Cour Pénale Internationale

International Criminal Court

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No.**: ICC-01/05-01/08**
Date:**07/10/2013**

TRIAL CHAMBER III

Before: **Judge Sylvia Steiner, Presiding Judge**
Judge Joyce Aluoch
Judge Kuniko Ozaki

SITUATION INTHE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF
THE PROSECUTOR
***v.*Jean-Pierre Bemba Gombo**

Public

Defence Motion on outstanding decisions on the admission of 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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A. BACKGROUND

1. The procedure for the admission of documents in the present proceedings is unique. It bears no resemblance to that instituted in other trial chambers before the International Criminal Court ("ICC"), nor to the procedure adopted in any trial before any of the other international criminal courts, where decisions on the admission of documentary and other material are made contemporaneously or in a timely manner following their submission through the presentation of *viva voce* witnesses. Such procedures not only provide certainty as to the composition of the case file, but critically provide notice to the accused of the case he is expected to meet.

2. Having had its initial procedure for the admission of documents struck down by the Appeals Chamber as being inconsistent with the Statute and general principles on admission of evidence,[1] Trial Chamber III ("the Chamber") then adopted a second procedure for the admission of documents in its *Order on the procedure relating to the submission of evidence* ("Order1470"). This complex procedure, which again relieves the Chamber from having to render contemporaneous decisions on the admission of evidence, is worth noting in full:[2]

> The Chamber orders that the material included in the lists of documents or other material to be used in Court starting as of the testimony of Witness 110 and for the remainder of the trial shall be subject to the following procedure:
>
> a. When submitting their respective lists of documents intended to be used during the questioning of each witness, in accordance with the time-limit set in the *Decision on Directions for the Conduct, of the Proceedings*, the parties shall identify the specific material intended to be submitted as evidence during the questioning of a witness.
>
> b. Any objections as regards the relevance or admissibility of the material that the parties identify as intended to be submitted as

[1] ICC-01/05-01/08-1386, para. 57. See also paras. 2, 52-53, and 59.
[2] ICC-01/05-01/08-1470.

> evidence shall be provided with detailed reasons for preparation purposes by way of an email sent to the opposing party and participants and copied to the Chamber as soon as practicable and before the hearing at which the document is to be submitted as evidence. The objection shall then be formally raised in court at the time the material is submitted to the Chamber. The opposing party will be given an opportunity to respond to the objection orally. The fact that notice of any objection is to be provided by email in advance of the hearing for preparation purposes will not preclude a party from raising any issue related to the relevance or admissibility of the material at the time the evidence is submitted to the Chamber, in accordance with the Rules.
>
> c. Whenever the parties do not raise an objection as regards the relevance or admissibility of an item which is submitted, it will be admitted into evidence and receive an EVD-T number, following consideration by the Trial Chamber. The Chamber will rule on any objections that are raised to the admission of items as evidence in due course.
>
> 8. The procedure as set out in paragraph 7 above does not preclude the parties from requesting the submission as evidence of any item, listed or not, either in the course of the questioning of a witness or at a later stage during the proceedings through a motion. The Chamber will decide, after giving the opposing party and participants the opportunity to raise any objections they may have.

3. While this procedure requires parties to indicate in advance via email whether they object to the admission of documents, in the overwhelming number of cases such objections are not ripe until the parties see whether the document can be, or has been, authenticated through a testifying witness.

4. The Chamber itself recognized the difficulties of both parties in complying with the procedure set out in Order 1470. On 26 March 2012, the Chamber rendered its *Order on the procedure for the submission as evidence of material used during questioning of witnesses*[3] identifying the uncertainty which still existed as to which materials used during the trial proceedings had been admitted into evidence.[4] This second order required the parties to file submissions identifying all materials used

[3]ICC-01/05-01/08-2177.
[4]ICC-01/05-01/08-2177, para. 3.

with the witnesses heard to date which they wished to submit as evidence. The Defence requested the admission of 59 documents,[5] and the Prosecution 43 documents.[6]

5. It took the Chamber 1 year, 2 months, and 3 weeks to issue a decision on the admission of these 102 documents, which was rendered on 14 June 2013.[7]

6. In the interim, the confusion continued. On 27 March 2013, the Chamber rendered its *Third Order on the submission into evidence of materials used during the examination of witnesses* ("Third Order"),[8] in which it noted that "although the parties have continued to indicate their intention to submit certain items into evidence in their respective lists of documents, since the commencement of presentation of evidence by the defence both parties have materially failed to submit certain items of evidence into court."[9] As such, the Chamber ordered the parties to file further submissions indicating the materials they wished to submit as evidence from the last tranche of witnesses heard.[10]

7. The parties complied, filing submissions on 22 April 2013.[11]

8. Both these requests for the admission of materials are currently outstanding. As such, there are currently 124 outstanding documents waiting to be admitted into evidence. Of the 29 documents tendered as evidence by the Defence, 24 were

[5]ICC-01/05-01/08-2198-Conf-AnxA.
[6] ICC-01/05-01/08-2191-Conf-AnxA-Corr.
[7]Second Decision on the admission into evidence of material used during the questioning of witnesses, ICC-01/05-01/08-2688-Conf.
[8]ICC-01/05-01/08-2565.
[9]ICC-01/05-01/08-2565, para. 5.
[10]ICC-01/05-01/08-2565, para. 6.
[11] ICC-01/05-01/08-2590-Conf and the Annex A ICC-01/05-01/08-2590-Conf-AnxA; ICC-01/05-01/08-2596-Conf and the Annex A ICC-01/05-01/08-2596-Conf-AnxA.

opposed by the Prosecution.[12] The Defence opposes 34 documents out of the 95 documents submitted as evidence by the Prosecution.[13]

9. Notably, the Defence specifically seized the Chamber with a request to decide on the outstanding requests for admission of documents as soon as possible, noting as follows:[14]

> **(ii) Timeliness of the Chamber's Decision**
>
> As to the timing of the Chamber's decision as to the admissibility of documents, the Chamber has repeatedly stressed that it "may defer its admissibility assessment until the end of the proceedings." Despite this pronouncement, the Defence hereby respectfully requests that the Chamber render a timely decision on all outstanding requests for the admission of materials in the present case, for the following reasons. Firstly, without a clear picture of the case against him (including which documentary materials ultimately form part of the evidence), the accused is put in a difficult position in terms of presenting his defence. Should the Chamber decide to admit a wealth of incriminating material on the Prosecution's request, fairness dictates that the accused be given notice of this admission in a manner which allows him to bring evidence to counter this material during the course of his defence case. If the assessment of the admissibility of this evidence is deferred until the end of the case, not only is the accused deprived of this opportunity, but he may then be required to seek to introduce additional evidence or recall particular witnesses which would increase the length of the proceedings and interfere with his right to expeditious proceedings.
>
> Secondly, the Chamber may ultimately determine that documents for which admission has been requested may not have been sufficiently identified or authenticated by the witnesses through whom admission is currently sought. In such a case, the parties may decide to seek to have the documents identified or authenticated through later witnesses. With each witness who completes his or her testimony, this opportunity is diminished. Finally, it cannot be denied that shifting process for the admission of documents in the present case has caused confusion among the parties – confusion identified by the Chamber itself. The Defence submits that a timely determination by the Chamber on which documents have been

[12] ICC-01/05-01/08-2616.
[13] ICC-01/05-01/08-2617-Conf.
[14] (Footnotes omitted).

> admitted into the evidence would go some way to alleviating this confusion.
>
> For these reasons, the Defence respectfully requests that the Chamber decides on all outstanding requests for the admission of documents as soon as possible.

10. On 16 July 2013, the Chamber by order required the Defence to close the presentation of its evidence by 25 October 2013 at the latest.[15] The Prosecution was ordered to file its Final Trial Brief "within eight weeks of the date on which the presentation of evidence is **formally** closed" (emphasis added), and the Defence "within twelve weeks of the filing of the prosecution's and legal representatives' closing briefs." The designated timeframes for the preparation of Final Trial Briefs were significantly less than those requested by the parties. The Chamber, moreover, set a tentative date for the hearing of closing oral arguments of two weeks after the completion of the written filings.[16]

11. Thereafter, on 1 October 2013, the Chamber rendered its *Order on the submission of final applications for the admission of material into evidence and seeking observations on the admission into evidence of witnesses' written statements*. ("Final Order").[17] By this Final Order, it is now clear that the parties will not file their final submissions setting out the documents which they wish to be admitted into evidence until **after** the proposed date for the conclusion of the presentation of Defence evidence on 25 October 2013.[18] More significantly, the Chamber has indicated that it, by Majority, is considering requesting the admission as evidence of 100 transcripts of interviews of a significant number of Prosecution witnesses, which it terms "witness statements".[19] The parties have been asked to file submissions on this crucial issue by 11 October 2013.

[15]ICC-01/05-01/08-2731, para. 38.
[16]ICC-01/05-01/08-2731, para. 38.
[17]ICC-01/05-01/08-2824.
[18]ICC-01/05-01/08-2824, para. 13.
[19]ICC-01/05-01/08-2824, para. 10.

12. Accordingly, the state and contents of the case file in the present proceedings is, to put it mildly, uncertain. Neither the parties nor the accused have any way of knowing – for a significant proportion of the documents and materials presented during the case – which are in evidence, and which are not. The Defence accordingly files the present motion seeking clarification of the Chamber's order requiring the close of the Defence case on 25 October 2013, and/or alternatively a stay of the said order and all subsequent deadlines until the evidentiary record is clarified.

B. APPLICABLE LAW

13. Article 67(1)(c) of the Statute of the International Criminal Court ("Statute") requires that an accused is "informed **promptly** and in detail of the nature, cause and content of the charge."

14. Article 69(4) of the Statute requires the Chamber to "[r]ule on the admissibility of evidence." In doing so, the Chamber must be guided by Article 64(2) of the Statute which requires the Chamber to ensure that the trial is fair and expeditious, and is conducted with the full respect for rights of the accused.

15. The Appeals Chamber of the ICC, in overturning the Majority's approach to the admission of evidence in this case, was clear that the Trial Chamber's discretion to defer its decision on the admission of evidence is not unlimited.[20]

> 37. The above provisions accord the Trial Chamber discretion when admitting evidence at trial. As home out by the use of the word "may" in article 69 (4), the Trial Chamber has the power to rule or not on relevance or admissibility when evidence is submitted to the Chamber. Consequently, the Trial Chamber may rule on the relevance and/or admissibility of each item of evidence when it is submitted, and then determine the weight to be attached to the evidence at the end of the trial. In that case, an item will be admitted into evidence only if the

[20] ICC-01/05-01/08-1386, para. 37.

> Chamber rules that it is relevant and/or admissible in terms of article 69 (4), taking into account "the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness". Alternatively, the Chamber may defer its consideration of these criteria until the end of the proceedings, making it part of its assessment of the evidence when it is evaluating the guilt or innocence of the accused person. **Nevertheless, under article 64 (2) of the Statute, the Chamber must always ensure that the trial "is fair and expeditious and conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses". In particular, if a party raises an issue regarding the relevance or admissibility of evidence, the Trial Chamber must balance its discretion to defer consideration of this issue with its obligations under that provision.**

16. Rule 141(1) of the RPE provides that the Presiding Judge shall declare when the submission of evidence is closed.

17. The practice of other Chambers of the International Criminal Court has been to rule on the admission of evidence on an on-going and expeditious basis, and to ensure that such critical procedural matters have been dealt with prior to the parties closing their respective cases. In *Lubanga*, while there was one outstanding issue, Presiding Judge Fulford noted as follows:

> Ordinarily, at this stage of the proceedings, it would be incumbent on the Judges, under Rule 141(1) to announce that the evidence in the case is closed. However, there is an outstanding issue in relation to Witness 5. Without giving any guarantees, the Chamber is hopeful that that issue will be resolved over the next two days, one way or the other. If there is to be further evidence, clearly Rule 141 will be dealt with at that point in time. If there is to be no further evidence there will be a written order from the Chamber indicating that the evidence in the case has closed.

18. This practice has been mirrored at the *ad hoc* Tribunals. Most recently in the *Karadžić* case, the Chamber considered that the "Prosecution case shall be considered closed on the day that the Chamber issues its decision on the last pending evidence-related motion filed by the Prosecution" after clearly stating that *"[t]he Chamber considers that the Prosecution case can only be deemed closed once the*

Chamber has ruled on all evidence-related motions filed by the Prosecution."[21] That Chamber thereafter filed an Order when that time came and all matters completed.[22] This practice is obviously reflective of the fact that it is impossible for the parties to complete their evidence or commence meaningful preparation of their final submissions without knowing whether documentary and other materials are or are not in evidence.

C. SUBMISSIONS

19. The practice and jurisprudence of the ICC are clear that a declaration pursuant Rule 141(1) can only be made when the Trial Chamber is satisfied that all outstanding matters concerning the admission of evidence have been determined.[23] That approach is consistent with practice at other international and domestic tribunals, and is, with respect, the only sensible construction of the Rule. To hold otherwise would render a declaration under Rule 141(1) a wholly arbitrary event, and lead to the procedural anomalies and unfairness highlighted below. The Defence concedes that the Trial Chamber may well have had this in mind in making the order of 16 July, and hence the subtle difference between the phrases "clos[ur]e of the presentation of [the defence] evidence" and "the date ...on which... the evidence is formally closed". However, the matter is not completely clear.

20. On one possible construction the parties might be required to begin to draft, and perhaps even to file their final briefs in ignorance of the full contents of the case file. The materials and documents for which admission has been sought by the parties in the 22 April 2013 filings ("Outstanding Materials") are, moreover, highly significant, both in number and content. The Outstanding Documents include, for example, the expert reports of all three Defence expert witnesses, D04-53, D04-60

[21] *Prosecutor v. Karadzic*, IT-95-5/18-T, Scheduling Order on Close of the Prosecution Case, Rule 98 *bis* Submissions, and Start of the Defence Case, 26 April 2012.
[22] *Prosecutor v. Karadzic*, IT-95-5/18-T, Further Order on Close of Prosecution Case, 1 June 2012.
[23] See *Lubanga*, *supra.*

and D04-59. The Defence currently has no way of knowing whether it will be able to rely on the expert reports of any or all of its expert witnesses in the case in general, or during the preparation of its Final Trial Brief in particular.

21. The Outstanding Documents also concern the so-called "CAR documents" – documents critical to the question of command responsibility of the accused. [24] The dispute over these documents is well known to the Chamber, having been litigated extensively in confidential filings and private session transcripts. Given the lack of a decision on this issue, despite it first being raised on 6 September 2012,[25] and the Defence responding on 25 September 2012, the Defence has no way of knowing *inter alia* whether it should endeavour to locate and call witnesses to provide further authentification of these documents. Of equal concern, is that meaningful preparation of Final Trial Briefs is also compromised with decisions on critical material pending.

22. The Appeals Chamber of the ICC, in overturning the Majority's approach to the admission of evidence in May 2011, was clear that although a Trial Chamber may decide to defer certain decisions on admissibility until the end of the case, it can only do so if such a decision is consistent with article 64(2) of the Statute, namely that the trial is conducted in a manner that is fair and expeditious and in full respect for the rights of the accused.[26]

23. Without a clear picture of the case against him (including which documentary materials ultimately form part of the evidence), the accused is put in an impossible position in terms of closing his defence, and preparing his Final Trial Brief submissions. It cannot be the case that the Chamber expects the accused to simply presume that his case includes all incriminating material for which

[24]CAR-D04-0003-0128; CAR-D04-0003-0130, CAR-D04-0003-0132, CAR-D04-0003-0133, CAR-D04-0003-0135, CAR-D04-0003-0136, CAR-D04-0003-0137, CAR-D04-0003-0138, CAR-D04-0003-0139 and CAR-D04-0003- 0140.
[25]ICC-01/05-01/08-2301-Conf.
[26] ICC-01/05-01/08-1386, para. 37.

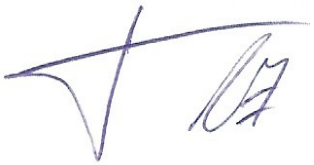
admission has been sought, and present a defence against material not formally in the record, nor defend against these incriminating materials in a Final Trial Brief for which a limited preparation timeframe (and limited page number) has been allocated. The Defence submits that this issue has significant implications for the fairness of the proceedings, and as such seeks the remedy set out below.

D. RELIEF REQUESTED

Given the above, the Defence respectfully requests that the Chamber

> **CLARIFY: (1)** whether or not the 16 July 2013 order, requiring the presentation of Defence evidence to conclude on 25 October 2013, is or was intended to amount to a declaration under Rule 141(1) that the submission of evidence shall be considered closed as of that date;
>
> **(2)** whether the timelines for the submissions of Final Trial Briefs by the parties and participants run from 25 October 2013 or from the date of the subsequent declaration under Rule 141(1); Further and/or alternatively
>
> **STAY** the order requiring that the accused close his case by 25 October 2013 and subsequent deadlines until decisions are rendered on the requests for admission of the Outstanding Materials.

The whole respectfully submitted.



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Done on the 7th of October 2013
At The Hague, The Netherlands