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

Date: 18/08/2017

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

**Defence Request for Leave to reply to the “Prosecution’s Response to Bemba’s
“Request for Additional Evidence on Appeal”**

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

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**Victims Participation and Reparations
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Other

1. The Defence for Mr. Jean-Pierre Bemba respectfully requests the leave of the Appeals Chamber to reply to the “Prosecution’s Response to Bemba’s “Request for Additional Evidence on Appeal”” (the Response).¹
2. The Defence submits that there is good cause to reply to the following discrete issues arising from the Response.
3. In terms of the first issue, the Prosecution has claimed the following: “As noted during trial, Mr Pestman’s opinion was given without knowing of the emails between the Dutch Public Prosecutor and the OTP, and failed to accurately depict the events.”²
4. At the trial stage, the Prosecution merely speculated, without any foundation, that the ‘Pestman Opinion’ might have been drafted without consideration of the emails exchanged between the Prosecution and the Dutch authorities, due to the fact that the Opinion did not refer to the emails.³ The Prosecution has now, however, elevated this speculation to an assertion of fact (albeit one, without any foundation).
5. If leave to reply is granted, the Defence will submit a statement from Mr. Pestman’s law office, attesting to the fact that the emails in question were in fact transmitted to Mr. Pestman at the time that the legal opinion was drafted. The emails would not have been cited in connection with the discussion as to the legality of the domestic procedure because as recognised by the Prosecution itself,⁴ emails are not a valid basis for requesting assistance from a State, particularly in an area as sensitive as interception

¹ ICC-01/05-01/13-2194-Conf

² Response, para.34

³ ICC-01/05-01/13-1833-Conf, para. 37.

⁴ 73 ICC-01/05-01/13-2170-Conf, para.48.

(indeed, it is telling that the emails are also not referenced in the Dutch district court decisions).

6. With respect to the second issue, the Prosecution has misconstrued the findings of the Trial Chamber concerning the diligence of certain Defence teams. In particular, the Prosecution has erroneously claimed that the Trial Chamber made express findings that the Bemba team had lacked diligence,⁵ when these findings concerned teams that were in a different position. Specifically, Mssrs. Mangenda and Kilolo participated directly in the Dutch proceedings, and had legal representation in these proceedings. In light of their status, the 2015 decision required the Mangenda team to first exhaust domestic options to obtain the case file before the ICC Trial Chamber would consider taking further measures. The Bemba Defence had in fact requested these decisions in 2015, but was subject to the same ruling. Nonetheless, since Mr. Bemba had no standing in domestic proceedings and the Prosecution refused to obtain them from the Dutch, the Bemba Defence had to rely on other Defence teams to exhaust this step, before the Chamber could be seised again.
7. If leave to reply is granted, the Defence will set out in the full context of the decisions from which the Prosecution has selectively quoted.
8. Finally, the Defence respectfully expresses its concern that the Prosecution has repeated on appeal, the completely spurious and unfounded claim that the Defence 'concealed' Mr. Pestman's role as Mr. Bemba's legal representative in Dutch proceedings. The Pestman Opinion – which was filed by the Bemba Defence – clearly mentioned this role. The Defence application relied on Mr. Pestman's involvement in the domestic procedures in order to corroborate the fact that Mr. Bemba had been denied standing in

⁵ Response, para. 16.

the Dutch process.⁶ The Defence further noted that the purpose of the Opinion was to demonstrate the legal remedies that would have been available to Mr. Bemba – as advised by Counsel – if the issues of legality had been addressed in accordance with standard Dutch domestic procedures,⁷ thus underscoring the importance of the ICC affording the defendants with an equivalent remedy in order to ensure that the mutual cooperation between the ICC and the Dutch authorities did not create gaps in protection, to the detriment of the Defence.

Relief Requested

9. Pursuant to Regulation 24(5) of the Regulations of the Court, the Defence for Mr. Bemba respectfully seeks leave to file a reply in relation to the two issues set out above.



Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba



Mylène Dimitri
Associate Counsel of Mr. Jean-Pierre Bemba

Dated this 18th day of August 2017

The Hague, The Netherlands

⁶ ICC-01/05-01/13-1799-Conf, para. 74, citing pages 1-2 of the Pestman Opinion, in order to establish the fact that Mr. Bemba had been denied *locus standi* in the Dutch proceedings.

⁷ ICC-01/05-01/13-1799-Conf, para. 85, fn. 87.