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

Confidential

**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'"**

Source: Office of the Prosecutor

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Introduction

1. Counsel for Mr Bemba seeks leave to reply to the Prosecution's consolidated response to his appeal against the article 76 decision in this case, under regulation 60 of the Regulations of the Court.¹ This request should be dismissed.²

Confidentiality

2. This response is filed confidentially, consistent with regulation 23*bis*(2), because it refers to a filing—the Consolidated Response—which remains confidential.³ A public redacted version of this response can be filed when a public redacted version of the Consolidated Response is filed.

Submissions

3. To succeed in the Request, Bemba must at least show that his proposed submissions will assist the Appeals Chamber in determining the appeals against the article 76 decision. However, he fails to do so.

4. Instead, he uses the 20 pages of the Request largely to make further submissions in support of his view of the merits of his appeal. He does this under the mantle of claims that the Prosecution has raised new issues of fundamental importance, mischaracterised jurisprudence and the law, and mischaracterised Bemba's submissions in his appeal. But as the Appeals Chamber has previously found with similar arguments raised by Bemba, these claims in the Request are unsupported, and should be rejected.⁴

¹ See ICC-01/05-01/13-2215-Red A6 A7 A8 ("Request"), para. 1. See also ICC-01/05-01/13-2203-Conf ("Consolidated Response").

² *Contra* Request, para. 57.

³ A public redacted version of the Consolidated Response has not yet been filed because public redacted versions of the appeal briefs for Mr Arido and Mr Babala have not yet been filed. See ICC-01/05-01/13-2166-Conf; ICC-01/05-01/13-2169-Conf.

⁴ See ICC-01/05-01/13-2197 A A2 A3 A4 A5 ("Conviction Appeal Reply Decision"), paras. 13, 18 (rejecting Bemba's request for leave to reply in his appeal against his conviction, on the basis of his claim of "(i) inaccurate

A. Bemba must at least show that his proposed submissions will assist the Appeals Chamber in determining the appeals

5. Regulation 60(1) provides that the Appeals Chamber may order an appellant to file a reply whenever it considers it necessary in the interests of justice. This is a discretionary determination which will be decided on a case-by-case basis.⁵ In this context, the Prosecution considers that the Appeals Chamber should ordinarily be guided by the principles developed in the jurisprudence related to regulation 24(5).⁶ This follows from the basic premise that the Parties have no right to reply, and the interests of procedural fairness and judicial economy in promoting comprehensive, well-considered, and clear appellate submissions. These considerations are common to regulations 24(5) and 60 alike.

6. At the very least, this same bench of the Appeals Chamber has recently indicated that it will not permit a reply if the moving party has not established that “further submissions on the issues identified” will assist in determining the appeals.⁷ The Prosecution submits that the Appeals Chamber should take this same approach in deciding the Request. Consequently, for the reasons which follow, it should be dismissed.

B. Bemba's proposed submissions will not assist the Appeals Chamber

7. In the Request, Bemba identifies seven issues for which he seeks leave to file a reply.⁸ In addition, in a footnote, he further contests two specific Prosecution submissions, which he claims to be unsubstantiated.⁹ Yet these nine topics fail to

or misleading statements of fact and law; (ii) specific uncontested points and the impact of certain concessions by the Prosecutor on key findings which, in turn, impact on the outcome of the Conviction Decision; (iii) changes in the Prosecutor's theory of the case and arguments introduced by the Prosecutor for the first time in her response; (iv) new legal arguments raised by the Prosecutor in her response; and (v) the approach advanced by the Prosecutor regarding the standard of appellate review”).

⁵ Conviction Appeal Reply Decision, para. 18.

⁶ See Conviction Appeal Reply Decision, para. 15 (recalling this submission).

⁷ Conviction Appeal Reply Decision, para. 18.

⁸ See Request, paras. 6-56.

⁹ See Request, para. 5 (complaining of “damaging factual propositions” for which the Prosecution cited no evidence), fn. 5 (stating that the Prosecution assertion in paragraph 9—which appears to be a typographic error, and should refer to paragraph 10—of the Consolidated Response that “if any of the co-perpetrators was a

disclose any issue raised for the first time in the Consolidated Response that could not reasonably have been foreseen by Bemba and for which his general position is not already clear.¹⁰ Nor does he show any procedural unfairness in the ordinary thrust and parry of appellate litigation.¹¹ Consequently, further submissions on these matters will not assist the Appeals Chamber, and should not be allowed.

8. Indeed, the Request is generally based on a misreading of the Consolidated Response, and represents an impermissible attempt to supplement aspects of Bemba's appeal which he now appears to consider deficient. This is briefly explained for each proposed submission in the following paragraphs.

9. Finally, Bemba complains about the use of the term "crimes" to refer to the "offences" under article 70 of which he was convicted and sentenced by the Chamber.¹² The Prosecution notes that, in English (in which the Consolidated Response was drafted), the terms "crime" and "offence" are in a legal context essentially synonymous.¹³ Nor does anything in the Consolidated Response imply any substantive misunderstanding of the scope of article 70, relative to article 5, nor does the Prosecution accept there is a general substantive distinction between "legal argument" relevant to article 5 and article 70.¹⁴ There is no basis to suggest that the Consolidated Response intended or could be understood to imply any harm to Bemba's reputation beyond that warranted by his own conduct, as determined by this Court beyond reasonable doubt.¹⁵

'leader' it was him [Bemba]" is "an allegation unsupported by evidence", and that the content of paragraph 76 of the Consolidated Response "is unsupported by reference to evidence").

¹⁰ *Contra* Request, para. 2.

¹¹ *Contra* Request, para. 3.

¹² Request, para. 4.

¹³ See e.g. *Oxford English Dictionary* (available through ICC Intranet), "crime, *n.*" ("1. [...] b. An evil or injurious act; an offence, a sin [...] 2. a. An act or omission constituting an offence (usually a grave one) against an individual or the state and punishable by law"); "offence, *n.*" ("[...] 2. a. A breach of law, rules, duty, propriety, or etiquette; a transgression, sin, wrong, misdemeanour, or misdeed; a fault [...] b. *Law.* An illegal act or omission; a punishable crime").

¹⁴ *Contra* Request, para. 4. See Statute, art. 70(2); rule 163.

¹⁵ *Contra* Request, para. 4.

B.1. Bemba's attempts to frustrate the article 70 investigation

10. Bemba's disagreement with the Prosecution's understanding of his argument concerning his attempts to frustrate the article 70 investigation does not "warrant[] a correction", nor is there any basis to characterise the Consolidated Response as "misleading".¹⁶ If his position is as "clear" as he contends,¹⁷ then the Appeals Chamber does not require any further assistance in assessing the pertinence of the Consolidated Response.

11. Rather, Bemba simply disagrees with the Prosecution's view of the sufficiency of the notice of this aggravating factor¹⁸—which, again without foundation, he criticises as "misleading"¹⁹—and makes speculative accusations that "the Prosecution maintained a deliberate stance of ambiguity".²⁰ Likewise, he now seeks to make new arguments concerning alleged "prejudice" and "legal quicksand" which are entirely unrelated to the Consolidated Response.²¹ Such additional arguments are wholly unjustified.

B.2. The authorities cited by the Prosecution and omitted in Bemba's appeal

12. Bemba's wish to address the authorities cited in the Consolidated Response does not excuse his failure to identify or address any of this case law in his appeal.²² As the Prosecution has previously recalled,²³ it is immaterial whether particular case

¹⁶ *Contra* Request, paras. 7, 15.

¹⁷ Request, para. 8.

¹⁸ Request, paras. 9-10. *See* Consolidated Response, paras. 37-39.

¹⁹ Request, para. 9. *See further* ICC-01/05-01/13-2187-Conf ("Prosecution Response to Conviction Reply Request"), para. 25 ("reasonable objections or disagreements" should not be "mischaracterised as attempts to 'mislead' the Appeals Chamber").

²⁰ Request, para. 11.

²¹ Request, paras. 12-14.

²² *See* Request, paras. 16, 20. *See further e.g.* Consolidated Response, paras. 28-30 (considering case law including *Delalić*, *Popović*, *Bemba*, *Rajić*, *Al Mahdi*, *Mrkšić*, *Kunarac*, *Deronjić*, and *Sesay*), 32 (noting expressly that Bemba "does not address" *Lubanga*), 35 (noting that *Semanza* is "the only authority upon which [Bemba] relies").

²³ *See* Prosecution Response to Conviction Reply Request, para. 26 (third bullet point).

law was argued at trial.²⁴ The Appeals Chamber is obliged to apply the law correctly, and the Parties make their submissions on that basis.

13. Moreover, Bemba has now in the Request *already* presented his subjective views of some of this case law, without the leave he purports to seek.²⁵ His analysis seems to misunderstand the reasoning in these authorities and the actual circumstances of this case. But the Appeals Chamber is in any event well placed to decide such matters for itself, and does not require the Parties' assistance at this time.²⁶

B.3. Whether Bemba's abuse of his privileged communications was a finding essential to conviction

14. Bemba disagrees with the Prosecution's understanding that Bemba's abuse of his privileged communications was not a finding essential to his conviction.²⁷ Yet this was an entirely foreseeable objection to his "double counting" argument.²⁸ Accordingly, nothing justifies the lengthy (10-paragraph) exposition of "the scope of the double counting rule, in a case built on inferences/subsidiary facts."²⁹ If Bemba wished to make such arguments, the proper place was in his appeal.

B.4. Bemba's abuse of privileged communications (with Mangenda)

15. As part of its findings that Bemba abused his privileged communications, the Chamber found that he did so with Mangenda. The Prosecution responded to Bemba's challenge in this respect—which was just one of the various ways in which Bemba abused his privileged communications—by giving its view of the Chamber's reasoning.³⁰ In this context, Bemba's view that the Prosecution interpretation is "new and entirely speculative" is beside the point.³¹ He has already had an opportunity, in

²⁴ *Contra* Request, para. 16.

²⁵ Request, paras. 17-20.

²⁶ *Contra* Request, para. 20.

²⁷ *See* Consolidated Response, para. 49.

²⁸ *See* Consolidated Response, para. 48.

²⁹ *Contra* Request, para. 30. *See generally* paras. 21-30.

³⁰ *See* Consolidated Response, para. 74 (second bullet point).

³¹ *Contra* Request, para. 31.

his appeal, to explain his view of the Chamber's reasoning, and now the Prosecution has had its opportunity. Again, he misuses his request for leave under regulation 60 simply to offer his comment on the merits of the Consolidated Response.³² This is inappropriate.

B.5. Arguments concerning sentencing credit

16. Bemba disagrees with the Prosecution's response to his arguments concerning sentencing credit,³³ based on his view that they present "erroneous assumptions" or misinterpret case law.³⁴ Yet again he characterises arguments with which he merely disagrees as "misleading".³⁵ In particular, he takes issue with the Prosecution's understanding of whether Mr Kanu and Mr Kamara were awarded two weeks of credit in the *Bangura* case, and its understanding of the *Šešelj* case.³⁶ Not only is any reply in this respect otiose—since Bemba has again now already presented his argument in this respect, without leave—but the Appeals Chamber is well placed to consider these matters for itself.

B.6. Evidential basis for the Chamber's finding about the promise made to D-55

17. Bemba challenged the evidential basis for the Chamber's finding that D-55 was promised he would be in Bemba's "good graces" in both his appeal against the sentencing decision *and* his appeal against conviction.³⁷ In its response to Bemba's appeal against conviction, the Prosecution explained that, although the citation to the relevant evidence appeared to have been inadvertently omitted from the Judgment, there was such a foundation.³⁸ Bemba did not seek leave to reply in this respect.

³² See Request, paras. 31-34.

³³ See Consolidated Response, paras. 110-125, 129.

³⁴ See Request, para. 35.

³⁵ See Request, p. 13, sub-title 2.4. See *above* para. 10.

³⁶ See Request, paras. 37-40.

³⁷ See ICC-01/05-01/13-2144-Red, para. 330; ICC-01/05-01/13-2167-Red, para. 97.

³⁸ See ICC-01/05-01/13-2170-Corr-Red, para. 558 (fifth bullet point, especially fn. 2126).

However, Bemba now seeks leave to reply to the Prosecution's identical submission in the Consolidated Response.³⁹

18. Yet Bemba merely re-states that the evidence in question was "not explicitly relied upon" – which was the point of the Prosecution's submission – and complains that it was unfair for the Prosecution to rely on the Judgment in the penalty phase of trial.⁴⁰ He shows no unfairness in this respect, or in any other.⁴¹ It is not the Prosecution which is relying on this evidence "for the first time"; rather, it is the *Judgment* which relied on this evidence, as the Prosecution has explained.⁴²

19. Bemba's desire to address this evidence on its merits is, moreover, misplaced.⁴³ In particular, nothing in the decision which Bemba now cites supports the view that this evidence was admitted for a limited purpose⁴⁴ – to the contrary, such an approach would be entirely inconsistent with the general approach taken at trial to the reception of evidence. Nor is Bemba's new argument that "it would have been a clear and reversible error" for the Chamber to rely on this evidence apt for a reply, when such an argument could have been made – with reasonable diligence – in his appeal.⁴⁵

B.7. The Prosecution does not request substitution of modes of liability in this case

20. Bemba misunderstands the Consolidated Response when he claims the Prosecution invited the Appeals Chamber in this case to "substitute solicitation for co-perpetration in connection with Articles 70(1)(b) and (c)".⁴⁶ To the contrary, the Prosecution meant only what it said, which is that not all legal errors *necessarily* call

³⁹ See Consolidated Response, para. 82.

⁴⁰ Request, para. 42.

⁴¹ *Contra* Request, para. 43.

⁴² *Contra* Request, para. 47.

⁴³ *Contra* Request, paras. 44-46, 52.

⁴⁴ *Contra* Request, paras. 45-46 (especially fn. 74, citing ICC-01/05-01/13-1478-Conf, para. 92).

⁴⁵ *Contra* Request, para. 51.

⁴⁶ *Contra* Request, para. 54.

for a reduction of sentence.⁴⁷ To support this assertion, the Prosecution provided multiple examples from case law. The Prosecution is nonetheless willing to confirm that, on the particular facts of this case, it is *not* making a specific request for the Appeals Chamber to substitute the modes of liability of which Bemba was convicted, even if this may legally be possible.⁴⁸

B.8./B.9. Evidentiary foundations for the Consolidated Response

21. Prosecution arguments were supported by evidence. Bemba identifies just two assertions which he considers not to be supported.⁴⁹ Yet in both cases it is his reading of the Consolidated Response which is in error.

22. Thus, the Prosecution assertion that “if any of the co-perpetrators was a ‘leader’, it was him [Bemba]”,⁵⁰ concluded its *prior* assertion (in the same sentence) that “Bemba played an ‘overall coordinating role’ in the scheme” – and this was not only supported by reference to the Judgment but also cross-referenced to the Prosecution’s submissions responding to Bemba’s appeal against conviction.⁵¹

23. Likewise, paragraph 76 of the Consolidated Response is a direct response to Bemba’s arguments, and does not make any direct assertion of fact at all. Nor does Bemba even explain *which* aspect of this paragraph he finds problematic.⁵² The meaning of, and basis for, the Prosecution’s reference to ostensibly privileged conversations in which counsel and client plan and engage in criminal activity was obvious in the context of the extensive preceding discussion (on whether the

⁴⁷ See Consolidated Response, para. 18 (beginning “Furthermore, even if the Appeals Chamber were to determine that the Chamber erred in some part of its reasoning leading to Bemba’s conviction, this still does not necessarily warrant a reduction in sentence [...]”, emphasis supplied).

⁴⁸ See Request, para. 55.

⁴⁹ *Contra* Request, para. 5.

⁵⁰ Consolidated Response, para. 10. See Request, fn. 5.

⁵¹ Consolidated Response, para. 10, fn. 11. This sentence was, moreover, immediately followed and supported by the assertion that “Kilolo and Mangenda acted in Bemba’s interest, with his authority, and with an evidence desire to secure his approval”, which is subsequently repeated in similar terms, and supported by citations to findings by the Chamber and cross-references to the Prosecution’s submissions responding to Bemba’s appeal against conviction: see Consolidated Response, para. 61 (first bullet point), fn. 154.

⁵² See Request, para. 5, fn. 5.

Chamber erred in aggravating Bemba's sentence based on his abuse of his privileged communications).⁵³

C. Application of regulation 34(c) to matters under regulation 60

24. The Prosecution notes that Bemba filed the Request two calendar weeks after the Prosecution filed its Consolidated Response. This is manifestly outside the time limit set by regulation 34(c), and suggests Bemba's view that this provision does not apply to a matter under regulation 60.

25. The Prosecution further notes the Appeals Chamber's observation that "regulation 60", which governs the Request, "does not prescribe any time limit for the submission of requests for leave to reply and, accordingly, the Appeals Chamber has discretion to set a deadline for any such request."⁵⁴ However, the Appeals Chamber has not yet set any such deadlines in the context of the Defence appeals against the sentencing decision in this case.⁵⁵

26. It is the Prosecution's view that, if the deadline for the submission of *requests* for leave to reply under regulation 34(c) does not apply, then neither can the (even more abbreviated) two-day deadline for *responses* to such requests under the same provision. Nonetheless, out of an abundance of caution, and mindful that the Appeals Chamber has not yet confirmed this interpretation, the Prosecution has filed this response within the two-day deadline. Consequently, however, it is necessarily filed separately from (and without prejudice to) any response which may be due to any requests for leave filed by Mr Arido and Mr Babala.

27. Clarification by the Appeals Chamber that the response deadline in regulation 34(c) does not apply to matters governed by regulation 60 may, however, be of

⁵³ See generally Consolidated Response, paras. 67-77.

⁵⁴ ICC-01/05-01/13-2196 A A2 A3 A4 A5, para. 9.

⁵⁵ See e.g. ICC-01/05-01/13-2208; ICC-01/05-01/13-2211.

general assistance to the Parties and participants in this appeal and future proceedings.

Conclusion

28. For all the reasons above, the Appeals Chamber should reject the Request.



Fatou Bensouda, Prosecutor

Dated this 6th day of September 2017⁵⁶

At The Hague, The Netherlands

⁵⁶ This submission complies with regulation 36, as amended on 6 December 2016: ICC-01/11-01/11-565 OA6, para. 32.