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

Date: 02/02/2017

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

**Appellant'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: Defence for Mr. Jean-Pierre Bemba Gombo

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

The Office of the Prosecutor

Fatou Bensouda
James Stewart
Helen Brady

Counsel for the Defence of Mr Jean-Pierre Bemba Gombo

Peter Haynes, QC
Kate Gibson

Legal Representatives of the Victims

Marie-Edith Douzima-Lawson

The Office of Public Counsel for the Victims

Paolina Massidda

The Office of Public Counsel for the Defence

Xavier-Jean Keita

REGISTRY

Registrar

Herman von Hebel

A. INTRODUCTION

1. The Prosecution Reply to the LRV's observations on additional evidence¹ should be struck from the record of the case, and any further Prosecution response to LRV observations in the current appeal be disallowed and/or restricted by specific order of the Chamber.

2. Although in a titular sense the Prosecution's current filing is a reply to the LRV's observations, substantively it is a sur-reply to the Appellant's Reply on the instant issue² for which no leave has been granted, and none even sought. In the premises, it is outside the scope of the pleadings permitted by the Appeals Chamber and, accordingly, an abuse of the process of the Court.

3. Further, given that, pursuant to the Appeals Chamber's existing orders, the Prosecution will have the opportunity to reply to the LRV observations on both the conviction appeal,³ and the appeal against sentence,⁴ the Appellant requests that the Appeals Chamber vary those orders to disallow these filings, and or expressly limit any Prosecution reply to a genuine response to the LRV observations.

B. PROCEDURAL HISTORY

4. On 21 March 2016, Trial Chamber III convicted Mr. Jean-Pierre Bemba ("the Appellant") of the charges against him.⁵

¹ Prosecution's reply to the Legal Representative of Victims' observations on Bemba's application to present additional evidence in the appeal ICC-01/05-01/08-3491-Conf ("Prosecution Reply to the LRV").

² Appellant's Reply to the Prosecution's response to Bemba's application to present additional evidence in the appeal ICC-01/05-01/08-3482-Conf ("Appellant's Reply").

³ ICC-01/05-01/08-3369, para. 4: "Mr Bemba and the Prosecutor may each file a response to the victims' observations within 30 days of the notification thereof."; ICC-01/05-01/08-3480.

⁴ ICC-01/05-01/08-3432, para. 4: "Mr Bemba and the Prosecutor may each file a response to the victims' observations within 30 days of the notification thereof."

⁵ ICC-01/05-01/08-3343.

5. On 19 September 2016, the Appellant filed his document in support of appeal.⁶ On the same day, the Appellant filed an application requesting the Appeals Chamber to admit 23 documents as additional evidence in the appeal against the Judgment (“Application”).⁷

6. On 17 October 2016, the Chamber rendered a “Decision on Procedure for Mr Bemba’s Additional Evidence Request of 19 September 2016” whereby it directed the Prosecution to file a response to the Application on 21 November 2016 and the LRV to file observations presenting their views and concerns on 22 December 2016.⁸ The Appellant and the Prosecutor were authorized to reply to the LRV observations by 26 January 2017.⁹

7. On 21 November 2016, the Prosecution filed its “Prosecution’s response to Bemba’s application to present additional evidence in the appeal” (“Prosecution Response”).¹⁰

8. On 28 November 2016, the Appellant requested leave to reply to the Prosecution Response.¹¹ It was granted by the Appeals Chamber on 2 December 2016.¹²

9. On 9 December 2016, the Appellant filed his Reply.

10. On 21 December 2016, the LRV filed its “Observations de la Représentante légale des victimes sur « *Defence application to present additional evidence in the appeal against the Judgment pursuant to Article 74 of the Statute* »” (“LRV Observations”).¹³

⁶ ICC-01/05-01/08-3434-Conf.

⁷ ICC-01/05-01/08-3435-Conf.

⁸ ICC-01/05-01/08-3446-Conf.

⁹ ICC-01/05-01/08-3446-Conf.

¹⁰ ICC-01/05-01/08-3471-Conf.

¹¹ ICC-01/05-01/08-3473.

¹² ICC-01/05-01/08-3479.

¹³ ICC-01/05-01/08-3484-Conf.

11. Having reviewed the LRV Observations, the Defence determined that they contained no arguments beyond those already presented by the Prosecution, and to which the Appellant had already replied. As such, on 23 January 2017, the Defence informed the Appeals Chamber that it did not intend to file a reply.¹⁴

12. On 26 January 2017, the Prosecution filed its Reply to the LRV.

C. LEVEL OF CONFIDENTIALITY

13. Despite the confidential classification of the LRV Observations and the Prosecution Reply to the LRV, the Appellant respectfully submits that nothing in the present document justifies a confidential classification, and files the document publicly.

D. SUBMISSIONS

14. In its “Decision on Procedure for Mr Bemba’s Additional Evidence Request of 19 September 2016”, the Appeals Chamber ordered that the Appellant and the Prosecutor had a right to reply “to the Victim’s observations”.¹⁵

15. The Prosecution Reply to the LRV offers no submission contradictory or even at variance to those contained in the pleading to which it notionally purports to reply. It makes oblique reference only to the submissions of the LRV in order to advance arguments to counter those made by the Appellant in both his Reply and his original Application. Spanning nine pages of argument, the Prosecution Reply to the LRV cites 15 times to the Appellant’s Reply, and also responds to the original Application.¹⁶ Numerous paragraphs merely repeat the Appellant’s original

¹⁴ Email from the Defence to the Appeals Chamber, parties and participants of Monday 23 January 2017 at 12:07.

¹⁵ ICC-01/05-01/08-3446-Conf (emphasis added).

¹⁶ ICC-01/05-01/08-3491-Conf, fns. 1, 2, 8, 11, 12, 14, 17, 19, 20, 21, 28, 29, 30, 33, 34, 35, 40.

arguments, and arguments on reply, only to provide counter-arguments in an attempt to contradict a filing to which no right of response had been sought or granted.

16. To take but one example, the Appellant argued in reply that:¹⁷

The information being tendered is nothing like a new eyewitness being found who can undermine central findings of fact of a trial which – for good reason – is subject to a test of particular stringency.

This argument is addressed in the Prosecution Reply to the LRV thus:¹⁸

The *Lubanga* test is comprehensive. It adequately and appropriately covers all situations where additional evidence is sought to be considered on appeal – whether such evidence relates to “new eye-witnesses” or not.

17. In case there was any doubt that this argument is a direct response to the Appellant rather than any reply to the LRV Observations, as a footnote to this argument, the Prosecution cites: “**Contra Bemba Reply**, para. 18 (stating “[T]he information being tendered is nothing like a new eyewitness being found who can undermine central findings of fact of a trial which—for good reason—is subject to a test of particular stringency.”)¹⁹”

18. There is nothing subtle in the Prosecution’s approach. The Prosecution has made a deliberate decision to circumvent the Appeals Chamber’s order authorising a reply to the LRV Observations, in an attempt to place additional arguments which counter the Application on the record of the appeal.

¹⁷ ICC-01/05-01/08-3482-Conf, para. 18.

¹⁸ ICC-01/05-01/08-3491-Conf, para. 4.

¹⁹ ICC-01/05-01/08-3491-Conf, para. 4 (emphasis added).

19. Neither can any sensible case be made that the references to the Appellant's arguments are incidental or collateral to its reply to the LRV Observations, for, in its so-called reply, the Prosecution has addressed topics on which the LRV made no submissions at all.²⁰ The Prosecution, for example, has provided more details on the dates of the disclosure and the Article 70 proceedings,²¹ thus responding to the submissions in the Appellant's Reply.²² The LRV has never been part of this disclosure process, and accordingly did not address this subject in its Observations. The Appeals Chamber cannot, in granting the parties the opportunity to reply to the LRV Observations, have envisaged that this would provide them with *carte blanche* to expand their submissions on the merits of the issues joined between the parties.

20. The prior practice of the Appeals Chambers at the ICC, moreover, reveals that responses by the parties to LRV observations (on the merits and on issues of additional evidence) should be limited strictly to the LRV's submissions and any disagreement with them. In *Lubanga*, the LRVs were authorised to file observations on the Defence appeal against conviction, the Defence and Prosecution appeals against sentence, and the Defence request to admit additional evidence, in one consolidated filing.²³ The Defence and the Prosecution had the right to reply to the LRV observations.²⁴ However, the replies to LRV observations were filed prior to²⁵ the responses by the Prosecution to the Defence appeals against conviction and sentence,²⁶ and prior to the Defence reply.²⁷ Accordingly, no opportunity for the parties to use their responses to the LRV observations as a means to further engage with each others' submissions presented.

²⁰ See, for example, ICC-01/05-01/08-3491-Conf, paras. 9-10, 13.

²¹ ICC-01/05-01/08-3491-Conf, para. 13.

²² ICC-01/05-01/08-3482-Conf, paras. 19, 21.

²³ ICC-01/04-01/06-2951.

²⁴ ICC-01/04-01/06-2951.

²⁵ ICC-01/04-01/06-2966 on 4 February 2013.

²⁶ ICC-01/04-01/06-2968-Red and ICC-01/04-01/06-2969-Red on 19 February 2013.

²⁷ ICC-01/04-01/06-2989-Red on 28 February 2013.

21. In any event, the Prosecution reply in *Lubanga*²⁸ was appropriately discrete. It identified two paragraphs of the LRV's submissions (paragraphs 106 and 108) which addressed the respective appeals against sentence,²⁹ and its response was limited to addressing these additional LRV submissions.

22. Similarly, in *Ngudjolo*, the LRV was authorised to file observations on both the Prosecution's appeal and Ngudjolo's response. Both the Prosecution and Ngudjolo were then given a right to reply to these observations.³⁰ Again, this was prior to the filing of a reply by the parties.³¹ In any event, the Prosecution did not exercise its right of reply.³²

23. The Prosecution's circumvention of the Appeals Chamber's order in the present case warrants the striking of the filing from the record of the appeal. Even putting aside the established practice of allowing the Defence to have the last word,³³ the Prosecution approach impacts on the fairness of the appeals proceedings. Patently, 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.

24. The situation is synonymous with the raising of novel arguments on appeal in a Reply Brief, which the Appeals Chamber of the ICTY has regularly deprecated as this practice meant that "the opposing party is deprived of an opportunity to respond. This could harm the fairness of the appeal proceedings."³⁴

²⁸ ICC-01/04-01/06-3004.

²⁹ ICC-01/04-01/06-3004, paras. 9, 11.

³⁰ ICC-01/04-02/12-71.

³¹ ICC-01/04-02/12-271-Corr, paras. 14 and 16.

³² ICC-01/04-02/12-271-Corr, para. 15.

³³ ICC-01/04-02/12-217, para. 10; ICC-01/04-01/06-2722, para. 2; ICC-01/04-01/06-2722, para. 3; ICC-01/05-01/08-2731, para. 32; ICC-01/05-01/08-3071, para. 10.

³⁴ *Prosecutor v. Martić*, IT-95-11-A, Judgement, 8 October 2008, para. 229. See also *Prosecutor v. Popović et al.*, IT-05-88-A, Judgement, 30 January 2015, para. 314; *Prosecutor v. Galić*, IT-98-29-A, Decision On Prosecution's Motion To Strike New Argument Alleging Errors By Trial Chamber Raised For First Time In Appellant's Reply Brief, 28 January 2005.

25. In the Appellant's submission, the Prosecution's instant filing undermines the central principle of all litigation before this Court, whether appellate or not, namely that any argument on the central issues which goes beyond a party's initial statement of its position (whether in application or response), requires the leave of the relevant Chamber. The Prosecution Reply makes a mockery of the requirement that the Appellant seek leave to reply to the Prosecution Response, and justify its need to present additional arguments to the Appeals Chamber. No such justification was provided by the Prosecution effectively to file a sur-reply to the very arguments for which the Appellant had sought leave. The Prosecution simply saw an opportunity, and took it.

26. On a practical level, the briefing period of an appeal must have some finality. The parties cannot be permitted indefinitely to respond to each other's arguments, particularly when these arguments are presented outside the bounds of an order from the Appeals Chamber. Additional arguments, and additional filings will all impact on the expediency of the appeal.

E. FORTHCOMING FILINGS

27. Throughout the proceedings against Mr. Bemba, the interests of the Prosecution and LRV have been aligned. Unlike in other trials or other international courts where the victims' representatives have taken a different position from that of the Prosecution,³⁵ this has never occurred in the present case on any issue.

28. Accordingly, even leaving aside any analysis of the Prosecution's current filing, a reply by the Prosecution to LRV observations, is necessarily otiose, since its submissions in this case will invariably support those of the LRV and *vice-versa*. In fact, the current filings provide ample illustration. The LRV's Observations aligning

³⁵ See, for example, ICC-01/04-01/07-3499, paras. 3-4, 12.

perfectly with those of the Prosecution, in truth they merited no Prosecution reply. The Appellant's primary position is thus that the Appeals Chamber ought to vary its existing orders by deleting the right of the Prosecution to reply.

29. Alternatively, the Appellant submits that the scope of any reply to LRV observations should be precisely delineated. Whilst the Chamber's order required no clarification – a reply “to the Victims' observations” does not admit of the interpretation placed upon it by the Prosecution, namely that it presents an opportunity through wholesale and unfettered agreement with the LRV Observations to respond substantively to the Appellant's filings, whether addressed by the LRV or not – in the light of the Prosecution's opportunist approach, some further clarification of the parties' right to reply to the LRV observations is, in the submission of the Appellant, necessary.

F. RELIEF SOUGHT

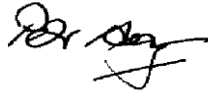
30. For the reasons outlined above, the Appellant respectfully requests that the Appeals Chamber:

STRIKE from the record of the case the “Prosecution's reply to the Legal Representative of Victims' observations on Bemba's application to present additional evidence in the appeal”;

PRECLUDE the Prosecution from responding to the LRV observations on the Appellant's documents in support of the Appeals against conviction and against sentence; or, in the alternative

ORDER any Prosecution reply to be strictly limited to responding the arguments raised by the LRV.

The whole respectfully submitted.



Peter Haynes QC

Lead Counsel for Mr. Jean-Pierre Bemba

Done at The Hague, The Netherlands, 2 February 2017

31. It is hereby certified that this document contains a total of 2359 words and complies in all respects with the requirements of regulation 36 of the Regulations of the Court.