

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 29 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 Redacted Version

with Annexes A and B, Confidential and Ex Parte, Defence and VWU only

Third Defence Submissions on the Presentation of its Evidence

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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Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented

Applicants

(Participation/Reparation)

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Victims**

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Defence**

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Detention Section

**Victims Participation and Reparations
Section**

Other

A. BACKGROUND

1. The Defence first presented its list of witnesses and relevant identifying information to VWU on **27 April 2012**, namely over eight weeks ago, and approximately four months prior to the anticipated start of the Defence case. This list of witnesses was provided within the timeframes as advised by VWU, and approximately 16 months after the Defence and VWU first made contact with a view to organising the presentation of the Defence case, in **February 2011**.

2. During an *ex parte* status conference on 10 May 2012, held at the request of the Defence, the Presiding Judge of Trial Chamber III ("the Chamber") stated as follows:¹

[REDACTED]

[REDCATED]

[REDACTED]

[REDACTED]

3. The present filing is the third by the Defence on its proposed presentation of evidence.² In the second filing, the Defence provided not only a list of its witness, their identifying particulars, details of any obstacles in their travel to The Hague, but also detailed information concerning the content of their proposed testimony. The Defence was ordered to compile this detailed information in a **four-day period**, a deadline with which it complied, filing the information with the Chamber on **28 May 2012**.

¹ ICC-01/05-01/08-T-226-CONF-EXP-ENG ET 10-05-2012 17/21

² See ICC-01/05-01/08-2214-Conf-Exp and ICC-01/05-01/08-2214-Conf-Exp-AnxA ("First Defence Submission") and ICC-01/05-01/08-2222-Conf-Exp and ICC-01/05-01/08-2222-Conf-Exp-AnxA ("Second Defence Submission")

4. On **7 June 2012**, the Chamber rendered its Decision on the “Submissions on the Defence Evidence”,³ (“Decision of 7 June”) in which it (i) decided to hear the witnesses in an order different from that proposed by the Defence; (ii) instructed 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”;⁴ and (iii) ordered the Defence (together with VWU) to assess the feasibility of alternatives to live testimony, including:⁵

- a) Testimony via video-link for witnesses located in the Republic of the Congo and the Republic of Cameroon;
- b) Introduction of the testimony of Defence witnesses in accordance with Rule 68(a) of the Rules of Procedure and Evidence; or
- c) The feasibility of holding in situ hearings (i.e, in the Republic of the Congo, the Democratic Republic of the Congo, the Republic of Cameroon, or any other relevant State).

5. The Defence files the present submissions pursuant to that decision.

B. SUBMISSIONS

(i) Ongoing Contact with VWU

6. The Defence continues to enjoy constructive exchanges with VWU regarding the presentation of the Defence witnesses, the most recent meeting between the Defence team and VWU staff having been held on **20 June 2012**.

³ ICC-01/05-01/08-2225

⁴ ICC-01/05-01/08-2225, para. 12.

⁵ ICC-01/05-01/08-2225-Conf-Exp-AnxA

(ii) **Order of Witnesses**

7. The Defence recalls the position the Chamber adopted during the Prosecution case, where it held that there would need to be “**compelling**” reasons to change the order of witnesses, and that this would only be done “**after considering the potential prejudice that may be caused.**”⁶ The Defence agrees that unless there are compelling reasons to interfere with the presentation of a party’s evidence, and subject to the need to ensure a fair and expeditious trial, the responsibility to present the evidence is with the party calling that evidence

8. The Defence respectfully submits that no **compelling reason** was enumerated in the Decision of 7 June for ordering that the Defence dramatically re-arrange the list of its witnesses into an order that does not allow the Defence to shape the presentation of its evidence in a manner that “best fits the overall theory of the case”.⁷ The Decision of 7 June contains no reasoned opinion justifying an interference with the Defence’s responsibility in that regard. Nor did the decision contain any reasoned opinion regarding the potential prejudice which may be caused to the Defence by the re-ordering of its witnesses, nor was the Defence given the opportunity to make submissions thereon.

9. In the decision, the Chamber merely stated as follows: ⁸

At this stage, the Chamber decides that the proposed order of appearance of defence witnesses shall be adjusted to commence with the testimony of 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**.

⁶ ICC-01/04-01/08-1904-Conf, paras. 24-25.

⁷ ICC-01/05-01/08-1904-Conf, para. 24.

⁸ ICC-01/05-01/08-2225, para. 16.

10. The Defence respectfully wishes to raise with the Chamber two issues which arise out of the Chamber's proposed order of witnesses. Firstly, the Defence had intended to call its expert witnesses **after** presenting its factual witnesses.⁹ The basis for calling these expert witnesses is for them to opine upon the actual evidence of the Defence witnesses about, *inter alia*, the command structures in the MLC and the Central African Republic, and the languages being spoken by the different groups involved in the conflict and in the region generally. Being ordered to call these expert witnesses **before** presenting the factual basis for their opinion evidence could greatly undermine their impact and utility, causing material prejudice to the Defence.

11. Regardless, General Jacques Seara (Military Expert) and Professor Octave Dioba (Geopolitical Expert) are making extraordinary efforts in order to complete their reports within the timeframe set by the Chamber in its decision of 24 May 2012,¹⁰ and to be available for presentation of their evidence from mid-August. However, the Defence regrets to inform the Chamber that Professor Georges Bokamba (Linguistic Expert) will not be available to either complete his report or appear before the Chamber in August due to a teaching schedule and academic obligations which cannot be changed on short notice. The Defence undertakes to update the Chamber on his availability to testify.

12. [REDACTED]

⁹ ICC-01/05-01/08-2214-Conf-Exp-AnxA and ICC-01/05-01/08-2222-Conf-Exp-AnxA

¹⁰ ICC-01/05-01/08-2221, para. 13.

13. As such, the Defence is concerned that the Chamber's re-ordering of its witnesses may not in fact be more efficient. This is particularly so given that the latest information received by the Defence from VWU was that it did not necessarily anticipate obstacles with calling the witnesses in the order in which they appeared in the Defence list.¹¹ Given these considerations, the Defence respectfully submits that there is no compelling reason for the re-ordering of its witnesses.

14. As such, the Defence respectfully reiterates its request to call its witnesses in the order set out in Confidential and Ex Parte Annex A to the present submissions. However, in order to comply with the Chamber's order,¹² the Defence also submits Confidential and Ex Parte Annex B, listing the Defence expert witnesses, and all those "who are in possession of, or do not face obstacles in obtaining, travel documents"¹³ as the first witnesses to be presented.

(iii) Number of Witnesses

15. As previously stated by the Defence, its list of witnesses represents not just the culmination of a lengthy and exhaustive investigation by the Defence, but also an exercise in providing the trier of fact with the minimal quantity of direct oral evidence to rebut the various assertions made obliquely throughout the Prosecution case. As such it represents a carefully reasoned selection of witnesses.

16. The Defence respectfully submits that it should not be prevented from presenting corroborative testimony of the issues which go to the heart of the accusations against Mr. Bemba, particularly considering the repetitive nature of the testimony of a significant number of Prosecution witnesses. Furthermore, repetition or overlap in evidence does not constitute a sufficient basis for excluding

¹¹ ICC-01/05-01/08-2222-Conf-Exp-AnxA.

¹² ICC-01/05-01/08-2225, para. 16.

¹³ Ibid.

a witness if his evidence is corroborative of another witnesses so as to render both testimonies more compelling.

17. In any event, each of the proposed Defence witness has been included on its list on the basis that he or she is able to testify as to particular factual assertions which are unique to his or her knowledge and experience. Witnesses who were able to give only purely repetitive testimony regarding the contested issues have already been excluded. As such, despite genuine efforts in reviewing its list, the Defence does not see any room to reduce the number of witnesses.

18. Since the Second Defence Submission, the Defence has been able to locate four additional witnesses who are able to provide the Chamber with evidence of clear relevance to the Prosecution allegations against the accused. The Defence wishes to add these witnesses to its list, for the reasons set out below:

(a) [REDACTED] (Proposed Code: CAR-D04-PPPP-0067)

19. In the *Revised Second Amended Document Containing the Charges*, the Prosecution alleges that “Bemba received regular reports of MLC activities in the CAR”.¹⁴ The Prosecution brought Witness 178 who claimed that [REDACTED] was one of Mr. Bemba’s [REDACTED] or “[REDACTED] to Bemba whose mission was to [REDACTED] to him.”¹⁵ Witness 169 alleged that [REDACTED] went to the Central African Republic [REDACTED] on Mr. [REDACTED].¹⁶

20. [REDACTED]

¹⁴ ICC-01/05-01/08-856-Conf-AnxA, p.27

¹⁵ ICC-01/05-01/08-T-151-CONF-ENG CT 01-09-2011 64/78

¹⁶ ICC-01/05-01/08-T-138-CONF-ENG ET 05-07-2011 13/58 et seq.

21. The Defence therefore respectfully wishes to add him to the list of potential Defence witnesses. He is currently living [REDACTED] , but the Defence does not anticipate any problems with his travel to The Hague, and estimates that his testimony will take no more than 2 hours. He can testify in French.

(b) [REDACTED] (Proposed Code: CAR-D04-PPPP-0064)

22. [REDACTED]

23. [REDACTED]

24. The Defence submits that the testimony of [REDACTED] is therefore directly relevant to critical aspects of the Prosecution's superior responsibility case, and also directly relevant to the credibility of the Prosecution witnesses who have testified about this, and other alleged visits.

25. The Defence therefore respectfully wishes to add him to the list of potential Defence witnesses. He resides in [REDACTED], and in possession of a valid passport, and the Defence does not anticipate any problems with his travel to The Hague. The Defence anticipates his testimony will take no more than 2 hours. He can testify in Sango or French.

(c) Prosper Ndouba (Proposed Code: CAR-D04-PPPP-0065)

26. Mr. Ndouba was Patassé's spokesman during the relevant events. The Chamber heard evidence of his kidnapping during the Prosecution case, for example from Witness 42,¹⁷ and Witness 22.¹⁸ His unique position as having been in regular contact with the now-deceased President Patassé, and having knowledge about the motivation and position of the Central African Government at the time makes him an important factual witness, particular as concerns the Prosecution's allegations as to the motivation for the MLC's involvement.¹⁹

27. Moreover, having been kidnapped in PK12 during the conflict, he was also a witness to the timing of the movement and activities of Bozizé's rebels and as such his testimony is relevant to the Prosecution's case that it was the MLC troops who were responsible for crimes committed in Bangui during the relevant period,²⁰ and to the credibility and reliability of the significant number of Prosecution witnesses who testified that Bozizé's troops never harmed civilians or committed any crimes.

28. The Defence therefore respectfully wishes to add him to the list of potential Defence witnesses. He is currently in Europe, and in possession of a passport, and the Defence anticipates his testimony will take no more than 2 hours. He can testify in French.

(d) [REDACTED] (Proposed Code: CAR-D04-PPPP-0066)

29. [REDACTED]

¹⁷ ICC-01/05-01/08-T-64-Red-ENG WT 11-02-2011 13/6

¹⁸ ICC-01/05-01/08-T-42-Red-ENG WT 02-12-2010 30/50

¹⁹ ICC-01/05-01/08-856-Conf-AnxA, para. 14.

²⁰ See, for example, ICC-01/05-01/08-856-Conf-AnxA, para. 85.

30. The Defence intends to call [REDACTED] to testify in respect of these, and other allegations made about him by Prosecution witnesses. His testimony is directly relevant to the Prosecution's allegation concerning Mr. Bemba's knowledge, and to the credibility of the Prosecution witnesses who made allegations against him. He is currently living in [REDACTED] , but the Defence does not anticipate any problems with his travel to The Hague, and estimates that his testimony will take no more than 2 hours. He can testify in French.

(iv) Alternative Measures

31. In Confidential Annex A to the Decision of 7 June, the Chamber ordered the Defence and Registry to liaise in order to "explore possible solutions to the problems faced by many of the proposed witnesses in relation to their testifying before the Chamber at the seat of the Court. In particular, the Chamber instructs the defence and the Registry to assess the feasibility of various alternatives to live testimony in The Hague..."²¹

32. As an initial point, the Defence expresses an overriding preference for the presentation of live evidence from its witnesses in The Hague, and notes that the Prosecution was never ordered to present any of its witnesses other than through live testimony, although it was authorised to do so upon its own election. Moreover, neither VWU nor the relevant arm of the Registry has informed the Defence of an impossibility of bringing any or all of its witnesses. However, in compliance with to the Chamber's Decision of 7 June and its ongoing commitment to the expeditious presentation of its case, the Defence makes the following submissions concerning the alternatives proposed:

²¹ ICC-01/05-01/08-2225-Conf-Exp-AnxA

(a) Testimony via video-link for witnesses located in [REDACTED] and [REDACTED]

33. The Defence has concerns about the quality of the link which has so far been demonstrated in the trial.²² It views testimony via video-link as an exceptional measure, to which resort should be had in a very limited circumstances, and on the understanding that Defence counsel is authorised be present with the witness *in situ*, and that the witness' testimony will not be ascribed less weight on the basis that the Chamber did not have the opportunity to assess demeanour in person. The Defence certainly does not view video-link as a solution for facilitating the testimony whole groups of witnesses in particular regions.

(b) Introduction of the testimony of defence witnesses in accordance with Rule 68(a) of the Rules of Procedure and Evidence; or

34. The Defence does not agree to the testimony of Defence witnesses being presented in accordance with Rule 68(a), and views this as a violation of the accused's right to an equitable trial, given that this procedure not applied to the witnesses of the Prosecution.

(c) The feasibility of holding in situ hearings (i.e, in the [REDACTED], the [REDACTED], the [REDACTED], or any other relevant State)

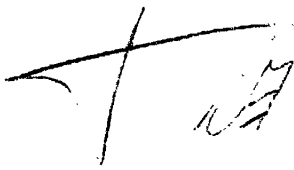
35. The Defence does not object in principle to trials being held *in situ*, on the basis that this does not interfere with Mr. Bemba's right to be tried in his presence, as guaranteed by Articles 63(1) and 67(1)(d) of the Statute.

36. On this point, the Defence notes the current state of Mr. Bemba's detention in The Hague, and his right to weekly family visits. Should it be logistically

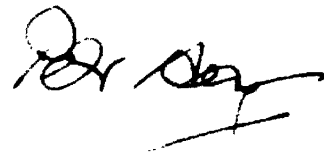
²² See, for example: ICC-01/05-01/08-T-213-CONF-ENG ET 13-03-2012, pp. 9, 13, 17, 19

impossible for him to be transferred to a secured residence and enjoy the same level of family access *in situ*, the Defence would request that for any hearings at which Mr. Bemba is not physically present, arrangements be made for privileged communication throughout the course of the hearing via both a telephone line and instant-messenger between the accused and his counsel.

The whole, respectfully submitted.



Aimé Kilolo Musamba
Lead Counsel



Peter Haynes
Co- Counsel

Done on the 29th of June 2012
At The Hague, The Netherlands