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

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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

**Prosecution's Response to Request for Leave to Reply to the "Prosecution's
response to Appellant's Document in Support of 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 Other
Section**

Introduction

1. The Prosecution previously recognised that the Defence may wish to reply concerning the existence of any causation requirement in article 28 of the Rome Statute,¹ as it now requests.² Accordingly, the Prosecution does not object to grant of a limited reply in this respect. The Prosecution takes this position primarily in the interest of a full and fair hearing of the merits of this important issue. Moreover, although the position of a Party necessarily cannot usurp the decision-making power of the Appeals Chamber, appropriate stipulations between counsel contribute to fair, expeditious, and responsible litigation, as well as professional comity.³
2. The Appeals Chamber should otherwise deny the Request, however, for its failure to show the requisite good cause on the other grounds advanced. Authorising a reply in these respects is not in the interests of justice.
3. Finally, to the extent any reply is authorised, the Appeals Chamber should set appropriate time and page limits. In the circumstances, the Prosecution considers that any reply should not exceed 20 pages in length, filed within no more than 30 days of the Appeals Chamber's order.

Submissions

4. Leave to reply will generally be granted only on showing of good cause.⁴ If permitted, replies must be “narrowly tailored to only address new issues”⁵ raised in a response which “could not have been foreseen”,⁶ and “may not be used to

¹ [ICC-01/05-01/08-3456 A](#), paras. 2, 12.

² See ICC-01/05-01/08-3475 A (“Request”), para. 15.

³ Cf. [ICC-01/05-01/08-3462 A](#), para. 13.

⁴ See e.g. [ICC-01/05-01/08-294](#), para. 3; [ICC-02/04-01/15-252](#), p. 3.

⁵ [ICC-01/05-01/08-3165-Red](#), para. 5. See also [ICC-01/05-01/13-893-Red](#), 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”).

⁶ [ICC-02/11-01/15-284 OA7](#), para. 11.

strengthen the arguments” previously advanced.⁷ The Appeals Chamber will generally not be assisted by submissions which are irrelevant,⁸ or which fell reasonably within the scope of the moving party’s original arguments.⁹

5. The regime under regulation 60 of the Regulations of the Court,¹⁰ which is “always discretionary and should be decided on a case-by-case basis”,¹¹ should not depart from these principles.

6. Although the Prosecution notes the practice in *Ngudjolo* whereby the Defence was granted leave to *respond* to a reply filed by the Prosecution (as appellant), based on rule 140(2)(d),¹² it is doubtful that this principle directly applies to regulation 60.

- First, although the Rules do, of course, have primacy over the Regulations, the application of rule 140(2)(d)—“[t]he defence shall have the right to be the last to examine a witness”—is, in these circumstances, far from clear.¹³
- Second, and conversely, the plain terms of regulation 60 clearly evince the understanding that the Parties are equal, that neither has an automatic right to a reply, and that instead replies are only authorised when it is in the interests of justice to do so.¹⁴
- Third, since the Defence may further be permitted the last word in any oral hearing convened in 2017, it is premature and unnecessary to grant leave to

⁷ [ICC-01/04-02/12-296-tENG](#), para. 7.

⁸ [ICC-01/04-01/06-824 OA7](#), para. 67 (finding that leave to reply was “unnecessary” and “not relevant to the deliberations of the Appeals Chamber”).

⁹ See e.g. [ICC-01/09-01/11-1417 OA7 OA8](#), para. 13 (rejecting a request to make additional submissions—albeit under regulation 28, rather than as a reply—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).

¹⁰ See regulation 60(1) (“Whenever the Appeals Chamber considers it necessary in the interests of justice, it may order the appellant to file a reply within such time as it may specify in its order”).

¹¹ [ICC-01/04-01/06-2982 A5 A6](#) (“*Lubanga* Decision”), para. 7.

¹² See Request, para. 13. See also ICC-01/04-02/12-123-Conf A (“*Ngudjolo* Confidential Decision”), para. 9.

¹³ If anything, rule 141(2), *mutatis mutandis*, may be more instructive.

¹⁴ See also *above* para. 5.

reply on this basis. Indeed, in *Ngudjolo*, the Appeals Chamber subsequently ruled that allowing Mr Ngudjolo to make a personal address at the conclusion of the *appeal hearing* gave “full effect” to his right to “speak last”.¹⁵

- Finally, any Defence right to the “last word” can mean only what it says. It is necessarily a unitary phenomenon. Applying any such right incrementally throughout the proceedings would thus not only be inconsistent with this defining quality, but also inefficient, cumbersome and contrary to the established motion practice of this and other courts.

7. These principles as a whole lead to the conclusion that the Request may, at most, be granted only in part.

A. Leave to reply is warranted on one issue only

8. The Request correctly notes that the Prosecution opposes the appeal against the Trial Chamber’s approach to the causal standard on the basis, among others, that article 28 requires no causal contribution at all to the subordinates’ crimes.¹⁶ The Prosecution thus seeks to show the error in a premise assumed by the Defence in its appeal.¹⁷

9. Neither of the two specific reasons advanced by the Defence as justifying a reply on the issue of causation is convincing.

- First, the Defence is incorrect to assert that the Prosecution’s position on causation was “never advanced at trial”.¹⁸ This is evident not only from the Response Brief,¹⁹ but also the separate opinions of both Judges Steiner and

¹⁵ [ICC-01/04-02/12-217 A](#), para. 10.

¹⁶ See Request, para. 14; ICC-01/05-01/08-3472-Conf A (“Response Brief”), paras. 220-274; [ICC-01/05-01/08-3434-Red A](#) (“Appeal Brief”), paras. 381-413. The Prosecution will file a public redacted version of the Response Brief shortly.

¹⁷ See Response Brief, paras. 220, 223-225.

¹⁸ *Contra* Request, para. 14.

¹⁹ Response Brief, para. 225 (fn. 821).

Ozaki.²⁰ Accordingly, the Defence claim that it must respond to the “propriety” of the Prosecution “asserting a position in response on appeal which it never presented to the finder of fact at first instance, and which is inconsistent with its position at trial” is misconceived and does not arise in the present circumstances.²¹

- Second, precisely because the Defence appeal in relevant part is premised on the assumption that article 28 *requires* a causal contribution to the subordinates’ crimes, there is nothing improper or unforeseeable in the Prosecution challenging the correctness of that assumption.²² The Prosecution was not obliged to appeal the Chamber’s contrary finding, nor indeed could it legally do so.²³ This does not alter the Appeals Chamber’s task now to decide the Defence appeal based on the correct law. Accordingly, this procedural question is not appropriate subject-matter for a reply.

10. Nonetheless, the Prosecution does not oppose grant of a limited reply to address the substantive legal issues in paragraphs 226 to 253 of the Response Brief, notwithstanding the defects in the Request. This is warranted by the importance for the Court of a proper interpretation of article 28, and the assistance which may be provided to the Appeals Chamber by hearing more fully from the Defence on this matter.

11. The Request advances three further reasons for granting leave to reply, which fail to show the requisite good cause.

²⁰ See [ICC-01/05-01/08-3343-AnxI](#), paras. 5-9 (separate opinion of Judge Steiner, noting that the Prosecution challenged the interpretation of article 28 in its closing arguments, but considering this was untimely); [ICC-01/05-01/08-3343-AnxII](#), para. 8 *et seq* (separate opinion of Judge Ozaki, addressing the Prosecution argument on the merits).

²¹ *Contra* Request, para. 15 (ii).

²² *Contra* Request, para. 15 (i).

²³ See Response Brief, paras. 224-225.

12. The subjective view of the Defence that the Prosecution's position concerning disclosure is "misconceived" does not justify a reply.²⁴ That the Prosecution may not agree with the Defence position in its appeal is hardly unforeseeable.

13. Nor does the "institutional inconsistency" in practice which the Defence purports to identify genuinely arise.²⁵ Again, therefore, this cannot justify a reply. The Request cites the Prosecution disclosure in the *Ntaganda* case, under rule 77, of materials arising from an investigation of potential article 70 offences.²⁶ Likewise, in the Response Brief, the Prosecution acknowledged that its "initial disclosure of article 70 material under rule 77" in this case "may not have been timely", but stressed that the material point for the appeal was the Trial Chamber's finding that the Defence had suffered no prejudice.²⁷ The practice of the Prosecution in the *Ntaganda* case has no relevance in this latter respect. Indeed, consistent with the various rulings on the matter, the Prosecution's position—that rule 77 may potentially apply to materials gathered for the purpose of an article 70 investigation—is the same.

14. Finally, the Request asserts without explanation or example that the Response Brief contains "a significant volume of misstatements of evidence" or assertions which, in the subjective view of the Defence, "are inconsistent with, or have no basis in, the evidentiary record".²⁸ This cryptic and unsubstantiated assertion invites the Appeals Chamber to authorise a reply on a speculative basis, to allow the Defence "to complete and correct the assertions" in the Response Brief.²⁹ Notwithstanding the Defence assertion that it can do this "without any repetition of the submissions made in the Appeal Brief", this would be an unrestricted mandate simply to provide a

²⁴ *Contra* Request, para. 16.

²⁵ *Contra* Request, para. 16.

²⁶ Request, para. 16 (citing [ICC-01/04-02/06-1616](#), paras. 3-4).

²⁷ Response Brief, para. 51. *See also* para. 53.

²⁸ Request, para. 17. *See also* [Appeal Brief](#), para. 9 (fn. 4: similarly asserting, without further explanation, that there are "errors in 84" citations to the evidence in the trial judgment).

²⁹ *Cf.* Request, para. 17.

further commentary on the material evidence in the trial judgment.³⁰ Such an effort will not assist the Appeals Chamber, nor does it constitute the proper use of a reply.

15. For all these reasons, therefore, the Appeals Chamber should decline to grant the relief requested, except insofar as it pertains to the merits of the Prosecution's arguments concerning the proper interpretation of the reference to causation in article 28 of the Statute.

B. The Appeals Chamber should order an appropriate page limit under Regulation 60(2)

16. Regulation 60(2) provides that any reply "shall not exceed 50 pages." Yet this does not mean that all replies, no matter their scope, should be of such a length. The Request does not address this question.

17. In *Lubanga*, the authorised reply was limited to "20 pages", even though it was of broad scope (addressing not only Prosecution rebuttal evidence but also "alleged inaccuracies" in the Prosecution response and "additional submissions" supporting the Defence appeal).³¹

18. In *Ngudjolo*, the authorised reply was 25 pages.³²

19. In this case, therefore, the Appeals Chamber should set an appropriate page limit, taking into account the following four factors:

- the single issue upon which leave to reply may be granted;³³

³⁰ *Contra* Request, para. 17.

³¹ [Lubanga Decision](#), para. 7.

³² See e.g. [ICC-01/04-02/12-126-Red2 A](#). See further *Ngudjolo* Confidential Decision, paras. 5, 8. The Prosecution notes that a public redacted version of this order is not presently available.

³³ See *above* para. 10.

- the very substantial (100%) extension of pages already provided to the Defence for the Appeal Brief, in which it freely decided how much detail to include in support of its arguments on causation;³⁴
- the inclusion by the Prosecution of its arguments concerning causation within its Response Brief of the same length as the Appeal Brief,³⁵ and
- the further opportunity which may arise for the Defence to make oral submissions, if the Appeals Chamber so orders.

20. On the basis of all these factors, the Prosecution considers that any reply authorised should not exceed more than 20 pages.³⁶

C. The Appeals Chamber should order the Defence to file its reply expeditiously

21. Regulation 60(1) provides that the Appeals Chamber shall set a time limit for the filing of any authorised reply. The Request does not address this question.

22. The Prosecution considers that that the time limit set by the Appeals Chamber should not be more than 30 days from the date of the relevant order. Thus, in *Lubanga*, the Appeals Chamber ordered that the reply was filed within seven days of the order granting leave.³⁷ In *Ngudjolo*, the Prosecution filed its reply 17 days after the Appeals Chamber's authorisation.³⁸

³⁴ See [ICC-01/05-01/08-3405 A](#), para. 13.

³⁵ See [ICC-01/05-01/08-3463 A](#), para. 16.

³⁶ In this regard, the Prosecution further notes that 11 pages of the Appeal Brief addressed causation, compared to just under 29 pages of the Response Brief: see [Appeal Brief](#), paras. 381-413; Response Brief, paras. 220-274. If permitted a 20-page reply, the Defence will thus be able to make 31 pages of submissions on this issue. Moreover, the arguments directed to the premise underlying the Defence appeal—that there is a causal contribution requirement in article 28—amounted to just 18 pages: see Response Brief, paras. 226-253.

³⁷ See [Lubanga Decision](#), p. 3 (ordering the reply to be filed by 28 February 2013).

³⁸ See [ICC-01/04-02/12-271-Anx2 A](#), para. 9 (fn. 13). See further *Ngudjolo* Confidential Decision.

Conclusion

23. For all the reasons above, the Appeals Chamber should, at most, grant the Request in part, and order any reply to be:

- i. confined to the legal arguments raised in paragraphs 226 to 253 of the Response Brief concerning the interpretation of article 28 of the Statute, and not repeating or developing any other submission previously made in the Appeal Brief;
- ii. limited to no more than 20 pages in length; and
- iii. filed within 30 days or less of the Appeals Chamber's order.

24. In all other respects, the Request should be dismissed.

Word count: 2,469³⁹



Fatou Bensouda, Prosecutor

Dated this 2nd day of December 2016

At The Hague, The Netherlands

³⁹ The Prosecution hereby makes the required certification: [ICC-01/11-01/11-565 OA6](#), para. 32.