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

Date: 13/07/2017

**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*

*Public*

**Request to Join the Application of 'Requête de la Défense de M. Babala  
demandant la suspension de l'échéance applicable à une requête visant à  
solliciter l'autorisation pour soumettre une réplique à la «Prosecution's  
Consolidated Response to the Appelants' Documents in Support of Appeal»  
(ICC-01/05-01/13-2170-Conf)'**

**Source:** Art. 70 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**

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**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 Curiae**

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**REGISTRY**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## Introduction

1. In the event that Regulation 34(c) of the Regulations of the Court (RoC) governs requests for leave to reply, which are filed under Regulation 60 of the RoC, the Defence for Mr. Bemba joins the application submitted by the Defence for Mr. Babala for a request for an extension of time to file its request for leave to reply to the 'Prosecution's Consolidated Response to the Appellants' Documents in Support of Appeal' (the Response).
2. For reasons which will be developed below, the Bemba Defence's primary position is that Regulation 60 is the *lex specialis*, which governs the specific procedure for submitting both a request for leave to reply, and the reply itself. As such, the deadline for seizing the Appeals Chamber under this Regulation should be dictated by the interests of justice set out in that Regulation.
3. Nonetheless, in light of the ambiguity of this issue, and in order not to prejudice the interests of Mr. Bemba, the Defence is filing the current application for additional time, within the three day deadline that would otherwise apply.

## Submissions

*Regulation 60 of the RoC is the Lex Specialis for Appellate Replies*

4. The Appeals Chamber has repeatedly distinguished the regime that applies to the appellate phase, from that which applies to standard motions, response and replies that are filed before the Pre-Trial Chamber and the Trial Chamber.

5. In the *Lubanga* case, the Appeals Chamber determined that Regulation 60 is the governing provision for filing replies in connection with appeals filed under Article 81 of the Statute. Specifically, the Appeals Chamber confirmed that since Regulation 60 vested the Appeals Chamber with the power to request a reply from the appellant, whenever it was in the interests of justice to do so, the appellant had the corollary right to petition the Appeals Chamber to exercise this power.<sup>1</sup>
  
6. In a subsequent ruling, the Appeals Chamber rejected a Prosecution request to strike the Lubanga Regulation 60 reply. The Prosecution had argued that because the Lubanga Defence had only been authorised to file a reply of 20 pages, whereas the Lubanga reply was 22 pages (counting the cover page), the reply should be struck due to case law that confirmed that the cover page was counted for replies filed under Regulation 37.<sup>2</sup>
  
7. In dismissing this request, the Appeals Chamber noted that the reply had been filed under Regulation 60, and that the page limit had also been established by the Chamber under Regulation 60 (not Regulation 37), based on the assessment made by the Lubanga Defence as to the pages required for its response. The Appeals Chamber therefore determined that it was not “in the interests of justice” to dismiss the reply, due to its non-compliance with Appeals Chamber’s order.<sup>3</sup>

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<sup>1</sup> ICC-01/04-01/06-2982, para. 6 (and case law cited therein).

<sup>2</sup> ICC-01/04-01/06-3002, para. 7.

<sup>3</sup> ICC-01/04-01/06-3002, para. 7.

8. These decisions underscore that the 'interests of justice' criterion in Regulation 60 should also govern the modalities of filings submitted pursuant to Regulation 60.
  
9. These findings should also be read in connection with other appellate jurisprudence, which has underscored that where appellate procedures are governed by particular provisions set out in Section 4 of the RoC, Regulation 24 is otherwise excluded. Thus, in the *Ruto* case, the Appeals Chamber found that the Government of Kenya could not invoke Regulation 24 to seek leave to reply, in connection with an appeal submitted under Article 82(1)(a), because the procedures set out in Section 4 did not envisage the applicability of such processes to Article 82(1)(a) appeals.<sup>4</sup>
  
10. The Appeals Chamber's finding were as follows:<sup>5</sup>

The Appeals Chamber nevertheless recalls that it has previously held that replies to responses to documents in support of appeal may not be filed pursuant to regulation 24 (5) of the Regulations of the Court for appeals brought under rule 154 and 155 of the Rules of Procedure and Evidence.

This is because "the more specific provisions of subsection 1 of Section 4 of Chapter 3 of the regulations of the Court do not foresee replies to responses to documents in support of appeals". Therefore, the present application is rejected. However, the Appeals Chamber has held that it has discretion under regulation 28 of the Regulations of the Court to order further submissions by parties or participants when it is "necessary for the proper disposal of the Appeal [...] bearing in mind the principle of equality of arms and the need for expeditious proceedings".

11. These findings are equally applicable as concerns the relationship of Regulation 60 to Article 81 appeals. Concretely, since "the more specific provisions of subsection 1 of Section 4" govern and control the ability to seize the Appeals Chamber of a request for leave to reply in

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<sup>4</sup> ICC-01/09-01/11-239, paras. 8-9

<sup>5</sup> ICC-01/09-01/11-239, paras. 8-9

an Article 81 appeal, Regulation 60, as the *lex specialis*, excludes Regulation 24. The application of Regulation 24(c) to Article 81 appeals would in fact defeat the very purpose of Regulation 60.

12. Indeed, since Regulation 60 vests the Appeals Chamber with the power to solicit a reply “[w]henever the Appeals Chamber considers it necessary in the interests of justice” (emphasis added), the Appeals Chamber clearly cannot be fettered from exercising this power due to the fact that an appellant has failed to seize the Appeals Chamber within the 3 day deadline set out in Regulation 24(c).

*There is Good Cause to Extend the Deadline of Three Days, or in the Alternative, it is in the Interests of Justice to Impose a Deadline That Takes into Consideration the Length and complexity of the Response*

13. The Defence fully supports the position of the Babala Defence that a French translation is required to ensure Mr. Babala’s right to effectively participate in his appeal. Whilst Mr. Bemba possesses proficiency in English, both the length of the Response and the issues raised therein render it impossible for the Defence to meaningfully review the Response, and identify issues falling within the proper ambit of a reply, within 3 days. It would not be in the interests of justice for the Defence to churn out a mechanical request that might either omit to raise key issues, or err on the side of over-inclusiveness.

14. In previously granting the Prosecution an additional two weeks and 101 pages to file its Response, the Appeals Chamber recognised the complexity of issues that would be addressed in the Response.<sup>6</sup> The resulting Response, of 362 pages, reflects this complexity, and it would therefore be in the interests of justice to extend the same

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<sup>6</sup> ICC-01/04-01/06-3002, para. 12.

consideration to the process for seeking leave to reply. Even if certain sections focus on individual defendants, it is necessary for the Defence to review the entirety in order to assess the consistency of the Prosecution position and whether specific points raised in sections concerning Mr. Bemba's co-defendants impact on Mr. Bemba

15. Without prejudice to the right of other Defence teams to have a deadline which is predicated on the French translation, the Defence for Mr. Bemba estimates that a deadline of 10 days from the notification of the Response, would be a fair and reasonable amount of time to prepare its request (and consistent with the prior deadline for replies). The Defence has also liaised with the Prosecution, who have indicated that they would not oppose the imposition of a deadline of 10 days.

16. Finally, given the ambiguity concerning the applicable deadline, it would be unfair for the deadline to expire before this ambiguity is addressed, and ruled upon by the Appeals Chamber.

### **Relief sought**

17. Without prejudice to the relief sought by the Defence for Mr. Babala which pertains to the specific language rights of Mr. Babala, the Defence for Mr. Bemba respectfully requests the Appeals Chamber to order that the deadline for filing the Bemba request for leave to reply to the 'Prosecution's Consolidated Response to the Appellants' Documents in Support of Appeal' should be 10 days from notification.



Melinda Taylor  
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Mylène Dimitri  
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Dated this 13<sup>th</sup> day of July 2017

The Hague, The Netherlands