

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: 28/11/2011

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**

Confidential

Defence Motion on the Re-Scheduling of the Prosecution Military Expert

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
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States' Representatives

Amicus Curiae

REGISTRY

Registrar

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

A. BACKGROUND

1. On 10 June 2009, the Prosecution filed its *Prosecution Submissions in Preparation for the Commencement of Trial*, in which it listed Witness 219 "Military expert witness – General Daniel Opende" as the second-last witness in the order of witnesses it intended to present at trial.¹

2. By way of an email on 21 October 2011, entitled "Prosecution Updated Witness Schedule", the Prosecution indicated that it was seeking to call Witness 219 prior to the testimony of the "insider" witnesses, Witnesses 15, 36, 44 and 45.²

3. In response, by way of an email of 24 October 2011, the Defence objected to the calling of Witness 219 prior to the four "insider" witnesses. The Defence noted that:³

"the calling of Witness 0219, the Military Expert, before the Chamber and the parties have heard the evidence of the 4 main "insider" witnesses will not be a useful exercise. The main purpose of his being called after all the factual witnesses (as the schedule always previously anticipated), was for him to be able to opine upon the *actual evidence* about command structures in the MLC, and in the Central African Republic. It is certain that he will have to be recalled for further examination, following the evidence of the insiders, and the Defence can state at this stage that it will apply for the whole of its examination of Witness 0219 to be deferred until after that event."

4. On 2 November 2011, the Prosecution filed its *Prosecution's Response regarding the Witness Schedule*,⁴ in which it repeated its request that the Prosecution military expert be called to give his evidence from 5 December 2011, before the testimony of "insider" Witnesses 15, 36, 44 and 45.

¹ ICC-01/05-01/08-793-AnxA

² Email Prosecution to Chambers, 21 October 2011, 11.12.

³ Email Defence to Chambers, 24 October 2011, 15.45.

⁴ ICC-01/05-01/08-1874-Conf

5. On 8 November 2011, the Defence filed its *Defence Response to Prosecution Further Revised Submissions on Scheduling*,⁵ in which it opposed the Prosecution proposal to bring its military expert before the evidence of Witnesses 15, 36, 44 and 45.

6. On 11 November 2011, the Trial Chamber rendered its *Decision regarding the Prosecution witness schedule*,⁶ in which it “**DENIE[D]** the defence request for Witness 219 to be deferred until after the testimony of Witnesses 15, 36, 44 and 45.”⁷

B. SUBMISSIONS

7. By the present filing, the Defence is not seeking re-consideration of the Trial Chamber’s decision to allow the Prosecution to re-arrange its order of witnesses in order to call the military expert prior to the “insider” witnesses. Rather, the Defence’s primary concern is protecting the position of the Accused in the event that the testimony which follows that of the military expert undermines or contradicts his expert report, the basis for his expert report, or his oral testimony.

8. The Defence accepts that in the normal course of the trial, an Accused’s right to explore contradictions between Prosecution witnesses would be protected through his ability to conduct examinations of Prosecution witnesses. However, the situation is different with a military expert. This is perhaps best illustrated by way of an example. The military expert represents that in the preparation of his report, he has considered Witness 36’s written statements.⁸ Pursuant to the Trial Chamber’s decision of 11 November 2011, Witness 36 is now scheduled to testify **after** the military expert. Should Witness 36 give evidence which differs in whole or part from his written statements, not only will the Defence wish to submit that the basis for the

⁵ ICC-01/05-01/08-1893-Conf

⁶ ICC-01/05-01/08-1904-Conf

⁷ ICC-01/05-01/08-1904-Conf, para. 38(f).

⁸ CAR-OTP-0064-0551

military expert's report has been compromised or undermined, but the Defence will also want to examine the military expert on Witness 36's new positions and evidence, and how (if at all) it affects the military expert's previous conclusions or testimony.

9. Accordingly, the Defence hereby respectfully seeks the leave of the Chamber not to close its examination of Witness 219 until after the four "insider" witnesses, Witnesses 15, 36, 44 and 45 have been heard; or, in the alternative, until after such time as they are dropped from the Prosecution list of witnesses it intends to present at trial.

C. RELIEF SOUGHT

10. For the above reasons, the Defence requests that the Chamber:

GRANT the Defence request for leave not to close the Defence examination of Witness 219 until after the completion of the testimony of Witnesses 15, 36, 44 and 45; or, in the alternative, their removal from the list of Prosecution witnesses; and

RE-CLASSIFY the present filing in line with the re-classification of the filings referred to in paragraph 21 of the *Decision regarding the Prosecution witness schedule*.⁹

⁹ ICC-01/05-01/08-1904-Conf



Aimé Kilolo
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Done at The Hague, the Netherlands

28 November 2011