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No. ICC-01/05-01/13 A6 A7 A8 A9

Date: 24 January 2018

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 document

**Decision on requests for leave to reply to the Prosecutor's consolidated response
to the appeal briefs**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for Jean-Pierre Bemba Gombo
Ms Melinda Taylor
Ms Mylène Dimitri

Counsel for Aimé Kilolo Musamba
Mr Michael G. Karnavas

Counsel for Jean-Jacques Mangenda Kabongo
Mr Christopher Gosnell
Mr Peter Robinson

Counsel for Fidèle Babala Wandu
Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido
Mr Charles Achaleke Taku
Ms Beth Lyons

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeals of Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu, Mr Narcisse Arido and the Prosecutor against the decision of Trial Chamber VII entitled “Decision on Sentence pursuant to Article 76 of the Statute” of 22 March 2017 (ICC-01/05-01/13-2123-Corr),

Having before it the “Defence Request for Leave to Reply to ‘Prosecution’s Consolidated Response to Mr Bemba’s, Mr Babala’s, and Mr Arido’s Appeals against the Sentencing Decision’” of 4 September 2017 (ICC-01/05-01/13-2215-Red),

Having before it “Narcisse Arido’s Request for Leave to Reply to the ‘Prosecution’s Consolidated Response to Mr Bemba’s, Mr Babala’s, and Mr Arido’s Appeals against the Sentencing Decision’ (ICC-01/05-01/13-2203-Conf) Pursuant to Regulation 60(1) of the Regulations of the Court” of 6 September 2017 (ICC-01/05-01/13-2218-Conf),

Having before it the “Demande d’autorisation de la Défense de M. Fidèle Babala Wandu de répliquer à « Prosecution’s Consolidated Response to Mr Bemba’s, Mr Babala’s, and Mr Arido’s Appeals against the Sentencing Decision » (ICC-01/05-01/13-2203-Conf)” of 22 September 2017 (ICC-01/05-01/13-2228-Conf),

Renders the following

DECISION

1. Mr Jean-Pierre Bemba Gombo’s, Mr Narcisse Arido’s, and Mr Fidèle Babala Wandu’s requests for leave to reply to the “Prosecution’s Consolidated Response to Mr Bemba’s, Mr Babala’s, and Mr Arido’s Appeals against the Sentencing Decision” of 21 August 2017 (ICC-01/05-01/13-2203-Conf) are rejected.
2. Mr Narcisse Arido is directed to file a public redacted version of:
 - (i) document ICC-01/05-01/13-2169-Conf, by Wednesday, 31 January 2018; and
 - (ii) document ICC-01/05-01/13-2218-Conf, by Tuesday, 13 February 2018.

3. Mr Fidèle Babala Wandu is directed to file a public redacted version of document ICC-01/05-01/13-2166-Conf, by Wednesday, 31 January 2018;
4. The Prosecutor is directed (i) to file a public redacted version of document ICC-01/05-01/08-2203-Conf, by Wednesday, 7 February 2018; and (ii) to file public redacted versions or seek public reclassifications of documents ICC-01/05-01/13-2217-Conf and ICC-01/05-01/13-2221-Conf, by Tuesday, 20 February 2018.
5. The Registrar is directed to reclassify as public documents ICC-01/05-01/13-2228-Conf and ICC-01/05-01/13-2231-Conf.

REASONS

I. PROCEDURAL HISTORY

1. On 22 March 2017, Trial Chamber VII (“Trial Chamber”) rendered its “Decision on Sentence pursuant to Article 76 of the Statute”¹ (“Sentencing Decision”).
2. Mr Fidèle Babala Wandu² (“Mr Babala”), Mr Narcisse Arido³ (“Mr Arido”), and Mr Jean-Pierre Bemba Gombo⁴ (“Mr Bemba”) each filed appeals against the Sentencing Decision.

¹ [ICC-01/05-01/13-2123-Corr.](#)

² “Notification d’appel de la Défense de M. Fidèle Babala Wandu à l’encontre de la «*Decision on Sentence pursuant to Article 76 of the Statute*» (ICC-01/05-01/13-2123) rendue par la Chambre de première instance VII”, 13 April 2017, [ICC-01/05-01/13-2139](#); “Appeal Brief of the Defence for Mr Fidèle Babala Wandu against the Sentence Handed Down by Trial Chamber VII (ICC-01/05-01/13-2123-Corr)”, dated 21 June 2017 and registered on 31 October 2017, ICC-01/05-01/13-2166-Conf-tENG with 21 public annexes and two confidential annexes (“Mr Babala’s Appeal Brief”); original French version was filed on 21 June 2017 (ICC-01/05-01/13-2166-Conf).

³ “Narcisse Arido’s Notice of Appeal against the Trial Chamber VII’s ‘Decision on Sentence pursuant to Article 76 of the Statute’ (ICC-01/05-01/13-2123-Corr)”, dated 20 April 2017 and registered on 24 April 2017, [ICC-01/05-01/13-2141](#); “Narcisse Arido’s Document in Support of Appeal Against Sentence Pursuant to Article 81”, 21 June 2017, ICC-01/05-01/13-2169-Conf with two public annexes (“Mr Arido’s Appeal Brief”).

⁴ “Bemba Defence Notice of Appeal against Decision Sentence pursuant to Article 76 of the Statute, (ICC-01/05-01/13-2123) by Trial Chamber VII”, 24 April 2017, [ICC-01/05-01/13-2142](#); “Defence Document in Support of the Appeal against the Sentence”, 21 June 2017, ICC-01/05-01/13-2167-Conf with two public annexes and six confidential annexes (“Mr Bemba’s Appeal Brief”); a public redacted version was filed on 28 June 2017 ([ICC-01/05-01/13-2167-Red](#)).

3. On 21 August 2017, the Prosecutor filed a consolidated response to Mr Babala's, Mr Arido's, and Mr Bemba's appeal briefs⁵ ("Prosecutor's Consolidated Response").

4. On 4, 6 and 22 September 2017, Mr Bemba,⁶ Mr Arido⁷ and Mr Babala⁸ filed their respective request seeking leave to reply to the Prosecutor's Consolidated Response, to which the Prosecutor responded on 6, 11 and 26 September 2017, respectively.⁹

II. SUBMISSIONS

5. Mr Bemba seeks leave to reply to the Prosecutor's Consolidated Response on the ground that the Prosecutor: (i) raises new issues about the remedial measures and the "double counting" principle and mischaracterises "selective filings from ICC, ICTY and SCSL cases";¹⁰ (ii) "petitions the Appeals Chamber to adopt positions that fall outside the scope" of Mr Bemba's appeal against the Sentencing Decision regarding privileged communications and the issue of sentencing credit;¹¹ (iii) mischaracterises the scope of the double counting rule "in a case built on inferences/subsidiary facts" by characterising the Trial Chamber's findings on

⁵ "Prosecution's Consolidated Response to Mr Bemba's, Mr Babala's, and Mr Arido's Appeals against the Sentencing Decision", ICC-01/05-01/13-2203-Conf with one confidential annex and one confidential *ex parte* annex.

⁶ "Defence Request for Leave to Reply to 'Prosecution's Consolidated Response to Mr Bemba's, Mr Babala's, and Mr Arido's Appeals against the Sentencing Decision'", ICC-01/05-01/13-2215-Conf ("Mr Bemba's Request"); a public redacted version was registered on the same date ([ICC-01/05-01/13-2215-Red](#)).

⁷ "Narcisse Arido's Request for Leave to Reply to the 'Prosecution's Consolidated Response to Mr Bemba's, Mr Babala's, and Mr Arido's Appeals against the Sentencing Decision' (ICC-01/05-01/13-2203-Conf) Pursuant to Regulation 60(1) of the Regulations of the Court", ICC-01/05-01/13-2218-Conf ("Mr Arido's Request").

⁸ "Demande d'autorisation de la Défense de M. Fidèle Babala Wandu de répliquer à « Prosecution's Consolidated Response to Mr Bemba's, Mr Babala's, and Mr Arido's Appeals against the Sentencing Decision » (ICC-01/05-01/13-2203-Conf)", ICC-01/05-01/13-2228-Conf ("Mr Babala's Request"). *See also* "Decision setting a time limit for requests for leave to reply", 15 September 2017, [ICC-01/05-01/13-2226](#).

⁹ "Prosecution's Response to Mr Bemba's 'Request for Leave to Reply to 'Prosecution's Consolidated Response to Mr Bemba's, Mr Babala's, and Mr Arido's Appeals against the Sentencing Decision''", ICC-01/05-01/13-2217-Conf ("Response to Mr Bemba's Request"); "Prosecution's Response to Arido's Request for Leave to Reply to 'Prosecution's Consolidated Response to Mr Bemba's, Mr Babala's, and Mr Arido's Appeals against the Sentencing Decision'", ICC-01/05-01/13-2221-Conf ("Response to Mr Arido's Request"); "Prosecution's Response to Mr Babala's Request for Leave to Reply to 'Prosecution's Consolidated Response to Mr Bemba's, Mr Babala's, and Mr Arido's Appeals against the Sentencing Decision'", ICC-01/05-01/13-2231-Conf ("Response to Mr Babala's Request").

¹⁰ Mr Bemba's Request, paras 2-20.

¹¹ Mr Bemba's Request, paras 3, 31-41.

incidents and conduct as “evidence” not essential to his conviction;¹² and (iv) distorts and mischaracterises the Trial Chamber’s findings, his submissions and the “legal foundation of the case”.¹³ Mr Bemba requests further that the Appeals Chamber exclude the Prosecutor’s submissions regarding certain evidentiary issues related to witness D-55 and the modes of liability which, according to him, are advanced for the first time before the Appeals Chamber.¹⁴ In respect of these submissions, Mr Bemba requests, in the alternative, that he be granted the opportunity to reply to these submissions.¹⁵

6. Mr Arido submits that the Prosecutor’s Consolidated Response contains “new legal arguments and legal and factual misrepresentations”, and therefore, a reply is necessary pursuant to regulation 60 (1) of the Regulations of the Court (“Regulations”).¹⁶ Mr Arido contends that the Prosecutor made inaccurate representations of findings in the Conviction Decision that relate to Mr Arido’s knowledge.¹⁷ Mr Arido avers further that the Prosecutor misrepresents his arguments about the Trial Chamber’s gravity assessment as she gives the impression that Mr Arido argued that the conviction for an offence under article 70 (1) (c) of the Statute was not serious.¹⁸ Mr Arido also avers that, as the Trial Chamber found that there was no aggravating factor, the Prosecutor cannot argue that the extent of damage can be considered as an aggravating factor.¹⁹ He contends that the Prosecutor misrepresents the legal elements of the offence under article 70 (1) (c) of the Statute as well as his arguments and raises new issues regarding the foreseeability of the false testimony in relation to the Trial Chamber’s gravity assessment.²⁰ Mr Arido adds that, contrary to Prosecutor’s argument, an error from the Trial Chamber in its gravity assessment would not be “harmless” and that according to human rights jurisprudence, the Trial Chamber does not have unlimited discretion in sentencing.²¹

¹² Mr Bemba’s Request, paras 21-30.

¹³ Mr Bemba’s Request, para. 4.

¹⁴ Mr Bemba’s Request, paras 42-56.

¹⁵ Mr Bemba’s Request, para. 57.

¹⁶ Mr Arido’s Request, para. 5.

¹⁷ Mr Arido’s Request, paras 8-11.

¹⁸ Mr Arido’s Request, paras 12-13.

¹⁹ Mr Arido’s Request, paras 14-15.

²⁰ Mr Arido’s Request, paras 16-31.

²¹ Mr Arido’s Request, paras 32-36.

7. Mr Babala submits that, because the Prosecutor failed to comply with her “obligation of truth” by “corrupting” the facts or breaching the law by misleading the Appeals Chamber with the aim that Mr Babala’s conviction be maintained, he should be allowed to reply to the Prosecutor’s Consolidated Response.²² More specifically, Mr Babala contends that the Prosecutor does not “effectively” respond to his arguments and misrepresents his arguments on (i) his knowledge about the purpose of money transfer made to witnesses D-57 and D-64; (ii) the existence of a false scenario and the use of coded language with Mr Bemba; (iii) and the Trial Chamber’s gravity assessment of the offence under article 70 (1) (c) of the Statute.²³

8. The Prosecutor responds that the three requests should be dismissed because Mr Bemba, Mr Arido and Mr Babala do not show that their proposed submissions will assist the Appeals Chamber in its determination of their appeals.²⁴ The Prosecutor contends that Mr Bemba: (i) misreads her Consolidated Response; (ii) “impermissibl[y] attempt[s] to supplement aspects” of his appeal that he now seems to consider deficient; and (iii) merely disagrees with or misunderstands the Prosecutor’s submissions.²⁵ With respect to Mr Arido’s Request, the Prosecutor contends that she does not misrepresent the Trial Chamber’s findings or raise new issues.²⁶ She adds that Mr Arido’s arguments are mere misrepresentations of or disagreements with the Prosecutor’s submissions.²⁷ As for Mr Babala’s Request, the Prosecutor contends that Mr Babala’s arguments are incorrect, vague and unsupported and repeat similar submissions made in his Appeal Brief.²⁸

III. MERITS

9. The Appeals Chamber recalls that, pursuant to regulation 60 (1) of the Regulations, it may order an appellant to file a reply whenever it considers it necessary in the interests of justice. Accordingly, the ordering of the filing of a reply

²² Mr Babala’s Request, paras 14-16, 18.

²³ Mr Babala’s Request, paras 21-36.

²⁴ Response to Mr Bemba’s Request, paras 1, 3-7, 28; Response to Arido’s Request, paras 1, 3, 5-6, 20; Response to Mr Babala’s Request, paras 1, 3-5, 12.

²⁵ Response to Mr Bemba’s Request, paras 8-23.

²⁶ Response to Mr Arido’s Request, paras 7-11, 15.

²⁷ Response to Mr Arido’s Request, paras 4, 12-15.

²⁸ Response to Mr Babala’s Request, paras 6-7.

lies within its discretion and is to be decided on a case-by-case basis.²⁹ The Appeals Chamber has recently confirmed that “[a]lthough not specifically mentioned in regulation 60 of the Regulations of the Court, an appellant may request, and accordingly, trigger the powers of the Appeals Chamber to order the filing of a reply under said regulation”.³⁰

10. Having carefully considered each of the issues on which Mr Bemba, Mr Arido and Mr Babala request leave to reply, the Appeals Chamber is of the view that further submissions on these issues would not assist the Appeals Chamber in its determination of the appeals. Accordingly, the three appellants’ requests for leave to reply are rejected.

11. The Appeals Chamber notes that Mr Arido’s and Mr Babala’s Appeal Briefs were filed as confidential documents and, to date, no public redacted versions have been submitted. As a result, no public redacted version of the Prosecutor’s Consolidated Response has been filed yet,³¹ and the subsequent filings (Mr Babala’s and Mr Arido’s Requests, the Prosecutor’s responses thereto and the Prosecutor’s Response to Mr Bemba’s Request) were all filed as confidential documents with no public redacted version on the ground, *inter alia*, that they referred to filings of the same classification.³²

12. The Appeals Chamber therefore directs Mr Arido and Mr Babala to file public redacted versions of their respective Appeal Briefs by Wednesday, 31 January 2018. The Prosecutor, in turn, is directed to file a public redacted version of the Prosecutor’s Consolidated Response, by Wednesday, 7 February 2018.

²⁹ See e.g. *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on Mr Bemba’s request for leave to reply to the Prosecutor’s Response to the Document in Support of the Appeal”, 7 December 2016, [ICC-01/05-01/08-3480 \(A\)](#), para. 8 and the reference cited therein.

³⁰ “Order on reclassification of documents and Reasons for the ‘Decision on requests for variation of time limits for a request for leave to reply’”, 14 August 2017, [ICC-01/05-01/13-2196 \(A A2 A3 A4 A5\)](#), para. 9, quoting Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, “Order on the filing of a reply under regulation 60 of the Regulations of the Court”, 21 February 2013, [ICC-01/04-01/06-2982 \(A5 A6\)](#), para. 6.

³¹ See Response to Mr Bemba’s Request, para. 2, fn. 3; Response to Mr Arido’s Request, fn. 3.

³² Mr Babala’s Request, para. 7; Mr Arido’s Request, para. 2; Response to Mr Babala’s Request, para. 2; Response to Mr Arido’s Request, para. 2; Response to Mr Bemba’s Request, para. 2.

13. Turning to the subsequent filings, the Appeals Chamber is of the view that Mr Babala's Request does not contain any information which warrants confidential treatment, and may thus be reclassified as public.³³ Accordingly, the Prosecutor's Response to Mr Babala's Request – which was filed confidentially only because of the level of classification of the Request³⁴ – can also be reclassified as public. As regards Mr Arido's Request, the Appeals Chamber notes that he submits that this document was filed confidentially as it "refers to a confidential name and responds to a filing of the same classification".³⁵ Mr Arido is thus directed to file a public redacted version of his Request by Tuesday, 13 February 2018. Finally, the Appeals Chamber directs the Prosecutor to file, by Tuesday, 20 February 2018, public redacted versions of her respective responses to Mr Arido's and Mr Bemba's Requests or seek public reclassifications thereof.

Done in both English and French, the English version being authoritative.



Judge Silvia Fernández de Gurmendi
Presiding Judge

Dated this 24th day of January 2018

At The Hague, The Netherlands

³³ The Appeals Chamber notes that Mr Babala indicates that his request "does not contain any confidential information" and seeks the reclassification of his Request upon filing of a public redacted version of the Prosecutor's Consolidated Response. *See* Mr Babala's Request, para. 7.

³⁴ Response to Mr Babala's Request, para. 2.

³⁵ Mr Arido's Request, para. 2.