

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/05-01/08**
Date: **1 December 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

Confidential

Prosecution's response to Bemba's request for leave to reply to "Prosecution's response to Bemba's application to present additional evidence in the appeal"

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr James Stewart
Ms Helen Brady

Counsel for the Defence

Mr Peter Haynes
Ms Kate Gibson
Mr Kai Ambos
Mr Michael A. Newton

Legal Representatives of the Victims

Ms Marie-Edith Douzima-Lawson

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

The Office of Public Counsel for Victims

Ms Paolina Massidda

The Office of Public Counsel for the Defence

Mr Xavier-Jean Keita

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**

Introduction

1. On 28 November 2016, Bemba sought leave to reply to the Prosecution's response on his Additional Evidence Application.¹ His Request is cursory and cryptic. Bemba presents the Appeals Chamber with a list of issues upon which he intends to reply, but provides no supporting legal arguments. The Chamber and the Parties are left to second-guess the reasons for the Request. As such, Bemba simply fails to show good cause for such reply.² The Appeals Chamber should dismiss his Request.

Classification

2. The Prosecution files this submission as "Confidential" pursuant to regulation 23bis(1), since it refers to confidential decisions. This submission can be reclassified as public, once public versions of the relevant decisions are available.

Submissions

a) Bemba fails to show good cause

3. To secure leave to reply, the requesting party must show good cause.³ In general, a "reply must be narrowly tailored to only address new issues" raised in a response,⁴ which "could not have been foreseen".⁵ Moreover, replies are only permitted if the Chambers will benefit from such additional submissions⁶ and "may

¹ ICC-01/05-01/08-3473 A ("Request" or "Request for Leave to Reply"). See also ICC-01/05-01/08-3435-Red A ("Application" or "Additional Evidence Application") and ICC-01/05-01/08-3471-Conf A ("Prosecution's Response").

² ICC-01/05-01/08-3446-Conf A ("Additional Evidence Procedure Decision"), para. 7 (The submissions [on additional evidence] should be contained in separate filings). Regulation 24(5) of the Regulations of the Court thus applies. See also regulation 60.

³ See e.g., ICC-01/05-01/08-294 ("Bemba Decision"), paras. 1-3; ICC-02/04-01/15-252 ("Ongwen Decision"), p. 3.

⁴ See ICC-01/05-01/08-3165-Red ("Bemba Disclosure Decision"), para. 5. See also ICC-01/05-01/13-893-Red ("Bemba et al. Decision"), para. 10 (rejecting a request for "leave to reply in order to clarify the record in the face of alleged misrepresentations" because "it does not identify any new issue which arises from the [...] Response").

⁵ See e.g., ICC-02/11-01/15-284 ("Gbagbo Blé Goudé Decision"), para. 11.

⁶ See e.g., ICC-02/11-01/11-775 ("Gbagbo Decision"), para. 7 ("[t]he Chamber may benefit from [...] submissions in reply"); ICC-01/05-01/08-3233 ("Bemba Relief Decision"), para. 10 ("the Chamber [...] may benefit from [...] views on the nine issues identified[...]"). See Bemba Disclosure Decision, para. 5 ("[t]he Chamber

not be used to strengthen the arguments" previously advanced.⁷ Additional submissions on issues falling reasonably within the scope of the moving party's original arguments do not assist the Chamber.⁸ Nor do additional submissions on irrelevant matters⁹ or those which have been extensively rehearsed, even if the Parties disagree, or quite simply, have a different view.

4. Granting leave to reply lies within a Chamber's discretion. Yet, Bemba has given the Appeals Chamber no reason to exercise its discretion in his favour. His Request merely sets out five issues¹⁰—apparently canvassing wide-ranging, and often irrelevant, subject-matter—but advances no supporting argument.¹¹ The Request sweepingly claims—without any substantiation—that it would be in "the interests of justice".¹² But it fails to articulate the legal test for leave to reply—let alone to meet it. Nor does it attempt to show that the Five Issues—individually or cumulatively—are pertinent issues for such reply. Apart from hinting that there are "a number of arguments" to which he claims "a right to reply",¹³ Bemba fails to even specify which submissions contained in the Prosecution's Response raised new issues warranting a reply. Moreover, the Request obscures the relevance of the Five Issues to the Additional Evidence Application, and to the 23 documents tendered.

is of the view that it may benefit from the defence's views on certain issues set out in its Request"); ICC-01/09-02/11-979 ("*Kenyatta* Decision"), para. 6 ("the Request for Leave to Reply identifies some new issues of law and fact on which [the Chamber] may benefit from receiving further observations; [...] the Chamber is not persuaded that submissions on the remainder of the issues would be of assistance to it").

⁷ See e.g., ICC-01/04-02/12-296-tENG ("*Ngudjolo* Decision"), paras. 6-7.

⁸ See e.g., ICC-01/09-01/11-1417 OA7 OA8 ("*Ruto* Decision"), para. 13 (rejecting a request to make additional submissions—albeit under regulation 28—on the basis that the issues for which leave was sought fell "within the ambit of the issues on appeal", that the arguments in response were "foreseeable" in the circumstances, and that the applicants had already received the material possibility of presenting "all arguments" within the scope of their appeals).

⁹ ICC-01/04-01/06-824 OA7 ("*Lubanga* Decision"), para. 67 (finding that the leave to reply was "unnecessary" and "not relevant to the deliberations of the Appeals Chamber").

¹⁰ Here, "Five Issues", "Issues".

¹¹ See e.g., Request, paras. 1-9 (stating only that "a focused and limited reply to the arguments contained in the Prosecution Response will assist the Appeals Chamber[...]" and "[his] right to reply would be in the interests of justice").

¹² Request, para. 9.

¹³ *Ibid.*

Indeed, Bemba's Request for Leave to Reply suffers from the same flaws that affected his Additional Evidence Application.

5. A reply cannot be a veiled effort to bolster a poorly substantiated initial application, nor can it serve to correct oversights that may have later come to light. Nor, having regard to the principle of judicial economy, will the Chamber be assisted by repetitive and unclear detail. And, as shown below, Bemba's submissions on the Five Issues shed no further light.

b) The Five Issues are unsubstantiated

6. All Five Issues are vague and poorly substantiated. They do not show good cause for a reply.

7. The First Issue—whether the Prosecution's submissions are consistent with the Court's statutory framework, particularly regulation 62(1) of the Regulations of the Court, jurisprudence, and/or its own previously advocated practice¹⁴—appears to challenge the Prosecution's Response *vis-à-vis* the statutory framework. Yet, Bemba does not identify which portions of the Prosecution's Response he considers affected, nor why regulation 62(1) or the Prosecution's purported previous practice is significant to any proposed reply. Critically, Bemba fails to specify how the Prosecution's submissions were novel so as to warrant a reply. Indeed they were not: the Prosecution's submissions—contrary to the Additional Evidence Application—complied with the existing statutory framework and the governing law on additional evidence at this Court. If Bemba wished to expand on the details of the statutory framework, his initial Additional Evidence Application—and not a reply—was the appropriate avenue.

¹⁴ Request, para. 9(i).

8. The Second Issue—whether the test now advocated by the Prosecution properly applies to documents already in the Parties’ possession and merely illustrative of procedural aspects of the trial rather than evidence undermining findings of fact¹⁵—appears to challenge the *Lubanga* Appeals Chamber’s standard on additional evidence. Indeed, the Prosecution relied on that standard.¹⁶ This standard is not new. Rather, it has been this Court’s established law since December 2014. It applies to all documents and material tendered as additional evidence. Bemba’s Additional Evidence Application even referred to this standard.¹⁷ Nor is the standard for summary dismissal novel—it has long been the practice at the Court.¹⁸ Nor is the Prosecution’s reliance on case-law a novel issue so as to warrant a reply.¹⁹ No further elucidation is required.

9. The Third Issue—whether a prolonged period of non-disclosure as identified by the Trial Chamber itself is relevant to the Prosecution’s arguments based on an alleged failure by the Appellant to have raised certain issues before the Trial Chamber²⁰—is no more than an impermissible effort to bolster the initial Application. Bemba fails to identify any particular novelty with the Prosecution’s Response. Nor does he claim that he could not have foreseen these arguments. Rather, the Issue remains opaque. Bemba neither identifies the purported “prolonged period of non-disclosure”, nor the “certain issues” he alleges. Nor has he shown how this relates to the Prosecution’s Response, if at all.

10. The Fourth Issue—whether the Prosecution’s conduct under the rubric of the Article 70 case can properly be hermetically sealed from the assessment of the

¹⁵ Request, para. 9(ii).

¹⁶ See ICC-01/04-01/06-3121-Red A5 (“*Lubanga* AJ”), paras. 53-64; Prosecution’s Response, paras. 6-34.

¹⁷ Additional Evidence Application, paras. 6-11.

¹⁸ See e.g., *Lubanga* AJ, paras. 29-34.

¹⁹ ICC-01/04-01/07-3697 OA15 (“*Katanga* Decision”), paras. 5-6 (rejecting Katanga’s request to reply to address the jurisprudence advanced in the Prosecution’s response).

²⁰ Request, para. 9(iii).

fairness of the Main Case²¹—yet again, distorts the boundaries between the two cases. However, the Defence’s opinion on the conduct of the two cases does not fall within the proper scope of the reply. Bemba does not challenge any particular aspect of the Prosecution’s submissions as new. Nor has he shown that he was deprived in any way from expressing himself fully in his initial Application. That he may disagree with the Prosecution’s and Chambers’ stated positions is not reason enough for a reply.

11. The Fifth Issue—the impact of the Prosecution’s submission that the Appeals Chamber maintain a strict separation between the Article 70 Case and the Main Case on the Prosecution’s own reliance on and references to the Article 70 conviction throughout the Prosecution’s Response Appeal Brief²²—is irrelevant to the Prosecution’s Response. Indeed, in its response and in a single footnote, the Prosecution acknowledged the Trial Judgment in the *CAR article 70* case, for accuracy and completeness of the record.²³ Such a citation does not warrant a reply. Nor does Bemba appear to be concerned by it. Rather, he appears to incorrectly suggest that the Prosecution cannot refer to this Court’s case law in the *CAR article 70* case, in its *Response Appeal Brief* (emphasis added). Bemba, through the Fifth Issue, thus seeks to reply—inappropriately, without first seeking leave—to the Prosecution’s *Response Appeal Brief*. No reply can thus be justified. Nor is a mere reference to judicial records of another case in a Court filing a proper basis for a reply. Bemba himself has done so several times.²⁴ The Issue—relying only on the fact that the Prosecution cited the *CAR article 70* Trial Judgment—cannot show that a strict separation *in the conduct* of the two cases should not be maintained (emphasis added).

²¹ Request, para. 9(iv).

²² Request, para. 9(v).

²³ See Prosecution’s Response, footnote 3.

²⁴ See e.g., ICC-01/05-01/08-3434-Red (“Bemba’s Conviction Appeal Brief”), fns. 37, 38, 58, 59, 60, 61, 62, 63, 64, 65, 67, 182, 183, 205, 206, 207, 209 (citing the *CAR article 70* record).

12. The Appeals Chamber will not be assisted by further submissions on any of the Issues. Not only are they vague and unspecified, Bemba has not discharged his burden to justify such a reply. Moreover, Bemba will have a further opportunity to reply to the victims' observations on additional evidence, if he deems it so necessary.²⁵ Rather than triggering unnecessary litigation at this stage, and depending on the content of the victims' observations, Bemba may preserve his submissions for that later stage.

Conclusion

13. The Request fails to show good cause for a reply. The Prosecution therefore requests the Appeals Chamber to dismiss the Request for Leave to Reply.

Word count: 2010²⁶



Fatou Bensouda, Prosecutor

Dated this 1st day of December 2016

At The Hague, The Netherlands

²⁵ Additional Evidence Procedure Decision, p. 3.

²⁶ The Prosecution hereby makes the required certification: ICC-01/11-01/11-565 OA6, para. 32.