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Original: **English**

No.**: ICC-01/05-01/13**
Date: **14/03/2019**

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
Request to Reply to the Prosecution's Response to Mr. Bemba's Request to Reply, pursuant to Regulation 60 of the Regulations of the Court'

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

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

The Office of the Prosecutor
Fatou Bensouda
James Stewart

Counsel for the Defence of Mr Jean-Pierre Bemba Gombo
Melinda Taylor

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence
Xavier-Jean Keïta

States' Representatives

Amicus Curia

Registrar
Peter Lewis

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

1. Pursuant to Regulation 24(5), the Defence for Mr. Jean-Pierre Bemba respectfully seeks leave to reply to two discrete points arising from the 'Prosecution's Response to Mr. Bemba's Request to Reply, pursuant to Regulation 60 of the Regulations of the Court' ('the Reply Response'). [1]

2. The Prosecution constantly recycles the trite claim that the Defence has shifted its strategy and positions throughout this case, but its submissions only serve to prove that the only shifting position is that of the Prosecution. In its Response to the Appeal Brief, the Prosecution made the bold claim that certain key arguments had "only just emerged",[2] or, had been proffered for the first time during the appeals stage.[3] After the Defence sought leave to reply, in order to correct these misstatements, the Prosecution then shifted its position to aver that, even if the arguments in question had been made at trial, they had not been included in the 2017 Appeal Brief, or, they had only been raised for the first time during sentencing. These new claims are not correct.

3. This has been a long, and complicated case. The record as to what was and was not argued at trial has undoubtedly been obscured by the absence of judicial findings in the Trial Judgment. The parties should not, however, be permitted to exploit this lacuna by advancing arguments that do not constitute a fair and accurate representation of the arguments and evidence tendered at trial. It would therefore serve the interests of a fair determination of the appeal to allow the Defence to address the following new claims, set out in the Reply Response.

[1] ICC-01/05-01/13-2326.
[2] ICC-01/05-01/13-2320, para. 68.
[3] ICC-01/05-01/13-2320, para. 68.

4. *First,* whereas the Prosecution claimed in its Response to the Appeals Brief that the Defence had not raised the independent common plan led by Joachim Kokaté at trial, it has now argued that the Defence did not address his involvement in its 2017 Appeal Brief.[4] This assertion is incorrect, and should be rectified: the Defence addressed the existence of a separate common plan, and Mr. Kokaté's independent role in instigating witnesses to provide false testimony, at several points of its 2017 Appeal Brief.[5]

5. *Second,* the Prosecution's claim that Defence shifted its position between trial and sentencing as concerns the reasonable inferences that could and should have been drawn from the evidence,[6] is incorrect and misconstrues the Defence submissions in the Re-Sentencing Appeal.

6. The Defence Sentencing Appeal referred to Defence evidence that had been tendered at trial, and during the sentencing phase, in order to demonstrate that the Trial Chamber's flawed approach to evidence in both the Trial Judgment and the Sentencing Decision had infected, and vitiated the fairness of the Re-sentencing phase. Specifically,[7]

> The absence of any record of the Chamber's position on Defence evidence, which negated or qualified the degree of Mr. Bemba's contribution and intent or the harm that resulted, has deprived the Defence of any insight into the foundation of the Chamber's ultimate conclusions concerning the nature of Mr. Bemba's culpability. For example, in both the 2017 and 2018 decisions, the Trial Chamber referred to the "somewhat restricted" nature of Mr. Bemba's

[4] Reply Response, para. 6.
[5] See for example, paras. 72, 210-213 (see para. 211 in particular:" The evidence confirmed that Mr. Bemba instructed his Defence to identify and call credible witnesses, with real experience. His Defence was then irreparably harmed by witnesses who lied for personal or professional benefit, unconnected to Mr. Bemba's best interests. The notion that Mr. Bemba instigated or approved a common plan to lie about contacts is also undercut by evidence that firstly, the proposal to conceal knowledge of acquaintances was initiated by persons outside the Defence, and secondly, in testifying falsely about certain contacts, the witnesses contradicted Defence submissions in the record"), 301, 302:"The initial agreement was based on the witnesses' willingness to lie to both the Court and the Defence; it was a common plan that excluded the Defence", 329.
[6] Reply Response, para. 6.
[7] ICC-01/05-01/13-2315, paras. 23-24.

contributions to the commission of the offences, and his "varying degree of participation in the execution of the offences", but provided no evidential citations for this position. It is therefore unclear as to whether the Chamber's position was based on: a lacuna in the Prosecution case as concerns Mr. Bemba's knowledge of, and contribution to specific incidents, a particular interpretation of certain intercepts; or, the Chamber accepted Defence arguments concerning the impact of detention on Mr. Bemba's knowledge of, and contribution to actions occurring beyond the four walls of his highly restrictive environment.

Confirmation as to whether the Chamber's findings were based on, or informed by particular items of Prosecution or Defence evidence would, at the very least, have allowed the Defence to gain a more precise insight into the Chamber's own understanding of Mr. Bemba's knowledge of, and contribution to specific lies from specific witnesses.

7. Moreover, contrary to the arguments of the Prosecution, this sentencing evidence was wholly consistent with the positions and evidence that had been advanced at trial, as reflected by the following:

- The Defence Final Trial Brief cited evidence concerning the fact that in November 2013, Mr. Bemba's Main Case defence team (as a whole) were preparing a request that the Chamber open an Article 70 investigation, and an abuse of process motion, on the grounds that the Prosecution had tampered with Prosecution witnesses.[8] The team (as a whole) was also preparing a request to conduct a '*tour d'horizon*' with the witnesses concerned. The email filed during sentencing was simply a longer chain of the email tendered at trial;[9] and
- The Defence Bar Table Motion referred to several examples of the Defence team, as a whole, using colour terminology as shorthand, to describe legitimate Defence preparation,[10] and argued that Mr. Bemba's

[8] ICC-01/05-01/13-1902-Conf-Corr2, para. 227 citing CAR-D20-0005-0430. See also paras. 218-227 concerning other contemporaneous developments in the Main case that would have supported Mr. Bemba's genuine belief that witnesses may have been tampered with.
[9] CAR-D20-0007-0184 follows on from CAR-D20-0005-0430.
[10] ICC-01/05-01/13-1794-Conf-AnxA,pp. 54-58.

understanding of this terminology would need to be interpreted in light of this usage.[11]

Melinda Taylor
Counsel for Mr. Jean-Pierre Bemba

Dated this 14th day of March, 2019
The Hague, The Netherlands

[11] ICC-01/05-01/13-1794-Conf-Corr , paras. 44-47:
"In particular, the Prosecution has averred that the phrases "faire la couleur" or "les couleurs" should be understood to mean illegal coaching or the bribing of witnesses. This phrase itself is a translation of various different combinations of the Lingala word "langi", which have the sense of putting something in colour.

It is, however, apparent from several contemporaneous email exchanges (and their attachments) that this phrase (or variations thereof) was employed regularly within the Defence team itself to connote the act of editing internal Defence documents. Red appears to have been used to refer to deletions, and yellow, additions.

These phrases were not employed uniquely in communications between Me. Kilolo and Mr. Mangenda. Rather, the use of 'colourful' terminology to denote aspects of the editing process encompassed all Defence team members, and included draft motions and questionnaires which were used during Defence investigations. It is reasonable to infer that any knowledge of the part of Mr. Bemba as concerns these phrases could have been derived from his interactions with any or all of the Defence team members."