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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 request for a variation of page limits
concerning annexes to its Closing Submissions” (ICC-01/05-01/13-1865)**

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

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Introduction

1. The Defence for Mr. Jean-Pierre Bemba strongly opposes the Prosecution request for a variation of page limits concerning annexes to its Closing Submissions (the Request).¹

Submissions

2. Although framed as a request for variation of page limits for annexes, it is, in effect, a request for an extension of the page limit for the Closing Submissions themselves.

3. The Request notes that “the Chamber did not prescribe a page limit in respect of substantive annexes”.²

4. The Prosecution fails, however, to address the more salient point that there is no such thing as a “substantive annex”.

5. Regulation 36(2) specifies that appendices (or annexes) will only be exempted from the word count of the filing itself if they are either limited to verbatim quotations, or contain “non-argumentative” (i.e. non-substantive) material.

6. If the Prosecution considers that a particular form of analysis would be better presented in a chart, then it can do that without seeking the leave of the Chamber. But, the Prosecution must then accepted the corollary consequence that any forms of argument or analysis will fall within the page limit and word count for the Closing Submissions.

¹ ICC-01/05-01/13-1865.

² Request, para. 4.

7. The fact that the Prosecution has nonetheless seized the Chamber with the Request for 70 pages for these “substantive annexes” is a clear indication of the fact that the Prosecution is unable to accommodate all of its argumentation within the 150 pages allocated by the Trial Chamber.

8. The placement of substantive analysis not only has the effect of affording an additional 70 pages for this analysis, it also allows the Prosecution to utilise the full 150 pages for other arguments. The end result will be that the Prosecution will have the advantage of 220 pages for its Closing Submissions.

9. The Prosecution already requested that the page limit for its Closing Submissions be extended by an additional 100 pages (the Initial Request).³

10. At the time that the Prosecution submitted its Initial Request for an extension of the page, it was entirely foreseeable that it would need to address the issues of telephone attribution, and synchronisation.

11. The Prosecution nonetheless failed to raise specific arguments on this point, electing instead, to argue in general terms, *inter alia*, that it required additional pages to “argue and explain the evidence actually submitted before the Chamber”.⁴

12. In his Decision, the Single Judge found that he,⁵

fails to see why the Prosecution requires 200 pages to make a closing submission that is expected to ‘crystallise [its] final position[] on the charges and evidence presented in a succinct manner’ without needing to ‘recapitulate the argumentation advanced in trial’.¹⁰ The Single Judge considers 150 pages to be more than sufficient for the Prosecution’s closing submission, and will extend the page limit only to this extent.

³ ICC-01/15-01/13-1531.

⁴ ICC-01/05-01/13-1531, para. 8.

⁵ ICC-01/05-01/13-1552, para. 8.

13. The current Request for an additional 70 pages – albeit dressed up as a request concerning “substantive annexes” – is an impermissible attempt to cure the argumentative deficiencies of the initial request.

14. Apart from the fact that the Request should be dismissed on the grounds that it is an attempt to re-litigate a previously adjudicated issue, an extension of pages is unwarranted, and unduly prejudicial to the Defence.

15. Closing submissions are not the correct means for introducing new or updated evidence, technical analysis, or new arguments on the admissibility of evidence.

16. In its decision of 9 December 2015, the Trial Chamber gave very clear directions concerning the object of the Closing Submissions. In particular, the Chamber underlined that,⁶

The purpose of this submission is for the parties to crystallise their final positions on the charges and the evidence presented in a succinct manner. There is no need to recapitulate the argumentation advanced in trial, as the parties’ discussions are on record. The parties are instead expected to stress the main points which constitute their core arguments in the case. Finally, only issues which arose and were discussed during the trial should be included.

17. In determining the last point, the Trial Chamber cited “Rule 64(1) of the Rules (in general, an issue relating to relevance or admissibility ‘must be raised at the time when the evidence is submitted to a Chamber’).”⁷

18. The Prosecution was thus on notice, before the close of evidence, that all issues related to the relevance or admissibility of Prosecution evidence should have been raised during the trial process itself, and not in the Closing Submissions.

⁶ ICC-01/05-01/13-1518, para. 21.

⁷ ICC-01/05-01/13-1518, para. 21, footnote 23.

19. This is consistent with the fact that the Prosecution has always born the burden of proof. The Prosecution has also always been under a duty to present its case in a manner, which respects Mr. Bemba's right to be informed promptly of the nature, cause and content of the charges, and his right to adequate time and facilities.

20. Given that the Prosecution case closed in November 2015, it is completely inappropriate for the Prosecution to employ its Closing Submissions as a vehicle for elaborating and elucidating key elements of its case, for the first time.

21. The Prosecution has indicated that it intends to submit – after the evidential close of the case – an annex, which purportedly,⁸

describes the technical issues affecting the Detention Unit calls in relation to the relevant portions of each recording and explains how given synchronisation issues may be surmounted. The annex is important to assist the Chamber's full understanding of these technical issues and their resolution.

22. If this is a key aspect of its case, then the Prosecution should have introduced this evidence or analysis during its case.

23. The Prosecution chose to submit the detention unit recordings from the bar, rather than through a witness. In choosing to do so, the Prosecution accepted the heightened obligation to establish the relevance and probative value of each item so tendered. This is not a burden, which can be shifted to Closing Submissions, after the evidential close of the case.

24. When the Prosecution first tendered the detention unit recordings, it represented to the Court that:⁹

⁸ Request, para. 6.

The Derivative Material accurately reflects the contents of the underlying Recordings. Certain Recordings are slightly out of synchronisation, such that the participants' voices periodically overlap. However, the issue is minimal and does not affect the understanding of the conversations, or make them unintelligible.

25. The related analysis in the annex proceeds on the basis that the sequence of speakers reflected in the transcripts is correct, and reflects exchanges made in real time. The only impact of synchronisation, which the Prosecution chose to reflect in the transcripts, was the existence of overlapping speakers.

26. Having advanced the position that the transcripts "accurately reflect[]" the underlying recordings, it would be extremely prejudicial for the Prosecution to be afforded an attempt, after the close of evidence, to reconstruct the order of the transcripts, and to advance, and rely on different sequential versions of the speakers in its Closing Submissions.

27. The Prosecution's waiver of any right to do so is strengthened by the fact that the Defence raised the issue of synchronisation in its responses to the Prosecution's bar table motions,¹⁰ and yet, the Prosecution did not seek leave to reply in relation to these points. It is therefore entirely improper and unfair for the Prosecution to now use its Closing Submissions as a means to "supplement[..] the Prosecution's arguments contained in its second and fourth bar table motions".¹¹

28. Similarly, it is entirely improper for the Prosecution to put its case forward concerning the "technical issues" affecting these recordings, in its Closing Submissions. The Prosecution did not call anyone from the Detention Unit or Bumicom to address these technical issues. The Prosecution also had an opportunity to raise "technical issues" of synchronisation either in advance of, or

⁹ ICC-01/05-01/13-1113-Conf, para. 23.

¹⁰ ICC-01/05-01/13-1199-Conf-AnxA, pp. 7-16; 18-19; 36-60; ICC-01/01-01/13-1245, para. 78; ICC-01/05-01/13-1517-Conf-AnxA, p. 7.

¹¹ Request, para. 6.

during the testimony of Dr. Harrison. The Prosecution can of course rely upon, and apply the evidence elicited from Dr. Harrison. But, the Prosecution cannot and should not be allowed to use the Closing Brief as a means to put to the Chamber the results of internal expertise and analysis, with a view to avoiding disclosure obligations and the adversarial right of the Defence to respond to the Prosecution's theory of its case.

29. These concerns apply equally to the Prosecution's request to append an updated version of its Attribution Table to its Closing Submissions.

30. The information, which the Prosecution proposes to include therein, was available to it before the close of evidence. If the Prosecution was of the view that such an update was required to assist the Chamber's understanding of evidence acquired later, than the Prosecution should have appended an updated Attribution Table to its request to admit additional attribution information into evidence. Yet, the Prosecution did not.

31. The Prosecution admitted the first Attribution Table (CAR-OTP-0090-0831) into evidence in order to give it the value of evidential weight, rather than Prosecutorial opinion. It now seeks to avoid the rigours of complying with disclosure obligations and evidential timetables, by appending an updated version as a form of Prosecution argument.

32. The Prosecution cannot have its cake and eat it too.

33. Having tendered the Table as evidence, it must be treated as such. If the Prosecution recognises that its Attribution Table (CAR-OTP-0090-0831) is no longer current, then this must attract the corollary finding that the Table should be withdrawn as an item of evidence, on the basis that it is no longer reliable and

accurate. The Prosecution cannot, however, submit a new version, after the final deadline for addressing all evidentiary issues has expired.

34. The above considerations also apply as concerns the Prosecution's proposal to submit an 'updated' annex concerning the interpretation of codes. The Prosecution did not call any witnesses to testify in relation to codes. Instead, it placed its interpretation of codes as an annex to the Pre-Trial Brief, and in so doing, advanced its interpretation as a necessary element of the Prosecution's charges against the accused.

35. The Defence was therefore entitled to rely on this version of the Codes in preparing, and advancing its case. It would be wholly unfair and prejudicial for the Prosecution to resile from any previous interpretations or explanations, after the evidentiary close of the case.

Relief sought

36. For the reasons set out above, the Defence for Mr. Bemba respectfully requests the Honourable Trial Chamber to reject the Request.



Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba

Dated this 6th day of May 2016

The Hague, The Netherlands