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No.: ICC-01/05-01/08 A

Date: 31 October 2016

THE APPEALS CHAMBER

Before: Judge Christine Van den Wyngaert, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Chile Eboe-Osuji
Judge Piotr Hofmański

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

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

Public

Request for an extension of the page limit

Source: Office of the Prosecutor

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Introduction

1. The Prosecution respectfully requests a 20% extension of the page limit for the Prosecution response to the document supporting Mr Bemba's appeal,¹ to allow a brief of no more than 240 pages. The extension is necessary, in the particular circumstances of this case, to provide necessary legal and factual context to the appellant's submissions. This will assist the Appeals Chamber in deciding the case, and promote the fair and expeditious conduct of these proceedings. These are exceptional circumstances.

2. Should the Appeals Chamber grant the relief requested, the Prosecution will a.) not object if the appellant requests leave to reply in support of his arguments concerning the Trial Chamber's approach to causation;² and b.) not object to the appellant receiving a proportionately equivalent extension for any reply permitted by the Appeals Chamber.³ The Prosecution requests a decision on an expedited basis.

Submissions

3. The Appeals Chamber has already determined that, as "the present appeal is the first directed at a decision on criminal responsibility under article 28 of the Statute," it "may raise both complex and novel issues."⁴ For this reason, it authorised the appellant to file a document in support of appeal of twice the usual length. The appellant used every page permitted.⁵

4. Although the Prosecution agrees that a response should ordinarily be limited to the same length as the document in support of the appeal, it may be appropriate in exceptional circumstances to depart from this position. This is such a case, where granting leave to file an extended response brief will promote a clear understanding

¹ See Regulations of the Court, reg. 37(2).

² See reg. 60(1). *But see below* fn. 6.

³ See reg. 60(2).

⁴ ICC-01/05-01/08-3405 A, para. 10. *See also* ICC-01/05-01/08-3370 A, para. 6.

⁵ *See e.g.* ICC-01/05-01/08-3434-Red ("Appeal Brief").

of the issues on appeal and favour judicial economy. Moreover, given the likelihood that the appellant may seek leave to reply in support of his appeal, under regulation 60(1), the Appeals Chamber can still regulate the briefing process to ensure fairness between the Parties.

5. For the reasons set out below therefore, and in the particular circumstances of this appeal, the Prosecution considers that a 20% extension of its response is reasonable and justified, resulting in a brief of 240 pages. Correspondingly, should the appellant be granted leave to reply,⁶ the Prosecution would not object to a similar 20% extension of its reply, resulting in a brief of 60 pages.⁷ Overall, the appellant would then have filed up to 260 pages of submissions before the Appeals Chamber (still 20 more pages than the Prosecution).

A. The appellant's submissions must be contextualized

6. In his brief, the appellant raises eight grounds of appeal, each compound in nature, asserting multiple errors of law, fact, and procedure. He challenges the fairness of his trial, notice of the charges, the law and facts pertaining to every element of superior responsibility, the requirements of the *chapeau* for crimes against humanity, the law of pillage, key aspects of the crime-base, the reliance on certain witnesses, and the conduct of the legal representatives of victims. The appellant has articulated as broad an appeal as he possibly can.

7. It is in the nature of appellate advocacy that, on occasion, the appellant's role is to focus attention on particular issues, and the respondent's role is to put those issues back in their broader context. The Appeals Chamber benefits from both perspectives. In this case, the appellant's submissions very frequently require the Prosecution to provide a clear explanation of the context for findings or legal

⁶ If the requested extension is granted, the Prosecution will stipulate that leave to reply, at least on the issue of causation, may be in the interests of justice. The Prosecution reserves its position, however, on the merits of granting leave to reply on other grounds.

⁷ See reg. 60(2).

conclusions in the Judgment. The space required to provide such context is greater than the space required simply to challenge a particular issue.

8. Without entering into the merits of the appeal, three examples—one procedural, one legal, and one factual—suffice to demonstrate why, exceptionally, the Appeals Chamber should grant the requested extension of pages. The same approach underlying these examples is perceptible through much of the appellant’s brief.

- The appellant challenges the extent to which he had notice of the charges against him. In just five pages, he asserts that “[n]early two thirds of the underlying acts for which Mr. Bemba was convicted” were not adequately charged.⁸ He thus succinctly puts in contention the adequacy of the charging of more than 30 distinct incidents. To meaningfully assist the Appeals Chamber, the response will need to set out the applicable law and show how adequate notice was provided in each of these cases.
- The appellant challenges the Chamber’s legal determination concerning the standard employed in its causation analysis, and the way in which this was applied. The appellant’s argument is pithy, lasting just four pages.⁹ Indeed, it states its view of the impact of this alleged error in a matter of sentences. Yet the Prosecution response must necessarily engage with the legal premise underlying this challenge, which requires explanation of the nature and origin of the reference to causation in article 28 in the first place. This is inherent in any meaningful response to the appeal. Furthermore, it is an issue of first impression before the Appeals Chamber, and may be highly significant in the future jurisprudence of the Court.

⁸ Appeal Brief, para. 115. *See also* paras. 116-128.

⁹ *See e.g.* Appeal Brief, paras. 381-393.

- The appellant repeatedly claims a lack of material reasoning in the Judgment, especially in the context of factual matters.¹⁰ Whereas such arguments can be *made* very succinctly, they typically require much greater detail in response. In each case, the Prosecution must briefly explain the nature of the reasoning in the Judgment, and provide suitable citations to assist the Parties and the Appeals Chamber.

9. The Prosecution notes, moreover, that the requirement of regulation 36(3) for an average of 300 words per page is very difficult to meet with even moderate use of references in footnotes. (For example, even *this* page contains 375 words.) As a result, to the extent that a page requires detailed citation to passages of the Judgment or to the evidence, it rapidly exceeds the average word count and thus must be counted as more than one page. In practice, three pages of text with close footnoting, or string citations to evidence or the Judgment or citations to relevant law, count as approximately *four* pages for the purpose of regulation 36.¹¹

10. In this context, it is noteworthy that the appellant, consistent with the way in which he has legitimately chosen to present his appeal, makes relatively few citations to the Judgment or evidence. Yet even these modest citations account for approximately 9,860 words, very nearly a sixth of his brief, and go to the very limit allowed by regulation 36(3).¹² If the response makes greater use of footnotes than the appellant, which is not unlikely and may be in the interests of justice, it will necessarily be unable to file the same number of pages.

11. Furthermore, well developed written arguments assist the Appeals Chamber in conducting this appeal. They will not only allow the Parties and participants to ventilate the issues of concern fully, but will also enable future proceedings,

¹⁰ See *e.g.* Appeal Brief, paras. 162, 167, 170, 206-207, 227-228, 298, 312, 339, 427, 431-432, 440, 442, 468, 509.

¹¹ In practice, this phenomenon substantially reduces the number of pages available to a respondent—from 200 pages to approximately 150, even complying in all other respects with the requirement of regulation 36(3).

¹² The appellant reports that his entire brief contains 59,461 words, which is an average of 298 words per page.

including any oral hearing,¹³ to be conducted in a more focused way. Conversely, limiting the Prosecution's ability to respond properly to the various arguments raised by the appellant may require greater clarification or amplification later in the proceedings.

B. The appellant is not disadvantaged by granting the requested extension

12. By making this request, the Prosecution does not seek to 'ambush' the appellant, or to gain partisan advantage. Accordingly, it makes two stipulations in the event the Appeals Chamber grants the requested extension. The Prosecution will not oppose grant of leave to reply regarding the meaning of the reference to causation in article 28 (which it anticipates the appellant may wish to seek), and it will not oppose a 20% extension to the page limit for any such reply brief.

Conclusion

13. For all the reasons above, the Appeals Chamber should grant the motion requesting a 20% extension of the page limit, and thus authorise the Prosecution to file a response to the Appeal Brief not exceeding 240 pages.

14. Given the imminent deadline for filing the response brief (21 November 2016), which the Prosecution has not sought to extend,¹⁴ the Prosecution respectfully requests that the Appeals Chamber decide this request on an expedited basis.

Word count: 1,785¹⁵

¹³ ICC-01/04-02/12-199 A, para. 13 (considering that "the decision to hold an oral hearing in appeal proceedings against final judgments is discretionary and made on a case-by-case basis", "based primarily on the potential utility of an oral hearing, namely whether it would assist the Appeals Chamber in clarifying and resolving the issues raised in the appeal"). *See further* ICC-01/04-02/12-193-Red, paras. 12-16.

¹⁴ *Cf.* ICC-01/05-01/08-3370 A (granting the appellant an extension of time for the Appeal Brief).

¹⁵ The Prosecution hereby makes the required certification: ICC-01/11-01/11-565 OA6, para. 32.



Fatou Bensouda, Prosecutor

Dated this 31st day of October 2016

At The Hague, The Netherlands