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No.: ICC-01/05-01/13  
Date: **12 September 2017**

**THE APPEALS CHAMBER**

**Before:** Judge Silvia Fernández de Gurmendi, Presiding Judge  
Judge Sanji Mmasenono Monageng  
Judge Piotr Hofmański  
Judge Geoffrey Henderson

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC**

**IN THE CASE OF**  
***THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO,***  
***AIME KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO,***  
***FIDELE BABALA WANDU AND NARCISSE ARIDO***

**Public Document**

**Defence Request for an Oral Hearing to Enable the Defence to Make Oral Closing  
Statements and Mr Fidèle Babala Wandu to Make an Oral Statement**

**Source:** Defence for Mr Fidèle Babala Wandu

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

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**Detention Section**

**Victims Participation and Reparations Section**

**Other**

## I. PURPOSE OF THE REQUEST

1. The Defence for Mr Fidèle Babala Wandu (“Defence” and “Mr Babala”) hereby respectfully asks the Appeals Chamber (“Chamber”) to convene a hearing to enable the Defence to make oral closing statements.
2. The Defence also takes this opportunity to submit to the Chamber its client’s request to make an oral statement at that hearing.

## II. PROCEDURAL HISTORY

3. On 19 October 2016, Trial Chamber VII (“Trial Chamber”) handed down its Judgment pursuant to article 74(2) of the Statute (“Judgment”).<sup>1</sup> Mr Babala was found guilty of aiding and abetting the corrupt influencing of Witnesses D-57 and D-64 and he was acquitted of more than 40 other charges confirmed by the Pre-Trial Chamber on 11 November 2014 pursuant to article 61(7)(a) and (b) of the Rome Statute.<sup>2</sup>
4. On 1 November 2016, the Defence submitted an application to the Appeals Chamber for an extension of time for filing its appeal brief, on the grounds chiefly of: the novelty and intricacy of the case; the Defence’s need to prepare for the determination of the sentence; and linguistic difficulties stemming from the fact that the Judgment was available only in English at the time, whereas the Accused and his Defence team are French speakers.<sup>3</sup>
5. On 2 November 2016, the Defence notified the Chamber and the parties of its intention to appeal against the Judgment.<sup>4</sup>

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<sup>1</sup> ICC-01/05-01/13-1989-Red.

<sup>2</sup> ICC-01/05-01/13-749.

<sup>3</sup> ICC-01/05-01/13-1996-tENG.

<sup>4</sup> ICC-01/05-01/13-1999-tENG.

6. On 23 November 2016, the Chamber granted the Defence Application of 1 November 2016 and set 18 April 2017 as the time limit for the submission of the appeal briefs. The Chamber nevertheless invited the Defence teams to submit a list of the Trial Chamber's legal findings that they intended to challenge on appeal, by 16.00 on 14 February 2017.<sup>5</sup>
7. Pursuant to an Order issued by the Appeals Chamber,<sup>6</sup> the Defence filed a notice of appeal on 14 February 2017, specifying the errors of procedure, fact and law identified in the Judgment.<sup>7</sup>
8. On 4 April 2017, the Defence team for Mr Aimé Kilolo Musamba submitted an urgent request for an extension of the time limit for submitting its appeal brief to 24 July 2017.<sup>8</sup> That request was seconded by the Defence team for Mr Jean-Jacques Mangenda Kabongo on 6 April 2017,<sup>9</sup> and granted by the Chamber on 10 April 2017.<sup>10</sup>
9. On 24 April 2017, the Defence submitted its appeal brief against the Judgment.<sup>11</sup>
10. On 10 July 2017, the Prosecution filed its Consolidated Response to the Defence teams' appeal briefs.<sup>12</sup>
11. On 11 July 2017, the Defence applied to the Chamber for a suspension of the time limit for submitting a request for leave to reply to the Prosecution's Consolidated Response.<sup>13</sup>

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<sup>5</sup> ICC-01/05-01/13-2046.

<sup>6</sup> *Idem.*

<sup>7</sup> ICC-01/05-01/13-2107.

<sup>8</sup> ICC-01/05-01/13-2133.

<sup>9</sup> ICC-01/05-01/13-2134.

<sup>10</sup> ICC-01/05-01/13-2136.

<sup>11</sup> ICC-01/05-01/13-2147-Conf-Corr-tENG.

<sup>12</sup> ICC-01/05-01/13-2170-Corr-Red.

<sup>13</sup> ICC-01/05-01/13-2171.

12. On 14 July 2017, the Chamber issued its Decision, setting the time limit for filing any requests for leave to reply to the Prosecution's Consolidated Response at 16.00 on 24 July 2017.<sup>14</sup>
13. On 21 June 2017, the Defence for Mr Babala submitted its appeal brief against the Decision on Sentence.<sup>15</sup> On 21 August 2017, the Prosecution responded.<sup>16</sup>
14. On 11 September 2017, the Defence for Mr Arido submitted a request to the Appeals Chamber for a hearing to enable the parties to make oral arguments. The present request echoes the Arido team's request.<sup>17</sup>

### III. APPLICABLE LAW

15. Article 83(1) of the Rome Statute of the International Criminal Court ("Statute") provides that "[f]or the purposes of proceedings under article 81 and this article, the Appeals Chambers shall have all the powers of the Trial Chamber". That provision accords perfectly with rule 149 of the Rules of Procedure and Evidence (RPE), which stipulates that "Parts 5 and 6 and rules governing proceedings and the submission of evidence in the Pre-Trial and Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber".
16. The ordering of hearings during the trial phase is one of the Trial Chamber's powers, as is clear from articles 63(2), 64(7), 64(9), 69(2), 71(1), 69(7) and 76(2) of the Statute and rules 141 and 143 of the RPE.

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<sup>14</sup> ICC-01/05-01/13-2175.

<sup>15</sup> ICC-01/05-01/13-2166-Conf.

<sup>16</sup> ICC-01/05-01/13-2203-Conf.

<sup>17</sup> ICC-01/05-01/13-2222.

17. Accordingly, invested with all the powers of the Trial Chamber, the Appeals Chamber can also order a hearing or hearings to enable the parties who so wish to raise defences orally to complement or to sum up those submitted in writing in their appeal briefs.

18. Article 67(1) of the Statute also inherently provides for oral proceedings.

By setting forth:

In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(d) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute<sup>18</sup>

the drafters of the Statute enshrined the principle of oral submissions since, logically, in order to be heard, submissions must be spoken.

19. Moreover, rule 156(3) of the RPE, which lays down the principle of written proceedings on appeal, does not exclude or prohibit oral submissions, but rather leaves the exception of convening an oral hearing to the Chamber's discretion. The Defence therefore asks the Chamber to exercise that discretionary power.

20. In the case of *The Prosecutor v. Mathieu Ngudjolo Chui*, when the Prosecutor submitted a request to the Chamber to hold an oral hearing to make its closing statements, the Chamber decided that, contrary to the arguments of the Prosecution,

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<sup>18</sup> Emphasis added.

the decision to hold an oral hearing in appeal proceedings against final judgments is discretionary and made on a case-by-case basis. Such decisions 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.<sup>19</sup>

21. In the same spirit, international instruments for the protection of human rights – especially article 14(1) and (3) of the International Covenant on Civil and Political Rights<sup>20</sup> and article 6(1) and (3) of the European Convention on Human Rights,<sup>21</sup> which constitute the applicable law at the International Criminal Court (ICC) in accordance with article 21(1)(b) of the Statute – inherently recognize oral hearings as the rule, by providing for closed hearings, and the examination and cross examination of witnesses.

22. Article 67(1)(h) of the Rome Statute enshrines the right of the accused to “make an unsworn oral or written statement in his or her defence”.

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<sup>19</sup> ICC-01/04-02/12-199, para. 13.

<sup>20</sup> Article 14(1) of the ICCPR: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.”

Article 14(3)(d) and (e): “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”

<sup>21</sup> Article 6(1) of the ECHR: “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

Article 6(3)(d): “Everyone charged with a criminal offence has the right:

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;”

#### IV. SUBMISSIONS

23. Oral argument is an important rule of criminal procedure. The corollary of the principles of adversarial proceedings and public hearings, oral argument creates a direct link between the parties and the judges – and ensures justice and fairness.
24. To date, the Honourable Judges of the Chamber have only read the transcripts of the hearings, the admitted evidence and various filings exchanged between the parties. They have not had an opportunity to hear the parties or the Accused who wish to make statements, nor to ask any questions, with a view to handing down a decision enlightened by the entirety of the contributions and the vitality of speech. Interactive debate, facilitated by an oral hearing, always adds a human element.
25. As the Chamber is judging this case on appeal, pursuant to article 81 of the Statute, and will hand down a final decision that is not open to further review, it is of the utmost importance that the Chamber avail itself of every opportunity to seek and discover the truth.
26. Furthermore, since the Accused, Mr Babala, intends to exercise his right under article 67(1)(h) of the Statute to make an unsworn statement to the Chamber, it is important and amply justified for his Defence team to be granted leave to argue orally the legal issues analysed in the closing brief.
27. The Trial Chamber granted that right to the Accused. In the instant case, before the closing statements at the end of the trial, the Defence informed the Trial Chamber, on 2 May 2016, of Mr Babala's wish to make an oral



statement, in accordance with article 67(1)(h) of the Rome Statute.<sup>22</sup> On 12 May 2016, the Trial Chamber granted Mr Babala's request.<sup>23</sup> He addressed the Honourable Judges on 1 June 2016.<sup>24</sup>

28. Moreover, in a case so closely followed in a country like the Democratic Republic of the Congo (DRC), where written culture is not widespread, oral proceedings show international justice and the independence and impartiality of the judges in action.

29. Furthermore, since the instant case contains elements that are both new and complex for the ICC – as acknowledged by the Appeals Chamber itself<sup>25</sup> – it would gain from being argued orally and publicly, with a view to assisting the Chamber to determine its precise reality and render a decision that is correct in fact and law.

30. For all of those reasons, the Defence submits that the presentation of the main points raised by the litigants in their written filings, as well as the opportunity for the Honourable Judges to ask questions of the parties during an interactive debate, will assist the Appeals Chamber in its determination of the matter before it.

31. In the two cases judged on appeal at the ICC to date – *The Prosecutor v. Thomas Lubanga Dyilo*<sup>26</sup> and *The Prosecutor v. Mathieu Ngudjolo Chui*<sup>27</sup> – the Appeals Chamber granted the requests of the parties to allow

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<sup>22</sup> ICC-01/05-01/13-1862-tENG.

<sup>23</sup> ICC-01/05-01/13-1890.

<sup>24</sup> ICC-01/05-01/13-T-49-Red-ENG, p. 55, line 12, to p. 65, line 18.

<sup>25</sup> ICC-01/05-01/13-2046, para. 18; ICC-01/05-01/13-2161, para. 12.

<sup>26</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-363-Red-ENG WT, p. 65, line 13, to p. 72, line 8.

<sup>27</sup> ICC, *The Prosecutor v. Mathieu Ngudjolo Chui*, "Order in relation to the conduct of the hearing before the Appeals Chamber", ICC-01/04-02/12-210, p. 4, point 1(c)(v) of the Order.

the Accused to address the Chamber for 30 minutes. The ad hoc international criminal tribunals set a similar precedent.<sup>28</sup>

32. It follows from the above that – contrary to what the title of the appended report *L'oralité est morte. Vive la plaidoirie*<sup>29</sup> might suggest [in English: Oral hearings are dead. Long live advocacy!] – oral hearings are *not* dead at the International Criminal Court. The Defence hails the tradition of oral hearings instituted by the Appeals Chamber. Moreover, despite its boast, in actual fact the above-mentioned report highlights the need for oral advocacy.

33. The oral closing statements – in other words, oral advocacy – proposed by the Defence would enable the Appeals Chamber to formalize at the ICC what Emmanuel Jeuland has termed the “*principe de présence*” (principle of presence).<sup>30</sup>

[TRANSLATION] Some even consider that no judgment should be rendered unless the judge has heard the litigants in person. Emmanuel Jeuland has called this the “principle of presence”, which is a requirement in some of our oral proceedings, in particular at the industrial relations tribunals, albeit often in distorted form.<sup>31</sup>

<sup>28</sup> The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has given the Accused the opportunity to address the Chamber in several cases, e.g. *Prosecutor v. Popović et al.*, “Order for the Agenda of the Appeal Hearing”, 7 November 2013, IT-05-88-A, pp. 4-5, see timetable of the Appeal Hearing on Wednesday, 11 December 2013; *Prosecutor v. Đorđević*, “Addendum to the Scheduling Order for Appeal Hearing”, 12 April 2013, IT-05-87/1-A, p. 1, timetable for the Appeal Hearing on 13 May 2013; *Prosecutor v. Šainović et al.*, “Order Amending Scheduling Order and Setting the Timetable for the Appeal Hearing”, 31 January 2013, IT-05-87-A, p. 3, timetable of the appeal hearing on 15 March 2013; *Prosecutor v. Perišić*, “Scheduling Order for Appeal Hearing”, 24 September 2012, IT-04-81-A, p. 1, timetable for the appeal hearing on 30 October 2012; *Prosecutor v. Gotovina and Markač*, “Scheduling Order for Appeal Hearing”, 4 April 2012, IT-06-90-A, p. 1, timetable for the appeal hearing on 14 May 2012; *Prosecutor v. Lukić and Lukić*, “Scheduling Order for Appeal Hearing”, 8 July 2011, IT-98-32/1-A, p. 2, timetable for the appeal hearing on 15 September 2011.

<sup>29</sup> E. Jullien, *L'oralité est morte. Vive la plaidoirie*, Droit & Procédure, lecture and debate, 3 December 2015.

<sup>30</sup> *Idem.*

<sup>31</sup> *Idem.*

34. The same report informs us:

[TRANSLATION] In Spanish law, the live encounter between the judge, who will decide the case, and the litigant is a requirement for proceedings to be valid, while German and UK law also place considerable importance on oral hearings in general and on the oral testimony of the litigant in particular, although German law has the particularity of “mandatory oral argument” while specifying that “in proceedings where the litigants have legal representation, oral argument shall be prepared by an exchange of written submissions”, thus the distinction is contingent not on mandatory representation but on whether the parties have representation or not.<sup>32</sup>

35. Highlighting the importance of oral hearings in his discussion of advocacy, the author observes that “[e]ven in law reform proposals made since the year 2000, court hearings have remained at the very core of justice.”<sup>33</sup>

36. The value of oral argument, in addition to the written submissions of the parties, is so great that, at its plenary assembly on 24 November 1989, France’s Court of Cassation recognized “[TRANSLATION] the existence of a subjective right of the parties to present their arguments orally” (*Bulletin de l’assemblée plénière*, no. 3).<sup>34</sup>

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<sup>32</sup> E. Jullien, *L’oralité est morte. Vive la plaidoirie*, Droit & Procédure, lecture and debate, 3 December 2015, p. 15

<sup>33</sup> *Ibid.*, p. 13, footnote 32: “[TRANSLATION] Court hearings must continue to be the lifeblood of the judicial and legal professions. Judges need to adapt to a new role that is more engaged with the public. Lawyers need to change in order to offer their clients a comprehensive defence, operating on several levels and never abandoning the prospect of a settlement. *La Prudence et l’Autorité*, IHEJ Report, p. 73. Soraya Amrani Mekki, ‘Efficacité et nouvelles technologies’, *Procédures*, No. 4, April 2010.”

<sup>34</sup> *Ibid.*, p. 16.

**FOR THESE REASONS**

May it please the Appeals Chamber:

TO FIND this request admissible and meritorious;

TO CONVENE an oral hearing so as to enable the Defence and other parties who so wish to make oral statements;

TO GRANT Mr Babala the right to address the Chamber.

MAY JUSTICE BE DONE.

RESPECTFULLY SUBMITTED.

**Mr Jean-Pierre Kilenda Kakengi Basila**

**Counsel for Mr Fidèle Babala Wandu**

**[signed]**

Dated this 12 September 2017

At Denderleeuw, East Flanders, Belgium