Cour Pénale Internationale

International Criminal Court

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No: **ICC-01/05-01/13**
Date: **22 September 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
With Public Annex A

Response to Requests for an Oral Hearing

Source: **Defence for Jean-Jacques Mangenda Kabongo**

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

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I. INTRODUCTION

1. Jean-Jacques Mangenda supports Arido's and Babala's requests for an oral hearing pursuant to Rule 156(3) of the Rules of Procedure and Evidence.[1] Holding such a hearing in respect of the Conviction Judgment[2] will assist the Appeals Chamber in resolving the complex, voluminous and novel issues involved.

2. The relatively small investment of time for an oral hearing will, ultimately, contribute to judicial economy. The importance of oral hearings to appeal judgments is reflected in the extent to which the latter often refer to submissions made during those oral hearings. The Appeals Chamber has previously granted oral hearings in 100% of the appeals from the two final Judgments when so requested by a party. This corresponds to the practice or rules of international criminal tribunals and many national jurisdictions, where an oral hearing on final appeal is either mandatory or customarily granted. An oral hearing will contribute to the dialectical engagement that is essential to the appellate function.

II. APPLICABLE LAW

3. Rule 156(3) of the Rules of Procedure and Evidence, which provides that "appeal proceedings shall be in writing unless the Appeals Chamber decides to convene a hearing," applies to interlocutory and final appeals alike. The standard for granting such a hearing differs, however, depending on whether the appeal is interlocutory or final. The standard for the former is "cogent reasons" demonstrating why an oral hearing "is necessary";[3] the latter requires only a showing that such a hearing "would

[1] *Bemba et al.,* Narcisse Arido's Request for an oral hearing pursuant to Rule 156(3), ICC-01/05-01/13-2222, 11 September 2017; *Bemba et al.,* Requête de la Défense sollicitant la tenue d'une audience en vue de la présentation de ses conclusions orales et de la déclaration orale de Monsieur Fidèle Babala Wandu, ICC-01/05-01/13-2223, 12 September 2017. All citations are to the *Bemba et al*. case, all references to "Rule" are to the ICC Rules of Procedure and Evidence, and all references to "Article" are to the Rome Statute, unless otherwise specified.

[2] Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/13-1989-Red, 19 October 2016 ("Conviction Judgment").

[3] *Muthaura et al.,* Decision on the "Request for an Oral Hearing Pursuant to Rule 156(3)", ICC-01/09-02/11-251, 17 August 2011, para. 10 ("for the Appeals Chamber to exercise its discretion and to depart from this norm it must be furnished with cogent reasons that demonstrate why an oral hearing in lieu of, or in addition to, written submissions is necessary.") *See also Gaddafi and Al-Senussi,* Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi", ICC-01/11-01/11-565, 24 July 2014, para. 64.

assist the Appeals Chamber in clarifying and resolving the issues raised in the Appeal."[4]

4. The Appeals Chamber, reflecting these standards, has rarely ordered an oral hearing in respect of interlocutory appeals, but has done so in both of the two appeals from final judgments when so requested by the appellants.[5]

5. The ICC Appeals Chamber's consistent, albeit limited, practice of granting oral hearings in respect of final appeals corresponds to the requirement at the ICTY,[6] ICTR,[7] MICT,[8] STL,[9] and ECCC[10] that such a hearing be held. The SCSL, like the ICC, does not compel an oral hearing by statute[11] but has done so in every appeal of complexity similar to that of the present case.[12]

6. National practice overwhelmingly favours holding an oral hearing in appellate proceedings.[13] The UK Supreme Court must hear "[e]very contested appeal […] in open court except where it is necessary in the interests of justice or in the public interest to sit in private for part of an appeal hearing."[14] Oral arguments are routine practice in appellate proceedings before the High Court of Australia,[15] the Supreme

[4] *Ngudjolo*, Scheduling order for a hearing before the Appeals Chamber, ICC-01/04-02/12-199, 18 September 2014, para. 13.
[5] *See Lubanga*, Public redacted version of the Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, 1 December 2014, para. 66; *Lubanga*, Scheduling order for a hearing before the Appeals Chamber, ICC-01/04-01/06-3067, 21 March 2014, p. 3, para. 1 ("[a] hearing before the Appeals Chamber will be held in Courtroom II on Monday, 14 April 2014 and Tuesday, I5 April 2014, in order to hear […] submissions and observations by the parties and participants"); *Ngudjolo* Scheduling Order.
[6] ICTY, RPE, Rule 114 ("After the expiry of the time-limits for filing the briefs provided for in Rules 111, 112 and 113, the Appeals Chamber shall set the date for the hearing and the Registrar shall notify the parties").
[7] ICTR, Rule 114.
[8] MICT, Rule 141.
[9] STL, Rule 185 ("[a]fter the expiry of the time-limits for filing the briefs provided for in Rules 182, 183 and 184, the Appeals Chamber shall set the date for the hearing and the Registrar shall notify the Parties").
[10] ECCC, Rule 108(3) Internal Rules (Rev. 9) ("[t]he date of the appeal hearing shall be determined by the President of the Chamber, after having verified that the case file is complete").
[11] *See* SCSL, Rule 114(B).
[12] *See e.g. Fofana and Kondewa*, SCSL-2004-14-A, Scheduling Order, 11 February 2008; *Brima et al.*, SCSL-2004-16-A, Scheduling order, 7 November 2007; *Sesay et al.*, SCSL-04-15-A, Scheduling Order for Appeal Hearing, 3 August 2009; *Taylor*, SCSL-03-01-A, Scheduling order, 18 January 2013. No oral hearings appear to have been held in the SCSL contempt decisions that were appealed. It is not clear whether oral hearings were requested in those cases and, in any event, the issues in those cases were far less complex than the present case.
[13] *See e.g.* Rule 27(1) The Supreme Court Rules 2009 (No. 1603 (L. 17)); Rule 44.08 High Court Rules 2004 (Cth) (Australia); Rules 69(1) and 71(1) Rules of the Supreme Court of Canada (SOR/2002-156); Rule 28 Rules of the Supreme Court of the United States.
[14] Rule 27(1) Supreme Court Rules (UK).
[15] *See* Rule 44.08 High Court Rules (Aus) (requiring a party or intervener to provide the Court, and the other parties and interveners, with an outline of the propositions that the party or intervener intends to advance in oral argument).

Court of Canada,[16] and the Supreme Court of the United States.[17] In France, oral submissions are permitted in the criminal trial and appeal.[18] Swiss law permits an appeal to be decided without an oral hearing only in very limited circumstances that would not encompass the present appeal.[19] Oral hearings on appeal are also mandatory under the German Code of Criminal Procedure[20] and the Polish Code of Criminal Procedure.[21]

III. SUBMISSIONS

(i) An Oral Hearing Will Sharpen and Focus the Issues

7. The present appeal, though involving charges under Article 70 of the Statute rather than Article 5, is voluminous and complex. The parties have filed hundreds of pages of submissions in the appeals from the Conviction Judgment. The number of issues, and volume of evidence relevant to those issues, increases the likelihood that the parties' submissions will, in certain important respects, resemble ships passing in the night. This may undermine the Appeals Chamber's capacity, especially in a system with only one level of appellate review, to discern the points of contention between the parties, or the relative merits and implications of the parties' positions. An oral hearing allows the parties to further refine and focus their submissions in light of one another's submissions which, in turn, will assist the Appeals Chamber in defining and deciding the points of contention.

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[16] Rule 69(1) ("the Registrar shall enter the appeal on a list of cases to be heard by the Court") and Rule 71(1) (determining the number of counsel to present oral arguments on appeal) Rules of the Supreme Court (Can) (SOR/2002-156).

[17] Rule 28(1) Rules of the Supreme Court (US) (outlining the procedure for oral arguments).

[18] France does not permit written submissions in criminal trials; all submissions must be made orally. *See* Code de procédure pénale, Chapitre VI: "Des débats", article 306, modifié par LOI n°2016-444 du 13 avril 2016 - art. 14. *See also* France, Cass. crim., n° 97-84.657, 24 juin 1998, para. 80 ("*il est de principe que, devant la cour d'assises, le débat doit être oral".* The official French commentary accompanying this decision indicates: *"[l]a cour d'assises doit en effet former sa conviction non d'après les pièces du dossier mais d'après ce que juges et jurés ont vu et entendu au cours des débats. Ce principe est d'ordre public et domine toute la procédure d'assises. En conséquence, des témoins, qui déposeront oralement doivent nécessairement être entendus au cours des débats ; les arrêts incidents ne peuvent être motivés par seule référence à l'instruction écrite; il ne peut être donné lecture du procès-verbal d'audition d'un témoin acquis aux débats et comparant ou du rapport d'un expert avant sa déposition orale à l'audience. S'il peut être versé au dossier des pièces écrites, ces documents doivent être soumis au débat contradictoire*.")

[19] Article 406(1) of the Swiss Code of Criminal Procedure (5 October 2007, as of 1 September 2017) ("The court of appeal may deal with the appeal in written proceedings if: a. its decision relates solely to legal issues; b. only the civil aspect is being contested; c. the subject matter of the judgment of the court of first instance is a contravention and the appeal does not request a conviction for a felony or misdemeanour; d. only an award of costs, damages or satisfaction is being contested; e. only measures under Article 66-73 SCC are being contested.")

[20] Sections 323-326 German Code of Criminal Procedure (outlining the procedure for oral arguments).

[21] Article 29§1 Code of Criminal Procedure ("At the appellate and cassation trial the court shall sit in a panel consisting of three judges, unless otherwise provided by law").

8. The positive impact of oral hearings is demonstrable. The *Lubanga* Appeals Chamber invited submissions and observations by the parties and participants on specific issues arising in the appeal, encouraged the parties to fully explore at the oral hearing issues that had been raised in the requests for admission of additional evidence, and asked numerous questions during the hearing. The answers to those questions figured prominently in the Appeal Judgment.[22] Judgments at the ICTY[23] and at the ICTR[24] often refer extensively to the content of oral hearings.

9. In *Ngudjolo,* the parties and participants exchanged extensive submissions, including replies and rejoinders.[25] The *Ngudjolo* Appeals Chamber, even with the benefit of these replies and rejoinders, still determined that an oral hearing would assist the Appeals Chamber.[26] In *Lubanga*, the Appeals Chamber likewise entertained the defence's reply to the Prosecution's response to the defence's appeal brief,[27] yet still ordered an oral hearing.[28]

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[22] *Lubanga* Appeal Judgment, paras. 13, 71, 72, 78, 84, 87, 89, 109, 111, 216. Questions asked during final appeals oral hearings have also factored into the Appeals Chambers' judgments at the *ad hoc* tribunals. The ICTY Appeals Chamber in *Krajisnik*, for example, referred to the transcript of the appeals hearing no less than 148 times in its 280-page judgement, and specifically considered the oral submissions made by the parties during the hearing. *Krajišnik*, IT-00-39-A, Judgement, 17 March 2009, paras. 166-169; 690-698. *See also Gotovina*, Appeals Hearing Transcript of 14 May 2012, 20:8-21:7, 46:22-48:5, 57:2-6, 68:22-69:23.

[23] The ICTY Appeals Chamber in *Krajisnik* referred to the transcript of the appeals hearing no less than 148 times in its 280-page judgement, and specifically considered the oral submissions made by the parties during the hearing. *See Krajišnik* Appeal Judgment, paras. 166-169, 690-698.

[24] The ICTR Appeals Chamber in *Mugenzi and Mugiraneza* considered the oral submissions made at the appeals hearing in deliberating the following issues: whether the Trial Chamber had erred in finding that the appellants' right to trial without undue delay had not been violated (paras. 20-37); whether the Trial Chamber had erred in its assessment of the evidence in finding that the appellants had the requisite *mens rea* for a conviction for conspiracy to commit genocide (paras. 77-93); whether the Trial Chamber erred in finding that the appellants possessed the *mens rea* necessary to sustain their conviction for direct and public incitement (paras. 130-141). Similarly, the ICTR Appeals Chamber has expressly referred to the transcripts of the appeal hearings in its final judgements, referring to arguments that had been, or that had failed to be, made at the oral hearing. *See e.g. Nahimana et al.*, ICTR-99-52-A, Judgement, 28 November 2007, paras. 164, 179, 215-17, 264; *Mugenzi and Mugiraneza*, ICTR-99-50-A, Judgement, 4 February 2013, paras. 20-37, 77-93, 130-141.

[25] The redacted version of the Defence's response was 146 pages (ICC-01/04-02/12-90-Corr2-Red); the Prosecution's redacted reply to the Defence's response was 21 pages; the redacted observations on appeal of the principal group of victims was 69 pages (ICC-01/04-02/12-124-Corr-Red) while that of the child soldiers was 63 pages (ICC-01/04-02/12-125-Corr-Red); the redacted response of Mr Ngudjolo to the observations to the victims' groups was 56 pages (ICC-01/04-02/12-131-Red-tENG); and Mr Ngudjolo's redacted rejoinder to the Prosecution's reply was 25 pages (ICC-01/04-02/12-134-Red-tENG).

[26] *Ngudjolo* Scheduling Order, para. 13 ("the Appeals Chamber finds that a hearing, limited to hearing the parties and participants on the confined issues raised on appeal, would be useful in assisting the Appeals Chamber in its decision-making process. Thus, the Prosecutor's Request for an Oral Hearing is granted.")

[27] *Lubanga,* Defence reply to the "Prosecution's Response to Thomas Lubanga's Appeal against Trial Chamber I's Judgment pursuant to Article 74" and the "Prosecution's Response to the '*Mémoire de la Défense de M. Thomas Lubanga relative à l'appel à l'encontre de la "Décision relative à la peine, rendue en application de l'article 76 du Statut" rendu par la Chambre de première instance I le 10 juillet 2012"*", both filed on 4 February 2013, ICC-01/04-01/06-2989-Red-tENG, 28 February 2013.

[28] *Lubanga* Scheduling Order, p. 3, para. 1 ("[a] hearing before the Appeals Chamber will be held in Courtroom II on Monday, 14 April 2014 and Tuesday, I5 April 2014, in order to hear […] submissions and observations by the parties and participants.")

10. The written submissions in the present appeal are extensive. The grounds of appeal raised by Mr Mangenda and the co-appellants involve novel issues of law, factually complex procedural issues, and a volume of evidence unusual for contempt charges. Unlike in *Lubanga* and *Ngudjolo*, no reply or rejoinder submissions have been granted, further increasing the likelihood that not all important issues have been explored or explained in the written submissions.

11. An oral hearing will efficiently and effectively clarify factual issues, and refine relevant legal issues. The Appeals Chamber would be assisted by such oral submissions.

(ii) An Oral Hearing Will Afford the Appeals Chamber an Opportunity to Ask Questions and Clarify Issues

12. Appeals chambers of the ICC and international criminal tribunals frequently use the oral appeal hearing to ask questions of the parties. The *Lubanga* Appeals Chamber asked numerous questions to the parties.[29] Appeals Chambers at other international courts have frequently utilised these hearings to give the parties an opportunity to respond to written questions, communicated in advance,[30] or to respond to questions posed orally during the hearing and invite oral submissions on specific issues not already addressed in the written submissions.[31]

[29] ICC-01/04-01/06-T-363-Red-ENG, 58:7-14 ("[a]nd, secondly, a related question reads: In your response to the document in support of the appeal, you say at paragraph 89, and I quote, "The list does not include all members of the FPLC as of December 2004. According to the Prosecution's understanding, the document lists only those FPLC members who were nominated for a process whereby soldiers from rebel armed groups would join DRC national army," unquote. These assertions are not footnoted in any manner. Can you please explain your basis for your, quote, "understanding", unquote?"); *Lubanga* Appeal Judgment, para. 111 ("[a]t the oral hearing, the Appeals Chamber requested the Prosecutor to provide further information as to why she had concluded that the 2004 FPLC List contained only the names of those members of the FPLC who would join the DRC national army and was not a complete list of the members at that time"); *Lubanga* Appeals Transcript, 57:20-65:12.

[30] **ICTY**, *Prlić et al.,* IT-04-74-A, Order for the Preparation of the Appeal Hearing, 1 March 2017, pp. 5-7; *Popović et al*., IT-05-88-A, Order for the Preparation of the Appeal Hearing, 6 November 2013, pp. 1-3; *Đorđević*, IT-05-87/1-A, *Addendum* to the Scheduling Order for Appeal Hearing, 12 April 2013, pp. 2-3; *Šainović et al.*, IT-05-87-A, Order for the Preparation of the Appeal Hearing, 20 February 2013, pp. 1-4; *Perišić*, IT-04-81-A, *Addendum* to the Scheduling Order for Appeal Hearing, 15 October 2012, pp. 1-2; *Gotovina et al*., IT-06-90-A, *Addendum* to the Scheduling Order for Appeal Hearing, 24 April 2012, pp. 1-2; *Lukić et al*., IT-98-32/1-A, Order for the Preparation of the Appeal Hearing, 6 September 2011, p. 1; **ICTR**, *Setako*, ICTR-04-81-A, Order for the Preparation of the Appeal Hearing, 25 March 2011, p. 1; *Bagosora et al.*, ICTR-98-41-A, Order for the Preparation of the Appeal Hearing, 7 March 2011, pp. 1-2; *Renzaho*, ICTR-97-31-A, Order for Preparation of Appeal Hearing, 7 June 2010, pp. 2-3; *Kalimanzira,* ICTR-05-88-A, Order for the Preparation of the Appeal Hearing, 3 June 2010, pp. 1-2; *Karera*, ICTR-01-74-A, Order for Preparation of Appeal Hearing, 20 August 2008, pp. 2-3. *See also Gotovina*, Appeals Hearing Transcript, 20:8 -21:7, 46:22-48:5, 57:2-6, 68:22-69:23. In this respect, see also the practice of the ICTY, in which the Appeals Chamber invites the parties to address at the oral hearing questions arising on appeal.

[31] *Lubanga* Appeals Transcript, 57:20-65:12; *Gotovina* Appeals Hearing Transcript, 46:23-47; *Lukić et al*., Appeals Hearing Transcript of 14 September 2011, 106:1-10.

13. The volume of submissions, and novelty of issues, in the present appeal increases the likelihood that the Appeals Chamber would benefit from being able to ask questions to clarify or test the strength of certain positions. As stated by the United States Supreme Court:

> [w]ritten submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue […] written submissions are a wholly unsatisfactory basis for decision.[32]

An oral appeal hearing, as the Prosecution has previously argued, would afford the judges the opportunity "to ask questions of counsel which may have been overlooked by parties and to explore with counsel the consequences of potential holdings in a particular case for future cases in general"[33] and allow the Chamber to take measure of and test the merits and strength of the parties' arguments.[34]

(iii) An Oral Hearing Limited to the Issues on Appeal Will Not Affect the Expeditiousness of the Proceedings

14. An oral hearing, relative to the total time taken to deliberate on the written pleadings, is a negligible investment of time. No more than two days should be required for such submissions, whereas the entire process of the appeal may be expected to take more than a year.

15. A short oral hearing will have no negative impact on the disposition of the appeals, especially given the timely nature of the present request,[35] which will allow the Appeals Chamber to schedule an oral hearing at the time most appropriate to its

[32] *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). *See also Sengupta & Anor v. Holmes & Ors* [2002] EWCA Civ 1104 ("... [a] central place [is] accorded to oral argument in our common law adversarial system. This I think is important, because oral argument is perhaps the most powerful force there is, in our legal process, to promote a change of mind by a judge. That judges in fact change their minds under the influence of oral argument is not an arcane feature of the system; it is at the centre of it.")

[33] Hawley, Jonathan E. et al., *Handbook for Criminal Appeals in the Seventh Circuit*, (Federal Public Defender, Central District of Illinois, 2nd ed.), para.6.01, cited in *Ngudjolo*, Public redacted version of "Prosecution's Request to Schedule the Appeal Hearing", 29 August 2014, ICC-01/04-02/12-193-Red, 29 August 2014, para. 15.

[34] *Ngudjolo* OTP Hearing Request, para. 15, fn. 30: "[t]he former UK Supreme Court Justice and now Master of Rolls, Lord Dyson, stated '[q]uite often […] I spend a lot of time reading the written cases beforehand, and reach a provisional view, and quite often in the course of argument my view changes […] it can swing backwards and forwards and at the end will have been influenced by oral argument.' Paterson, A., Final Judgement: the Last Law Lords and the Supreme Court (Oxford: Hart, 2013), pp. 48-51."

[35] The Appeals Chamber in *Ngudjolo* granted an oral hearing that was requested more than one year after the submission of the final documents in the appeal. The Prosecution made its request for an oral hearing on 29 August 2014, and the last written pleading in the appeal was filed on 12 August 2013 (*Ngudjolo* Defence Response, para. 8).

deliberations. The short time that will be required for oral submissions will be more than outweighed by the saving of time arising from the clarification of issues that an oral hearing is likely to provide.

IV. CONCLUSION AND RELIEF REQUESTED

16. The Defence supports the Arido and Babala requests an oral hearing in the appeals from the Conviction Judgment. An oral hearing will facilitate the appellate process, and stand as a public reminder of the importance of the appellate phase of proceedings before the International Criminal Court. The Defence, accordingly, supports the requests of Mr Arido and Mr Babala to the extent that they request hearings in the appeals from the Conviction Judgment.

Christopher Gosnell
Counsel for Mr. Jean-Jacques Kabongo Mangenda

Respectfully submitted this 22 September 2017,
At The Hague, The Netherlands