

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 30 October 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

**Decision on the Motion for clarification and reconsideration of the timetable
for the parties' final submissions of evidence**

Decision 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

Legal Representatives of the Victims

Ms Marie Edith Douzima-Lawson
Mr Assingambi Zarambaud

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for 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

Defence Support Section

Victims and Witnesses Unit

Mr Patrick Craig

Detention Section

Other

Victims Participation and Reparations Section

Trial Chamber III ("Chamber") of the International Criminal Court ("Court" or "ICC"), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (the "*Bemba case*"), issues the following Decision on Motion for clarification and reconsideration of the timetable for the parties' final submissions of evidence ("Decision").

I. Background and Submissions

1. On 16 July 2013, the Chamber issued its "Decision on the timeline for the completion of the defence's presentation of evidence and issues related to the closing of the case" ("Decision 2731"),¹ in which, *inter alia*, it ordered that "the presentation of evidence by the defence be concluded by 25 October 2013, at the latest."²
2. On 6 September 2013, the defence filed its "Defence Submission as to the current timetable for the completion of its case" ("Submission 2796"),³ in which, *inter alia*, it informed the Chamber that the remaining witnesses to be called were Witnesses D04-54, D04-14, D04-41, and D04-44, and that it did not currently anticipate calling any further witnesses.⁴ In addition, it informed the Chamber that a "bar table motion" would be filed before 25 October 2013 and that "the formal closure of the Defence case will be consequent upon the Chamber's decision upon the admission of documents from the Bar Table."⁵
3. On 1 October 2013, the Chamber issued 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

¹ Decision on the timeline for the completion of the defence's presentation of evidence and issues related to the closing of the case, 16 July 2013, ICC-01/05-01/08-2731.

² ICC-01/05-01/08-2731, paragraph 38(b).

³ Defence Submission as to the current timetable for the completion of its case, 6 September 2013, ICC-01/05-01/08-2796.

⁴ ICC-01/05-01/08-2796, paragraphs 1 to 4.

⁵ ICC-01/05-01/08-2796, paragraph 6.

statements" ("Order 2824"),⁶ in which, *inter alia*, it ordered the parties and participants to file any remaining applications for the admission of evidence within seven days of the completion of the testimony of the last witness to be called by the defence, and in any event by no later than 31 October 2013.⁷

4. On 18 October 2013, following a defence's motion and its prosecution's response,⁸ the Chamber issued its "Second decision on issues related to the closing of the case" ("Decision 2837"),⁹ in which, *inter alia*, it reiterated that: (i) the defence's presentation of oral evidence is to conclude by 25 October 2013 at the latest; (ii) the final date for the parties and participants to submit the remaining material they would like to be admitted into evidence is 31 October 2013; and (iii) the timeline for the submissions of the parties' closing briefs will run from the date - yet to be determined - on which the Chamber declares the case to be closed, pursuant to Rule 141(1) of the Rules of Procedure and Evidence ("Rules").¹⁰ In addition, the Chamber informed the parties and participants that, pursuant to its powers under Articles 64(6)(d) and 69(3) of the Rome Statute ("Statute"), it was considering hearing the testimony of two individuals whose names had repeatedly been mentioned by witnesses in the proceedings and requesting the submission of additional material, which had been discussed at trial but not yet submitted into evidence.¹¹

5. On 23 October 2013, and following an *ex parte* Status Conference held with the defence and representatives of the Registry and a subsequent report

⁶ 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, 1 October 2013, ICC-01/05-01/08-2824.

⁷ ICC-01/05-01/08-2824, paragraph 13(i).

⁸ Defence Motion on outstanding decision on the admission of evidence, 7 October 2013, ICC-01/05-01/08-2828 and Prosecution's Response to Defence Motion on outstanding decisions on the admission of evidence, 10 October 2013, ICC-01/05-01/08-2832.

⁹ Second decision on issues related to the closing of the case, 18 October 2013, ICC-01/05-01/08-2837-Conf, a public redacted version was filed on the same day, ICC-01/05-01/08-2837-Red.

¹⁰ ICC-01/05-01/08-2837-Red, paragraph 17.

¹¹ ICC-01/05-01/08-2837-Red, paragraphs 19 to 22.

from the Registry,¹² the Chamber issued its “Decision on the testimony of Witnesses D04-54, D04-14, D04-41 and D04-44” (“Decision 2842”).¹³ Taking into account the submissions of the Registry and the defence, the Chamber decided to extend the deadline for the defence to present the testimony of Witness D04-54, provided that the testimony commenced no later than 30 October 2013 and concluded by 1 November 2013 at the latest.¹⁴ As to Witnesses D04-14, D04-41 and D04-44, the Chamber ordered the Registry to continue making the necessary arrangements to facilitate their voluntary appearance, and to report back to the Chamber on 30 October 2013 on their availability and the feasibility of hearing them as soon as practicable.¹⁵ The Chamber further stressed that, on the basis of this report it would decide whether a further extension of the deadline in order to allow the defence to present the testimony of Witnesses D04-14, D04-41 and D04-44 would be appropriate.¹⁶

6. On 24 October 2013, the defence filed its “Motion for clarification and reconsideration of the timetable for the parties’ final submissions of evidence” (“Defence’s Motion”),¹⁷ in which it requests the Chamber to (i) clarify whether, 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;¹⁸ and (ii) 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

¹² Transcript of hearing of 21 October 2013, ICC-01/05-01/08-T-346-CONF-EXP-ENG ET and Registry report on the measures taken in order to ensure the appearance of remaining Defence witnesses, 22 October 2013, ICC-01/05-01/08-2840-Conf.

¹³ Decision on the testimony of Witnesses D04-54, D04-14, D04-41 and D04-44, 23 October 2013, ICC-01/05-01/08-2842.

¹⁴ ICC-01/05-01/08-2842, paragraphs 9 and 11(i).

¹⁵ ICC-01/05-01/08-2842, paragraphs 10 and 11(ii) and (iii).

¹⁶ ICC-01/05-01/08-2842, paragraph 10.

¹⁷ Motion for clarification and reconsideration of the timetable for the parties’ final submissions of evidence, 24 October 2013, ICC-01/05-01/08-2844-Conf, following the Chamber’s order the filing was reclassified as public on 25 October 2013, ICC-01/05-01/08-2844.

¹⁸ ICC-01/05-01/08-2844, paragraphs 18 and 21.

defence of submissions of material into evidence, such filings being consequent upon the conclusion of the receipt by the Chamber of all other forms of evidence, whether *viva voce* or documentary.¹⁹

7. On 29 October 2013, the prosecution filed its "Prosecution's Response to defence Motion for clarification and reconsideration of the timetable for the parties' final submissions of evidence" ("Prosecution's Response"),²⁰ in which it requests the Chamber to reject the Defence's Motion as premature and made in the abstract.²¹ The prosecution submits that the Chamber's Decision 2837 cannot be fairly described as a "revelation" since the possibility for the Chamber to call additional evidence was already envisaged in Decision 1023 of 19 November 2010, and the decision was also consistent with the Chamber's statutory authority under Article 64(6)(b), (d) and (8)(b) and Article 69(3) of the Statute.²² Further, the prosecution submits that the defence wrongly assumes that it has a right to call evidence in reply under Article 69(3) of the Statute, which is a misconstruction of the accused's right to have the last word in the case against him as a right to be the last to present evidence.²³ The prosecution further adds that the right of the accused to have the last word, enshrined in Rule 141(2), and the right to be the last to examine a witness under Rule 140(2)(d), cannot be expanded to include an inexistent right to be the last to call evidence, a right which is not recognised by the Statute or the Rules.²⁴ Lastly, the prosecution submits that, while it is highly unlikely that the evidence of the witnesses called by the Chamber would be of a nature requiring the exceptional submission of

¹⁹ ICC-01/05-01/08-2844, paragraphs 20 and 21.

²⁰ Prosecution's Response to defence Motion for clarification and reconsideration of the timetable for the parties' final submissions of evidence, 29 October 2013, ICC-01/05-01/08-2850.

²¹ ICC-01/05-01/08-2850, paragraphs 13 and 14.

²² ICC-01/05-01/08-2850, paragraphs 6 and 8.

²³ ICC-01/05-01/08-2850, paragraph 9.

²⁴ ICC-01/05-01/08-2850, paragraphs 10 and 11.

rebuttal evidence, the defence will have the opportunity to submit a tailored request if it considers that such is the case.²⁵

II. Analysis

8. For the purpose of the present Decision, the Chamber has considered, in accordance with Article 21(1) of the Statute, Articles 64(2), (3)(a), (6)(b) and (d) and (8)(b), 67(1), and 69(3) and (4) of the Statute, Rules 134(3), 140, and 141 of the Rules, and Regulations 24, 28, 34, 35, 43, and 54 of the Regulations of the Court.

The deadline for the parties' final submission of materials into evidence

9. As indicated in its Order 2824, in order to take a timely decision on any remaining applications for the admission of material into evidence, the Chamber considers it appropriate to give the parties and the participants a timeline of seven days, following the completion of the testimony of the last defence witness, within which to submit any remaining applications for the admission of evidence.²⁶ In view of the foregoing, and taking into account that in Decision 2842 the Chamber extended the deadline set out in Decision 2731 in order to allow the defence to present the testimony of Witness D04-54, under the condition that it should be concluded by 1 November 2013 at the latest, the Chamber finds it appropriate to extend the deadline set out in Order 2824 for the parties to submit any remaining applications for the admission of material into evidence until 8 November 2013.

10. For the sake of clarity, both parties should submit, by 8 November 2013 at the latest: (i) any applications for the admission into evidence of material

²⁵ ICC-01/05-01/08-2850, paragraph 13.

²⁶ ICC-01/05-01/08-2824, paragraph 7

used during the testimony of Witnesses D04-15 and D04-54; and (ii) any applications for the admission of any remaining material into evidence pursuant to Article 64(9)(a) of the Statute. The same deadline applies to the submission of any applications by the legal representatives of victims in accordance with the procedure previously set out by the Chamber.²⁷ In addition, as decided in Order 2824, any responses to such applications shall be filed within seven days of their notification and replies are subject to leave being granted by the Chamber pursuant to Regulation 24(5) of the Regulations.²⁸

11. In case the Chamber decides to further extend the deadline in order to allow the defence to present the testimony of Witnesses D04-14, D04-41 and D04-44—a possibility envisaged in Decision 2842—a deadline for the parties to submit documents used during the questioning of only those witnesses will be set.
12. In line with the Chamber's consistent approach to the matter, the defence's request that the Chamber reconsider its order for the parties to simultaneously file their final submissions for the admission of any remaining material into evidence is denied. The Chamber is not persuaded by the defence's assertion that the accused would be prejudiced if his defence were to be "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."²⁹ Indeed, as stressed in its oral decision of 21 October 2010,³⁰ any documents that the prosecution might submit up to 8 November 2013 would have been disclosed to the defence

²⁷ ICC-01/05-01/08-2824, paragraph 8 in relation to ICC-01/05-01/08-1470, paragraphs 13 and 14.

²⁸ ICC-01/05-01/08-2824, paragraph 9.

²⁹ ICC-01/05-01/08-2844, paragraphs 19.

³⁰ Transcript of hearing of 21 October 2010, ICC-01/05-01/08-T-30-ENG ET WT.

well in advance of that date.³¹ As such, the defence has been informed of all evidence which is to be used against the accused at trial. Further, in relation to the documents to be submitted through Witnesses D04-15 and D04-54, the defence was informed of the prosecution's intention to submit them as evidence pursuant to the procedure established by the Chamber's Order 1470 of 31 May 2011.³²

13. Finally, should the defence identify any specific and concrete prejudice requiring the submission of further evidence essential to the Chamber's determination of the truth, it may submit a substantiated motion after the deadline of 8 November 2013, before the Chamber declares the submission of evidence to be closed pursuant to Rule 141(1) of the Rules. Such motion, if and when submitted, will be decided upon by the Chamber in due course, after the prosecution and the legal representatives of victims have been given the opportunity to respond to it.

³¹ By Oral Decision of 21 October 2010, the Chamber approved the prosecution's proposal for submissions of documents from the "bar table" at "a later stage during the trial when the relevance of the evidence [...] might appear more apparent." See ICC-01/05-01/08-T-30-ENG ET WT, page 13, lines 5 to 7. In responding to the defence's opposition, the Chamber held that it: "does not agree with the Defence's assertion that the rights of the accused may be prejudiced by such arrangement. Considering that all documents concerned have already been disclosed to the Defence, it cannot be said that the Defence is not informed of all evidence which is to be used against the accused during trial. However, the Chamber expects the Prosecution to exert rigour in the choosing of the documents which will be the subject of the application and to filter and eliminate documents which, at a later stage of the proceedings, will appear to be of little or no assistance to the Chamber's determination of the truth." See ICC-01/05-01/08-T-30-ENG Et WT, page 14, lines 10 to 22.

³² By its Order 1470 the Chamber, *inter alia*, set out the procedure by which the parties and participants were to inform each other, and the Chamber, of the documents they intended to use during their questioning of witnesses—including identifying the specific material they intended to submit as evidence—and that by which they were to inform each other and the Chamber of any objections to the admissibility of documents intended to be submitted used by the others. In that Decision, the Chamber further stressed that the above procedure did 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. See Order on the procedure relating to the submission of evidence, 31 May 2011, ICC-01/05-01/08-1470, paragraphs 7 and 8.

The defence's right to submit evidence following the testimony of the Chamber's witnesses or the admission of evidence by the Chamber

14. As noted in the Prosecution's Response,³³ since as early as 19 November 2010 when the Chamber issued its Decision 1023,³⁴ the defence has been on notice of the possibility that the Chamber may call additional witnesses "at the end of the presentation of the parties' evidence" or order the production of additional evidence that it considers necessary for the determination of the truth "at any given time".³⁵ In addition, as stressed by the Appeals Chamber in its Judgement 1386 of 3 May 2011,³⁶ the Chamber has discretion in deciding when admitting evidence at trial.³⁷ Consequently, it may rule on the admissibility of evidence when the item is submitted or it "may defer its consideration [...] 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."³⁸

15. Further, as rightly pointed out by the prosecution,³⁹ the Court's legal framework does not grant the accused the right to be the last to present evidence. The only two provisions relied upon by the defence in its Motion, Rules 140(2)(d) and 141(2) of the Rules, do not grant the accused the right to be the last to present evidence. Rather, Rule 140(2)(d) specifies that "the defence shall have the right to be the last to examine a witness" and Rule 141(2) refers to the right of the defence "to speak last" within the context of the parties' closing statements.

³³ ICC-01/05-01/08-2850, paragraph 6.

³⁴ Decision on Directions for the Conduct of the Proceedings, 19 November 2010, ICC-01/05-01/08-1023.

³⁵ ICC-01/05-01/08-1023, paragraph 5.

³⁶ Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011, ICC-01/05-01/08-1386.

³⁷ ICC-01/05-01/08-1386, paragraph 37.

³⁸ ICC-01/05-01/08-1386, paragraph 37.

³⁹ ICC-01/05-01/08-2850, paragraph 10.

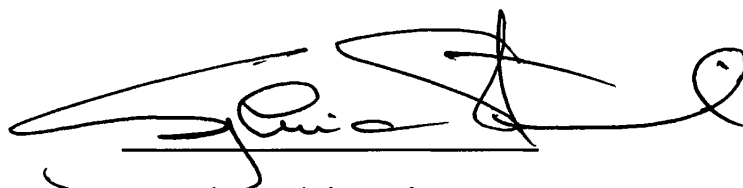
16. Consequently, the defence has no statutory right to call evidence after the presentation of the Chamber's evidence or to expect the Chamber to decide on the admissibility of all evidence before the end of the defence's presentation of evidence.
17. Having said this, should the defence identify any specific and concrete prejudice requiring the submission of further evidence essential to the Chamber's determination of the truth, after hearing the evidence called by the Chamber and before the Chamber declares the submission of evidence to be closed pursuant to Rule 141(1) of the Rules, it may submit a substantiated motion, which will be decided upon by the Chamber in due course, after the prosecution and the legal representatives of victims have been given the opportunity to respond to it.

III. Conclusions

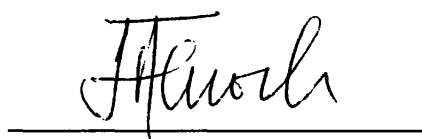
18. For the above reasons, the Trial Chamber hereby:

- (i) EXTENDS the deadline set out in Order 2824 to 8 November 2013 for both parties to submit: (i) any applications for the admission into evidence of material used during the testimony of Witnesses D04-15 and D04-54; and (ii) any applications for the admission of any remaining material into evidence pursuant to Article 64(9)(a) of the Statute. The same deadline applies to the submission of any applications by the legal representatives of victims; and
- (ii) REJECTS the Defence's Motion.

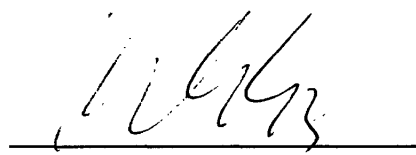
Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 30 October 2013

At The Hague, the Netherlands