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

Date: 8 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***

Public

**Request to make additional submissions under regulation 28 concerning
two issues**

Source: Office of the Prosecutor

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Introduction

1. The Prosecution requests the Appeals Chamber to exercise its discretion under regulation 28 of the Regulations of the Court to order additional submissions from the Prosecution, not exceeding 12 pages, concerning two discrete issues (“Two Issues”). This measure is necessary for the proper disposal of the issues on appeal.

2. The proposed submissions will correct two significant inaccuracies arising from the Reply filed by Mr Bemba, which were not resolved by the Legal Representatives of Victims (“LRV”) in their observations. The proposed submissions are, moreover, necessary to ensure the equality of arms, since Bemba implies without foundation that the Prosecution has not properly complied with its obligations, which the Prosecution should be able to answer. The proposed submissions will also promote expeditious proceedings by ensuring that the next stage of this appeal, and any oral hearing, is based on a common understanding of the material facts and procedural history.

3. This motion is filed in light of the Appeals Chamber’s very recent clarification of the proper scope of replies to the observations of the LRV in this case.¹ To maintain the present briefing schedule, if it is granted leave, the Prosecution stands ready to file its proposed submissions within 24 hours of the Appeals Chamber’s order.

Submissions

4. Regulation 28(1) provides that “[a] Chamber may order the participants to clarify or to provide additional details on any document within a time limit specified by the Chamber.” The Appeals Chamber has previously exercised this discretion to

¹ ICC-01/05-01/08-3497 A (“Clarification on Scope of Replies to LRV”).

clarify an ambiguity or new understanding of the issues on appeal, to preserve the Parties' equality of arms and to promote the expeditious conduct of proceedings.²

5. In appeals under rule 150—when the Appeals Chamber has exercised its discretion in the interest of justice to order a reply by the appellant under regulation 60³—the Prosecution considers that it may sometimes be necessary, especially in the interest of equality of arms, for the Appeals Chamber to grant leave to the respondent under regulation 28 to make additional submissions on discrete matters arising from the appellant's reply.

6. Furthermore, whereas previous appeals under rule 150 have by their particular circumstances tended to avoid the necessity for such requests,⁴ the Prosecution attaches due weight to the Appeals Chamber's recent clarification of the procedure in this case.⁵

7. Indeed, the Prosecution was previously of the view that the Two Issues fell within the scope of its intended reply to the LRV on the merits of the appeal against conviction, due to be filed on 9 February 2017. This was because the LRV addressed the broad topics to which the Two Issues are related, but failed to provide the

² See e.g. [ICC-01/09-01/11-239 OA](#), para. 9; [ICC-01/09-02/11-206 OA](#), para. 9; [ICC-01/04-01/06-1476 OA12 OA13](#), para. 3; [ICC-01/04-01/06-424 OA3](#), para. 7.

³ [ICC-01/05-01/08-3480 A](#), para. 8 (“the Appeals Chamber is persuaded by Mr Bemba's submissions that a reply to the Response may assist the Appeals Chamber in its determination of the appeal, noting that the issues to which Mr Bemba wishes to reply are pertinent to the proper adjudication of the appeal”).

⁴ Bemba's account of the practice in *Lubanga* and *Ngudjolo* is in some respects unclear: cf. ICC-01/05-01/08-3494 A (“Bemba's Motion to Strike”), paras. 20-22. In *Lubanga*, the Prosecution filed its response to the observations of the victims (V01) on 23 March 2013 ([ICC-01/04-01/06-3004](#): “*Lubanga* Prosecution Response to Victims”), and after the Defence reply supporting its appeal, filed on 28 February 2013 ([ICC-01/04-01/06-2989-Red](#): “*Lubanga* Reply”). Whereas the conviction and sentence appeals had been briefed separately, the Defence had been authorised to file a consolidated reply, and the victims' observations and the Parties' responses were likewise consolidated. Although the Prosecution response to the victims, on matters of sentencing, did not squarely address matters in the *Lubanga* Reply, it did address matters arising from the appeal against sentence: see e.g. [Lubanga Prosecution Response to Victims](#), para. 12. In *Ngudjolo*, where the Prosecution was the appellant, the respondent was not only entitled to file a response to the Prosecution reply supporting its appeal ([ICC-01/04-02/12-126-Red A](#): “*Ngudjolo* Prosecution Reply”; [ICC-01/04-02/12-134-Red-tENG A](#): “*Ngudjolo* Response to Prosecution Reply”) but also, three days before, filed a response to the victims' observations ([ICC-01/04-02/12-131-Red-tENG](#)) which in substantial part repeated and developed very similar arguments to the respondent's other filings, including the *Ngudjolo* Response to Prosecution Reply (which was substantially shorter). Bemba rightly points out that, in *Ngudjolo*, the victims were not given opportunity to comment on the appellant's reply.

⁵ Clarification on Scope of Replies to LRV, paras. 11-12.

necessary context now demanded by Bemba’s Reply.⁶ However, mindful of the Appeals Chamber’s guidance, the Prosecution now considers it appropriate instead to seek leave for these submissions under regulation 28.

8. The Prosecution stresses that, additionally, it takes issue with numerous other aspects of the Reply⁷—but recognises that such ongoing differences of opinion are in the nature of all perfected appellate proceedings. It thus does *not* seek leave under regulation 28 in these respects, nor indeed would it have addressed them in its intended reply to the LRV on the merits of the appeal against conviction. It does, however, consider that these issues should be further ventilated at an oral hearing,⁸ to be convened by the Appeals Chamber in due course.

A. Additional submissions by the Prosecution on the Two Issues are warranted under regulation 28

9. The Appeals Chamber should grant leave for the Prosecution to file additional submissions on the Two Issues. These are:

- “**Disclosure Issue**”: in the Reply, Bemba resurrected the allegation from trial—which he has not previously made clear in his appeal brief—that “information relevant to the validity of the Prosecution allegations” concerning the article 70 offences adjudicated in case ICC-01/05-01/13 was “disclosed long *after* closing submissions”.⁹ By contrast, the LRV in its Observations—like the Prosecution in its Response—addressed only Bemba’s original claim on appeal concerning the *initial* (and only) rule 77

⁶ [ICC-01/05-01/08-3483-Red A](#) (“Reply”).

⁷ Cf. [Reply](#), paras. 4-6, 49-50 (suggesting that grounds of appeal might “succeed[] by reason of the absence of effective response”).

⁸ See [ICC-01/04-02/12-199 A](#), para. 13 (“the decision to hold an oral hearing in appeal proceedings against final judgments is discretionary and made on a case-by-case basis. Such decisions should be 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”).

⁹ [Reply](#), para. 21 (emphasis added). See also ICC-01/05-01/08-3482-Conf A, para. 21; ICC-01/05-01/08-3496-Conf A, para. 13.

disclosure which the Trial Chamber found to have been untimely.¹⁰ The Prosecution should now be permitted the opportunity to address this allegation, and to correct the record in this regard.

- **“Waiver/Estopper Issue”**: in the Reply, Bemba complains that he knew too late of the Prosecution’s legal interpretation of article 28, such that the Prosecution should be considered to have waived, or otherwise to be estopped from, responding to *his* appeal by, *inter alia*, identifying the erroneous legal premise in the Judgment.¹¹ He alleges that the Prosecution made a statement in its Response which “borders on unethical”, and attempts to substantiate this claim by listing some—but, crucially, not *all*—relevant submissions made by the Prosecution, as well as other bodies, during pre-trial and trial proceedings.¹² Moreover, both Bemba and the LRV appear to share some misapprehensions concerning the factual and legal significance of the Pre-Trial Chamber’s reasoning in its confirmation decision. The Prosecution should now be permitted the opportunity to address this allegation, to correct the record in this regard, and to give its view of the relevant law now raised by Bemba.

10. Neither of the Two Issues could reasonably have been anticipated in the Response.

11. Given the need for focused proceedings on appeal, the Prosecution could not be expected preemptively to explain two years of its disclosure practices—an ongoing obligation on appeal—unless that issue was squarely put in question. Nor could it be expected to list the entire history of its legal and evidentiary submissions on causation under article 28, and to clarify the differences between them, until the question of its position *prior* to closing submissions was put in issue.

¹⁰ [ICC-01/05-01/08-3472-Corr-Red A](#), paras. 50-53; ICC-01/05-01/08-3489-Conf-Corr A, para. 26.

¹¹ [Reply](#), paras. 42-49.

¹² [Reply](#), para. 44.

12. Furthermore, in raising the Waiver/Estoppel Issue, Bemba has also raised an important new point of law—what is the significance for a respondent to an appeal, if any, of its prior submissions on the proper *interpretation* of the law at pre-trial and/or trial stages?

13. For the particular reasons which follow, therefore, leave should be granted for the Prosecution to make additional submissions on the Two Issues in order to correct factual and legal ambiguities, to preserve equality of arms between the Parties, and to facilitate the expeditious conduct of these appeal proceedings. The proposed submissions are necessary to assist the Appeals Chamber in its determination.

A.1. Additional submissions on the Two Issues will clarify the material facts and law

14. The Reply does not give a full explanation of the relevant facts and law which will be clarified by the Prosecution's additional submissions.

15. With regard to the Disclosure Issue, the Prosecution will briefly explain the nature of its disclosure after closing submissions until the present date, and why these disclosures have been made. This will provide the factual context for the Appeals Chamber to assess Bemba's new claim in the Reply.

16. With regard to the Waiver/Estoppel Issue, the Prosecution will highlight the difference between its *legal* submissions during trial and its *evidentiary* submissions, based on the facts that happen to be established in this case. It will identify two significant additional submissions from the procedural history that Bemba has omitted to include in the Reply. It will address the legal ambiguity concerning the significance, if any, of a Party's view of the proper interpretation of the law prior to closing submissions at trial. This will provide both factual and legal context for the Appeals Chamber to assess Bemba's claim in the Reply.

A.2. Additional submissions on the Two Issues will ensure the equality of arms

17. The Reply seeks to put in issue the Prosecution's proper discharge of its legal obligations (the Disclosure Issue) and its ethical obligations before the Appeals Chamber (the Waiver/Estoppel Issue). These are matters which the Prosecution takes with the greatest seriousness. The principle of equality of arms will thus be assured by permitting the Prosecution the opportunity to answer these two claims, which otherwise may go unanswered, in a similar written form in which they were raised. Moreover, in light of the seriousness of the concerns raised by Bemba, the Prosecution considers that both Bemba and the Appeals Chamber have the right to expect a proper answer from the Prosecution. This interest, too, will be addressed by granting leave to make additional submissions.

A.3. Additional submissions on the Two Issues will facilitate the expeditious conduct of this appeal

18. The Reply, in raising the Two Issues, primarily addresses the procedural history of this case. Such matters are potentially important for the resolution of the issues on appeal, yet they do not go to the essential merits of the legal and factual issues in dispute. Accordingly, while these matters must be resolved, they are not readily suited to submissions in any oral hearing which the Appeals Chamber may convene. To the contrary, they are quintessential matters of detail, regarding close citation to the record and/or reference to dates, disclosure package numbers, and documentary information. They are best adapted to written submissions.

19. The Appeals Chamber will be thus assisted in ensuring the fair and expeditious conduct of these proceedings by receiving submissions on these topics from the Prosecution in writing, and thus enabling any oral hearing to be dedicated to the 'bigger picture' issues which characterise the appeal in this case.

20. Granting leave to make further submissions on the Two Issues will also assist the Appeals Chamber in assessing the merits of Bemba's claims. In particular, the Prosecution's assistance in highlighting salient aspects of the very lengthy procedural history, and details from the intricate and Party-driven regime of ongoing disclosure, may help to ease the burden of the Appeals Chamber's own inquiry into these matters.

B. Granting leave to make additional submissions on the Two Issues occasions Bemba no prejudice

21. Finally, in the context of this request, the Prosecution notes Bemba's previous argument that "affording Prosecution a second opportunity to counter the Appellant's arguments, to which the Appellant has no ability effectively to respond, gives rise to prejudice."¹³ However, the Prosecution does not consider that this concern arises.

22. First, Bemba has raised the Two Issues of his own volition in the Reply. Accordingly, the Prosecution is not seeking a second opportunity to respond in these respects, but indeed a *first* one.

23. Second, as the Prosecution has previously argued,¹⁴ and consistent with the jurisprudence of the Appeals Chamber in *Ngudjolo*, any right of Bemba to the 'last word' may find expression in any oral hearing which the Appeals Chamber wishes to convene.¹⁵ This principle cannot be relied upon at each stage of the appeal proceedings,¹⁶ nor indeed can it be relied upon to prevent appropriate responses to new arguments. The 'first word' cannot, in fairness, also be the 'last word'.

¹³ Bemba's Motion to Strike, para. 23.

¹⁴ [ICC-01/05-01/08-3478 A](#) ("Prosecution Response to Request to Reply"), para. 6.

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

¹⁶ The Prosecution has previously argued that "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": [Prosecution Response to Request to Reply](#), para. 6.

Conclusion

24. For all the reasons above, the Appeals Chamber should grant the motion, and order the Prosecution to file additional submissions on the Two Issues, not exceeding 12 pages.



Fatou Bensouda, Prosecutor

Dated this 8th day of February 2017¹⁷

At The Hague, The Netherlands

¹⁷ This submission complies with regulation 36, as amended on 6 December 2016: [ICC-01/11-01/11-565 OA6](#), para. 32.