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Date: **26 February 2019**

THE APPEALS CHAMBER

Before: **Judge Howard Morrison, Presiding Judge**
Judge Chile Eboe-Osuji
Judge Piotr Hofmański
Judge Luz del Carmen Ibánez Carranza
Judge Solomy Balungi Bossa

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

Prosecution's response to Bemba's Request to Admit Additional Evidence

Source: **Office of the Prosecutor**

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Introduction

1. Jean-Pierre Bemba Gombo's request to admit additional evidence should be dismissed.[1] Admitting additional evidence on appeal is the exception, not the rule. While this principle is central to all appeals,[2] it assumes special significance within the context of a *re-sentencing appeal* (which is confined in its scope) in a case where the Appeals Chamber has already confirmed the convictions for offences against the administration of justice (articles 70(1)(a) and (c)). The Request—which is based on a speculative reading of select extracts of the materials presented—is yet another example of Bemba's shifting and dilatory strategy to unnecessarily prolong these limited re-sentencing proceedings.[3] The Appeals Chamber has previously dismissed Bemba's similar requests.[4] This Request is no different.

2. The Request fails to meet the high threshold to admit additional evidence on appeal and must fail. Essentially, Bemba proposes two categories of material (both documents and videos) as additional evidence in this re-sentencing appeal.[5]

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[1] ICC-01/05-01/13-2319 ("Request" or "Bemba's Request"), ICC-01/05-01/13-2319-AnxA-Red-Corr ("List of Materials") and ICC-01/05-01/13-2319-AnxB ("Transcribed Extracts").
[2] ICC-01/04-01/06-3121-Red ("*Lubanga* AJ"), para. 57 ("[E]vidence relevant to a decision pursuant to article 74(2) of the Statute should, with only limited exceptions, be presented *before* that decision is taken. […] [A]llowing the admission of additional 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."); ICC-01/05-01/13-2275-Red ("*Bemba et al.* AJ"), para. 509 ("[D]ue consideration shall be given to the distinct features of the appellate stage of proceedings, in particular as concerns the corrective nature of appeal proceedings and the principle that evidence should, as far as possible, be presented before the Trial Chamber, which has the primary responsibility for evaluating the evidence."); ICC-01/05-01/08-3636-AnxI-Red ("*Bemba* AJ Dissent"), para. 410 ("[…] Focusing on the corrective nature of proceedings and the principle that evidence should, as far as possible, be presented before the Trial Chamber, which has the primary responsibility for evaluating the evidence […]").
[3] *See* ICC-01/05-01/13-2320 ("Prosecution Re-sentencing Appeal Response"), para. 3.
[4] *See e.g.*, *Bemba et al.* AJ, paras. 508-515 (where the Appeals Chamber found that the material proposed by Bemba as additional evidence on appeal did not support his arguments), in particular, para. 512 (finding that Bemba's argument "[rested] on speculation which is not supported by a plain reading of the proposed additional evidence."); para. 513 (finding that Bemba's argument is "based on a misrepresentation of the material at issue."); paras. 54-84 (where the Appeals Chamber dismissed various Bemba requests), in particular, para. 61 (observing that "Bemba provid[ed] no explanation as to why he waited until after the commencement of appellate proceedings—even after the filing of his appeal brief […]"); para. 62 ("[Bemba] does not explain why, in his view, the need to pursue this line of investigation […] arises only now and could not have been reasonably pursued before […]"); para. 72 (rejecting Bemba's request to draw "factual conclusions", without showing how such conclusions would affect the determination of the grounds of appeal or without seeking the appropriate procedural relief, such as variation of the grounds of appeal or additional evidence).
[5] *See* List of Materials (setting out 11 discrete items).

- Category 1 relates to lectures given and/or remarks made by Judge Perrin de Brichambaut at events organised by the Centre for International Law Research and Policy ("CILRAP") for educational purposes.[6] Of the four items in this Category, the first two are the transcript and the video-recording of a lecture given by the Judge on the topic of article 68 of the ICC Statute at the Peking University Law School, Beijing (17 May 2017).[7] The remaining items relate to the Judge's written and verbal observations on the topic of the "perceived tension between civil and common law in international criminal justice" at Florence (28 October 2017): one available as a text in French,[8] and the other as an audio recording (podcast) in English.[9]
- Category 2 relates to *seven* items (including assorted news items and official reports) purportedly explaining Judge Perrin de Brichambaut's previous role within the French Ministry of Defence ("MoD").[10] These include Judge Perrin de Brichambaut's *curriculum vitae* (CV),[11] *two* public information sources from the US MoD and the French MoD respectively,[12] *two* media articles[13] and selected pages from *two* reports from the French MoD.[14]

3. Bemba fails to show why the items in Category 1 or Category 2 should be admitted as additional evidence at this late stage.

[6] *See* List of Materials, p. 2 (first four items).
[7] *See* Judge Perrin de Brichambaut, 'ICC Statute Article 68', CILRAP, 17 May 2017 ("CILRAP 1"). Bemba also provides a video of this lecture.
[8] *See* Judge Perrin de Brichambaut, '*Le droit civil et la common law au sein de la justice pénale internationale, tensions ou convergences', Pouvoir et justice pénale internationale*—Colloque organisé par le CILRAP, 28 October 2017 ("CILRAP 2").
[9] *See* Judge Perrin de Brichambaut, 'On the Perceived Tension between Civil and Common Law in International Criminal Justice', CILRAP, 28 October 2017 ("CILRAP 3").
[10] List of Materials, pp. 2-3.
[11] CV of Judge Perrin de Brichambaut (outlining his vision and commitment to serve as an ICC judge) ("Judge Perrin de Brichambaut's CV").
[12] News item from the US Department of Defence archive, 15 January 2004 ("US DoD Photo"); 'L'opération Boali', French Ministry of Defence, 5 December 2013 ("French MoD article").
[13] IRIN news, 'Paris to provide "necessary means" to secure electoral process', 31 December 2003 ("IRIN News Article"); RFI, 'Quatre millions d'euros pour encourager Bozizé', 2 August 2005 ("RFI News Article").
[14] French Ministry of Defence Report, 'Rapport d'activité 2003', 2003 ("2003 French MoD Report"), pp. 3, 7, 9; French Ministry of Defence Report, 'La reconversion des anciens combattants en période de sortie de crise', October 2004 (details obtained from the website) ("2004 French MoD Report"), p. 152.

- *First,* Bemba has not shown the necessary diligence. As he concedes, all the items are open-source material[15] and have been readily available for some time. For instance, all the documents in Category 2 (including Judge Perrin de Brichambaut's CV) could have been accessed from even before the start of trial in this case. Several public information sources presented date back to 2003, 2004 and 2005.
- *Second*, although Bemba argues that Category 1 material is relevant to Grounds 1 and 2 of his re-sentencing appeal and Category 2 material is relevant to Ground 2,[16] this "relevance" is, at best, tenuous and based on Bemba's attempt to shoehorn a link to the grounds of appeal.
- *Third*, the materials in Category 1 and Category 2 could not and would not have changed the verdict in this case (convictions and re-sentencing). Bemba merely handpicks extracts of information, overlooking their broader context. Likewise, Bemba interprets Judge Perrin de Brichambaut's words in a strained manner, disregarding their plain text and import.
- *Fourth,* although additional evidence on appeal may relate to questions of alleged unfairness, Bemba must demonstrate this based "on the circumstances of the case and the evidence sought to be admitted."[17] He fails to do so.
- *Fifth,* since the Request is based on Bemba's misreading and conjecture, he has not demonstrated any reason—let alone a compelling one—why the Appeals Chamber should exercise its discretion to admit this material, notwithstanding his failure to meet the criteria.

4. For similar reasons, and as set out below, Bemba's request to "supplement the factual basis" for Ground 2 and to "expand the scope of the appellate grounds"

[15] Request, paras. 5-7; List of Materials, pp. 1-3.
[16] Request, para. 2; List of Materials, pp. 1-3.
[17] *Lubanga* AJ, para. 60; *Bemba* AJ Dissent, para. 410.

should be dismissed.[18] These proceedings should not be further extended to entertain Bemba's speculation.[19]

Submissions

A. Admitting additional evidence on appeal is exceptional

5. Admitting additional evidence on appeal is exceptional and highly circumscribed. Regulation 62 of the Regulations of the Court, articles 69(4) and 83 of the Statute, and rule 149 of the Rules of Procedure and Evidence govern the admission of additional evidence on appeal.[20] None contemplate re-opening the evidentiary phase of trial or allowing the liberal admission of evidence on appeal—let alone in a *re-sentencing appeal* where the issues are confined to addressing the discrete errors that the Appeals Chamber had remanded back to the Trial Chamber and any new considerations affecting the new sentences to be imposed.[21] In this context, the restrictive approach towards additional evidence is only further underscored.[22]

B. Bemba was not diligent

6. In particular, Bemba has not been diligent in presenting the Category 2 materials. The Category 2 materials all purportedly pertain to Judge Perrin de Brichambaut's previous role within the French MoD. That Judge Perrin de Brichambaut had such a role was known since as early as 25 July 2014, when the

[18] Request, para. 3. *See* regulations 61(1) and (3), Regulations of the Court.
[19] ICC-01/04-01/06-3057-Corr ("*Lubanga* Variation of Appeal AD"), paras. 10 ("[I]t is within [the Appeals Chamber's] discretionary authority to grant or deny the request […]"); 11 (rejecting the need for an additional document to be filed, since the legal and factual reasons in support of the additional ground were already advanced). *See also* regulation 61(7), Regulations of the Court: The Prosecution is entitled to respond, if the variation of the grounds of appeal is granted.
[20] *Lubanga* AJ, paras. 53-64.
[21] ICC-01/05-01/13-2276-Red ("*Bemba et al.* SAJ"), paras. 356-362; ICC-01/05-01/13-2312 ("*Bemba et al.* Re-sentencing Decision"), paras. 15-17.
[22] *Lubanga* AJ, paras. 56-57.

details of his nomination as ICC judge were made public.[23] Bemba could have raised this issue when Judge Perrin de Brichambaut was assigned to this trial on 24 August 2015 and even before the start of trial in September 2015,[24] if he wished to.

7. Bemba argues that statements in a specific transcript (CILRAP 1), which he claims to have received on 6 February 2019, alerted him to the relevance of the information (including Judge Perrin de Brichambaut's previous role within the French MoD).[25] However, the limited extract of CILRAP 1 that Bemba relies on to explain his delay in raising this issue adds nothing.[26] Judge Perrin de Brichambaut merely narrated his experience as part of the French delegation in the drafting of the Rome Statute,[27] recounting that members of his delegation from the MoD were keen to ensure that positions were not taken in the Rome Statute that would affect "the work of French soldiers serving in peacekeeping missions, which were quite active at that time particularly in Yugoslavia, former Yugoslavia."[28] These particular facts could have been discerned from public information on Judge Perrin de Brichambaut's background (including his roles in the French MoD and as part of the French delegation that participated in drafting the Rome Statute), available in 2014 well before this CILRAP lecture was given.

8. With respect to the Category 1 material, the Prosecution accepts that, in isolation, the Defence may not have had reason to closely examine the Judge's interventions in the CILRAP material before the 17 May 2017 transcript (CILRAP 1)

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[23] *See e.g.*, *http://asp.icc-cpi.int/en_menus/asp/elections/judges/2014/Nominations/Pages/PERRIN-DE-BRICHAMBAUT,-Marc-Pierre.aspx*. with Judge Perrin de Brichambaut's CV, p. 3 (outlining his employment with the French Ministry of Defence between 1998-2005 and stating that the Department of Strategic Affairs (DAS) at the French Ministry of Defence provided the minister with analyses and policy advice covering a broad range of geographic, sectoral and technical fields, paying particular attention to crisis regions including Africa).
[24] ICC-01/05-01/13-1173 ("*Bemba et al* TC Composition Decision"), p. 3.
[25] Request, paras. 5-7.
[26] *Contra* Request, para. 31.
[27] CILRAP 1, p. 3 ("[…] I had observers in my delegation from my Ministry of Defen[c]e also, making sure that I wouldn't adopt anything which would make the work of French soldiers serving in peacekeeping missions, which were quite active at that time particularly in Yugoslavia, former Yugoslavia.")
[28] CILRAP 1, p. 3.

was sent to Defence counsel in February 2019. However, since Judge Perrin de Brichambaut's previous role in the French MoD was a matter of public knowledge in 2014, and well before the trial began in 2015, given the Bemba Defence's apparent concern with his previous role in the French MoD, it could have easily pursued this line of inquiry leading it to the CILRAP material, all of which were created in 2017 and have since been available online on the CILRAP website generally known to Court users.[29]

9. Moreover, Bemba's lack of diligence must be situated within the broader context of his shifting strategy in this case, which has only unnecessarily prolonged these re-sentencing proceedings. For instance, in July 2018, Bemba announced that he was going to seek revision (under article 84) of the Appeal Judgment,[30] only to state in September 2018, that he was not going to do so.[31] Then, Bemba chose to appeal the Re-sentencing decision, with an appeal that far exceeded the confined scope of the re-sentencing decision.[32] Further, once the Prosecution had responded to his wide-ranging appeal, Bemba—in an application filed the same day as the Prosecution's response to his appeal[33]—then sought to expand this appeal by introducing disparate issues which he could have previously pursued if he wished and which—on a reasonable reading—bear little relevance to the re-sentencing proceedings.

[29] For instance, the transcript of CILRAP 1 was uploaded on the Legal Tools Database on 31 August 2017. The podcast of CILRAP 3 bears the date of 28 October 2017. As of 21 February 2019, the CILRAP website was accessible through Google, by using the search terms "ICC" and "Perrin de Brichambaut". *Contra* Request, para. 5 (stating that the contents of the transcript did not appear pursuant to open source searches in relation to any of the issues that arose in the case). *See* *Bemba et al.* AJ, paras. 56, 61 (addressing Bemba's failures to pursue relevant enquiries and/or make relevant requests in a timely manner).
[30] ICC-01/05-01/13-2304 ("Bemba Re-sentencing Notice Response"), para. 8.
[31] ICC-01/05-01/13-2310 ("13 September 2018 Bemba Request Leave Reply"), para. 9.
[32] Prosecution Re-sentencing Appeal Response, para. 3.
[33] *See also e.g.*, ICC-01/05-01/13-2194-Red ("14 August 2017 Prosecution Additional Evidence Response"), para. 20 (regarding the first appeal in this case, noting that Bemba had filed his request to admit additional evidence request just after the Prosecution had filed its response to the appeals of the five convicted persons).

C. The Materials are not relevant to the appeal and do not affect the verdict.

10. The Category 1 and Category 2 materials are not relevant to the appeal, and could not and would not have altered Trial Chamber VII's decisions convicting and re-sentencing Bemba. Bemba merely relies on fragmented and unsupported (mis)interpretations of the materials. Every single extract that Bemba relies on in his Request is taken out of context, and at times, is misquoted. None have the far-reaching import that Bemba gives them.

i. Bemba's arguments that the Category I materials should be admitted in relation to Ground 1 should be dismissed in limine

11. Bemba's claim that the items in Category I show that "Trial Chamber VII conducted a *coup d'état* as concerns the Court's applicable law" and ("unbeknownst to the parties"), "[conducted] the Article 70 proceedings as a civil law trial" is unfounded.[34] None of the selected extracts of Judge Perrin de Brichambaut's observations in the CILRAP material support this view. Rather, Bemba overlooks the only reasonable view: the Court's applicable law is an amalgam of procedures adopted from both common law and civil law traditions: a "hybrid" system.[35] This was in fact the import of the Judge's remarks. Moreover, in relying rigidly on hand-picked extracts, Bemba not only over-states their significance, but also overlooks the narrative and anecdotal nature of some of the Judge's remarks.[36] Likewise, Bemba's views continue to misread the case record. The Prosecution has already argued that Bemba's submissions on Ground 1 of his appeal should be dismissed *in limine*.[37] Ground 1 advanced several issues outside the scope of the re-sentencing proceedings; this present Request goes even further.

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[34] Request, paras. 1(i), 10.
[35] *Bemba et al.* AJ, para. 590; ICC-01/05-01/13-2275-Anx ("Judge Henderson's Separate Opinion"), para. 38.
[36] *See e.g.*, Request, para. 13, fn. 13 ("When I was discussing this week with the Justice Ministers of Francophone Africa they were all steeped in the proper law, the civil romantic (*sic*) law, which has inquisitorial systems"). Bemba relies on this quote to state that "Judge Perrin underscores that civil law is the 'proper law'", but does not convey that the Judge's comments were made when describing the "central and extremely powerful" role of the Prosecutor under the Statute as compared with civil law systems.
[37] *See* Prosecution Re-sentencing Appeal Response, paras. 40-63.

12. Notwithstanding, several flawed premises underpin Bemba's arguments regarding the Category 1 documents and Ground 1.

13. *First,* by claiming that he was not informed of the procedural standards adopted in the case,[38] Bemba misstates the record. The Trial Chamber clearly set out the procedure by which it would consider evidence tendered. In a decision rendered on 24 September 2015 (before the trial began), the Chamber adopted the "submission of evidence" regime in the case.[39] Accordingly, the Chamber, as a general rule, deferred its assessment of the admissibility of evidence until its deliberations at the end of trial.[40] It also found that notwithstanding this general rule, it would still rule on objections which amounted to procedural bars, such as those made under article 69(7) of the Statute or rule 68 of the Rules.[41] Moreover, the Chamber confirmed its approach several times in the course of the trial and in the Trial Judgment.[42] Significantly, Judge Perrin de Brichambaut's remarks reflect exactly this understanding.[43] Bemba's claim is unfounded.

14. *Second,* Bemba's suggestion that Judge Perrin de Brichambaut's remarks somehow reveal that the article 70 trial was not conducted "on adversarial lines" is equally misplaced.[44] Its adversarial nature was apparent to everyone.[45] Nor does Bemba show how Judge Perrin de Brichambaut's comments can be construed differently.

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[38] Request, paras. 14, 16 ("[The] Defence has a right to know which law and procedural standards will be applied in the case at hand, and, at an appellate level, which law and procedural standards were applied to the case at hand") emphasis removed.
[39] ICC-01/05-01/13-1285 ("Evidence Submission Decision"), paras. 5-15.
[40] Evidence Submission Decision, para. 9.
[41] Evidence Submission Decision, para. 13.
[42] *See e.g.*, ICC-01/05-01/13-1989-Red ("*Bemba et al.* TJ"), paras. 189-193 (including fn. 199, listing out relevant decisions).
[43] *See* CILRAP 3 at minutes 30.00-34.00 ("[…] But the most radical change that was done in the Bemba and others the decision was that as a general rule the chamber determined that it would defer its assessment on the admissibility of evidence until deliberating its judgment. So the Chamber made no ruling on the admissibility of evidence, except in a few cases where it was mandated by the rules themselves."); *See also* Request, para. 13 (selectively emphasising the text).
[44] Request, para. 10.
[45] *See e.g.*, ICC-01/05-01/13-1209 ("*Bemba et al.* Conduct of Proceedings Order").

15. *Third,* in misinterpreting the relevance of German law to this case, Bemba takes Judge Perrin de Brichambaut's comments out of context.[46] Judge Perrin de Brichambaut stated that Judge Bertram Schmitt—his judicial colleague and Presiding Judge of the trial—had been mindful of his own domestic legal background (in Germany).[47] This is anodyne. Merely because a judge or a lawyer at this Court is aware of their domestic legal background when working at the Court does not mean that they do not apply the Court's applicable law.[48] Further, different features of various legal systems—both legal and procedural—combine in the statutory framework.[49] Bemba's argument is incorrect.

16. Moreover, Bemba's interpretation of German law on the burden of proof is beside the point. There is simply no indication that the Trial Chamber applied the burden of proof incorrectly. To the contrary, as the case record shows, the Chamber applied the burden of proof correctly.[50] Equally, there is no indication that the Chamber applied "German law".[51] The discussion is not germane. Further, Bemba misquotes the Court's case law[52] and oversimplifies German law.[53]

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[46] Request, paras. 10 ("[e]vidence was admitted pursuant to the system employed in Germany, rather than in accordance with the criteria set out in the Statute, as interpreted by appellate case law"); 12-15.
[47] CILRAP 2 ("[…] En agissant ainsi, la Chambre se rapprocha de la pratique d'une cour d'appel allemande avec laquelle le président Schmitt était très familier […]"); CILRAP 3 at minutes 33.00-34.00 ("[…] so if you do such a radical changes of the rules, which in all respect is the practice of the German appeals section which was implemented by Judge Schmitt and I supported him 100% on all this, you can change rules.")
[48] *Contra* Request, para. 14 ("[…] article 21(1) also does not permit the Chamber to conduct a trial based on the procedures of one country […]") emphasis removed.
[49] *See e.g.*, Judge Schmitt, 'ICC Judge Schmitt Counsels Resilience to Preserve International Justice', 13 February 2019 (http://www.justsecurity.org/62577/icc-judge-schmitt-counsels-resilience-preserve-international-justice/, accessed on 21 February 2019).
[50] *Bemba et al.* TJ, paras. 185-188 (setting out the standard of beyond reasonable doubt applied).
[51] *Contra* Request, paras. 15, 17-18, 20.
[52] *Compare* Request, fn. 15 (misquoting ICC-01/04-168 ("DRC Extraordinary Review AD"), paras. 23-32, including para. 27 stating that the Appeals Chamber had rejected the appellate procedures of Germany as being inapposite to ICC procedure) *with* DRC Extraordinary Review AD, paras. 23-32 (where the Appeals Chamber considered different national practices on the competence of the appeals court in reviewing decisions disallowing an appeal and concluded, that "nothing in the nature of a general principle of law exists or is universally adopted entailing the review of decisions of hierarchically subordinate courts disallowing or not permitting an appeal").
[53] *Compare* Request, paras. 15, 17-18 *with* M. Bohlander, *Principles of German Procedure*, (Hart Publisher: Oregon, 2012), pp. 143-174.

17. *Fourth,* in claiming that the Judge's remarks stand for "the elimination of the right to seek interlocutory appeal" in the article 70 trial, Bemba misstates the remarks.[54] When the remarks are seen in their broader context, it is clear that the decision "disallowing" interlocutory appeals was *not* "just a whim", but rather one that "appreciated" whether the interlocutory appeal, in question, was justified or not.[55] Although conveyed in an informal way (to a student audience), it is reasonable to assume that the Judge was referring to the discretionary and exceptional nature of the article 82(1)(d) remedy, which is granted, only if established criteria are met. Bemba certainly had a "right" to seek leave to appeal; he did not have a right to have such relief granted.[56] All the applications for leave to appeal under article 82(1)(d) filed in the case were rejected, since the Chamber found in every instance that they did not meet the criteria. This fell within the Chamber's discretion.

18. Moreover, Bemba merely speculates that "the absence of [interlocutory review]" meant that the Appeals Chamber "was compelled to address [complicated legal, procedural and factual issues] within a very circumscribed deadline of 9 [March] 2018" in its final judgment.[57] The Appeals Judgment was 699-pages long and it was detailed and determinative—addressing the convicted persons' complaints on procedural, legal and factual issues exhaustively.[58] Likewise, although Bemba appears to suggest that he had "expended time and resources filing requests for

[54] Request, paras. 11, 19. *See* CILRAP 1, p. 10 ("Third elements that the chamber has to has to rule on, because this is the common law tradition, there is a constant exchange of documents between the Prosecutor, the [Defence] and one of them is—and I hate it because we don't have it in our system and in the civil law system—interlocutory appeal. If either party, either the Prosecutor or the [Defence] is not happy with a decision which has been taken by the chamber, he asks for leave to appeal to the Chamber of Appeal, So, there are different approaches to this. I sat in the *Bemba and others* Chamber. This is the picture you saw, presided by Judge [Schmitt]. Judge [Schmitt], serious German judge, no nonsense: "Interlocutory appeals—I don't have. None. Full-stop.". I agreed, actually, and the Filipino judge also agreed. We all said, "We won't accept any interlocutory appeal. If they have any questions to make they will make it in the full appeal." That allowed us to reach a decision from the beginning of the trial process to the end of the trial process in 400 days […]").
[55] *See* CILRAP 1, p. 11 ("So, we were civil lawyers in Bemba and others. We said interlocutory appeals shouldn't even exist, we will ignore it. *We had every right to do it, by the way, it was not just the whim of our own, because we have to appreciate whether the interlocutory appeal is justified or not.* But, in another chamber—[I won't quote some of my common law colleagues]—they would practically accept every single interlocutory appeal […]") emphasis added.
[56] Request, para. 19.
[57] Request, para. 19.
[58] *See generally* *Bemba et al.* AJ.

leave to appeal", Bemba had himself never sought leave to appeal the Trial Chamber's initial decision setting out the submission regime in the case,[59] which appears to constitute the core of his current complaint.

19. *Fifth,* Bemba misstates the record and advances conjecture. For instance,

- There is no indication from the Judge's comments that "key Prosecution witnesses in the Article 70 trial had agreed to testify in a certain manner for the Prosecution, as a *quid pro quo* […]").[60] This is a leap too far. The remarks cannot be reasonably construed to mean anything other than that the Prosecution witnesses in the article 70 proceedings were protected and paid for through *routine* expenses. In implying that the Judge meant that witnesses (such as D-2 and D-3) benefitted from some "extraordinary" payments so as to "alter their testimony in exchange for something offered to them",[61] Bemba disregards the detailed credibility assessments that the Trial Chamber undertook of these witnesses, before relying on them.[62] Bemba merely re-litigates issues thoroughly canvassed in his appeal against his convictions.
- Bemba's objection to the Judge's comment that "[Bemba] invented witnesses" and that he "created a group of people who are well aware, who were central Africans and his legal team told them what to do" is obscure.[63] The Judge's

[59] *Contra* Request, para. 19, fn. 31. *See* ICC-01/05-01/13-1361 ("Evidence Submission ALA Decision"), para. 2 (noting that the Babala and Arido Defence teams had sought leave to appeal).
[60] *Contra* Request, para. 21. *See* CILRAP 1, p. 21 ("So, we had in Bemba II, we were addressing the second issue. We were going after Bemba and the legal team who had tried to disrupt justice by false testimony. But the witnesses we had, they were also quite clever. So, they had been invented by Mr. Bemba, but while they were witnesses, they were protected and paid for. [When the Prosecutor] went to them and said, "You have been lying" They say, "Well, c'mon now, maybe yes, maybe not, but what do you offer me?" So, we had, I won't tell you how many, but a number of witnesses which had been defen[c]e witnesses of Mr Bemba, which—who, when it came to the second round—were turn coats. They were defen[c]e witnesses of the Prosecution, and in between they had lived a fairly comfortable life at the expense of the taxpayers of the ICC. Ironic, but inevitable. So, this just to amuse you with a little bit of background.")
[61] Request, paras. 21-22.
[62] *Bemba et al.* TJ, paras. 307-311 (D-2) and paras. 312-319 (D-2 and D-3).
[63] Request, paras. 23-25. *See* CILRAP 1, p. 21 ("In the Bemba case, things were very complicated and ambiguous because some of the witnesses which had been accused, which had been witnesses of Mr Bemba and [Defence], then became witnesses of the Prosecutor against Mr Bemba, when it was obvious that those first round of witnesses had been created by Mr Bemba. Mr Bemba was not a small war lord. He was a major political figure in DRC. Richest man in DRC. He got caught in special circumstances, we don't have time to

remarks reflect the findings in the Trial Judgment and the Appeal Judgment (conveyed in a simplified and informal way, as may be expected when addressing a student audience).[64] Bemba insists on his own independent (and incorrect) view of the record, long after these findings have been confirmed on appeal.[65] Equally, it remains unclear why the Judge's views on Bemba mean that the Chamber imposed "the highest penalty" on him.[66] The Chamber did not impose the five-year custodial sentence (the highest custodial sentence possible for article 70 offences) on him. Moreover, Bemba merely re-litigates the issue of the "degree of influence" that Bemba wielded though detained[67]— despite it having no obvious connection to the Judge's views.

- In claiming that the Judge's comment that in the *Bemba et al.* case "[we] were going after Bemba and the legal team who had tried to disrupt justice by false testimony" showed his "inquisitorial bent",[68] Bemba over-states the anecdotal nature of this comment. Nor does this single phrase show that the burden of proof was reversed.[69]
- Similarly, in claiming that he had not been aware that the 300,000€ fine imposed on him as part of his sentence was "for the victims",[70] Bemba disregards the record. It was always clear from the 22 March 2017 Sentencing

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discuss it. Mr Bemba had a whole legal and political machinery and large resources. So, when he was accused of having his militia misbehave heavily in Central African Republic, he invented witnesses. He created a group of people who are well aware, who were central Africans and his legal team told them what to do. So, this is a little bit of a manipulation of justice. They were good, but not good enough that it didn't start to become obvious, so the Prosecutor went after them, found out.")

[64] *See* *Bemba et al.* TJ, paras. 678-820, 851-857 and *Bemba et al.* AJ, paras. 854-1069.

[65] Request, para. 25 ("[I]ndeed the evidence (which the Chamber ignored in both its judgment and sentencing decisions) reflected that witnesses invented their testimonies independently of Mr. Bemba, and for reasons that were unrelated to Mr Bemba. […]").

[66] Request, para. 24.

[67] Request, para. 24.

[68] Request, para. 26.

[69] Request, para. 27. *See* CILRAP 1, p. 5, where the Judge uses the phrase "going after" in a different context ("[…] we are going now after major crimes, this is something which shocks the conscience of humanity, we are going now after genocide, war crimes, crimes against humanity. […]")

[70] Request, para. 26. *See* CILRAP 3 at minutes 34.00-34.30 ("[…] of course we reached a decision, Bemba was convicted, he was sentenced, we even innovated a little bit in the sentencing because we inflicted a 300,000 euros fine on him in order to do something for the victims. […]")

Decision, as it was from the 17 September 2018 Re-sentencing Decision, that the fine would be transferred ultimately to the *Trust Fund for Victims (TFV)*.[71]

ii. Bemba fails to show why the Category 1 and 2 materials should be admitted vis-à-vis Ground 2 of the appeal

20. Requests for additional evidence may relate to the fairness of the proceedings—but Bemba's Request—and his unsupported inferences and leaps in logic—raises no such issue. Notwithstanding the presumption of impartiality that attaches to Judges at this Court, Bemba appears to seek the admission of the Category 1 and 2 materials to now raise issues about Judge Perrin de Brichambaut's lack of impartiality to sit as a judge on the Article 70 trial, on two grounds: (i) *first*, that the Judge's remarks were purportedly "inflected with an appearance of partiality", which when read with his background in the French MoD and its involvement in the CAR conflict, lead to an "objective appearance" that he "lacked sufficient impartiality to adjudicate issues that were intrinsically tied to [Bemba's] involvement in the CAR"; and (ii) *second*, that the Judge's "pre-determination of key legal issues" was "incompatible with the duty to adjudicate requests (including Defence applications for abuse of process remedies *vis-à-vis* [purported] Prosecution misconduct) in an impartial manner."[72]

21. Bemba's interpretation of the materials he relies on is speculative and his request to admit the documents should be dismissed on that basis alone. Although Bemba's Request is effectively raising issues of bias by Judge Perrin de Brichambaut, the Judge was not given the opportunity to comment on allegations regarding his prior role within the French MoD at the time of the trial—as he should have.[73] That said, even if such allegations had been raised in a timely manner, they would not

[71] ICC-01/05-01/13-2123-Corr ("*Bemba et al.* SD"), para. 262; *Bemba et al.* Re-sentencing Decision, para. 128.
[72] Request, paras. 28, 32 (referring to provisions governing the disqualification of judges, article 41(2)(a), Statute and rule 34(2), Rules of Procedure and Evidence).
[73] Article 41(2)(c), Statute.

have been a proper basis for recusal or disqualification. Similarly, the Judge was not permitted an opportunity to comment on allegations that Bemba now makes regarding the CILRAP material.

a) Bemba's claim that the Category 1 and 2 materials show that "the Trial Chamber lacked impartiality" is unsubstantiated

22. *First,* in claiming that Judge Perrin de Brichambaut's comments show that the findings on Bemba's culpability in the Article 70 case were "directly linked to [Bemba's] political and military position in the CAR and DRC, rather than the evidential findings concerning [his] role in the charged offences",[74] Bemba offers mere conjecture. As is clear from the context, the Judge was explaining to the audience who Bemba was: he was not expected to, and did not, embark on a detailed analysis of the evidential findings of the case in a public presentation.

23. *Second,* Bemba does not explain why the Judge's remark that "Bemba was not a small warlord" should mean that he was being "portrayed as the exclusive instigator and proponent".[75] Again, as is clear from the accompanying remarks, the Judge proceeded to explain that Bemba was "a major political figure in [the] DRC" and the "richest man in [the] DRC".[76] This was not a legal discussion on modes of liability, including instigation.

24. *Third,* it is equally unclear why the Judge's observations that the Chamber imposed a fine on Bemba "to do something for the victims" reveals "partiality".[77] Bemba merely repeats submissions on the fine, which he has already advanced in

[74] Request, para. 30. *See* Request, para. 29 (referring to the Judge's comments that "Bemba was not a small warlord", that "we are going after Bemba" and that "we inflicted a 300,000 euros fine on him in order to do something for the victims").
[75] Request, para. 29.
[76] CILRAP 1, p. 21 ("[…] Bemba was not a small warlord. He was a major political figure in DRC. Richest man in DRC. He got caught in special circumstances, we don't have time to discuss it. […]")
[77] Request, para. 30.

Ground 3 of his appeal.[78] As the Prosecution has already set out in its response to Bemba's appeal, the Chamber imposed the fine in light of Bemba's enhanced culpability.[79] Bemba's submissions disregard the extensive findings made in this case reflecting his culpability.[80]

25. *Fourth,* Bemba's claim that Judge Perrin de Brichambaut's previous role as the Director of the Delegation of Strategic Affairs (DAS) within the French MoD from 1998 until 2005 may have affected his perception of Bemba when he adjudicated the Article 70 case is unsubstantiated.[81] The solitary extract (limited to four lines) from the CILRAP material that Bemba relies on as a springboard to advance this argument suggests nothing to this effect.[82] In fact, the extract simply records the Judge as saying that in the French delegation to the Rome Conference representatives from the French MoD (where Judge Perrin de Brichambaut worked at the time) were making sure that nothing would be adopted to affect the work of French soldiers in peacekeeping missions. The only mission mentioned by name is the one in the former Yugoslavia.[83] Rather than revealing "partiality" in the sense of article 41(2) (a) of the Statute or rule 34(2) of the Rules, the remarks merely provide an anecdote about his delegation in the diplomatic negotiations that led to the creation of the Statute. Further, in this context, the significance of Bemba's oblique reference to various provisions of the French Penal Code apparently imposing on Judge Perrin de

[78] Request, para. 30 ("[G]iven that the Chamber decided to maintain the fine in its 2018 decision, even though [Bemba] was acquitted, and bears no responsibility for the crimes committed against the victims in the Main Case. […]")
[79] *See e.g.*, Prosecution Re-sentencing Appeal Response, paras. 178, 180-181.
[80] Request, para. 30 (suggesting without substantiation that this argument also relates to ground 1 of the appeal).
[81] Request, paras. 31, 37 ("The fact that Judge de Brichambaut has access to various sources of military intelligence concerning both the CAR and DRC conflicts, coupled with Judge Perrin de Brichambaut's continuing duty of confidentiality, also creates an objective appearance that Judge Perrin de Brichambaut's perception of [Bemba] may have derived from information received independently of the case, in violation of the principle of open, adversarial justice. […]")
[82] Request, para. 31 (quoting an extract from CILRAP 1).
[83] CILRAP 1, p. 3 ("[…] I had observers in my delegation from my Ministry of Defen[c]e also, making sure that I wouldn't adopt anything which would make the work of French soldiers serving in peacekeeping missions, which were quite active at that time particularly in Yugoslavia, former Yugoslavia.").

Brichambaut an obligation to maintain the secrecy of confidential information is unclear.[84]

26. Likewise, Bemba's suggestion that "the French Ministry of Defence's direct involvement in the CAR conflict, during [the Judge's] tenure, and during the time period of the Main Case charges" affected the impartiality of the Article 70 proceedings that he adjudicated is vague.[85] Bemba's submissions do not show why the Category 1 and 2 materials should be admitted at this late stage.

27. It is also unclear how the Category 2 material—all advanced to explain Bemba's theory on the Judge's purported "partiality" in the article 70 proceedings—supports this proposition. Two documents in Category 2 are Judge Perrin de Brichambaut's CV (listing, among other things, his role as the Director of Strategic Affairs within the French Ministry) and a photograph of him attending a meeting at the Pentagon in 2004 in that capacity.[86] Three other documents (news articles) in Category 2 relate various actions by the French *vis-à-vis* the CAR.[87] And the selected extracts from the two French MoD reports show that the French participated in Operation Boali in the CAR since December 2002 and that, as of 2003, the French had taken part in Operation Artemis in the DRC and further describing the French role in Operation Boali.[88] Although Bemba provides his complex narrative of events in the DRC and the CAR in 2002-2003,[89] its relevance is unclear. Bemba's narrative—even if correct—assumes that Judge Perrin de Brichambaut adjudicated the Main Case.[90] But he did not. The Judge was one among three judges who decided a case on the offences against the administration of justice—for which Bemba's factual narrative is simply

[84] Request, para. 34.
[85] Request, para. 31, 34, 36.
[86] *See* Judge Perrin de Brichambaut's CV and US DoD photo (a photograph of Judge Perrin de Brichambaut (as director of strategic affairs) at a meeting at the Pentagon on 15 January 2004).
[87] *See* French MoD article, p. 1 (describing Operation Boali in the CAR in 2002 to protect French citizens and French strategic interests); IRIN News Article, pp. 1-3 (media article, stating that the French government would support security efforts in the CAR electoral process in early 2005); RFI News Article, pp. 1-2 (describing that the then French President (Jacques Chirac) had promised to lend 4 million euros to the CAR).
[88] 2003 French MoD Report, pp. 3, 7, 9; 2004 French MoD Report, p. 152.
[89] Request, paras. 35-37.
[90] Request, para. 31 (mentioning the time period of the Main Case charges as relevant).

not germane. As such, these arguments do not show why the Category 1 and 2 materials should be admitted in this appeal.

28. Likewise, although Bemba claims that Judge Perrin de Brichambaut apparently "endorsed" "the French interest in preserving the 'civil law' at the ICC", Bemba simply has not shown that this (even if true) was the result of any inappropriate "appearance of loyalty to French interests *vis-à-vis* the ICC proceedings".[91] Similarly, in speculating that Judge Perrin de Brichambaut "played a particularly active role in reviewing the French intercepts and detention unit recordings concerning [Bemba]",[92] Bemba merely surmises. The one transcript reference that he provides does not lead to this conclusion.[93] It provides no basis to admit the Category 1 and 2 materials.

b) Bemba's claim that the Category 1 and 2 materials show that Judge Perrin de Brichambaut had "pre-determined key legal issues" so as to affect his impartiality is unsubstantiated

29. To explain his theory that the documents show that Judge Perrin de Brichambaut had "pre-determined" key legal issues in the case, thereby affecting his "impartiality", Bemba offers one example, relating to "the abuse of process" doctrine.[94] The example is unsupported.

30. *First,* the extract that Bemba relies on to show that the Trial Chamber "disavowed the abuse of process doctrine and related remedies" is inapposite.[95] As

[91] Request, para. 36.
[92] Request, para. 38.
[93] Request, para. 38, fn. 74 (citing T-48-Red-ENG, p. 56 lns. 12-15 (PRESIDING JUDGE SCHMITT: If you agree to that. But on the other side, Judge Perrin could listen to the original of course which would serve him. So I think we should—we should give it another try with the two, two ways, audio and translation from the papers)), on finding a solution to a technical problem in playing audio and its interpretation in the courtroom.
[94] Request, paras. 39-40.
[95] Request, para. 40, fn. 84 ("[When] the Court was still finding its way and Judge Fulford was presiding in the Lubanga case, he had a head-on clash with the Prosecutor on intermediaries (…) But this is, by the way, a typical common law dialogue. In a civil law court, I don't know what would happen in other countries, but we would

the remarks show, the Judge was referring, more generally, to the difference between common law and civil law domestic systems: the abuse of process doctrine is used more often in common law systems.[96] He was not referring to the practice at this Court as such, let alone the Article 70 proceedings.

31. *Second*, Bemba's inference that Judge Perrin de Brichambaut's remarks meant that he considered that "oversight [of the proceedings] was somehow overly confrontational" is without basis.[97] Merely because the Trial Chamber did not agree with Bemba's characterisation that the Prosecutor's out of court statements following Bemba's acquittal in the Main Case constituted an "abuse of process" does not mean that they disavowed the doctrine itself, or that they did not apply the Court's law.[98] Bemba incorrectly assumes that his word is sufficient to meet the high threshold of abuse of process.

32. For all the reasons above, Bemba's submissions—and his Request—should be dismissed. None of his arguments based on his selected extracts of materials are founded.

33. *Finally*, a broader review of the underlying material (beyond the selected extracts and arguments that Bemba presents in his filing) is beyond the scope of this Request. Anything else that may arise from a broader review of the material may be adequately resolved, if found necessary, in a different forum and according to the Statute and the Rules. They do not form part of these appeal proceedings, which should be brought to an expeditious end.

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never accept such a thing, which is to tell the Prosecutor, "go home and tomorrow morning, this is what we want"—but okay". *See also* CILRAP 3 at minute 24:43-25:26.

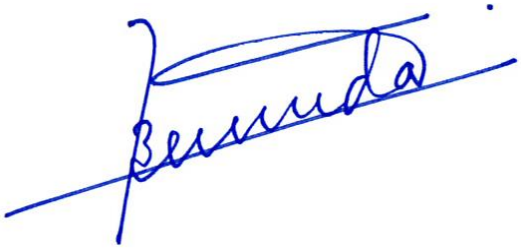
[96] *See* CILRAP 3 at minutes 24:43-25:26, "[On] the Lubanga issue we had Judge Fulford a quintessential British common law personality. He put—very strong judge he put a very strong imprint on the proceedings. He ran them with an iron hand. He suspended the trial three times in order to safeguard the accused the fairness of the proceedings when the prosecutor which we have already nominally mentioned refused to disclose the source of potentially exculpatory material and therefore he exercised head on pressures on the prosecutor for those disclosures to make. Nice common law frontal fight.")

[97] Request, para. 42.

[98] Request, para. 39.

Conclusion and Relief

34. For all the reasons above, the Prosecution respectfully requests the Appeals Chamber to dismiss Bemba's Request to admit additional evidence and his request to "supplement the factual basis" for Ground 2 and to "expand the scope of the appellate grounds".



Fatou Bensouda, Prosecutor

Dated this 26th February 2019[99]
At The Hague, The Netherlands

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