

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 7 April 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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO

Public Redacted Document

Public redacted version of "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'", 23 March 2016, ICC-01/05-01/13-1743-Conf

Source: The Office of the Prosecutor

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

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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) opposes the Mangenda Defence’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)” (“Request”).¹ In what has become an established practice for the Mangenda Defence, the Request circumvents regulation 24(5) of the Regulations of the Court (“RoC”) by advancing substantive arguments in reply to the pending response without first obtaining the Chamber’s leave. It should thus be dismissed on this basis alone.²

2. Alternatively, the Request fails to justify the relief requested. The additional substantive arguments the Mangenda Defence now advances were either available when Mangenda’s Bar Table Motion³ was first filed, or were already raised in the Bar Table Motion. Such use of the Request violates regulation 23(1)(d) of the RoC, and warrants its dismissal.

II. Confidentiality

3. This filing is classified as “*Confidential*” as it responds to a filing of the same designation. The Prosecution does not object to its reclassification as “*Public*”.

¹ ICC-01/05-01/13-1730-Conf.

² See ICC-01/05-13-1136-Conf-Corr. See also ICC-01/05-01/13-1206-Conf, para. 4.

³ ICC-01/05-01/13-1665 and its Confidential Annex A, ICC-01/05-01/13-1665-Conf-AnxA.

III. Submissions

A. The Request violates regulation 24(5) by advancing substantive arguments

4. The Request circumvents regulation 24(5) of the RoC. Throughout paragraphs 4-7, 9, and 11, the Request addresses the substance of the arguments it would adduce if the Request was granted. As the Prosecution has previously noted,⁴ this practice is impermissible and should not be countenanced by the Chamber. The Request should be dismissed on this basis alone, in accordance with the Appeals Chamber's jurisprudence.⁵

B. The Request advances arguments that could have been anticipated

5. The Defence also inappropriately identifies arguments for the first time that, contrary to its submissions,⁶ it could have anticipated in its Bar Table Motion, but chose not to do so.

6. *First*, the Defence cannot contend that the Prosecution's position on the relevance of the Prosecution's provision of benefits and telephones to witnesses, set out in near identical detail in the Prosecution's prior submissions,⁷ was unfamiliar to it or unforeseeable.⁸ In its previous submissions, the Prosecution detailed its position on the distinction between the provision of benefits by the Defence to specific witnesses in the specific context of the article 70 case, and the general practices

⁴ ICC-01/05-01/13-1215-Conf, para. 1; ICC-01/05-01/13-1206-Conf, para. 4.

⁵ See ICC-01/04-01/06-824, para. 68 ("The 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."); ICC-01/05-01/08-602, para. 9 ("the submission of substantive observations is only permissible after a Chamber has decided to invite or grant leave to do so. [...] For that reason, the Appeals Chamber shall disregard the substantive submissions contained in the Amicus Application"). See also ICC-01/05-01/08-2985, para. 5.

⁶ Request, para. 5.

⁷ See ICC-01/05-01/13-1034, ICC-01/05-01/13-1118.

⁸ Request, para. 5.

concerning the provision of benefits.⁹ The provision of telephones is no different, especially given the specific purpose for which the Defence wishes to rely on this evidence.¹⁰

7. *Second*, the Prosecution disclosed the documents in question under rule 77 of the Rules and at the Chamber's direction.¹¹ Such disclosure hardly constitutes a "tacit recognition" that these documents are probative of any issues in the case, let alone that they go to disproving allegations that the Accused acted corruptly to influence witnesses.

8. *Third*, the Defence offers no cogent explanation as to why it did not provide any of the arguments it now advances for the admission of the documents related to P-0245 and P-0260, when it filed its Bar Table Motion.¹² Again, the Defence cannot claim surprise regarding the Prosecution's position, particularly given its placement of the documents now sought to be tendered on its own lists for cross-examination of the respective witnesses. That the Mangenda Defence did not reasonably anticipate that in these circumstances is untenable. In contrast to the Request,¹³ the only thing that is surprising here is the complete absence of any explanation by the Defence as to why, given the ample opportunity it had, it never attempted to show the documents to the witnesses during their testimony. Mangenda Defence was also required to explain whether a representative sample of the documents was in fact shown to the witnesses, which would afford the Prosecution a meaningful opportunity to respond to such a contention. The same reasoning applies to the argument that the Prosecution "dumped" documents *via* its own bar table motions – especially given the entirely different context and content of the documents thus submitted, requiring a response.

⁹ See ICC-01/05-01/13-1034, paras. 9-11.

¹⁰ Bar Table Motion, paras. 11-12, ICC-01/05-01/13-1665-Conf-AnxA, p. 13.

¹¹ See, *inter alia*, ICC-01/05-01/13-1154, ICC-01/05-01/13-1172.

¹² See Request, para. 6.

¹³ See Request, para. 7.

9. *Fourth*, with respect to the transcripts purportedly highlighted by Mangenda, the Mangenda Defence misconstrues the Prosecution's position on the transcripts' significance in addition to arguing the merits of its position.¹⁴ The Prosecution's argument was primarily predicated on the Mangenda Defence's failure to demonstrate any temporal or substantive link between the transcripts and the Prosecution's allegations – a weakness which Mangenda does not alleviate with his new submissions.¹⁵ The arguments the Request advances to admit these transcripts should have been advanced in the Bar Table Motion.¹⁶ Mangenda should have anticipated the Prosecution's arguments, especially given their elaboration in the Prosecution's Pre-Trial Brief.¹⁷

10. *Finally*, the Mangenda Defence's contention that "the correctness of th[e] assertion about "facilitate[ing] or thwart[ing]" a crime can only be assessed in light of the actual content of the questions in relation to actual testimony,"¹⁸ is plainly incorrect. It continues to ignore that Mangenda knew that the questions were to be sent to a sworn witness, with knowledge that witness preparation was prohibited.¹⁹ In any event, this argument adds nothing to those already made in the Bar Table Motion.²⁰

11. Mangenda cannot be permitted to flout the reply process and to use it to supplement omissions in the arguments he advanced the first time around, or to have a "second bite of the apple".²¹ Such conduct contravenes regulation 23(1)(d), which demands that documents filed with the Court "shall, as far as practicable, state

¹⁴ See Request, para. 8.

¹⁵ See Request, para. 9.

¹⁶ Request, para. 9. [REDACTED]. See ICC-01/05-01/13-1665-Conf-AnxA, p. 17.

¹⁷ See ICC-01/05-01/13-1110-Conf-AnxA, pp. 34-41.

¹⁸ Request, para. 11.

¹⁹ See ICC-01/05-01/13-1110-Conf, paras. 79-80, 95.

²⁰ See ICC-01/05-01/13-1165-Conf-AnxA, p. 18.

²¹ See ICC-01/05-01/13-1206-Conf, paras. 3-4.

[...] [a]ll relevant legal and factual issues [...] relied upon". The Defence's "attempt[] to supplement their submission with additional legal and factual arguments which were available when the request was first filed" ²² breaches the rule. In these circumstances, the appropriate remedy is that these submissions be disregarded.²³

IV. Relief Requested

12. For the foregoing reasons, the Chamber should dismiss the Request.



Fatou Bensouda, Prosecutor

Dated this 7th Day of April 2016
At The Hague, The Netherlands

²² ICC-01/05-01/13-1202, para. 4.

²³ ICC-01/05-01/13-1202, para. 4.