

**Cour
Pénale
Internationale**



**International
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Court**

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Date: 24 March 2016

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF
THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO

**Public Document
with
Confidential Annex A**

Prosecution's Response to Bemba's "Defence Request for Judicial Notice"

Source: The Office of the Prosecutor

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

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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) opposes the Bemba Defence’s “Request for Judicial Notice” (“Request”).¹ The Motion inappropriately attempts to characterise the Accused’s alleged acts and conduct through judicially noticing various filings and decisions in the Main Case where the Bemba Defence failed to call such evidence at trial. The Motion is directly contrary to the Chamber’s express caution that its power to judicially notice documents should not be used to admit filings and decisions from the Main Case for the truth of their contents.² Contrary to Bemba’s assertion, however, the significant majority of the tendered documents violate that fundamental premise.

2. In addition, the vast majority of documents tendered for judicial notice are “clearly irrelevant” to the issues in this case.³ For that reason, the Chamber should not take judicial notice of them, and disallow the Bemba Defence’s attempt to expand this case beyond its limited contours.

3. Annex A contains the Prosecution’s particularised response to each document tendered by the Bemba Defence. The Prosecution notes that many of the filing numbers in the Annex accompanying the Motion appear to be incorrect or incomplete.⁴

¹ ICC-01/05-01/13-1728.

² ICC-01/05-01/13-1473, para. 4.

³ ICC-01/05-01/13-1473, para. 6.

⁴ For instance, it appears that: “ICC-01/05-01/08-751-AnxD-T-Eng” should be “ICC-01/05-01/08-751-AnxD-tENG”; “ICC-01/05-01/08-3182-Conf” should be “ICC-01/05-01/08-3182-Conf-Corr”; “ICC-01/05-01/08-2250-Conf-AnxB-Red2” should be “ICC-01/05-01/08-2250-Conf-Exp-AnxB-Red2”; “ICC-01/05-01/08-2250-Conf-Red” should be “ICC-01/05-01/08-2250-Conf-Exp”; “ICC-01/05-01/08-1593” should be “ICC-01/05-01/08-1593-Conf”; “ICC-01/05-01/08-2239” should be “ICC-01/05-01/08-2239-Conf-Red2”; “ICC-01/05-01/08-2903-Conf-Red” should be “ICC-01/05-01/08-2903-Conf”.

II. Confidentiality

4. This annex to this filing is classified as “*Confidential*” as it responds to an annex of the same designation. The Prosecution will file a “*Public Redacted*” version following the Bemba Defence’s filing of the Public Redacted version of its annex.

III. Submissions

A. The Bemba Defence improperly seeks judicial notice of documents for the truth of their contents

5. The Bemba Defence’s assertion that it does not “seek[] to admit the contents of these filings for the truth of their contents” is contradicted by their individualized arguments in Annex A. This contradiction is exemplified by the Bemba Defence’s request to judicially notice documents concerning the Defence’s purported lack of funds in the Main Case.⁵ The documents are clearly intended to establish the state of the Defence’s finances in the Main Case (the truth of their contents), and not simply the Defence’s assertion of those facts. If it was the latter, *i.e.* what the Defence asserted their finances to be and not the state of those finances as a matter of fact, then the documents are so clearly irrelevant to the case that they do not warrant admission.

6. The same underlying issue affects most of the documents tendered by the Bemba Defence for judicial notice. For instance, as reflected in the Motion’s annex, the Bemba Defence seeks judicial notice to establish the truth concerning purported “logistical issues” facing the Defence in the Main Case,⁶ payments and services provided by various Court entities (the Victims and Witnesses Unit (“VWU”), the

⁵ See *e.g.* Annex A, Document Nos. 5, 9, 10, 11, 15, 42, 43, 44, 63, 64, 73, 74, 75, 77.

⁶ See *e.g.* Annex A, Document Nos. 1, 6, 7, 14, 15, 16, 19, 25, 30, 41, 42, 44, 46, 47, 53, 58, 59, 62, 64, 65, 66, 70, 76, 77.

Prosecution, the Trust Fund for Victims) to victims and witnesses,⁷ and Arido's decision not to testify in the Main Case.⁸ The Bemba Defence seeks the admission of these documents not for what was simply expressed in those filings by the relevant Party, but for what actually happened.

7. That the Bemba Defence seeks to judicially notice these documents for their truth is also apparent by its failure to call a single witness in this case with personal knowledge about the *Bemba* Defence's finances or logistical issues in the Main Case. These include the Main Case representatives from the Counsel Support Section, the Registrar, or the remaining counsel for the Defence in the Main Case. Instead, the Bemba Defence seeks to do what it is expressly precluded from doing: producing self-serving statements made by the Defence in the Main Case as a substitute for the lack of any evidence about those matters in this case. In doing so, the Bemba Defence seeks to deny the Prosecution, the Chamber, and the other Accused any credible opportunity to examine individuals knowledgeable about these alleged facts and to challenge their veracity.

8. This Chamber previously concluded that it would not judicially notice documents tendered to establish "the truth or falsity of any particular fact" in the Main Case, as "this would not be a judicial notice request, but rather one falling under other provisions like Rule 68 of the Rules."⁹ As many of the documents tendered by the Bemba Defence do just that, the Motion should be denied with respect to those items.

⁷ See e.g. Annex A, Document Nos. 3, 4, 33, 35, 36, 37, 38, 61, 67, 68.

⁸ See e.g. Annex A, Document Nos. 1, 54.

⁹ ICC-01/05-01/13-1473, para. 4.

B. Many of the Main Case filings and decisions are clearly irrelevant

9. In addition to going to their truth, the vast majority of documents tendered by the Bemba Defence are so clearly irrelevant to the issues in this case that the Chamber should exercise its discretion and decline to take judicial notice of them.¹⁰

10. As noted above, a significant number of documents tendered by the Bemba Defence constitute self-serving statements by the Defence in the Main Case concerning their lack of funds and purported logistical issues. Even if not tendered for the truth of their contents, the Bemba Defence fails to identify any genuine link between the Defence's assertion of those facts in the Main Case and the conduct of the Accused alleged in this case. Indeed, the Bemba Defence fails altogether to make any argument in its Motion about that essential question.

11. Paradigmatic of the Bemba Defence's tenuous approach to establishing relevance is its attempt to seek judicial notice of filings by the Board of Directors of the Victims' Trust Fund for authorisation to provide programs for victims of sexual violence in the Central African Republic ("CAR").¹¹ The Defence fails to identify any discernible link between those programs and the limited matter at issue in this case: the Accused's conduct *vis-à-vis* certain Main Case Defence witnesses. The same underlying issue affects the Bemba Defence's attempt at eliciting evidence concerning the conduct of other Court agents in the Main Case, including the Prosecution,¹² the VWU,¹³ and the Legal Representative for Victims.¹⁴ With only one witness potentially remaining in this case, neither the Bemba Defence nor any Accused has called any witness or identified any document establishing any link between the conduct of these Court agents and the alleged conduct of the Accused.

¹⁰ ICC-01/05-01/13-1473, para. 6.

¹¹ See e.g. Annex A, Document Nos. 67, 68.

¹² See e.g. Annex A, Document Nos. 3, 4, 33, 35, 36, 37, 38, 61.

¹³ See e.g. Annex A, Document Nos. 20, 22, 38.

¹⁴ See e.g. Annex A, Document Nos. 20, 22, 40.

12. To justify the relevance of these documents, the Bemba Defence relies upon a misreading of this Chamber's previous disclosure ruling that "'payments to certain witnesses [...] could be deemed useful in understanding the overall system of money transfer and payment of witnesses' in the Main case."¹⁵ Two distinctions must be drawn. *First*, the Chamber's decision was made in the context of disclosure, not judicial notice or even the admissibility of evidence. The two have different standards. For disclosure, the Defence needs to show that the documents are material to its preparation. However, for judicial notice of a document or its contents as a fact of common knowledge, the Defence must show that it is relevant to the case itself, not simply the Defence's preparation. In this instance, Bemba Defence makes no argument as to the relevance of these documents, but simply relies on the Chamber's disclosure ruling that the documents are material to the Defence's preparation. Despite Bemba's treating them as such, the two standards are not synonymous.

13. *Second*, the Chamber's decision was not so broad as to make relevant *any* payment or service by *any* Court entity operating in CAR. The decision narrowly required disclosure of documents that might enable the Defence to properly understand the rules and regulations applicable to the money transfers at issue in this case. The Chamber did not intend that ruling to broaden this case to matters of an entirely tangential nature, such as programs provided to victims of sexual violence in CAR. Any other interpretation of the Chamber's prior ruling would risk broadening this case untenably.

14. Other documents tendered by the Bemba Defence are clearly irrelevant to the issues in this case for the following reasons:

¹⁵ ICC-01/05-01/13-1728, para. 15 (citing ICC-01/05-01/13-1154, para. 12).

- Documents 2, 9, 10, 11, 43, 44, 63, 66, 69, 71, 74 and 79 concern matters, including the conduct of the Accused, preceding the time frame of the criminal enterprise alleged by the Prosecution.¹⁶
- Documents 21 and 23 relate to an application made by the Prosecution to Trial Chamber III for assistance that was denied due to that Chamber's determination that it lacked competence concerning the matter. To the extent the Bemba Defence wishes to argue that Trial Chamber III was biased by the Prosecution's article 70 investigation, that is not an appropriate subject of these proceedings.
- Document 39 concerns the Prosecution's position on the elements for "collusion, coaching, and corruption" *in the Main Case*, an entirely irrelevant matter. The Prosecution's position on the legal elements of the article 70 crimes in *this case* is detailed in its Pre-Trial Brief¹⁷ and currently under the Chamber's consideration.
- Documents 55 and 56 concern the conduct of intermediaries in assisting victim participation in the Main Case, none of whom are part of any of the allegations in this case.
- Documents 60 and 78 rely upon the Bemba Defence's misunderstanding or mischaracterisation of the Prosecution's Closing Brief in the Main Case and Pre-Trial Brief in this case.

15. Judicial notice of these filings and decisions in the Main Case should be denied, as they are clearly irrelevant to this case.

¹⁶ ICC-01/05-01/13-1110-Conf, para. 1.

¹⁷ See ICC-01/05-01/13-1110-Conf, paras. 220-234. See also ICC-01/05-01/13-1024.

C. The Prosecution does not object to the Chamber's judicial notice of the remaining Main Case filings and decisions

16. The Prosecution does not object to the Chamber's judicial notice of the remaining documents, numbers 8, 13, 26, 27, 28, 29, 32, 34, and 72, but only to the extent that they are being judicially noticed for the perceptions of the Parties therein and not the truth of their contents.

IV. Relief Requested

17. For the foregoing reasons, the Chamber should dismiss the Motion, except in relation to the documents identified at paragraph 16, above.



Fatou Bensouda, Prosecutor

Dated this 24th day of March, 2016
At The Hague, The Netherlands