



Original: English

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

Date: 02/03/2017

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 response to the Prosecution's "Request to make additional submissions under regulation 28 concerning two issues"

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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A. INTRODUCTION

1. The instant request to make additional submissions under Regulation 28,¹ is based on a purported misunderstanding on the part of the Prosecution as to the proper scope of a “reply”.

2. According to the Prosecution, in its decision of 7 February 2017,² the Appeals Chamber of the International Criminal Court clarified for the first time that a reply to a filing cannot be used as a pretext indirectly to respond to a different filing to which no leave has been granted to reply.³ The Prosecution accordingly “attaches due weight to the Appeals Chamber’s **recent clarification** of the procedure in this case”.⁴

3. Regulation 28 of the Regulations of the Court, in the Appellant’s submission, is primarily a mechanism to be employed *proprio motu* by the Appeals Chamber. Classically, it would be used to direct specific questions to the parties to be addressed in further submissions (orally or in writing) for the proper determination of an appeal. Although a party may ask the Chamber to make an order under Regulation 28, a purported misunderstanding of a basic premise of adversarial proceedings is an insufficient basis to invoke its operation.

4. In reality, the Prosecution’s application is reflective of nothing more than a desire on its part to reiterate its disagreement with the Appellant’s position. It was, moreover, borne of a deliberate decision by the Prosecution not to seek leave to file a further submission, by way of Sur-Reply in a timely manner to the Appellant’s Reply Brief, but rather to include pages of counter-argument to the Appellant in a reply to the Observations of the Legal Representative of Victims. This avenue now

¹ ICC-01/05-01/08-3498 (“Regulation 28 Request”).

² ICC-01/05-01/08-3497.

³ Regulation 28 Request, paras. 3, 6-7.

⁴ Regulation 28 Request, para. 6 (emphasis added).

having been rightly closed,⁵ the Prosecution seeks another route to the same end. For the reasons set out below, this is not one which is available to it. The Prosecution application should be dismissed.

B. PROCEDURAL HISTORY

5. On 21 March 2016, Trial Chamber III convicted Mr. Jean-Pierre Bemba (“the Appellant”) of the charges against him.⁶

6. On 15 April 2016, the Appeals Chamber rendered its “Decision on the participation of victims in the appeal against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”” whereby it authorised the LRV to file observations within 30 days of the notification of the response to the document in support of the appeal (“LRV Observations”). These Observations were limited to 60 pages.⁷ The Appellant and the Prosecution were given the right to respond within 30 days of the notification of the LRV Observations and were limited to 60 pages.⁸

7. On 19 September 2016, the Appellant filed his document in support of appeal (“Appeal Brief”).⁹ 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 for Additional Evidence”).¹⁰

8. 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

⁵ ICC-01/05-01/08-3497.

⁶ ICC-01/05-01/08-3343.

⁷ ICC-01/05-01/08-3369.

⁸ ICC-01/05-01/08-3369.

⁹ ICC-01/05-01/08-3434-Conf.

¹⁰ ICC-01/05-01/08-3435-Conf.

2016.¹¹ The Appellant and the Prosecutor were authorised to reply to the LRV observations on the Application for Additional Evidence by 26 January 2017.¹²

9. On 31 October 2016, the Prosecution filed a request for a 20% extension of the page limit to file a response to the Appeal Brief.¹³ On 4 November 2016, the Appeals Chamber denied this request.¹⁴

10. On 21 November 2016, the Prosecution filed its response to the Appeal Brief (“Prosecution Response Brief”)¹⁵ and its response to the Defence Application for Additional Evidence.¹⁶

11. On 28 November 2016, the Appellant requested leave to reply to the Prosecution Response to the Defence Application for Additional Evidence.¹⁷ It was granted by the Appeals Chamber on 2 December 2016.¹⁸

12. On 30 November 2016, the Appellant requested leave to reply to the Prosecution Response Brief.¹⁹ A reply not exceeding 30 pages was granted by the Appeals Chamber on 7 December 2016.²⁰ The deadline for the filing of the LRV Observations was extended to 9 January 2017. The deadline for the filing of responses from the Appellant and the Prosecution to the LRV Observations was extended to 9 February 2017.²¹

¹¹ ICC-01/05-01/08-3446-Conf.

¹² ICC-01/05-01/08-3446-Conf.

¹³ ICC-01/05-01/08-3456.

¹⁴ ICC-01/05-01/08-3463.

¹⁵ ICC-01/05-01/08-3472-Conf.

¹⁶ ICC-01/05-01/08-3471-Conf.

¹⁷ ICC-01/05-01/08-3473.

¹⁸ ICC-01/05-01/08-3479.

¹⁹ ICC-01/05-01/08-3475.

²⁰ ICC-01/05-01/08-3480.

²¹ ICC-01/05-01/08-3480, p. 3.

13. On 9 December 2016, the Appellant filed his Reply to the Prosecution response to the Defence Application for Additional Evidence.²²

14. On 20 December 2016, the Appellant filed its Reply to the Prosecution Response Brief.²³

15. 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»”.²⁴

16. On 9 January 2017, the LRV filed its Observations de la Représentante légale des victimes sur «*Appellant’s document in support of appeal*».²⁵

17. On 23 January 2017, the Defence informed the Appeals Chamber that it did not intend to file a reply to the LRV observations on the Defence Application for Additional Evidence.²⁶

18. On 26 January 2017, the Prosecution filed its Reply to the LRV observations on the Defence Application for Additional Evidence.

19. On 2 February 2017, the Appellant filed a 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”.²⁷ The Prosecution responded to that request on 6 February 2017.²⁸

²² ICC-01/05-01/08-3482-Conf.

²³ ICC-01/05-01/08-3483-Conf.

²⁴ ICC-01/05-01/08-3484-Conf.

²⁵ ICC-01/05-01/08-3489-Conf.

²⁶ Email from the Defence to the Appeals Chamber, parties and participants of Monday 23 January 2017 at 12:07.

²⁷ ICC-01/05-01/08-3494.

²⁸ ICC-01/05-01/08-3496-Conf.

20. On 7 February 2017, the Appeals Chamber rendered its “Decision on Mr. Bemba’s request regarding the Prosecutor’s reply to victims’ observations” in which it granted the Appellant’s request and ordered that the Prosecution’s reply to the LRV observations on the Defence Application for Additional Evidence be disregarded.²⁹ It also ordered the Prosecution to “refrain from unnecessary and repetitive submissions, and from indirectly responding to Mr Jean-Pierre Bemba Gombo’s submissions through any future replies to the victims’ observations in the present case”.³⁰

21. On 8 February 2017, the Prosecution filed the instant Regulation 28 Request.³¹

22. On 9 February 2017, the Appellant filed his reply to “Observations de la Représentante légale des victimes sur «Appellants’s document in support of appeal»”.³² The Prosecution did not reply to the LRV Observations.

C. LEVEL OF CONFIDENTIALITY

23. The present filing responds to a public filing on the part of the Prosecution, and nothing in its contents justifies a confidential classification. The Appellant accordingly files the document publicly.

D. SUBMISSIONS

1. The Prosecution’s application is procedurally inappropriate

24. The Appeals Chamber has previously ruled that further submissions under Regulation 28 “are not intended to reiterate a position or demonstrate mere disagreements with the position of another party.”³³

²⁹ ICC-01/05-01/08-3497.

³⁰ ICC-01/05-01/08-3497, p. 3.

³¹ ICC-01/05-01/08-3498.

³² ICC-01/05-01/08-3499-Conf.

³³ ICC-01/11-01/11-493, para. 6.

25. The Prosecution seeks to do just that. Neither of the “Two Issues” demonstrates a “need for clarification”, or raises issues that are “necessary for the proper determination of the appeal”.³⁴ There is no misunderstanding or ambiguity which warrants a departure from the normal course of appellate briefing. The Prosecution simply disagrees with the Appellant’s submissions in reply, and wants a chance to argue again before the Appeals Chamber on the same issues.

26. Moreover, both of the “Two Issues” could have been addressed in the Prosecution Response Brief. Concerning the Prosecution’s **disclosure violations**,³⁵ the Appellant’s position on appeal was that the Prosecution’s failure to disclose information material to the credibility of Defence witnesses deprived the Defence of taking numerous remedial measures, such as:³⁶

implementing a more transparent regime for disclosing and approving witness expenses that would exclude any suspicions of impropriety; replacing any witness whose credibility might legitimately have been placed in doubt by certain payments; squarely addressing the issue of payments during testimony; explaining the payments to the Trial Chamber; and/or **re-calling the three witnesses who had allegedly been procured to give false testimony as of the date of the Prosecution’s first allegations of misconduct** to get to the bottom of the allegations (as the Prosecution was given the opportunity to do in respect of P169).

27. The Appellant’s case is that the (admitted) failure of the Prosecution to make that initial disclosure in a timely manner was “catastrophic” to the further proper process of the case.³⁷ In response, the Prosecution argued that any prejudice caused could have been **later** remedied by submissions during trial, re-opening of the case

³⁴ ICC-01/04-01/07-475.

³⁵ Regulation 28 Request, paras. 9-11, 14-15.

³⁶ Appeal Brief, para. 88. *See generally*, paras. 76-92.

³⁷ Appeal Brief, para. 88.

and the recall of witnesses.³⁸ It is worth pausing to note that in making these submissions, the Prosecution is not talking about the recall of merely the same three witnesses, who were the only ones “tainted” at the time of the first disclosure violation, but rather upwards of 14 witnesses. These were witnesses who had been criminalized, were not compellable, and who ultimately the Accused would have to obtain leave to call back to court to admit perjury. In reply, the Appellant pointed out that this argument was **unrealistic**, not least because, in relation to the further witnesses, the disclosure violations continued long after closing submissions³⁹ (or as the Prosecution puts it for “two years”).⁴⁰

28. This is a classic operation of adversarial proceedings. One party takes a position, the responding party raises a novel argument in response, and it is countered, explained or mitigated in a reply. Nothing about this standard exchange of submissions justifies the extraordinary resort to additional pleadings. The Appellant was entitled to argue that proper disclosure would have put the case on a different track; the Prosecution was entitled to respond that the Defence could later have sought to re-open its case and recalled witnesses to mitigate the effects of any prejudice; and the Appellant was entitled to demonstrate why this was impossible. The Prosecution was well aware that Mr Bemba alleged that breaches of its disclosure obligations had continued long after the closing submissions.⁴¹ This was not new information.

29. The fact that the Prosecution’s argument does not withstand the scrutiny of the Appellant’s reply does not entitle it to a second chance to attempt to argue the point in a different manner.

³⁸ Prosecution Response, para. 55.

³⁹ Appellant’s Reply, para. 21.

⁴⁰ Regulation 28 Request, para 11.

⁴¹ Regulation 28 Request, para 9 in which the Prosecution complains merely that the Appellant “resurrected the allegation” in his Reply.

30. Similar failings undermine the Prosecution arguments concerning **causation**.⁴² In its Response Brief, it was patently open to the Prosecution to have argued that (i) its primary position at trial was that Article 28 of the ICC Statute does not encompass a causal link between the omissions and the crimes; and in the alternative (ii) even if this had not been its primary position at trial, it was not estopped from raising this question on appeal. In a brief of 200 pages, the Prosecution elected (presumably tactically) only to advance the former argument. What it seeks now is not an opportunity to clarify the issue, but rather to correct a tactical error. Regulation 28 is not intended for such purposes.

31. Significantly, the Prosecution does not attempt to argue that it could never have anticipated that the Appellant would demonstrate in reply the falsity of the claim that the Prosecution's position at trial had been that there was no obligation to show a causal link under Article 28.⁴³ Had it been in possession of "two significant additional submissions from the procedural history"⁴⁴ which supported its argument, the Prosecution's lack of diligence in relying on these in its Response Brief should not be rewarded with a second chance to attempt to argue the same point more effectively.

32. Indeed, poignantly to the question at hand, the Appeals Chamber is not required to determine whether Article 28 encompasses a causal link in the disposition of the present appeal.⁴⁵ It is only properly seised with the question of whether the Trial Chamber erred in failing to identify the requisite causal standard.⁴⁶ The question of whether or not Article 28 encompasses a causal link (and even less what position the Prosecution took on the question at first instance),

⁴² Regulation 28 Request, paras. 9-11, 16.

⁴³ Regulation 28 Request, paras. 9, 11-12, 16.

⁴⁴ Regulation 28 Request, para. 16.

⁴⁵ Reply Brief, paras. 42-43.

⁴⁶ Appeal Brief, paras. 318-388.

is not a live issue in this appeal.⁴⁷ Accordingly, the Prosecution's proposed additional submissions can clarify nothing of relevance.

33. The Prosecution's submission, moreover, that the Appeals Chamber should allow it to make further submissions, because, in this case, the Appellant was permitted a Reply,⁴⁸ is both misplaced and disingenuous. Leave to reply is governed by Regulation 60 and a specific (and separate) legal test. It is routinely granted in litigation at the ICC. The fact that the Appellant in this case should be permitted a Reply was almost entirely uncontentious; the Prosecution conceded that as early as 31 November 2016, when it sought leave to file an extended response brief.⁴⁹ The reason it was driven to that concession, was that it had raised a ground of appeal, wholly unforeseeably, in its Response Brief. On the contrary, Regulation 28, is a tool of the Chamber, and not a right of reply for those who chose to hold back arguments. The circumstances in which such an application is allowed to permit **one party** to make further submissions is truly exceptional. The circumstances herein are not.

34. Ultimately, appellate proceedings must be finite. A party must tailor its grounds and responses to the permitted limits. It behoves a party to anticipate counter-arguments and deal with them as best it can within the scope of the briefing schedule set by the Appeals Chamber, as it cannot assume the right to make further written or oral submissions.

2. The Prosecution's application is untimely

35. The Appellant's Reply Brief was filed on 20 December 2016. Had the Prosecution taken the criticism of its conduct with the "greatest seriousness",⁵⁰ it was incumbent upon it to apply for leave to file a Sur-Reply within a reasonable

⁴⁷ Reply Brief, paras. 50-51.

⁴⁸ Regulation 28 Request, para. 5.

⁴⁹ ICC-01/05-01/08-3456.

⁵⁰ Regulation 28 Request, para. 17.

period after receipt of the Reply Brief,⁵¹ rather than allowing weeks to elapse before attempting to respond through its reply to the LRV Observations.

36. An application for leave to file a Sur-Reply would have been subject to, not only a stringent test for leave, but also a requirement for a timely application, and a severe restriction upon the length of any filing. The Appellant received leave to file a 30-page reply to the Prosecution's 200-page response.⁵² By necessary inference, any Sur-Reply could not possibly have exceeded more than a handful of pages. The Prosecution now proposes to "limit" itself to 12 pages of argument in an additional Regulation 28 filing.⁵³ A party should not benefit from a deliberate choice to circumvent the proper procedure in preference for one which is manifestly less restrictive.

3. The "equality of arms" submission is misplaced

37. The Prosecution and the LRV have concurrent interests in opposing the present appeal.⁵⁴ Even without any further submissions from the Prosecution, the "arms" at the disposal of those adverse to the Appellant are greater than his own. Simply in terms of the volume of submissions, the Appellant has submitted less pages of argument in the present appeal than the LRV and the Prosecution combined.⁵⁵

38. Equality of arms does not, moreover, equate to ensuring that no argument goes "unanswered".⁵⁶ The nature of adversarial proceedings means that one party will inevitably speak last, and the proceedings will then finish. The Appellant does

⁵¹ See ICC-01/04-02/12-126-Red2 and ICC-01/04-02/12-134-Red-tENG.

⁵² ICC-01/05-01/08-3480.

⁵³ Regulation 28 Request, paras. 1, 24.

⁵⁴ ICC-01/05-01/08-3489-Conf-Corr-tENG, para. 10.

⁵⁵ See ICC-01/05-01/08-3434-Conf and ICC-01/05-01/08-3483-Conf for the Appellant and ICC-01/05-01/08-3472-Conf-Corr and ICC-01/05-01/08-3489-Conf-Corr-tENG for the Prosecution and LRV.

⁵⁶ Regulation 28 Request, para. 17.

not “expect a proper answer from the Prosecution”.⁵⁷ In filing his Reply Brief, he properly understood the pleadings on these issues to be concluded.

4. The Appeals Chamber should not condone sharp litigation tactics

39. The Trial Chamber, in convicting the Appellant, held that there was a requirement of causality under Article 28 of the ICC Statute.⁵⁸ The Prosecution relied on this causal link to seek an increased sentence for Mr. Bemba at first instance, arguing that the causation requirement “increases Jean-Pierre Bemba’s degree of culpability”.⁵⁹ The Trial Chamber agreed, and increased Mr. Bemba’s sentence accordingly.⁶⁰

40. Undoubtedly for this reason, amongst others, the Prosecution chose not to appeal the Trial Chamber’s finding that Article 28 requires a causal link between the superior’s omissions and the resultant crimes. Rather, it raised this argument, impermissibly, in response.⁶¹ The Appellant was then granted leave to address this novel argument in reply.⁶²

41. Subsequent filings⁶³ now reveal that the Prosecution “planned” its litigation strategy⁶⁴ on the basis that it would have the opportunity to file a 60-page reply to the LRV Observations,⁶⁵ and that it would use this filing not just to reply to the Appellant’s Reply Brief⁶⁶ but also, inferentially, to supplement arguments in its own

⁵⁷ Regulation 28 Request, para. 17.

⁵⁸ ICC-01/05-01/08-3343, paras. 210-211.

⁵⁹ See ICC-01/05-01/08-3363-Conf, para. 125; T-370-ENG, 14:9-11, 15-17.

⁶⁰ ICC-01/05-01/08-3399, para. 60.

⁶¹ See ICC-01/05-01/08-3483-Conf, paras. 44-49.

⁶² ICC-01/05-01/08-3480, paras. 6, 8.

⁶³ ICC-01/05-01/08-3491-Conf; ICC-01/05-01/08-3496-Conf; Regulation 28 Request.

⁶⁴ ICC-01/05-01/08-3496, para. 9; “On the basis of the Appeals Chamber’s orders, the Prosecution was entitled to assume that the appeal would follow a certain course [...] and plan accordingly.”

⁶⁵ ICC-01/05-01/08-3369, p. 3.

⁶⁶ ICC-01/05-01/08-3498, para. 7: “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”.

Response Brief.⁶⁷ The Prosecution's failure to file any reply to the LRV Observations is an express concession that not one word of its "planned" reply would have been remotely responsive thereto.

42. The necessary consequence of filing a reply to the LRV of such content would have been that the Prosecution would at a stroke have avoided both the need to seek leave to file further submissions, as well as the practical effects of the Appeals Chamber's decision to deny it an extension to the page limit for its Response Brief.⁶⁸

43. Further and/or alternatively, the Prosecution offers no persuasive argument why matters, which apparently require further submissions, could not be addressed orally. The decision to hold an oral hearing in appeals proceedings is discretionary and made on a case-by-case basis.⁶⁹ For the avoidance of doubt, the Appellant remains at the disposal of the Chamber as to whether it will require from him further submissions or explanation of his pleadings pursuant to Regulation 28 or during an oral hearing. However, as presently advised, he neither seeks any such opportunity, nor presumes that it will arise.

E. RELIEF SOUGHT

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

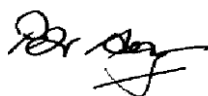
REJECT the Prosecution request to make additional submissions under regulation 28 concerning two issues.

⁶⁷ See Prosecution's reply to the LRV's observations on Defence's application to present additional evidence which replies to the Defence and references the original application, 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.

⁶⁸ ICC-01/05-01/08-3463.

⁶⁹ ICC-01/04-02/12-199A, para. 13.

The whole respectfully submitted.



Peter Haynes QC

Lead Counsel for Mr. Jean-Pierre Bemba

Done at The Hague, The Netherlands, 2 March 2017

It is hereby certified that this document contains a total of 3,435 words and complies in all respects with the requirements of regulation 36 of the Regulations of the Court.