

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/05-01/13**

Date: **11 March 2019**

THE APPEALS CHAMBER

Before: Judge Howard Morrison, Presiding Judge
Judge Chile Eboe-Osuji
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez 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 Reply, pursuant to Regulation
60 of the Regulations of the Court"**

Source: Office of the Prosecutor

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

Court to:

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor

Mr James Stewart

Ms Helen Brady

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. Mr Bemba seeks leave to reply to the Prosecution’s Response to his appeal against the Re-sentencing Decision in this case, under regulation 60 of the Regulations of the Court.¹ Bemba’s Request—filed seventeen days after the Prosecution filed its response to the Bemba’s Re-sentencing Appeal—should be dismissed *in limine* on any of the following grounds. *First*, Bemba provides substantive submissions without the Appeals Chamber having granted him leave to do so. *Second*, Bemba’s arguments are largely unrelated to the Re-sentencing Decision and seek to re-open settled factual and legal findings and to challenge the Trial Judgment in this case.

Submissions

A. Bemba replies to the Prosecution’s Response without the Appeals Chamber’s authorisation

2. Regulation 60(1) of the Regulations of the Court reads as follows:

“Whenever the Appeals Chamber considers it necessary in the interests of justice, it may order the appellant to file a reply within such time as it may specify in its order.”

3. Bemba cannot substantively reply to the Prosecution’s Response without the Appeals Chamber’s decision granting his Request. Yet, Bemba has effectively done so. Indeed, the Request already includes extensive substantive submissions for which Bemba simultaneously seeks leave to provide.² Moreover, Bemba clarifies and expands his Re-sentencing Appeal

¹ See ICC-01/05-01/13-2324 A10 (“Request”). See also ICC-01/05-01/13-2320 A10 (“Prosecution’s Response”) and ICC-01/05-01/13-2315 A10 (“Bemba Re-sentencing Appeal”).

² See e.g. Request, paras. 10-13 (expanding on factual arguments already advanced), 14-20, 44-49 (replying to the Prosecution’s Response and further developing his previous arguments on the relief requested in the first ground of appeal), paras. 21-22 and 50-53 (replying to the Prosecution’s Response and developing on his arguments on detention regarding the second ground of appeal), 31 (clarifying his previous arguments as to Bemba’s contributions to the different criminal incidents and the common plan), 32-39 (repeating and developing his arguments as to the assessment of the gravity of the offences *in concreto*), paras. 40-43 (responding to the Prosecution’s arguments and clarifying and developing his arguments regarding article 81(2)(b)).

without showing good cause;³ he does not identify new issues which could not have been foreseen when filing his appeal against the Re-sentencing Decision.⁴

4. In similar situations where participants have provided substantive submissions without the required authorisation by a Chamber, the Appeals Chamber has disregarded them.⁵ Therefore, on this basis alone, the Appeals Chamber should dismiss *in limine* Bemba's Request.

B. Bemba's arguments are largely unrelated to the Re-sentencing Decision

5. To succeed in the Request, Bemba must at least show that his proposed submissions will assist the Appeals Chamber in determining his appeal against the Re-sentencing Decision.⁶ However, he patently fails to do so.⁷ Instead, he uses the 20 pages of the Request to again make substantive submissions largely unrelated to the Re-sentencing Decision and again challenge the Trial Judgment in this case.⁸ As the Prosecution has submitted, the Appeals Chamber has already ruled on the comprehensive five Defence appeals against the

³ See above fn. 2. See Request, para. 5 (where Bemba generally argues that the six issues that he identifies in paragraph 4 are "central to the Appeals Chamber's adjudication of the Appeal").

⁴ The Prosecution submits that the regime under regulation 60 of the Regulations of the Court applicable to final appeals, which is "always discretionary and should be decided on a case-by-case basis", should not depart from the principles developed in the context of replies under regulation 24(5) of the Regulations of the Court. Leave to reply will generally be granted only after a showing of good cause (See e.g. [ICC-01/05-01/08-294](#), para. 3; [ICC-02/04-01/15-252](#), p. 3). If permitted, replies must be "narrowly tailored to only address new issues" ([ICC-01/05-01/08-3165-Red](#), para. 5; [ICC-01/05-01/13-893-Red](#), para. 10) raised in a response which "could not have been foreseen" ([ICC-02/11-01/15-284 OA7](#), para. 11), and "may not be used to strengthen the arguments" previously advanced ([ICC-01/04-02/12-296-tENG](#), para. 7; [ICC-01/05-01/08-3480 A](#), para. 8). The Appeals Chamber will generally not be assisted by submissions which are irrelevant or unnecessary to assist the Chamber's deliberations, or which fall reasonably within the scope of the moving party's original arguments (see [ICC-01/04-01/06-824 OA7](#), para. 67 finding that leave to reply was "unnecessary" and "not relevant to the deliberations of the Appeals Chamber", and [ICC-01/09-01/11-1417 OA7 OA8](#), para. 13 rejecting a request to make additional submissions—albeit under regulation 28, rather than as a reply—on the basis that the issues for which leave was sought fell "within the ambit of the issues on appeal", that the arguments in response were "foreseeable" in the circumstances, and that the applicants had already received the material possibility of presenting "all arguments" within the scope of their appeals).

⁵ [ICC-01/05-01/08-602 OA2](#) ("*Bemba* Rule 103 AD"), para. 9 ("[I]n accordance with rule 103 [...], the submission of substantive observations is only permissible after a Chamber has decided to invite or grant leave to do so. In the present circumstances, Aprocdec submitted substantive observations on the appeal in paragraphs 35 through 74 of the application without leave. For that reason, the Appeals Chamber shall disregard the substantive submissions contained in the *Amicus* Application.").

⁶ See [ICC-01/05-01/13-2197 A A2 A3 A4 A5](#) ("Conviction Appeal Reply AD"), para. 18 (rejecting the five Defence requests for leave to reply to the Prosecution's consolidated response to the Defence appeals against the Conviction Decision on the grounds that "the issues identified will not assist the Appeals Chamber in its determination of the appeals"). See [ICC-01/05-01/13-2259 A6 A7 A8 A9](#) ("Sentence Appeal Reply AD"), para. 10 (rejecting three Defence requests for leave to reply to the Prosecution's consolidated response to the Defence appeals against the Sentencing Decision on the same grounds).

⁷ Request, paras. 4-5.

⁸ See e.g. Request, paras. 10, 12, 13, 47.

Trial Judgment, and has confirmed Bemba's convictions for article 70(1)(a) and article 70(1)(c) offences.⁹ On this basis alone, Bemba's Request should be dismissed *in limine*.

6. In addition, even assuming that these appeal proceedings were conducted in the context of an appeal against the Trial Judgment (which they are not), Bemba's arguments should also be dismissed because they would not assist the Appeals Chamber deciding an appeal against the Conviction Decision. Bemba does not accurately present the Prosecution's Response and misstates the record of this case, including the findings of Trial Chamber VII in the Trial Judgment and the Appeals Chamber in the Appeals Judgment in this case. For example:¹⁰

- The Prosecution did not request Judge Eboe-Osuji's disqualification in its Response.¹¹
- Bemba did not refer to Kokaté's purported common plan in his appeal against the Trial Judgment, but he revived these arguments in a subsequent interlocutory filing, which itself sought to impermissibly expand on his appeal.¹² The Appeals Chamber correctly dismissed them.¹³
- As the Prosecution has already submitted,¹⁴ the Appeals Chamber dismissed Bemba's arguments attempting to explain away the remedial measures that he took to cover up his (and the co-perpetrators) criminal conduct and frustrate the Prosecution's article 70 investigation.¹⁵ The Trial Chamber's reasoning and conclusions in the Trial Judgment were based on a wealth of reliable evidence, including Bemba's intercepted conversations with other convicted persons.¹⁶ Similarly, the Appeals Chamber

⁹ Prosecution's Response, paras. 5, 40.

¹⁰ Since the Request impermissibly engages with the merits without leave, the Prosecution does not address the merits of all the arguments, but only provides some examples.

¹¹ *Contra* Request, para. 7 referring to Prosecution's Response, para. 66.

¹² *Contra* Request, paras. 9-10 referring to Prosecution's Response, para. 68 (first item) where the Prosecution responded to Bemba Re-sentencing Appeal, para. 26 (first item). *Compare* Bemba Appeal Conviction Decision ([ICC-01/05-01/13-2144-Red](#)) with Bemba First Request for a Remedy (ICC-01/05-01/13-2241-Conf).

¹³ [ICC-01/05-01/13-2275-Red](#) ("Appeal Judgment"), paras. 71-72 (cited in Prosecution's Response, fn. 230). The Appeals Chamber dismissed these arguments because Bemba did not substantiate how they related to his grounds of appeal.

¹⁴ Prosecution's Response, para. 68 (fifth item) citing Appeal Judgment, para. 1060 and [ICC-01/05-01/13-2276-Red](#) ("Sentencing Appeal Judgment"), para. 138.

¹⁵ Appeal Judgment, paras. 1054-1061 (especially para. 1060). *See also* paras. 1347-1350 (dismissing Babala's arguments).

¹⁶ *See* [ICC-01/05-01/13-1989-Red](#) ("Trial Judgment"), paras. 110-111 and 770-801 (Trial Chamber's assessment of the evidence supporting its conclusion that the co-perpetrators discussed and agreed to take measures to prevent and frustrate the Prosecution's article 70 investigation). *See also* paras. 814-815 (Trial Chamber's conclusions regarding Bemba's contributions to authorise, ensure and / or implement measures to conceal the

dismissed the Defence arguments regarding coded language and confirmed the Trial Chamber's reasoning and conclusions in the Trial Judgment.¹⁷ Moreover, the Trial Chamber had previously expressly addressed and dismissed Defence arguments related to the use of coded language in the Trial Judgment.¹⁸

- Bemba's arguments (and his alternative interpretations of the evidence) have continuously evolved and shifted throughout the proceedings. For example, Bemba did not argue before Trial Chamber VII issued the Trial Judgment on 19 October 2016 that he had also communicated his belief that the Prosecution tampered with witnesses to non-tainted members of the Defence.¹⁹ Similarly, he did not argue before that date that Kilolo had asked a legal assistant to highlight passages of a witness's statement.²⁰ But even if he had made those arguments, the Trial Chamber's conclusions in the Trial Judgment would have remained reasonable and correct in light of the Chamber's detailed assessment of the totality of the evidence presented.
- As the Prosecution has already submitted,²¹ the Appeals Chamber did not "invalidate key aspects of the Trial Chamber's conclusions concerning Bemba's involvement in the solicitation of Defence witnesses".²² In particular, the Appeals Chamber did not find that Bemba had solicited the false testimony of the 14 witnesses only through Kilolo and Mangenda.²³ To the contrary, the Appeals Chamber confirmed that Bemba had also exerted direct influence on witness D-55, with whom Bemba spoke with the intention of motivating him to give specific testimony.²⁴ Further, the Appeals

common plan) and 816-820 (overall conclusions regarding Bemba's essential contributions to the common plan). *See also* [ICC-01/05-01/13-2123-Corr](#) ("Sentencing Decision"), para. 238 (the Trial Chamber considered the remedial measures as an aggravating circumstance).

¹⁷ *See* Appeal Judgment, paras. 1034-1035 (cited in Prosecution's Response, para. 68, fourth item).

¹⁸ *See* Trial Judgment, paras. 748-761 (especially paras. 748-749). *See also* para. 495. *Contra* Request, para. 12.

¹⁹ *Contra* Request, para. 11. *See* Bemba Re-sentencing Appeal, para. 26 (fifth item) at fn. 60. CAR-D20-0007-0184 (an e-mail from a Defence member) was only tendered on 12 December 2016 and thus after the Trial Judgment was rendered.

²⁰ *Contra* Request, para. 12. *See* Bemba Re-sentencing Appeal, para. 26 (fourth item) at fn. 58. CAR-D20-0007-0064 (another e-mail from a Defence member which does not clearly support Bemba's proposition) was tendered on 12 December 2016 and thus also after the Trial Judgment was rendered.

²¹ Prosecution's Response, paras. 21 and 68 (last item).

²² *Contra* Request, paras. 25-28 citing Prosecution's Response, para. 21 (where the Prosecution responded to Bemba's inaccurate reading (*see* Bemba Re-sentencing Appeal, para. 10, fn. 14) of the Appeal Judgment, para. 155, where the Appeals Chamber dismissed Bemba's reading of the Trial Judgment and stated that "it is clear that the Trial Chamber did not find that Mr Bemba had solicited witness D-19 to testify falsely").

²³ *Contra* Request, paras. 25, 26 and 28.

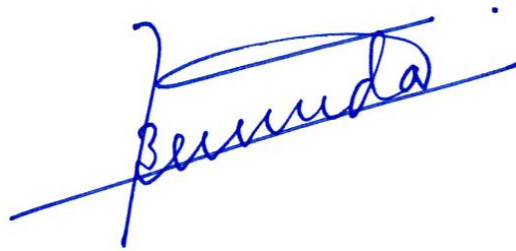
²⁴ *See* Appeal Judgment, paras. 935-939 (confirming the Trial Chamber's assessment of the evidence regarding the Trial Chamber's finding in Trial Judgment, para. 856). *See also* Appeal Judgment, paras. 843-851 (dismissing Bemba's arguments, and confirming that solicitation does not need to be performed directly on the

Chamber also confirmed that Trial Chamber VII “was at liberty to consider, examine and rely on the evidence concerning Mr Bemba’s conduct in connection with witness D-19 in determining the factual findings against Mr Bemba”.²⁵

7. In conclusion, Bemba’s Request should be dismissed because it would not assist the Appeals Chamber in its determination of Bemba’s appeal against the Re-sentencing Decision.

Conclusion and Relief

8. For all the reasons above, the Prosecution respectfully requests the Appeals Chamber to dismiss Bemba’s Request.



Fatou Bensouda, Prosecutor

Dated this 11th March 2019²⁶
At The Hague, The Netherlands

principal perpetrator, but may be committed through intermediaries). *See* Trial Judgment, paras. 293-298, 814, 851-857. *See also* Sentencing Decision, para. 222.

²⁵ Appeal Judgment, para. 154. *See also* Appeal Judgment, para. 155. *See also* Sentencing Appeal Judgment, paras. 103-105 (summarising Bemba’s arguments) and 111-120 (dismissing Bemba’s arguments that the Trial Chamber had erred in relying on uncharged allegations to aggravate the sentence).

²⁶ This submission complies with regulation 36, as amended on 6 December 2016: ICC-01/11-01/11-565 OA6 (“*Al Senussi AD*”), para. 32.