

**Cour
Pénale
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**International
Criminal
Court**

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No: ICC-01/05-01/13

Date: 18 March 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**

Confidential

**Request for Leave to Reply to “Prosecution’s Response to Mangenda’s Request for the
Admission of Evidence from the Bar Table” (ICC-01/05-01/13-1720-Conf)**

Source: Defence for Jean-Jacques Kabongo Mangenda

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

The Office of the Prosecutor

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

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Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. Jean-Jacques Mangenda hereby seeks leave to reply to specific aspects of the Prosecution's response¹ to his request for the admission of evidence from the Bar Table.² Leave is sought only in respect of limited issues for which a reply is genuinely warranted and may assist the Trial Chamber.

II. APPLICABLE LAW

2. Previous jurisprudence establishes that "leave of the Chamber" for filing a reply under Regulation 24(5) of the Regulations of the Court is appropriate where a response:
 - raises "new issues";³
 - relies on information that "was not available to the defence at the time of the request";⁴
 - presents arguments not reasonably foreseeable at the time of the request;⁵
 - offers a new explanation or solution to a problem is raised in the response;⁶
 - warrants a reply in "the interests of completeness of the judicial record";⁷

¹ *Bemba et al.*, Prosecution's Response to Mangenda's Request for the Admission of Evidence from the Bar Table, ICC-01/05-01/13-1720-Conf, 14 March 2016 ("Response"). The present filing is confidential pursuant to Regulation 23bis(2) of the Regulations as it corresponds to a filing of the same classification. The Defence has no objection to reclassification of this submission as public should the Chamber so decide.

² *Bemba et al.*, Jean-Jacques Mangenda's Request for the Admission of Evidence from Bar Table, ICC-01/05-01/13-1665, 26 February 2016 ("Request").

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; *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.")

⁴ *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.")

⁵ *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).

⁶ *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.

⁷ *Ruto and Sang*, Decision granting the Government of Kenya leave to reply, ICC-01/09-01/11-757, 30 May 2013, para. 8.

- “misinterprets the applicable law and misrepresents the facts in an unanticipated way”;⁸
- addresses questions of “novel or of particular importance”;⁹ and
- warrants a reply in “the interests of completeness of the judicial record”.¹⁰

III. ISSUES FOR WHICH LEAVE TO REPLY IS SOUGHT

(i) *Categories A, B and F: Benefits and Telephones Provided to Witnesses By the Office of the Prosecutor*

3. The Prosecution argues that evidence of customary and accepted practice of the Prosecution and the Registry in respect of benefits to witnesses is “patently irrelevant” because it does not refute the alleged criminal intent of the defendants.¹¹
4. The Prosecution’s argument ignores its own case, which invites the drawing of inferences of criminal intent based, in part, on such benefits.¹² This inference is only justified and proper if it is “the only reasonable conclusion available from the evidence.”¹³ Evidence of other reasonable conclusions from the evidence – i.e., of other reasonable explanations for providing payments and telephones to witnesses – is therefore highly relevant to this case.
5. A reply is warranted on the basis that the Prosecution’s argument was unforeseeable, given that its disclosure of the documents constituted a tacit recognition of their

⁸ *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 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”).

⁹ *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).

¹⁰ *Ruto and Sang*, Decision granting the Government of Kenya leave to reply, ICC-01/09-01/11-757, 30 May 2013, para. 8.

¹¹ Response, para. 4.

¹² See e.g., *Bemba et al.*, Prosecution Pre-Trial Brief, ICC-01/05-01/13-1110-Conf, 31 July 2015 (“Pre-Trial Brief”), para. 254, fn. 799, cross-referencing proof of *mens rea* to allegation in paragraph 139 that the telephone provided to D-3 was for the purpose of staying “in contact after their handover to the VWU.”

¹³ *Tolimir*, IT-05-88/2-T, Judgement, 12 December 2012, para. 34 (bench composed of a majority of judges from civil law jurisdictions); *Ngudjolo*, Judgment pursuant to article 74 of the Statute, ICC-01/04-02/12-3-tENG, 18 December 2012, para. 71 (“[w]here, based on the evidence, there is only one reasonable finding to be drawn from particular facts, the Chamber concluded that they have been established beyond reasonable doubt”).

relevance. The Defence could not have foreseen that the Prosecution would attempt to resile from this position, or that it would adopt a view of relevance that is manifestly incompatible with its disclosure obligations.

(ii) *Categories C, D and E: Payments to P-245 and P-260*

6. The Prosecution argues¹⁴ that the relevance of records of substantial payments over a long period of time by the Prosecution to P-245 and P-260 is “speculative” because not each and every record of such payments was presented to the witness. The Defence seeks leave to reply to: (i) show that a representative sample of such documents was presented to the witness; (ii) that an exhaustive presentation of similar documents to the witness could not have been accomplished within the time allotted for cross-examination, nor would such an *ad nauseam* exercise have been an efficient use of court time; and (iii) that the Prosecution has dumped volumes of documents onto the record through bar table motions and by email that were never shown to witnesses who could have commented upon them.
7. A reply is warranted on the basis that the Defence could not have foreseen that the Prosecution would make an argument so directly contrary to the position adopted during its own case.

(iii) *Category I: Transcripts Highlighted By Mr. Mangenda*

8. The Prosecution argues that evidence that Mr. Mangenda physically highlighted transcripts is irrelevant to its interpretation of the word “*couleur*” in alleged conversations between Mr. Mangenda and Mr. Kilolo. The Prosecution argues that the meaning of this word is unequivocal and that, accordingly, any evidence to the contrary must be irrelevant.¹⁵
9. The Prosecution is incorrect. The meaning of the term “*couleur*” is equivocal. The expression is consistent with the notion of having witnesses underscore key points in the Defence’s favour, and is reflected literally in the exercise of highlighting transcripts produced through Transcend. Expressions of disappointment that a witness

¹⁴ Response, paras. 9-10.

¹⁵ Response, paras. 11-18.

may have damaged the Defence case (such as “*vraiment déconné*”) or that the testimony of witnesses should be re-tested as late as possible before their testimony¹⁶ is not probative of a scheme to get witnesses to lie under oath.

(iv) *Category J: The Form and Distribution of LRV Questions in the Bemba Case*

10. The Prosecution disputes that the cover page of the LRV questions is relevant to their actual circulation or that the content of the question is in any way relevant to the propensity of such questions to facilitate the corrupt influence or lying of witnesses.
11. The Prosecution is not correct. The Prosecution claims that Mr. Mangenda's alleged forwarding of LRV questions to Mr. Kilolo constitutes the *actus reus* of a crime, and demonstrates his “ability [...] to facilitate or thwart the unlawful activities of his co-perpetrators.”¹⁷ The correctness of this assertion about “facilitat[ing] or thwart[ing]” a crime can only be assessed in light of the actual content of the questions in relation to actual testimony, and their accessibility.
12. A reply is warranted to correct the Prosecution's unanticipated factual misrepresentations.

IV. RELIEF REQUESTED

13. Leave is accordingly sought to reply as indicated above.



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Respectfully submitted this 18 March 2016,
At The Hague, The Netherlands

¹⁶ Response, para. 15.

¹⁷ Pre-Trial Brief, para. 254.