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No.: **ICC-02/04-01/05**
Date: **26 February 2025**

THE APPEALS CHAMBER

Before: Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Joanna Korner
Judge Gocha Lordkipanidze
Judge Erdenebalsuren Damdin

SITUATION IN THE REPUBLIC OF UGANDA

IN THE CASE OF

PROSECUTOR V. JOSEPH KONY

Public

Prosecution response to the “Request for Leave to Reply” in support of the Defence appeal

Source: Office of the Prosecutor

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INTRODUCTION

1. The request for leave to reply, filed by the Defence in support of its appeal against the decision ordering the confirmation of charges against Joseph Kony in his absence, should be dismissed.¹ All five of the issues identified as arising from the Prosecution’s response could reasonably have been anticipated by the Defence, and the proposed reply is not necessary for the Appeals Chamber’s adjudication of the matters before it in the present appeal.² Rather, the submissions proposed by the Defence—in addition to the five pages already set out in the Request itself—are nothing more than an attempt to supplement and elaborate upon the Defence arguments already set out in the Appeal. This should not be permitted.

SUBMISSIONS

2. Granting leave to reply lies within the Appeals Chamber’s discretion.³ The Appeals Chamber has granted leave in circumstances where the proposed reply addresses new issues that could not reasonably have been anticipated, or where the Appeals Chamber otherwise considered it necessary for the adjudication of the matter before it.⁴ In line with these principles, an appellant may not use a reply merely to strengthen arguments previously advanced,⁵ or to repeat submissions already made in its appeal brief.⁶

3. The Defence seeks leave to reply on the following five issues:

- a. Whether the Pre-Trial Chamber’s implication that persons who are merely inaccessible to the Court are excluded from the definition of ‘cannot be found’ was a mere *obiter dictum* (“First Issue”);⁷

¹ *Contra* [ICC-02/04-01/05-569 OA4](#) (“Request”), para. 14. *See also* [ICC-02/04-01/05-532](#) (“Decision”); [ICC-02/04-01/05-557 OA4](#) (“Appeal”); [ICC-02/04-01/05-566 OA4](#) (“Response”).

² *Contra* [Request](#), para. 7.

³ *See e.g.* [ICC-01/14-01/18-799 OA2](#) (“Yekatom Leave to Reply Decision”), para. 8; [ICC-01/04-02/06-1994 OA6](#) (“Ntaganda July 2017 Leave to Reply Decision”), para. 9; [ICC-01/04-02/06-1813 OA5](#) (“Ntaganda March 2017 Leave to Reply Decision”), para. 8. *See also* [ICC-01/04-02/06-2488 A](#) (“Ntaganda March 2020 Leave to Reply Decision”), para. 7.

⁴ *See* [Regulations of the Court](#), reg. 24(5). *See further e.g.* [ICC-02/18-66 OA](#) (“Venezuela Leave to Reply Decision”), paras. 10-11; [ICC-01/21-72 OA](#) (“Philippines Leave to Reply Decision”), paras. 6-7; [ICC-02/17-206 OA5](#) (“Afghanistan Leave to Reply Decision”), paras. 7-8; [Yekatom Leave to Reply Decision](#), para. 8; [Ntaganda July 2017 Leave to Reply Decision](#), para. 9; [Ntaganda March 2017 Leave to Reply Decision](#), para. 8. *See also* [Request](#), paras. 4-6.

⁵ *See e.g.* [ICC-01/04-02/12-296-tENG](#) (“Ngudjolo Leave to Reply Decision”), para. 7.

⁶ *See e.g.* [Ntaganda March 2020 Leave to Reply Decision](#), para. 8.

⁷ *See* [Request](#), para. 8.

- b. Whether the “subject to” clause in article 61(1) of the Statute excludes for the purpose of confirmations *in absentia* the application of the requirement for an initial appearance in article 60(1) (“Second Issue”);⁸
- c. Whether the “all reasonable steps” requirement in article 61(2) of the Statute, read with rule 121(3), supports the view that an initial appearance under article 60(1) is not a prerequisite for a confirmation *in absentia* (“Third Issue”);⁹
- d. Whether quotations from academic commentary made by the Prosecution were taken out of context (“Fourth Issue”);¹⁰
- e. Whether the Pre-Trial Chamber’s interpretation of article 61(2) is consistent with the object and purpose of the Statute (“Fifth Issue”).¹¹

4. All these issues could reasonably have been anticipated by the Defence. Further submissions on these issues are not required by the Appeals Chamber in adjudicating the Appeal.

5. In general, it is neither remarkable nor unforeseeable that a respondent might clarify what it regards as essential to the correctness of the reasoning in the impugned decision, and what is not, as the Prosecution did.¹² This is a routine aspect of appellate litigation. Likewise, and especially since the Pre-Trial Chamber and the Parties all concurred that the Statute is to be interpreted by means of the general rule of interpretation in article 31(1) of the Vienna

⁸ See [Request](#), para. 9.

⁹ See [Request](#), para. 10.

¹⁰ See [Request](#), para. 11.

¹¹ See [Request](#), para. 12.

¹² *Contra* [Request](#), paras. 2-3 (suggesting that “several submissions” in the Response “actually contradict” the reasoning in the Decision). *But compare e.g.* [Response](#), paras. 6 (noting that “[e]ven if the Appeals Chamber were to adopt different reasoning to the Chamber in some respects, this does not itself suffice to show a reversible error”, and in fn. 11, “[w]hat matters is that the Chamber’s ultimate conclusion was correct”), 8 (“the Chamber correctly interpreted article 61(2)(b)”), 13-15 (comparing the Chamber’s interpretation of the terms of article 61(2)(b) with that of the Defence, and submitting that “the Defence’s alternative definition of ‘cannot be found’ is not convincing”), 20 (submitting that “the Chamber’s understanding of the ordinary meaning of the terms of article 61(2)(b) does not lead to ‘manifestly absurd’ results or any inequality in the application of the law”, and in that context submitting that even if the “the *obiter dicta* of the Chamber highlighted by the Defence may be seen as somewhat anomalous, and unsupported by authority, *at most* these amount to *harmless error*” and, “[i]n any event, these comments were *not integral to the Chamber’s reasoning*, and *go to matters beyond the scope of this appeal*”, emphasis added), 21 (submitting that “[t]he context provided by other provisions of the Statute, as well as the Rules, strongly supports the Chamber’s interpretation of article 61(2)(b)”). See also para. 7 (recalling that the present appeal is “concerned only with the question whether or not an initial appearance before the Court is a prerequisite for a confirmation *in absentia*” and expressly stating that “the Appeals Chamber need not enter into” hypothetical questions concerning “the approach of the Court in future cases in determining precisely when such proceedings should be ordered”).

Convention on the Law of Treaties (“VCLT”),¹³ it was to be expected that the Prosecution would address all three limbs of this test, showing that the Chamber’s conclusion was correct.¹⁴ The Prosecution was not bound to limit its arguments to the expressly stated reasoning of the Chamber—nor did the Chamber state in terms that such matters were “irrelevant”, as the Defence contends.¹⁵

6. Furthermore, considered individually, nothing in the five proposed issues necessitates a reply. Notably:

- a. The First, Second, and Third Issues all concern the Defence view of the merits of the issue which is the central focus of dispute between the Parties in these proceedings—the interpretation of the relevant provisions of article 61, and the correctness of the Chamber’s conclusion.¹⁶ Both Parties have had a full and equal opportunity to set out their views in this respect, and there is no need for these to be further augmented. Indeed, with respect to the Second Issue in particular, since the Defence acknowledges that it *had* “anticipated some of the arguments now advanced”,¹⁷ a reply is not justified simply to allow a further opportunity to address those arguments in detail. Nor was there anything unforeseeable even in that detail, which was itself explicit in a source cited by both the Defence and the Prosecution.¹⁸

¹³ See e.g. [Decision](#), paras. 32 (fn. 55: expressly citing article 31(1) of the VCLT), 34 (referring to “the general rule of interpretation contained in article 31 of the VCLT”); [Appeal](#), paras 6 (criticising the Chamber’s alleged “failure to interpret Articles 60 and 61 holistically”), 9 (quoting the Appeals Chamber as requiring the interpretation of the Statute according to the VCLT), 32; [Response](#), paras. 1, 8, 11, 15, 21, 28, 33.

¹⁴ *Contra* [Request](#), paras. 2-3. See e.g. [Response](#), paras. 13-20 (ordinary meaning of the terms), 21-27 (context), 28-30 (object and purpose).

¹⁵ *Contra* [Request](#), para. 2. The Chamber had rejected the Defence argument that, in its own prior reasoning, Pre-Trial Chamber II had been obliged “to provide further legal authority for its interpretation of article 61(2)(b) of the Statute because this interpretation was grounded in the ‘ordinary meaning’ of the disjunctive term [...] whereas the references to the jurisprudence of the Special Tribunal for Lebanon [...] served as a comparison rather than the sole basis for its interpretation”: [Decision](#), para. 32 (citing [ICC-02/04-01/05-466](#) (“Pre-Trial Chamber II Decision”), paras. 29 (fn. 40), 33 (fn. 41)). The Chamber then proceeded to consider “the contextual argument put forward by the Defence”: [Decision](#), para. 33. The Chamber concluded by rejecting the need to examine the preparatory work of the Statute, since this is only “a supplementary method of interpretation to which recourse may be had if the general rule of interpretation” is insufficient and that, in its view “[i]n the present case,” relying on “the use of the disjunctive ‘or’ in article 61(2)(b)”, there was “no need to have recourse to the preparatory work”: [Decision](#), para. 34.

¹⁶ [Request](#), paras. 8-10.

¹⁷ [Request](#), para. 9.

¹⁸ See [Appeal](#), paras. 23, 26-27 (referring to [E. Trendafilova, ‘Fairness and expeditiousness in the International Criminal Court’s pre-trial proceedings,’ in C. Stahn and G. Sluiter \(eds.\), The Emerging Practice of the International Criminal Court \(Martinus Nijhoff: 2009\)](#) (“Trendafilova”)); [Response](#), paras. 13, 19, 22, especially para. 19 (citing [Trendafilova](#), pp. 453-454). Compare e.g. [Request](#), para. 9 (requesting “leave specifically to address the validity of the Prosecution’s arguments that the words ‘subject to’ must, or even should, be interpreted as creating an exception to [...] Article 60(1)”, with [Trendafilova](#), p. 453 (“The force and effect of Article 61(1)

- b. The Fourth Issue merely claims the necessity of reviewing the context of references made by the Prosecution in the Response.¹⁹ The Appeals Chamber requires no further assistance from the Parties in this regard. While the Prosecution considers that the context of these references was obvious, out of an abundance of caution it willingly places into the record here the full passage of the specific reference identified by the Defence²⁰—even though it does not consider this to be inconsistent with its own submissions or to require any particular clarification.²¹ Likewise, having already made its own submissions on its view of relevant academic commentary, the Defence is not entitled to reply merely because the Prosecution identified the views of different commentators.²²
- c. The Defence seeks to use the Fifth Issue to remedy an apparent oversight in its own Appeal.²³ In criticising the reasoning of the Chamber concerning the ordinary meaning of the terms of article 61(2)(b), the Defence had stressed one of the other limbs of the general rule of interpretation in article 31(1) of the VCLT (context). In response, the Prosecution merely—and predictably—addressed all three limbs of this rule. This justifies no reply.

CONCLUSION

7. For all the reasons above, the Request should be dismissed.

is qualified. It[] [...] is explicitly ‘subject to the provisions of paragraph 2’ [...] It is thus logical to assume that the wording of Article 61(1), ‘*subject to*’, gives Article 61(2) an independent meaning and leaves room for a confirmation hearing *in absentia* when there has been no initial appearance”).

¹⁹ [Request](#), para. 11.

²⁰ The Prosecution notes that it made no citation directly for the proposition identified by the Defence that “[i]f anything, the drafting history of the Rules tends to suggest that prior presence was not considered a requirement for a confirmation *in absentia* under Article 61(2), consistent with the statutory framework set out above”: compare [Request](#), para. 11 (text accompanying fn. 20), with [Response](#), para. 42 (first sentence). However, assuming that the Defence refers to the quoted text in the third sentence of paragraph 42 of the Response, the “omitted sentence immediately following the quoted passage” reads as follows: “As a result, the solution chosen was that a *person arrested or served with a summons* to appear (see art. 58) should be notified of the provisions of such hearings”: see H. Friman, ‘Investigation and prosecution,’ in R.S. Lee *et al.* (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers: 2001), p. 528 (emphasis added).

²¹ See e.g. [Response](#), paras. 25-26, 42.

²² *Contra* [Request](#), para. 11. Compare [Appeal](#), para. 27 (referring to “numerous eminent commentators”, and citing three authorities in fn. 42), with [Response](#), para. 19 (suggesting that “the three commentators highlighted by the Defence [...] are in the minority”, and citing additional authorities in fn. 46).

²³ [Request](#), para. 12. See further e.g. [Response](#), para. 28.

A handwritten signature in blue ink, consisting of a stylized 'K' followed by a horizontal line and a small dot.

Karim A. A. Khan KC, Prosecutor

Dated this 26th day of February 2025

At The Hague, the Netherlands