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Date: **07/06/2018**

TRIAL CHAMBER VII

Before: **Judge Bertram Schmitt, Presiding Judge**
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

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

Defence Response to the Prosecution's Request for Leave to Reply to Bemba's, [REDACTED] and Mangenda's Sentencing Submissions

Source: **Defence for Mr. Jean-Pierre Bemba Gombo**

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

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1. Introduction

1. In his decision of 14 March 2018, the Single Judge set out a comprehensive schedule for the filing of submissions on sentencing (the Scheduling Order), which was sequenced and spaced in a manner that made clear that the ordinary sequence of filings, set out in Regulation 34, was not applicable to this specific litigation.[1] The Single Judge further underscored that a hearing would only be convened if the requesting party could demonstrate the necessity of convening a further hearing, and, in granting the Prosecution 50 pages for its brief, emphasised the Prosecution's obligation to justify the sentences that should be imposed on the defendants.[2]

2. The Prosecution was therefore put on notice that firstly, the burden fell to the Prosecution to justify whichever sentence would ultimately be imposed on the defendants, and secondly, that all relevant arguments should be set out in the briefs themselves, since there could be no expectation that further submissions would be entertained.

3. The Prosecution's request to 'respond' to the Defence submissions, or in the alternative, reply to them (the Request),[3] seeks to circumvent this specific schedule for submissions. The issues identified by the Prosecution are neither new, nor unanticipated. Some do not arise from the Defence submissions. Their introduction would also flout the adversarial process by affording the Prosecution an opportunity to introduce entirely new substantive arguments on law and fact, to which the Defence will have no opportunity to respond. Such submissions would also further protract the proceedings, at a time, when the need for certainty is paramount.

[1] ICC-01/05-01/13-2277
[2] "and the Prosecution (who must justify three separate sentences) shall have up to 50 pages": p. 4.
[3] ICC-01/05-01/13-2283-Red

4. The Defence therefore requests the Honourable Trial Chamber to dismiss the Request in its entirety.[4]

2. Submissions

2.1 The Prosecution's attempt to characterise a reply as a response is contrary to the plain meaning and intent of the Single Judge's schedule and would be unfair

5. The Scheduling Order set out a clear sequence of events: the Registry was requested to file an updated report concerning the defendants' financial status, the Prosecution were then ordered to file its submissions on sentencing for all three defendants by 30 April, and the Defence were, in turn, ordered to file their submissions by 30 May.

6. The Scheduling Order cites Regulations 34 and 37 of the Regulations of the Court: Regulation 37 clearly relates to the fact that the parties were provided more than 20 pages for their submissions, and Regulation 34 presumably refers to the fact that the standard time limits were varied, such that the Defence were allocated 30 rather than 10 days as their submissions were expected to 'respond' to the Prosecution. If the Defence Submissions were not intended to be a 'response', then it would not have been necessary to invoke Regulation 34, or stagger the deadlines for the filings.[5] The Defence Submissions are also framed as a response. The Defence has requested no separate relief, nor has it included any specific applications within the framework of its Submissions.

[4] The Defence understands that the 2 day deadline set out in Regulation 34(c) should be interpreted consistently with other deadlines, and Regulation 33(1), such that the days of notification and filing are not counted.

[5] Cf ICC-01/05-01/13-1552, para. 10, where the Single Judge declined to stagger the deadlines for the closing briefs, on the grounds that the purpose of the briefs was to allow the parties to set out each party's position, and not to respond to the other.

7. Characterising the Defence Submissions as a 'motion' for the purposes of Regulation 34, would also invite the possibility that the Defence could invoke Regulation 35(2), and seek a retrospective extension of time to 'respond' to the Prosecution Submissions. Both the Prosecution and Defence responses would, in turn, open the possibility for parties to seek leave to reply. This chain of requests, responses and replies runs directly contrary to the Single Judge's clear intention to conduct a streamlined process. The purpose of allowing the parties to file submissions was to afford "the affected parties an opportunity to make new submissions on the appropriate sentences in light of the Appeals Chamber Judgments."[6] That limited purpose has now been achieved. As demonstrated by the issues set out in the Request, the submission of a further response/reply would inevitably expand the scope of this process, and delay its timely resolution.

2.2 The filing of further Prosecution submissions would prevent the Defence from having the 'last word'

8. In the specific context of sentencing, it would be unfair and prejudicial to afford the Prosecution, rather than the Defence, 'the last word'. Although this Trial Chamber has found that Rule 141(2) does not necessarily apply to sentencing briefs, this finding was subject to the residual safeguard that the Defence would have the last word at any related hearing.[7] Nonetheless, in this particular case, the Trial Chamber found that the December 2016 hearing satisfies the requirements of Article 76(2), and that as such, a further hearing did not appear to be necessary. The Prosecution has also expressed the position that a further hearing is not required. Any further Prosecution submissions would constitute the 'last word' unless the Chamber decides

[6] Request, para. 4.
[7] ICC-01/05-01/13-1518, para. 22; ICC-01/05-01/13-2025, p. 9.

either that a further hearing should be convened, or that the Defence should be afforded a further opportunity to respond to such submissions.

9. This sequence would be contrary to the spirit of the Rules, and ICC practice. Rule 141(2) provides that after the closure of evidence, the parties shall be invited to make closing statements, and "the defence shall always have the opportunity to speak last". Although this right is framed within the content of oral statements, the intention is clearly to allow the Defence to be the last party to address the Chamber before the Chamber retires for its deliberations. It follows that in circumstances where a hearing is not convened, the Defence should be the last party to address the Chamber in its written submissions.

10. This would be consistent with the approach adopted in this case during the confirmation stage. Rule 122(8) provides that the Defence should have the last word during any confirmation hearing. Because the Pre-Trial Chamber decided not to convene a hearing, the Single Judge established a time-table for the filing of briefs, which ensured that the Defence would have the last word, before the Chamber retired for its deliberations.[8]

11. This would also be consistent with the practice adopted in all other ICC sentencing proceedings, where the Defence were always afforded either a written or oral opportunity to have the last word.[9]

2.3 The issues do not meet the criteria of Regulation 24(5)

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[8] ICC-01/05-01/13-364, p. 6.

[9] ICC-01/04-01/06-2871, paras. 6-8; ICC-01/04-01/07-T-345-Red-ENG; ICC-01/04-01/07-T-347-ENG, p. 29; ICC-01/05-01/08-3344; ICC-01/05-01/08-3387; ICC-01/12-01/15-T-6-ENG, p. 17.

12. Apart from a fleeting reference to the criteria set out in Regulation 24(5),[10] the Request provides no explanation or arguments as to why the issues concerning the Bemba Defence submissions are new, or could not otherwise be anticipated. The absence of such argumentation derives from the fact that no such argumentation could be made: the issues were clearly not new or otherwise unanticipated: indeed, the Prosecution has already presented arguments on the issues in question, at various junctures of the proceedings.

a. The issue concerning the scope of the remand

13. The Prosecution did not contest or otherwise request leave to appeal the limitations set out in the Scheduling Order concerning the scope of this sentencing remand. To the contrary, the Prosecution Submissions repeated these limitations,[11] and further set out the <u>same</u> ICTY legal principles concerning the scope of remand,[12] to which it now seeks leave to reply. Specifically, the Prosecution has sought leave to adduce additional arguments concerning Defence submissions to the effect that it would be impermissible to relitigate issues that fall outside the specific scope of the errors identified by the Appeals Chamber. This argument relied on the Scheduling Order, the Prosecution's submissions on this point:[13] namely, the Prosecution's argument that "[t]his is not a forum to re-litigate matters which have been settled, either because they were not appealed, or by the Appeals Chamber itself".[14] This issue is thus neither new, nor unanticipated, since the Prosecution not only anticipated the relevance of this point, but addressed it in terms, which were consistent with the Defence arguments, to which it seeks leave to reply. The purpose of a reply is not to allow a party to augment earlier arguments, and its purpose is certainly not to allow a party

[10] Request, para. 5.
[11] Prosecution Sentencing Submissions, para. 6.
[12] Prosecution Sentencing Submissions, fn. 7.
[13] Defence Sentencing Submissions, para. 48, citing Prosecution Sentencing Submissions, para. 6.
[14] Prosecution Sentencing Submissions, para. 6.

to revise or resile from previous positions, which were subsequently relied upon by the Defence.

b. The issue concerning the existence of harm

14. The primary submission of the Defence in its Sentencing Submission was that although the Appeals Chamber provided a clear definition of *in concreto* harm, and the Trial Chamber afforded the Prosecution with a substantive opportunity to provide submissions in relation to the definition adumbrated by the Prosecution, it failed to do so.[15]

15. Having realised its error, the Prosecution has now attempted to rectify it by firstly, arguing that the notion of harm for Article 70 offences should be construed in a manner that is different from Article 5 crimes, and secondly, by seeking to adduce examples of 'harm' based on factors that either duplicate arguments that were raised previously, replicate Article 70(1)(b) conduct for which the defendants were acquitted, or require the Chamber to enter new findings of fact.

16. The purpose of a reply is not to correct a party's strategic errors in failing to bring arguments that it could and should have, at first instance. The Single Judge underlined the Prosecution's obligation to justify the sentences that should be imposed on the defendants, in their submissions. This justification should not now be provided in a reply. In this regard, the Prosecution has incorrectly framed the Bemba Defence position as that the "the Prosecution has not shown how the 14 witnesses' false testimony caused harm "in concreto"" because of Trial Chamber III's findings.[16] The Bemba Defence position was, rather, that the "Prosecution has not shown how the 14

[15] Defence Sentencing Submissions, paras. 10-17.
[16] Request, para. 6.

witnesses' false testimony caused harm "in concreto"", because the Prosecution failed to adduce any arguments on this point.[17] The Defence further noted that the Chamber should not conduct its own inquiry on this point since the Defence has a right to fair notice of the issues and arguments that can be used to determine the defendant's sentence.[18] If the Prosecution were to adduce arguments on these issues, through a reply, it would only serve to prove the Defence point that fair notice was not provided to the Defence, because the Prosecution failed to address such issues in their initial submissions.

17. As concerns the issue of duplication, the Prosecution's initial submissions already raised factors concerning the abstract gravity of the offences (i.e the harm that could have been caused by an offence),[19] and the Defence duly responded to them.[20] The specific quote from the Appeals Chamber, on which the Prosecution relies to justify its reply, was also set out in the Prosecutions Submissions.[21] The only quasi-new issue is that the Prosecution considers it to be "absurd" that Rule 145(1)(c) requires the Chamber to base the sentence on a range of factors, such as abstract gravity and actual harm, that might, or might not increase the degree of the defendant's culpability, depending on the specific facts and arguments led before the Chamber. As found in the *Lubanga* case, if it is established, beyond reasonable doubt, that the recruitment of child soldiers led to certain consequences, then the Chamber can take those consequences into account when assessing the harm, but if that is not established, it cannot.[22] This is not absurd, but a feature of Rule 145's multi-faceted approach to sentencing.

[17] Defence Sentencing Submissions, paras. 10-17.
[18] Defence Sentencing Submissions, para. 18.
[19] Prosecution Sentencing Submissions, paras. 11, 13-14, 16.
[20] Defence Sentencing Submissions, paras. 8.
[21] Prosecution Sentencing Submissions, fn. 35.
[22] Defence Sentencing Submissions, para. 9.

18. Although the Prosecution acknowledged that any assessment of concrete gravity would require a "fact-specific assessment, *in concreto*, of the gravity of the particular offences",[23] the Prosecution led no facts and arguments that would have enabled the Chamber to reach a fact-specific assessment, to the standard of beyond reasonable doubt, of the nexus between the specific lies provided by the 14 witnesses, and the harm caused to Trial Chamber III's truth-seeking functions. The Prosecution's opinion that an outcome, generated by the deficiencies in its Submissions, is 'absurd', is not an 'issue' or a basis for granting leave to reply.

19. A reply must also remain within the permissible scope of the proceedings. But, as concerns the new factors raised in the Request (costs and delays), the Prosecution prefaces its point by stating that "the witnesses testified before Trial Chamber III and their false evidence on the "non-merits" was introduced in the record of the Main Bemba Case".[24] This point is thus linked to the decision to introduce the evidence into the record, and not the *actus reus* captured by Article 70(1)(a) (that is, prompting the witnesses to provide false testimony). The defendants were <u>acquitted</u> of the Article 70(1)(b) offences: these are not 'uncharged' offences or prior convictions for the purposes of Rule 145. These factors therefore fall outside the scope of the confirmed convictions, and are thus outside the limited scope of this sentencing process.

20. The introduction of the Prosecution's arguments on these matters would also require the Chamber to make new findings of fact, without the benefit of Defence submissions and evidence. For example, in its first Sentencing Decision, the Chamber made no factual findings concerning the existence and causes of delay, or 'costs' incurred by the Court, and the extent to which

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[23] Prosecution Sentencing Submissions, para. 11.
[24] Request, para. 6.

such 'costs' were attributable to individual defendants (including Mr. Bemba), although it is possible that such findings were subsumed within its decision to impose a substantial fine on Mr. Bemba, in which case it would constitute double counting to rely on it 'again'.

21. The Prosecution did not raise the Chamber's failure to make rulings as to costs or delays on appeal nor did it mention these factors in its appellate submissions concerning the errors in the Trial Chamber's approach to Article 70(1)(a). It would therefore fall outside the scope of the remand to initiate a *de facto* appeal, through the vehicle of a 'reply'. The Trial Chamber also found that matters that could have been mitigating as concern the issue of costs and delays, such as the decision of the Defence to renounce its reliance on the 14 witnesses and Mr. Bemba's reimbursement of the legal costs of the Main Case Defence, fell outside the scope of the Article 70 case.[25] The Appeals Chamber upheld this position on appeal, and further noted that the act of contributing to Defence costs was a consequence of Mr. Bemba's duty to contribute to the costs of his Defence.[26] This reason is, nonetheless, equally applicable to costs incurred in connection with Defence witnesses, in the sense that these costs are a consequence of the right to bring witnesses, and have no established and direct link to the specific false testimony that was the subject of the Article 70(1)(a) conviction. In any case, the fact that there is a plethora of arguments that can be made in this regard highlights the prejudice that would arise if these issues were to be addressed in a reply.

c. Prosecution 'clarifications'

22. The purpose of a reply is not to have a second chance to reword or re-argue past submissions, particularly in circumstances in which the Prosecution's

[25] Sentencing Decision, para. 242.
[26] Appeals Judgment on Sentence, para. 190.

'clarifications' are themselves, presented in a misleading manner, for example, through the omission of key words that qualify the quotation in question. For example, the Prosecution has requested to reply to the alleged Defence submission that "the fine is "the most appropriate form of punishment"".[27] This 'submission' simply does not exist in the Defence Submissions. If the Prosecution were granted leave to reply to this 'submission', they would, therefore, be entering entirely new territory that has no nexus to the current pleadings.

23. Similarly, the Defence Sentencing Submissions did not claim that as a matter of law, the joint sentence could not exceed the highest sentence imposed for individual offences. But, by omitting the words 'conduct' and 'overlap in conduct', the Prosecution has attempted to shift a point concerning the Chamber's finding that because of the overlap in conduct between the offences, the overall culpability of Mr. Bemba was captured by the custodial sentence corresponding to article 70(1)(c) (and of course the fine), in order to create the impression that the Defence made an inexistent argument.

24. The Prosecution itself argued on appeal that "[l]egal labels should not determine sentencing; rather, culpability and appropriate penalties must be determined based on the facts".[28] And, although the Prosecution maintained that the joint sentence imposed for Mr. Bemba 'failed to deter', the same submissions relied on case law concerning the fact that in case of cumulative convictions, care must be taken to avoid excessive punishment, by ensuring that the sentence is tailored to conduct.[29] The Prosecution's appeal further maintained that:[30]

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[27] Request, para. 7.
[28] ICC-01/05-01/13-2168-Conf, para. 4.
[29] ICC-01/05-01/13-2168-Conf, fns. 172, and 236.
[30] ICC-01/05-01/13-2168-Conf, para. 109.

the Chamber did not distinguish between Kilolo's and Bemba's *culpability* for their contributions to the article 70(1)(a) offences, and their contributions to the article 70(1)(b) and (c) offences. **And logically so, since none existed on the facts.**

25. Having advanced the position on appeal that based on the facts, there was no distinction between Mr. Bemba's culpability – as concerns his contributions to Article 70(1)(a) and (c) offences, it is difficult to see how the Prosecution can resile from this position, within the limited context of this sentencing remand.

26. The Appeals Chamber's statement that joint sentences can, in theory, be larger than the highest individual sentence thus has no link to the existence of any disagreement in law, or the actual arguments in the Defence Submissions: that is, that in accordance with Rule 145(1), the joint sentence cannot exceed the overall culpability of the defendant, and that this in turn, should be assessed by reference to his conduct, and not abstract "legal labels".

27. The Appeals Chamber's 'finding' does not, therefore, disturb the point that having found that the culpable conduct under Articles 70(1)(a) and (c) overlapped, and, given that the conduct concerning Article 70(1)(c) represented the highest/fullest spectrum as concerns the degree of Mr Bemba's culpability, the custodial sentence imposed for Article 70(1)(c), in combination with the fine, appropriately reflects the totality of his culpability for the conduct for which he was convicted. Accordingly, the Prosecution's request to reply to this 'issue' should be rejected because firstly, the issue – as framed by the Prosecution's selective quotation – does not arise from the Defence Sentencing Submissions, and secondly, given that the Prosecutor agreed that the conduct overlapped on appeal, and did not appeal the

appropriate reference point for the high-water mark of such culpability, it would be prejudicial and unfair to initiate a *de facto* appeal through a 'reply'.

28. Apart from the fact that the Prosecution merely asserts that it should be permitted to clarify issues, without explaining why its right to do so is congruent with the criteria set out in Regulation 24(5),[31] it is also, somewhat concerning, that the Prosecution claims to have an 'intimate' knowledge of the appellate proceedings, and avers further that this 'intimate' knowledge constitutes a valid reason for granting it leave to file further submissions.[32] The appellate proceedings should be clear from the record, to which all parties, and the Trial Chamber, are privy. For example, the Prosecution has asserted that that the Defence 'misrepresented' the Prosecution appeal since the Prosecution avers that it did appeal the imposition of the fine. The appellate record on this point speaks for itself:[33] it does not need to be interpreted or reframed by the Prosecution. Given that the Prosecution has already exhausted its opportunity to be heard, it would not be in the interests of justice to afford the Prosecution a further opportunity simply so that it can provide its own commentary on the appellate record.

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[31] For example, the Prosecution has requested to reply to "Bemba's distorted reading of the Prosecution Sentencing Submissions regarding his contributions as an accessory to the article 70(1)(a) offences", and "Bemba's erroneous interpretation of the Prosecution's reference to rule 221"(Request, para. 7): the nature of the new and unanticipated issue, to which the Prosecution seeks leave to reply, is entirely unclear.

[32] Request, para. 7.

[33] Prosecution Sentencing Submissions, fn. 18 – citing paras. 16-74 of the Prosecution Sentencing Appeal – none of which specifically requested the Appeals Chamber to overturn the Trial Chamber's decision to impose a fine. The relief sought to para. 171 also did not request the Appeals Chamber to reverse the Trial Chamber's decision to impose a fine. The Prosecution's Sentencing Brief, at first instance, further averred that "**B. THE CONVICTED PERSONS SHOULD BE FINED FOR THEIR CRIMINAL CONDUCT**".

3. Relief Sought

29. For the reasons set out above, the Defence for Mr. Jean-Pierre Bemba respectfully requests the Honourable Trial Chamber to dismiss the Request.

Melinda Taylor
Counsel for Mr. Jean-Pierre Bemba

Dated this 7th day of June 2018

The Hague, The Netherlands