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No.: **ICC-01/05-01/08**
Date: **6 February 2017**

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 to strike the "Prosecution's reply to the Legal Representative of Victims' observations on 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**

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Introduction

1. By asking the Appeals Chamber to strike the Prosecution's Reply to the Legal Representative of Victims' Observations¹ from the record, Bemba seeks to negate the Appeals Chamber's established briefing schedule in this appeal, and to deny the Prosecution's statutory right to reply to the LRV's submissions on appeal.² The Prosecution's Reply was legitimate in law, and was proper in the circumstances of this appeal. Bemba's Motion should be rejected.

2. Despite being given a proper opportunity to address the substantive issues raised by the LRV with respect to Bemba's additional evidence request, Bemba chose not to address them. He informed the Chamber accordingly.³ Bemba's assessment of his own position vis-a-vis the LRV's submissions cannot, however, bind the Prosecution. The Prosecution assessed the LRV's submissions differently, and exercised its litigation prerogative to file a reply addressing distinct issues raised by the LRV.

3. Bemba's argument wrongly assumes that a party can reply to an LRV's submissions only if it disagrees with their content.⁴ If this were correct, the party whose position the LRV accord with could never exercise its right to reply. Not only is this interpretation illogical, it would contravene the Court's legal framework. Moreover, although Bemba presents an incomplete view of the content of the Prosecution's Reply, the three issues highlighted in the Prosecution's Reply were

¹ Here, ("LRV"). See ICC-01/05-01/08-3494 A ("Motion" or "Bemba's Motion"). See also ICC-01/05-01/08-3491-Conf A ("Prosecution's Reply" or "Prosecution's Reply to the LRV's Observations"); ICC-01/05-01/08-3484 Conf A ("LRV's Observations"); ICC-01/05-01/08-3435-Conf A and ICC-01/05-01/08-3435-Red A ("Application" or "Bemba's Application"); ICC-01/05-01/08-3482-Conf A ("Reply" or "Bemba's Reply"); ICC-01/05-01/08-3471-Conf ("Prosecution Response").

² Bemba's Motion, paras. 1, 3, 14-30.

³ Email from the Bemba Defence team, 23 January 2017.

⁴ Bemba's Motion, para. 15.

precisely within the scope of the LRV's Observations. The Prosecution did not address other issues in Bemba's Reply, which it deemed as falling outside the authorised purview of the LRV's submissions.

4. For these reasons, Bemba's Motion should be rejected.

Level of Confidentiality

5. The Prosecution notes that Bemba's Motion is filed publicly. However, the Prosecution files this submission as "Confidential" pursuant to regulation 23*bis*(2) of the Regulations of the Court, since it relates to underlying confidential submissions, in particular the LRV's Observations. The Prosecution will file a public redacted version in due course.

Submissions

A. Bemba's arguments contravene the Court's legal framework and the Appeals Chamber's orders

6. Rule 91(2) of the Rules of Procedure and Evidence entitles the Prosecution and the Defence "to reply to any oral or written observation by the legal representative for victims."⁵ So does the practice in this appeal. On 17 October 2016, having first permitted the LRV to submit observations on Bemba's additional evidence request,⁶ the Appeals Chamber authorised the Prosecution and Bemba to reply to these observations.⁷ This "right to reply" to the LRV's observations belongs equally to both parties. The Court's legal framework and the Appeals Chamber's practice recognise

⁵ Rule 91(2), RPE.

⁶ ICC-01/05-01/08-3445 A ("LRV Access Decision"), para. 8.

⁷ ICC-01/05-01/08-3446 A ("Additional Evidence Procedure Decision"), para. 6.

the Prosecution's "right to reply" to the LRV's observations. It cannot be denied when Bemba finds it inconvenient.

7. Moreover, the Appeals Chamber sequenced the submissions from the parties and the participants in a deliberate manner. Although Bemba was allotted a limited reply relating to the proposed additional evidence, he was ordered to file his reply on 9 December 2016,⁸ well before the LRV's Observations were due. Bemba advanced several substantive arguments for the first time in his Reply—including on the legal standard. The LRV could thus, in her observations, address all relevant filings relating to the proposed additional evidence, including Bemba's Reply. And the LRV did so.⁹ In turn, the Prosecution in its reply addressed the content of the LRV's Observations. Although Bemba was given the same right, he chose not exercise it.

8. Bemba's request to "delete" all future Prosecution replies to the LRV's observations in this appeal is both abstract and unfounded.¹⁰ Apart from stating that the LRV's position is "aligned" to the Prosecution's, he advances no concrete reason.¹¹ Nor is it feasible to suggest that the scope of any future reply to the LRV's observations should be "precisely delineated" before such replies are filed.¹² The proper scope of a reply can only be determined in its particular context. Moreover, rather than asking for the Prosecution's right to reply to be curtailed, Bemba can exercise his own right by replying to the LRV's observations on conviction and sentence if he finds it necessary. The briefing schedule allows him to do so.¹³

⁸ ICC-01/05-01/08-3479 A ("Leave to Reply Decision"), para. 8, p. 3.

⁹ See generally LRV's Observations.

¹⁰ Bemba's Motion, para. 28.

¹¹ Bemba's Motion, paras. 27-28.

¹² Bemba's Motion, para. 29.

¹³ See ICC-01/05-01/08-3480 A ("DSA Leave to Reply Decision"), p. 3; ICC-01/05-01/08-3432 A ("Sentence Appeal Participation Decision"), p. 3.

9. Moreover, Bemba's arguments remain unclear. He claims, without support, that the Prosecution "circumvented" the Appeals Chamber's order by exercising its right to reply, while at the same time asks that the order allowing such replies be modified.¹⁴ Nor is his request to modify the briefing schedule at this advanced stage of this appeal justified. Modifying the briefing schedule when almost all of the briefing has been completed would prejudice the Prosecution. On the basis of the Appeals Chamber's orders, the Prosecution was entitled to assume that the appeal (and its briefing) would follow a certain course and to plan accordingly. Bemba fails to explain why he did not raise his concerns about having an alleged "last word" earlier in the proceedings.¹⁵ Nor is it "unfair" to him when he has deliberately decided not to use all avenues available to him in these appeal proceedings to put forward his arguments. Finally, Bemba can indeed have the "last word" at the oral hearing in this appeal, as has been the practice in previous final appeals.¹⁶

B. The Prosecution's Reply to the LRV's Observations did not exceed the scope of a proper reply

10. Bemba incorrectly argues that the Prosecution's Reply to the LRV's Observations on the proposed additional evidence was a "sur-reply", "for which no leave has been granted".¹⁷ The Prosecution's Reply was proper, and limited to the issues raised by the LRV.

11. The LRV highlighted three distinct issues that the Prosecution also then addressed:

¹⁴ Bemba's Motion, paras. 23-30.

¹⁵ Bemba's Motion, para. 23.

¹⁶ See e.g., ICC-01/04-02/12-210 A ("Ngudjolo order"), pp. 3-5.

¹⁷ Bemba's Motion, para. 2.

- i. *Issue 1*: The *Lubanga* standard on additional evidence, and whether it applies to all proposed additional evidence, including Bemba's argument that this standard does not apply to allegations relating to the fairness of the proceedings;¹⁸
- ii. *Issue 2*: That Bemba was required to substantiate his arguments, and did not do so;¹⁹
- iii. *Issue 3*: The merits of the request, pertaining to Category 1 documents (Western Union documents relating to the *CAR Article 70* case), Category 2 documents (documents purportedly relating to the funding of Defence investigations in the Main Case), and Category 3 documents (intercepted communications), including Bemba's arguments on relevance and "privilege".²⁰ The LRV further submitted that Bemba had not demonstrated prejudice or unfairness, with which the Prosecution agreed.²¹

12. The Prosecution's Reply properly remained within its permitted scope. For instance, the Prosecution's comment on the scope of the *Lubanga* standard was directly relevant to the LRV's Observations (*Issue 1*), which in turn referred to Bemba's Reply.²² Likewise, its submissions reiterating Bemba's obligation to substantiate his arguments were necessarily linked to the LRV's Observations (*Issue 2*). Nor, in that context, can the Prosecution be prevented from reiterating its request to dismiss Bemba's submissions summarily for lack of substantiation.²³ Likewise, although Bemba suggests that "the Prosecution [...] provided more details on the dates of the disclosure and the Article 70 proceedings",²⁴ the Prosecution did not do so. The Prosecution simply reiterated information it had already given in its initial

¹⁸ LRV's Observations, paras. 13-20; Prosecution's Reply, paras. 4-7.

¹⁹ LRV's Observations, paras. 21-25; Prosecution's Reply, paras. 8-10.

²⁰ LRV's Observations, paras. 26-33; Prosecution's Reply, paras. 11-13.

²¹ *Ibid.*

²² LRV's Observations, paras. 13-20; Prosecution's Reply, paras. 4-7. *Contra* Bemba's Motion, para. 16.

²³ See Prosecution's Reply, paras. 9-10; LRV's Observations, paras. 21-25. *Contra* Bemba's Motion, para. 19.

²⁴ Bemba's Motion, para. 19.

response— information Bemba already had—and all within the proper scope of *Issue* 3.²⁵ A party is allowed to refer to its earlier submissions, and indeed all the relevant material on the record, in its later submissions. Moreover, in light of Bemba's misstatement that all the Western Union documents were available to him "26 days before the Judgement",²⁶ as part of the Prosecution's obligation towards the Court as officers of the Court, the reiteration was necessary to correct the record and to assist the Appeals Chamber. No new information was provided.

13. That the Prosecution's Reply was not a "sur-reply" is evident. The Prosecution did not address at least two substantive issues that Bemba had raised for the first time in his reply, because it assessed them as falling outside the purview of the LRV's Observations. They include:

- i. Bemba's arguments on "the Prosecution's reliance on Article 70 material" in, *inter alia*, its response brief;²⁷ and
- ii. Bemba's allegations about the Prosecution's purported non-disclosure of relevant materials, including his claims as to the alleged "background of non-disclosure", the purported "piecemeal and tardy disclosure of material relevant to the Article 70 proceedings", and his suggestion that he "has no grounds for confidence that he has received all relevant material to date".²⁸

14. Bemba's Motion must fail: he reads the Prosecution's Reply in an overly narrow and piecemeal manner. Likewise, his arguments on the permitted scope of a reply are impractical and contrary to the Court's practice. As long as the broad issues for reply *per se* are within the permitted scope, a party is not prohibited from referring to earlier relevant submissions on the record. As shown above, the Prosecution's Reply

²⁵ See Prosecution's Reply, para. 13, citing Prosecution Response, para. 20 and the Category 1 documents.

²⁶ See Prosecution's Reply, para. 13.

²⁷ Bemba's Reply, paras. 7-9.

²⁸ *Ibid.*, para. 21.

followed the three distinct issues that the LRV had identified. Beyond this, there is no requirement that the two submissions mirror each other in every detail. Indeed, given the different roles of the parties and participants, it would be odd if they mirrored each other precisely. Nor is it necessary for replies to advance only “contradictory” or “at variance” pleadings.²⁹ Requiring a reply to do so would run counter to principles of legal advocacy. Varying degrees of accord and disagreement between submissions are both possible and permitted. Every party and participant is entitled to approach the same issue differently and from its own vantage point. The Chamber is best assisted when all angles of the same issue are properly explored in a transparent fashion. Finally, Bemba’s suggested minutiae are irrelevant to his Motion: using the word “*contra*” is a standard form of citation. Nor has Bemba shown how this would affect the scope of a reply nor the thrust of his Motion.³⁰

²⁹ Bemba’s Motion, para. 15.

³⁰ Bemba’s Motion, para. 17.

Conclusion and Relief

15. Bemba has failed to properly justify his Motion to strike the Prosecution's Reply to the LRV's Observations. To the contrary, the Prosecution's Reply was appropriate in its scope and content. Bemba has also failed to show good cause to modify the briefing schedule of this appeal at this advanced stage. For these reasons, the Prosecution respectfully requests the Appeals Chamber to dismiss Bemba's Motion.



Fatou Bensouda, Prosecutor

Dated this 6th day of February 2017³¹

At The Hague, The Netherlands

³¹ This submission complies with regulation 36, as amended on 6 December 2016: ICC-01/11-01/11-565 OA6 ("Al Senussi AD"), para. 32.