

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 1 November 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 unsworn statement by the accused pursuant to
Article 67(1)(h) of the Rome Statute**

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 unsworn statement by the accused pursuant to Article 67(1)(h) of the Rome Statute ("Decision").

I. Background and Submissions

1. On 11 May 2012, the defence filed its "Defence submissions to the Chamber concerning its witnesses",¹ in which it listed the accused among the witnesses to be called by the defence.² The inclusion of the accused in the defence's list of witnesses was confirmed in the "Submissions on Defence Evidence"³ of 28 May 2012, the "Third Defence Submissions on the Presentation of its Evidence"⁴ filed on 29 June 2012,⁵ and in the list of witnesses disclosed to the Office of the Prosecutor ("prosecution") and communicated to the legal representatives of victims on 13 July 2012.⁶
2. On 6 September 2013, pursuant to an oral order of the Chamber,⁷ the defence filed its "Defence Submission as to the current timetable for the completion of its case",⁸ in which it, *inter alia*, informed the Chamber that "[t]he accused will not be giving sworn evidence" and that "[c]onsideration

¹ Defence submissions to the Chamber concerning its witnesses, 11 May 2012, ICC-01/05-01/08-2214-Conf-Exp with a Confidential Annex A-Ex parte Defence and VWU only. A redacted version of the main filing was notified on 11 June 2012 (ICC-01/05-01/08-2214-Red).

² ICC-01/05-01/08-2214-Conf-Exp-AnxA, page 2.

³ Submissions on Defence Evidence, 28 May 2012, ICC-01/05-01/08-2222-Conf-Exp and confidential *ex parte* Annex A. A redacted version of the main filing was notified on 11 June 2012 (ICC-01/05-01/08-2222-Red) and the annex was reclassified as confidential pursuant to the Chamber's instruction of 19 September 2012.

⁴ Third Defence Submissions on the Presentation of its Evidence, 29 June 2012, ICC-01/05-01/08-2238-Conf-Exp and confidential *ex parte* Annexes A and B. A public redacted version of the filing was notified on 19 September 2012 (ICC-01/05-01/08-2238-Red).

⁵ The Chamber approved the list of witnesses to be called by the defence, albeit in a modified order in its Decision on the "Third Defence Submissions on the Presentation of its Evidence", 6 July 2012, ICC-01/05-01/08-2242-Conf-Exp and confidential *ex parte* Annex A. A public redacted version was notified on 28 September 2012 (ICC-01/05-01/08-2242-Red).

⁶ Defence Disclosure of its List of Witnesses and the Factual and Legal Elements of its Case, 13 July 2012, ICC-01/05-01/08-2243-Conf and confidential Annexes A and B.

⁷ Transcript of hearing of 3 September 2013, ICC-01/05-08-T-342-CONF-ENG ET, page 32, line 20 to page 34, line 10.

⁸ Defence Submission as to the current timetable for the completion of its case, 6 September 2013, ICC-01/05-01/08-2796.

is being given to his giving a brief unsworn statement at the conclusion of all the other oral evidence.”⁹

3. On 9 September 2013, the prosecution filed its “Prosecution’s Response to ‘Defence Submissions as to the current timetable for the completion of its case’”,¹⁰ in which it, *inter alia*, requests that the Chamber authorise the prosecution “to put questions to the Accused should he choose to make an unsworn statement on substantive issues or make arguments in favour of his case.”¹¹ The prosecution submits that pursuant to Articles 64(2) and 69(4) of the Rome Statute (“Statute”) and in the interest of a fair trial, “the Prosecution should be allowed to put questions to the Accused to test those portions of his statement which have any evidentiary value, however limited, in order to assist the Chamber to determine the truth.” It further asserts that the prosecution should “not be deprived of the right to question the Accused on relevant aspects of the case simply because he has chosen to exercise his right to make unsworn statements” and that the right to make an unsworn statement should not “be used by an accused as a vehicle to address relevant issues in a case in the hope that this would enable him to evade questioning by the Prosecution.”¹²
4. On 11 September 2013, the Chamber issued an oral decision, instructing the defence to confirm whether the accused intends to make an unsworn statement, at least one week before the end of the testimony of the last defence witness.¹³

⁹ ICC-01/05-01/08-2796, paragraph 5.

¹⁰ Prosecution’s Response to “Defence Submissions as to the current timetable for the completion of its case”, 9 September 2013, ICC-01/05-01/08-2798.

¹¹ ICC-01/05-01/08-2798, paragraph 6.

¹² ICC-01/05-01/08-2798, paragraph 5.

¹³ ICC-01/05-01-08-T-343-CONF-ENG ET, page 3, lines 18 to 22.

5. On 18 October 2013, the defence filed its "Defence Submissions on the proposed unsworn statement of the accused",¹⁴ in which it: (i) formally informs the Chamber that Mr Bemba intends to make an unsworn statement in the present case;¹⁵ (ii) requests that Mr Bemba be permitted to make an unsworn statement directly following the completion of the testimony of the last defence witness;¹⁶ and (iii) submits that the prosecution's request to question Mr Bemba "has no basis and would be directly contrary to the rationale of unsworn statements in international criminal trials."¹⁷

II. Analysis and Conclusions

6. For the purpose of the present Decision, the Chamber has considered, in accordance with Article 21(1) of the Statute, Articles 64(2), 67(1)(g) and (h), and 69(1) of the Statute and Rules 66, 101, 140 and 141 of the Rules of Procedure and Evidence ("Rules").

Timing of the unsworn statement

7. The Chamber notes that the statutory framework affords the accused the opportunity to make an unsworn statement at an appropriate moment, subject to the Chamber's discretion as to timing and modality.¹⁸ As to the defence's request for the accused to be permitted to make an unsworn statement directly following the completion of the testimony of the last defence witness, the Chamber notes that further to the "Decision on the

¹⁴ Defence Submissions on the proposed unsworn statement of the accused, 18 October 2013, ICC-01/05-01-2838.

¹⁵ ICC-01/05-01-2838, paragraph 4.

¹⁶ ICC-01/05-01-2838, paragraph 5.

¹⁷ ICC-01/05-01-2838, paragraph 11.

¹⁸ Articles 64(2) and 67(1)(h). *See also The Prosecutor v. Katanga and Ngudjolo*, Trial Chamber, Decision on "Directions for the conduct of the proceedings and testimony in accordance with rule 140", 1 December 2009, ICC-01/04-01/07-1665-Corr, paragraph 12.

testimony of Witnesses D04-54, D04-14, D04-41 and D04-44”,¹⁹ the date of appearance of the last defence witness is still uncertain. In the interest of expeditiousness of the proceedings in accordance with Article 64(2) of the Statute and in line with the jurisprudence of other Chambers of this Court,²⁰ the Chamber considers it appropriate for the unsworn statement to be given as part of the presentation of the closing statement by the defence pursuant to Rule 141(2) of the Rules.²¹ In addition, the Chamber considers that this would allow the accused to make his unsworn statement having been informed of all the evidence admitted in the case and having heard all the allegations made against him by the prosecution and legal representatives, including those made during their closing briefs and statements.²²

Prosecution request to question the accused

8. While Rule 140(2)(b) of the Rules establishes the right of both parties to question witnesses, no such right exists in the Court’s statutory framework with respect to unsworn statements made by an accused person pursuant to Article 67(1)(h) of the Statute. In the view of the Chamber, this is consistent with the distinction between (i) a testimony provided by an accused person who appears as a witness in the case against him or her, which is preceded by a solemn undertaking pursuant to Article 69(1) of the Statute and Rule 66 of the Rules and (ii) an unsworn statement which is not subject to such solemn undertaking and does not constitute evidence.²³ The Chamber considers that permitting the prosecution to question an accused person

¹⁹ Decision on the testimony of Witnesses D04-54, D04-14, D04-41 and D04-44, 23 October 2013, ICC-01/05-01/08-2842, paragraph 10.

²⁰ *Katanga and Ngudjolo* Decision, ICC-01/04-01/07-1665-Corr, paragraph 12; *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on opening and closing statements, 22 May 2008, ICC-01/04-01/06-1346, paragraphs 14-16.

²¹ As previously decided by the Chamber, the closing arguments or final oral submissions will be presented two weeks after the defence’s reply to the closing briefs. *See* 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, paragraphs 37 and 38(r).

²² *See* ICC-01/05-01/08-2731, paragraph 38.

²³ *See also The Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, 8 February 2010 (ICC-02/05-02/09-243-Red).

who makes an unsworn statement would undermine this distinction. Moreover, the Chamber considers that allowing the prosecution to question an accused person who has elected not to testify but rather to make an unsworn statement may conflict with the accused's right not to be compelled to testify or confess guilt and to remain silent pursuant to Article 67(1)(g) of the Statute.²⁴ As a result, and following the jurisprudence of this Court,²⁵ the Chamber rejects the prosecution's request to question Mr Bemba when he gives his unsworn statement pursuant to Article 67(1)(h) of the Statute.

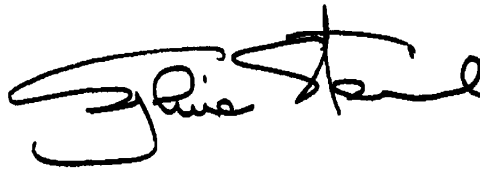
9. For the above reasons, the Trial Chamber hereby:

- (i) DECIDES that the accused shall be given an opportunity to make an unsworn statement pursuant to Article 67(1)(h) of the Statute as part of the presentation of the closing statement by the defence.
- (ii) DECIDES that the unsworn statement by the accused shall not exceed one hour. The defence shall inform the Chamber, the parties and the participants as to the anticipated length of the unsworn statement seven days before it is scheduled to be made.
- (iii) REJECTS the prosecution's request to question the accused when he gives his unsworn statement pursuant to Article 67(1)(h) of the Statute.

²⁴ The right not to be compelled to testify against oneself and the right not to confess guilt and remain silent are also expressed in Article 14(3)(g) of International Covenant on Civil and Political Right and Article 6(1) of European Convention of Human Rights. This right was confirmed by European Court of Human Rights (*see* ECtHR, *Funke v. France*, Judgement, 25 February 1993, application no. 10828/84, paragraph 44; ECtHR, *Saunders v. United Kingdom*, Judgement, 17 December 1996, application no. 19187, paragraph 71; ECtHR, *Heaney and McGuinness v. Ireland*, Judgement, 21 December 2000, application no. 34720/97, paragraph 48; ECtHR, *Brusco v. France*, Judgement, 14 October 2010, application no. 1466/07, paragraph 44).

²⁵ As pointed out by the defence, the accused in other cases before this Court were not questioned by the prosecution when making their unsworn statements.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 1 November 2013

At The Hague, the Netherlands