



Original: English

No.: ICC-01/05-01/08

Date: 03/09/2014

TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF
THE PROSECUTOR
v. Jean-Pierre Bemba Gombo**

Public

Public Redacted Version of Defence Response to Prosecution Request for a corrected version of the Defence Closing Brief and extension of time to file a response

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

The Office of the Prosecutor

Fatou Bensouda

Jean-Jacques Badibanga

Counsel for the Defence

Peter Haynes QC

Kate Gibson

Melinda Taylor

Legal Representatives of the Victims

Marie-Edith Douzima-Lawson

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented

(Participation/Reparation)

Applicants

The Office of Public Counsel for the Victims

Paolina Massida

The Office of Public Counsel for the Defence

Xavier-Jean Keita

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and Reparations Other
Section**

A. SUBMISSIONS

1. Had the Prosecution deemed 14 days to be too short a timeframe in which to respond to Mr. Bemba's Closing Brief, it should have appealed the original decision in which this timeframe was set.¹ It did not. The present application² appears to be nothing more than an attempt to circumnavigate the Trial Chamber's original order.

2. The Prosecution Request should be denied for lack of diligence. The Prosecution waited until Friday afternoon to file its request, when the alleged "deficiency" would have been apparent on Monday afternoon. Mr. Bemba's Closing Brief was filed at 14.30 and notified to the parties and participants at 15.13 on 25 August 2014, having been accepted as filed by Court Management Services. The first transcript references appear under paragraph 7 of the brief. It is realistic to assume that the Prosecution was fully aware of the manner in which transcripts of evidence had been cited by 15.30 that afternoon. Given the 14-day deadline for filing a response, waiting four days to file the present application exhibits a lack of diligence warranting its dismissal.

3. As for the merits of the Prosecution Response, there is no legal or procedural requirement that line references be given in footnotes. There is no rule, practice direction, or decision of the Trial Chamber which mandates the provision of line references. The Chamber itself has previously cited to transcripts by only page number, without giving line references.³ The Defence has consistently filed motions without line references for a period of almost four years which has met with no

¹ ICC-01/05-01/08-2731, para. 38(n) ("Decision 2731").

² ICC-01/05-01/08-3126 ("Prosecution Request").

³ See, for example, ICC-01/05-01/08-928, Decision on the Prosecution's Request for Approval of a Proposed Expert and for Extension of Time for the Submission of an Expert Report, fn. 19: "ICC-01/05-01-T-21-ENGET WT, page 21." ICC-01/05-01/08-1974, Decision on the prosecution's and defence's requests regarding Witness 219's testimony, fn. 1: "Transcript of hearing on 29 March 2010, ICC-01/05-01-T-21-ENG ET WT, pages 20-24."

objection from the Prosecution, nor criticism from the Trial Chamber.⁴ Accordingly, that, with respect, is the practice of the Trial Chamber as far as the Defence is concerned.

4. The practice before other Trial Chambers of the International Criminal Court demonstrates no consistency of approach, but the most instructive precedent is the most recent Judgement in the *Katanga* case of 7 March 2014, which does not contain line references, but cites to witness number, transcript number and page,⁵ in the same manner as Mr. Bemba's Closing Brief.

5. Given the size of the *Katanga* Judgment (running to over 700 pages) and the fact that grounds of appeal need to be founded upon it and filed within 30 days,⁶ a page reference must be deemed sufficient notice to the parties of the evidence relied upon. The Defence must be entitled to rely on the most recent practice of the Trial Chambers as an appropriate guide on the formatting of footnotes.

6. The practice of other international criminal tribunals also varies. At the ICTY, line references in Closing Briefs⁷ and Judgments⁸ are not required; nor are they used at the STL.⁹ The ICTR practice was the same; Judgments¹⁰ did not provide line

⁴ See, for example, ICC-01/05-01/08-2862; ICC-01/05-01/08-2214-Conf-Exp; ICC-01/05-01/08-2806; ICC-01/05-01/08-2732; ICC-01/05-01/08-2638; ICC-01/05-01/08-2628; ICC-01/05-01/08-2624; ICC-01/05-01/08-2491.

⁵ ICC-01/04-01/07-3436.

⁶ Rule 150 of the Rules of Procedure and Evidence.

⁷ See, for example, *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Prosecution Final Trial Brief, 12 May 2009; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Stanišić Defence Final Trial Brief, 11 February 2013; Public Redacted Version of Prosecution Final Trial Brief, IT-03-69-T, 28 February 2013.

⁸ *Prosecutor v. Vidoje Blojčević and Dragan Jokić*, Case No. IT-02-60-T, Judgement, 17 January 2005; *Prosecutor v. Tihomir Blaskić*, Case No. IT-95-14-T, Judgement, 3 March 2000; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgement, 2 August 2001; *Prosecutor v. Fatmir Limaj et al.*, Judgement, Case No. IT-03-66-T, 30 November 2005.

⁹ See, for example, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/TC, Decision on the Prosecution Motion for Testimony by Video-Conference link for Witnesses PRH130, PRH120 and PRH548, 19 June 2014, at footnote 4: "Transcript, 9 January 2014, pp 12-14; Transcript, 22 January 2014, pp 65-66; Transcript, 29 January 2014, pp 64-67", Transcript, 4 February 2014, p. 61." See also *Prosecutor v.*

references, and Briefs with only page numbers raised no criticism.¹¹ Nor are line references found in the Judgements of the ECCC¹² or SCSL,¹³ where a Closing Brief which did not consistently cite line references was also accepted without question.¹⁴

7. Accordingly, the Defence formatting of its transcript references is consistent with its accepted practice before this Trial Chamber, consistent with the practice of other Trial Chambers at the ICC and consistent with the practice of other international criminal courts and tribunals. The Prosecution cites to no authority for the proposition that line references are mandatory. It appears that it has not troubled to research the issue. The Defence adopted good practice in the formatting of Mr. Bemba's Closing Brief, and did so in good faith.

8. Moreover, it is a matter for the Prosecution if it **chose** to cite to lines of transcript. The Prosecution was neither ordered nor asked to do so. This choice did not create a precedent that the Defence was bound to follow. The Prosecution's citation to line references is illustrative of two things; firstly that the Prosecution bears the burden of proof, but more significantly, the Prosecution's practice of "cherry-picking" small fragments of transcript out of context. Many of the Defence citations are responsive to this regrettable approach to the citation evidence. There are numerous examples, including:

Ayyash et al., Case No. STL-11-01/T/TC, Request for Certification to Appeal the Decision on Joinder – Corrected Version, 5 March 2014.

¹⁰ See, for example, *The Prosecutor v. Mikaeli Muhimana*, Case No. ICTR-95-1B-T, Judgement and Sentence, 28 April 2005; *The Prosecutor v. Tharcisse Renzaho*, Judgement and sentence, Case No. ICTR-97-31-T, 14 July 2009; *The Prosecutor v. Emmanuel Rukundo*, Case No. ICTR-2001-70-T, Judgement, 27 February 2009; *The Prosecutor v. Simon Bikindi*, Case No. ICTR-01-72-T, Judgement, 2 December 2008; *The Prosecutor v. Sylvestre Gacumbtsi*, Judgement, Case No. ICTR-2001-64-T, 17 June 2004.

¹¹ See, for example, *Mugenzi and Mugiraneza v. The Prosecutor*, ICTR-99-50-A, Justin Mugenzi's Appeal Brief, 20 February 2012.

¹² See, for example, *Case 001, Prosecutor v. Kaing Guek Eav*, Case No. 001/18-07-2007/ECCC/TC, Judgement, 26 July 2010; *Case 002/01, Prosecutor v. Nuon Chea and Khieu Samphan*, Case No. 0002/19-09-2007/ECCC/TC, Judgement, 7 August 2014.

¹³ See, for example, *Prosecutor v. Issa Sesay et al.*, Judgement, Case No. SCSL-04-15-T, 2 March 2009; *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-T, Judgement, 18 May 2012.

¹⁴ *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-T, Defence Final Trial Brief Public Version, 23 May 2011.

- **D-56:** [REDACTED].
- **P-213:** [REDACTED].

9. It was the Prosecution's reliance on line references that facilitated its practice of attempting to draw attention away from unhelpful testimony, and limit the Trial Chamber's deliberations to discrete fragments of evidence. By contrast, the Defence actively wants the Chamber to consider the whole context of a witness' testimony (and the Defence has no doubt that it will).

10. Moreover, the Prosecution's reliance¹⁵ on the Chamber's decision of 17 June 2014¹⁶ needs to be placed in context. The Prosecution filed a palpably inadequate brief in almost every respect. It contained no Table of Contents, it still has no Table of Legal Authorities or Acronyms. It contained two Chapter IV's and was repetitive, not just thematically but actually in terms of duplicating whole series of paragraphs. Paragraphs 90-93, for example are simply repeated verbatim at paragraphs 101-104. Rather than carry out any sensible attempt to come within the word limit by editing its repetitive submissions, it chose to spend many hours hyphenating its footnotes. The decision, moreover, not initially to file a Table of Contents must be viewed with skepticism, given that it is an automatic function of Microsoft Word software.

11. The Prosecution should not be permitted at this stage to caricature the Trial Chamber's decision to the effect that the normal way of citing references was to include a line reference, when the more natural reading of that decision is that all the Chamber meant by "normal" was "not hyphenated to circumvent the proscribed word count".

¹⁵ ICC-01/05-01/08-3126, para. 3.

¹⁶ ICC-01/05-01/08-3091.

12. The fact that the Table of Contents and corrected version of the Prosecution's Closing Brief was not filed until 2 weeks after the deadline¹⁷ and yet, no extension was given to the Defence deadline for filing its Closing Brief, militates further against granting the Prosecution Request now.

13. In the Defence submission, references to specific lines are unnecessary and indeed often unhelpful. It is only good legal practice to read around an isolated quotation. A page of transcript contains just 25 lines. Each line is no more than 10 words long, and frequently much shorter when the questions are brief and the answers "yes" or "no". A page thus contains a maximum of 250 words, and often as few as 70 or 80. It takes literally seconds to read a page of transcript. Claims that it takes "considerable time" are entirely misplaced.

14. Sight should not be lost of the fact that in the 21st century, trial lawyers do not pour over numerous files of typescript, they use the tools of the modern courtroom; CaseMap, Transcend (with its highlighting facilities), Microsoft Word and Acrobat (with their search functions). The relevant passages have been highlighted and casemapped by both parties. They jump out from the pages and are filed away under headings.

15. The Defence transcript references have been checked and are plainly accurate. The fact that after four days of scrutiny of Mr. Bemba's Closing Brief the Prosecution with its massive resources has only been able to find two references to criticise is supportive of this submission. Indeed in neither case is the criticism merited. The submissions made about footnote 410 are troubling. In fact there is a typographical error in the reference. The signature remark by witness P-169 that he was corrupted by the offer of money appears not in transcript T-158 at page 12 but in T-159 at page 12. However, unless the Defence has completely misunderstood the position, it appears that the Prosecution is advancing this mistake as support for the

¹⁷ ICC-01/05-01/08-3079-Conf-Corr.

proposition that references change according to whether transcripts are edited or corrected. Such a submission has no factual foundation.

16. In any event, the Prosecution is hardly in a position to complain about typographical errors in footnotes. Numerous footnotes in the Prosecution Closing Brief remain incorrect despite the filing of a 25-page corrigendum.¹⁸ Footnote 512 of the Prosecution Closing Brief refers both to D-56 and D-65.¹⁹ The Defence was required (as the Chamber will be) to try to work out which was the correct reference. The only difference being the Defence did not seek an extension of time within which to do so. The citation given to support the assertion that P-36 testified that “[Mr. Bemba] was the one who made all the decisions”²⁰ actually reads as follows:

And if you feel comfortable I would ask you to mark it on the map, and I assume the court usher may assist with operating the machine.
THE COURT OFFICER: Madam President, if I may, it is not possible to use the SMARTBoard while using the other machine.

17. There are many more examples.²¹ More generally, the Prosecution’s footnoting was chaotic and often sent the Defence on wild-goose chases through the evidential record.²² Unlike the Prosecution, however, the Defence followed the

¹⁸ ICC-01/05-01/08-3079-Conf-Corr.

¹⁹ Prosecution Closing Brief, fn. 512: [D56-T246-ENG-ET-p9-L13]/[D65-T246-FRA-ET-p10-L10]

²⁰ Prosecution Closing Brief, fn. 1746.

²¹ Footnote 448 cites only to evidence not admitted in the case: EVD-P-00017; EVD-P-00018; EVD-P-02093. Footnotes 49 and 148 give an incorrect reference: “CAR-OTP-0004-0067 at 0669” should read “CAR-OTP-0004-0667 at 0669.” Footnotes 50 and 2073 give an incorrect reference: “EVD-T-CHM-0019” should read “EVD-T-CHM-00019”. Footnote 1255 gives an incorrect reference: “CAR-OTP-0037-0126” should read “CAR-OTP-0037-0126_R01”, but in any event this document is not admitted in the case. Footnote 1817 gives an incorrect reference: “CAR-OTP-0008-0381” should read “CAR-OTP-0010-0471”. Footnotes 1581, 1582, 1583, 1584, 1586 cite to “CAR-OTP-0048-0492”, which should read “CAR-OTP-0048-0492_R01”.

²² The following footnote references in the Prosecution Closing Brief do not support the propositions in the text: Footnote 274: EVD-T-OTP-00576/CAR-OTP-0031-0099-at-17:00-20:00 (audio); EVD-T-CHM-00040/CAR-OTP-0036-0041 (French transcript); CAR-OTP-0056-0287 (English transcript); Footnote 275: CAR-OTP-0031-0099-at-17:00-20:00 (audio), CAR-OTP-0036-0041 (French transcript), CAR-OTP-0056-0287; Footnote 276: EVD-T-OTP-00576/CAR-OTP-0031-0099-at-17:00-20:00 (audio); EVD-T-CHM-00040/CAR-OTP-0036-0041 (French transcript) CAR-OTP-0056-0287. The following references to RFI broadcasts are incorrect: Footnote 293: CAR-OTP-0031-0124-at-0405, 00:00-

preferred practice of the Trial Chamber and attempted to resolve such issues *inter partes*, rather than using them as basis to seek an unwarranted extension of time:²³

Dear [REDACTED],

With reference to your Final Trial Brief, we refer to page 232 and note that there are three versions of footnote 1864.

Only one reference to footnote 1864 appears in the text above. As such, we are unable to determine which is the correct version, or which proposition these different footnotes are intended to support.

We would be grateful if your office could clarify as soon as possible by way of a corrigendum.

This request is without prejudice to Defence filing ICC-01/05-01/08-3082.

Kind Regards,
Bemba Defence Team.

18. The only other impugned reference in Mr. Bemba's Closing Brief, Footnote 477, is actually in identical terms to Footnote 7, the first reference in the whole brief to transcripts. The Defence assumes, therefore, that they were the first references checked. The propositions the references are said to support are almost identical and [REDACTED].²⁴ One must therefore assume that the Prosecution checked the first set of references and found them to confirm the assertion made, but 215 paragraphs later, they did not find them so compelling. [REDACTED]. The Defence maintains the references support the propositions in the text. The Prosecutor who read paragraph 222 of the Closing Brief plainly did not read the material as carefully as the one who reviewed paragraph 7.

11:47 (audio), CAR-OTP-0057-0344 (French transcript), CAR-OTP-0057-0403 (English translation); CAR-OTP-0031-0120/EVD-T-OTP-00580-at-Track 1, 02:00-02:15, Track 2, 02:39; [V2-T222-ENG-ET-p53-L21-p54-L2]/[V2-T222-FRA-ET-p56-L17];[V2-T224-ENG-ET-p23-L4]/[V2-T224-FRA-ET-p27-L1]/[P119-T83-ENG-CT2-p11-L2-and-p12-L24-p13-L9]/[P119-T83-FRA-CT2-p10-L4]and-p12-L23-p13-L5]; Footnote 341 allegedly supports the proposition that [REDACTED]. There is no reference to any RFI reports in the footnote cited: V1-T220-ENG-ET-p12-L13-p13-L6-and-p14-L2]/[V1-T220-FRA-ET-p13-L14-and-p14-L6-and-p15-L2];[P29-T80-ENG-ET-p26-L18]/[P29-T80-FRA-ET-p28-L23]; EVD-T-OTP-00820/ CAR-OTP-0013-0114-at-0114 ; EVD-T-OTP-00820/CAR-OTP-0013-0114-at-114.

²³ Email from Bemba Defence Team to [REDACTED] at 16 June 2014 at 13:30.

²⁴ [REDACTED].

19. The purpose of footnote references is to enable the reader to check the referenced material reasonably efficiently. However, the transcripts are but one source of evidence in the case. As an illustration, the Defence brief contains 569 references to documents and other material. There is no requirement to give any greater particularity to a document reference than a page number. Newspaper reports and NGO reports, cited by all parties and participants are by the page, without any indication of where the relevant portion can be found and these pages contain far greater numbers of words than does a page of transcript. The *cahier de communication* is similarly cited by page, despite the fact that each page contains numerous messages. Legal articles are cited in their entirety.²⁵ If the logic of the proposed approach is followed through to its conclusion, then all parties should be required to re-submit their briefs to particularise which portions of documents and articles support the submissions in the text.

20. The Defence has, moreover, copy-pasted portions of transcript into its Closing Brief. Repetitive citations to these pages of transcript do no more than underline the point in the text. Indeed, given time, the brief could be reduced in length by simply referring *supra*, or *infra* to previous citations in the brief, though with respect, this is a pointless and unhelpful exercise.

21. The Prosecution has demonstrated no prejudice. It plainly has been able to identify all of the evidential references in the Defence brief and can offer two unsupportable criticisms. If it feels they or any others are worthy of argument, it can include them in its response. There is no justification in granting any of the relief sought. As an aside, the Defence notes, firstly, that no criticism is made of the Defence references to documents (which are to pages), and secondly, that the Prosecution's assertions in its email of 27 August 2014,²⁶ to which the Trial Chamber was copied, that it did not know whether transcripts were English or French,

²⁵ See, for example, Prosecution Closing Brief, footnote 2161.

²⁶ Email Prosecution to the Defence, 27 August 2014, 15:38.

Realtime or edited have now been abandoned. That if nothing else, should give the Trial Chamber the key to how genuine a complaint this is.

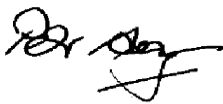
22. Lastly, the accused has been in custody in relation to these proceedings since 24 May 2008. It is time that this case moved on in accordance with the proscribed schedule of the Trial Chamber to the next phase. The Prosecution Request has no legal basis, is not justified on the basis of the submissions made, and has not been made diligently. They stand to be summarily dismissed.

D. REQUESTED RELIEF

23. On the basis of the submissions made above, the Defence respectfully requests that the Chamber:

REJECT the Request for a corrected version of the Defence Closing Brief and extension of time to file a response

The whole respectfully submitted.



Peter Haynes QC

Lead counsel for Mr. Jean-Pierre Bemba

The Hague, The Netherlands

3 September 2014