Cour Pénale Internationale

International Criminal Court

Original: English

No**: ICC-01/05-01/13**
Date: **6 May 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

Response to Prosecution's Request for Variation of Page Limits Concerning Annexes to its Closing Submission

Source: **Defence for Jean-Jacques Kabongo Mangenda**

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

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1. The Prosecution's request[1] for an 87% increase in the length of its closing submissions is not justified. Indeed, the content of the request suggests that the Prosecution is contemplating substantially modifying, changing or expanding positions on important issues of which the Defence should have had notice at the outset of trial. The Prosecution evidently intends to alter its position in respect of at least two key areas, upon which the Defence has already relied on previous submissions in preparing its defence:

- A supposed "updated version of the analysis of codes and terms"[2] used in intercepted conversations, that has already been explained and defined at great length (over 60 pages) in its Pre-Trial Brief;[3] and

- A supposed explanation of "how given synchronisation issues may be surmounted,"[4] whereas the Prosecution previously submitted that this issue "is minimal and does not affect the understanding of the conversations."[5]

2. A request to nearly double the page limit demonstrates that the Prosecution is contemplating altering its position – *i.e.* "moulding its case" – as it goes along.[6]

3. The Prosecution is not allowed to mould its case in this way. Article 67(1)(a) of the Rome Statute confers upon the accused the right "to be informed promptly and in detail of the nature, cause and content of the charge." As a practical matter, as stated in *Katanga*, this obliges the Prosecution:

> to present, during the pre-trial phase, all of the facts and circumstances relating to his case. To hold otherwise would be to call into question the very purpose of a pre-trial phase, at the close of which the charges are fixed and settled. Such a solution would, moreover, render useless the months of work devoted by the Pre-Trial Chamber to preparing the case for trial and, to a large extent, would make it pointless even to hold a confirmation hearing where evidence is presented, and at the close of

[1] *Bemba et al.*, Prosecution's Request for Variation of Page Limits Concerning Annexes to its Closing Submission, ICC-01/05-01/13-1865, 3 May 2016 ("Motion").
[2] Motion, para.3.
[3] *Bemba et al.*, Annex A to Prosecution Pre-Trial Brief, ICC-01/05-01/13-1110-Conf-AnxA, 31 July 2015.
[4] Motion, para.6.
[5] *Bemba et al.*, Prosecution's Second Request for the Admission of Evidence from the Bar Table, ICC-01/05-01/13-1113-Conf, 31 July 2015, para.23.
[6] *Kanyarukiga*, ICTR-02-78-A, Appeal Judgement, 8 May 2012, para.73; *Dordević*, IT-05-87/1-A, Appeal Judgement, 27 January 2014, para.575 ("[t]he Prosecution is expected to know its case before proceeding to trial and may not rely on the weaknesses of its own investigation in order to mould the case against the accused as the trial progresses.")

> which the trial is supposed to commence. As the *ad hoc* international criminal tribunals have stressed, the Prosecutor "is expected to know [his] case before it goes to trial. It is not acceptable for the Prosecut[or] to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds."[7]

4. The *ad hoc* tribunals have insisted on clarity of notice in respect of "material facts":

> to state the charges and the material facts underpinning those charges in the indictment, but not the evidence by which such facts are to be proven. Moreover, the charges and supporting material facts must be pleaded with sufficient precision in the indictment in order to provide clear notice to the accused. The prosecution is expected to know its case before it goes to trial and cannot omit material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.[8]

5. Material facts may also be communicated in the Opening Statement, Pre-Trial Brief, or other "clear and consistent information detailing the factual basis underpinning the charges against him or her."[9] Notice is not provided by "'mere service of witness statements by the [P]rosecution pursuant to the disclosure requirements.'"[10]

[7] *Katanga & Ngudjolo*, Decision on the Filing of Summary of the Charges by the Prosecutor, ICC-01/04-01/07-1547-tENG, 21 October 2009, para.23.

[8] *Kupreškić*, IT-95-16-A, Appeal Judgement, 23 October 2001 (*Kupreškić* Appeal Judgement), paras.88, 92; *Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Appeal Judgement, 13 December 2004 (*Ntakirutimana* Appeal Judgment), paras.25, 57, 470. *See Niyitegeka*, ICTR-96-14-A, Appeal Judgement, 9 July 2004 (*Niyitegeka* Appeal Judgement), paras.193, 197-98; *Kanyarukiga*, ICTR-02-78-A, Appeal Judgement, 8 May 2012, para.73; *cf. Bizimungu et al.*, ICTR-99-50-AR73.2, Decision on Prosecution Interlocutory Appeals Against Decision of the Trial Chamber on Exclusion of Evidence, 25 June 2004, para.18 ("[f]urther, in finding that the failure to plead could not be remedied by the Pre-Trial Brief, disclosed witness statements or the Prosecution's opening statement, the Trial Chamber made specific reference to the jurisprudence of the Appeals Chamber").

[9] *Kupreškić* Appeal Judgement, para.114.

[10] *Ntakirutimana* Appeal Judgement, para.27*; Niyitegeka* Appeal Judgement, paras.221-222 (disclosure in a witness statement of an allegation not mentioned in the pre-trial brief did not provide the "timely, clear and consistent" notice required to cure a defect in the indictment because "the [Accused] could well have concluded from the failure to mention Kivumu in the Pre-Trial Brief that the Prosecution did not intend to present evidence at trial regarding an attack at that location or in that timeframe"); *Ntakirutimana* Appeal Judgement, para.111 (Trial Chamber erred in basing conviction on a particular incident where it was alleged that the Accused was present during an attack, but without precisely specifying the location, date, or his conduct: "the information available to [the Accused] before trial, however, provided no notice of the location of the event, contained a date that the Trial Chamber found was inaccurate, and did not allege that [the Accused] had pointed out refugees to attackers during the event"); *id.* para.57 (a single, somewhat ambiguous reference in a pre-trial brief provided inadequate notice of a new material fact when the testimony of five other witnesses was also used at trial to prove the material fact); *Kamuhanda*, ICTR-99-54A-A, Appeal Judgement, 19 September 2005, paras.25-26 (disclosure in witness statement and pre-trial brief of precise commune in which weapons had allegedly been distributed provided sufficient information to the Accused, even though the Indictment itself identified only the prefecture).

6. The pre-trial mechanism at the ICC is much more developed than at the *ad hoc* tribunals, and requires the Prosecution to give notice not only of material facts, but also the "evidential basis" of its case:

> [t]he Chamber further agrees with the Defence that it is entitled to be informed – sufficiently in advance of the commencement of the trial – of the precise evidentiary basis of the Prosecution case. Indeed, although the Prosecution rightly asserts a great level of discretion in choosing which evidence to introduce at trial, the Defence must be placed in a position to adequately prepare its response, select counter-evidence or challenge the relevance, admissibility and/or authenticity of the incriminating evidence. This is only possible if the evidentiary basis of the Prosecution case is clearly defined sufficiently in advance of the trial.[11]

7. This is a basic requirement of the fairness of any adversarial proceeding. The Defence must have the opportunity to know the entirety of the Prosecution case before presenting its own evidence and, *a fortiori,* being required to adopt written final submissions. Changing the evidential basis of the charges at this stage of proceedings, at a time when the Defence has no further opportunity to adduce any evidence in response – or even to set out a response in writing – would be fundamentally and deeply unfair and prejudicial. The Prosecution's mere request to do so at this stage should be a cause for serious concern.

8. A third basis upon which the Prosecution seeks an extension of pages is its wish to update a telephone attribution table in order to reflect which items are "formally submitted" and to "address evidence elicited at trial." Neither of these purposes justifies any enlargement of the page limit.

9. The Prosecution also ignores that its request, in substance, is for reconsideration of the Trial Chamber's "Further Directions on the Conduct of Proceedings in 2016", as subsequently modified at the Prosecution's request.[12] No attempt has been made in the Motion to show that the stringent threshold for reconsideration is met:

> is exceptional, and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.[13]

[11] *Katanga & Ngudjolo,* Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol, ICC-01/04-01/07-956, 13 March 2009, para.6 (internal citations omitted).
[12] *Bemba et al.,* Decision on Prosecution's Motion for Reconsideration of the Closing Submissions Directions, ICC-01/05-01/13-1552, 15 January 2016, p.6 ("[f]or the foregoing reasons, the Single Judge hereby partially grants the Request, extending the page limit for the Prosecution's closing submission to 150 pages").
[13] *Bemba et al.,* Decision on Kilolo Defence Request for Reconsideration, ICC-01/05-01/13-1085-Conf, 15 July 2015, para.4.

10. Finally, the Trial Chamber's Decision is not ambiguous and does not require further clarification. So-called "substantive annexes" are not permitted under the Regulations of the Court[14] and, accordingly, it was entirely correct for the Trial Chamber not to "prescribe a page limit in respect of substantive annexes."[15] No clarification is required as to whether previous submissions of record can be taken into account by the Trial Chamber.[16]

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Respectfully submitted this 6 May 2016,
At The Hague, The Netherlands

[14] Regulation 36(2)(b).
[15] Motion, para.4.
[16] Motion, para.10.