13-2227-Conf-Red ("Bemba's Disclosure Request").

² Regulation 24(5): "Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations. Unless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated."

³ ICC-01/04-01/06-824 OA7, para. 68.

⁴ ICC-01/05-01/08-602 OA2 para. 9.

⁵ ICC-01/05-01/13-2197, para. 17.

⁶ See e.g. [ICC-01/05-01/08-294](#), para. 3; [ICC-02/04-01/15-252](#), p. 3.

issues”⁷ raised in a response which “could not have been foreseen”,⁸ and “may not be used to strengthen the arguments” previously advanced.⁹ The Appeals Chamber will generally not be assisted by submissions which are irrelevant or unnecessary to assist the Chamber’s deliberations,¹⁰ or which fall reasonably within the scope of the moving party’s original arguments.¹¹ Recently in this case, the Appeals Chamber rejected a request for leave to reply because it would not be in the interests of justice and would not assist the Appeals Chamber in its determination of the matter.¹²

5. As demonstrated below, Bemba fails to identify any issue in the Prosecution’s Response that he could not have foreseen and which merits a reply. To the contrary, he seeks to expand submissions he has already made in his Disclosure Request and his Appeal Brief. The Appeals Chamber will not benefit from such submissions. Rather, Bemba’s arguments, based on speculations and a misreading of the Prosecution’s Response, would further delay the proceedings.

6. Accordingly, Bemba’s request to reply on the four issues he has identified should be rejected. His substantive submissions which have been made without leave should be disregarded.

I. The Appeals Chamber would not be assisted by Bemba’s further submissions in reply regarding the issue of “diligence”

7. Bemba’s request to provide submissions as to whether his diligence is relevant to the Prosecution’s/ Registry’s disclosure duties should be rejected.¹³ Bemba has not identified an issue in the Prosecution’s Response that he could not have foreseen and that needs to be

⁷ [ICC-01/05-01/08-3165-Red](#), para. 5. See also [ICC-01/05-01/13-893-Red](#), para. 10 (rejecting a request for “leave to reply in order to clarify the record in the face of alleged misrepresentations” because “it does not identify any new issue which arises from the [...] Response”).

⁸ [ICC-02/11-01/15-284 OA7](#), para. 11.

⁹ [ICC-01/04-02/12-296-tENG](#), para. 7. See also ICC-01/05-01/08-3480 A (“[Bemba Reply AD](#)”), para. 8.

¹⁰ [ICC-01/04-01/06-824 OA7](#), para. 67 (finding that leave to reply was “unnecessary” and “not relevant to the deliberations of the Appeals Chamber”).

¹¹ See e.g. [ICC-01/09-01/11-1417 OA7 OA8](#), para. 13 (rejecting a request to make additional submissions—albeit under regulation 28, rather than as a reply—on the basis that the issues for which leave was sought fell “within the ambit of the issues on appeal”, that the arguments in response were “foreseeable” in the circumstances, and that the applicants had already received the material possibility of presenting “all arguments” within the scope of their appeals).

¹² ICC-01/05-01/13-2197 A A2 A3 A4 A5, para. 17.

¹³ See Bemba’s Reply Request, paras. 8-15.

addressed. Nor does he show that his submissions would assist the Appeals Chamber in its determination of the matter. Instead, Bemba fundamentally misunderstands the Prosecution's arguments and improperly provides substantive submissions without leave being granted.

8. Bemba misunderstands the Prosecution's Response. The Prosecution's primary position in its Response was that it has complied with its disclosure obligations, and the requested material does not fall within the Prosecution's disclosure obligations under article 67(2), rules 76 and 77 or the Trial Chamber's orders.¹⁴ Had the Prosecution assessed that the requested material was disclosable, it would have provided it to the Defence, irrespective of any request.¹⁵ However, and as noted in its Response, the Prosecution considers that, in the circumstances of this case, the requested information is not *prima facie* material to the Defence's preparation.¹⁶

9. In addition, the Prosecution underscored that Bemba has been aware that the Prosecution had the requested material since the pre-trial and trial phases of the proceedings and yet, has never asked for it.¹⁷ Crucially, he has been aware of the distinction between CDRs (non-privileged) and logs associated with intercepted calls (which contain privileged information) since at least June 2015,¹⁸ and yet now on appeal conflates these materials to found his Disclosure Request.¹⁹ Bemba's inaction at trial undermines his submissions as to the materiality of the information sought. Similarly, his knowledge of the distinction between CDRs and logs confirms that Bemba's Disclosure Request is one more of a steady stream of filings and correspondence which unnecessarily dissipate the Court's time and resources by requesting unnecessary, irrelevant and even non-existent material.²⁰ Such continuous and unfocused enquiries—which Bemba confirms merely seek “to assist the Defence to make an informed decision as to whether to submit a request to admit additional evidence on

¹⁴ Prosecution's Response, paras. 9 (“The Prosecution has met its disclosure obligations and rejects Bemba's unfounded assertions”), 11 (“The Prosecution did not breach its disclosure obligations”). See also Prosecution's Response, paras. 25, 27 and 29. *Contra* Bemba's Reply Request, paras. 13-14.

¹⁵ *Contra* Bemba's Reply Request, para. 14.

¹⁶ See Prosecution's Response, paras. 14-24.

¹⁷ Prosecution's Response, paras. 12 and 20.

¹⁸ Prosecution's Response, para. 17.

¹⁹ Prosecution's Response, paras. 14-20.

²⁰ See Prosecution's Response, fn. 2. See also Bemba's Reply Request, para. 39 referring to one of the latest Defence's e-mail requests dated 4 October 2017. Bemba has sent another request on 10 October 2017. In total, Bemba has sent at least 14 enquiries and/ or requests to the Prosecution via e-mail during these appellate proceedings (from 8 May 2017 until 10 October 2017).

appeal”²¹—should be restrictively considered due to the corrective nature of the appellate proceedings.²² Since appellate proceedings do not involve a *de novo* assessment,²³ Parties should not use them to make up for their perceived deficient strategies at trial. A contrary view would be inconsistent with the fundamental rationale for having a rigorous standard to admit additional evidence on appeal.²⁴

10. In sum, since Bemba’s intended submissions are premised on a misunderstanding of the Prosecution’s position, they would not assist the Appeals Chamber in its determination. Further, the Appeals Chamber should disregard Bemba’s substantive submissions—see in particular footnote 13—which effectively reply to the Prosecution’s Response without having obtained prior leave.

II. The Appeals Chamber will not be assisted by Bemba’s submissions on assertions that the Prosecution did not make

11. Bemba’s request to reply to “the Prosecution’s assertion that the particular information provided by the Dutch authorities did not contain confidential information and was not generated through law enforcement activity” should be similarly dismissed.²⁵ First, Bemba provides substantive submissions without prior leave. Those arguments should be disregarded. Second, Bemba does not seek to respond to issues raised in the Prosecution’s Response which he could not have foreseen; rather, he attempts to supplement submissions in his original Disclosure Request and his Appeal Brief. Moreover, his submissions fundamentally misunderstand the Prosecution’s Response and the evidence. The Appeals Chamber would not benefit from such arguments.

12. First, Bemba’s substantive submissions without leave should be summarily dismissed. Since leave has not yet been granted, the Appeals Chamber should disregard Bemba’s

²¹ Bemba’s Reply Request, para. 10.

²² ICC-01/04-01/06-3121-Red (“*Lubanga AJ*”), para. 56.

²³ *Lubanga AJ*, para. 56.

²⁴ *Lubanga AJ*, para. 57 (“[a]llowing the admission of evidence on appeal, without further restriction, entails a real risk of litigation strategies that contemplate the presentation of evidence for the first time on appeal, even if such evidence was available at trial or, with due diligence, could have been produced.”)

²⁵ Bemba’s Reply Request, paras. 16-27.

substantive arguments on CDRs containing confidential/ privileged information,²⁶ as well as those in relation to P-433's and P-361's reports and testimonies.²⁷ Further, although Bemba has argued in his Disclosure Request that CDRs are privileged,²⁸ he did not appeal the Single Judge's and the Trial Chamber's contrary position on this point.²⁹ Bemba cannot use the Reply Request to develop and amend his appellate submissions.

13. Second, Bemba's submissions would not assist the Appeals Chamber's determination. Bemba does not argue that the Prosecution has raised a new issue that he must reply to. Instead, he develops and supplements his arguments in his Disclosure Request and his Appeal Brief. Yet, he fails to show how his submissions, largely premised on misconstructions of the Prosecution's Response and the evidence, would assist the Appeals Chamber in its determination. They will not.

14. Bemba misrepresents the Prosecution's submissions and the evidence. The Prosecution did not assert that CDRs did not contain confidential information; instead, it stated that CDRs are not privileged because they do not contain privileged communications.³⁰

15. Moreover, Bemba takes P-433's testimony out of context. [REDACTED].³¹ His testimony must be read in its proper context:

“[REDACTED].”³²

16. Nor does Bemba accurately represent P-361's testimony. There is nothing in his evidence to suggest that “[there] were substantive discussions post-Report between P-361 and

²⁶ Bemba's Reply Request, paras. 16-21. Bemba interchangeably refers to, and conflates, confidential and privileged information.

²⁷ Bemba's Reply Request, paras. 22-27.

²⁸ Disclosure Request, para. 9 (“The Single Judge also amended his order on the understanding that CDR are not protected by privilege, which is not correct”).

²⁹ See ICC-01/05-01/13-2144-Red (“Bemba's Appeal Brief”), para. 173, where Bemba challenges the fact that the Prosecution obtained CDRs directly from the Dutch but does not argue that the Single Judge or the Trial Chamber erred in considering the CDRs as non-privileged material.

³⁰ Prosecution's Response, para. 14 (“CDRs are not privileged, and the Prosecution was entitled to obtain them directly from the Dutch authorities, without prior vetting by the Independent Counsel”), para. 18 (“since CDRs do not contain the contents of intercepted conversations, they do not contain any ‘privileged information’”), p. 11 (“Instead he was confirming the Prosecution's position that CDRs are not privileged and could be directly collected”), para. 20 (“since CDRs are not privileged [...]”). *Contra* Bemba's Reply Request, paras. 16, 17 and fn. 15, referring to Prosecution's Response paras. 14-20

³¹ *Contra* Bemba's Reply Request, para. 22. [REDACTED].

³² [REDACTED].

the OTP concerning this CDR that have never been disclosed to the Defence”.³³ Nor does P-361’s testimony contradict the Prosecution’s Response. That CDRs are compiled by the telecommunication service providers (TSPs) pursuant to a request from a law enforcement agency does not mean that the information contained therein (the data) is generated pursuant to, or as a result of, such request.³⁴ To the contrary, TSPs generate and keep such data for their own business practices (*e.g.* for billing purposes), and as directed by relevant state legislation.³⁵

17. Because of the above, Bemba’s request to reply to the second issue should be dismissed.

III. Bemba’s submissions on the inferences that the Appeals Chamber should draw would not assist it

18. Bemba also seeks to provide submissions on “the inferences that should be drawn from the Prosecution’s opposition to the provision of information concerning the date on which confidential information was first provided to the Prosecution”.³⁶ Once more, Bemba improperly advances substantive submissions without having obtained leave from the Appeals Chamber. Those arguments should be summarily dismissed. In any event, Bemba’s requested submissions would not assist the Appeals Chamber since they fundamentally misunderstand the Prosecution’s Response and the evidence, and are irrelevant to the Disclosure Request. They also unfoundedly suggest the Prosecution’s impropriety.³⁷ Such conjectures are wholly unsupported and Counsel should refrain from making such baseless allegations.

19. First, Bemba’s substantive submissions, made without leave, should be summarily dismissed.³⁸ He uses the Reply Request to develop his arguments—perfunctorily set out in his

³³ *Contra* Bemba’s Reply Request, para. 27.

³⁴ *Contra* Bemba’s Reply Request, para. 27.

³⁵ See Prosecution’s Response, fn. 33. See also [REDACTED].

³⁶ Bemba’s Reply Request, paras. 28-51.

³⁷ See *e.g.* Bemba’s Reply Request, paras. 31 (“The possibility that the disclosure of this information might expose impropriety on the part of the Prosecution (or reveal factual inaccuracies in its written submissions) is not grounds for withholding it”) and 32 (“the Prosecution’s failure to refer to these precedents and related obligations suggests that the Prosecution is applying the wrong legal standard to its review of disclosure”).

³⁸ See Bemba’s Reply Request, paras. 28-51.

Appeal Brief—as to his perceived deficiencies of the Dutch interception process.³⁹ To that end he provides his version of a chronology of events which contains many of his own speculations.⁴⁰ Further, the relevance of these further submissions to the Disclosure Request is unclear, since Bemba fails to identify any disclosure violation or impropriety by the Prosecution which could justify his request for a schedule. Contrary to Bemba’s assertion, there are not questions “that remain unresolved”.⁴¹ Bemba’s questions have been answered, albeit to his dissatisfaction.

20. Second and in any event, Bemba’s submissions as to the inferences that the Appeals Chamber should draw would not assist the Appeals Chamber. To the contrary, they would unnecessarily delay the proceedings, since Bemba speculates and draws unreasonable conclusions from the evidence,⁴² and misunderstands the Prosecution’s Response.⁴³ Contrary to Bemba’s suggestion, the Prosecution undoubtedly stated that it had disclosed all information material to the Defence preparation.⁴⁴ Hence, a schedule was and remains unnecessary. The Prosecution asserted that a schedule would be “time and resource consuming” because of the sheer amount of material disclosed (6,816 items), and not because material had not been disclosed.⁴⁵

21. Having all submissions before it, the Appeals Chamber is fully disposed to draw its own conclusions. Hence, Bemba’s request to provide submissions on the third issue should be dismissed.

³⁹ Bemba Appeal Brief, paras. 169-178. In particular, Bemba seeks to revive his trial submissions (not elaborated on appeal) as to the interception of the “18” number (*see* ICC-01/05-01/13-1799-Red, paras. 23-39 or “Bemba Article 69(7) Motion”). These arguments were squarely addressed and dismissed by Trial Chamber VII in its Article 69(7) Decision (*see* ICC-01/05-01/13-1855, paras. 22-27).

⁴⁰ Reply Request, paras. 33-34 (speculating once again as to the attribution of the “18” number to Kilolo and the Prosecution’s interactions with the Dutch authorities), para. 35 and annex A (where Bemba further speculates about the lack of records regarding the Prosecution’s interactions with the Dutch authorities) and paras. 37-50 (laying out a chronology full of conjecture and unreasonable conclusions).

⁴¹ Bemba’s Reply Request, para. 51.

⁴² *See above*, fn. 40.

⁴³ Bemba does not accurately present the Prosecution’s submissions. *See e.g. below* footnotes 44-45. Moreover, the Prosecution did not acknowledge in its Response – and much less in paras. 6 and 10 – that the Dutch authorities had collected information that fell beyond the terms of the formal requests submitted by the Prosecution. *Contra* Bemba’s Reply Request, para. 45, fn. 52 referring to Prosecution’s Response, paras. 6 and 10.

⁴⁴ *See* Prosecution’s Response, para. 29 (“Compiling a schedule such as the one requested by Bemba (and disclosing all documents again) would be excessively time and resource-consuming, and is not needed or justified when the Prosecution has already complied with its disclosure obligations at trial”). *See also* paras. 9 and 11. *Contra* Reply Request, para. 28.

⁴⁵ *See* Prosecution Response, para. 29. *Contra* Bemba’s Reply Request, para. 28.

IV. Bemba's submissions as to the *Ex Parte* classification of Annex A are unnecessary

22. As to his fourth issue, Bemba requests the disclosure of Confidential *Ex Parte* Annex A ([REDACTED]) and the “right to reply in relation to any consequences emanating from the fact that this information has been placed before the Chamber”.⁴⁶ Again, Bemba's submissions are misconceived and would not assist the Appeals Chamber. First, the Prosecution reasonably filed Annex A as Confidential *Ex Parte* only available to the Prosecution, Registry and the Appeals Chamber. Second, the Prosecution has not misunderstood the scope of its disclosure obligations. However, so as to bring finality to, and ensure the efficiency of these appellate proceedings, the Prosecution is simultaneously filing a separate request for reclassification of the Annex to the Appeals Chamber so that the e-mail communication is available to Bemba. Further, Bemba was already aware of the public information enclosed therein, which cannot, in any event, improperly influence the Appeals Chamber. Hence, no further submissions on the fourth issue are necessary.

23. First, Bemba fails to show an error in the Prosecution's *Ex Parte* classification of Annex A.⁴⁷ There has not been a “complete abuse of procedure”.⁴⁸ Rather, the Prosecution reasonably filed the annex as *Ex Parte* available to the Prosecution, Registry and Appeals Chamber because the confidential information enclosed in [REDACTED] is not, contrary to Bemba's claim, “relevant” to this appeal.⁴⁹ [REDACTED].⁵⁰ [REDACTED] was not disclosable, since the confidential information enclosed therein was not material to the Defence's preparation of the article 70 case against the Accused.⁵¹

24. Further, the Prosecution provided the Annex to the Appeals Chamber to support its assertion that the information communicated was public and irrelevant to this case.⁵² Moreover, Bemba did not ask for the Prosecution's communication; rather, he asked for the Registry's reaction to this communication (*i.e.* “any steps that were taken in connection with

⁴⁶ Bemba's Reply Request, para. 56. *See generally* Bemba's Reply Request, paras. 52-56.

⁴⁷ *Contra* Bemba's Reply Request, paras. 52, 55.

⁴⁸ *Contra* Bemba's Reply Request, para. 55.

⁴⁹ *Contra* Disclosure Request, para. 36. *See* Prosecution's Response, para. 39.

⁵⁰ Prosecution's Response, para. 40.

⁵¹ *See* Prosecution's Response, fn. 105.

⁵² Prosecution's Response, paras. 39-40.

the information provided by the Prosecution”).⁵³ Once again, Bemba misrepresents the Prosecution’s submissions: the Prosecution did not disclose the communication because it assessed it to be irrelevant to the case, and not because Bemba did not request it.⁵⁴

25. Second, the Prosecution has not misunderstood the scope of its disclosure obligations, nor has it deliberately made “(carefully worded) assertion[s]” or used “ambiguously worded phrases” to evade its disclosure obligations. Bemba’s suggestion is unsupported.⁵⁵ The Prosecution reiterates that it did not receive any information from the Registry relevant to this appeal as a result of its communication.⁵⁶

26. In any event, and for the sake of expediency and finality, the Prosecution is simultaneously filing a separate request to the Appeals Chamber to re-classify the Annex so that it will be available to Bemba.⁵⁷ The Prosecution maintains, however, that this communication does not fall within the scope of information material to the Defence preparation of this case.

27. As such, there is no need for Bemba to address the Appeals Chamber as to the consequences of having had the information before it.⁵⁸ The Appeals Chamber is constituted by professional judges. Further, the information is simply not relevant to this case and, in any event, Bemba was aware of it since the content of [REDACTED] was largely reproduced in the Prosecution’s motions⁵⁹ which were available to Bemba.⁶⁰

28. Bemba’s request to reply on his fourth identified issue should be dismissed.

⁵³ Disclosure Request, para. 49.

⁵⁴ *Contra* Bemba’s Reply Request, para. 53 (arguing that since “the Prosecution appears to believe that a specific request addressed to the Prosecution is necessary to trigger its disclosure obligations highlights the fact that the Prosecution misunderstands the scope of its disclosure obligations at this Court”).

⁵⁵ Bemba’s Reply Request, para. 53. Moreover, the exchanges referred to in ICC-01/05-01/08-T-303, p. 27, lns. 10-11 (Bemba’s Reply Request, fn. 65) are completely unrelated to this communication to the Registry.

⁵⁶ Prosecution’s Response, para. 41.

⁵⁷ The Registry has agreed to this reclassification.

⁵⁸ *Contra* Bemba’s Reply Request, para. 56.

⁵⁹ ICC-01/05-44-Conf-Red2, para. 27 and ICC-01/05-01/08-3022-Conf-Anx7, para. 25.

⁶⁰ See Prosecution’s Response, para. 37, fn. 98.

Conclusion and Relief

29. The Prosecution requests the Appeals Chamber to reject Bemba's Reply Request.



Fatou Bensouda, Prosecutor

Dated this 14th day of February 2018⁶¹
At The Hague, The Netherlands

⁶¹ This submission complies with regulation 36, as amended on 6 December 2016: ICC-01/11-01/11-565 OA6 (“*Al Senussi AD*”), para. 32.