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No: **ICC-01/05-01/13**
Date: **13 January 2016**

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF
THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO MUSAMBA,
JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU AND
NARCISSE ARIDO

Public

**Request for Leave to Reply to Prosecution's Response to Mangenda Defence's Request
for Variation of Time Limit for Disclosure of Potential Expert Report
(ICC-01/05-01/13-1544)**

Source: Defence for Jean-Jacques Kabongo Mangenda

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

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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

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Detention Section

**Victims Participation and Reparations
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Other

I. INTRODUCTION

1. Jean-Jacques Mangenda respectfully requests leave, pursuant to Regulation 24(5) of the Regulations of the Court (“Regulations”), to reply to the Prosecution’s Response to his Request for Variation of Time Limit for Disclosure of Potential Expert Report.¹ The Defence, if leave is granted, would address the following two issues.
2. Proof of national law does not usurp the function of the Trial Chamber. The expert is not being called to offer opinions on international criminal law, but rather on national law, to which the Statute expressly refers as relevant. Article 93, which is part of the “Statute” referred to in Article 69(7), refers specifically to “national law”. This reference to foreign law, known as “*renvoi*”, is well-recognised in domestic courts as a circumstance in which expert evidence assists, rather than usurps, the functions of the court. The Prosecution’s reference to Article 69(8) is misplaced, as it concerns only evidence “collected by a State”. In any event, issues of admissibility are irrelevant to the “good cause” standard for extensions of time to produce evidence, particularly given this Trial Chamber’s approach of assessing relevance and probative value in relation to the totality of the information before it.
3. Compelling the Defence to disclose the identity of its prospective witness, in addition to being fundamentally unfair, would contravene the express wording of the Trial Chamber’s previous rulings. The Defence has not, contrary to the Prosecution’s assertion, “[f]or all intents and purposes [...] decided on a specific expert who it intends to call.”² The Defence has not yet even been able to ascertain the prospective expert’s views on the matters of greatest relevance. Nominating a witness without, at a minimum, ascertaining those views would be irresponsible and prejudicial. The Defence, for this reason alone, should not be required to name or list the prospective witness until the Defence has, at the very least, had the opportunity to form an informed intention whether to call this witness, to attempt to identify a more suitable witness, or to choose to name no witness at all in respect of this subject-matter.

¹ See *Bemba et al.*, Prosecution’s Response to Mangenda Defence’s Request for Variation of Time Limit for Disclosure of Potential Expert Report, ICC-01/05-01/13-1544, 13 January 2016 (“Response”); *Bemba et al.*, Request for Variation of Time Limit for Disclosure of Potential Expert Report, ICC-01/05-01/13-1540, 8 January 2016 (“Request”).

² Response, para. 8.

II. LAW APPLICABLE TO GRANTING LEAVE

4. Regulation 24(5) of the Regulations permits parties to file a reply “with the leave of the Chamber” upon a showing of “good cause.” The circumstances in which a Chamber “may benefit from the Defence’s views”³ by way of reply include:

- “new issues” are raised in the response;⁴
- information is relied upon in the response that “was not available to the defence at the time of the request”;⁵
- arguments are made in response that were not reasonably foreseeable at the time of the request;⁶
- a new explanation or solution to a problem is raised in the response;⁷
- “the interests of completeness of the judicial record” require additional submissions;⁸
- the responding party has “misinterpret[ed] the applicable law and misrepresents the facts in an unanticipated way”;⁹ or

³ *Bemba*, Decision on “Defence Request for Leave to Reply to the ‘Consolidated Response to the Defence Requests’”, ICC-01/05-01/08-3049, 17 April 2014, para. 5; *Bemba et al.*, Decision on the “Demande d'autorisation de répliquer à la ‘Prosecution Response to the ‘Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba’ of 16 December 2013 and its Addendum of 7 January 2014 (ICC-01/05-01/13 and ICC-01/05-01/13-69)”, ICC-01/05-01/13-112, 20 January 2014, p. 3 (considering that good cause exists when it “would be beneficial for the Chamber to receive further submissions prior to its disposal of the matter under consideration.”)

⁴ *Bemba*, Decision on “Defence Request for Leave to Reply to the ‘Consolidated Response to the Defence Requests’”, ICC-01/05-01/08-3049, 17 April 2014, para. 5; *Mbarushimana*, Decision on the Prosecution’s request for leave to reply to the “Defence Response to Prosecution’s Request for the Review of Potentially Privileged Material”, ICC-01/04-01/10-61, 24 February 2011, p. 3 (granting the Prosecution’s leave to reply where the Defence Response raised “new and distinct issues of law and fact, which the Prosecutor had not had the opportunity to address”); *Bemba et al.*, Decision on the “Demande d'autorisation de répliquer à la ‘Prosecution Response to the ‘Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba’ of 16 December 2013 and its Addendum of 7 January 2014 (ICC-01/05-01/13 and ICC-01/05-01/13-69)”, ICC-01/05-01/13-112, 20 January 2014, p. 3 (holding that good cause exists “when one or more issues arising from the response could not have been anticipated in [the] initial submissions.”)

⁵ *Bemba*, Decision on defence request for leave to reply to “Prosecution’s Response to ‘Defence Request for Interim Relief’”, ICC-01/05-01/08-2985, 19 February 2014, para. 6 (“considering the defence’s assertion that part of the information relied upon by the prosecution was not available to the defence at the time of its request, the Chamber is of the view that it might benefit from the defence’s views on the four discrete issues set out in paragraph 3 above. Leave to reply will therefore be granted.”)

⁶ *Banda and Jerbo*, Order on the defence’s application for leave to reply, ICC-02/05-03/09-261, 24 November 2011, para. 5 (granting the defence leave to reply where the Prosecution’s response raised certain legal issues that were – as argued by the Defence – unforeseeable and warranted a reply).

⁷ *Bemba*, Public Redacted Version of the Chamber’s 10 November 2011 Order granting leave to reply, ICC-01/05-01/08-1899-Red, 15 November 2011, para. 4.

⁸ *Ruto and Sang.*, Decision granting the Government of Kenya leave to reply, ICC-01/09-01/11-757, 30 May 2013, para. 8.

⁹ *Banda and Jerbo*, Order on the defence’s application for leave to reply, ICC-02/05-03/09-261, 24 November 2011, para. 5 (granting a leave to reply in response to a Defence application that argued *inter alia* that the Prosecution’s response “raises various new issues of law, misinterprets the applicable law and misrepresents the facts in an unanticipated way”); *Situation in the Democratic Republic of the Congo*, Decision on the

- the issue in question is “novel or of particular importance”.¹⁰

5. The scope of the leave granted to reply may be limited by: (i) imposing a low page-limit;¹¹ (ii) limiting the subject-matter that may be addressed;¹² or (iii) directing that the reply be brief and focused.¹³

III. THE PROSECUTION’S ARGUMENTS COULD NOT REASONABLY HAVE BEEN ADDRESSED IN THE REQUEST

6. The Prosecution has asserted that “good cause” for the requested extension of time should be evaluated on the basis of the likely admissibility of the information to be produced. This argument is not only a “new issue,” but is also so remote from the usual criteria applied for establishing “good cause” that it was not reasonably foreseeable. Indeed, the lone ICC precedent cited by the Prosecution for this proposition supports the view that questions of admissibility are distinct from the determination of whether information can be added to an exhibit list.¹⁴ The information the Defence seeks to produce is not close to being “obviously irrelevant.”¹⁵ Now that the Prosecution has raised this unforeseeable argument, the Defence ought to have an opportunity to reply, particularly if the Trial Chamber is persuaded by these arguments.

Prosecution’s Application for Leave to Reply, ICC-01/04-110-tEN, 1 February 2006, p. 2 (granting a leave to reply to “clarify what seems to be a misinterpretation of the Prosecution’s submissions”).

¹⁰ *Katanga*, Decision granting leave to reply, ICC-01/04-01/07-3382, 6 June 2013, para. 8; *Mbarushimana*, Decision on the Prosecution’s request for leave to reply to the “Defence Response to Prosecution’s Request for the Review of Potentially Privileged Material”, ICC-01/04-01/10-61, 24 February 2011, p. 4 (finding good cause in light of the importance and the potential effect of the issues raised).

¹¹ *Bemba*, Decision on “Defence Request for Leave to Reply to the ‘Prosecution’s Response to ‘Further Defence Request for Disclosure’””, ICC-01/05-01/08-3279, 6 August 2015, para.7(c) (imposing a page limit of 8 pages).

¹² *Bemba*, Decision on defence request for leave to reply to “Prosecution’s Response to ‘Defence Request for Interim Relief’”, ICC-01/05-01/08-2985, 19 February 2014, para.7(a).

¹³ *Bemba*, Decision on “Defence Request for Leave to Reply to the Prosecution’s Response to ‘Defence request for a stay of proceedings and request for further disclosure’”, ICC-01/05-01/08-3272, 23 July 2015, para. 4 (imposing a page limit of fifteen pages but requiring, without further specificity, that the “reply must be narrowly tailored to only address new issues raised in the Defence Response”).

¹⁴ *Ruto and Sang*, Decision on Sang Defence Application to exclude Expert Report of Mr Hervé Maupeu, ICC-01/09-01/11-844, 7 August 2013, paras. 27-29 (“[n]one of the arguments of the Sang Defence ... affect the admissibility of the Expert Report...[a]ny determination as to which specific parts of the Expert Report can be considered by the Chamber, and for what purposes they may be considered, will be significantly clarified after Mr. Maupeu has testified and all objections to his testimony have been made and ruled upon. Accordingly, the Chamber will defer any ruling on the secondary relief sought in the Application until after Mr. Maupeu has testified and the Expert Report has been submitted.”)

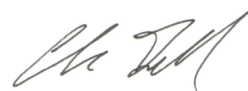
¹⁵ *Prosecutor v. Stanisic & Simatovic*, Case No IT-03-69-T, Decision on Sixteenth Motion for Leave to Amend its Rule 65 ter Exhibit List With Confidential Annex (Mladic Notebooks), 7 October 2010, para. 11; *Prosecutor v. Rasim Delic*, Case No. IT-04-83-T, Decision on Urgent Prosecution Motion for Leave to Amend its Exhibit List, 17 October 2007, p. 4; *Prosecutor v. Boskoski & Tarculovski*, Case No. IT-04-82-T, Decision on Prosecution’s Fifth Motion to Amend its Exhibit List and on its Motion to Remove Witnesses from Witness List (Confidential), 20 April 2007, para. 3.

IV. THE PROSECUTION HAS “MISINTERPRET[ED] THE APPLICABLE LAW AND MISREPRESENTS THE FACTS IN AN UNANTICIPATED WAY”

7. The Prosecution’s claim that issues of national law are matters that fall within the expertise of the Trial Chamber misinterprets the facts or law in an unanticipated manner. The Trial Chamber’s expertise extends to international law and international criminal law. The exercise of this expertise will be assisted, not usurped, with the assistance of an expert in national law where international law contains a *renvoi* to national law.¹⁶ The Prosecution’s argument that hearing evidence on national law would usurp the Trial Chamber’s functions was an unanticipated misinterpretation upon which the Defence ought to have an opportunity to reply, particularly if the Trial Chamber is persuaded by these arguments.
8. The Prosecution’s speculative assertion that the Defence has an intention to call the witness unforeseeably disregards relevant facts that did not need to be presented in the Request. The Defence reasonably expected that its good faith indications of its intent, supported by a general indication of the circumstances, would be accepted without being obliged to reveal each and every circumstance leading to that state of affairs. The Defence should now be provided the opportunity to explain those circumstances in light of the Prosecution’s unforeseeably erroneous claim that the Defence has already made a decision to call the potential expert in question – which is not the case.

V. RELIEF REQUESTED

9. The Defence accordingly requests, pursuant to Regulation 24(5) of the Regulations, leave to reply to the Prosecution’s Response.



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Respectfully submitted this 13 January 2016,
 At The Hague, The Netherlands

¹⁶ National jurisdictions routinely permit proof of foreign law by expert evidence. Citation to that widespread practice is not provided in the absence of leave being granted to reply.