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No: **ICC-01/05-01/13**

Date: **21 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***

**Public**  
**with Public Annexes A and B**

**Request for Leave to Reply to “Prosecution response to Jean-Jacques Mangenda Kabongo’s request for leave to appeal ‘Decision on request for compensation for unlawful detention’” (ICC-01/05-01/13-1715)**

**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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**Legal Representatives of the Victims**

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**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

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Defence**

**States' Representatives**

**Amicus Curiae**

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
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## 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 Leave to Appeal ‘Decision on request for compensation for unlawful detention’ (ICC-01/05-01/13-1663)”.<sup>1</sup> The present request is limited to matters for which a reply is genuinely warranted, and which may assist the Trial Chamber. The absence of request for leave to reply in respect of other matters reflects no agreement with other Prosecution arguments.

## 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”;<sup>2</sup>
  - relies on information that “was not available to the defence at the time of the request”;<sup>3</sup>
  - presents arguments not reasonably foreseeable at the time of the request;<sup>4</sup>
  - offers a new explanation or solution to a problem is raised in the response;<sup>5</sup>

<sup>1</sup> *Bemba et al.*, Prosecution response to Jean-Jacques Mangenda Kabongo’s request for leave to appeal “Decision on request for compensation for unlawful detention”, ICC-01/05-01/13-1715, 11 March 2016 (“Response”); *Bemba et al.*, Request for Leave to Appeal “Decision on request for compensation for unlawful detention” (ICC-01/05-01/13-1663), ICC-01/05-01/13-1704, 7 March 2016 (“Request”); *Bemba et al.*, Decision on request for compensation for unlawful detention, ICC-01/05-01/13-1663, 26 February 2016 (“Decision”).

<sup>2</sup> *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.”)

<sup>3</sup> *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.”)

<sup>4</sup> *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).

<sup>5</sup> *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.

- warrants a reply in “the interests of completeness of the judicial record”;<sup>6</sup>
- “misinterprets the applicable law and misrepresents the facts in an unanticipated way”;<sup>7</sup>
- addresses questions of “novel or of particular importance”;<sup>8</sup> or
- warrants a reply in “the interests of completeness of the judicial record”.<sup>9</sup>

### III. ISSUES FOR WHICH LEAVE TO REPLY IS SOUGHT

#### (i) *Whether Article 82(1)(d) Applies Only to Interlocutory Decisions*

3. The Prosecution asserts that Article 82(1)(d) “governs interlocutory decisions”; that the Decision is “a final decision”; and that, accordingly, the Decision is “not one such determination” that falls within Article 82(1)(d).<sup>10</sup> The Prosecution’s argument is unsound for three reasons.
4. First, the plain wording of Article 82(1)(d) draws no distinction between final, interlocutory or any other type of decision. Article 82(1)(d) permits a request for leave to appeal any “decision” for which the criteria are satisfied. The Prosecution’s textual reading of the Article is unsupported.
5. Second, the Prosecution misreads the Appeals Chamber’s decision in the *Lubanga* case.<sup>11</sup> The issue in that case was whether an appeal could be taken from a decision rejecting leave to appeal. The Appeals Chamber rejected that argument, *inter alia*, on the basis that “Article 82(1)(d) of the Statute confers a right of appeal against

<sup>6</sup> *Ruto and Sang*, Decision granting the Government of Kenya leave to reply, ICC-01/09-01/11-757, 30 May 2013, para. 8.

<sup>7</sup> *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”).

<sup>8</sup> *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).

<sup>9</sup> *Ruto and Sang*, Decision granting the Government of Kenya leave to reply, ICC-01/09-01/11-757, 30 May 2013, para. 8.

<sup>10</sup> Response, para. 6.

<sup>11</sup> Response, para. 9.

interlocutory or intermediate decisions of either the Pre-Trial or the Trial Chamber.”<sup>12</sup> The obvious purpose of this statement was to show that Article 82(1)(d) is *lex specialis* in respect of the type of decision that the Prosecution wished to appeal – i.e. an interlocutory decision. The Prosecution’s interpretation of this statement as an exhaustive and limiting definition of Article 82(1)(d) is unwarranted and ignores the issue that was being addressed by the Appeals Chamber.

6. Third, the Prosecution’s attempt to distinguish the seizure of Kilolo’s assets<sup>13</sup> is specious. The Appeals Chamber never mentions the supposed “provisional and precautionary” character of the decision as being relevant to the scope of Article 82(1)(d). The sole criterion of relevance cited by the Appeals Chamber corresponds to the wording of Article 82(1)(d) – i.e., “whether appellate resolution will materially advance the proceedings.”<sup>14</sup> The asserted dichotomy between final versus “provisional and precautionary” finds no support in Article 82(1)(d) or in the language used by the Appeals Chamber itself.
7. A reply in respect of these issues is necessary and justified in order to address unanticipated misinterpretations of the applicable law; to address misinterpretations of applicable jurisprudence; and because the issue is of particular importance and novelty.

(ii) *Whether the Drafting History of Article 85(1) Precludes Permitting Leave to Appeal to be Considered Under Article 82(1)(d)*

8. The Prosecution argues that the drafting history is “unambiguous” in showing a collective intent to exclude appeals from decisions under Article 85, and that the Request “impermissibly attempts to rewrite the drafting history.”<sup>15</sup>
9. The Prosecution cites no drafting history showing the existence of any consensus that no appeals should lie from decisions taken under Article 85. Staker and Nerlich –

<sup>12</sup> *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 36.

<sup>13</sup> Response, para. 10.

<sup>14</sup> *Bemba et al.*, Decision on the “Requête en appel de la défense de monsieur Aimé Kilolo Musamba contre la décision de la Chambre de première instance VII du 17 novembre 2015”, ICC-01/05-01/13-1533, 23 December 2015, para. 16.

<sup>15</sup> Response, para. 7.

writing in the article-by-article Triffterer commentary – assert only that “[n]o provision is made for any appeal against such a decision.”<sup>16</sup> The authors, given the scope of their chapter, make no comment on whether Article 82(1)(d) could be interpreted as permitting such an appeal with leave, let alone say one word about the drafting history of Article 85. Staker and Nerlich do not, contrary to the Prosecution’s claim, “confirm[]”<sup>17</sup> Mr. Bitti’s uncorroborated personal recollections<sup>18</sup> about the drafting history of Article 85. On the contrary, Staker and Nerlich highlight that the “curious feature of this article is its lack of detail”<sup>19</sup> – implying that the intentions of the drafters were far from crystalline.

10. The Response also fails to cite any drafting material to confirm Mr. Bitti’s unsourced assertion about the supposedly clear intention of States Parties. Nothing in the drafting history excerpted in the Bassiouni book is remotely indicative of a consensus view amongst State Parties that claims under Article 85 could not be appealed, or that they should be exempted from the scope of Article 82(1)(d).<sup>20</sup> The Prosecution’s failure to pinpoint any drafting history in support of this claim speaks for itself.
11. The Prosecution also provides no explanation to refute the natural inference arising from the failure of the Canadian proposal to expressly exclude such appeals. The fact that that failure occurred in the context of a discussion about the necessity of providing reasons is immaterial.
12. A reply in respect of these issues is necessary and justified in order to address unanticipated misinterpretations of the applicable law; to address misinterpretations of applicable jurisprudence; and because the issue is of particular importance and novelty.

#### **IV. RELIEF REQUESTED**

13. Leave to reply is requested as indicated above.

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<sup>16</sup> C. Staker and V. Nerlich, “Compensation to an Arrested or Convicted Person”, in O. Triffterer and K. Ambos (eds.) *Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> ed., C. H. Beck, Munich) (“Staker & Nerlich”), p. 2001.

<sup>17</sup> Response, para. 7.

<sup>18</sup> Request, para. 14.

<sup>19</sup> Staker & Nerlich, p. 2001.

<sup>20</sup> M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute* (Transnational Publisher Inc, New York) pp. 582-584, 601-604; Response, para. 7.



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Respectfully submitted this 21 March 2016,  
At The Hague, The Netherlands