



Original: English

No. ICC-01/04-02/06 OA 5

Date: 3 March 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

Decision on Mr Ntaganda's request for leave to reply

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for the Defence
Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of Victims
Ms Sarah Pellet
Mr Dmytro Suprun

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI entitled “Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9” of 4 January 2017 (ICC-01/04-02/06-1707),

Having before it the “Request on behalf of Mr Ntaganda seeking leave to reply to the ‘Corrected version of ‘Prosecution’s Response to Ntaganda’s ‘Appeal from the Second Decision on the Defence’s Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9’” of 23 February 2017 (ICC-01/04-02/06-1800),

Renders, pursuant to regulation 24(5), read with regulation 34 (c), of the Regulations of the Court, the following

DECISION

The request for leave to reply is rejected.

REASONS

I. PROCEDURAL HISTORY

1. On 4 January 2017, the Trial Chamber rendered the “Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9”¹ (“Impugned Decision”).
2. On 26 January 2017, Mr Ntaganda filed the “Appeal from the Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9”.²
3. On 17 February 2017, the Prosecutor filed “Prosecution’s Response to Ntaganda’s ‘Appeal from the Second Decision on the Defence’s Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9’”.³

¹ [ICC-01/04-02/06-1707](#).

² [ICC-01/04-02/06-1754](#). See also “Appeal on behalf of Mr Ntaganda against Trial Chamber VI’s ‘Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9’ ICC-01/04-02/06-1707”, 10 January 2017, [ICC-01/04-02/06-1710](#) (OA5).

4. On 23 February 2017, Mr Ntaganda filed a “Request on behalf of Mr Ntaganda seeking leave to reply to the ‘Corrected version of ‘Prosecution’s Response to Ntaganda’s ‘Appeal from the Second Decision on the Defence’s Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9’”⁴ (“Request”). On 27 February 2017, the Prosecutor filed the “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)”⁵ (“Response”).

II. MERITS

5. At the outset, the Appeals Chamber notes the Prosecutor’s submission that the Request is “procedurally misconceived” as both the Rules of Procedure and Evidence (“Rules”) and the Regulations of the Court do not permit an opportunity to reply in interlocutory appeals.⁶ The Prosecutor avers that neither regulations 24 (5) nor 60 of the Regulations of the Court applies to appeals pursuant to article 82 (1) (a) and rule 154 of the Rules. Instead, the Prosecutor submits that in such circumstances a party may request the Appeals Chamber to exercise its discretion under regulation 28 of the Regulations of the Court.

6. The Appeals Chamber further notes that this interpretation, while consistent with the Appeals Chamber’s previous jurisprudence is, however, no longer relevant given the Appeals Chamber’s subsequent departure from this interpretation of the right to request leave to reply. In a decision arising in the case of *Prosecutor v. Laurent Gbagbo and Charles Blé Goude*,⁷ the Appeals Chamber explained that for reasons of efficiency it deemed it “appropriate for an appellant who wishe[d] to reply to a participant’s response to a document in support of the appeal, to first seek leave of the Appeals Chamber under regulation 24 (5) of the Regulations of the Court”.

³ [ICC-01/04-02/06-1794](#). A corrected version was registered on 21 February 2017 as “Corrected version of ‘Prosecution’s Response to Ntaganda’s ‘Appeal from the Second Decision on the Defence’s Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9’”, 17 February 2017, ICC-01/04-02/06-1794” (“Response to the Document in Support of the Appeal”).

⁴ [ICC-01/04-02/06-1800](#).

⁵ [ICC-01/04-02/06-1804](#).

⁶ [Response](#), paras 4-6.

⁷ *Prosecutor v. Laurent Gbagbo and Charles Blé Goude*, “Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 8 July 2015 entitled ‘Ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute’”, 8 September 2015, [ICC-02/11-01/15-208](#) (OA 6), paras 26-27.

7. The Appeals Chamber is cognisant that the departure from its previous jurisprudence occurred in the context of an appeal arising pursuant to article 82 (1) (b) of the Statute. Subsequently, the Appeals Chamber applied this interpretation in an appeal arising under article 82 (1) (d).⁸ The Appeals Chamber considers that there is no reason for not applying the same interpretation to appeals arising pursuant to article 82 (1) (a) of the Statute, as is the case at hand. Accordingly, the Prosecutor's submissions on the correct legal basis for the Request are dismissed.

8. Turning to the merits of the Request, the Appeals Chamber notes that the granting of leave to reply is a discretionary decision. The newly amended regulation 24 (5) of the Regulations of the Court⁹ provides in relevant part that "[u]nless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated". Thus, the Appeals Chamber would consider granting a request for leave to reply if these conditions are met, unless it considers that a reply would otherwise be necessary for the adjudication of the appeal.

9. Mr Ntaganda seeks leave to reply to eleven issues arising from the Response to the Document in Support of the Appeal.¹⁰ He claims that "in the context of the Prosecution's voluminous and novel submissions",¹¹ additional submissions on those matters would materially assist the Chamber in its adjudication of the Appeal.¹²

10. The Prosecutor is opposed to the granting of leave to reply and submits, *inter alia*, that "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".¹³

⁸ *Prosecutor v. Laurent Gbagbo and Charles Blé Goude*, "Decision on Mr Laurent Gbagbo's request for leave to reply", 9 October 2015, [ICC-02/11-01/15-284](#) (OA7).

⁹ As amended on 6 December 2016 and entered into force on the same day.

¹⁰ [Request](#), para. 1.

¹¹ [Request](#), para. 2.

¹² [Request](#), para. 2.

¹³ [Response](#), para. 9.

11. The Appeals Chamber observes that, in this particular case, issues arising in this appeal have been previously litigated before the Pre-Trial Chamber,¹⁴ Trial Chamber,¹⁵ and the Appeals Chamber.¹⁶

12. The Appeals Chamber notes that the Request merely points to issues arising from the Response to the Document in Support of the Appeal without demonstrating why they are new and could not reasonably have been anticipated by him. Further, the

¹⁴ Transcript of the hearing dated 13 February 2014, [ICC-01/04-02/06-T-10-RED-ENG](#), p. 27. “*Conclusions écrites de la Défense de Bosco Ntaganda suite à l’Audience de confirmation des charges*”, 14 April 2014, [ICC-01/04-02/06-292-Red2](#), paras 250-263.

¹⁵ “Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Document containing the charges”, 1 September 2015, [ICC-01/04-02/06-804](#); “Former child soldiers’ response to the ‘Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Document containing the charges’”, 9 September 2015, [ICC-01/04-02/06-814](#); “Prosecution Response to the ‘Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Document Containing the Charges’, ICC-01/04-02/06-804”, 11 September 2015, [ICC-01/04-02/06-818](#); “Reply on behalf of Mr Ntaganda to ‘Prosecution Response to the ‘Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Documents containing the charges’, ICC-01/04-02/06-804’”, 24 September 2015, [ICC-01/04-02/06-863](#); “Consolidated submissions challenging jurisdiction of the Court in respect of Counts 6 and 9 of the Updated Document containing the charges”, 7 April 2016, [ICC-01/04-02/06-1256](#); “Prosecution’s response to Mr Ntaganda’s ‘Consolidated submissions challenging jurisdiction’ regarding Counts 6 and 9”, 14 April 2016, [ICC-01/04-02/06-1278](#); “Former child soldiers’ Response to the ‘Consolidated submissions challenging jurisdiction of the Court in respect of Counts 6 and 9 of the Updated Document containing the charges’”, 14 April 2016, [ICC-01/04-02/06-1279](#).

¹⁶ “Appeal on behalf of Mr Ntaganda against Trial Chamber VI’s ‘Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9’, ICC-01/04-02/06-892”, 19 October 2015, [ICC-01/04-02/06-909](#); “Document in support of the appeal on behalf of Mr Ntaganda against Trial Chamber VI’s ‘Decision on the Defence’s Challenge to the jurisdiction of the Court in respect of Counts 6 and 9’, ICC-01/04-02/06-892”, 2 November 2015, [ICC-01/04-02/06-972](#) (OA 2); “Prosecution’s response to Mr Ntaganda’s appeal against the ‘Decision on the Defence’s Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9’”, 24 November 2015, [ICC-01/04-02/06-1034](#) (OA 2); “Former Child Soldiers’ observations on the ‘Document in support of the appeal on behalf of Mr Ntaganda against Trial Chamber VI’s ‘Decision on the Defence’s Challenge to the jurisdiction of the Court in respect of Counts 6 and 9’, ICC-01/04-02/06-892’”, 30 November 2015, [ICC-01/04-02/06-1040](#) (OA 2); “Response to ‘Former Child Soldiers’ observations on the ‘Document in support of the appeal on behalf of Mr Ntaganda against Trial Chamber VI’s ‘Decision on the Defence’s Challenge to the jurisdiction of the Court in respect of Counts 6 and 9’, ICC-01/04-02/06-892’”, 7 December 2015, [ICC-01/04-02/06-1045](#) (OA 2); “Appeal on behalf of Mr Ntaganda against Trial Chamber VI’s ‘Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9’, ICC-01/04-02/06-1707”, 10 January 2017, [ICC-01/04-02/06-1710](#); “Appeal from the Second Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9”, 26 January 2017, [ICC-01/04-02/06-1754](#); “Corrected version of ‘Prosecution’s Response to Ntaganda’s ‘Appeal from the Second Decision on the Defence’s Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9’”, 17 February 2017, ICC-01/04-02/06-1794”, 21 February 2017, [ICC-01/04-02/06-1794-Corr](#); “Former Child Soldiers’ observations on the ‘Appeal from the Second Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9’”, 23 February 2017, [ICC-01/04-02/06-1798](#); “Response to ‘Former child soldiers’ observations on the Appeal from the Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9’”, 1 March 2017, ICC-01/04-02/06-1810.

Appeals Chamber cannot discern why a reply to the said issues is otherwise necessary for the adjudication of the appeal.

13. Accordingly, the Appeals Chamber rejects the Request for being unfounded.

Done in both English and French, the English version being authoritative.



Judge Sanji Mmasenono Monageng
Presiding Judge

Dated this 3rd of March 2017

At The Hague, The Netherlands