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No. ICC-01/05-01/13 A10

Date: 5 July 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 document

Decision on Mr Jean-Pierre Bemba Gombo's requests for leave to reply

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 Mr Jean-Pierre Bemba Gombo
Ms Melinda Taylor

Registrar
Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber VII entitled ‘Decision Re-sentencing Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo’ of 17 September 2018 (ICC-01/05-01/13-2312),

Having before it the ‘Request to Reply, pursuant to Regulation 60 of the Regulations of the Court’ of 7 March 2019 (ICC-01/05-01/13-2324 (A10)),

Having before it the ‘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’ of 14 March 2019 (ICC-01/05-01/13-2327 (A10)),

Pursuant to regulations 24 and 60 of the Regulations of the Court,

Renders the following

DECISION

1. The ‘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’ is rejected.
2. The ‘Request to Reply, pursuant to Regulation 60 of the Regulations of the Court’ is granted to the extent set out in paragraph 22 of the present decision. Mr Jean-Pierre Bemba Gombo may file, by 16h00 on Monday, 15 July 2019, a reply, not exceeding 10 pages, to the ‘Prosecution’s Response to Bemba’s “Article 82(1)(a) [*sic*] Appeal” against the Re-sentencing Decision’ (ICC-01/05-01/13-2320 (A10)). The reply shall not repeat submissions already made in the ‘Article 82(1)(a) [*sic*] Appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber VII entitled “Decision Re-sentencing Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo”’ (ICC-01/05-01/13-2315 (A10)).

REASONS

I. PROCEDURAL HISTORY

1. Following an initial conviction for offences against the administration of justice pursuant to article 70 of the Statute,¹ the sentence of Mr Jean-Pierre Bemba Gombo (‘Mr Bemba’)² was overturned on appeal and remanded before Trial Chamber VII (the ‘Trial Chamber’) for the issuance of a new sentencing decision.³

2. On 17 September 2018, the Trial Chamber rendered its decision on re-sentencing (the ‘Re-Sentencing Decision’)⁴ in which it sentenced Mr Bemba to a total of one year imprisonment and imposed a fine of 300,000.00 euros to be paid by Mr Bemba within three months of the Re-Sentencing Decision.⁵

3. On 18 October 2018, Mr Bemba filed his notice of appeal in which he presents three grounds of appeal.⁶ On 17 December 2018, Mr Bemba filed his appeal brief (the ‘Appeal Brief’).⁷

4. On 18 February 2019, the Prosecutor filed her response to the Appeal Brief (the ‘Response to the Appeal Brief’).⁸

5. On 7 March 2019, Mr Bemba filed a request for leave to reply to the Prosecutor’s Response to the Appeal Brief pursuant to regulation 60 of the Regulations of the Court (the ‘Request for Leave to Reply under Regulation 60’).⁹

¹ [‘Judgment pursuant to Article 74 of the Statute’](#), 19 October 2016, ICC-01/05-01/13-1989-Conf; a public redacted version was registered on the same date (ICC-01/05-01/13-1989-Red), p. 455.

² [‘Decision on Sentence pursuant to Article 76 of the Statute’](#), 22 March 2017, ICC-01/05-01/13-2123-Corr (‘Sentencing Decision’), p. 99.

³ [‘Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Decision on Sentence pursuant to Article 76 of the Statute”](#)’, 8 March 2018, ICC-01/05-01/13-2276-Conf-Exp (A6 A7 A8 A9 A10); a public redacted version was registered on the same date (ICC-01/05-01/13-2276-Red), paras 361-362.

⁴ [‘Decision Re-sentencing Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo’](#), ICC-01/05-01/13-2312.

⁵ [Re-Sentencing Decision](#), pp. 50-51.

⁶ [‘Notice of Appeal’](#), ICC-01/05-01/13-2313 (A10).

⁷ [‘Article 82\(1\)\(a\) \[sic\] Appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber VII entitled “Decision Re-sentencing Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo”](#)’, ICC-01/05-01/13-2315 (A10), with [annex A](#) (ICC-01/05-01/13-2315-AnxA (A10)) and [annex B](#) (ICC-01/05-01/13-2315-Conf-AnxB (A10)).

⁸ [‘Prosecution’s Response to Bemba’s “Article 82\(1\)\(a\) \[sic\] Appeal” against the Re-sentencing Decision’](#), ICC-01/05-01/13-2320 (A10), with [annex A](#) (ICC-01/05-01/13-2320-AnxA (A10)).

6. On 11 March 2019, the Prosecutor filed her response to the Request for Leave to Reply under Regulation 60 (the ‘Response to Request for Leave to Reply under Regulation 60’).¹⁰

7. On 14 March 2019, Mr Bemba filed a request for leave to reply to the Response to Request for Leave to Reply under Regulation 60 (the ‘Request for Leave to Reply to the Response to Request for Leave to Reply under Regulation 60’).¹¹

A. Request for Leave to Reply to the Response to Request for Leave to Reply under Regulation 60

8. The Appeals Chamber finds it appropriate to first consider the present request of Mr Bemba before proceeding to consider his Request for Leave to Reply under Regulation 60. This is because the present request concerns the issue of whether the Appeals Chamber would be assisted with further submissions when examining that latter request.

9. Mr Bemba requests leave to reply to the Prosecutor’s Response to the Request for Leave to Reply pursuant to regulation 24(5) of the Regulations of the Court on two points.¹² First, he seeks leave to reply to the Prosecutor’s contention that he did not address the ‘existence of a separate common plan, and [Joachim Kokaté (‘Mr Kokaté’)]’s independent role in instigating witnesses to provide false testimony, at several points in [his] 2017 Appeal Brief’.¹³ Second, Mr Bemba seeks to address the argument that he shifted his position between trial and sentencing regarding the reasonable inferences to be drawn from the evidence.¹⁴ In that regard, Mr Bemba reiterates his arguments regarding the Trial Chamber’s ‘flawed approach to evidence

⁹ [‘Request to Reply, pursuant to Regulation 60 of the Regulations of the Court’](#), ICC-01/05-01/13-2324 (A10).

¹⁰ [‘Prosecution’s Response to Mr Bemba’s “Request to Reply, pursuant to Regulation 60 of the Regulations of the Court”](#), ICC-01/05-01/13-2326 (A10).

¹¹ [‘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’](#), ICC-01/05-01/13-2327 (A10).

¹² [Request for Leave to Reply to the Response to Request for Leave to Reply under Regulation 60](#), para. 1.

¹³ [Request for Leave to Reply to the Response to Request for Leave to Reply under Regulation 60](#), para. 4.

¹⁴ [Request for Leave to Reply to the Response to Request for Leave to Reply under Regulation 60](#), para. 5.

in both the Trial Judgment and the Sentencing Decision’ which affected the ‘fairness’ of the re-sentencing proceedings.¹⁵

10. The Appeals Chamber notes that in his request, Mr Bemba seeks leave to reply to a response by the Prosecutor to his Request for Leave to Reply under Regulation 60. Pursuant to regulation 24(5) of the Regulations of the Court, such a reply may only be filed with the leave of the Chamber. In the present circumstances, the Appeals Chamber is not convinced by Mr Bemba’s arguments that further submissions by him will assist the Appeals Chamber in its determination of the Request for Leave to Reply under Regulation 60. The Appeals Chamber notes that Mr Bemba merely reiterates arguments with respect to issues related to the scope of the appeal – the Trial Chamber’s approach to the evidence and the alleged role of Mr Kokaté – he presented in that request.¹⁶ Mr Bemba does not explain how further submissions on these issues would assist the Appeals Chamber in its determination of the Request for Leave to Reply under Regulation 60. Accordingly, the Request for Leave to Reply to the Response to the Request for Leave to Reply under Regulation 60 is rejected.

B. Request for Leave to Reply under Regulation 60

11. Having denied leave to Mr Bemba to make further submissions in relation to his Request for Leave to Reply under Regulation 60, the Appeals Chamber will now consider the merits of that request itself.

1. Submissions of the parties

(a) Mr Bemba

12. Mr Bemba seeks leave pursuant to regulation 60 of the Regulations to file a reply to the Response to the Appeal Brief.¹⁷ Mr Bemba submits that, as it is uncertain whether the Appeals Chamber will schedule a hearing under rule 156(3) of the Rules of Procedure and Evidence, he seeks the opportunity to make submissions on several points raised in the Prosecutor’s Response to the Appeal Brief.¹⁸ In particular, he seeks leave to reply to the following: (i) the ‘implicit request to disqualify Judge

¹⁵ [Request for Leave to Reply to the Response to Request for Leave to Reply under Regulation 60](#), paras 6-7.

¹⁶ See [Request for Leave to Reply to the Response to Request for Leave to Reply under Regulation 60](#), paras 4-7.

¹⁷ [Request for Leave to Reply under Regulation 60](#), paras 1, 54.

¹⁸ [Request for Leave to Reply under Regulation 60](#), para. 3.

Eboe-Osuji’; (ii) ‘[i]ncorrect statements of fact and procedure, and mischaracterisations of the Defence position’; (iii) factual submissions that ‘either fall outside the scope of the Trial Chamber’s findings or contradict them’; (iv) ‘[n]ew legal arguments concerning the definition of “gravity” for Article 70 offences’ and article 81(2)(b); and (v) the Prosecutor’s argument regarding the ‘definition of unlawful detention’.¹⁹

13. Mr Bemba argues that it is inappropriate for the Prosecutor to include a request for disqualification of a Judge in a response and avers that the Appeals Chamber may wish to dismiss this request on this basis alone, but if the Appeals Chamber were to consider the request, he seeks the opportunity to respond to the ‘admissibility and merits’ of the Prosecutor’s request.²⁰

14. Mr Bemba submits that the Prosecutor relies on incorrect statements of facts and procedure and mischaracterises his submissions referring in particular to arguments on the issue of Mr Kokaté, on Mr Bemba’s reaction to the ‘*faux scenario*’ and on the term ‘colour’.²¹ Mr Bemba contends further that the Prosecutor mischaracterises the nature of Mr Bemba’s appeal when she refers to the appeal as a request for reconsideration and by arguing that it is impermissible to ‘reconsider’ Mr Bemba’s conviction ‘on the basis of the legal findings set out in the separate opinions issued by the Main Case Appeals Chamber’.²²

15. In addition, Mr Bemba submits further that the Prosecutor’s account of his detention history is ‘incorrect, and misleading’.²³ Mr Bemba challenges the Prosecutor’s argument that the Trial Chamber’s assessment of his contribution is confined to the scope of the re-sentencing proceedings in view of the Appeals Chamber’s findings invalidating ‘key aspects of the Trial Chamber’s conclusions concerning Mr Bemba’s involvement in the solicitation of Defence witnesses’.²⁴ Mr Bemba also seeks leave to reply to the Prosecutor’s characterisation of some evidence as direct evidence of his ‘intentional contributions to the charges’ and the Prosecutor’s

¹⁹ [Request for Leave to Reply under Regulation 60](#), para. 4.

²⁰ [Request for Leave to Reply under Regulation 60](#), para. 7.

²¹ [Request for Leave to Reply under Regulation 60](#), paras 8-12.

²² [Request for Leave to Reply under Regulation 60](#), paras 14-20.

²³ [Request for Leave to Reply under Regulation 60](#), paras 21-22.

²⁴ [Request for Leave to Reply under Regulation 60](#), paras 23-28.

arguments regarding co-perpetration liability.²⁵ Mr Bemba argues that the Prosecutor raised new arguments regarding the assessment of the gravity of article 70(1)(a) offences.²⁶

16. Furthermore, Mr Bemba argues that the Prosecutor presented new arguments regarding the scope of article 81(2)(b) of the Statute.²⁷ Mr Bemba further submits that the Appeals Chamber changed in its composition where three of the five judges ‘are not privy to the manner in which the Appeals Chamber made its assessment of Mr. Bemba’s contributions ‘on the basis of the overall assessment of the evidence’, and because of the Trial Chamber’s approach to evidence, ‘five of the five Appeals judges are also not privy to the manner in which the Trial Chamber evaluated and weighed the evidence’.²⁸ Finally, Mr Bemba argues that the Prosecutor’s contention that the ‘Court’s legal framework does not distinguish between formal and substantive lawfulness of detention is legally incorrect’.²⁹

(b) The Prosecutor

17. The Prosecutor submits that Mr Bemba’s request ‘should be dismissed *in limine* on any of the [...] grounds’ raised in the response.³⁰

18. First the Prosecutor argues that Mr Bemba advances arguments which are substantive in nature, although leave to do so has not been granted.³¹ In that regard, she avers that Mr Bemba’s request ‘includes extensive substantive submissions for which Bemba simultaneously seeks leave to provide’ and that, therefore, this request should be dismissed *in limine*.³²

²⁵ [Request for Leave to Reply under Regulation 60](#), paras 29, 31.

²⁶ [Request for Leave to Reply under Regulation 60](#), paras 32-39.

²⁷ [Request for Leave to Reply under Regulation 60](#), paras 40-47.

²⁸ [Request for Leave to Reply under Regulation 60](#), para. 48.

²⁹ [Request for Leave to Reply under Regulation 60](#), paras 50-53.

³⁰ [Response to Request for Leave to Reply under Regulation 60](#), para. 1. *See also* paras 7-8.

³¹ [Response to Request for Leave to Reply under Regulation 60](#), para. 1.

³² [Response to Request for Leave to Reply under Regulation 60](#), paras 3-4, referring to Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, ‘Decision on the application of 14 September 2009 for participation as an *amicus curiae*’, 9 November 2009, ICC-01/05-01/08-602 (OA2) (the ‘*Bemba Decision OA2*’), para. 9. *See also* [Response to Request for Leave to Reply under Regulation 60](#), para. 8.

19. Second, the Prosecutor submits that Mr Bemba's arguments are 'largely unrelated to the Re-sentencing Decision'.³³ The Prosecutor argues that Mr Bemba's arguments are 'largely unrelated to the Re-sentencing Decision and again challenge the [Sentencing Decision]'.³⁴ The Prosecutor maintains that (i) she did not request the disqualification of Judge Eboe-Osuji; (ii) Mr Bemba's arguments concerning Mr Kokaté's 'purported common plan' were dismissed by the Appeals Chamber; (iii) Mr Bemba's alternative explanation to remedial measures 'he took to cover up his criminal conduct [...] and frustrate the Prosecution's article 70 investigation' and his arguments regarding coded language have already been dismissed by the Appeals Chamber; (iii) Mr Bemba's 'arguments (and his alternative interpretations of the evidence) have continuously evolved and shifted throughout the proceedings'; and (iv) regarding solicitation, contrary to Mr Bemba's submission, the Appeals Chamber found that Mr Bemba had solicited the false testimony of the 14 witnesses through Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo, he had also 'exerted direct influence on witness D-55' and confirmed the Trial Chamber's consideration, examination and reliance on the evidence pertaining to Mr Bemba's conduct in relation to witness D-19 for the determination of its factual findings against Mr Bemba.³⁵

2. *Merits*

20. The Appeals Chamber recalls that, pursuant to regulation 60(1) of the Regulations of the Court, 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 lies within its discretion and is to be decided on a case-by-case basis.³⁶ The Appeals Chamber has confirmed that '[a]lthough not specifically mentioned in regulation 60 of the Regulations of the Court, an appellant may request, and

³³ [Response to Request for Leave to Reply under Regulation 60](#), para. 1.

³⁴ [Response to Request for Leave to Reply under Regulation 60](#), paras 1, 5-6.

³⁵ [Response to Request for Leave to Reply under Regulation 60](#), para. 6.

³⁶ See e.g. *The 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.

accordingly, trigger the powers of the Appeals Chamber to order the filing of a reply under said regulation'.³⁷

21. In the present case, the Appeals Chamber is not convinced by the Prosecutor's argument that the request should be dismissed *in limine* because it contains substantive submissions.³⁸ While the Appeals Chamber agrees with the Prosecutor that such substantive submissions should not have been contained in the request, and these substantive submissions will therefore be disregarded by the Appeals Chamber, this does not mean that the *procedural request* that Mr Bemba makes – namely to be granted leave to file a reply – must be dismissed. Indeed, in the decision referenced by the Prosecutor in support of her argument the Appeals Chamber, after clarifying that it would disregard substantive submissions that a potential participant had made without first obtaining leave to do so, considered that potential participant's procedural request (and rejected it because it considered it unnecessary to receive further submissions).³⁹

22. With respect to the request, the Appeals Chamber notes that the scope of the present appeal is under dispute between the parties, as is reflected in the Prosecutor's Response to the Appeal Brief.⁴⁰ Given the extent of the Prosecutor's challenge to the inclusion of some arguments in the Appeal Brief and the significance of the issue of scope of the present appeal, the Appeals Chamber is of the view that a reply to the Response to the Appeal Brief on the issue of the scope of the appeal may assist the Appeals Chamber in its determination of the appeal and that ordering a reply on that issue is necessary in the interests of justice. The Appeals Chamber is not persuaded that it would be assisted by further submissions on other matters on which Mr Bemba seeks leave to reply. Therefore, the Appeals Chamber grants the Request for Leave to Reply under Regulation 60 in part and orders Mr Bemba to file a reply on the issue identified above. The Appeals Chamber considers that, in the circumstances, it is

³⁷ *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, '[Decision on requests for leave to reply to the Prosecutor's consolidated response to the appeal briefs](#)', 24 January 2018, ICC-01/05-01/13-2259 (A6 A7 A8 A9), para. 9, quoting Appeals Chamber, *The 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.

³⁸ [Response to Request for Leave to Reply under Regulation 60](#), paras 1, 3-4.

³⁹ See [Bemba Decision OA2](#), paras 9, 11.

⁴⁰ See [Response to the Appeal Brief](#), paras 3-10, 40-63.

appropriate to set a page limit of 10 pages for the reply and emphasises that the reply shall not repeat submissions already made in the Appeal Brief.

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

A handwritten signature in black ink, appearing to read 'H. Morrison', is written over a horizontal line.

Judge Howard Morrison
Presiding Judge

Dated this 5th day of July 2019

At The Hague, The Netherlands