

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/04-01/15

Date: 24 January 2022

THE APPEALS CHAMBER

Before: Judge Luz del Carmen Ibáñez Carranza, Presiding
Judge Piotr Hofmański
Judge Solomy Balungi Bossa
Judge Reine Alapini-Gansou
Judge Gocha Lordkipanidze

SITUATION IN UGANDA

**IN THE CASE OF
*THE PROSECUTOR v. DOMINIC ONGWEN***

Public

**CLRV Response to the Prosecution “Motion to Strike Paragraphs 51-52 of the
‘Defence Response to the *Amici Curiae* Observations’ (ICC-02/04-01/15-1950”**

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. The Common Legal Representative of the Victims participating in the proceedings (the “CLR”) supports the Prosecution’s Motion¹ to strike paragraphs 51 and 52 (the “Motion”) of the Defence’s Response to the *Amici Curiae* Observations (the “Defence Response to the *Amici*”).²

II. SUBMISSIONS

2. The CLR agrees with the Prosecution that the Defence impermissibly uses its Response to the *Amici Curiae*’s submissions to supplement and/or add new arguments to its Appeal against the Conviction of Mr Ongwen.³ In addition to running against the procedural framework of the Court and the basic principles to a fair trial, this attempt impedes the other party and the participating victims from an opportunity to respond in writing.

3. In particular, the Defence’s approach impacts on the fairness of the appeal proceedings. Indeed, this course of events affords the Defence with a second opportunity to plead and/or add arguments to its appeal, to which the other party and the participating victims have no ability to respond effectively, giving rise to prejudice.

4. The situation can be assimilated to 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*

¹ See the “Motion to Strike Paragraphs 51-52 of the ‘Defence Response to the Amici Curiae Observations’ (ICC-02/04-01/15-1950”, [No. ICC-02/04-01/15-1959 A A2](#), 21 January 2022 (the “Motion”).

² See the “Defence Response to the Amici Curiae Observation”, [No. ICC-02/04-01/15-1950 A A2 + Anxs](#), 17 January 2022 (the “Defence Response to the *Amici*”).

³ See the “Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021”, [No. ICC-02/04-01/15-1866 Red A A2](#), 19 October 2021.

*harm the fairness of the appeal proceedings”.*⁴ As underlined by the Prosecution, the Appeals Chamber has also already condemned similar ill practices, noting that such unauthorised response is inappropriate.⁵ In a decision, pertaining to another stage of the proceedings, the Appeals Chamber also noted that *“the arguments of a participant to an appeal must be fully contained within that participant’s filing in relation to that particular appeal. The filing must, in itself, enable the Appeals Chamber to understand the position of the participant on the appeal, without requiring reference to arguments made by that participant elsewhere. The practice followed by the appellant in this appeal could also lead, in reality, to a circumvention of the page limits that are stipulated in the Regulations of the Court”.*⁶

5. The Defence’s attempt undermines the central principle of all litigations before the Court, namely that any argument on the central issues which goes beyond a party’s initial position, requires the leave of the relevant Chamber; thereby abusing the Court’s due process (from the fair trial rights, to the Appeals Chamber’s instructions and related statutory time-limits and page-limits for appeal under rule 150 of the Rules of Procedure and Evidence).

6. In this regard, the CLRV recalls the specific provision about variation of grounds of appeal and that, in the present case, the Appeals Chamber has previously granted the Defence the possibility to seek said variation once received the translation into Acholi of the sections of the decision on conviction relevant to its ground(s) of appeal⁷ (an opportunity that the Defence chose not to take). The Defence had,

⁴ See ICTY, *Prosecutor v. Martić*, Case No. IT-95-11-A, [Judgement](#), 8 October 2008, para. 229. See also, ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, [Judgement](#), 30 January 2015, para. 314; ICTY, *Prosecutor v. Galić*, Case No. 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.

⁵ See the “Decision on Mr Bemba’s request regarding the Prosecutor’s reply to victims’ observations” (Appeals Chamber), [No. ICC-01/05-01/08-3497](#), 7 February 2017, para. 12.

⁶ See the Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges” (Pre-Trial Chamber II), [No. ICC-01/09-02/11-406](#), 9 March 2012, para. 17; and the “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”” (Appeals Chamber), [No. ICC-01/04-01/06-774](#), 14 December 2006, para. 29.

⁷ See the “Decision on Mr Ongwen’s request for time extension for the notice of appeal and on translation” (Appeals Chamber), [No. ICC-02/04-01/15-1781 A](#), 24 February 2021, para. 11.

therefore, ample possibilities to raise all its issues on appeal, and is now precluded from raising any new or additional arguments. This is all the more true that the Defence did not even attempt to explain which compelling reasons would justify that these new or additional arguments could not be included in its earliest submissions and could give rise to an exceptional late admission from the Appeals Chamber.

7. Moreover, on a practical level, as also underlined by the Prosecution,⁸ the raising of supplemental arguments presented outside the bounds of the briefing period of an appeal impacts on the expeditiousness of the proceedings which will require the other party and the participating victims to eventually dedicate their precious time and resources in the forthcoming oral hearing to address the matters improperly raised by the Defence at this juncture. For the participating victims, this course of events is even more prejudicial considering that organising comprehensive consultations with victims at the last minute on new issues is not easily foreseeable, and that, by general practice of this Court, the Legal Representatives are afforded less time than the Prosecution for addressing their arguments.

III. CONCLUSION

8. Therefore, the Defence's circumvention of the legal provisions governing the appeal proceedings warrants the striking from the record of the appeal of paragraphs 51 and 52 of the Defence Response to the *Amici* and the associated annexes, and the disregarding of the corresponding submissions for the remainder of these proceedings.

⁸ See the Motion, *supra* note 1, para. 4.

Respectfully submitted.

A handwritten signature in black ink, reading "Paolina Massidda". The signature is written in a cursive style with a prominent initial 'P' and a long horizontal stroke at the end.

Paolina Massidda
Principal Counsel

Dated this 24th day of January 2022

At The Hague, The Netherlands