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

Date: **18/10/2013**

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 proposed unsworn statement of the accused

Source: Defence for Mr. Jean-Pierre Bemba Gombo

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr. Jean-Jacques Badibanga

Counsel for the Defence

Mr. Aimé Kilolo-Musamba
Mr. Peter Haynes QC

Legal Representatives of the Victims

Ms. Marie-Edith Douzima-Lawson
Mr. Zarambaud Assingambi

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms. Paolina Massidda

**The Office of Public Counsel for the
Defence**

Mr. Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel

Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

A. BACKGROUND

1. On 6 September 2013, the Defence informed Trial Chamber III (“the Chamber”) that “consideration is being given to [Mr. Bemba] giving a brief unsworn statement at the conclusion of all the other oral evidence.”¹
2. On 9 September 2013, the Prosecution seized the Chamber with a request that it be granted authorisation to question the accused in the event that he make an unsworn statement.²

B. APPLICABLE LAW

3. Article 67(1)(h) of the Rome Statute expressly grants the accused the right “to make an unsworn oral or written statement in his or her defence”. The modalities of the presentation of unsworn statements are governed by the Chamber’s general power of Article 64(8)(b).

C. SUBMISSIONS

(a) Unsworn statement by the accused, and its timing

4. The Defence hereby formally informs the Chamber that Mr. Bemba intends to make an unsworn statement in the present case.
5. As to the timing of this statement, Article 67(1)(h) of the Rome Statute does not specify a time frame or period of the proceedings within which an unsworn statement must be presented. The Chamber has previously held that upon notice of the Accused of a wish to make such an unsworn statement, the Chamber will

¹ ICC-01/05-01/08-2796, para. 5.

² ICC-01/05-01/08-2798, para. 5.

determine “the appropriate moment and modalities”.³ With this in mind, the Defence respectfully requests that Mr. Bemba be permitted to make an unsworn statement directly following the completion of the testimony of the last Defence witness.

(b) Prosecution request for authorization to question the accused during an unsworn statement

6. The proposed questioning of Mr. Bemba by the Prosecution has no basis in the either governing documents of the International Criminal Court (“ICC”), or the practice of either the ICC or the international tribunals. On the contrary, questioning by the Prosecution following the unsworn statement of an accused has been consistently prohibited. The prohibition has been explained as reflecting a desire to allow “for a more active participation by the accused in the judicial debate, and thereby lay the foundation for approximating the procedure for statements by the accused... to the approach established in most civil law systems, on the one hand, while completely preserving the accused’s right to remain silent, on the other.”⁴

7. A statement pursuant to Article 67(1)(h) is not sworn evidence. The Prosecution was not permitted to examine any of the other three ICC accused who made unsworn statements during their respective closing arguments. Mr. Lubanga⁵, Mr. Katanga⁶ and Mr. Ngudjolo⁷ all made an unsworn statement during the presentation of closing arguments and did not face questioning. In fact, the Trial Chamber in *Abu Garda* was unequivocal: “the suspect making an unsworn statement does not undergo any form of questioning by the parties, the participants

³ Decision on Directions for the Conduct of the Proceedings, 19 November 2010, ICC-01/05-01/08-1023, para. 21; See also *Katanga & Ngudjolo*, Directions for the conduct of the proceedings and testimony in accordance with rule 140, 20 November 2009; ICC-01/04-01/07-1665-Corr, para. 12;

⁴ *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on Praljak defence notice concerning opening statements under rules 84 and 84 bis statement, 27 April 2009, page 8.

⁵ *Lubanga*, 26 August 2011, T. 48-49, ICC-01/04-01/06-T-357-ENG ET WT 26-08-2011.

⁶ *Katanga & Ngudjolo*, 23 May 2012, T. 46-53, ICC-01/04-01/07-T-340-ENG CT WT 23-05-2012.

⁷ *Katanga & Ngudjolo*, 23 May 2012, T. 47, 53-61, ICC-01/04-01/07-T-340-ENG CT WT 23-05-2012.

or the judges”, albeit a statement made with reference to the pre-confirmation stage.⁸

8. The ICTY also adopted the procedure of accused presenting unsworn statements in the course of closing arguments. Trial Chambers consistently recognised that these unsworn statements did not constitute evidence, and the accused were not to be questioned on their contents. In the *Krajišnik* case, the Presiding Judge informed Mr. Krajišnik as follows:⁹

We'll give an opportunity to you, Mr Krajišnik, to make your statement after the break... It is an unsworn statement, which means that you don't take an oath for that... you'll not make any solemn declaration, and oath, of course, is not the right word in this Tribunal. **You'll not be examined about it. No one will be in position to put any questions to you about it. We'll just listen to you.**

9. In *Blagojević and Jokić*, the Trial Chamber responded to a request from Mr. Blagojević to make an unsworn statement by reminding him that he would not face questioning on the content of the statement:¹⁰

The second option to make an unsworn statement is provided in the Rules of Procedure and Evidence, especially Rule 84 *bis*. While under the exact language of the rule, an unsworn statement is generally made after the opening statement of the parties, the Trial Chamber does not find any reason to deny you the opportunity to make an unsworn statement at a later time. What is meant by making an unsworn statement is that you do not have to make the solemn declaration, although you may if you like make the solemn declaration at the start of your statement, and **you should not be examined by either parties or the Bench about the content of your statement.**”

⁸ *Abu Garda*, Decision on the confirmation of the charges, ICC-02/05-02/09-243-Red, para. 54.

⁹ *Prosecutor v. Krajišnik*, IT-00-39-T, Accused closing statement, 31 August 2006, page 27500, line 9 – page 27501, line 5.

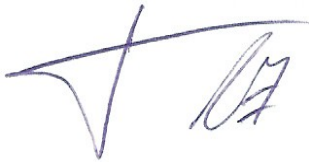
¹⁰ *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Decision on Vidoje Blagojević's oral request, 30 July 2004, page 7.

10. Again, in *Prlić*, the Trial Chamber noted:

Rule 84 *bis* of the Rules allows an accused to make an unsworn statement **that is not subject to cross-examination**. The purpose of this statement is to give an accused the opportunity to be heard by the Chamber without having to appear as a witness in his own case. This right is optional for the Accused who may decide whether or not to make use of it¹¹.”

11. The Prosecution’s request to question Mr. Bemba accordingly has no basis and would be directly contrary to the rationale of unsworn statements in international criminal trials.

The whole respectfully submitted.



Aimé Kilolo Musamba
Lead Counsel



Peter Haynes
Co- Counsel

Done on the 18th of October 2013

At The Hague, The Netherlands

¹¹ *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision regarding supplement to the Accused Prlić’s rule 84 *bis* statement, 12 February 2009, Paragraph 17.