



Original: **English**

No.: ICC-01/04-02/06
Date: 27 February 2017

THE APPEALS CHAMBER

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Christine Van den Wyngaert
Judge Howard Morrison
Judge Piotr Hofmański
Judge Raul C. Pangalangan

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public

**Prosecution Response to Mr Ntaganda's request for leave to reply supporting his
'Appeal from the Second Decision on the Defence's Challenge to the Jurisdiction
of the Court in respect of Counts 6 and 9' (ICC-01/04-02/06-1800)**

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 Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of the Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

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. The Defence's request to make eleven additional submissions further to its appeal—against the Trial Chamber's second decision on the same jurisdictional challenge¹—should be rejected.² There was nothing novel or unforeseeable in the Prosecution's response, especially given the lengthy preceding litigation.³

2. Having framed its appeal as it best saw fit—with ample pages to spare if it had wished to develop its position further⁴—the Defence's last-minute request to make further submissions cannot be justified. As the author of the original jurisdictional challenge(s), the Defence was in the very best position to know its own case. Its position on appeal must be understood as the most comprehensive that it felt able to take, marshalling all the various arguments which might be relevant based on the preceding litigation. After all, as the Appeals Chamber has already noted, the Defence has been litigating this issue for more than three years, on no less than five occasions.⁵ To the extent the Defence elected not to address certain foreseeable issues squarely in its Appeal, it should not then be allowed to make those submissions subsequently—and potentially without the possibility of a Prosecution response.

Submissions

3. The Request should be denied because it is procedurally misconceived, and fails to show any reason why leave should be granted for the proposed additional submissions. Moreover, both the principle of equality of arms and the interest in the expedition of proceedings favour a procedural scheme in which the Parties are incentivised to present their arguments fully and comprehensively in their original

¹ See e.g. [ICC-01/04-02/06-1707](#) (“Decision”), para. 22; [ICC-01/04-02/06-1754 OA5](#) (“Appeal”).

² *Contra* ICC-01/04-02/06-1800 OA5 (“Request”).

³ *Contra* Request, para. 2.

⁴ See generally [Appeal](#) (36 pages).

⁵ [ICC-01/01-02-07-1738 OA5](#), para. 12 (“the issues likely to arise in this appeal have been previously litigated by Mr Ntaganda in the course of the pre-trial, trial and appeal proceedings”).

submissions. Granting the Request would undermine these principles, and cannot assist the Appeals Chamber.

A. The Request is procedurally misconceived

4. The Rules and Regulations of this Court afford no opportunity to reply in interlocutory appeals.⁶ Neither regulation 24(5) nor regulation 60 applies to appeals under article 82(1)(a) and rule 154. Rather, in such instances, the Parties may instead only request the Appeals Chamber to exercise its discretion under regulation 28 to order the Parties to “clarify or to provide additional details on any document” or “to address specific issues in [...] written or oral submissions”.⁷

5. The Request—although devoid of any relevant legal argument in its three paragraphs justifying *why* even its proposed remedy should be granted—is thus misdirected in the relief which it requests.⁸ This alone may be a basis for summary dismissal.

6. Yet in any event nothing in the procedural history or substance of this appeal warrants any exercise of the Appeals Chamber’s discretion to order additional submissions under regulation 28.

B. Additional submissions should not be ordered under regulation 28

7. The Appeals Chamber has previously exercised its discretion to order additional submissions under regulation 28 when necessary to clarify an ambiguity or new understanding of the issues on appeal, to preserve the Parties’ equality of

⁶ *Contra* Request, paras. 1, 3. See e.g. [ICC-01/04-01/06-424 OA3](#) (“*Lubanga* Decision”), para. 6 (“Regulation 24(5) [...] is not applicable to such proceeding [...] because the more specific regulations of subsection 1 of Section 4 of Chapter 3 of the Regulations [...] do not foresee replies to responses to documents in support of the appeal under rules 154 or 155. It follows *a contrario* that no applications for replies may be filed pursuant to regulation 24(5) [...] to responses to documents in support of the appeal for appeals brought under rules 154 or 155”). See further e.g. [ICC-01/04-01/07-148 OA](#), para. 3; [ICC-01/05-01/08-1846 OA9](#), para. 6; [ICC-01/09-01/11-239 OA](#) (“*Ruto et al* Decision”), para. 8; [ICC-01/09-02/11-206 OA](#) (“*Muthaura et al* Decision”), para. 8; [ICC-01/11-01/11-508 OA6](#), para. 17.

⁷ See e.g. [Lubanga Decision](#), para. 7; [ICC-01/04-01/07-476 OA2](#), paras. 17-18.

⁸ *Contra* Request, paras. 2-3 (asserting that “a reply” would “materially assist the Chamber”).

arms and to promote the expeditious conduct of proceedings.⁹ None of these justifications applies to this appeal.

8. Indeed, the Appeals Chamber has specifically warned that “submissions under regulation 28 [...] are not intended to reiterate a position or demonstrate mere disagreements with the position of another party.”¹⁰ Moreover, leave should not be granted under regulation 28 to address arguments which foreseeably formed part of the original appeal. Thus, in *Ruto and Sang*, the Appeals Chamber rejected requests for additional submissions which “fall within the ambit of the issues on appeal”, or “were foreseeable” considering the issues addressed “during trial and appeal proceedings”, and bearing in mind that the appellants had the facility “to present all arguments within the scope of the appeals”.¹¹

9. These same three factors all apply in this case, requiring rejection of the Request. The eleven proposed issues all fall within the ambit of the Decision, which the Defence generally argued to be incorrect. Moreover, specifically, as the following paragraphs show, each of the issues is no more than a reiteration or elaboration of the Defence position already taken in the Appeal, a mere expression of disagreement with the Prosecution, or an impermissible attempt to address foreseeable issues which it had previously chosen not to address.¹² Given the page limits applicable to jurisdictional challenges¹³—which the Defence did not fully use¹⁴—it was fully able to present all relevant arguments within the Appeal.

⁹ See e.g. [Ruto et al Decision](#), para. 9; [Muthaura et al Decision](#), para. 9; [ICC-01/04-01/06-1476 OA12 OA13](#), para. 3; [Lubanga Decision](#), para. 7.

¹⁰ [ICC-01/11-01/11-442 OA4](#), para. 13.

¹¹ [ICC-01/09-01/11-1417 OA7 OA8](#), para. 13.

¹² *Contra* Request, para. 1.

¹³ Regulation 38(2)(c).

¹⁴ See above fn. 4.

- a. **“Whether the Appeals Chamber is precluded from considering or relying on the words ‘also constituting’ in Articles 8(2)(e)(vi) and 8(2)(b)(xxii) in this appeal”.**
- This issue was wholly foreseeable. The Decision specifically considered the meaning of the words “also constituting” in articles 8(2)(b)(xxii) and (e)(vi).¹⁵
 - Yet, although the Defence appeared to elect not to dispute this analysis on Appeal,¹⁶ the relevant arguments are an integral part of the Trial Chamber’s reasoning,¹⁷ and had been presented at trial by the Prosecution.¹⁸
 - In the Response, the Prosecution did no more than point out these facts.¹⁹ To the extent the Request may imply a different understanding by the Defence, this is incorrect.
- b. **“Whether ‘in circumstances where the activities or status of the victim is material to liability under article 8(2)(b) and (e), the Elements of Crimes expressly set out such a requirement’ or whether, rather, there are provisions that also rely on the *chapeaux* to import well-established jurisdictional limitations”.**
- This issue was wholly foreseeable. The Decision specifically noted that the Elements of Crimes expressly sets out activity or status requirements *when* any such requirement is material to liability under articles 8(2)(b) and (e).²⁰
 - The Appeal expressly referred to this observation in the Decision,²¹ and also referred to the intention of “the drafters of the Elements of Crimes”.²²

¹⁵ [Decision](#), paras. 41-42.

¹⁶ See [Appeal](#), paras. 20-39.

¹⁷ [Decision](#), para. 41 (fn. 90).

¹⁸ [ICC-01/04-02/06-1278](#) (“Trial Response”), paras. 47-52.

¹⁹ [ICC-01/04-02/06-1794-Corr OA5](#) (“Response”), para. 26.

²⁰ [Decision](#), para. 41.

²¹ [Appeal](#), para. 21.

²² [Appeal](#), para. 34. See also para. 42.

Furthermore, the Prosecution position in its Response was consistent with its position previously taken at trial.²³

- c. **“Whether customary international law has no place in the interpretation of Article 8(2)(b) and (e)”.**
- The Defence mistakes the Prosecution’s position. The Prosecution has not said that customary international law has no place in the interpretation of the Statute,²⁴ but rather referred to the Court’s jurisprudence that customary international law can only be used as a *source of law* when there is a lacuna in the Statute—which is not the case concerning the elements of articles 8(2)(b)(xxii) and 8(2)(e)(vi).²⁵
 - In any event, the significance of customary international law, as the Defence understands it, is one of the issues at the very heart of the Appeal.²⁶ It was not only foreseeable but *inevitable* that the Prosecution would address this issue. Granting leave to make additional submissions on such a broad issue would, moreover, amount to granting leave to reargue much of the Appeal itself.
- d. **“Whether Article 8(2)(b)(xxii) (defining rape and other crimes) overlaps with any provision of Article 8(2)(a) (pertaining to grave breaches) and whether Article 8(2)(e)(vi) overlaps with any provision of Article 8(2)(c)”.**
- This issue has already been argued by the Defence, and was in any event wholly foreseeable. The Decision found that the existence of any

²³ [Trial Response](#), para. 51; [Response](#), para. 24.

²⁴ See e.g. [Response](#), paras. 50, 55 (referring to the [Vienna Convention on the Law of Treaties](#), art. 31(3)(c)).

²⁵ [Response](#), para. 30.

²⁶ See e.g. [Appeal](#), para. 29 (criticising the reasoning of the Decision for “fail[ing] to address, however, status requirements that arise from the expression ‘within the established framework of international law’”).

status/activity requirement in articles 8(2)(b)(xxii) and 8(2)(e)(vi) would duplicate analogous protections under articles 8(2)(a) and (c).²⁷

- The Appeal expressly took issue with this reasoning, including by introducing the “overlap” language itself.²⁸ The Prosecution, unsurprisingly, responded to these submissions—and, moreover, in a fashion consistent with its position at trial.²⁹
- e. **“Whether the Defence’s interpretation of the phrase ‘within the established framework of international law’ constitutes a ‘blank cheque’ that overthrows the ‘principle of legality’ and undermines the ‘drafters’ efforts to strictly define the punishable crimes’”.**
- The Defence merely disagrees with the Prosecution’s view of one of the issues raised in the Appeal³⁰—what is the significance of the *chapeau* reference to the “established framework of international law”? The Parties’ views on this topic are fully expressed in their existing submissions.
- f. **“Whether the words ‘within the established framework of international law’ can be properly interpreted as ‘simply reiterat[ing] that the acts listed are indeed serious violations of the laws and customs’ of war, whereas the words immediately preceding ([o]ther serious violations of the laws and customs’ of war) render the Prosecution’s interpretation redundant”.**
- The Decision expressly referred to the structure of article 8 and the significance of the *chapeaux* of articles 8(2)(b) and (e), including the description of these provisions as “other” violations of the laws and customs of war.³¹ The Parties had addressed these issues in some detail at trial.³² The

²⁷ [Decision](#), para. 40.

²⁸ See [Appeal](#), paras. 35-39.

²⁹ [Response](#), paras. 36-40; [Trial Response](#), para. 44.

³⁰ [Response](#), para. 41 (“[t]he Defence’s submissions appear to be based on the premise that the expression ‘within the established framework of international law’ works as a ‘blank cheque’ circumventing article 21”).

³¹ See e.g. [Decision](#), paras. 40, 45.

³² See e.g. [Trial Response](#), paras. 30, 31, 34, 41-46; [ICC-01/04-02/06-1256](#), para. 15.

Appeal now also already addresses these subjects at length.³³ The Parties' views on this topic are fully expressed in their existing submissions.

g. **“Whether the Defence has posited, as the Prosecution asserts, ‘a general ‘adverse party’ requirement’ under Common Article 3 (as opposed to an adverse party requirement for those not taking no active part in hostilities”.**

- This proposed submission seeks to reinterpret the Defence's own argument. By definition, it has thus already been addressed in the Appeal.³⁴ In any event this issue was wholly foreseeable, since the Prosecution position in response was consistent with its position at trial.³⁵

h. **“Whether a ‘properly applied’ version of the nexus requirement, or the statutory gravity threshold, can substitute for other jurisdictional requirements”.**

- This issue was not only already argued in the Appeal, but was wholly foreseeable. The Decision expressly acknowledged the Defence concern that “any rape or instance of sexual slavery occurring during an armed conflict constitutes a war crime” and recalled that this was prevented by the nexus requirement.³⁶
- On appeal, the Defence expressly criticised this reference to the nexus in the context of its jurisdictional argument that the Trial Chamber erred in finding that articles 8(2)(b)(xxii) and 8(2)(e)(vi) “are not subject to any status

³³ See e.g. [Appeal](#), paras. 28-39, 69-73.

³⁴ See e.g. [Appeal](#), paras. 29-30, 42, 53, 59-62 (arguing that common article 3 may impose an ‘adverse party’ requirement relevant to the victims charged under counts 6 and 9); 54-57 (generally criticising the ICRC’s 2016 updated commentary to the First Geneva Convention, and its analysis of the application of any ‘adverse party’ requirement to common article 3); 60-61, 75-79 (arguing that common article 3 provides a different scope of protection for civilians taking no active part in hostilities and members of armed forces *hors de combat*).

³⁵ [Response](#), paras. 69-81 (common article 3 contains no form of ‘adverse party’ requirement); [Trial Response](#), paras. 58-65, 67-78 (common article 3 contains no form of ‘adverse party’ requirement).

³⁶ [Decision](#), para. 52.

requirements”.³⁷ It relied on circumstances in which the *nexus* requirement may not be satisfied as circumstances it considered to be “outside of the jurisdictional scope of war crimes law.”³⁸ Likewise, the Defence specifically put in issue the relationship “between gravity and jurisdiction”,³⁹ and asserted that “a single act of sexual violence could fall within the Court’s war crime jurisdiction when committed [...] in international or non-international armed conflict”.⁴⁰

- The Prosecution response on appeal was, moreover, consistent with its position at trial.⁴¹
- i. **“Whether the Prosecution’s claim that members of armed forces are within the ‘power’ of their own armed forces is consistent with the well-established understanding of that term in international humanitarian law”.**
- This issue was wholly foreseeable. In discussing the absolute prohibition of rape and sexual slavery under international law, the Decision expressly refers to article 75 of Additional Protocol I, the fundamental guarantees provision that protects “all persons in the power of a Party to the conflict”⁴²—and which is not limited “to persons in the power of the opposing party.”⁴³ On appeal, the Defence claims, *inter alia*, that common article 3 must nonetheless apply to articles 8(2)(b)(xxii) and 8(2)(e)(vi).⁴⁴

³⁷ [Appeal](#), para. 27. *See also* preceding subtitle (“The Chamber erred in finding that the crimes defined in subsections (b)(xxii) and (e)(vi) of Article 8(2) are not subject to any status requirements”). *See further* paras. 51 (addressing the nexus requirement), 59 (citing Gaggioli).

³⁸ [Appeal](#), para. 49.

³⁹ [Appeal](#), para. 52.

⁴⁰ [Appeal](#), para. 27.

⁴¹ [Trial Response](#), paras. 57 (“Other elements of the crime, notably the requirement for proof of a nexus to the armed conflict, suffice to ensure that the Court does not exercise jurisdiction over offences which, although also grave, are more amenable to regulation by domestic law”), 74 (addressing Gaggioli’s observation, raised by the Defence, which “concerns the *nexus* requirement rather than any general ‘adverse party’ requirement).

⁴² [Decision](#), para. 47. *See also* [Appeal](#), para. 25 (quoting this paragraph in part).

⁴³ [Decision](#), para. 47 (fn. 111).

⁴⁴ *See e.g.* [Appeal](#), paras. 29-31.

- The Prosecution had previously responded to this same argument at trial that the requirements of common article 3 are met, *if* it applies⁴⁵—which necessarily entails that the victims are within the ‘power’ of the perpetrators such that the alleged prohibited acts could be committed against them. Indeed, the Pre-Trial Chamber itself, almost three years ago, had reasoned in a related way.⁴⁶
- j. **“Whether the Prosecution is correct that there are two separate and discrete bodies of law governing targeting and protection within the phrase ‘taking no active part in hostilities,’ and the implications that would arise from this bifurcation”.**
- This issue has consistently been argued by the Defence, which opened the door to discussion of concepts drawn from the conduct of hostilities, and was in any event wholly foreseeable. Both in the Appeal and at trial, the Defence argued that the victims of counts 6 and 9 must be considered “members of armed forces” under common article 3, relying primarily on reasoning borrowed from the *DPH Interpretive Guidance*.⁴⁷ Furthermore, the Defence on appeal specifically took the related position that a person cannot be, “at one and the same time, treated as a combatant for the purposes of targeting, but as a civilian for the purposes of (some) war crimes law”.⁴⁸
 - The Prosecution response on appeal (addressing, *inter alia*, the significance of the *DPH Interpretive Guidance*) was consistent with its position at trial.⁴⁹

⁴⁵ See e.g. [Response](#), paras. 95-117; [Trial Response](#), paras. 59, 78-80, 83-85. See also [Appeal](#), para. 80 (expressly criticising at least one part of the Prosecution reasoning from trial); see also fn. 119, citing [Trial Response](#), paras. 36, 41.

⁴⁶ See [ICC-01/04-02/06-309](#), para. 79.

⁴⁷ See e.g. [Appeal](#), paras. 75-81.

⁴⁸ [Appeal](#), para. 65.

⁴⁹ [Response](#), paras. 103-111, 114-116; [Trial Response](#), paras. 82-85.

- k. **“Whether the Prosecution is correct that it has made no pleading that is incompatible with a finding by the Trial Chamber that the alleged child soldiers were not taking no active part in hostilities at the relevant time, and that it can now be permitted to claim that the alleged child soldiers are merely civilians directly participating in hostilities”.**
- This issue—which, although unclear, must again relate to whether the *charging* of counts 6 and 9 precludes the victims from being protected by common article 3, which the Defence says is required—has consistently been argued by the Defence, and was in any event wholly foreseeable. Both in the Appeal and at trial, the Defence raised these arguments.⁵⁰ The Prosecution response on appeal was consistent with its position at trial.⁵¹

Conclusion

10. For all the reasons above, the Request should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 27th day of February 2017⁵²

At The Hague, The Netherlands

⁵⁰ See e.g. [Appeal](#), paras. 8-16, 74, 80-81.

⁵¹ [Response](#), paras. 95-102, 112-117; [Trial Response](#), paras. 79-85.

⁵² This submission complies with regulation 36, as amended on 6 December 2016: [ICC-01/11-01/11-565 OA6](#), para. 32.