

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 30 November 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**

Public Document

**Prosecution Response to “Defence Motion on the Re-Scheduling of the
Prosecution Military Expert” and Subsequent Related Defence In-Court
Submissions, and Request for Additional Examination Time for Witness CAR-
OTP-PPPP-0219**

Source: The Office of the Prosecutor

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

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I. Introduction

1. On 28 November 2011 the Defence filed a motion requesting that Witness CAR-OTP-PPPP-0219 ("Witness 219") be subject to recall as a witness in order to analyze future witness testimony.¹ On 29 November 2011 the Defence orally amended their motion to request a 30-day delay in the testimony of Witness 219.² The Office of the Prosecutor ("Prosecution") requests that Trial Chamber III ("Chamber") deny the Defence request to delay the proceedings for 30 days from 28 November 2011 and that it maintain its ruling that Witness 219 commence his testimony on 5 December 2011. The Prosecution does not oppose the Defence request to recall Witness 219, subject to his availability, but notes that the Defence may have to recall him as a Defence witness because Witness 219 will not be available to return in January or February 2012.

2. As an additional and related matter, on 21 October 2011 the Prosecution requested an additional four hours examination time for Witness 219, its military expert.³ The Chamber denied the request,⁴ but noted that it would entertain a substantiated request for additional examination time.⁵ The Prosecution respectfully now renews that request and provides substantiation for its request, based on the evidence regarding military structure and the like that has emerged during the trial. The Prosecution will not use the additional four hours if it turns out to be unnecessary, but submits that an order granting the additional time may facilitate the Chamber's ability to understand the military evidence. Nor will this prolong the trial beyond its anticipated duration, since whether the Prosecution examines him for four

¹ ICC-01/05-01/08-1943-Conf, Defence Motion of the Re-Scheduling of the Prosecution Military Expert, 28 November 2011, para. 10.

² ICC-01/05-01/08-T-193-CONF ENG RT, 29 November 2011, p. 2 line 10 to p. 7 line 23.

³ Email from Prosecution to Chamber's Legal Officer, 21 October 2011, 11:12.

⁴ ICC-01/05-01/08-1904-Red, Public Redacted Version of the Chamber's 11 November 2011 Decision regarding the prosecution's witness schedule, 15 November 2011, para. 23.

⁵ *Id.*

or eight hours, he will in any event be the last witness before the Court's recess, and the Prosecution still has approximately 50 hours within which to present its case.

II. Background

3. On 27 September 2011 Witness 219 provided a 13-page report in advance of his appearance as an expert witness.⁶ On 21 November 2011 Witness 219 provided the Prosecution with an additional expert report of 28 pages with no annexes.⁷ The additional expert report itself is substantially similar to Witness 219's 13 page original report and is based on the same materials Witness 219 previously reviewed. The bulk of the 28 pages restates verbatim the original report, cites to quotations in the materials, and contains blank spaces. The supplementary or new analysis contained in the additional expert report consists of 18 paragraphs filling about eight pages.⁸

4. The Prosecution did not request any additional written information from Witness 219. Rather Witness 219 provided the additional expert report on his own accord.⁹ In fact on 8 November 2010, in light of the litigation of supplemental expert reports occurring between 21 October 2010 and 30 November 2010,¹⁰ the Prosecution specifically requested Witness 219 to not provide further written reports unless requested by the Chamber.

⁶ The original report (CAR-OTP-0064-0547) and its French translation (CAR-OTP-0064-0607) were disclosed to the Defence on 4 October 2010; see ICC-01/05-01/08-924+Conf-Exp-AnxA, Prosecution's Communication of Incriminatory Evidence Disclosed to the Defence on 4 October 2010 Pursuant to the Trial Chamber III's Order, 5 October 2010.

⁷ The Defence erroneously stated that the report contained 60 pages with annexes. See ICC-01/05-01/08-T-193-CONF RT, 29 November 2011, p. 4, line 23.

⁸ The 18 paragraphs consist of a total of 183 lines.

⁹ The Prosecution informed the Defence of this fact in its filing ICC-01/05-01/08-1946, Prosecution's Communication of Pre-Inspection Report for Material Provided to the Defence under Rule 77 on 28 November 2011, 28 November 2011, para. 2.

¹⁰ ICC-01/05-01/08-T-39-ENG ET, 30 November 2010, p. 2, line 10 to p. 4, line 9.

5. Once the unrequested expert report was provided to the Prosecution, however, the Prosecution deemed it to be subject to disclosure, as information that might be material to the preparation of the Defence. Accordingly, the new expert report was immediately disclosed to the Defence on 28 November 2011 consistent with the Prosecution's obligations under Rule 77 of the Rules of Procedure and Evidence.¹¹ That same day, the Prosecution told the Defence that it does not intend to rely on the additional expert report in the testimony of Witness 219.

6. After the issue arose in court on 29 November 2011, the Prosecution emailed Witness 219 to inquire as to his availability in the event that the Chamber might permit the Defence to recall him to testify or if his appearance were postponed. Witness 219 sent a responsive email on 29 November 2011 informing the Prosecution that he will not be available to testify in January or February. He can be available on 6 March 2012.

III. Submissions

Defence Request for Delay

7. Since 24 October 2011 the Defence has attempted to require the postponement of Witness 219's testimony until after "insider" witnesses have testified.¹² In its oral submission on 29 November 2011 the Defence mischaracterized facts in an attempt to accuse the Prosecution of trickery and to strengthen their request to delay the testimony of Witness 219.¹³

¹¹ ICC-01/05-01/08-1946, Prosecution's Communication of Pre-Inspection Report for Material Provided to the Defence under Rule 77, 28 November 2011.

¹² Email from the Defence to the Chamber's Legal Officer, 24 October 2011, 15:46.

¹³ The Defence plainly and baselessly accuses the Prosecution of attempting to "trick" the Chamber with the timing of the disclosure of the additional expert report and the Prosecution request for additional examination time. See ICC-01/05-01/08-T-193-CONF RT, 29 November 2011, p. 6, line 6. The Defence chose to ignore that the Prosecution had requested additional time to examine Witness 219 on 21 October 2011 prior to knowing anything about an additional expert report. See Email from the Prosecution to the Chamber's Legal Officer, 21 October 2011, 11:12.

8. Witness 219 will provide expertise and context to testimony the Chamber has heard in court and to the anticipated testimony of the remaining Prosecution witnesses. Witness 219 will also likely address hypothetical situations in order to illustrate his understanding of “command and control.” The Prosecution does not intend to rely on the additional expert report, though it understands that the Defence may rely upon it. The Defence is not prejudiced by the report itself but claims only that the timing of the disclosure of the report causes prejudice.

9. The additional expert report, containing 18 supplementary paragraphs not contained in the original report, does not contain any new factual findings. It re-evaluates information and provides more context to previous finding. This is information that the Defence could have readily anticipated arising during the course of Witness 219’s examination. The Defence claim that it will require 30 days to fully analyze and read through 18 paragraphs of information that could have been anticipated during testimony is not reasonable. The Defence should be fully capable of incorporating the 18 paragraphs into its examination plan, should it choose to do so, within days and not weeks. Further the Defence will have an opportunity to challenge expert testimony both during its examination and during the presentation of its case.

Recalling Witness 219

10. The Prosecution does not oppose the Defence request to recall Witness 219, subject to his availability. In accordance with the Chamber’s Decision of 19 November 2010, the Defence may call Witness 219 during the presentation of the Defence’s evidence, should it elect to present such evidence.¹⁴ As noted previously,

¹⁴ ICC-01/05-01/08-1023, Decision on Directions for the Conduct of the Proceedings, 19 November 2010, para. 5.

however, the witness will not be available should his appearance be postponed or should he be subject to recall during the Prosecution's case, before 6 March 2012.

Request for Additional Examination Time

11. On 26 October 2010, before the trial began, the Prosecution submitted a list of witnesses and an estimate as the length of time necessary for the direct examination of each witness.¹⁵ In that submission, it anticipated that Witness 219 would require four hours, based on the Prosecution's best approximation of the amount and types of material he would analyze to assist the Chamber.¹⁶

12. Since the trial commenced, the Chamber has heard a considerable amount of testimony related to military matters.¹⁷ The Chamber has also heard testimony referencing documents from the Defence, which were not available for Witness 219's review, that bear on military reports, organization, and structure.¹⁸ For example, Witness 65 testified on the use of the *Mouvement de Libération du Congo's* situation report logbooks - furnished by the Accused himself - and communications between the Accused and his officers on the field.¹⁹ During its examination of Prosecution witnesses the Defence has on various occasions also explored military topics. For example, it extensively questioned Witness 213 on military hierarchy, military titles, and expected responsibilities.²⁰

¹⁵ ICC-01/05-01/08-975-Conf, Prosecution's Revised Order of its Witnesses at Trial and Estimated Length of Questioning, 26 October 2010, para. 2.

¹⁶ ICC-01/05-01/08-975-Conf, para. 2.

¹⁷ See e.g., ICC-01/05-01/08-T-158-CONF-ENG ET, 9 September 2011, pp. 34-37, lines 8-2; ICC-01/05-01/08-T-167-CONF-ENG ET, 27 September 2011, p. 19, line 13 to p.21, line 20; ICC-01/05-01/08-T-170-CONF-ENG ET, 05 October 2011, p. 16, lines 6-16.

¹⁸ The situation report logbooks were disclosed initially on 22 November 2010 (CAR-D04-0002-0817) and on 23 November 2010 (CAR-D04-0002-0922). The complete versions of the logbooks were disclosed on 08 September 2011 (CAR-D04-0002-1514 and CAR-D04-0002-1641).

¹⁹ ICC-01/05-01/08-T-168-CONF-ENG ET, 03 October 2011, p. 20, line 18 to p. 21, line 5.

²⁰ ICC-01/05-01/08-T-189-CONF-ENG ET, 17 November 2011, p. 4, line 22 to p. 7, line 17.

13. In this context, Witness 219 will offer the Chamber an educated background and specialized military knowledge to assist the Chamber in understanding the evidence that has been presented, including, *inter alia*, the use of military terms, training, units, weapons, communications and other military-type information which bears on his expert opinion regarding “command and control”.

14. The Prosecution will make all reasonable efforts to ensure the efficiency of Witness 219’s testimony. However, in order to provide the Chamber with the fullest benefit of Witness 219’s expertise, it now seems clear that the Prosecution will require up to eight hours to examine Witness 219.²¹ The Prosecution recognizes that this is four hours more than originally projected, but adds that this additional time will not extend the projected length of the Prosecution’s case overall, since the Prosecution still has approximately 50 hours remaining within which to present its case. Nor will an extension of his testimony for four hours delay any other witnesses, since he is the last scheduled witness before the Court’s winter recess.

²¹ The Defence has also recognized the importance of having sufficient time to examine Witness 219 where it requested 20 hours of examination time. See Email Defence to Chamber’s Legal Officer, 24 October 2011, 15:46.

IV. Conclusion

15. For the above reasons it is respectfully submitted that the Chamber should deny the Defence request for a 30-day delay, approve the Defence request to recall Witness 219 during its case, and approve the Prosecution request for additional examination time.



Luis Moreno-Ocampo, Prosecutor

Dated this 30th Day of November 2011

At The Hague, The Netherlands