

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No: ICC-01/05-01/13

Date: 29 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

Response to “Prosecution’s Motion to Strike, or in the Alternative, a Response to Mangenda’s ‘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)’ ICC-01/05-01/13-1743-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

Ms Fatou Bensouda
Mr James Stewart
Mr Kweku Vanderpuye

Counsel for Jean-Jacques Kabongo Mangenda

Mr Christopher Gosnell
Mr Arthur Vercken

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi
Mr Steven Powles

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Roland Azama Shalie Rodoma

Counsel for Narcisse Arido

Mr Charles Achaleke Taku
Ms Beth Lyons

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

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. Jean-Jacques Mangenda requests that the Prosecution's Motion to Strike, or in the Alternative, a Response, etc.,¹ be: (i) disregarded; or (ii) rejected on the merits.
2. The Regulations of the Court do not authorise "motions to strike", or responses to, requests for leave to reply. The Trial Chamber, when the Prosecution filed such a document before,² disregarded the content of that filing.³ The Trial Chamber is invited to do the same in relation to the Motion to Strike.
3. If the Trial Chamber considers that the Motion to Strike is receivable, its argument that the content of the Request for Leave "circumvents" Regulation 24(5) because it "addresses the substance of the arguments it would adduce if the Request was granted"⁴ should be rejected.
4. First, Regulation 24(5) says nothing about the scope of a request for leave to reply.
5. Second, the Prosecution's own requests for leave to reply, even if couched with prefatory words such as "seeks to address", often describe "the substance of the arguments it would adduce"⁵ in just as much detail as the Request for Leave.⁶ Trial Chambers have not disapproved of the form of these leave to reply requests.⁷

¹ *Bemba et al.*, Prosecution's Motion to Strike, or in the Alternative, a Response to Mangenda's '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)', ICC-01/05-01/13-1743-Conf, 23 March 2016 ("Motion to Strike"). See *Bemba et al.*, 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), ICC-01/05-01/13-1730-Conf ("Request for Leave"); *Bemba et al.*, Jean-Jacques Mangenda's Request for the Admission of Evidence from the Bar Table, ICC-01/05-01/13-1665, 26 February 2016; *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. The present submission is filed confidentially pursuant to Regulation 23*bis* of the Regulations of the Court as it is a response to a confidential submission by the Prosecution.

² *Bemba et al.*, Prosecution's Response to the "Request for Leave to Reply to the Prosecution Response to Motion to Declare Inadmissible Telephone Intercepts of Mr. Mangenda", ICC-01/05-01/13-1206-Conf, 1 September 2015.

³ *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).

⁴ Motion to Strike, para. 4.

⁵ *Id.*

⁶ See e.g. *Ntaganda*, Prosecution request to file a reply to the "Response on behalf of Mr Ntaganda to the 'Prosecution's application under rule 68(2)(c) to admit the statements and related documents of deceased witnesses P-22, P-41 and P-103'", ICC-01/04-02-06-736-Conf-Exp, ICC-01/04-02/06-751, 27 July 2015, paras. 4-10 (the content of seven substantive arguments, though prefaced by the incantation "seeks to argue", are presented in detail); *Ntaganda*, Prosecution's Request to File a Reply, ICC-01/04-02/06-293, 11 April 2014, para. 8 ("[m]oreover, 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"); *Kenyatta*, Request for leave to reply to Defence filing ICC-01/09-02/11-945-Red, ICC-01/09-02/11-952, 17 September 2014, para. 5

6. Third, this Trial Chamber has ruled on six leave to reply requests filed by the Mangenda Defence, without once suggesting that the form of those applications was improper.⁸ Three of those requests were extremely short, with little substantive elaboration;⁹ three others did provide some substantive elucidation because the circumstances so required.¹⁰ On no occasion has the Trial Chamber suggested that the form of these requests violated Regulation 24(5) or that they “should not be countenanced.”¹¹

(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”); *Ntaganda*, Prosecution request to file a reply to the “Response on Behalf of Mr Ntaganda to Prosecution’s request for variation of time limit to disclose the transcriptions of ‘Radio Candip’ broadcasts”, ICC-01/04-02/06-531, 23 March 2015; *Bemba*, Prosecution’s Request for Leave to Reply to “Defence Addendum to Response for admission of new Article 70 evidence”, ICC-01/05-01/08-3024, 25 March 2014.

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; *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”); *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.”)

⁸ *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 phrase, 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.

⁹ *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.

¹⁰ *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.

¹¹ Motion to Strike, para. 4.

7. Fourth, Trial Chambers of the ICTY and MICT have overwhelmingly interpreted a substantially identical provision as permitting, if not requiring, substantive issues to be addressed in requests for leave.¹² The approach promotes judicial efficiency by allowing the Trial Chamber to (i) grant leave; (ii) summarily take into account the submissions; or (iii) summarily disregard them. The Prosecution's approach, on the other hand, provokes litigation about whether a request for leave to reply is too substantive. Such litigation is pointless considering that the professional judges of this Trial Chamber can easily disregard arguments for which they do not grant leave.
8. Fifth, the Appeals Chamber jurisprudence cited by the Prosecution does not support its position.¹³ One of the two cited decisions has nothing to do with Regulation 24(5) but rather concerns an *amicus curiae* filing without prior leave pursuant to Rule 103 of the Rules of Procedure and Evidence.¹⁴ The lone remaining precedent cited by the Prosecution, now nine years old, was an *obiter dictum* pronounced in the context of appellate practice that is not even expressed as a firm rule.¹⁵ This is, at best, a stale, weak and distinguishable precedent.

¹² *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); *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-04-84bis-PT, Decision on Prosecution's Motion for Admission of Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92bis, 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 92bis, 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.

¹³ Motion to Strike, para. 4.

¹⁴ *Bemba*, Decision on the application of 14 September 2009 for participation as an *amicus curiae*, ICC-01/05-01/08-602, 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.”)

¹⁵ *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, para. 68 (“which in and of itself *may* also give rise to the rejection of an application for leave”) (italics added).

9. The Defence does not seek leave, assuming that is required,¹⁶ to address the substantive submissions under heading III.B of the Motion to Strike. The Defence does not believe that additional submissions are required for the Trial Chamber to discern their proper weight.



Christopher Gosnell
Counsel for Mr. Jean-Jacques Kabongo Mangenda

Respectfully submitted this 29th of March 2016,
At The Hague, The Netherlands

¹⁶ The Prosecution in an email (dated 29 March 2016, 12.08 pm to all parties and the Trial Chamber) has suggested that the Motion to Strike is, in fact, a “response.” The filing is titled “Motion to Strike, or in the Alternative, a Response.” A review of the content of the document suggests that section III.A may be the “Motion”, and that section III.B may, indeed, be the alternative Response. Whatever may have been the Prosecution’s intentions, it should not be permitted to re-classify what is described as a “motion” by way of subsequent email. In any event, the Defence does not address the portion of the filing that might be seen as a “response”.