

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 2 December 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***

URGENT

Public document and public Annex A

**Decision on the defence's objection to the use of 10 documents by the
prosecution during Witness 219's testimony**

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

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor
Ms Petra Kneuer, Senior Trial Lawyer

Counsel for the Defence

Mr Nkwebe Liriss
Mr Aimé Kilolo Musamba

Legal Representatives of the Victims

Ms Marie Edith Douzima-Lawson
Mr Assingambi Zarambaud

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber III (“Chamber”) of the International Criminal Court (“Court”) in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* issues the following Decision on the defence’s objection to the use of 10 documents by the prosecution during Witness 219’s testimony.

I. Background and submissions

1. Witness 219, a military expert, is scheduled to start testifying before the Chamber on 6 December 2010.¹
2. On 30 November 2011, the defence sent the Chamber an email objecting to the prosecution’s use, during Witness 219’s testimony, of 10 documents included on the prosecution’s list of documents for use with that witness (“Objection”).² Observing that “the documents were not amongst those provided to the expert witness in the preparation of his report”, the defence argues that if “the Prosecution intended to seek the expert witness’ opinion on these documents, these should have been provided to him, and an additional report detailing his opinion on these materials should have been disclosed to the Defence at least 30 days prior to his testimony”.³
3. On the same day, the prosecution replied *via* email, arguing that the “documents objected to by the Defence form or will likely form part of the record and are facts in this case” and that “[i]f facts, such as the facts contained in these documents, are withheld from the military expert he

¹ Decision on the prosecution’s and defence’s requests regarding Witness 219’s testimony, 1 December 2011, ICC-01/05-01/08-1974, paragraph 24(a).

² Email from defence Legal Assistant to Chamber’s Legal Officer, 30 November 2011 at 14:28 (objecting to the use of documents 6, 7, 8, 9, 10, 11, 12, 13, 21 and 22 on the prosecution’s list of documents for Witness 219), Annex A.

³ Email from defence Legal Assistant to Chamber’s Legal Officer, 30 November 2011 at 14:28, Annex A.

will effectively be prevented from offering his expert opinion on crucial evidence in the case”.⁴

4. The defence provided additional observations on the use of the 10 disputed documents on 1 December 2011, in which it argued, *inter alia*, that:

Opposing parties are entitled to have full disclosure at least 30 days in advance of testimony not just of the gist of an expert witness’ opinion, but of its detail and its sources. To permit General Opande to give evidence by reference to a list of documents, (the sections of which will be relied upon remain unspecified), is to ambush the Defence in its preparation for this witness. [...] By providing him with these additional source materials, but failing to seek and disclose a supplemental expert report in a timely manner, the Prosecution is bypassing the rules of disclosure which govern expert evidence in this trial, to the prejudice of Defence preparations.⁵

5. On 1 December 2010, the Chamber issued the “Decision on the prosecution’s and defence’s requests regarding Witness 219’s testimony” (“Decision of 1 December 2011”).⁶
6. On 2 December 2011, the defence sent the Chamber its updated list of documents to be used during Witness 219’s testimony. That list contains, *inter alia*, the same 10 disputed documents.⁷
7. In accordance with Article 21(1) of the Rome Statute (“Statute”), the Trial Chamber has considered Articles 64(2), 67(1)(b) of the Rome Statute

⁴ Email from prosecution Trial Lawyer to Chamber’s Legal Officer, 30 November 2011, at 15:48, Annex A.

⁵ Email from defence Legal Assistant to Chamber’s Legal Officer, 1 December 2011, at 10:39, Annex A.

⁶ ICC-01/05-01/08-1974.

⁷ Email from defence Case Manager to Chamber’s Legal Officer, 2 December 2011, at 15:18.

("Statute"), Rule 140(2)(d) of the Rules of Procedure of Evidence and Regulations 23, 43 and 54(d) of the Regulations of the Court.

II. Analysis

8. At the outset, the Chamber notes that the defence's Objection was made *via* email, and was not placed on the record *via* a formal filing or an oral submission. While the Chamber's "Order on the procedure relating to the submission of evidence" ("Order")⁸ establishes a mechanism under which the parties provide notice of their objections to the *admission* of documents into evidence *via* email, this Order was not intended – and does not – create a mechanism for *all procedural disputes* to be resolved *via* email. Procedural issues like the present one are to be raised on the record, by written or oral motion, with factual and legal substantiation as required under Regulation 23 of the Regulations of the Court. However, due to the need to resolve the present dispute expeditiously, the Chamber has decided to rule upon the defence's Objection, notwithstanding the manner in which it was raised.

9. Turning to the substance of the defence's Objection, the Chamber notes that the 10 disputed documents are not mentioned in either of Witness 219's expert reports. The prosecution now wishes to use them during its questioning of Witness 219, so that he may "offer his expert opinion" on them.⁹ The defence argues that using these documents would in effect permit the witness to add new opinions to those expressed in his expert report, without the defence having been provided with sufficient notice of these opinions. In essence, the witness would be able to provide an opinion on the 10 documents for the first time in court, without the

⁸ Order on the procedure relating to the submission of evidence, 31 May 2011, ICC-01/05-01/08-1470, paragraph 7.

⁹ Email from prosecution Trial Lawyer to Chamber's Legal Officer, 30 November 2011, at 15:48, Annex A.

defence having sufficient time to prepare. This, according to the defence, undercuts the specific rules of disclosure applicable to expert testimony.

10. In the Chamber's view, the issue is not strictly a problem of late *disclosure* because all 10 disputed documents are part of the case record and have already been used by the prosecution during the questioning of other witnesses. For example, some of the documents were used during the testimonies of Witnesses 65 and 213.¹⁰
11. Rather, the issue is whether the prosecution has provided adequate *advanced notice* that it intends Witness 219 to opine on documents that were not relied upon or mentioned in his expert report,¹¹ and if so, whether the late notice is prejudicial to the defence.
12. The Chamber considers that the prosecution has not provided the defence with timely notice that it intended to ask Witness 219 to provide opinions on the 10 disputed documents during his in-court testimony and will analyse below the potential prejudice to the defence.
13. The Chamber first notes that the prosecution has repeatedly submitted that it does not intend to rely on Witness 219's supplementary expert report,¹² which was disclosed under Rule 77 of the Rules on Monday 28 November 2011, one week before the Witness 219's testimony was originally scheduled to begin.¹³ The Chamber has ruled that although the

¹⁰ For Witness 65, See for example ICC-01/05-01/08-T-168-CONF-ENG ET 03-10-2011, page 19 lines 19-25, page 50 lines 19 to page 51 line 9 and page 61 lines 20 to page 62 line 1; for Witness 213, See for example, ICC-01/05-01/08-T-188-CONF-ENG ET 16-11-2011, page 16 lines 21 to page 17 line 6, page 18, lines 10 and 11 and page 19 lines 6 to 25

¹¹ Military expert's report, CAR-OTP-0064-0547.

¹² See supplementary expert report at CAR-OTP-0066-0002 and 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-PPP-0219, 30 November 2011, ICC-01/05-01/08-1968, paragraphs 4 and 8.

¹³ Prosecution's Communication of Pre - Inspection Report for Material Provided to the Defence under Rule 77 on 28 November 2011, 28 November 2011, ICC-01/05-01/08-1946 and Annex A.

supplementary report is not materially different from the first one, it nevertheless contains some new information, which warrants an additional day of preparation time for the defence.¹⁴ By the same token, the Chamber is of the view that, if the prosecution was to rely on the 10 disputed documents, the defence would, at a minimum, need more time for its preparation.

14. Secondly, because Witness 219 chose not to rely on the 10 disputed documents in his expert reports,¹⁵ the Chamber will not allow the prosecution to seek his opinion on those documents during his testimony. To do so would, in the Chamber's view, prejudice the defence's preparation for its questioning of the witness.

15. The Chamber therefore finds that it would prejudice the defence if Witness 219 were permitted to provide new opinions, disclosed for the first time in court, based on documents that do not form the basis of either of his reports. Indeed, the defence would not have been provided with advance notice of the opinions themselves, or the basis for them.

16. However, the Chamber specifies that if the defence chooses to question the witness on any of the 10 disputed documents, the prosecution will be permitted to re-direct the witness on any documents that the defence opts to use. The defence will be given the floor last, in accordance with Rule 140(2)(d) of the Rules.

17. Furthermore, this ruling does not preclude the Chamber from questioning Witness 219 regarding his opinion on military matters that

¹⁴ ICC-01/05-01/08-1974, paragraph 19.

¹⁵ See Military Expert's Report, CAR-OTP-0064-0547, paragraphs 16 and 17.

have been discussed in court to date. In this respect, the Chamber recalls its Decision at paragraph 22, in which it stated:

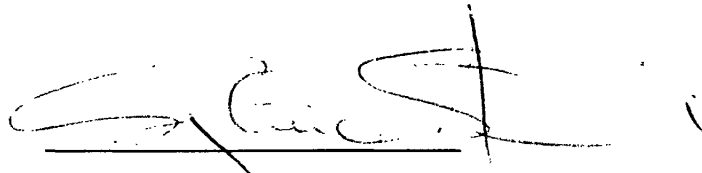
22. The Chamber notes that previous insider witnesses, such as Witnesses 65 and 213, have already testified on military matters, which are related to Witness 219's military expertise and is of the view that Witness 219 may be in a position, due to his background and experience, to give evidence on specific technical issues raised during previous testimonies and thus assist the Chamber in its duty to find the truth. Therefore, the Chamber finds the prosecution Request for Additional Time well-founded.

18. In this respect, the Chamber's questioning of the witness, if any, will not necessarily be limited to the documents on the parties' lists of documents. To the extent that the Chamber questions the witness on documents *not* on the parties' lists, the parties will be given an opportunity to redirect the witness on those documents.

19. Finally, with regard to the scheduling of Witness 219's testimony, the above findings require the Chamber to clarify its ruling in paragraph 24(d) of its Decision of 1 December 2011. The questioning of Witness 219, including by the prosecution (8 hours), the legal representatives, the Chamber and any redirect by the parties, is to be concluded by 11:00 on 15 December 2011. The Chamber will monitor the parties' questioning closely to ensure that the defence has ample time to conduct its questioning of the witness.

20. For the reasons above, the Chamber GRANTS the defence's Objection.

Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 2 December 2011

At The Hague, The Netherlands