

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

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

Date: **24 July 2017**

THE APPEALS CHAMBER

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Piotr Hofmański
Judge Geoffrey Henderson

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

Application for Leave to Reply to the “Prosecution’s Consolidated Response to the Appellants’ Documents in Support of Appeal” (ICC-01/05-01/13-2170-Conf)

Source: Defence for Mr Fidèle Babala Wandu

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

Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Kweku Vanderpuye

Defence Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Defence Counsel for Aimé Kilolo Musamba

Mr Michael Karnavas

Defence Counsel for Jean-Jacques Mangenda Kabongo

Mr Chris Gosnell

Mr Peter Robinson

Defence Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Ms Mylène Dimitri

Defence Counsel for Narcisse Arido

Chief Charles A. Taku

Ms Beth Lyons

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparations

Office of Public Counsel for Victims

Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. PRELIMINARY REMARKS

1. This Application for Leave to Reply is based on an oral summary by the Defence case manager. In other words, it is not based on an official translation by the Court's language services. Accordingly, it cannot be faulted for leaving out any number of fundamental issues that might have been raised before the Appeals Chamber at this juncture. The Defence maintains that, had article 50 of the Statute been given effect, and had the choice of language expressed by Mr Babala at his initial appearance on 27 November 2013 been respected, a full analysis of the Prosecution Response would have been possible and a whole range of issues would have been unearthed and then expounded in this Application for Leave to Reply to that Response.
2. As a matter of doctrine, "[TRANSLATION] [t]he rule of effective construction states that treaty provisions are drafted with their effective operation in mind and should therefore be construed accordingly (*ut res magis valeat quam pereat*)".¹ The designation of English and French as the Court's dual working languages, under article 50 of the Rome Statute, was not an empty gesture. Nor is it fortuitous that article 67(1)(a) gives the accused the right "[t]o be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks".
3. Moreover, article 67(1)(b) entitles the accused to have adequate time and facilities for the preparation of his or her defence and to communicate freely and in confidence with counsel of his or her choosing.
4. In the Appellant's view, not having the Prosecution's Consolidated Response in French (the language of his choosing and the working language of his Defence) is a breach of his rights, and notably of his statutory right under article 67(1)(f):

[t]o 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.

¹ Currat, Philippe. "[L'interprétation du Statut de Rome](#)". 20.1 *Revue québécoise de droit international* (2007), p. 144.

5. The Prosecution's Consolidated Response, now at issue before the Appeals Chamber, is written entirely in English – a language which the Appellant does not fully understand or master.
6. The operative principle here is equality before the criminal law for all accused. Bosco Ntaganda,² for example, received translations into Kinyarwanda of all documents material to his defence. Germain Katanga³ enjoyed the full services of interpreters proficient in Lingala for the duration of his trial.

II. PURPOSE OF THIS APPLICATION

7. The Defence for Mr Fidèle Babala Wandu ("Defence", "Appellant", "Mr Babala") hereby seeks leave to reply to the "Prosecution's Consolidated Response to the Appellants' Documents in Support of Appeal" ("Prosecution Response").⁴
8. Although an official translation of the Prosecution Response is not yet available, the Defence has been able to detect numerous false claims in that document, which, if left unchallenged, could mislead the Chamber and interfere with the discovery of the truth, thereby subverting the fairness of the trial.

III. CONFIDENTIALITY

9. Pursuant to regulation 23 *bis*(2) of the Regulations of the Court, this Application is filed as confidential, in keeping with the classification of the Prosecution Response. As this Application concerns neither the content of the Prosecution Response nor any other confidential information in this matter, the Defence has no objection to its being reclassified as public when a public redacted version of the Prosecution Response becomes available.

² ICC-01/04-02/06-T-2-ENG, pp. 5, 10.

³ ICC-01/04-01/07-T-11-ENG, p. 2; ICC-01/04-01/07-522; ICC-01/04-01/07-539; ICC-01/04-01/07-1473.

⁴ ICC-01/05-01/13-2170-Conf.

IV. BRIEF PROCEDURAL HISTORY

10. On 19 October 2016, Trial Chamber VII ("Trial Chamber") delivered its Judgment pursuant to article 74(2) of the Rome Statute ("Judgment of Conviction"),⁵ finding Mr Babala guilty of having aided in the commission of the offence of corruptly influencing witnesses D-57 and D-64, and acquitting him of more than 40 other charges confirmed by the Pre-Trial Chamber on 11 November 2014 under article 61(7)(a) and (b) of the Statute.⁶
11. On 1 November 2016, the Defence applied to the Appeals Chamber ("Chamber", "this Chamber") for an extension of time to file its appeal brief, mainly on grounds of the novelty and intricacy of the case, its need to prepare for the determination of the sentence, and the linguistic difficulties stemming from the fact that the Judgment was then available only in English, whereas the Accused and his Defence team are French-speakers.⁷
12. On 2 November 2016, the Defence filed its notice of appeal, available to the Chamber and the Parties, against the Judgment of Conviction.⁸
13. On 23 November 2016, the Chamber granted the Defence application of 1 November 2016 and extended the time limit for filing appeal briefs to 18 April 2017. It also, however, invited the respective defence teams to specify, by 16.00 on 14 February 2017, which legal findings of the Trial Chamber they intended to challenge.⁹
14. Accordingly, on 14 February 2017, the Defence filed a document enumerating the errors of procedure, fact and law found in the Judgment of Conviction.¹⁰

⁵ ICC-01/05-01/13-1989-Red.

⁶ ICC-01/05-01/13-749.

⁷ ICC-01/05-01/13-1996-tENG.

⁸ ICC-01/05-01/13-1999-tENG.

⁹ ICC-01/05-01/13-2046.

¹⁰ ICC-01/05-01/13-2107.

15. On 4 April 2017, the Defence for Aimé Kilolo Musamba filed an urgent request for an extension of time to 24 July 2017 to file its appeal brief.¹¹ Seconded on 6 April 2017 by the Defence for Jean-Jacques Mangenda Kabongo,¹² this request was granted by the Chamber on 10 April 2017.¹³
16. On 24 April 2017, the Defence filed its Appeal Brief against the Judgment of Conviction.¹⁴
17. On 10 July 2017, the Office of the Prosecutor ("Prosecution") filed its Consolidated Response to the defence appeal briefs.
18. On 11 July 2017, the Defence applied to the Chamber for a suspension of the time limit to seek leave to reply to the Prosecution Response.¹⁵
19. On 14 July 2017, the Chamber ruled that any requests for leave to reply to the Prosecution Response had to be filed by 16.00 on 24 July 2017.¹⁶

V. APPLICABLE LAW

20. Under regulation 24(5) of the Regulations of the Court ("RoC"), the parties may reply to a response only with the leave of the Chamber. Moreover, the party wishing to reply must show good cause.¹⁷
21. The Single Judge of Pre-Trial Chamber II cited two scenarios potentially demonstrative of good cause:
 - "when one or more issues arising from the response could not have been anticipated in [the replying party's] initial submission"; or
 - "when it would be beneficial for the Chamber to receive further submissions prior to the disposal of the matter under consideration".¹⁸

¹¹ ICC-01/05-01/13-2133.

¹² ICC-01/05-01/13-2134.

¹³ ICC-01/05-01/13-2136.

¹⁴ ICC-01/05-01/13-2147-Conf-Corr-tENG.

¹⁵ ICC-01/05-01/13-2171-Conf.

¹⁶ ICC-01/05-01/13-2175.

¹⁷ ICC-01/05-01/08-294, para. 3; ICC-01/04-01/10-6, p. 4.

¹⁸ ICC-01/05-01/13-112, p. 3.

22. With regard to the second scenario, there can be no doubt that fairness and the discovery of the truth are concerns of the highest order in trial proceedings before any court, including the International Criminal Court. The Court must therefore be fully and fairly informed in order to reach a decision that reflects the facts as accurately as possible.
23. Article 64(2) of the Statute rightly provides that “[t]he Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses”.
24. Moreover, it is a general principle of criminal law that the defence is entitled to address the court last. Article 21 of the Statute requires the Court to uphold this principle. In *Constantinescu v. Romania*, the European Court of Human Rights in Strasbourg, citing article 6(3)(b) of the European Convention on Human Rights – according to which all accused are afforded the right to “adequate time and facilities for the preparation of [their] defence”¹⁹ – stressed that “an accused’s right to address the court last is certainly of importance”.²⁰
25. Under regulation 34(c) of the RoC, if the Chamber grants leave to reply, any response to that reply must be filed within 10 days of notification of the response.

¹⁹ Article 67(1)(b) of the Rome Statute echoes these terms.

²⁰ European Court of Human Rights, [*Constantinescu v. Romania*](#), 27 June 2000, Application No. 28871/95.

VI. ISSUES TO BE ADDRESSED IN THE REPLY

26. The four main issues to be addressed in the reply, subject to the Chamber's leave to reply, are as follows:

- the Prosecution's failure to respond to the Defence Appeal Brief;
- the discussion surrounding the timing of the lifting of immunities from members of Mr Bemba's defence team in the Main Case;
- the Appeals Chamber's competence to reverse a judgment founded on an irregularity, even if that irregularity originates with the Presidency of the Court; and
- the Prosecution's misrepresentation of certain statements made by the Defence.

(1) The Prosecution failed to respond to the Defence Appeal Brief

27. The Prosecution Response to the Defence Appeal Brief merely juxtaposes paragraphs from the impugned Judgment. It disregards every key point developed in the Appeal Brief. Not once does it address the various rights violations and logical fallacies associated with Mr Babala's arbitrary implication in the instant case.

28. Rather than responding to the specific points of fact and law raised by the Defence, the Prosecution simply engages in gratuitous allegations. It fails to substantiate any specific or viable claims against Mr Babala.

29. The Prosecution fails to demonstrate that Mr Babala interfered with Defence witnesses or that the evidence concerning money transfers and communications was legal. It fails to establish Mr Babala's role in relation to Mr Bemba's defence team in the Main Case. It fails to show how the transfers made by Mr Babala to relatives of Witnesses D-57 and D-64 were different – in any way that might render them unlawful – from transfers executed by other people close to Mr Bemba or received by other witnesses. As far as the offence of corruptly influencing witnesses is concerned, the Prosecution fails, in both fact and law, to prove knowledge and intent on Mr Babala's part.

30. By any standard of legal rigour, the Prosecution also fails to answer the ground of appeal that the use of analogy and induction violated the principle of legality. Nor does it respond to the ground of appeal concerning the required mental element of knowledge and intent in addition to participation in the offence of corruptly influencing witnesses.

(2) The discussion surrounding the timing of the lifting of immunities from members of Mr Bemba's defence team in the Main Case

31. The Prosecution's arguments regarding the lifting of immunities from members of the Bemba defence team betray a failure to distinguish between investigative actions and an order for arrest.
32. The warrant of arrest that was issued after those immunities were lifted does not cover the investigative actions themselves, which the Prosecution undertook illegally before the lifting of the immunities of Mr Bemba's lead counsel and case manager. The Chamber should grant the Defence this opportunity to correct the Prosecution's patent confusion between an order for arrest and a series of investigative actions undertaken while Mr Bemba's defence team still enjoyed their privileges and immunities.
33. As the Prosecution noted in the opening paragraph of its Consolidated Response, this case is the first of its kind to be tried before the International Criminal Court. It therefore behoves the Appeals Chamber to satisfy the curiosity of the judicial and scholarly communities by clarifying, once and for all, in a landmark judgment, its approach to the fundamental issues raised by this "Article 70 case".
34. The Defence would like to correct the Prosecution's misrepresentation of its statements concerning the lifting of immunities from members of Mr Bemba's defence team. The Defence asserted not that those immunities covered any offences allegedly committed by the persons concerned but that their lifting after the proceedings had begun was a violation of law.

(3) The Appeals Chamber is competent to reverse a judgment founded on an irregularity, even if that irregularity originates with the Presidency of the Court

35. The Defence wishes to make clear that it has appealed the Judgment of the Trial Chamber, not the decision of the Presidency, and that the Appeals Chamber, now seized of the matter, may adjudicate irregularities arising from any source.

(4) The Prosecution misrepresents certain statements made by the Defence

36. In its reply, subject to the Chamber's leave, the Defence will seek to rectify some of the false claims with which the Prosecution Response is riddled. For example, it is false to claim that Mr Babala admitted to knowing the recipients of the transfers in their capacity as witnesses or relatives of witnesses.

37. The Prosecution takes several of the Defence's arguments out of context, alters their meaning, and then claims that they make no sense.

FOR THESE REASONS

The Defence hereby seeks the Chamber's leave to reply to the "Prosecution's Consolidated Response to the Appellants' Documents in Support of Appeal" so as to clarify the disputed points of fact, law and procedure in the Trial Chamber Judgment of 19 October 2016, and so that the Trial Chamber may consequently make a fully informed ruling.

AND JUSTICE SHALL BE DONE.

RESPECTFULLY SUBMITTED.

[signed]

Mr Jean-Pierre Kilenda Kakengi Basila
Counsel for Fidèle Babala Wandu

Dated this 24 July 2017

At Denderleeuw, East Flanders, Belgium