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

Date: **27/01/2012**

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 Redacted Version

**Defence response to the Prosecution request for additional sitting hours to hear
the testimony of witness CAR-OTP-PPPP-0045**

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 Victims

**Unrepresented Applicants
(Participation/Reparation)**

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**Victims Participation and Reparations Other
Section**

1. The defence firstly notes that, not for the first time, an application is brought at the very last possible moment (the likely arrival time of witness 45 and its ancillary impact having been presumably known for some days prior to its filing) with the inevitable consequence that the defence time for response is reduced from 21 days to a matter of a few hours.
2. The defence further notes with deep concern the considerable amount of information which is currently being provided to the Chamber on an *ex parte* confidential basis under the pretext that it concerns the personal circumstances and/or travel arrangements of witnesses, the justification for which is the *ex post facto* application of protected status by the chamber.
3. The Chamber last sat in the case of *The Prosecutor –v- Jean-Pierre Bemba* on 9th December 2011. Even given the fact that there has been a judicial recess in the intervening period, the public is rightly mystified to know why the only current trial before the ICC has not proceeded for 50 consecutive days. Since late September 2011, the single and simple cause of all the scheduling difficulties faced by Trial Chamber III has been the behaviour and wishes of witnesses 15, 44 and 45. In the available time, the defence has not been able with complete accuracy to calculate the court time lost, but believes in approximate terms the chamber has not sat for 27 days (or 121.5 hours) owing to the collective failure of these men to return telephone calls, and their insistence upon giving evidence at a time of their choosing.
4. For the prosecution thus to talk of measures being required to cause “minimal or no” interruption to the proposed schedule is thus not just ironic, it is absurd.

5. The defence further notes that the cancellation of hearings, especially this year, have been notified on a late and “drip-fed” basis¹, with the effect that it has been virtually impossible for the defence to make sensible professional or personal arrangements.
6. The defence contends that there is no justification for the proposed changes to the sitting schedule. The only justification advanced is that it will minimise the inconvenience to witness 44. However, almost every witness thus far in the case has had to wait for a few days before commencing his or her testimony. There is thus no justification to characterise the situation of witness 44 as “exceptional”, or at least none that has been disclosed to the defence or advanced in this motion.
7. Neither can the defence understand why, given that this situation was literally bound to occur, [REDACTED] [REDACTED] [REDACTED], that no consideration has been given to postponing the evidence of witness 44. This is plainly the obvious solution, and doubtless one which is still open.
8. The defence does not accept that the present situation has occurred by reason of events “beyond the prosecution’s control”. It is the responsibility of the prosecution to marshal its witnesses and to fill the court’s schedule. The defence notes that witnesses 44 and 45, with their considerable secretarial resources are eminently contactable, and yet, the prosecution allowed them to go “off the radar” in September last year, and again in December and January (indeed, the defence have been provided with no information to show that they were not out of contact throughout that whole period). The prosecution moreover, has at its disposal considerable resources, as well as statutory powers of compulsion in relation to the attendance of witnesses.

¹ For example the cancellation of the hearing for the 27th January 2012 was notified by email of 16.45 on 26th

9. [REDACTED].

10. However, even if one absolves the prosecution of responsibility for that debacle, immediate consideration should have been given to altering the arrangements for the ensuing witness(es). It still could.

11. Instead, what is proposed is that wholly unprecedented conditions for the receipt of evidence be put in place solely in order to accommodate witness 44's personal schedule, and this a man who has exhibited an express contempt for these proceedings by his actions in August and September 2011.

12. There are very good reasons why the Chambers of the ICC do not sit on a Sunday. Leave aside the fact that for many it is a holy day of obligation, and a day of rest, people make plans to be with their families or travel away at weekends, which by Friday afternoon are impossible to alter. There are reduced staffing levels at the UNDU, and there is no public transport to the Court. The Trial Chamber will be obliquely aware that the defence are currently extremely stretched for unhappy and unforeseen reasons. There is insufficient time available to develop these matters more fully (and they inevitably would be matters for confidential *ex parte* filings), but the defence asserts simply that it will be unable effectively to represent the accused in a hearing on Sunday 28th January should it be so scheduled.

13. There are also good reasons why court hearings are limited to 4 or 4 and a half hours per day. The principal one is the quality of evidence. The chamber has routinely observed how difficult witnesses find a 4 hour day. Elongating the day by 50% will impose unfair and inhuman conditions on everybody, not least the witness himself.

14. The witness is not moreover, the only consideration. Advocates tire as well, and dare one say it, so do Judges! This is important evidence, and it is vital that everybody is "on their game". At the risk of being trite, we have waited a long time for witness 45 to grace us with his presence: it would be wrong to rush his evidence now he is here.
15. The defence knows that the Chamber will also be mindful of the welfare of the various other parties who are essential to the proper running of the court: the interpreters and court reporters amongst others. The accused also has a right to a fair hearing in which he can follow the proceedings and give sensible instructions to his lawyers. Although robust of health generally, the chamber will be aware that Mr Bemba has had certain issues, not least with his back. A 6-hour court day would mean his being seated for about 8 hours in total with no access to fresh air or exercise. It is difficult moreover to see how such a schedule could include sufficient time for a meaningful meal break.
16. Neither can the defence accept that it is bound to finish its cross-examination of this witness by 1st February, and the defence is confident that the Chamber would not seek to impose any such constraint upon it.
17. In all the circumstances, and in the interests of justice and a fair trial, the defence submits that the court schedule should resume and continue as advertised in the website of the ICC, namely at 9.30 on Monday morning 29th January 2012, when it will sit from 9.30 to 16.00 each day.

Status of the Filings and Decision

18. Matters of Court Scheduling are undeniably public. To illustrate that point one need only posit the situation wherein the Chamber ordered a public hearing to take place on Sunday sometime, say, this afternoon in a decision to which the public had no access, for reasons which it could never learn. The public would thereby be excluded from attendance or even knowing about the hearing.

19. The references to witness 45's travel arrangements can be redacted. The filings and decision, however should all be classified as public

Relief Sought

1. Deny the Prosecution Motion in its entirety
2. Order that the hearing of the case of the Prosecutor –v- Jean Pierre Bemba Gombo recommence at 9.30 on Monday 29th January 2012 and proceed as advertised;
3. Order the reclassification of all filings as public.



Aimé Kilolo Musamba

Associate Counsel

Done on the 27th of January 2012

At The Hague, The Netherlands