

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 3 May 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*

**Confidential**

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

**Source:** Office of the Prosecutor

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

**The Office of the Prosecutor**

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**Detention Section**

**Victims Participation and Reparations Other  
Section**

## Submissions

1. Mr Jean-Pierre Bemba's request to take judicial notice under article 69(6) of two decisions of the Dutch District Court issued in October 2013<sup>1</sup> should be dismissed. Bemba has not discharged his burden to justify the introduction of additional material into the court record of a case during appeal proceedings.
2. In order to introduce additional material on appeal, a party still bears the burden to demonstrate that this material meets the requirements that the Appeals Chamber has developed with respect to additional evidence on appeal pursuant to regulation 62(1) of the Regulations of the Court ("RoC").<sup>2</sup> This is due to the distinctive nature and purpose of appellate proceedings,<sup>3</sup> which are corrective in nature and do not constitute a trial *de novo*.<sup>4</sup> Regardless of the type of material,<sup>5</sup> or limited purpose that Counsel seeks to attach to it,<sup>6</sup> 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.<sup>7</sup> This practice would contravene the spirit and confined purpose of the appellate proceedings. Moreover, the Request<sup>8</sup> belies Bemba's appeal brief,<sup>9</sup> insofar as the latter appears to rely on—and interprets—the content of the Decisions and does not merely refer to their existence and date.
3. Hence, since Bemba has not made submissions as to whether the two Dutch Decisions comply with the requirements of the additional evidence test as

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<sup>1</sup> ICC-01/05-01/13-2150-Conf ("Request").

<sup>2</sup> ICC-01/04-01/06-3121-Red A5 ("*Lubanga* AJ"), paras. 1, 54-62.

<sup>3</sup> *Lubanga* AJ, para. 56.

<sup>4</sup> *Lubanga* AJ, paras. 26-27, 56.

<sup>5</sup> The Prosecution does not pronounce as to whether the decisions are facts of common knowledge within the terms of article 69(6).

<sup>6</sup> Request, para. 30.

<sup>7</sup> *Lubanga* AJ, para. 57. The Appeals Chamber made such statement in the context of additional evidence on appeal.

<sup>8</sup> Request, para. 30.

<sup>9</sup> ICC-01/05-01/13-2144-Conf A4 ("Bemba Appeal Brief"), paras. 176-178. The Prosecution also notes that Trial Chamber VII refused to take judicial notice of similar material (Austrian Court Decisions) in the context of the same litigation and instead it considered them as supporting material of the Parties' article 69(7) challenge against the Western Union Documents. *See* ICC-01/05-01/13-1948, para. 42.

developed by the Appeals Chamber—which equally applies to Bemba’s Request—his Request should be dismissed. The Prosecution reserves its position as to whether the material should enter the case record—and would respond accordingly—after the Appeals Chamber instructs Bemba to file submissions or so decides.

### **Level of Confidentiality**

4. The Prosecution files this submission as “Confidential” pursuant to regulation 23bis(2) of the RoC, since it responds to a confidential submission. The Prosecution does not object to its submission being reclassified as public, once a public version of the Defence filing is available.

### **Conclusion and Relief**

5. The Prosecution requests the Appeals Chamber to dismiss Bemba’s Request.



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**Fatou Bensouda, Prosecutor**

Dated this 3<sup>rd</sup> day of May 2017<sup>10</sup>  
At The Hague, The Netherlands.

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<sup>10</sup> This submission complies with regulation 36 of the RoC, as amended on 6 December 2016: ICC-01/11-01/11-565 OA6 (“*Al Senussi AD*”), para. 32.