

**Cour
Pénale
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**International
Criminal
Court**

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No.: **ICC-01/05-01/08**

Date: **10 May 2019**

PRE-TRIAL CHAMBER II

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF *THE PROSECUTOR V. JEAN-PIERRE BEMBA GOMBO***

Public

Prosecution's Response to Mr Bemba's Request for Leave to Reply

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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Mr James Stewart
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Introduction

1. The Prosecution respectfully requests the Chamber to dismiss Jean-Pierre Bemba Gombo's request¹ for leave to reply to the Prosecution's response² and the Registry's observations³ in the compensation proceedings.

2. No reply is warranted. Mr Bemba identifies no new issues arising from the Prosecution Response that would merit a reply. A reply should not be utilised as a vehicle to express further disagreement with the Prosecution on issues that have already been fully ventilated before the Chamber. In any event, Mr Bemba will not be prejudiced: the hearing on 9 May 2019 was called at his request and he has been given every opportunity to explore the issues, which he has.⁴ On the other hand, granting Mr Bemba's request to file a further 50 pages in an additional six weeks following the filing of the Prosecution Response⁵ will unnecessarily prolong these proceedings. In the interest of reasonable finality, no further written submissions should be permitted in these proceedings.

Submissions

3. Mr Bemba fails to justify why the Chamber should exercise its discretion to grant him leave to reply to the Prosecution Response and Registry Observations. In particular, the Request fails to identify any *new issues* in the Prosecution Response, let alone any new issues which Mr Bemba could not have reasonably anticipated when drafting his compensation claim. The Request therefore fails to meet the

¹ ICC-01/05-01/08-3682 ("Request").

² ICC-01/05-01/08-3680-Red ("Prosecution Response").

³ ICC-01/05-01/08-3681-Red3 ("Registry Observations").

⁴ ICC-01/05-01/08-3675 ("Order Convening Hearing"); ICC-01/05-01/08-T-376-ENG ("*Bemba* Compensation Hearing"), 37:24-38:9 ("PRESIDING JUDGE MINDUA: Well, I must say I'm in a bit of a difficult situation. After the Registry's remarks, if I allow the Defence to address the Court, then the OTP will want to address the Court and we will never come to an end of this, so I would like to ask anyone who wants to add anything to supply fresh filings to the Chamber. Is this solution suitable to the parties? MR HAYNES: I would simply want to make one possibly, two points which I can do in no more than two points and it arises really from what Mr Dubuisson said and nothing else. PRESIDING JUDGE MINDUA: Okay, we are going to do that. Two minutes for you and two minutes for the Office of the Prosecutor").

⁵ Request, para. 12.

requirements of Regulation 24(5) of the Regulations of the Court,⁶ and should be dismissed.

4. *First*, the “novelty and complexity” of the issues in the claim is of itself not a reason to grant an opportunity to reply.⁷ Mr Bemba had already sought an extension on the same basis.⁸ He was granted an extension for double the amount of pages, and an additional three months to file his claim.⁹ Moreover, he has not only used the full 60 pages afforded to him for the claim, but he has filed more than 600 pages of material across nine different annexes,¹⁰ and has presented oral submissions before the Chamber.¹¹ He has therefore had ample opportunity to elucidate the novel and complex aspects of his claim.

5. *Second*, the Prosecution Response raises no new issues regarding Mr Bemba’s assets.¹² The Prosecution expressly limited its submissions on the assets to responding to allegations of Prosecutorial conduct regarding the keys and documents to Mr Bemba’s aircraft in Faro, Portugal.¹³ In that regard, the full record regarding the issue of the plane keys and documents is before the Chamber.¹⁴ Moreover, the issue is not new: Mr Bemba had raised exactly the same allegation in his sentencing appeal in 2016 and the Prosecution had responded on the same lines.¹⁵

⁶ Regulation 24(5) provides: “Participants may only reply to a response with the leave of a 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.”

⁷ *Contra* Request, para. 9.

⁸ ICC-01/05-01/08-3664 (“Page Time Extension Decision”), para. 4 (“[Mr Bemba] also alleges a variation of time is warranted due to the complexities of the arguments [he] intends to make”); 5 (“As regards the variation of the page limit, [Mr Bemba] refers to the complexity of the case [...] and the novelty of the litigation”).

⁹ Page Time Extension Decision, paras. 6-7, p. 5 Disposition.

¹⁰ ICC-01/05-01/08-3673-Red2 (“*Bemba* Compensation Claim”) and Annexes A to I.

¹¹ *See generally Bemba* Compensation Hearing.

¹² *Contra* Request, para. 10.

¹³ Prosecution Response, fn. 12 (“On the issue of assets, the Prosecution will respond to claims made regarding its purported conduct, based on information in its possession. Regarding the broader claims on the Court’s alleged negligence in managing the assets, the Prosecution does not have all the relevant information and the Registry is better placed to address this set of allegations”), paras. 33-36 (responding to the allegations of Prosecutorial conduct regarding the documentation and keys to Mr Bemba’s aircraft in Faro airport, Portugal).

¹⁴ Prosecution Response, para. 34.

¹⁵ ICC-01/05-01/08-3486-Conf-Red (“Prosecution Response to Bemba Sentence Appeal”), para. 124 (responding to the allegations that the Prosecution had the keys to Bemba’s plane); ICC-01/05-01/08-3450-Red (“*Bemba* Sentence Appeal”), paras. 148, 159.

6. *Third*, Mr Bemba merely expresses disagreement with the Prosecution's submissions regarding alleged errors in the trial process and in the trial judgment.¹⁶ In particular, Mr Bemba does not explain why further submissions may be required on this basis:¹⁷ he did not himself explain these issues in any detail at the hearing when allowed to do so.¹⁸ No further submissions are necessary regarding the characterisation of the conduct of the Prosecution, the Trial Chamber or the LRV in the trial process.¹⁹ The Prosecution's Response on these issues merely describes the record of the trial proceedings,²⁰ which is before the Chamber.

7. *Fourth*, the Prosecution Response did not "introduce a new standard" for the adjudication of article 85 claims.²¹ To the contrary, the Prosecution Response set out and applied the legal standard for article 85 as established in this Court, including by the *Ngudjolo* Chamber.²² Mr Bemba should reasonably have anticipated that the Prosecution would address the law on article 85 in the Prosecution Response. Yet he chose to barely address the legal standard in this claim.²³ But, in any event, in response to the Prosecution's submissions and the Presiding Judge's question at the compensation hearing, Mr Bemba had the opportunity to further elucidate his position on this issue, which he did.²⁴

¹⁶ Request, para. 11 ("[E]vidently the Prosecution and Mr Bemba take opposing positions on the significance of the errors made during the *Bemba* trial process and in the Trial Judgment").

¹⁷ Request, para. 11 (Mr Bemba states, without providing further explanation, that, "[...] many aspects of the Prosecutor's characterisation of its own conduct and that of the Trial Chamber and LRV warrant further submissions").

¹⁸ *Bemba* Compensation Hearing, 4:22-5:5 (Mr Bemba refers to the "manipulation of the evidence and the failure to properly apply central and essential principles, such as the burden and standard of proof" but provides no further submissions on the conduct of the trial); 30:4-15 (Mr Bemba refers only to "the language of the judges who overturned the conviction, who were very disturbed at the way in which the convicting judges in the Trial Chamber, as it were, dealt with issues of evidence, issues of burden of proof").

¹⁹ *Contra* Request, para. 11.

²⁰ Prosecution Response, paras. 26-74.

²¹ *Contra* Request, para. 11.

²² See generally ICC-01/04-02/12-301-tENG ("*Ngudjolo* Compensation Decision").

²³ See *Bemba* Compensation Claim, paras. 10-12.

²⁴ *Bemba* Compensation Hearing, 27:14-23 (the Presiding Judge asks Mr Bemba's counsel to elaborate on whether there is a need for *mala fide* intention or malicious intent for article 85 of the Statute); 29:18-30:15 ("MR HAYNES: Now, as regards whether Article 85 has a requirement that the claimant proves malice, we disagree [...] I say Article 85 makes no mention of malice, it makes no mention of malfeasance, it makes no mention of *mala fides*. What it does say is that you have to find a grave and manifest miscarriage of justice [...] So I say that what Mr Bemba has laid out satisfies the test under Article 85. It's wrong to import notions of

8. *Fifth*, contrary to Mr Bemba's submissions, the Prosecution did not take a position on the nature of his ancillary claim for damages (separate from his article 85 claim).²⁵ The Prosecution expressly did not take a position as to whether Mr Bemba's claim was of a public or private nature.²⁶ Rather, it made some limited submissions on the possible legal issues that may be relevant to the Chamber if it chose to engage with the substance of this aspect of his claim.²⁷ In any event, as the Prosecution has consistently maintained, the public or private nature of the claim is well outside the scope of the article 85 proceedings.²⁸ A reply on this issue is not needed.

9. *Sixth*, a reply will not assist the Chamber. The parties' views have already been fully ventilated before the Chamber, both in extensive written submissions and in the oral submissions before the Chamber on 9 May 2019. Affording Mr Bemba the further 50 pages he seeks to file as a reply (which would bring his total length of his written submissions in the compensation proceedings to 110 pages) is not only disproportionate given the length of written submissions filed by the Prosecution (52 pages) and the Registry (20 pages), but is also unlikely to meaningfully assist the Chamber any further for the reasons set out above.

10. These compensation proceedings—intended to be discrete and exceptional in nature— should not be prolonged any further. These proceedings have already taken

malice, *mala fides* or malfeasance, but even if you do, having been challenged by the Prosecution on Monday night to do so, I've done so today and they haven't answered that either").

²⁵ Request, para. 11 (“[The Prosecution Response] makes concrete submission as to alleged “public” nature of the claim which Mr Bemba could not reasonably have anticipated”).

²⁶ Prosecution Response, para. 96 (“[S]hould the Chamber wish to consider this aspect, it must conduct its own analysis of whether Mr Bemba's claim is “private” in nature, or “public”, or has aspects of both, based on the facts before it. A number of different issues may arise”).

²⁷ Prosecution Response, paras. 97-102.

²⁸ *See e.g.*, Prosecution Response, para. 85 (“Regarding the second aspect relating to his “private claim”, Mr Bemba's arguments fall patently outside the limited scope of article 85 proceedings); *Bemba* Compensation Hearing, 19:19-24 (“MR GUARIGLIA: [T]hese article 85 compensation proceedings governed by the Rome Statute. They are not proceedings to determine claims of negligence, tort, or otherwise entertain Mr Bemba's private claims. These aspects of Mr Bemba's claim fall manifestly outside the scope of article 85 therefore these proceedings and therefore outside the jurisdiction of this Chamber. They must accordingly be dismissed”); 22:2-4 (“MS NARAYANAN: [...] Article 85 as a statutory compensation scheme is exhaustive. It is already consistent with international human rights standards. And in fact, Article 85(3) goes beyond these standards”).

several months and Mr Bemba has had nine months to prepare his claim.²⁹ In the interest of reasonable finality, the Request should be dismissed.

11. In any event, as a matter of principle, *if* Mr Bemba is given the opportunity to further reply, Rule 173 of the Rules of Procedure and Evidence gives the Prosecution a right to respond, depending on what Mr Bemba may raise.

12. Further, for the sake of clarity, and out of an abundance of caution, the Prosecution notes its understanding that no further written submissions are required or allowed in this case. Although the Chamber, in the 9 May 2019 hearing, initially contemplated permitting the parties to file further written submissions,³⁰ it decided to then allow parties to make further oral submissions to the Chamber *in lieu* of those final written submissions.³¹ The parties then made final oral submissions.

Conclusion

13. For the reasons set out above, the Prosecution respectfully requests the Chamber to dismiss Mr Bemba's Request.



Fatou Bensouda, Prosecutor

Dated this 10th day of May 2019

At The Hague, The Netherlands

²⁹ Page Time Extension Decision, p. 5 Disposition.

³⁰ *Bemba* Compensation Hearing, 37:24-38:4 (“PRESIDING JUDGE MINDUA: “Well, I must say I’m in a bit of a difficult situation. After the Registry’s remarks, if I allow the Defence to address the Court, then the OTP will want to address the Court and we will never come to an end of this, so I would like to ask anyone who wants to add anything to supply fresh filings to the Chamber. Is this solution suitable to the parties?”).

³¹ *Bemba* Compensation Hearing, 38:5-9 (“MR HAYNES: I would simply want to make one possibly, two points which I can do in no more than two points and it arises really from what Mr Dubuisson said and nothing else. PRESIDING JUDGE MINDUA: Okay, we are going to do that. Two minutes for you and two minutes for the Office of the Prosecutor”).