

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/05-01/08**
Date: **6 September 2016**

TRIAL CHAMBER III

Before: Judge Joyce Aluoch, Presiding Judge
Judge Geoffrey Henderson
Judge Chang-ho Chung

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
V. JEAN-PIERRE BEMBA GOMBO**

**Public Redacted Document
with
Confidential Annex A**

**Public redacted version of "Prosecution's Response regarding the Witness Schedule",
2 November 2011, ICC-01/05-01/08-1874-Conf**

Source: The Office of the Prosecutor

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

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I. Introduction

1. On 21 October 2011, in line with its weekly and monthly updates regarding the schedule of upcoming witnesses, the Office of the Prosecutor ("Prosecution") informed the Trial Chamber III ("Chamber") as well as the Defence and participants, *inter alia*, that due to the availability of Witness CAR-OTP-PPPP-0219 ("Witness 219") as well as courtroom interpreters to translate the testimony of Witness CAR-OTP-PPPP-0213 ("Witness 213") into Lingala, Witness 213 is now scheduled to testify between 14 and 18 November 2011 whilst the next witness will be Witness 219 who indicated that he would be available to testify on 5 December 2011 ("Prosecution's Proposal").¹ Consequently, there is likely to be a gap of one or two court days prior to the testimony of Witness 213 and a gap of 10 court days between the testimonies of Witnesses 213 and 219.

2. On 24 October 2011, the Defence provided observations regarding the Prosecution's proposed schedule of its remaining witnesses ("Defence Observations").²

3. On 27 October 2011, the Chamber issued an oral ruling requesting the Prosecution to provide information regarding the availability of Witnesses CAR-OTP-PPPP-0036 ("Witness 36") or CAR-OTP-PPPP-0045 ("Witness 45"), or both, to testify either before Witness 213 or between Witnesses 213 and 219, including the specific dates on which they can testify ("Order").³

¹ Email sent by the Prosecution to the Legal Officer of the Chamber, Defence and participants on 21 October 2011 at 11:12.

² Email sent by the Defence to the Legal Officer of the Chamber, Prosecution and participants on 24 October 2011 at 15:46.

³ ICC-01/05-01/08-T-176-CONF-ENG ET, 27 October 2011, p. 5, lines 4 to 9.

4. Pursuant to the Order, the Prosecution hereby informs the Chamber that it has been unable to secure the attendance of Witnesses 36 and/or 45 to testify either before or immediately after Witness 213.

II. Request for confidentiality

5. The Prosecution requests that this document be received as “Confidential” as it contains information regarding the personal circumstances of witnesses and scheduling information that is known to the Defence and participants but not to the public.

III. Prosecution’s submissions

6. The Chamber has been aware of Witness 36’s [REDACTED]. The Prosecution provided an update informing the Chamber that Witness 36 [REDACTED] and undertook to provide further information regarding [REDACTED] and availability to testify.⁴ Witness 36 [REDACTED]. Due to the witness’ [REDACTED], the Prosecution has not been able to secure his attendance to testify either before or immediately after Witness 213, as requested by the Chamber. Nevertheless the Prosecution is continuing its efforts to determine whether and when he will be [REDACTED] available to testify and whether he [REDACTED] to travel to The Hague or if testimony via video-link should be requested.

7. With respect to Witness 45, Witness CAR-OTP-PPPP-0044 (“Witness 44”) and Witness CAR-OTP-PPPP-0015 (“Witness 15”), the Chamber will recall that in the Prosecution’s initial schedule, they were expected to testify in May 2011, towards the

⁴ Email sent by the Prosecution to the Legal Officer of the Chamber, Defence and participants on 21 October 2011 at 11:12.

end of the Prosecution's case - which the Prosecution expected to complete by the end of June 2011.

8. In particular, Witness 45 throughout has been willing to make himself available to appear before the Court, prior to September 2011, at the Chamber's convenience. However due to various delays that cannot in any way be attributed to him, his scheduled testimony was progressively delayed until mid-September and then November or early December 2011.

9. [REDACTED].⁵ As is common with [REDACTED]. Witness 45, who is currently [REDACTED], informed the Prosecution that [REDACTED].⁶ After the [REDACTED]. Immediately thereafter, [REDACTED] will take place during the month of December, after which [REDACTED].

10. As a result, Witness 45 informed the Prosecution that he now cannot be available to testify before this Court's winter judicial recess, but will be available to testify on 9 January 2012.

11. Witnesses 44 and 15 are similarly situated. They are [REDACTED] respectively. Thus, the Prosecution's submissions regarding the [REDACTED] are equally applicable to them. They are both [REDACTED] they are both [REDACTED]. Witness 44 informed the Prosecution that he can testify on 16 January 2012 whilst Witness 15 informed the Prosecution that he can testify on 23 January 2012.

⁵ The Defence mistakenly stated that [REDACTED]. Email sent by the Defence to the Legal Officer of the Chamber, Prosecution and participants on 24 October 2011 at 15:46; See, the [REDACTED].

⁶ See, also, the [REDACTED].

12. The Defence assertion that the witnesses “prefer” a postponement “for a period of several months” exaggerates the requested delay and wrongly dismisses the justification for the request. In fact since the end of August 2011, it was contemplated and agreed that Witnesses 44 and 15 would testify after Witness 213 completed his testimony. Witness 213 has not yet testified, due to delays identified in paragraph 13 below. So the requested delay in the appearance of the witnesses is not to accommodate their preference, but to maintain the contemplated order of the witnesses, all of whom have been delayed for reasons not attributable to prosecutorial malfeasance or personal preference. Nor is the request to delay their appearance for “several months”. Not counting the judicial recess, commencing on 19 December 2011, the request is for a delay of 20 court days on account of the witnesses’ [REDACTED]. This delay is not unreasonable, particularly as Witness 219 will testify for eight days during this period.

13. The Prosecution submits that the structure of its presentation of evidence in a manner deemed fit to prove its case is generally within its prerogative. While it is subject to judicial scrutiny, the Prosecution’s presentation should not be rearranged or restructured to suit the preference of the Defence. The reasons for the delays, which make it impossible to conclude the Prosecution’s presentation of evidence prior to the judicial recess, are all legitimate, unanticipatable, or attributable to the Defence itself. They include witness [REDACTED], changes in the schedule that required rescheduling and affected witness availability, logistical difficulties beyond the control of the Victims and Witnesses Unit or Court Management, and also the frequently lengthy, repetitive and sometimes irrelevant questioning by the Defence significantly beyond its projected estimation.⁷ The Prosecution’s Proposal was amended in order to proceed expeditiously

⁷ The examination of witnesses by the Defence included tireless repetitive questions, reading huge portions of documents, using two counsels to question the same witness without dividing the topics, and putting many questions to the witness that are beyond the scope of the case to the point that witnesses themselves or the Chamber highlighted it: see, for example, ICC-01/05-01/08-T-85-CONF-ENG ET, p. 40, line 24 to p. 41, line 5: “The Chamber will

by accommodating the availability of witnesses, courtroom interpreters for Lingala and remaining number of courtroom days prior to the judicial recess.

14. The Prosecution's rationale for calling Witness 219 after its insider witnesses was to assist the Chamber and participants "in understanding the functioning of the MLC as a military movement as well as the exercise of command and authority within the MLC"⁸ and considered it "reasonable for this group of witnesses to be heard in close proximity, which would provide a better understanding of how command and control was exercised by the MLC during the period relevant to the charges".⁹ The Prosecution maintains its rationale regarding the testimony of Witness 219. The Chamber would have heard at least five out of nine Prosecution insider witnesses regarding evidence on command and control, including evidence related to the military logbook, prior to the testimony of Witness 219. In fact, the insider witnesses expected to testify after Witness 219 are [REDACTED]. The Defence insistence that the Prosecution call Witness 219 only

respect, of course, the planning of the Defence, although the Chamber has asked itself many times about the relevance of many questions that have been put by the Defence. So maybe the Defence could be more objective and just ask questions that are really relevant for the case; otherwise, the Chamber will have to intervene every time to ask the Defence to justify the relevance of the questions. So I really would like the Defence to pay more attention for the wise use of its time."; and ICC-01/05-01/08-T-135-CONF-ENG ET, p. 2, line 6 to p. 3, line 8: "The Chamber is concerned that the Defence has been using most of its questioning time in relation to Witness 108 not to challenge the credibility of his testimony, but rather to try to harass and intimidate the witness, to cast doubt on his integrity as a public figure in his country and to pursue other lines of questioning not intended to bring to the Chamber's attention any relevant contradiction or inconsistency in the witness's testimony and statements. The Chamber, after yesterday's objection by the Prosecution regarding what it saw as an inappropriate use of the Defence's questioning time, called the Defence's attention to what the Chamber considered to be an abuse on the part of the Defence of the latitude that the Chamber has thus far afforded to the parties and participants in their questioning of witnesses. The Defence, in spite of the Chamber's instruction, continued to pursue a line of questioning that appears to have little or no relevance to the substance of Mr Bemba's defence, but that is instead intended to harass and intimidate the witness." See, also, further illustrations ICC-01/05-01/08-T-166-CONF-ENG ET, p. 46, line 24 to p. 47, line 4; ICC-01/05-01/08-T-156-CONF-ENG ET, p. 43, lines 9 to 19; ICC-01/05-01/08-T-122-CONF-ENG ET, p. 54, lines 5 to 17; ICC-01/05-01/08-T-131-CONF-ENG CT, p. 15, lines 1 to 6; ICC-01/05-01/08-T-49-CONF-ENG ET, p. 44, lines 5 to 15; ICC-01/05-01/08-T-141-CONF-ENG ET, p. 55, lines 7 to 10; ICC-01/05-01/08-T-79-CONF-ENG CT2, p. 23, line 23 to p. 24, line 10; ICC-01/05-01/08-T-106-CONF-ENG ET, p. 65, lines 8 to 23; ICC-01/05-01/08-T-157-CONF-ENG ET, p. 46, line 21 to p. 47, line 12; ICC-01/05-01/08-T-164-CONF-ENG, p. 23, line 17 to p. 25, line 15; ICC-01/05-01/08-T-69-CONF-ENG ET, p. 57, lines 8 to 11; ICC-01/05-01/08-T-86-CONF-ENG ET, p. 2, line 18 to p. 3, line 13.

⁸ See ICC-01/05-01/08-793-AnxA, The Prosecution's Submissions in Preparation for the Commencement of the Trial, 10 June 2010, at para. 9.

⁹ *Ibid.*

after all insider witnesses have testified would further delay the proceedings. The Defence is at liberty to explore the type of evidence upon which Witness 219's assessment is based upon during its examination of the witness. Furthermore, the Defence refused joint instruction of Witness 219 as a military expert and indicated that it would call its own expert.¹⁰ Consequently, the Defence would not be prejudiced as it has the option to make use of its own expert to opine upon the evidence on the record.

15. Lastly, the Prosecution notes that the Defence request that the Chamber require the Prosecution to complete the presentation of its evidence by a specific cut-off date, regardless whether its witnesses can rearrange their schedules and other commitments in order to be available to testify, is both premature and disproportionate in these circumstances. Firstly, the Defence has failed to show that the delay is attributable to the Prosecution, which to-date is about 50 hours below its estimated time, let alone prove that it has either done so unduly or acted in bad faith. The Prosecution recalls that it has a right to an adequate opportunity to present its case as well as a duty to present its evidence expeditiously and has complied fully.¹¹ The Prosecution notes that even if all witnesses were available to testify, it would not in any event be able to conclude the presentation of its evidence prior to the winter judicial recess.

16. Moreover, expeditiousness must be interpreted in light of the specific circumstances and other competing principles in the administration of justice such as the obligation to establish the truth. The Defence has a similar obligation to proceed

¹⁰ See, ICC-01/05-01/08-706, Defence observations on the experts proposed by the Prosecution, 26 February 2010 and ICC-01/05-01/08-T-21-ENG ET, 29 March 2010, p. 10, line 25 to p. 11, line 14. Also, in an email to the Prosecution on 19 April 2010 at 17:02, the Defence stated that they considered the four experts to be called by the Prosecution as only witnesses of the Prosecution, not the Defence.

¹¹ See, ICC-01/05-01/08-T-176-CONF-ENG ET, 27 October 2011, p. 3, lines 20 to 24: "First, the Chamber wishes to stress the importance of completing the presentation of evidence in this case as expeditiously as possible. At the same time, the Chamber needs to ensure that the parties have an adequate opportunity to present their cases. In the Chamber's view, this is a key component of a fair trial as enshrined in Article 64(2) of the Statute."

expeditiously and has failed to show any concrete prejudice beyond mere inconvenience, particularly as almost all the witness statements were disclosed about two or three years ago.¹² Furthermore, the Prosecution's Proposal is based on logistical concerns beyond its control and it has kept the Defence and participants informed of changes as soon as possible. Based on its proposal, the Prosecution will finish the presentation of its case by mid-February 2012.

IV. Conclusion

17. In light of the foregoing and the Chamber's ruling deferring its decision on whether Witnesses 15, 44 and Witness CAR-OTP-PPPP-0069 may testify after the judicial recess,¹³ the Prosecution requests that Witness 45 be allowed to testify on 9 January 2012 and undertakes to inform the Chamber as soon as possible of the [REDACTED] of Witness 36 to testify, as well as the dates and manner in which he can do so.



Fatou Bensouda, Prosecutor

Dated this 6th Day of September 2016
At The Hague, The Netherlands

¹² Similarly, on numerous occasions, the Prosecution has been inconvenienced by the Defence provision of its list of documents for examination of witnesses in violation of the three day judicial deadline, but the Prosecution has thus far refrained from requesting additional time or an order barring the the Defence from using these documents.

¹³ ICC-01/05-01/08-T-176-CONF-ENG ET, 27 October 2011, p. 5, lines 11 to 16.