



Original: **English**

No.: **ICC-01/05-01/08**
Date: **07 October 2010**

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

**Legal Representative's Response to the Prosecution's Proposal on Time-Frames for
Submission of Bar Table Motions and the Prosecution's Updated Order of
Presentation of its Witnesses at Trial**

**Source: Office of Public Counsel for Victims, as Legal Representative of Victims
a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08,
a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08,
a/0464/08, a/0465/08, a/0466/08, a/0467/08, a/0130/09, a/0131/09, a/0132/09, a/0133/09,
a/0134/09, a/0135/09, a/0136/09, a/0137/09, a/0138/09, a/0139/09, a/0141/09, a/0427/09,
a/0432/09, a/0511/08, a/0512/08, a/0513/08, a/0515/08, a/0516/08, a/0562/08, a/0563/08,
a/0564/08, a/0565/08, a/0566/08, a/0567/08, a/0568/08, a/0569/08, a/0570/08, a/0571/08,
a/0572/08, a/0651/09, a/0652/09 and a/0653/09**

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

The Office of the Prosecutor

Ms. Fatou Bensouda
Ms. Petra Kneuer

Counsel for the Defence

Mr. Nkwebe Liriss
Mr. Aime Kilolo-Musamba

Legal Representatives of Victims

Ms. Marie Edith Douzima-Lawson
Ms. Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms. Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar

Mrs. Silvana Arbia & Mr. Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Procedural Background

1. On 2 June 2010, Trial Chamber III (the “Chamber”) issued an order instructing the parties and participants to file their submissions on issues relevant to preparation for the commencement of the trial.¹ In particular, it ordered the Office of the Prosecutor (the “Prosecution”) to file its submissions regarding certain issues including the order in which it intends to call its witnesses and whether it intends to request the admission of documents from the bar table.²

2. On 10 June 2010, the Prosecution submitted, *inter alia*, its order of witnesses and expressed its intention to request the admission of evidence from the bar table in advance of the commencement of the trial.³ On 7 July and 21 September 2010, respectively, the Prosecution updated its Order of Witnesses.⁴

3. On 24 September 2010, during the course of a Status Conference, the Presiding Judge inquired whether it was possible for the Prosecution to reduce the number of crime-base witnesses to be presented at trial in order to avoid duplicative evidence and to facilitate the efficient presentation of evidence.⁵ The Presiding Judge also asked if the Prosecution could question its expert witnesses before the other witnesses and group some of its witnesses together.⁶ Finally, the Presiding Judge instructed the Prosecution to file new proposals on these issues and indicated that the Chamber shall hold another status conference in order to discuss the Prosecution’s proposals.⁷

¹ See the “Order for the filing of submissions in preparation the commencement of the trial”, No. ICC-01/05-01/08-785, 02 June 2010.

² *Idem*, par. 2.

³ See the “Prosecution’s Submissions in Preparation for the Commencement of the Trial”, No. ICC-01/05-01/08-793, 10 June 2010, par. 12 and Annex A.

⁴ See the “Prosecution’s Updated Order of Witnesses”, No. ICC-01/05-01/08-812, 7 July 2010 and the “Prosecution’s Updated Order of Witnesses”, No. ICC-01/05-01/08-891, 21 September 2010.

⁵ See the transcripts of the Status Conference on 24 September 2010, No. ICC-01/05-01/08-T-25-CONF-ENG ET, p. 7, line 2 – p. 7, line 22.

⁶ *Idem*, p. 8, line 16 - p. 9, line 21.

⁷ *Ibidem*, p. 9, line 25 – p. 10, line 12.

4. In relation to the admission of documents from the bar table, the Prosecution stated, during the said Status Conference, that it would seek to introduce documents from the bar table at appropriate times during the trial and at the end of its case.⁸ In addition, the Prosecution requested that the Chamber adopt and follow Trial Chamber II's practice on the bar table motions as set out in the "*Directions for the conduct of the proceedings and testimony in accordance with rule 140*"⁹ (the "Decision on Rule 140") according to which the moving party is required to send the proposed materials it seeks to tender as evidence to the opposing party in advance within a reasonable time.¹⁰ The Prosecution further confirmed, in response to Judge Aluoch's inquiry, that it was indeed departing from its earlier submission on bar table motions contained in paragraph 12 of its previous filing.¹¹

5. Consequently, the Chamber issued an oral decision ordering the Prosecution to file its written observations on the above-mentioned issues (the possibility to reduce the number of crime-base witnesses, to question expert witnesses before other witnesses, to group some of its witnesses, and the procedure on bar table motions) by 1 October 2010, thereafter granting the Legal Representatives a week from notification of said submission to respond.¹²

6. On 30 September 2010, the Prosecution filed its Proposal on Time-Frames for Submission of Bar Table Motions, and, on 1 October 2010, the Prosecution filed its Updated Order of Presentation of its Witnesses at Trial.¹³

⁸ *Idem*, p. 17, line 22 – p. 18, line 10.

⁹ See the "*Directions for the conduct of the proceedings and testimony in accordance with rule 140*", (Trial Chamber II), No. ICC-01/04-01/07-1665, 20 November 2009, paras. 101-102.

¹⁰ See *supra* footnote 5, p. 18, lines 12 – 24.

¹¹ *Idem*, p. 19, lines 3 – 6.

¹² *Ibidem*, p. 19, line 17 – p. 20, line 2.

¹³ See the "*Prosecution's Proposal on Time-Frames for Submission of Bar Table Motions*", No. ICC-01/05-01/08-911, 30 September 2010; and the "*Prosecution's Updated Order of Presentation of its Witnesses at Trial*", No. ICC-01/05-01/08-918, 1 October 2010.

7. Following the instruction of the Chamber and in accordance with Regulation 24(2) of the Regulations of the Court, the Principal Counsel of the Office of Public Counsel for Victims, acting as Legal Representative of victims a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08, a/0467/08, a/0130/09, a/0131/09, a/0132/09, a/0133/09, a/0134/09, a/0135/09, a/0136/09, a/0137/09, a/0138/09, a/0139/09, a/0141/09, a/0427/09, a/0432/09, a/0511/08, a/0512/08, a/0513/08, a/0515/08, a/0516/08, a/0562/08, a/0563/08, a/0564/08, a/0565/08, a/0566/08, a/0567/08, a/0568/08, a/0569/08, a/0570/08, a/0571/08, a/0572/08, a/0651/09, a/0652/09 and a/0653/09 (the “Legal Representative”)¹⁴, hereby respectfully submits her Response to the said Prosecution’s submissions.

II. Response to the Prosecution’s Proposal on Time-Frames for Submission of Bar Table Motions

8. Preliminarily, the Legal Representative submits that the practice of tendering documentary evidence through bar table motions has already been firmly established in the jurisprudence of the Court. In the case of *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I decided to allow bar table motions.¹⁵ This practice was then endorsed by Trial Chamber II in the case of *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*.¹⁶ Both Chambers emphasised that documentary evidence, not introduced by a witness, may be tendered via bar table motions if those materials

¹⁴ See the “Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties’ observations on applications for participation by 86 applicants”, No. ICC-01/08-01/05-699, 22 February 2010; see also the “Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings”, No. ICC-01/05-01/08-807 and No. ICC-01/05-01/08-807-Conf-Exp-AnxA, 30 June 2010.

¹⁵ See the “Decision on the admissibility of four documents”, (Trial Chamber I), No. ICC-01/04-01/06-1399, 13 June 2008; See also the “Decision on the admission of material from the ‘bar table’”, (Trial Chamber I), No. ICC-01/04-01/06-1981, 24 June 2009.

¹⁶ See *supra* footnote 9, paras. 98-100.

meet the general requirements of admissibility of evidence (relevance and probative value).¹⁷

9. The Legal Representative argues that the Prosecution's proposal to file bar table motions at appropriate times during the trial or at the end of its case is in conformity with the practice of the Court. Indeed, both Trial Chambers have so far allowed bar table motions during the trial.¹⁸ The Legal Representative maintains that bar table motions should be allowed at times judged appropriate by the tendering party or participant, not only due to the established jurisprudence of the Court on the issue, but also since there exists no statutory rules which would require that documentary evidence be presented only before the commencement of the trial.

10. Furthermore, the Court's practice on bar table evidence is consistent and in line with the practice of other international criminal tribunals. For example, the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") has allowed documents to be admitted into evidence from the bar table at the end of both the Prosecution and the Defence case.¹⁹ In particular, the ICTY reasoned that "[w]hile the Rules are not explicit on this matter", materials may be admitted during a trial "[a]t any convenient time" and "[i]t is for the party, which moves to have a document admitted into evidence to demonstrate its relevance and reliability sufficiently to justify its admission at that stage of the proceedings."²⁰

¹⁷ See *supra* footnote 15, "Decision on the admissibility of four documents", paras. 27 -31. See also *supra* footnote 9, paras. 96-100.

¹⁸ See *supra* footnote 9, par. 95. Trial Chamber II ruled that "[i]n principle, each item of documentary evidence shall be introduced by the tendering party during a hearing." (Emphasis added.) See also *supra* footnote 15, "Decision on the admission of material from the 'bar table'", paras. 33-50.

¹⁹ See ICTY, *Prosecutor v. Stanislav Galic*, Case No. IT-98-29-T, Judgement and Opinion, 5 December 2003, par. 801 (citing Decision on the Admission into Evidence of Documents Tendered from the Bar Table by the Prosecutor, 11 September 2002, and Decision on Admission of Documents Tendered During the Testimony of Radoslav Radinovic, Dusan Dunjic, Svetlana Radovanovic and on Motion Regarding Document of 14.05.1992, 11 April 2003).

²⁰ See ICTY, *Prosecutor v. Ljube Boskoski, Johan Tarculovski*, Case No. IT-04-82-T, Decision on Prosecution's Motion for Admission of Exhibits from the Bar Table with Confidential Annexes A to E, 14 May 2007, paras. 10 and 14.

11. The Legal Representative further observes that the Prosecution also proposed that the Chamber adopt the procedure²¹ on filing bar table motions set out by Trial Chamber II's in its "Decision on Rule 140".²²

12. In fact, as the Prosecution cited, Trial Chamber II ruled that "[b]efore submitting the application with the table to the Chamber, the tendering party shall send it to the opposing party, which may enter its observations in the table in relation to each document. It is the responsibility of the tendering party to ensure that the opposing party is given sufficient time to formulate its observations. However, the tendering party may request that the observations are submitted within a reasonable time frame."²³

13. The Legal Representative supports, in principle, the Prosecution's proposal. However, the Legal Representative would like to clarify the fact that the procedure on bar table motions is not an *inter partes* proceeding since the relevant procedural steps were not exclusively designated as such in the Trial Chamber II's "Decision on Rule 140".

14. In fact, the Legal Representative submits that the provisions of said decision were intended to be complimented by more specific instructions contained in the "Decision on the Modalities of Victim Participation".²⁴ For this reason, Trial Chamber II explained in the latter decision that "[i]n the Decision on Rule 140, the Chamber gave detailed directions on how the trial must be organised and conducted. At that time, it already laid down a number of rules stating the manner in which the victims will be able to participate in the trial" and thus "[t]he present Decision addresses the issues raised by the

²¹ See *supra* footnote 13, "Prosecution's Proposal on Time-Frames for Submission of Bar Table Motions", paras. 1-2.

²² See *supra* footnote 5, p. 18, lines 12 – 24.

²³ See *supra* footnote 9, par. 102.

²⁴ See the "Decision on the Modalities of Victim Participation at Trial", (Trial Chamber II) No. ICC-01/04-01/07-1788, 22 January 2010. See also. "Decision on Rule 140", par. 4. Trial Chamber II stated that "[w]ith regard to the modalities of the participation by the Legal Representatives of the victims, the Chamber will issue a decision in the coming days. However, in order to inform the Legal Representatives about how they will be able to perform their role during the proceedings on the merits, the Directions include specific instructions on the different ways in which victims may be allowed to intervene in the proceedings."

parties and participants, and states the precise modalities of their participation in the areas which were not covered in the aforementioned Decision on Rule 140.”²⁵

15. Particularly with relation to the presentation of evidence by the parties, Trial Chamber II held that “[i]n order to give full effect to victim participation during the trial, the Legal Representatives should be authorised to consult the material adduced by the parties.”²⁶ Trial Chamber II further reasoned that “[a]s regards a potential challenge to the admissibility and relevance of evidence pursuant to article 69(4) of the Statute, the Chamber again considers that this is a means for the victims to express their views and concerns within the meaning of article 68(3) of the Statute. [...] Thus it must permit a victim who has information clearly indicating the admissibility of disputed evidence, or, on the contrary, establishing that such evidence cannot be admitted or is irrelevant, to transmit that information to the Chamber. Such information may prevent the Chamber from being misled by relying on inadmissible or irrelevant evidence – or dismissing evidence that is in fact admissible and relevant – in order to establish the facts.”²⁷

16. Thus, Trial Chamber II ordered the Registry to grant the Legal Representatives access to the evidence in the case and allowed the Legal Representatives to submit their observations on the relevance or admissibility of evidentiary materials adduced by the parties.²⁸

17. Likewise, the Legal Representative recalls that Trial Chamber I similarly reasoned that the relevance of documents tendered through bar table motions, which is the initial threshold for an admissibility assessment, must be examined in relation to “[t]he matters that are properly to be considered by the Chamber in its investigation of the charges against the accused and its consideration of the views and concerns of participating

²⁵ *Idem*, paras. 66-67.

²⁶ *Ibidem*, par. 122.

²⁷ *Idem*, par. 104.

²⁸ *Idem*, p. 45.

victims” (Emphasis added).²⁹ Thus, Trial Chamber I also considered the observations of Legal Representatives relevant in its determination on issues of admissibility of documents tendered through bar table motions.³⁰

18. Therefore, as stated above, the practice of both Trial Chambers I and II dictates that the Legal Representatives are entitled to participate in the procedure of tendering evidence through the bar table conducted during trial proceedings, and to receive documents tendered through bar table motions in advance so that they may submit their observations on the admissibility of said materials within a reasonable time.

19. Finally, the Legal Representative submits that the practice of tendering evidence via the bar table should also apply directly to them. In this regard, Trial Chamber I held that the right to introduce evidence during trial is not limited to the parties because the Court has a general right to request the presentation of all evidence necessary for the determination of the truth, pursuant to article 69(3) of the Rome Statute, and thus “[i]t follows that victims participating in the proceedings may be permitted to tender and examine evidence if in the view of the Chamber it will assist it in the determination of the truth, and if in this sense the Court has ‘requested’ the evidence.”³¹ Trial Chamber II also held that the possibility for the Legal Representatives to tender documentary evidence is a means for the victims to express their “views and concerns” within the meaning of article 68(3) of the Rome Statute and therefore, “[m]aking it possible for the Legal Representatives of the Victims to propose the presentation of documentary evidence would indeed assist it in its implementation of article 69(3) of the Statute, and by the same token in its search for the truth.”³²

²⁹ See *supra* footnote 15, “Decision on the admissibility of four documents”, par. 27; and “Decision on the admission of material from the ‘bar table’”, par. 33.

³⁰ See *supra* footnote 15, “Decision on the admission of material from the ‘bar table’”, par. 9.

³¹ See the “Decision on victims’ participation”, (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, par. 108.

³² See *supra* footnote 24, par. 98.

III. Response to the Prosecution's Updated Order of Presentation of its Witnesses at Trial

20. The Legal Representative notes that the Prosecution, in its latest updated order of presentation of the witnesses, pleads the Chamber to respect the intentional choice made by it in relation to the specific order of the appearance of its lay witnesses and expert witnesses.³³ More importantly, the Prosecution contends that re-ordering the witnesses at this stage will postpone the planned appearance of certain vulnerable witnesses who have already expressed concerns about the delay in the proceedings.³⁴ As the Prosecution mentioned in its submissions, the latter is a factor which could potentially create reluctance on their part to testify.³⁵

21. The Legal Representative supports the Prosecution's proposal regarding the total number of witnesses to be presented at trial and the particular selection of those witnesses, since the Prosecution's choice appears to sufficiently and adequately reflect the nature, scale, impact, gravity, range of crimes charged, the context in which they were committed and the Accused's criminal responsibility. The Legal Representative also supports the Prosecution's proposal regarding the order of presentation of expert testimony, since the latter's expertise usually serves to put into perspective and explain the testimonies of crime-base and overview witnesses.

22. The Legal Representative further shares the Prosecution's concerns regarding the fragile psychological state of certain vulnerable witnesses. As previously indicated by the Prosecution during the last Status Conference, the uninterrupted and consecutive appearance of certain witnesses, who are also represented as victims by the Legal Representative, should be facilitated as expeditiously as possible.³⁶ Moreover, there are several other dual status individuals, represented by the Legal

³³ See *supra* footnote 13, "Prosecution's Updated Order of Presentation of its Witnesses at Trial", paras 5-14.

³⁴ *Idem*, par. 10.

³⁵ *Ibidem*.

³⁶ See *supra* footnote 5, p. 32, line 5 – p. 34, line 14.

Representative, who also have been anxiously waiting for the commencement of the trial for several years.

23. Therefore, the Legal Representative respectfully requests that the Chamber take into account the vulnerability of these witnesses and that it approve the Prosecution's updated order of presentation of its witnesses in order to avoid further delay and ensure that the trial is expeditious.

24. In this regard, the Legal Representative would like to recall an instruction issued by the Appeals Chamber, which stressed that:

*"[E]xpeditiousness is a recurrent theme in the Court's legal instruments. The Statute and the Rules of Procedure and Evidence place an onus on all those involved in the trial to act in a diligent and expeditious manner in the performance of their obligations. The duty applies to the Chambers of the Court, the parties and participants. [...] An expeditious trial is beneficial to victims. It assures them of receiving justice and of going through the healing process quickly. For witnesses, it relieves them as soon as possible of the anxiety of having to appear in court to give evidence. Unreasonable delay in commencing or finalising a trial may also diminish public interest and public support for, and cooperation with, the Court. [...] Expeditiousness is thus an independent and important value in the Statute to ensure the proper administration of justice, and is therefore more than just a component of the fair trial rights of the accused. For this reason, article 64(2) enjoins the Trial Chamber to ensure that the trial is both fair and expeditious."*³⁷

³⁷ See the "Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled 'Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings'", (Appeals Chamber), No. ICC-01/04-01/07-2259, 12 July 2010, paras. 43 - 47.

FOR THE ABOVE-MENTIONED REASONS, the Legal Representative of victims a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08, a/0467/08, a/0130/09, a/0131/09, a/0132/09, a/0133/09, a/0134/09, a/0135/09, a/0136/09, a/0137/09, a/0138/09, a/0139/09, a/0141/09, a/0427/09, a/0432/09, a/0511/08, a/0512/08, a/0513/08, a/0515/08, a/0516/08, a/0562/08, a/0563/08, a/0564/08, a/0565/08, a/0566/08, a/0567/08, a/0568/08, a/0569/08, a/0570/08, a/0571/08, a/0572/08, a/0651/09, a/0652/09 and a/0653/09 respectfully requests the Chamber to

(i) Grant the Prosecution's Proposal on Time-Frames for Submission of bar table motions; instruct the tendering party to send any proposed evidence submitted from the bar table during trial to the Legal Representatives at the same time as it is provided to the other party in order for them to submit their observations on the admissibility of the materials within a reasonable time; and to clarify that said procedure shall apply *mutatis mutandis* to the Legal Representatives wishing to tender evidence via the bar table at trial, in accordance with the modalities of participation established by the Chamber;

(ii) Approve the Prosecution's Updated Order of Presentation of its Witnesses at Trial.



Paolina Massidda
Principal Counsel

Dated this 07 October 2010

At The Hague, The Netherlands