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

Date: 10/05/2013

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

Defence Submissions on the remaining Defence witnesses

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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A. BACKGROUND

1. Mr. Jean-Pierre Bemba was arrested by the International Criminal Court in May 2008, and has been in detention for 5 years.

2. On 7 June 2012, the Chamber ordered the Defence to present the evidence of its witnesses in chief within a timeframe 230 hours.¹ The Defence was ordered to present this 230 hours of evidence within 8 months.² By way of comparison, the Prosecution presented 228 hours of evidence in chief in a case which spanned 16 calendar months.³

3. As at 7 May 2013, the Defence had called 18 out of a total list of 63 Defence witnesses. The evidence in chief of these 18 witnesses has taken 72 hours and 57 minutes, leaving 157 hours within which to present the remainder of its Defence evidence.⁴

4. The Defence's preferred strategy as to the order in which it called its evidence was originally intended effectively to mirror the presentation of the Prosecution case, inasmuch as it commenced with so-called crime-base evidence, before moving onto evidence relating to the accused's superior responsibility.⁵ However, prior to the presentation of the Defence case, the Chamber imposed an order of witnesses that bore very little resemblance to that proposed by the Defence. The witnesses with whom the Defence had intended to commence its case were relegated to the end of its presentation of its evidence. The Chamber justified this revised order as follows:

¹ ICC-01/05-01/08-2225, para. 6.

² ICC-01/05-01/08-2225, para. 11.

³ The Prosecution case opened on 22 November 2010, with the last day of Prosecution evidence being heard in March 2012. In the last 8 months of the Prosecution case, the Chamber heard approximately 10 witnesses in total.

⁴ Email Court Management Services to the Bemba Defence Team, 3 May 2013.

⁵ ICC-01/05-01/08-2225, para. 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.

As such, the order of presentation of witnesses during the Defence case has remained in the hands of the Chamber, with the Defence requiring occasional leave to amend the Chamber's order where, for example, by reason of the non-availability of witnesses, the subsisting schedule was impractical.

5. On 3 May 2012, the Chamber convened a public status conference in order to discuss, *inter alia*, the "[e]stimated time required for the presentation of evidence by the Defence", and the "[p]ossible review of the list of witnesses to be called by the defence".⁶

6. It was in the context of this discussion that the Defence was able to explain to the Chamber, in public session, the ongoing obstacles to the presentation of the Defence evidence caused by the non-cooperation of 3 countries in which its witnesses were currently located. The Defence submissions on these obstacles were corroborated by the representative of the Registry, who explained to the Chamber that: "[t]here are issues, problems, in the area of co-operation and these problems are complex **and require relatively long periods of time.**"⁷

7. Despite having heard submissions on these obstacles, none of which are attributable to the Defence, the Chamber asserted that:⁸

⁶ Email Chamber to the Bemba Defence Team, 02 May 2013 17:00, entitled "RE: Witness D04-56 - Request for an Ex Parte Status Conference"

⁷ ICC-01/05-01/08-T-311-CONF-ENG ET 03-05-2013 p.28 (Open Session).

⁸ ICC-01/05-01/08-T-311-CONF-ENG ET 03-05-2013 p.30-31 (Open Session).

the Chamber notes that the Defence should be in a position to conclude the presentation of its evidence by approximately 19 July 2013, unless due to compelling reasons the Chamber decides otherwise... the Chamber takes this opportunity to alert Defence to the need for it **to carefully review its list of witnesses...**

8. Following this instruction from the Chamber, the Defence files the following submissions reducing its list of witnesses.

B. ONGOING OBSTACLES TO THE PRESENTATION OF THE DEFENCE CASE

(i) Country 1: Extensive Delay or Refusal to Provide Defence Witnesses with Authorisation to Testify

9. The majority of Defence witnesses residing in Country 1 are unable to testify before the International Criminal Court without authorization from the government authorities. While requests for authorization have been introduced in a timely manner by the relevant services of the Registry, cooperation with these requests has consistently been painfully slow or non-existent.

10. As an example, the Defence notes that one of the next witnesses scheduled to testify for the Defence is Witness D04-18. VWU introduced a request for authorization for this witness on 13 November 2012. In the intervening 6 months, no authorization has been provided by the authorities in question, despite the Registry informing the Defence of consistent follow-ups with the designated focal point.

11. These delays are not attributable to Witness D04-18 himself, the Defence, or the relevant services within the Registry of the ICC. However, the situation with Witness D04-18 is one example of the kind of delays which are slowing or

prohibiting the presentation of Defence evidence, and which remain out of the hands of the Defence.

(ii) Country 2:

12. The second group of Defence witnesses is located in Country 2, which is not a state party to the Rome Statute. The Chamber and Registry were informed in May 2012, prior to the start of the Defence case, of the difficulties which would be experienced by the witnesses in Country 2 in travelling to Europe to testify at the seat of the Court.⁹ As such, the Registry has informed the Defence of efforts made in order to arrange video-link testimony for these witnesses from their current location.

13. During the public status conference on 3 May 2013, the Registry informed the Chamber that it has still been unable to locate a “focal point” in Country 2 through which negotiations for a video-link facility could be undertaken.¹⁰ The Chamber was also informed that previous Registry missions to this country to make arrangements had been unsuccessful.¹¹ As such, the Defence notes that there is currently no concrete plan or arrangement in place to hear the testimony of these Defence witnesses, despite the efforts of the Registry. The Defence recalls the critical importance of the witnesses in Country 2 to Mr. Bemba’s defence.

(iii) Country 3:

14. The third group of Defence witnesses is located in Country 3, another non-state party. Despite the efforts of the Registry, the International Criminal Court has been unable to negotiate an Agreement on Privileges and Immunities with this state. On 3 May 2013, the Registry explained to the Chamber in public session that

⁹ ICC-01/05-01/08-T-226-CONF-EXP-ENG ET 10-05-2012.

¹⁰ ICC-01/05-01/08-T-311-CONF-ENG ET 03-05-2013 p. 28 (Open Session).

¹¹ ICC-01/05-01/08-T-311-CONF-ENG ET 03-05-2013 p. 29 (Open Session).

steps had been taken, and that negotiations are ongoing to facilitate the establishment of a video-link facility in Country 3.¹²

15. Despite this progress, however, the Registry informed the Chamber that it estimates that four additional weeks are required before the anticipated video-link testimony could begin.¹³ This progress must be viewed in the context of the Chamber and Registry being informed in May 2012 of the existence and location of these witnesses, and the difficulties they would face in entering Europe in order to give evidence at the seat of the Court in The Hague.¹⁴

C. SUBMISSIONS ON THE REMAINING DEFENCE WITNESSES

16. Taking into account the inherent difficulties outlined above, arising from the level of cooperation between the International Criminal Court and the states in which the Defence witnesses are currently located, the Defence hereby complies with the Chamber's instruction to review its witness list with a view to working towards completing the presentation of its evidence within the timeframes set by the Chamber. The Defence accordingly notifies the Chamber, parties and participants of its intention not to call the following witnesses on list of witnesses,¹⁵ with a view to streamlining the evidence and allowing the Defence to conclude its presentation of evidence in the most expeditious manner possible:

- Witness D04-40
- Witness D04-63
- Witness D04-67
- Witness D04-46
- Witness D04-61
- Witness D04-12
- Witness D04-62

¹² ICC-01/05-01/08-T-311-CONF-ENG ET 03-05-2013 p.28 (Open Session)

¹³ ICC-01/05-01/08-T-311-CONF-ENG ET 03-05-2013 p.28 (Open Session).

¹⁴ ICC-01/05-01/08-T-226-CONF-EXP-ENG ET 10-05-2012

¹⁵ ICC-01/05-01/08-2242-Conf-Exp-AnxA

- Witness D04-20
- Witness D04-43
- Witness D04-42
- Witness D04-47
- Witness D04-28
- Witness D04-23

17. The Defence reserves its right to add witnesses to this list, depending on the progress made with the identified states, and to make further submissions on the impact that the cooperation of states has had on the overall fairness of the trial against Mr. Bemba, and its impact on the rights afforded to him under Article 67(1) of the Rome Statute.

The whole, respectfully submitted.



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Done on the 10th of May 2013
At The Hague, The Netherlands