

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 7 June 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
With *ex parte* Annex-A Defence and VWU only
Decision on the “Submissions on Defence Evidence”

Decision 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 Aimé Kilolo Musamba

Mr Peter Haynes

Legal Representatives of the Victims

Ms Marie Edith Douzima-Lawson

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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

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber III (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”) in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (“Bemba case”) issues the following Decision on the “Submissions on Defence Evidence” (“Decision”).

I. Background and submissions

1. At an *ex parte* status conference, held on 10 May 2012 at the request of the defence,¹ the Chamber was informed of a series of issues faced by the defence in its preparation for the presentation of evidence. Consequently, the Chamber requested the defence to provide detailed information on the witnesses it intends to call to testify at trial.²
2. On 11 May 2012 the defence filed its confidential *ex parte* “Defence submissions to the Chamber concerning its witnesses” (“First Defence Submission”),³ together with a table of witnesses contained in Annex A to that filing.
3. On 24 May 2012 the Chamber issued its “Decision on the starting date of the defence presentation of evidence and related issues” (“24 May 2012 Decision”),⁴ wherein, *inter alia*, it instructed the defence to provide further information regarding each of the anticipated defence witnesses.⁵
4. On 28 May 2012, in compliance with the 24 May 2012 Decision, the defence filed its *Confidential Ex parte, defence and VWU only* “Submissions on

¹ Decision on the “Defence request for an *ex parte* status conference”, 8 May 2012, ICC-01/05-01/08-2213.

² Transcript of the hearing on 10 May 2012, ICC-01/05-01/08-T-226-CONF-EXP-ENG ET, page 18 line 25 to page 19 line 16. Complemented by email sent from the Chamber’s Assistant Legal Officer to the defence’s Legal Assistant on 11 May 2012 at 10h45.

³ Defence submissions to the Chamber concerning its witnesses, 11 May 2012, ICC-01/05-01/08-2214-Conf-Exp and Confidential *ex parte* Annex ICC-01/05-01/08-2214-Conf-Exp-AnxA.

⁴ Decision on the starting date of the defence presentation of evidence and related issues, 24 May 2012, ICC-01/05-01/08-2221.

⁵ ICC-01/05-01/08-2221, paragraph 16.

Defence Evidence" ("Second Defence Submission"),⁶ together with detailed information on its proposed witnesses contained in Annex A to that filing.

II. Relevant provisions

5. In accordance with Article 21(1) of the Rome Statute ("Statute"), the Chamber, in making its determination, has considered Articles 64(2), (6)(f), (7), (8)(b) and (9)(a), 67(1)(b), (c), (e), and (i), 68 and 69 of the Statute, Rules 16 to 18, 20, 63, 68, 86, 134(3) and 140 of the Rules of Procedure and Evidence ("Rules"), Regulations 20(1), 23 *bis* (1) and (3), 43, 44(5) and 54 of the Regulations of the Court ("Regulations").

III. Analysis

6. The Chamber notes its prior ruling of 11 November 2011, wherein it stressed that:

24. As a general principle, the Chamber is of the view that it is for the parties to determine the manner in which they will present their cases. This discretion is not, however, unlimited. It is subject to judicial oversight from the Chamber, which has a statutory duty to "ensure that [the] trial is fair and expeditious and is conducted with full respect for the rights of the accused". The Chamber is also required to ensure that the accused's right to be tried "without undue delay" is not violated by the manner in which the parties choose to present their cases. In line with these statutory principles, Regulation 43 of the Regulations requires the Presiding Judge, in consultation with the other members of the Chamber, to ensure that the "mode and order of questioning of witnesses and presenting of evidence" is fair and is conducted in such a way to "avoid delays and ensure the effective use of time".

25. The Chamber will not interfere with a party's decisions regarding its selection and presentation of evidence unless there is a compelling reason to do so. This measure of deference permits the parties to shape their presentation of evidence in a manner that best fits their overall theory of the case. While the Chamber may intervene to ensure

⁶ Submissions on Defence Evidence, 28 May 2012, ICC-01/05-01/08-2222-Conf-Exp, with Annex A ICC-01/05-01/08-2222-Conf-Exp-AnxA.

that the abovementioned principles are respected, it will do so sparingly and only after considering the potential prejudice that may be caused.⁷

7. In keeping with the above approach to the Chamber's role and that of the parties in relation to the presentation of evidence, the Chamber is of the view that, for the reasons detailed in the 24 May 2012 Decision, some directions for the presentation of evidence by the defence are warranted at this stage. Accordingly, the defence is instructed to adhere to the guidelines set out below.

Length of the presentation of evidence by the defence

8. The Chamber notes that in the First Defence Submission, the defence requests permission to call 59 witnesses and submits that it will require approximately 230 hours to question its proposed witnesses, which, the defence stresses, is "almost the same than the 228 hours taken by the Prosecution."⁸
9. The Chamber notes that the total time used by the prosecution to question its 40 witnesses amounts to 228 hours and 37 minutes.⁹ The Chamber further notes that the first witness called by the prosecution commenced providing testimony on 23 November 2010¹⁰ and the last prosecution witness concluded its testimony on 20 March 2012,¹¹ which amounts to a total of approximately 16 months, including the judicial recesses and gaps due to *inter alia* difficulties in the scheduling of the witnesses.

⁷ Decision regarding the prosecution's witness schedule, 11 November 2011, ICC-01/05-01/08-1904-Conf, paragraphs 24-25.

⁸ ICC-01/05-01/08-2214-Conf-Exp, paragraph 9.

⁹ Email sent from the Court Officer to the Legal Adviser of the Trial Division on 3 May 2012, at 14h13.

¹⁰ Transcript of hearing on 23 November 2010, ICC-01/05-01/08-T-33-ENG.

¹¹ Transcript of hearing on 20 March 2012, ICC-01/05-01/08-T-218-ENG.

10. The Chamber underlines that the defence does not bear the burden of proof and that it is for the prosecution to prove its case beyond reasonable doubt.¹² However, given that the defence is the best placed to know how to best shape its case and that the estimated time of its questioning does not exceed the time used by the prosecution, the Chamber considers that the time requested by the defence for the questioning of its witnesses is appropriate and reasonable. The Chamber therefore grants the defence the requested total of 230 hours for the questioning of its witnesses.
11. Generally, the defence shall take all reasonable measures to minimise breaks in the trial proceedings. The Chamber is mindful that difficulties may arise in the scheduling of witnesses. That having been said, the Chamber notes that, taking into consideration the time expected to be used for questioning by the other party, the participants and the Chamber, it may be reasonable to expect the presentation of defence evidence to be completed within approximately 20 weeks or 5 months. However, given the potential practical difficulties involved and considering the need to ensure the fair and expeditious conduct of the proceedings and the right of the accused to be tried without undue delay, the Chamber finds that a reasonable estimate for the completion of the presentation of the defence evidence at this stage is eight months.

Number of witnesses to be called by the defence

12. After reviewing the Second Defence Submission in detail, the Chamber decides – at this stage – not to itself reduce the proposed number of witnesses to be called by the defence. Notwithstanding the above, the Chamber observes that on the basis of the information provided several

¹² See Order determining the mode and order of examination for the witnesses called by the Defence teams (regulation 43 and 54 of the Regulations of the Court), 15 March 2011, ICC-01/04-01/07-2775-tENG, paragraph 16.

witnesses on the defence list appear to give testimony on the same facts.¹³ The Chamber therefore instructs the defence to review its list in order to determine whether there is any room for reducing the number of witnesses and avoiding the presentation of overly repetitive evidence.

13. Further, the Chamber instructs the defence to focus its presentation of evidence on truly contentious issues, falling strictly within the confirmed charges against the accused,¹⁴ in order to avoid the presentation of evidence that may be irrelevant to the Chamber's final determination of the case.¹⁵

Order of witnesses to be called by the defence

14. The Chamber underscores that pursuant to Court's legal framework, the Chamber has the power to alter the order of appearance of witnesses proposed by the defence in order to ensure an efficient presentation of evidence and the fairness and expeditiousness of proceedings.
15. In line with the approach adopted during the prosecution's presentation of evidence, the Chamber will pay close attention to the availability of witnesses to be presented by the defence and may intervene to request the defence to alter its schedule of witnesses if considered necessary.

¹³ See for example the possible repetition in relation to parts of their proposed testimony between, *inter alia*: CAR-D04-PPPP-0010, CAR-D04-PPPP-0022, CAR-D04-PPPP-0023, CAR-D04-PPPP-0026, CAR-D04-PPPP-0028, CAR-D04-PPPP-0036 and CAR-D04-PPPP-0056; CAR-D04-PPPP-0029 and CAR-D04-PPPP-0030; CAR-D04-PPPP-0006 and CAR-D04-PPPP-0008; CAR-D04-PPPP-0037 and CAR-D04-PPPP-0038; CAR-D04-PPPP-0034 and CAR-D04-PPPP-0036; and CAR-D04-PPPP-0050, CAR-D04-PPPP-0051 and CAR-D04-PPPP-0057

¹⁴ As confirmed by Pre-Trial Chamber II in its Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424; see also Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges, 20 July 2010, ICC-01/05-01/08-836.

¹⁵ The parties should be guided in their submission of evidence by the three part test of relevance, probative value and prejudice to a fair trial, as set up by the Chamber in its First decision on the prosecution and defence requests for the admission of evidence, 15 December 2011, ICC-01/05-01/08-2012-Red, paragraphs 13-16.

16. At this stage, the Chamber decides that the proposed order of appearance of defence witnesses shall be adjusted to commence with the testimony of the expert witnesses proposed by the defence. Following the expert witnesses, the Chamber decides to hear the evidence of all those witnesses that are in possession of, or do not face obstacles in obtaining, travel documents.
17. As indicated during the presentation of evidence by the prosecution, "it is on the basis of the evidence that it is presented, rather than the order of its presentation, that the case will be decided. The Chamber is well-equipped to synthesise the oral evidence irrespective of the sequence in which it is presented."¹⁶

Cooperation with the Registry and the Victims and Witnesses Unit ("VWU")

18. The Chamber acknowledges that the defence has been working closely with the VWU in the organisation of its presentation of evidence since February 2011.¹⁷ The Chamber instructs the defence and VWU to continue this close coordination to ensure that logistical and practical arrangements are undertaken to ensure the smooth and continuous presentation of evidence by the defence.
19. The Chamber further orders the defence and the Registry to inform the Chamber, as early as possible, of any problems that may be encountered in ensuring the appearance of defence witnesses, including within the time-limit of eight months set by the Chamber above. In such cases, concrete proposals and alternatives should be submitted for the Chamber's consideration.

¹⁶ ICC-01/05-01/08-1904-Conf, paragraph 34.

¹⁷ ICC-01/05-01/08-2214-Conf-Exp, paragraph 1.

Level of confidentiality of the defence's submission on evidence

20. The defence has requested confidentiality and *ex parte* treatment of its Second Defence Submission and Annex A thereto, because they “contain details of Defence witnesses which the Defence is not required to disclose to the Prosecution or Legal Representatives at this stage”.¹⁸ The Chamber notes the principle of publicity of proceedings established by the Statute and the Rules. Taking into account the legitimate public interest in the scheduling and progress of the case, the Chamber orders the defence to file public redacted versions of its First and Second Submission (ICC-01/05-01/08-2214-Conf-Exp and ICC-01/05-01/08-2222-Conf-Exp).

21. However, given the detailed information on its prospective witnesses provided by the defence in Annexes A to both, the First and Second Submissions, the Chamber is of the view that both annexes should remain confidential and *ex parte* until such time as *inter partes* disclosure takes place.

22. In line with the above position, specific issues related to the appearance of defence witnesses are, at this stage, dealt with in *ex parte* Annex A to the present Decision.

IV. Conclusion

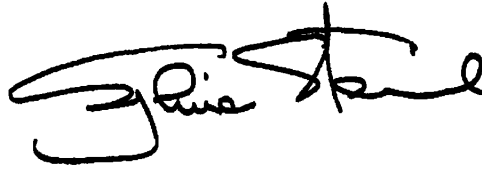
23. In view of the foregoing, and subject to any further decision on the matter, the Chamber hereby:

- a. grants the defence the requested total of 230 hours for the questioning of its witnesses;

¹⁸ ICC-01/05-01/08-2222-Conf-Exp, paragraph 6.

- b. orders that the defence use the allocated number of hours in the most efficient manner possible and, in any case, that the defence presentation of evidence not exceed eight months;
- c. instructs the defence to review its list in order to determine whether there is a possibility of reducing the number of witnesses and avoiding the presentation of overly repetitive evidence and to focus on truly contentious issues falling strictly within the confirmed charges against the accused. The defence should report back to the Chamber as to the possibility of reducing the number of witnesses by 29 June 2012;
- d. orders the defence to adjust the order of appearance of its witnesses in order to start with the testimony of the proposed expert witnesses, followed by those witnesses that are in possession of, or do not face obstacles in obtaining, travel documents;
- e. instructs the defence and the Registry to inform the Chamber, as early as possible, of any problems that may be encountered in ensuring the appearance of defence witnesses, and to submit concrete proposals and alternatives for the Chamber's consideration;
- f. orders the defence to file public redacted versions of the First Defence Submission and the Second Defence Submission no later than 16:00 on 11 June 2012;
- g. orders the defence, the VWU and the Registry to comply with the orders detailed in Annex A to the present Decision

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 7 June 2012

At The Hague, the Netherlands