



Original: English

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

Date: 12/01/2016

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*

Public

**Defence Response to 'Prosecution's Motion for Reconsideration of the Further
Directions on the Conduct of the Proceedings in 2016 (ICC-01/05-01/13-1518)'**

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

James Stewart

Kweku Vanderpuye

Counsel for the Defence of Mr Jean-Pierre Bemba Gombo

Melinda Taylor

Counsel for the Defence of Mr Aimé Kilolo Musamba

Paul Djunga Mudimbi

Steven Powles

Counsel for the Defence of Jean-Jacques Mangenda Kabongo

Christopher Gosnell

Arthur Vercken

Counsel for the Defence of Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Roland Azama Shalie Rodoma

Counsel for the Defence of Mr Narcisse Arido

Charles Achaleke Taku

Beth Lyons

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section Other

Introduction

1. The Defence for Mr. Jean-Pierre Bemba hereby files its response to the 'Prosecution's Motion for Reconsideration of the Further Directions on the Conduct of the Proceedings in 2016 (ICC-01/05-01/13-1518)' ¹ (the Request), in which the Prosecution requested the Trial Chamber to:

- i. Vary the page limit of the Prosecution's Final Trial Brief from 100 pages to 200 pages (the First Request); and
- ii. Vary the deadline for the submission of both the English and the French versions of the Prosecution Final Trial Brief (the Second Request).

2. The Defence takes no position on the First Request.

3. As concerns the Second Request, the Defence concurs that it would be advisable to draft the Final Trial Briefs with the benefit of the edited versions of the English transcripts.

4. The Defence further notes that the reasons underpinning both the First and the Second Requests militate in favour of a corresponding variation for the deadline for the submission of the Defence Final Trial Briefs.

5. In particular, by presaging that the Prosecution case is likely to mutate and develop throughout the Defence case depending on how the evidence of the respective five Defence teams unfolds, the Request underscores the prejudice which would ensue from requiring the Defence to file its Final Trial Brief at the same time as that of the Prosecution, rather than afterwards.

¹ ICC-01/05-01/13-1531.

6. Accordingly, if the Trial Chamber finds that the factors set out in the Request warrant reconsideration of either the page limit or the deadline for the Prosecution Final-Trial Brief, then the same factors warrant a reconsideration of the specific timing of the respective briefs such that the Defence deadline should fall after that of the Prosecution.

Submissions

7. The objective of filing a Final Trial Brief is to “address all the relevant legal and factual issues arising in the case”.² It is, however, apparent from the arguments set out in the Request that this objective will be rendered otiose unless the Defence is provided with an effective opportunity to respond to the legal and factual issues arising from the Prosecution’s Final Trial Brief.

8. Although the Single Judge rejected the prospect of staggered deadlines for the Final Trial Brief,³ the decision was issued without the benefit of prior submissions from the parties. There was thus no consideration of the specific arguments, which were delineated in the Prosecution’s Request, namely, that:

- i. “Although comprehensive, the Prosecution’s pre-trial submissions were geared toward the given stage of the proceedings and the relevant evidentiary standards. However, they were not designed to establish the facts of the case to the requisite legal threshold for a conviction, and thus cannot supplant the necessity of the Prosecution to fully address the *trial evidence*.”⁴

² ICC-01/04-01/06-2722, para. 4.

³ ICC-01/05-01/13-1518, para. 22.

⁴ ICC-01/05-01/13-1531, para. 5.

- ii. “Presently, nothing precludes the Defence from changing or expanding the scope of their respective cases, which would correspondingly warrant the Prosecution addressing such evidence in its closing submission.”⁵

- iii. “The record at trial does not expound the Parties’ *arguments* on evidence. Further, the Prosecution cannot reasonably be held to rely on its Pre-Trial Brief, or other pre-trial submissions, either in place of, or supplemental to, its closing submissions in arguing the trial evidence. *First*, the Pre-Trial Brief sets out the Prosecution’s theory of the case. It does not form part of the argumentative trial record, *per se*, and therefore obviate further exposition of the salient trial evidence. *Second*, although the Prosecution’s Pre-Trial Brief foreshadowed the evidence introduced during its case-in-chief, its purpose was wholly distinct from that of a closing submission. While the former set out the Prosecution’s prospective case and theory as an instrument of notice, the latter will argue and explain the evidence actually submitted before the Chamber, the reasonable inferences rising therefrom, and demonstrate how they establish the Accused’s individual criminal responsibility beyond a reasonable doubt. *Third*, the Pre-Trial Brief does not account for arguments and evidence to be adduced by the Defence in their respective cases-in-chief. Because the extent and materiality of that evidence is yet to be seen, it is not possible to know the depth of the response required in the Prosecution’s closing submission for it to demonstrate how it has met its high evidentiary burden.”⁶

⁵ ICC-01/05-01/13-1531, para. 5.

⁶ ICC-01/05-01/13-1531, paras. 6-8.

9. The upshot of these arguments is that the Prosecution's Pre-Trial Brief cannot be considered to be a reliable compass as concerns the specific contours and content of the Prosecution's case regarding each defendant. The Prosecution has also foreshadowed its intent to adduce new arguments on fact and law after the close of evidence.

10. The prejudice ensuing from this approach is aggravated by the fact that a significant proportion of the evidence concerning Mr. Bemba was tendered through bar table motions prior to the commencement of the evidential component of the trial, notwithstanding the clear nexus which many of the documents had to potential witnesses. As a result of this discombobulated approach, the Prosecution has not yet submitted argumentation in light of the actual trial record as to how each item fulfils the criteria for admissibility.

11. Given the specific nature of Article 70 proceedings, the Defence has a right to expect that the Prosecution will consider carefully whether it maintains its reliance on certain witness testimony or evidence, which was clearly lacking in credibility. Rather than shadowboxing allegations from which the Prosecution has since resiled, it would be fair and efficient for the Defence to be given a discrete opportunity to consider, and then respond to the Prosecution case as it stands at the end of the trial process.

12. It is also entirely possible that the Defence might not contest certain evidential or legal arguments set out in Prosecution's Final Trial Brief. Allowing the Defence to review its contents prior to the submission of its own Brief would permit the Defence to identify points of agreement and disagreement. Staggered deadlines would serve to focus the issues in dispute and avoid unnecessary

argumentation, which is of particular importance in a case involving five defendants.⁷

13. The existing case law of the ICC has also interpreted the right of the defence to have the last word in Rule 141(2) of the Rules of Procedure and Evidence to apply to the deadline for the submission of the Final Trial Brief.⁸ The logic of allowing the Defence to have the last word in both Rule 140(2)(d) and Rule 141(2) stems from the fact that the burden falls on the Prosecution to prove the guilt of the accused (as *per* Article 66(2) of the Statute). It is not the role of the Defence to prove that the accused is innocent, but to test whether the Prosecution has discharged its burden of proof and argumentation. The Defence cannot discharge this mandate in a vacuum; it would be premature for the Defence to file detailed legal and factual submissions as to how the Prosecution has failed to discharge its burden whilst the Prosecution is still in the process of doing so.

14. Although the Defence can, in theory, respond to the Prosecution case during the closing submissions, this possibility undercuts the utility of the Defence Final Trial Brief itself, and further raises the spectre that the closing submissions will be transformed into an oral version of the Final Trial Brief, rather than a discrete opportunity to focus on the principle facts and issues arising from the case and respond to questions from the bench.⁹ It would serve both judicial economy and clarity to enable the Defence to respond in a written format to any complex legal issues raised by the Prosecution; precise and detailed legal references are not easily conveyed through oral submissions.

⁷ This is consistent with the position of Trial Chamber I that “[t]he accused is entitled to know, once the evidence has closed, the legal and factual basis on which the Prosecutor maintains he is guilty. In this particular case, the lack of clearly identified bases could, potentially, result in the defence responding to evidence that is no longer relied on.” ICC-01/04-01/06-2722, para. 2.

⁸ ICC-01/04-01/06-2722, para. 2; ICC-01/04-01/07-3218-Red-tENG, para. 7; ICC-01/05-01/08-2731, para. 32. During the pre-confirmation phase of the case, Pre-Trial Chamber I also reconsidered its initial ruling that the parties were required to file their confirmation submissions at the same time in order to respect the right of the Defence to have the last word: ICC-01/04-01/06-T-29-EN, p.24; ICC-01/04-01/06-678, p.14.

⁹ ICC-01/04-01/06-2722, paras. 6-8.

15. The delay between the deadline for the filing of the Final Trial Briefs and the scheduling of the closing submissions is also extremely short (one week). In practice, this time period will not afford the Defence a sufficient opportunity to verify the specific legal and transcript references cited by the Prosecution in advance of the closing submissions and draft the Defence response to them, whilst simultaneously reviewing the briefs submitted by the co-defendants, and crafting oral submissions. The difficulty in doing so would be exacerbated if the Prosecution is granted leave to file a 200 page brief.

Relief Sought

16. For the reasons set out above, the Defence supports the Prosecution request for the Trial Chamber to reconsider the deadlines for the submission of the Final Trial Briefs.

Respectfully submitted,



Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba

Dated this 12th day of January 2016
The Hague, The Netherlands