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**International
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No.: **ICC-01/05-01/13**
Date: **4 September 2017**

THE APPEALS CHAMBER

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Geoffrey A. Henderson
Judge Piotr Hofmański

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

Prosecution's request for leave to reply to Mangenda's "Response to Prosecution's request for leave to file a corrected version of its response brief"

Source: Office of the Prosecutor

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Ms Fatou Bensouda, Prosecutor

Mr James Stewart

Ms Helen Brady

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Ms Mylène Dimitri

Counsel for Aimé Kilolo Musamba

Mr Michael G. Karnavas

Counsel for Jean-Jacques Mangenda**Kabongo**

Mr Christopher Gosnell

Mr Peter Robinson

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Ms Beth Lyons

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

Counsel Support Section**Victims and Witnesses Unit**

Mr Nigel Verrill

Detention Section**Victims Participation and Reparations
Section Other**

Introduction

1. On 25 August 2017, the Prosecution requested leave to correct paragraph 73 and footnote 211 of its Response Brief, filed on 10 July 2017.¹ It identified the need to do so after following up on a Mangenda Defence enquiry. On 29 August 2017 Mangenda responded,² advancing several substantive arguments which are incorrect or go well beyond the scope of the very narrow issue before the Appeals Chamber.

2. The Prosecution respectfully seeks leave to reply to Mangenda's Response. Mangenda makes incorrect assertions and raises several unrelated and new issues. He mistakes the impact of the proposed correction and improperly—and without substantiation—implies the Prosecution's bad faith in seeking to correct the record. Moreover, many of Mangenda's submissions impermissibly re-litigate several different issues and constitute a veiled reply to the Prosecution's Response Brief, notwithstanding that the Chamber denied his request for leave to file a reply.³ While the proposed correction was limited to deleting one word in a paragraph and adding seven words to the corresponding footnote, Mangenda's 10-page response far exceeds the scope of the issue before the Chamber—*i.e.*, whether a correction of the Response Brief is warranted. For these reasons, granting the Prosecution an opportunity to reply is justified.⁴

3. If leave were granted, the Prosecution would submit a discrete reply addressing Mangenda's incorrect arguments regarding the purpose, import and context of the

¹ ICC-01/05-01/13-2207-Conf ("Prosecution's Correction Request"). *See also* ICC-01/05-01/13-2170-Corr ("Prosecution's Response Brief).

² ICC-01/05-01/13-2210-Conf ("Mangenda's Response"), paras. 1-30; ICC-01/05-01/13-2210-Conf-AnxA ("Mangenda Response Annex").

³ ICC-01/05-01/13-2197 ("Replies Decision"), paras. 12, 18 ("In the circumstances of the present case and after careful consideration of each of the issues on which the appellants request leave to reply, the Appeals Chamber is of the view that further submissions on the issues identified will not assist the Appeals Chamber in its determination of the appeals. Accordingly, the five appellants' requests for leave to reply are rejected."); *see e.g.*, ICC-01/05-01/13-2182-Conf ("Mangenda Reply Request"), paras. 8-9.

⁴ ICC-01/05-01/13-2206 ("Arido Additional Evidence Decision"), para. 11 ("The Appeals Chamber notes that regulation 24(5) of the Regulations provides that leave of the Chamber is required to reply to a response. The Appeals Chamber considers that the question of whether leave to reply should be granted lies within its discretionary powers and must be considered on a case-by-case basis.").

proposed correction. Further, since Mangenda's submissions on the Western Union screening process⁵ and submissions regarding disclosure during trial⁶ (many of which are largely unsupported and/or incorrect) go beyond the scope of the Prosecution's Correction Request, if leave to reply were granted, the Prosecution would request that the Chamber disregard them.

Level of Confidentiality

4. The Prosecution files this submission as "Confidential" pursuant to regulation 23*bis* of the Regulations of the Court, since it refers to confidential information. The Prosecution will file a public redacted version in due course.

Submissions

5. Regulation 24(5) governs requests for leave to reply to responses to standalone motions on appeal.⁷ Whether leave to reply should be granted lies within the Chamber's discretionary powers and is decided on a case-by-case basis.⁸

6. A limited and focused reply, as proposed, would assist the Appeals Chamber in this case.

7. First, although Mangenda claims that the proposed correction is "material to important issues in this appeal" and speculates that the Prosecution has changed its

⁵ See e.g., Mangenda's Response, paras. 4-12, 24-27.

⁶ See e.g., Mangenda's Response, paras. 28-29.

⁷ Regulation 24(5): Unless otherwise permitted by the Chamber, a reply must be limited to new issues raised in response which the replying participant could not reasonably have anticipated.

Arido Additional Evidence Decision, para. 11; Replies Decision, para. 17. See also ICC-01/05-01/08-3479 ("Bemba Reply Decision"), para. 7.

⁸ Arido Additional Evidence Decision, para. 11; Replies Decision, para. 17; Bemba Reply Decision, para. 7. See also ICC-01/05-01/13-2187-Conf ("Prosecution's Leave to Reply Response"), para. 5 ("Leave to reply will generally be granted only after a showing of good cause. If permitted, replies must be "narrowly tailored to only address new issues" raised in a response which "could not have been foreseen", and "may not be used to strengthen the arguments" previously advanced. The Appeals Chamber will generally not be assisted by submissions which are irrelevant or unnecessary to assist the Chamber's deliberations, or which fall reasonably within the scope of the moving party's original arguments.")

position,⁹ this is not so. The Prosecution's arguments on appeal about the screening of Western Union material have already been fully addressed in its Response Brief, and overall the Prosecution's position remains the same. The proposed correction does not change this. Mangenda's demand for an "explanation of the need for the correction" is therefore unfounded.¹⁰ Moreover, his own submission that "*it would not matter* whether they [the spreadsheets] were emailed, or burned onto a CD and put in the hands of the Prosecution investigator"¹¹ only undermines his claim that the proposed correction is material.

8. Second, the Prosecution has acted in good faith, and if leave to reply is granted, can provide details about the context of the correction, should the Chamber consider this necessary.

- The Prosecution would demonstrate that following a specific query from the Mangenda Defence on 17 July 2017 regarding the content of footnote 211 of the Prosecution's Response Brief, the Prosecution noted a mistake in footnote 211, resulting from a misreading of the metadata regarding the email and spreadsheets in Ringtail. Accordingly, the Prosecution saw a need to correct the text of footnote 211, namely, to correct the sender and recipient names of the email dated 7 November 2012. Moreover, the Prosecution made further inquiries including with relevant Prosecution investigators. If necessary, the Prosecution can provide the Chamber with the relevant *inter partes* correspondence to which Mangenda alludes, including the Prosecution's disclosure to the Defence of the results of its further inquiries.¹²

⁹ Mangenda's Response, paras. 2, 23-24.

¹⁰ *Contra* Mangenda's Response, paras. 3, 30, requesting the Appeals Chamber to order the Prosecution to "provide a proper explanation of the need for the correction, and to correct its Response Brief unambiguously" and "to file a new request that adequately addresses the substance of the correction that it needs to make".

¹¹ Mangenda's Response, para. 27 (emphasis added).

¹² Mangenda's Response, paras. 28-29.

- The Prosecution would further show that, contrary to Mangenda's claim,¹³ footnote 211 (current and proposed versions), by including the date of 7 November 2012, specifically addresses Mangenda's submission in his Appeal Brief that the spreadsheets were "given to the Prosecution on 4 November 2014" (also included in footnote 211).¹⁴ Mangenda's Response omits this aspect of the footnote.
- Likewise, the Prosecution would show that the proposed correction to paragraph 73 (*i.e.*, deletion of the word "subsequently") flows from the correction to footnote 211 and that the Prosecution's overall position in its Response Brief, including paragraph 73, addressed Mangenda's submissions in his Appeal Brief and remains unchanged.¹⁵

9. Third, several of Mangenda's submissions pertain to the larger issue of the Prosecution's screening of Western Union material,¹⁶ an issue already fully briefed on appeal and well beyond the salient issue attendant to the Prosecution's Correction Request. In this respect, Mangenda's Response appears to be an attempt impermissibly to address the relevant argument in the Prosecution's Response Brief, without having first sought leave. As such, if leave to reply were granted, the Prosecution would request that these submissions should be disregarded.

10. Finally, if leave to reply were granted, the Prosecution would request that Mangenda's assertion that the Prosecution's disclosure during trial was "unsatisfactory" should be disregarded. Not only is the allegation unsubstantiated, it is manifestly not connected to the proposed correction.¹⁷ If the Appeals Chamber deems it necessary, the Prosecution can provide further information regarding the

¹³ Mangenda's Response, para. 22.

¹⁴ See *e.g.*, ICC-01/05-01/13-2143-Red ("Mangenda Brief), para. 24, fn. 33 ("[...] Metadata for the four excel spreadsheets shows that they were given to the OTP on 4 November 2014"). See also Prosecution's Response Brief, para. 73, fn. 211.

¹⁵ *Contra* Mangenda's Response, paras. 16-21.

¹⁶ See *e.g.*, Mangenda's Response, paras. 4-12, 26-27.

¹⁷ Mangenda's Response, para. 28.

Prosecution's disclosures to the Defence during trial (including emails from Mr Smetana and Western Union Excel spreadsheets).¹⁸

Conclusion and Relief

11. For the above reasons, the Prosecution respectfully requests the Appeals Chamber's leave to file a discrete reply on the identified issues.



Fatou Bensouda, Prosecutor

Dated this 4th day of September 2017¹⁹
At The Hague, The Netherlands

¹⁸ Mangenda's Reponse, para. 28.

¹⁹ This submission complies with regulation 36, as amended on 6 December 2016: ICC-01/11-01/11-565 OA6 ("Al Senussi AD"), para. 32.