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TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Chang-ho Chung

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

Response to “Prosecution’s request to dismiss *in limine* Jean-Jacques Mangenda Kabongo’s request for leave to reply to the Prosecution’s response to his request to appeal ‘Decision on request for compensation for unlawful detention’” (ICC-01/05-01/13-1750)

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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I. INTRODUCTION

1. Jean-Jacques Mangenda respectfully requests that the Trial Chamber (i) reject the Prosecution's request¹ to dismiss the Defence's request for leave to reply;² or (ii) disregard the Prosecution's request as not authorised by the Regulations of the Court.³ Further, if necessary, the request to file a sur-reply should be denied.

II. SUBMISSIONS

(i) *Transparency Is Not Improper In a Leave to Reply Request*

2. Regulation 24(5) provides that "[p]articipants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations." The Regulation says nothing about the degree of detail that is permissible in an application requesting leave to reply.
3. The Prosecution nevertheless argues that the Defence has committed a "flagrant violation of regulation 24(5)" because the Leave to Reply Request, of which two-and-a-half pages address the arguments to be presented in reply,⁴ is a "transparent attempt to put additional arguments on the record without the Chamber's prior authorisation."⁵
4. The Prosecution, however, has devoted comparable space to the merits in its own requests for leave. Trial Chambers have not suggested that this practice is improper; on the contrary, leave has sometimes been granted on the basis of such submissions. A few examples are:

¹ *Bemba et al.*, Prosecution's request to dismiss *in limine* Jean-Jacques Mangenda Kabongo's request for leave to reply to the Prosecution's response to his request to appeal "Decision on request for compensation for unlawful detention", ICC-01/05-01/13-1750, 24 March 2016 ("OTP Request"), paras. 1, 4. The present submission is filed confidentially pursuant to Regulation 23*bis* of the Regulations of the Court as it refers to confidential decisions. A public redacted version will be filed forthwith.

² *Bemba et al.*, Corrigendum to 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), ICC-01/05-01/13-1734-Corr, 22 March 2016 ("Leave to Reply Request"); *see also 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 ("Leave to Appeal Request"); *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 ("OTP Response").

³ All references hereinafter to "Regulation" are to the Regulations of the Court, unless otherwise stated.

⁴ Leave to Reply Request, paras. 3-6, 8-11.

⁵ OTP Request, para. 2.

OTP Leave to Reply	Discussion of Merits	Negative Comment by the Chamber?
ICC-01/04-02/06-751 ⁶	2.5 pages on the merits	Leave granted ⁷
ICC-01/04-02/06-293 ⁸	2.5 pages on the merits	No decision found
ICC-01/09-02/11-952 ⁹	2 pages on the merits	No negative comment ¹⁰
ICC-01/04-02/06-531	1.5 pages on the merits	No negative comment ¹¹
ICC-01/05-01/08-3024	1.5 pages on the merits	No decision found
ICC-02/05-03/09-594-Conf	Unknown length and content (confidential)	Leave granted in respect of one of two issues, despite Defence argument that the Prosecution's request for leave was too substantive ¹²
ICC-01/04-02/06-70	1+ page on the merits	Leave granted ¹³
ICC-01/05-01/13-1018-Conf	Half page on the merits, and inclusion of two annexes of <i>inter partes</i> email communications, not previously submitted, allegedly supportive of those assertions	Leave rejected without negative comment on the insertion of the annexes with <i>inter partes</i> email communications

5. The Prosecution's own practice also contradicts its arguments in respect of the annexes.¹⁴ The Prosecution filed a leave to reply request in this very case with two annexes containing *inter partes* email communications not previously submitted to the

⁶ See e.g. paras. 4-10 (despite prefacing those arguments with the incantations "seeks to address", "seeks to reply" or "seeks to argue", seven substantive arguments are cumulatively presented in detail).

⁷ Ntaganda, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103, ICC-01/04-02/06-1029, 20 November 2015, para. 4, fn. 7.

⁸ See e.g. para. 8 ("Moreover, contrary to what the Defence suggests, PTC I and the Appeals Chamber did not state that it is only possible to rely on incidents where the underlying acts that occurred are charged.")

⁹ See e.g. para. 5 (stating that the Prosecution "will explain" that "has not received all the bank records sought in its Revised Request and has instead received records covering only part of the relevant time period; (ii) the telephone data extraction to which the Defence refers was initiated in the hope of discrediting Prosecution witnesses, not establishing the activities of Mr Kenyatta, and neither the extraction process nor the Revised Request for assistance to the Government of Kenya ("GoK") has resulted in a complete set of data being obtained for Mr Kenyatta's telephones; (iii) the GoK does not claim that its failure fully to comply with the Prosecution's Revised Request is "founded upon issues of Kenyan law", and (iv) the Prosecution has not "refus[ed] to comply with Kenyan legal procedure" and has availed itself of the procedure established in Part 9 of the Statute for seeking State assistance, which the GoK has failed to fully provide.")

¹⁰ Kenyatta, Decision on three requests for leave to reply, ICC-01/09-02/11-953, 19 September 2014, para. 13 ("[w]hile the remaining points identified by the Prosecution in its Request for Leave to Reply are of some relevance, the Chamber does not require further written submissions on these issues at this particular juncture.")

¹¹ Ntaganda, Decision on the Prosecution's request for variation of time limit to disclose the transcripts of 'Radio Candip' broadcasts, ICC-01/04-02/06-580, 30 April 2015, para. 15 ("[a]s to the Leave to Reply Request, the Chamber does not consider that it would be assisted by further submissions on any of the issues raised in it, and it is therefore rejected.")

¹² Banda, Order on the Prosecution's application for leave to reply to filing ICC-02/05-03/09-592-Conf, ICC-02/05-03/09-597, 14 August 2014, para. 8.

¹³ Ntaganda, Decision on the 'Prosecution's Urgent Request to Postpone the Date of the Confirmation Hearing' and Setting a New Calendar for the Disclosure of Evidence Between the Parties, ICC-01/04-02/06-73, 17 June 2013, para. 9.

¹⁴ OTP Request, para. 2 ("the Request includes not only substantive arguments, but voluminous Extracts of Commentaries").

Trial Chamber.¹⁵ The Trial Chamber denied leave, but without any negative comment about the Prosecution's inclusion of the two annexes.¹⁶ The annex to the Mangenda Leave to Reply Request, on the other hand, is nothing more than an extract of the exact pages cited in the OTP Response. Reproducing a legal source cited in the Prosecution's own response for the Trial Chamber's convenience is not improper. The extract is directly relevant to assessing whether the criteria for granting leave to reply are met.

6. The Prosecution's assertion that "the Mangenda Defence is not new to this practice"¹⁷ implies contumacious misconduct that has been previously disapproved. This is utterly false. Trial Chamber VII has ruled on six leave to reply requests filed by the Mangenda Defence, without once suggesting that the form of those applications was improper.¹⁸ Three of those requests were extremely short, with little substantive elaboration;¹⁹ three others provided fuller substantive elucidation because the circumstances so required.²⁰ On no occasion has Trial Chamber VII suggested that the form of these requests violated Regulation 24(5) or were otherwise improper.

7. The Prosecution states in its filing, as if it were a fact, that the Mangenda Defence has

¹⁵ See *Bemba et al.*, Prosecution Request for Leave to Reply to ICC-01/05-01/13-1002-Conf and ICC-01/05-01/13-1004-Conf, ICC-01/05-01/13-1018-Conf, 19 June 2015.

¹⁶ *Bemba et al.*, Decision on 'Prosecution's Request pursuant to Regulation 35 to vary the Time Limit for Disclosure of an Expert Report', ICC-01/05-01/13-1027, 24 June 2015, para. 7.

¹⁷ OTP Request, para. 3.

¹⁸ *Bemba et al.*, Decision on the Defence applications for judicial review of the decision of the Registrar on the allocation of resources during the trial phase, ICC-01/05-01/13-955, 21 May 2015; *Bemba et al.*, Decision on 'Motion for Severance or, in the Alternative, Adjournment or Appearance Pursuant to Rule 134bis of the Rules', ICC-01/05-01/13-1269, 18 September 2015; *Bemba et al.*, Decision on Request to declare telephone intercepts inadmissible, ICC-01/05-01/13-1284, 24 September 2015; *Bemba et al.*, Decision on Mangenda Defence Request for Directions to the Registry, ICC-01/05-01/13-1367, 14 October 2015; *Bemba et al.*, Decision on Motion for Reconsideration or Leave to Appeal Decision ICC-01/05-01/13-1284, ICC-01/05-01/13-1425, 27 October 2015; *Bemba et al.*, Decision on Request for Formal Submission of D23-1's Expert Report Pursuant to Rule 68(2)(b) or, in the Alternative, Rules 68(3) and 67, ICC-01/05-01/13-1641, 19 February 2016.

¹⁹ *Bemba et al.*, Request for Leave to Reply to Prosecution Response to Motion for Severance or, in the Alternative, Adjournment or Appearance Pursuant to Rule 134bis of the Rules, ICC-01/05-01/13-1267-Conf, 17 September 2015; *Bemba et al.*, Urgent Request for Leave to Reply to the Registry's Observations (ICC-01/05-01/13-1347-Conf-Exp), ICC-01/05-01/13-1352-Conf-Exp, 8 October 2015; *Bemba et al.*, Request for Leave to Reply to "Prosecution response to Jean-Jacques Mangenda Kabongo's request for compensation", ICC-01/05-01/13-1467-Conf, 5 November 2015.

²⁰ *Bemba et al.*, Mangenda Defence Request for Leave to Reply to the "Observations of the Registrar on Requests ICC-01/05-01/13-857-Conf and ICC-01/05-01/13-867-Conf" (ICC-01/05-01/13-913), ICC-01/05-01/13-923-Conf, 23 April 2015; *Bemba et al.*, Request for Leave to Reply to Prosecution Response to Motion to Declare Inadmissible Telephone Intercepts of Mr. Mangenda, ICC-01/05-01/13-1194-Conf, 28 August 2015; *Bemba et al.*, Request for Leave to Reply to Prosecution response to Mr. Mangenda's "Motion for Reconsideration or, In the Alternative, for Leave to Appeal the Decision on Request to Declare Telephone Intercepts Inadmissible, ICC-01/05-01/13-1351-Conf, 8 October 2015; *Bemba et al.*, 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), ICC-01/05-01/13-1545, 13 January 2016.

“bypassed the requirement to seek leave before advancing substantive arguments in reply.”²¹ Three citations are provided in support of this claim. Contrary to what might be expected, these are references to the Prosecution’s own filings. The Prosecution’s position in the first filing was not accepted by Trial Chamber VII; in fact, the arguments in that filing were disregarded.²² The second filing concerned the content of a response, not a reply, and is therefore irrelevant. The third filing is dated 23 March 2016 – one day before the OTP Request – and is expressed in almost identical terms except in seeking that the leave to reply request be “struck” rather than to “dismiss *in limine*”. A pending motion, filed the day before the OTP Request, has no precedential or other significance.

8. The Prosecution asserts that “this very Chamber has cautioned the Mangenda Defence for failing to properly anticipate issues in its initial submissions, when it rejected its compensation claim.”²³ The word “caution” casts yet another aspersion of impropriety.²⁴ This supposed “caution” is said to arise from the following words:

The Trial Chamber does not consider that it would have been assisted by further submissions on any of the identified issues. Additionally, the first issue, in particular, should have been anticipated by the Defence when it initially filed its Request in the context of addressing the unlawfulness of the detention. The Chamber therefore rejects the Request for Leave to Reply.²⁵

The Trial Chamber is best placed to assess whether this statement was meant as a “caution.” The Defence understood this language, on the contrary, to be a straightforward rejection of its appropriate and good faith submissions.

9. The claim that the Defence has put “additional arguments on the record”²⁶ implies an attempt to improperly influence judges who might nevertheless reject the request for leave to reply. That argument has no merit. The Judges of this Trial Chamber are professional and experienced. Just as when a Trial Chamber declares evidence inadmissible at trial, there is no danger that professional judges will take the excluded

²¹ OTP Request, para. 3.

²² *Bemba et al.*, Decision on Request to declare telephone intercepts inadmissible, ICC-01/05-01/13-1284, 24 September 2015, para. 4 (noting that the Prosecution “filed its response to the Leave to Reply Request on 1 September 2015, submitting that it should be rejected,” without further referring to this filing.)

²³ OTP Request, para. 3.

²⁴ Concise Oxford English Dictionary (Oxford, Oxford UP, 10th edition, 2002), p. 224 (“2. *Chiefly Brit.* An official or legal warning given to someone who has committed a minor offence but has not been charged”).

²⁵ *Bemba et al.*, Decision on request for compensation unlawful detention, ICC-01/05-01/13-1663, 26 February 2016, para. 17.

²⁶ OTP Request, para. 2.

information into account.²⁷ The Trial Chamber is perfectly capable of denying leave and, if leave is denied, of disregarding the proposed arguments.

10. This is confirmed by the overwhelming practice of the ICTY and the MICT, both of which permit replies, as is the case pursuant to Regulation 24(5), only “with leave of the relevant Chamber or Single Judge.”²⁸ Most ICTY Trial Chambers have not interpreted this provision as limiting the content of requests for leave to reply; on the contrary, most Trial Chambers expect and permit that the leave to reply request set out fully the substance of the reply.²⁹ The MICT has followed the same practice.³⁰ Trial Chambers may then grant leave in a separate step or, if they choose, summarily grant or deny leave in deciding the original motion. Regulation 24(5) should be interpreted likewise in the interests of judicial efficiency, and to avoid a cascade of collateral litigation.
11. The Prosecution cites two ICC Appeals Chamber decisions from nine and seven years ago, respectively, in support of its view that Regulation 24(5) requires leave to reply requests to be vague.³¹ The seven-year-old decision is wholly irrelevant. The leave to

²⁷ *Ntaganda*, Decision on the Defence’s request for clarification of the admissibility of evidence related to any allegations of rape and sexual slavery committed personally by Mr Ntaganda, ICC-01/04-02/06-968, 30 October 2015, para. 14 (“the Chamber notes that the risk of prejudice is reduced by the fact that the accused is not charged with personal commission of rape and sexual slavery, and that the trial is being heard before a panel of professional Judges who are fully capable of only considering such evidence within its proper context or, as the case may be, ultimately declining to consider such evidence.”)

²⁸ Rule 153, MICT Rules of Procedure and Evidence; Rule 126*bis*, ICTY Rules of Procedure and Evidence.

²⁹ *Mladić*, IT-09-92-T, Decision on Prosecution Motion to Re-Open Its Case In Chief, 23 October 2014, para. 12 (taking note of the arguments in a nine-page leave to reply request that included the proposed reply in the request for leave); *Mladić*, IT-09-92-T, Decision on Prosecution Motion of Documents From the Bar Table, 13 February 2014 (taking account of the substantive arguments in a nine-page Prosecution request for leave); *Stanišić & Župljanin*, IT-08-91-T, Decision Granting in Part the Stanišić Defence Bar Table Motion, 14 September 2011, paras. 9-11; *Stanišić & Simatović*, IT-03-69-T, Decision on Prosecution Motion to Reopen Prosecution case and for the Admission of a Document from the Bar Table, 1 September 2011, paras. 11-12; *Haradinaj et al.*, IT-04-84*bis*-PT, Decision on Prosecution’s Motion for Admission of Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92*bis*, 22 July 2011, para. 3, p. 23; *Perišić*, IT-04-81-T, Decision on Defence Motion *In Limine* for Prosecution Witness Miodrag Starčević, 21 April 2009, para. 10; *Gotovina et al.*, IT-06-90-T, Decision on Joint Defence Motion to Strike the Prosecution’s Further Clarification of Identity of Victims, 9 October 2008, paras. 7-8; *Popović et al.*, Decision on Prosecution’s Motion to Add Eighteen Witnesses to Its 65*ter* List and Admit Their Written Statements Pursuant to Rule 92*bis*, 29 January 2008, pp. 1, 4; *Milutinović et al.*, IT-05-87-T, Decision on Šainović Motion Requesting Testimony Via Video-Conference Link, 3 August 2007, paras. 3, 5.

³⁰ *In re Sebureze & Turinabo*, MICT-13-40/41-R90, Public Redacted Version of Decision on Allegation of Contempt of the ICTR, 17 July 2013, paras. 3, 6 (citing to six paragraphs of the leave to reply request in a decision on the merits without suggesting that the transparency of those submissions was improper).

³¹ *Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “*Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo*”, ICC-01/04-01/06-824, 13 February 2007 (“*Lubanga Appeals Decision of 13 February 2007*”), para. 68 stating “[t]he Appeals Chamber disapproves of a practice of the filing of a substantive reply prior to leave being granted by the Appeals Chamber, which in and of itself may also give rise to the rejection of an application for leave”; see also *Bemba*, Decision on the application of 14 September 2009 for participation as an *amicus curiae*, ICC-01/05-01/08-602, 9

reply was rejected not on the basis of Regulation 24(5) but because the replying party was an *amicus curiae* who had not first sought leave under Rule 103 of the Rules of Procedure and Evidence.³² The nine-year-old decision involves a Prosecution leave to reply request (as subsequently amended) that remains confidential to this day.³³ The Defence is not, therefore, in a position to assess whether the length, scope or content of that application is analogous to that presently under consideration. Even assuming that to be so, the Appeals Chamber only stated that a reply “may” – not must – be dismissed on this basis.³⁴ This nine-year-old decision, assuming that it was ever intended to be applicable to Trial Chambers, sets out no firm rule and, as the table above indicates, has not precluded the Prosecution in the intervening years from presenting leave to reply requests that are transparent as to the arguments to be presented.

12. Finally, even assuming that Regulation 24(5) imposes substantive limitations on the content of requests for leave to reply, the Leave to Reply Request does not violate any such limitation. The Leave to Reply Request is short, succinct, and can be easily granted or denied if the Trial Chamber deems fit. Setting out the precise basis on which leave is sought facilitates the Trial Chamber’s assessment of whether the criteria for granting leave are met.³⁵
13. The Prosecution’s suggestion that all such potential inaccuracies must be addressed in advance and that all such materials must be set out *in extenso* in the initial motion³⁶ would be cumbersome and highly inefficient. Regulation 24(5) commands no such absurdity, and its counterparts at the ICTY and the MICT have never been so

November 2009 (“*Bemba* Appeals Decision of 9 November 2009”), para. 9, in the context of rule 103 of the Rules of Procedure and Evidence, “[t]he submissions of substantive observations is only permissible after a Chamber has decided to invite or grant leave to do so.”

³² *Bemba* Appeals Decision of 9 November 2009, para. 9 (“[t]he Appeals Chamber considers that in accordance with rule 103 of the Rules of Procedure and Evidence, the submission of substantive observations is only permissible after a Chamber has decided to invite or grant leave to do so. In the present circumstances, Aprocdec submitted substantive observations on the appeal in paragraph 35 through 74 of the application without leave. For the reason, the Appeals Chamber shall disregard the substantive submissions contained in the Amicus Application. Furthermore [...] rule 103 of the Rules of Procedure and Evidence does not provide for the supplementation of an application once said application has been filed.”)

³³ *Lubanga*, Prosecution Request for Leave to Reply to the Appellant’s 20 December 2006 Response to the Observations of Victims a/0001/06, a/0002/06 and a/0003/06, ICC-01/04-01/06-783-Conf, 22 December 2006; *Lubanga*, Submissions supplementing the Prosecution’s 22 December 2006 Request for Leave to Reply to the Appellant’s 20 December 2006 Response to the Observations of Victims, ICC-01/04-01/06-787-Conf, 2 January 2007.

³⁴ *Lubanga* Appeals Decision of 13 February 2007, para. 68 (“which in and of itself *may* also give rise to the rejection of an application for leave”) (italics added).

³⁵ Leave to Reply Request, paras. 8-12.

³⁶ OTP Request, para. 2.

interpreted by the Prosecution, Defence or Chambers.

(ii) The Filing Should Be Rejected as Inadmissible

14. The Regulations do not authorise responses to requests for leaves to reply. Permitting such litigation could mean that each and every motion would engender six filings: (1) Motion; (2) Response; (3) Leave to Reply; (4) Motion to Deny Leave; (5) Response to Motion to Deny Leave; and (6) Leave to Reply to Response to Motion to Deny Leave. Trial Chamber VII appears to have adopted this approach by simply disregarding a similar motion filed by the Prosecution in the present case.³⁷ This Trial Chamber is respectfully invited to do the same.
15. The Prosecution's alternative request to file a "sur-reply" should also be rejected. The statutory instruments of the Court do not provide for sur-replies.

III. CONCLUSION

16. The Defence requests that the Trial Chamber: (i) deny the OTP Request; (ii) find that the OTP Request is improperly filed and disregard it; and, if necessary, (iii) reject the Prosecution's alternative request to file a sur-reply.



Christopher Gosnell
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Respectfully submitted this 29 March 2016,
At The Hague, The Netherlands

³⁷ *Bemba et al.*, Decision on Request to declare telephone intercepts inadmissible, ICC-01/05-01/13-1284, 24 September 2015, para. 4 (noting that the Prosecution "filed its response to the Leave to Reply Request on 1 September 2015, submitting that it should be rejected", without referring again to this filing).