

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 24/10/2013

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**

Confidential

**Motion for clarification and reconsideration of the timetable for the parties' final
submissions 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. On 16 July 2013, Trial Chamber III ("the Chamber") ordered that the presentation of evidence by the Defence be concluded by 25 October 2013 at the latest.¹

2. 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* ("Order 2824"). By this Order 2824, the majority of the Chamber informed the parties that it was considering requesting the submission as evidence of 100 transcripts of interviews of 30 Prosecution witnesses which "were not submitted into evidence".² These transcripts total 2919 pages in length.

3. Order 2824 also required the Prosecution and Defence to file any remaining applications for the admission of evidence by 31 October 2013.³ Such filings are apparently to be made simultaneously by the Prosecution and the Defence.

4. On 7 October 2013, the Defence filed its *Defence Motion on outstanding decisions on the admission of evidence*, pointing out the state of utter uncertainty regarding the state of the documentary evidence in this case, and noting the 124 outstanding documents on which the Chamber has not yet ruled despite requests for admission having been filed in April 2013. The Defence expressed concern that it was being required to close its case when the accused did not have a clear picture of the case against him as the Chamber had not ruled on the admission of documents at the time of their submission, as had been the practice of other chambers of the ICC, and at the *ad hoc* international tribunals.⁴

¹ ICC-01/05-01/08-2731, para. 38.

² ICC-01/05-01/08-2824, paras. 10-12.

³ ICC-01/05-01/08-2824, para.13.

⁴ ICC-01/05-01/08-2828.

5. On 18 October 2013, one week prior to the scheduled close of the Defence case, the Chamber rendered its confidential *Second Decision on Issues Related to the Closing of the Defence Case* ("Order 2837"), which contained two significant revelations. Firstly, the Chamber indicated that it was intending to call two witnesses to give *viva voce* evidence in the present proceedings, and that their testimony would be heard following the close of the Defence case.⁵

6. Secondly, the Chamber indicated - for the first time - that in addition to the 100 Prosecution witness statements, it was also considering admitting unspecified additional material as evidence in the case at some unspecified future point in time:⁶

In addition, the Chamber is considering requesting the submission of additional material, which have been discussed at trial but so far not submitted into evidence. The parties and participants will be informed in due course of the specific documents under the Chamber's consideration, and will be given an opportunity to make observations on the issue.

7. The Defence files the present motion to seek clarification and confirmation that should the Chamber decide to either hear additional *viva voce* witnesses, or admit documentary evidence following the close of its case, the Defence will be given the opportunity to present explanatory or contradictory evidence in reply, pursuant to Mr. Bemba's right to have "the final word" in the case against him.

B. CONFIDENTIALITY OF THE PRESENT FILING

8. Order 2837 was rendered confidentially, with no public redacted version being made available. Given that the entirety of the present filing discusses this confidential order, the Defence also files the present motion confidentially. In due course, however, the Defence submits that public versions of all filings and

⁵ ICC-01/05-01/08-2837-Conf, paras. 19-21.

⁶ ICC-01/05-01/08-2837-Conf, para. 22

decisions in this matter should be ordered and/or made available, given the obvious jurisprudential significance of the issue.

C. APPLICABLE LAW

9. “The Defence shall always have the opportunity to speak last”. The drafters of the ICC Rules of Procedure and Evidence thought this an important enough concept to be codified unambiguously in Rule 141(2). The principle can also be found in Rule 140(2)(d), which gives the Defence the right to examine all witnesses last. This principle is a natural corollary of the right of an accused to challenge the case against him, which can only logically be safeguarded if the Defence has a chance to respond to all incriminating elements led during the course of the trial.

10. The Chamber has previously been mindful of this right of the Defence to the “last word”, reiterating this principle in as early as November 2011 in its *Decision on Directions for the Conduct of the Proceedings* in November 2011.⁷ The Presiding Judge has repeated the principle on numerous occasions during the course of the proceedings. More recently, the Chamber has reaffirmed its adherence to this practice in its Decision on Defence Witness D04-07.⁸ The Defence’s right to the “last word” in terms of the evidence presented has also been recognized by other Trial Chambers of the ICC. Significantly, in the context of considering whether the Prosecution would be permitted to present a rebuttal case in the *Katanga & Ngudjolo* trial, Trial Chamber II was explicit that “in any case, it should be understood that in this exercise, the Defence is going to have the final word.”⁹

11. This principle is reflected in domestic practice. In the United Kingdom, for example, if a trial court chooses to call a witness who will testify against the defendant, it must do so before the prosecution case is closed in order to give the

⁷ ICC-01/05-01/08-1023, paras. 9, 11.

⁸ See ICC-01/05-01/08-2839, para. 15.

⁹ ICC-01/04-01/07-T-222-Red-ENG WT, p.78.

defendant an opportunity to respond to the witness's testimony.¹⁰ Again, the defendant is given the "last word".

C. SUBMISSIONS

(a) Clarification that the Defence will be given the opportunity to present evidence following the testimony of Chamber's witnesses or admission of evidence by the Chamber

12. The Defence does not dispute the Chamber's right to "decide to call additional witnesses" at the end of the presentation of the Defence's evidence.¹¹ However, the Defence submits that the presentation of evidence by the Chamber at the final stages of the trial is subject to its obligation to ensure that the trial is fair, and that the accused is not only given notice of the case he has to meet, but has the right to challenge allegations levelled against him during the course of the proceedings. Affording the Defence "the last word" ensures that the Chamber meets this obligation. This practice permeates all facets of the presentation of evidence from the order of questioning of witnesses, through to the right to present further *viva voce* or documentary evidence.

13. On this point, while Trial Chamber I in the *Lubanga* case recognized a statutory basis for the Chamber to order or to allow the production of evidence at any stage during the trial, it was explicit that the calling of evidence must be done "within the context of its overarching obligation to uphold the accused's right to a fair hearing under Article 67 of the Statute."¹² The Defence respectfully submits that it cannot be the case that the accused is afforded an opportunity to counter all the allegations lead during the Prosecution case, only to be prevented from challenging or countering incriminating or damaging evidence lead through evidence

¹⁰ *R. v. Harris* [1927] 2 K.B 587, 594-6; *R. v. Cleghorn* [1967] 51 Cr. App. R. 291 (England and Wales.)

¹¹ ICC-01/05-01/08-1023, para. 5.

¹² ICC-01/04-01/06-2727-Red, para. 38.

introduced at the final stages of the trial by the Chamber which the accused is not entitled to answer.

14. The practice of the ICC supports the Defence being given “the last word”, and the corresponding ability to meet the case against the accused. As noted above, in the *Katanga & Ngudjolo* case, the Prosecution sought to present rebuttal evidence after the close of the Defence case. In considering whether the criteria for rebuttal evidence had been met, Trial Chamber II was nonetheless explicit that “in any case, it should be understood that in this exercise, the Defence is going to have the final word.”¹³ There was no suggestion that the Prosecution would be permitted to call incriminating evidence after the close of the Defence case without the Defence being given the opportunity to challenge this evidence.

15. It is also worth noting that both Trial Chamber I in *Lubanga* and Trial Chamber II in the *Katanga & Ngudjolo* case have also taken advantage of their statutory right to call Chamber’s witnesses to give evidence in the course of those proceedings. However, these witnesses were called **before** the start of the Defence case. As such, the Defence was given the opportunity to challenge, clarify or counter any evidence led by them during the presentation of the Defence case. In *Lubanga*, Trial Chamber I called two expert witnesses during the course of the Prosecution case.¹⁴ It then called an additional two expert witnesses prior to the commencement of the Defence case.¹⁵ In *Katanga*, Trial Chamber II also called two expert witnesses; the first being the head of the investigations team in the Investigations Division of the Office of the Prosecutor who was the first witness to

¹³ ICC-01/04-01/07-T-222-Red-ENG WT, p.78.

¹⁴ “The presentation of oral evidence by the prosecution concluded on 14 July 2009”, ICC-01/04-01/06-2842, page 12. “Additionally the Chamber called four experts”, ICC-01/04-01/06-2842, page 14; See ICC-01/04-01/06-T-166-ENG, page 6, lines 2-3; ICC-01/04-01/06-T-193-ENG, page 15, lines 16-18.

¹⁵ “The presentation of the defence evidence commenced on 27 January 2010”, ICC-01/04-01/06-2842, page 13; “The presentation of evidence resumed on 7 January 2010 with the testimony of the third expert called by the Chamber”, ICC-01/04-01/06-2842, page 13; ICC-01/04-01/06-T-223-ENG, page 8, lines 4-8; ICC-01/04-01/06-T-223-ENG, page 50, lines 7-8.

testify at trial.¹⁶ The second, an expert in the Ngiti language, was called during the Prosecution case.¹⁷

16. Significantly, at the *ad hoc* international tribunals, Rule 85 Rules of Procedure and Evidence explicitly gives a Trial Chamber the right to call evidence after the close of the Defence case, and unlike at the ICC, there is no statutory codification of the principle that the Defence should have “the last word”. Regardless, Trial Chambers at both the ICTY and ICTR recognized that the interests of justice dictated that the Defence be given the opportunity to respond to evidence called by the Chamber. In *Rukundo*, for example, Trial Chamber II of the ICTR held that:¹⁸

Rule 85 of the Rules provides for the order of presentation of evidence and requires that any evidence ordered by the Trial Chamber pursuant to Rule 98 be presented following the close of both the Prosecution and Defence cases. **However, the rights of the accused, and the interests of justice would be better served by altering this normal course and allowing the Defence to have the benefit of the additional evidence before presenting its case.**

17. Concerning the admission of documents at the request of the Chamber, in *Hadžihasanović*, the Trial Chamber ordered that some war diaries and logbooks be admitted as Trial Chamber exhibits. The Defence argued that this admission infringed the right of the accused to have the necessary time and facilities to prepare his defence and have knowledge of the case he was required to meet. Concerning the timing of their admission, the ICTY Appeals Chamber held that where a Chamber decided to admit exhibits *proprio motu*, the parties must be given adequate time and facilities to develop their strategy with respect to the admitted exhibits:¹⁹

¹⁶ ICC-01/04-01/07-T-81-Red-ENG.

¹⁷ ICC-01/04-01/07-T-158-Red-ENG and T-159-Red-ENG.

¹⁸ *Prosecutor v. Rukundo*, ICTR-2001-70-T, Decision on Defence Motion to Recall Prosecution Witness BLP, 30 April 2007, para. 7.

¹⁹ *Prosecutor v. Hadžihasanović and Kubura*, Appeal Judgment, 22 April 2008, para. 117.

Contrary to the Trial Chamber's finding in its order postponing the filing of the Parties' final trial briefs, and in light of its earlier Confidential Decision on Admissibility of Evidence ordering admission of only part of the diaries, the fact that all diaries were disclosed to Hadžihasanović at the pre-trial stage does not necessarily mean that Hadžihasanović "had adequate time during both the Prosecution and the Defence cases to develop its strategy in light of the documents taken from the War diaries". **In fact, a better practice would have been to admit the war diaries in their entirety during the Prosecution case or at least before the closure of the Defence case, so as to give as much time as possible to the Parties to develop their strategy.**

18. The Defence accordingly requests clarification that should the Chamber decide either to hear additional *viva voce* witnesses, or admit further documentary evidence following the close of the Defence case, the Defence will be given the opportunity to present explanatory or contradictory evidence in reply, pursuant to the right of Mr. Bemba to have the "last word" in the case against him. The Defence submits that given the Chamber's obligation to ensure an expeditious trial, a timetable could be set whereby the Defence present any additional evidence within, say, 60 days of the completion of the testimony or admission of additional documentary or material evidence by the Chamber.

(b) Contemporaneous Submission of Bar Table Motions by the Prosecution and Defence

19. The Chamber has ordered both the Prosecution and the Defence to simultaneously file any remaining applications for the admission of evidence by 31 October 2013.²⁰ As such, both parties have been given the same deadline. The practical effect of this order is that the Defence is required to decide which documentary and material evidence it should submit for admission, before having a complete picture of the Prosecution's case against him.

²⁰ ICC-01/05-01/08-2824, para.13.

20. The Defence submits that this procedure cannot in any event be reconciled with the overarching principle, discussed above, that the Defence has the “last word”, but has, moreover, been superseded by the Chamber’s apparent decision to present further *viva voce* and/or documentary evidence *proprio motu*. As such, the Defence accordingly requests that the Chamber reconsider Order 2824 and order the consecutive filing by the Prosecution and Defence of any outstanding requests for the admission of evidence in the present case, such filings, in any event to be consequent upon the conclusion of the receipt by the Chamber of all other forms of evidence, whether *viva voce* or documentary.

D. REQUESTED RELIEF

21. Given the above, the Defence respectfully requests that the Chamber

CLARIFY that following the testimony of *viva voce* witnesses or the admission of documentary evidence at the request of the Chamber, the Defence will be given an opportunity to call evidence in reply within a timeframe set by the Chamber; and

RECONSIDER its Order 2824 by deleting the requirement for the parties to file submissions by 31 October 2013, and to provide for consecutive filings by the Prosecution and the Defence of submissions of documents and other materials to be received into evidence, such process not to commence before the processes described in paragraphs 19-22 of Order 2837 had been concluded or, in default of such processes occurring, further order of the Chamber.

The whole respectfully submitted.



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Lead Counsel



Peter Haynes
Co- Counsel

Done on the 24th of October 2013
At The Hague, The Netherlands