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No.: **ICC-01/05-01/13**
Date: **15 July 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 Mr Bemba's Request to the Appeals Chamber to hold an Oral Hearing in the Re-sentencing appeal proceedings (ICC-01/05-01/13-2332)

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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Introduction

1. Mr Jean-Pierre Bemba Gombo's request to the Appeals Chamber to hold an oral hearing in the Article 70 re-sentencing appeal proceedings should be dismissed.[1] The Prosecution supports the holding of an appeal hearing when it would assist a Chamber in clarifying and resolving the issues that it must decide. However, holding a hearing to further ventilate the issues raised in Mr Bemba's Appeal would not serve this purpose.

2. *First*, the re-sentencing proceedings in this case were limited in scope. They were not an opportunity to re-litigate issues confirmed by the Appeals Chamber in the Article 70 Appeal Judgments. Apart from five confined errors, the Appeals Chamber confirmed the Trial Chamber's factual and legal findings. The appeal proceedings resulting from the Re-sentencing Decision should be limited to the sentencing issues on remand. Nonetheless, Mr Bemba has gone beyond those parameters and sought to re-litigate legal and factual findings which have already been confirmed by the Appeals Chamber. Moreover, contrary to the principle of finality, Mr Bemba has requested the Appeals Chamber to quash his convictions even though they have been confirmed on appeal. Mr Bemba should not be given another opportunity to repeat these submissions which have been improperly filed.

3. *Second,* the Parties have provided extensive and detailed written submissions in these re-sentencing appeal proceedings which, in the Prosecution's view and considering the particular context of these proceedings, make additional oral submissions unnecessary. In addition to his 98-page Appeal against the Re-sentencing Decision, Mr Bemba has filed four additional written submissions in which he has supplemented and expanded his arguments. Moreover, the Appeals

[1] ICC-01/05-01/13-2332 ("Request" or "Bemba's Request").

Chamber has allowed him to file additional submissions on the scope of the appeal by 15 July 2019.

4. *Third*, Mr Bemba does not justify why an oral hearing is necessary or useful in this case. Mr Bemba suggests that an oral hearing is required to discuss the compatibility of the 'submission' evidentiary regime, adopted by Trial Chamber VII at trial, with the Court's framework.[2] This was the crux of ground 1 of Mr Bemba's Re-sentencing Appeal. Yet, these are not 'novel' issues.[3] Mr Bemba and the other convicted persons in this case already challenged this topic in their appeals against the Conviction Decision and Sentencing Decision in this case. The Majority of the Appeals Chamber rejected those arguments and confirmed the legality of the 'submission' evidentiary regime as applied in this case.

5. In any event, even if the Trial Chamber erred in the evidentiary regime adopted in the re-sentencing proceedings (which it did not), Mr Bemba suffered no prejudice since the Chamber considered, and rightly gave limited weight to, the media material that Mr Bemba submitted. Hence, any error would not have materially impacted Mr Bemba's sentence of one year imprisonment and € 300,000 fine which was exactly the same penalty as he received in the original Sentencing Decision.

Submissions

6. The Appeals Chamber has stated that "the decision to hold an oral hearing in appeal proceedings against final judgments is discretionary and made on a case-by-case basis [and] should be based primarily on the potential utility of an oral hearing, namely, whether it would assist the Appeals Chamber in clarifying and resolving the issues raised in the appeal".[4] The Prosecution respectfully submits that holding an

[2] Request, paras. 4-6.
[3] *Contra* Request, para. 4.
[4] ICC-01/04-02/12-199, para. 13, quoted in Request, para. 2.

oral hearing in this case is not useful to resolve Mr Bemba's Appeal against the Re-sentencing Decision for the following reasons.

A. The re-sentencing proceedings are confined to the issues on remand

7. *First*, the re-sentencing proceedings and the Re-sentencing Decision were limited in their scope. The Appeals Chamber remanded the determination of a new sentence to Trial Chamber VII following the Appeals Chamber's upholding of the Prosecution's appeal against the sentence and dismissal of the accused's appeal against his convictions. The Trial Chamber emphasised that the re-sentencing proceedings were "not an opportunity to re-litigate matters which ha[d] been definitively resolved by the Appeals Chamber Judgments [since] [m]any aspects of the Sentencing Decision were confirmed on appeal and the affected parties must treat these rulings as final".[5] The Trial Chamber underscored that the "Appeals Chamber Judgments found errors only on [five] limited points".[6] Mr Bemba agreed. In his re-sentencing submissions before Trial Chamber VII he submitted:

> "This was an important case, in which complex legal and factual issues were discussed by the parties, and adjudicated by the Chambers. Legal principles have been defined and articulated, and apart from the individual penalties imposed on the defendants, the findings issued by the Trial Chamber and the Appeals Chamber will continue to ensure the goals of deterrence and respect for the law, for the years and cases to come.
>
> Within this framework, there is also a need for finality and certainty. The case was remanded, but it was a limited remand, not an invitation for the Prosecution to relitigate its case against Mr. Bemba […].[7]

8. Yet, Mr Bemba has now changed his strategy in these appeal proceedings. Under the pretext that the re-sentencing proceedings lacked clarity,[8] Mr Bemba has

[5] ICC-01/05-01/13-2277 ("Re-sentencing Briefing Schedule"), para. 3. *See also* ICC-01/05-01/13-2312 ("Re-sentencing Decision"), para. 15.
[6] Re-sentencing Decision, para. 15.
[7] ICC-01/05-01/13-2281-Red ("Bemba Re-sentencing Submissions"), paras. 78-79.
[8] *See* ICC-01/05-01/13-2320 ("Prosecution Re-sentencing Appeal Response"), para 7 (fn. 20) referring to ICC-01/05-01/13-2315 ("Bemba Re-sentencing Appeal"), paras. 32-34, 36-37. *See also* Request, paras. 5, 6.

improperly attempted to re-litigate the validity of the 'submission' evidentiary regime which was used during the trial, and the factual findings which were confirmed by the Appeals Chamber in its Article 70 Appeal Judgment.[9] Further, Mr Bemba has inexplicably requested the Appeals Chamber hearing this re-sentencing appeal to quash his convictions, notwithstanding they have already been confirmed by the Appeals Chamber.[10] Mr Bemba's indifference to the Court's procedure and legal framework should not be rewarded with an oral hearing. Instead, Mr Bemba's submissions should be dismissed *in limine,* as the Prosecution has requested.[11]

9. In addition, Mr Bemba's submissions with respect to the evidentiary procedure during the re-sentencing proceedings are plainly incorrect.[12] Not only was the Trial Chamber's procedure clear, reasonable and correct,[13] but even if the Chamber had erred (which it did not), Mr Bemba suffered no prejudice since the Chamber considered, and rightly gave limited weight to, the media material that Mr Bemba submitted.[14] Hence, any error would not have materially impacted Mr Bemba's sentence of one year imprisonment and € 300,000 fine.

B. The Parties have filed extensive and detailed submissions

10. *Second*, Mr Bemba and the Prosecution, the two parties in the litigation, have submitted extensive and detailed written submissions in these re-sentencing appeal

[9] Prosecution Re-sentencing Appeal Response, para. 7 (fns. 21-23) referring to Bemba Re-sentencing Appeal, paras. 17-31, 35, 38-77.
[10] Prosecution Re-sentencing Appeal Response, para. 7 (fn. 24) referring to Bemba Re-sentencing Appeal, paras. 63-77.
[11] Prosecution Re-sentencing Appeal Response, paras. 9, 40-63.
[12] Request, paras. 5-6.
[13] *See* Prosecution Re-sentencing Appeal Response, paras. 32-37.
[14] *See* Re-Sentencing Decision, paras. 10, 119 (fn 199) referring to Annex A of DRC Media Material Request. *See in particular* para. 119 ("[…]As to the Bemba Defence arguments that this case has affected his professional life, the Chamber will only give minimal weight to this for purposes of re-sentencing. The fact that Mr Bemba's conviction had a negative impact on his professional life is a natural consequence of the circumstances Mr Bemba found himself as a result of the criminal behaviour that he has been convicted for"). In addition, the Chamber also considered material attached to Bemba's submissions: two e-mails and a compilation of social media material (Re-Sentencing Decision, fn. 18 referring to the three annexes that Bemba attached to his Bemba Re-sentencing Notice Response) and list of filings, chronology of events, and extracts of *Bemba* Main Case Trial Judgment and of Prosecution's cross-examinations (Re-Sentencing Decision, fn. 10 referring to the annexes that Bemba attached to his Bemba Re-sentencing Submissions).

proceedings. Mr Bemba, in particular, has filed a detailed 98-page Re-sentencing Appeal[15] and has twice replied to the Prosecution's 98-page Response: although he arguably sought "leave" to do so, his "Request to Reply"[16] to the Prosecution's Response,[17] and his "Request to Reply to the Prosecution's Response to Mr. Bemba's Request to Reply"[18] already (and improperly) included lengthy submissions on the merits.[19] Mr Bemba also requested the submission of additional evidence and to "supplement the factual basis" and to "expand the scope of the appellate grounds".[20] He also sought to reply to the Prosecution's response to this request[21] and again effectively (and improperly) replied without leave from the Appeals Chamber.[22] On 5 July 2019, the Appeals Chamber allowed Mr Bemba to file a reply with respect to the issue of the scope of the appeal by 15 July 2019.[23]

11. Considering the above, the Prosecution respectfully submits that an oral hearing is not useful or necessary to resolve the issues at stake. Instead, it would only give Mr Bemba another opportunity to re-litigate legal and factual findings which have been confirmed by the Appeals Chamber in the Article 70 Appeals Judgments, and which should not feature in these appeal proceedings.

12. Moreover, the legal and factual issues that Mr Bemba incorrectly seeks to re-litigate in his Re-sentencing Appeal were already subject to a thorough analysis by the Appeals Chamber and resulted in a comprehensive 699-page Conviction Appeal Judgment[24] and a 146-page Sentencing Appeal Judgment.[25] That the Appeals Chamber did not convene a hearing in the first appeal proceedings does not mean

[15] ICC-01/05-01/13-2315 ("Bemba Re-sentencing Appeal").
[16] ICC-01/05-01/13-2324 ("Bemba First Reply").
[17] Prosecution Re-sentencing Appeal Response.
[18] ICC-01/05-01/13-2327 ("Bemba Second Reply"). *See* ICC-01/05-01/13-2326 ("Prosecution's Response to Mr Bemba's Request to Reply").
[19] *See* ICC-01/05-01/13-2333 ("Decision Requests to Reply"), para. 21.
[20] ICC-01/05-01/13-2319 ("Bemba Additional Evidence Request").
[21] ICC-01/05-01/13-2322 ("Prosecution Response Request Additional Evidence")
[22] ICC-01/05-01/13-2323 ("Bemba Third Reply")
[23] Decision Requests to Reply, para. 22.
[24] ICC-01/05-01/13-2275-Red ("Conviction Appeal Judgment").
[25] ICC-01/05-01/13-2276-Red ("Sentencing Appeal Judgment").

that there was no adversarial debate.[26] To the contrary, Mr Bemba and the other convicted persons challenged the 'submission' evidentiary regime, as well as a litany of other factual, procedural and legal issues in their detailed appeals against the Conviction Decision and the Sentencing Decision. This resulted in intense and prolonged written litigation between the Parties.[27] Because of the Parties' extensive and detailed written submissions, the Appeals Chamber did not consider it useful to receive additional oral submissions.[28] Mr Bemba himself did not consider it necessary: he did not request an oral hearing at that stage.[29] Given Mr Bemba's stance in the first appeal proceedings (which dealt with a wide range of legal, procedural and factual questions), it is counter-intuitive that he now considers that a hearing is necessary in these confined re-sentencing proceedings.

C. Mr Bemba does not justify the utility of an oral hearing in this case

13. *Third,* Mr Bemba requests an oral hearing to discuss the compatibility of the 'submission' evidentiary regime with the Court's framework.[30] He does not provide any other specific justification. But Mr Bemba's submissions on this topic are far from 'novel'.[31] As noted, he and his co-accused had the opportunity to challenge the application of the 'submission' evidentiary regime at trial, and did so,[32] including during the sentencing phase.[33] Their arguments were rejected by a Majority of the Appeals Chamber which confirmed the legality of the evidentiary regime adopted in the Article 70 case.[34] As Trial Chamber IX has recently recalled:

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[26] *Contra* Request, para. 4.
[27] *See* e.g. Conviction Appeal Judgment, paras. 37-42 (general overview of the appeals) and paras. 43-88 (preliminary matters).
[28] Conviction Appeal Judgment, para. 48.
[29] *See* Conviction Appeal Judgment, para. 48 referring to Mr Arido, Mr Babala and Mr Mangenda.
[30] Request, paras. 4-6.
[31] *Contra* Request, para. 4.
[32] ICC-01/05-01/13-2144-Red ("Bemba Appeal"), paras. 188-202; ICC-01/05-01/13-2145-Corr-Red ("Arido Appeal"), paras. 241-246; ICC-01/05-01/13-2147-Corr-Red ("Babala Appeal"), paras. 35, 49-72.
[33] ICC-01/05-01/13-2166-Red ("Babala Sentence Appeal"), paras. 167-169.
[34] *See* Conviction Appeal Judgment, paras. 572-587, 593-601, 607-610; Sentencing Appeal Judgment, para. 301 (dismissing Babala's arguments that "the Trial Chamber erred procedurally by not issuing decisions on the admissibility of each item of evidence that had been submitted to it for the purposes of sentencing [because the]

> "the Chamber notes that up to now there is only one decision by the Appeals Chamber where it had to pronounce itself on the lawfulness of a system like the Evidentiary Regime. The Appeals Chamber confirmed the legality of this approach, with one judge writing separately on this point. This finding has never been reversed. Accordingly, there are no jurisprudential arguments constituting a reason for reconsideration".[35]

14. Neither Mr Bemba nor the Re-sentencing Decision provides 'compelling reasons' to depart from this appeals jurisprudence.[36] There is a need for finality in these proceedings, and for judicial certainty in the proceedings before the Court.[37] Therefore, the Prosecution reiterates its request to dismiss *in limine* Mr Bemba's

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Appeals Chamber has already addressed this question in the context of appeals against the Conviction Decision in the present case and concluded that such a ruling is not required, for the reasons set out in its judgment on the appeals against the Conviction Decision. The same considerations apply to the sentencing phase of the proceedings").

[35] ICC-02/04-01/15-1546 ("Ongwen Evidentiary Regime Decision"), para. 33.

[36] ICC-02/11-01/15-172 ("Gbagbo Victims Participation Decision"), para. 14 (finding that "while the Appeals Chamber has discretion to depart from its previous jurisprudence, it will not readily do so, given the need to ensure predictability of the law and the fairness of adjudication to foster public reliance on its decisions" and referring to ICC-01/05-01/08-566, para. 16 where the Appeals Chamber found that "absent 'convincing reasons' it will not depart from its previous decisions"). *See also* Aleksovski AJ, paras. 107 ("[…]in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice") and 108 ("situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been 'wrongly decided, usually because the judge or judges were ill-informed about the applicable law'") and 109 ("the normal rule is that previous decisions are to be followed, and departure from them is the exception. The Appeals Chamber will only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts"), quoted in Judge Eboe-Osuji Concurring Separate Opinion to Kenyatta Article 64(4) Decision, para. 91. *See also Šešelj* AJ, para. 11 ("[t]he Appeals Chamber is guided by the principle that, in the interests of legal certainty and predictability, it should follow previous decisions of the ICTY or the ICTR Appeals Chambers and depart from them only for cogent reasons in the interests of justice"); *Rutaganda* AJ, para. 26 ("The Appeals Chamber recalls that, once it has determined the law applicable to a particular issue, it should in principle follow its previous decisions, in the interests of certainty and predictability of the law"); Beirut S.A.L. and Ali Al Amin Jurisdiction AD, para. 71 ("regardless of the discussion on the applicability of the *stare decisis* principle raised in the Impugned Decision, the Appeals Panel, Judge Nasworthy dissenting, considers that it would have been preferable and important for judicial certainty as well as to avoid the fragmentation of the law, for the Contempt Judge to have followed the conclusions of the New TV Jurisdiction Appeal Decision"). *See also Croatia vs. Serbia*, Preliminary Objections Judgment, para. 53 ("[…]. To the extent that the decisions contain findings of law, the Court will treat them as it treats all previous decisions : that is to say that, while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so. As the Court has observed in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria : Equatorial Guinea intervening*), while "[t]here can be no question of holding [a State] to decisions reached by the Court in previous cases" which do not have binding effect for that State, in such circumstances "[t]he real question is whether, in [the current] case, there is cause not to follow the reasoning and conclusions of earlier cases" (*Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 292, para. 28)").

[37] Gbagbo Victims Participation Decision, para. 14.

submissions with respect to the 'submission' evidentiary regime adopted by Trial Chamber VII.[38]

15. Contrary to Mr Bemba's suggestion, a Chamber does not need to decide *all* issues raised by the parties in their filings when they do not arise or are unnecessary to resolve the issues at stake.[39] The contrary approach (*i.e.* resolving all matters raised) is not an effective use of the Chambers' time and Court's resources. There is also a real risk that a Chamber makes abstract legal statements which are subsequently proven to be inapt to the specific cases before the Court. This is why the Appeals Chamber has cautiously "consider[ed] it inappropriate to pronounce itself on *obiter dicta*. To do so would be tantamount to rendering advisory opinions on issues that are not properly before it."[40]

16. The question of whether (and/or in what circumstances) an Appeals Chamber can reconsider and quash final convictions pursuant to article 81(2)(b) (or any other statutory provision) is indeed an important legal question. However, it does not arise from these appeal proceedings. Mr Bemba's request is based on the premise that the Appeals Chamber overturned the 'submission' evidentiary regime in the Bemba Main Case Appeal Judgment, a premise that is incorrect.[41] Therefore, as the Prosecution has submitted, this legal question need not be resolved in these re-sentencing appeal proceedings.

17. Further, if the Appeals Chamber decides to hold an oral hearing, the Prosecution respectfully requests that the Appeals Chamber issue the order on the conduct of the oral hearing, identifying the specific issues it would like to hear further submissions on, with adequate notice to the parties. As the Prosecution has already submitted in its Response to Mr Bemba's Appeal against the Re-sentencing

[38] Prosecution Re-sentencing Appeal Response, paras. 9, 40-63.
[39] *Contra* Request, para. 4.
[40] ICC-01/04-01/07-1497 ("Katanga Admissibility AD") , para. 38.
[41] *See* Prosecution Re-sentencing Appeal Response, paras. 46-49.

Decision, if this Appeals Chamber were to entertain the merits of Mr Bemba's arguments on the 'submission' evidentiary regime (rather than dismissing them *in limine*), this could give rise to an appearance of bias for Judge Eboe-Osuji.[42] The Prosecution fully respects the presumption of impartiality that Judges enjoy at this Court.[43] That notwithstanding, it could be said that a reasonable observer could reasonably apprehend bias on the part of Judge Eboe-Osuji as an Appeals Chamber Judge in the present case based on the views he expressed in his Separate Opinion of the *Bemba* Main Case Appeal Judgment on the 'submission' evidentiary regime applied in this case,[44] in particular, given his previous role as Presiding Judge of the Trial Chamber in this case,[45] where he had adopted the 'admission' evidentiary regime.[46] Because Mr Bemba's arguments regarding the 'submission' evidentiary regime in his Appeal against the Re-sentencing Decision were, in the Prosecution's view, *ultra vires* and thus cannot be entertained on their merits, after careful consideration, the Prosecution did not consider that any further action was required at that stage. However, considering the "detailed and case-specific assessment of the circumstances" required in article 41(2)(a),[47] and the need to make such requests "as soon as there is knowledge of the grounds on which it is based",[48] if the Appeals Chamber decides to schedule an oral appeal hearing, the Prosecution would

[42] *See* Prosecution Re-sentencing Appeal Response, para. 66. *See also* para. 85 (with respect to Judge Eboe-Osuji's participation in the decision of 17 August 2015: ICC-01/05-01/13-1151). *See e.g.* ICC-01/04-01/06-3459-Anx ("Lubanga Reparations Disqualification Decision"), para. 27.
[43] Lubanga Reparations Disqualification Decision, para. 26.
[44] *See e.g.* Appendix I to Judge Eboe-Osuji Concurring Separate Opinion, paras. 293-294. *See also* paras. 298, 303, 304, 305, 307, 310.
[45] Trial Chamber VII was composed on 30 January 2015. Judge Eboe-Osuji was appointed as the Presiding Judge on 13 February 2015 and he served until 24 August 2015 when he and Judge Carbuccia were replaced by Judge Pangalangan and Judge Perrin de Brichambaut. As Presiding Judge of the Trial Chamber in this case, Judge Eboe-Osuji issued over 50 decisions. *See* Presidency Replacement Decision.
[46] In a status conference held on 24 April 2015, Judge Eboe-Osuji allowed the Prosecution's request to submit *in limine* bar-table motions in advance of the trial, ahead of the evidence being led. The Prosecution had asked the Chamber to determine these issues *in limine* but some Defence preferred a decision later or even at the end of the trial. Judge Eboe-Osuji rejected a Defence suggestion for the Chamber to "defer" its decision on the bar table motion until after witness testimony. *See* T-8-Red, 50:13-17.
[47] ICC-01/04-02/06-2355-AnxI-Red ("Ntaganda Disqualification Decision"), para. 36.
[48] *See e.g.* ICC-01/04-02/06-2346 ("Ntaganda Reconsideration Presidency Decision"), para. 22. *See also* ICC-01/12-01/18-398-AnxI ("Al-Hassan Plenary Decision"), paras. 48 (noting that disqualification requests should pertain to "presently existing legal or factual issues and not be based on issues a party claims might be raised in the future") and 50 ("[…]this does not provide a free license for the filing of 'prospective' disqualification requests and that counsel must always act in accordance with her or his duties to the Court as set out in the Code of Professional Conduct for Counsel").

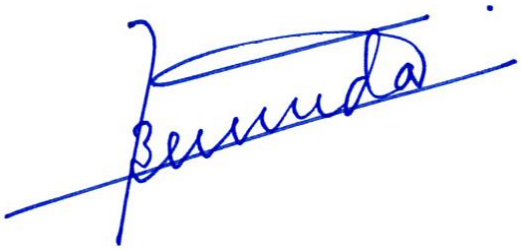
respectfully request to be promptly informed of the topics that the Appeals Chamber would like to hear submissions on so that it may re-examine whether the standard set out in article 41(2)(a) is met.

18. In conclusion, the Prosecution submits that an oral hearing is not useful or necessary to decide on Mr Bemba's Appeal against the Re-sentencing Decision. Moreover, although Mr Bemba is correct that the Appeals Chamber scheduled an oral hearing in the appeal proceedings against the Decision setting the Size of the Reparations Award in the *Lubanga* case,[49] the hearing was eventually cancelled[50] and, instead, the Appeals Chamber invited the parties and participants to make further written submissions.[51] The Appeals Judgment is scheduled to be rendered on 18 July 2019.[52]

[49] Request, para. 3.
[50] *See* ICC-01/04-01/06-3431.
[51] ICC-01/04-01/06-3435.
[52] ICC-01/04-01/06-3460 ("Scheduling Order").

Conclusion and Relief

19. For all the reasons above, the Prosecution requests the Appeals Chamber to dismiss Mr Bemba's Request to hold an oral hearing in the re-sentencing appeal proceedings. In the alternative, if the Appeals Chamber decides to hold an oral hearing, the Prosecution respectfully requests that the Appeals Chamber issue the order on the conduct of the oral hearing, identifying the specific issues it would like to further hear on, with adequate notice to the parties.



Fatou Bensouda, Prosecutor

Dated this 15th July 2019[53]
At The Hague, The Netherlands

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