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Pénale
Internationale**



**International
Criminal
Court**

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TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

*IN THE CASE OF
THE PROSECUTOR
v. JEAN-PIERRE BEMBA GOMBO*

Public

**Prosecution's Observations Concerning the Filing of any Appeals against
Judgment**

Source: Office of the Prosecutor

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

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Overview

1. The Parties and participants should be notified of the Trial Chamber's judgment, by the ordinary application of regulation 31 of the Regulations of the Court, on the day it is first rendered (in English). Any request to postpone or suspend the deadline to file any notice of appeal under rule 150 of the Rules of Procedure and Evidence, or document in support of appeal under regulation 58, should be properly made to the Appeals Chamber. Adherence to these provisions causes no unfairness, promotes straightforward and expeditious proceedings, and recognises the distinct competence of the Appeals Chamber to control any appellate proceedings. The Trial Chamber should thus refrain from varying the date of notification of its judgment under regulation 31.

2. The Prosecution welcomes the observations of the Defence and other participants on this issue. It proposes, however, that the Trial Chamber reserves its ruling on this request until such time as it renders its judgment.

Submissions

3. The Prosecution understands that the Trial Chamber will render its forthcoming judgment in English,¹ one of the two working languages of the Court.² Mindful of this fact, and also of (a) the linguistic preference of Mr Bemba (French)³, (b) the working language of Mr Bemba's counsel (English),⁴ and (c) the Trial Chamber's consistent efforts during this trial to ensure Mr Bemba's adequate understanding of, and participation in, the case against him, the Prosecution considers it appropriate to address the impact of the date on which the judgment is notified upon the deadline for filing any notices of appeal.

¹ See ICC-01/05-01/08-3071 ("Timetable Decision"), para.16 (noting that, at the time of judgment, there will not be "an immediate translation into French of the full judgment on the merits").

² Statute, art.50(2).

³ ICC-01/05-01/08-2731 ("*Bemba* Closing Issues Decision"), paras.28, 31; ICC-01/05-01/08-307 ("*Language Decision*"), para.9.

⁴ ICC-01/05-01/08-3035, para.5; *Bemba* Closing Issues Decision, paras.28, 32.

4. Although it agrees with much of the reasoning in Trial Chamber I’s relevant decision in *Lubanga*,⁵ the Prosecution does not consider that article 67(1)(f) of the Statute and rule 144(2)(b) require the Trial Chamber to deem Mr Bemba “notified” of the judgment, in the event of a conviction, only at such time as it is translated into French. For the essentially procedural step of filing a notice of appeal under rule 150(1), fairness does not require an accused person to have access to a full translation of the judgment. To the contrary, the requirements of judicial economy, fairness, and expedition are best served by the ordinary application of regulation 31 which, in the event of any appeal, will, through rule 150, promptly trigger the jurisdiction of the Appeals Chamber to control the proceedings and to grant any further relief which may be necessary.

Article 67(1)(f) and rule 144(2)(b) do not require the Trial Chamber to modify or to depart from regulation 31

5. Article 67(1)(f)—which may be paraphrased as the right “to translations in order to secure fairness”⁶—guarantees that an accused person will:

[...] have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks[.]

6. Rule 144(2) specifies that certain decisions of a Trial Chamber, including those concerning “the criminal responsibility of the accused”,⁷ shall be:

[...] provided as soon as possible to:

⁵ ICC-01/04-01/06-2834 (“*Lubanga* Decision”).

⁶ *Lubanga* Decision, para.23.

⁷ See Rules, rule 144(1).

- (a) All those who participated in the proceedings, in a working language of the Court;
- (b) The accused, in a language he or she fully understands or speaks, if necessary to meet the requirements of fairness under article 67, paragraph 1 (f).

7. The *Lubanga* Trial Chamber correctly determined that in the context of judgments under article 74 “the essential requirement is for the Chamber to ensure that the accused is provided with a translation [...] in circumstances that protect the fairness of the proceedings.”⁸ The question is what, precisely, this obligation requires. Primarily, procedural fairness requires consideration of the need for translations to enable any sentencing phase and any appellate phase.⁹

8. For the purpose of any appeal against an acquittal, the *Lubanga* Trial Chamber considered that “the prosecution’s obligations as regards [r]ule 150(1) [...] should commence as soon as the English version of the judgment is notified, in accordance with [r]egulation 31(2)”.¹⁰

9. The Prosecution agrees that, should the Trial Chamber acquit Mr Bemba in whole or in part, any appeal against acquittal should be filed within 30 days of the (English) judgment, in accordance with regulation 31 and rule 150(1).

10. The Prosecution does not agree with the *Lubanga* Trial Chamber, however, that different considerations would apply to an appeal against any conviction.¹¹ Whereas a convicted person may need to participate in more detailed preparations

⁸ *Lubanga* Decision, para.19.

⁹ The Trial Chamber has already made provision with regard to the sentencing phase: *see below* paras.22-23.

¹⁰ *Lubanga* Decision, para.22.

¹¹ *See Lubanga* Decision, para.23. In *Lubanga*, where the judgment was issued in English but both the convicted person and his counsel understood French, the Prosecution’s acquiescence to notification occurring from the date of the French translation was understood by the Trial Chamber to be limited “to the circumstances of this case”: *Lubanga* Decision, para.14. In *Katanga*, where the judgment was issued in French and the convicted person understood French but counsel preferred to work in English, the Prosecution’s position was grounded primarily in the importance of *counsel* being able to understand the judgment adequately, rather than the convicted person, and, in any event, was rejected by the Appeals Chamber: *see below* para.11; *also below* fn.16; ICC-01/04-01/07-3442, paras.2-3.

with counsel later in the appellate process (*i.e.*, settling the grounds of appeal, and supporting arguments, in the document supporting the appeal)—and, for that purpose, may require greater acquaintance with the judgment, in the interest of fairness—this is not necessary for the initial and essentially procedural step of filing a notice of appeal pursuant to rule 150(1). Such instruments are typically very brief—in the Court’s practice, they average no more than 218 words¹²—and require only the informed determination by the convicted person as to whether they wish to challenge the Trial Chamber’s findings in at least one respect. At this stage, they need not apprehend the nature or particularities of any error in the judgment, but merely express the intention to contest it.

11. This view has been confirmed by the Appeals Chamber, in the context of a trial judgment which included a lengthy dissenting opinion (supporting an acquittal) in a language which the convicted person did not fully understand and speak:

The Appeals Chamber recalls that the filing of a notice of appeal, which must take place within 30 days from the notification of the Conviction Decision to Mr Katanga, is not necessarily onerous. Pursuant to regulation 57 [...], Mr Katanga merely has to state the name and number of the case, the date of the decision under appeal, whether he is appealing the entirety of the decision or only part of it, and the relief sought. Thus, the notice of appeal, while showing the appellant’s intention to challenge a decision, does not require any extensive analysis thereof. Therefore, irrespective of the validity of Mr Katanga’s arguments as to the need for a full translation of the Conviction Decision [...], they cannot be said to apply to the filing of the notice of appeal. Rather, the Appeals Chamber considers that Mr Katanga, with the assistance of his counsel, should be able to make a decision as to whether to appeal the Conviction Decision and file a

¹² See ICC-01/04-01/06-2933 (Prosecution’s notice of appeal against sentence in *Lubanga*: 147 words, not including formalities); ICC-01/04-01/06-2934-tENG (Lubanga’s notice of appeal against conviction: 195 words, not including formalities); ICC-01/04-01/06-2935-tENG (Lubanga’s notice of appeal against sentence: 222 words, not including formalities); ICC-01/04-02/12-10 (Prosecution’s notice of appeal against acquittal in *Ngudjolo*: 166 words, not including formalities); ICC-01/04-01/07-3459 (Katanga’s notice of appeal against conviction: 359 words, not including formalities); ICC-01/04-01/07-3462 (Prosecution’s notice of appeal against acquittal in *Katanga*: 217 words, not including formalities).

notice of appeal based on the information currently available to him.¹³

12. By contrast, the Appeals Chamber acknowledged that, whereas the decision to file a notice of appeal does not require extensive analysis, the subsequent brief setting out the arguments supporting the appeal may raise “significant issues of law and fact”.¹⁴ Accordingly, to the extent that the sufficiency of a judgment’s translation is relevant to appellate proceedings, the matter may relate more properly to the timetable for filing the substantive brief under regulation 58(1) rather than the procedural notice under rule 150(1). In other words, this is a matter for regulation by the Appeals Chamber.

13. The approach of the *Katanga* Appeals Chamber is consistent with the practice of the *ad hoc* tribunals. At the ICTY—and notwithstanding its more onerous requirements for legal specificity in notices of appeal,¹⁵ requiring greater preparatory legal and factual analysis—fairness is maintained by allowing a convicted person to seek variation of the grounds of their appeal, based on a subsequent translation of the judgment, rather than delaying the start of the appellate process altogether. For example:

- In *Prlić et al.*, the trial judgment was issued in French, but counsel for four of the six convicted persons worked in English, and at least four of the six convicted persons themselves understood only Bosnian-Croatian-Serbian (“BCS”). The ICTY Appeals Chamber deemed the relevant Defence counsel to be notified of the judgment at the time a translation was issued

¹³ ICC-01/04-01/07-3454 A (“*Katanga* Appeal Decision”), para.14. Recounting the basis for the convicted person’s application to extend the period to file his notice of appeal, see paras.1, 5 (lengthy dissenting opinion in English; counsel’s limited ability to work in French).

¹⁴ *Katanga* Appeal Decision, para.18. On this basis, “coupled with the language challenges that Mr Katanga faces”, the Appeals Chamber extended the time for filing the document supporting Mr Katanga’s appeal.

¹⁵ See ICTY, Rules of Procedure and Evidence, IT/32/Rev.49, 22 May 2013, available at http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev49_en.pdf (accessed 17 June 2015, rule 107 (requiring a notice of appeal to “set[] forth the grounds”, including “indicat[ing] the substance of the alleged errors”).

in *English* (the language understood by counsel).¹⁶ It determined that “it would be unreasonable to delay the appellate proceedings until the filing of the BCS translation of the Trial Judgement”, and noted instead that the four convicted persons would “have the opportunity, if they so wish, to request variation of their grounds of appeal after having read the BCS translation of the Trial Judgement, provided that they show good cause”.¹⁷

- In *Tolimir*, although an extension of time to file the notice of appeal was granted by the Pre-Appeal Judge on the basis that the judgment was in a language not understood by the convicted person, the extension was only 30 days—the date of notification of the judgment was not modified.¹⁸ Otherwise, Mr Tolimir’s remedy was to seek variation of his notice of appeal or appeal brief at such time as he received the BCS translation.¹⁹ Moreover, this case may be distinguished by the fact that the accused was self-represented, and thus unassisted by counsel.²⁰
- In *Šainović et al.*, the ICTY Appeals Chamber noted the importance of the appellant’s participation in the preparation of their appeal, but again observed that this interest could be protected effectively by permitting

¹⁶ In this context, the Prosecution notes the different emphasis of the Appeals Chamber at this Court, which has held that “article 67(1)(a) and (f) of the Statute relates to the language ability and knowledge of the suspect/accused, not of his/her [c]ounsel and/or defence team”: *Katanga* Appeal Decision, para.17 (citing ICC-02/11-01/11-489 OA5, para.11; ICC-01/04-01/10-505 OA4, para.10). The Prosecution does not consider this different emphasis to alter the essential point that the essentially procedural notice of appeal required under rule 150(1) does not require the convicted person, as a matter of fairness, to be fully acquainted with the trial judgment.

¹⁷ ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-A, Decision on Motions for an Extension of Time to File Notices of Appeal and Other Relief, 21 June 2013, available at <http://www.icty.org/x/cases/prlic/acdec/en/130621.pdf> (accessed 17 June 2015) (“*Prlić* Notice Decision”), pp.3-4.

¹⁸ ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-A, Decision on Zdravko Tolimir’s Motion for an Extension of Time to File a Notice of Appeal, 3 January 2013, available at <http://www.icty.org/x/cases/tolimir/tdec/en/130103.pdf> (accessed 17 June 2015).

¹⁹ See e.g. ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-A, Decision on Motion for Setting a Time Limit for Filing an Appeal[l]ant’s Brief and for an Extension of Word Limit, 17 May 2013, available at <http://www.icty.org/x/cases/tolimir/acdec/en/130517.pdf> (accessed 17 June 2015), pp.3-4.

²⁰ ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-A, Decision on Tolimir’s Motion for Variation of the Grounds of Appeal and Amendment of the Appeal Brief, 4 September 2013, available at <http://www.icty.org/x/cases/tolimir/acdec/en/130904.pdf> (accessed 17 June 2015) (“*Tolimir* Amendment Decision”), para.12 (noting that, “[w]hile errors of law are usually identifiable by an appellant’s counsel prior to the translation of the judgement, Tolimir is self-represented and has only the assistance of a legal advisor”).

variation of their substantive arguments on appeal, if good cause is shown:

The interests of justice require that an appellant have adequate time to read the Trial Judgement in a language he understands and consult with counsel before filing his appeal brief. In the present case, the convicted appellants did not have the opportunity to read the Trial Judgement in B/C/S prior to the filing of their respective notices of appeal and appeal briefs. Mindful of this constraint, the Pre-Appeal Judge reminded the Defence that they could seek variation of their respective grounds of appeal after having read the B/C/S translation of the Trial Judgement, provided that they showed good cause under Rule 108 of the Rules. He further clarified that such requests “should concern matters which require direct input from the convicted appellants rather than their counsel.” The Appeals Chamber has previously acknowledged that the unavailability of the B/C/S translation of the Trial Judgement at the time when the notices of appeal were filed could prevent the identification of alleged errors to which the appellant’s understanding of the Trial Judgement is central.²¹

14. For these reasons, the Trial Chamber should affirm that the judgment in English will be promptly notified to the Parties in the ordinary fashion under regulation 31. This is entirely compatible with Mr Bemba’s right to a translation in the interest of fairness, in the meaning of article 67(1)(f) and rule 144(2)(b), since any notice of appeal filed under rule 150(1) requires a very minimal analysis of the judgment, for which he is adequately and ably supported by counsel.

²¹ ICTY, *Prosecutor v. Šainović et al.*, IT-05-87-A, Decision on Sreten Lukić’s Re-Filed Second Motion for Leave to Vary his Notice of Appeal and Appeal Brief, 9 September 2011, available at <http://www.icty.org/x/cases/milutinovic/acdec/en/110909.pdf> (accessed 17 June 2015), para.17. *See also Tolimir Amendment Decision*, para.15.

Other legitimate interests favour applying regulation 31 in the ordinary fashion

15. Not only nothing in article 67(1)(f) or rule 144(2)(b) requires the Trial Chamber to depart from the ordinary application of regulation 31; other legitimate interests actively favour an equal requirement for the Parties to file any notice of appeal promptly after the issue of the judgment in English, as provided by rule 150. Doing so will promote straightforward and expeditious proceedings for the Parties and participants, and foster the sound administration of justice by recognising the distinct competence of the Appeals Chamber to govern appellate proceedings. It is also generally fair and reasonable.

The ordinary application of regulation 31 to the trial judgment promotes straightforward and expeditious proceedings

16. Mr Bemba enjoys the right under article 67(1)(c) of the Statute to trial “without undue delay”. The Court also bears the duty, to the extent compatible with Mr Bemba’s rights and the fairness of the trial, to take appropriate measures for the psychological well-being and dignity of victims and witnesses,²² which may likewise include maintaining the expedition of its proceedings. These interests are served by adopting procedures which are fair and as simple and straightforward as may reasonably be achieved—the concept of judicial or procedural economy.

17. The ordinary application of regulation 31 in this case favours procedural economy. First, given the Appeals Chamber’s reminder that filing any notice of appeal is “not [...] onerous”,²³ delaying either Party’s notice of appeal until a full translation of the judgment is provided will delay the proceedings for negligible benefit to Mr Bemba.²⁴

²² Statute, art.68(1).

²³ *Katanga* Appeal Decision, para.14.

²⁴ See further Language Decision, paras.14-15 (an accused has the right to translations “of all those documents which are necessary for him to understand the nature, cause and content of th[e] charges”; “[t]his approach is also consistent with the right of the accused to be tried without undue delay”—the translation of documents “beyond what is actually necessary to guarantee the right[s] of the accused [...] may seriously jeopardize the

18. Second, the consequence of varying the date of notification under regulation 31 may create procedural complexities in the subsequent conduct of the appeal, leading to further delay in the proceedings. For example, any judgment which convicts a person in part and acquits a person in part may attract appeals from both the Prosecution and the Defence. An unequal application of regulation 31 (the “*Lubanga* approach”) would oblige the Prosecution to appeal the acquittals on the basis of the original version of the judgment, potentially months before the Defence is obliged to appeal the convictions on the basis of the translated version of the judgment. Asynchronous appeals on related matters risk inefficiencies, duplication of effort and even, potentially, unfairness between the Parties (for example, by allowing one Party to tailor its appeal once it has seen the progress of the other Party’s appeal). Although Prosecution and Defence appeals are “legally distinct proceedings”, the Appeals Chamber has recognised that merely “having a different briefing schedule could negatively impact on procedural economy, as well as on the interests of [the convicted person]”.²⁵

The ordinary application of regulation 31 to the trial judgment respects the distinct competence of the Appeals Chamber

19. The ordinary application of regulation 31 is appropriate to allow the Appeals Chamber to play its intended role in controlling appellate proceedings, including through rule 150. As the Appeals Chamber has itself recalled, rule 150(2) expressly vests the Appeals Chamber with the power to “extend the time limit” in rule 150(1) for filing a notice of appeal, upon showing of “good cause”.²⁶

expeditiousness of the proceedings due to the substantial time required”). See also ICC-02/04-01/15-203, para.32.

²⁵ *Katanga* Appeal Decision, para.21. See also e.g. ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-A, Decision on Appellants’ Requests for Extension of Time and Word Limits, 9 October 2014, available at <http://www.icty.org/x/cases/prlic/acdec/en/141009.pdf> (accessed 17 June 2015), p.3 (“it is in the interests of justice and effective case management to maintain a harmonised briefing schedule”).

²⁶ *Katanga* Appeal Decision, para.13.

20. The Trial Chamber should be cautious in encroaching upon the expressly defined power of the Appeals Chamber in rule 150(2) by deeming notification of the judgment to have occurred later than ordinarily provided by regulation 31. Such a measure not only risks impinging upon the Appeals Chamber's distinct competence—and hence interfering with its control over its own proceedings, by significantly affecting the briefing schedule on appeal—but is in any event unnecessary. An adequate remedy exists elsewhere, expressly set out in the Rules and Regulations.

The ordinary application of regulation 31 to the trial judgment will not be unfair in this case

21. The Trial Chamber need fear no risk of unfairness to Mr Bemba from declining to vary the ordinary application of regulation 31. Rule 150(2) gives him any remedy he requires—an application to the Appeals Chamber, showing good cause, requesting an extension of the time limit for filing any notice of appeal. Likewise, Mr Bemba can also seek extension of time in due course for filing the document supporting any appeal. These remedies are consistent with the Appeals Chamber's competence to control its own proceedings.

22. Moreover, the Trial Chamber has already made provision to assist Mr Bemba in reviewing the essential aspects of the judgment himself, in French (the language which he fully understands and speaks), which will assist him to participate in the decision to file any notice of appeal. It has done this by its order concerning the extent of translations required for procedural fairness in any sentencing phase.

23. Consistent with the approach in *Lubanga*, where it was affirmed that the requirements of fairness and expedition permitted proceeding to the sentencing phase before a “complete [...] translation” of the judgment in the language of the

accused was available,²⁷ this Trial Chamber has stated, “in order to ensure expeditiousness”, that:

In the event of a conviction, the Chamber underlines that, even though the defence and the legal representative will not have an immediate translation into French of the full judgment on the merits, they will be provided with a detailed French and English summary of the judgment in the context of the reading of the summary of the judgment in court, and soon thereafter, with a translation into French of parts of the judgment which are considered by the Chamber to be relevant to sentencing issues. The translation into French of the remaining parts of the judgment will be provided on a regular and expeditious basis.

In the event of a conviction, the parties and participants are thus to file any requests to submit further evidence or to call witnesses [...] within two weeks of the issuance of the judgment on the merits. [...]²⁸

24. The detailed summary, and excerpt translations, ordered by the Trial Chamber more than suffice to enable Mr Bemba to make a fair and informed decision, with the assistance of his counsel, as to whether to file any notice of appeal against the judgment. In addition, the Prosecution also notes that Mr Bemba “has had the possibility since the pre-trial stage of the case to have a sight interpreter at his disposal who may [...] assist him in understanding written documents, translating them orally.”²⁹ He also has “some knowledge of English.”³⁰

Conclusion

25. For the reasons above, the Trial Chamber should, when it issues its judgment, affirm that regulation 31 will apply to ensure the prompt notification of the

²⁷ See *Lubanga* Decision, paras.20-21 (providing that, as a “minimum safeguard[]”, translations of selected passages of the judgment would need to be available).

²⁸ *Timetable* Decision, paras.16-17.

²⁹ *Bemba* Closing Issues Decision, para.28. See also para.32; *Language* Decision, para.18.

³⁰ *Language* Decision, para.9.

judgment, in English, in the ordinary fashion. Rule 150(1) will then govern the time limit for filing any notice of appeal.



Fatou Bensouda, Prosecutor

Dated this 22nd day of June 2015

At The Hague, The Netherlands