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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

Defence Response to Prosecution Further Revised Submissions on Scheduling

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 2 November 2011, the Prosecution filed its Confidential *Prosecution's Response regarding the Witness Schedule*, ("Prosecution Submissions")¹ in which it (a) repeated its request that the Chamber authorise a further amendment to its witness schedule to allow Witnesses 15, 44 and 45 to testify in 2012; (b) undertook to inform the Chamber at a later stage about the availability of Witness 36; and (c) proposed that the Prosecution military expert, Witness 219, be called to give his evidence from 5 December 2011.

2. The following day, by way of an oral ruling, the Chamber ordered the Defence to respond to the Prosecution Submissions by 8 November 2011.² Pursuant to that order, the Defence makes the following submissions.

B. PROSECUTION REQUEST FOR CONFIDENTIALITY

3. The Prosecution requests that its Submissions be classified as "Confidential" on the basis that the filing "contains information regarding the personal circumstances of the witnesses and scheduling information that is known to the Defence and participants but not to the public."³

4. The Defence notes that none of the witnesses referred to in the Prosecution Submissions are protected. By contrast, information concerning their status as Prosecution witnesses has been in the public domain from as early as 2008.⁴ The Defence submits that the State Parties, and the public at large, have a legitimate interest in the scheduling of cases before the International Criminal Court. As such, the Defence submits that there is no basis for the Prosecution request for

¹ICC-01/05-01/08-1874-Conf

²ICC-01/05-01/08-T-181-CONF-ENG ET 03-11-2011 38/39

³Prosecution Submissions, para. 5.

⁴See generally, ICC-01/05-01/08-1835-Conf

confidentiality. The Defence notes that Article 64(7) of the Rome Statute safeguards the right of the accused to a public trial, a right which the Defence submits should only be curtailed when necessary and proportionate. The Defence therefore requests that the Chamber order the re-classification of both the Prosecution Submissions and the present filing as “Public”, with references to other confidential documents therein to be redacted as strictly necessary.

C. SUBMISSIONS

5. The trial of *Prosecutor v. Jean Pierre Bemba Gombo* has evidently taken considerably longer to date than anticipated at the outset. In the Defence submission, that fact cannot properly be attributed to any single cause, but rather to a combination of circumstances, such as arise in the course of all trials of this sort.⁵ In the Defence submission, seeking to attribute responsibility to any particular party, or to distribute it between the parties, is neither a scientific, nor a useful exercise. As such, the Defence does not intend herein to entertain, or engage in the kind of blame-casting contained in Prosecution Submissions, as to who is responsible for the scheduling problems which the Prosecution currently faces. The Defence respectfully submits that such arguments are irrelevant to the pertinent question; namely how the case should most efficiently and properly proceed.

6. It is worth noting, however, that those representing Mr. Jean-Pierre Bemba have, without exception, exhibited consistent flexibility to the changing witness schedule, and have never asked for additional preparation time to respond to numerous changes in the order of Prosecution witnesses, despite having experienced significant professional, personal and financial inconvenience as a result. The

⁵ The Defence notes that since the commencement of this trial there have been theoretically 231 days on which the court could have sat to hear evidence. Of those, the court has not sat at all on a total of 89 days. Disregarding days described as “court recess”, there have been 175 available days, only 135 of which have been wholly or partially used.

Defence has always been ready to do its utmost to avoid unnecessary delays in the proceedings, and will continue to do so.

7. The Defence is compelled, however, to respond to the Prosecution request that the Chamber accommodate the refusals of Witnesses 15, 44 and 45 to give evidence prior to the elections in the Democratic Republic of the Congo, and to authorise the calling of the Prosecution military expert at this stage of the Prosecution case. The Defence opposes these two proposals on the grounds set out below.

(a) Witness 69

8. As an initial point, the Defence, notes that Witness 69 receives no mention in the Prosecution Submissions. Assuming the Prosecution still intends to rely upon this evidence, enquiry ought to be made as to whether this witness could attend in the period after Witness 213, and before 16 December 2011.

(b) Witness 219: Military Expert

9. The Defence maintains that the Prosecution's proposal to call Witness 219 prior to the evidence of Witnesses 15, 36, 44 and 45 represents a "false economy", and is little more than a device to mitigate the disruption to proceedings caused by the collective attitude of witnesses 15, 44, and 45 to giving evidence in the long-anticipated sequence. Hearing the military expert before the evidence of these four significant "insider" witnesses will be detrimental to the Chamber, the parties, and the conduct of the proceedings.

10. Having originally sought to call its military expert **after** the testimony of Witnesses 15, 36, 44 and 45, the Prosecution now states that the order doesn't matter. It argues, in particular, that the remaining insider witnesses "are from the political

rather than the military wing of the *Mouvement de Libération du Congo*.”⁶ In response, it is worth examining how the Prosecution previously characterised the testimony of these witnesses, prior to its scheduling difficulties. In its *Submissions in Preparation for the Commencement of the Proceedings*, the Prosecution stated to the Chamber that Witness 36 [REDACTED]

[REDACTED]⁷ Any argument that Witness 36’s testimony is not directly relevant to the issues with which the military expert has been seized, is without merit.

11. The Prosecution represented that Witness 15 would testify, *inter alia*, as to:⁸

- Bemba’s power and authority within the MLC. Bemba was the only decision-maker on both political and military matters;
- The MLC [*sic*] were [*sic*] structured like a conventional army; [...]
- Bemba’s role as the commander in chief of the MLC army; [...]
- Bemba usually gave instructions during military operations both through the official hierarchy and directly to the field commanders;
- Bemba was informed about military operations through carnets de transmission. The witness describes the MLC communication system and the reporting system to Bemba; [...]
- MLC recruits received a military training [*sic*], including on the Geneva Conventions, and a manual was drafted but never distributed. A code of conduct existed but was not applied systematically [...]

12. The Prosecution represented that Witness 44 would testify, *inter alia*, as to:⁹

- Witness 0044 portrays Bemba as the ultimate decision maker, stressing that he was the only person who took military and political decisions within the MLC. [...]
- Bemba’s political and military leadership/ *de jure* authority. [...]
- Bemba’s unilateral decision to send troops to the CAR;

⁶Prosecution Submissions, para. 14.

⁷ICC-01/05-01/08-793-Conf-Exp-AnxC9.

⁸ICC-01/05-01/08-793-Conf-Exp-AnxC3

⁹ICC-01/05-01/08-793-Conf-Exp-AnxC12

- Bemba's overall position within the military wing, Bemba gave direct manders in the field, bypassing the MLC Chief-of-staff [REDACTED]
- Features of MLC soldiers: Uniforms; Weapons; [...]

13. The Prosecution represented that Witness 45 would testify, *inter alia*, as to: ¹⁰

- Role of Bemba as MLC chief; [...]
- Witness 0045 provides evidence on MLC's history, political and military evolution and structure; [...]
- Bemba possessed effective control over MLC's political and military apparatus, *de jure* and *de facto*; he took all political and military decisions of the MLC; [...]
- The MLC had a code of conduct which prohibited the commission of crimes against civilians. However, the code was neither respected nor applied by Bemba for fear of mutiny;
- The Witness provides evidence on Bemba's actions in releasing and promoting some of the MLC officers who had been found guilty and sentenced to terms of imprisonment by court-martial [...]

14. In order to demonstrate how the proposed testimony of Witnesses 15, 36, 44, and 45 is inextricably linked to that of the military expert, it is only necessary to look at the very first question the military expert has been asked by the Prosecution to answer. The Prosecution tasked the expert with:

“[p]roviding an overview of the military structure of the *Mouvement de Libération du Congo* (“MLC”) during the year 2002-2003 in the CAR. Identify its leadership, chain of command, and how the leadership exercised command and control. Identify how orders were transmitted, and the training of MLC soldiers underwent *[sic]*.”

15. As such, the Prosecution's current position that the testimony of these witnesses relates more to the political rather than the military aspects of the trial is difficult to attribute to anything other than a desire to use Witness 219 to plug the gaps in the judicial calendar. It appears, in fact, that these witnesses have as much,

¹⁰ICC-01/05-01/08-793-Conf-Exp-AnxC13

or more, to say on the military structure and operations of the MLC than those previously called.

16. In order to explain the difficulties and prejudice which may result in hearing the military expert on 5 December 2011, the Defence invites the Chamber to consider the following example. Witness 219 represents that he has considered, *inter alia*, Witness 36's written statements in the preparation of his report.¹¹ Given the Appeals Chamber's Judgement of 3 May 2011, these statements are no longer in evidence in the present proceedings.¹² Should Witness 36 testify after the military expert and give evidence that differs in whole or part from his written statements, not only will the basis for the military expert's report be undermined, but the parties may well wish to re-examine the expert on the changes in Witness 36's testimony. When viewed practically, the only solution would be to hear the military expert after the testimony of the relevant witnesses, as originally proposed by the Prosecution.

17. In maintaining its objection, the Defence is not commenting on Prosecution trial strategy, nor is it merely "expressing a preference"¹³ as to the order of witnesses. In addition to the real possibility of the need to recall the military expert, the Defence also submits that hearing his testimony before that of the relevant insiders may expose the admissibility of his proposed evidence to an objection on grounds of unreliability, given that he would not have the benefit of all relevant evidence. As demonstrated by a wealth of practice in previous international criminal trials, (and as the Prosecution itself acknowledged before it experienced scheduling problems),¹⁴ a military expert will be of most assistance, to the Chamber in determining the relevant issues of command and control if he can comment on the relevant evidence which is before the Chamber.

¹¹CAR-OTP-0064-0551

¹²ICC-01/05-01/08-1386 OA5 OA6

¹³ Prosecution Submissions, para. 13.

¹⁴ Prosecution Submissions, para. 14.

(b) Witnesses 15, 44, and 45

18. The Defence is aware that should the Chamber accept the above arguments against hearing the military expert before Witnesses 15, 36, 44 and 45, this will leave more gaps in the current sitting schedule. However, the Defence position is that these gaps should more properly be filled by the testimony of the “insider” witnesses, rather than calling the military expert out of turn.

19. The Defence also does not accept that the reasons proffered by the Prosecution for the failure of Witnesses 15, 44 and 45 to appear before the Chamber in 2011 are sufficient to warrant such significant gaps in the proceedings. The Prosecution argues that these witnesses are [REDACTED] [REDACTED],¹⁵ prior to the election which are scheduled for 28 November 2011. The Defence reiterates its position that [REDACTED] does not justify either delays in the proceedings, or the premature calling of the military expert.

20. In any event, should the Chamber decide it is appropriate that these witnesses prioritise [REDACTED] the Prosecution itself notes that the elections will be held on 28 November 2011.¹⁶ As such, the Defence submits that at least one, or even two of these witnesses could be brought between the elections and the judicial recess on 16 December 2011.

(c) Remainder of the Prosecution case

The Defence finally reiterates its request that the Chamber sets a date by which the Prosecution must close its case, regardless of whether it has been able to secure the attendance of its witnesses. On this point, the Defence is greatly concerned by a witness schedule which has at its base the process of elections and [REDACTED]

¹⁵ Prosecution Submissions, para. 9 – 11.

¹⁶ Prosecution submissions, para. 9.

[REDACTED] The dates set out in the Prosecution Submissions, as historical experience demonstrates, can only be merely theoretical. The idea that the [REDACTED]

[REDACTED] In the Defence submission, even if [REDACTED] elections does justify the postponement of a witness' testimony, that justification will cease to exist after 28 November this year, and it would be abhorrent to any system of criminal justice to permit witnesses to have an open-ended licence to delay their testimony to a date when the political situation made it more attractive to them to attend.

21. Clear deadlines as to when the Prosecution must close its case would prevent the trial process from becoming subject to uncertain delays arising from events beyond the Chamber's control. It would also avoid the concrete prejudice which would arise should the accused continue to be incarcerated as a result of inefficient and/or unrealistic scheduling. It would also be of great assistance to the Defence, who would be in a better position efficiently to plan and prepare for the presentation of its own case, in that event.

D. RELIEF SOUGHT

22. For the above reasons, the Defence requests that the Chamber:

REJECTS the Prosecution request for authorisation to present the evidence of Witnesses 15, 44 and 45 after the judicial recess;

REJECTS the Prosecution request to call Witness 219 on 5 December 2011 or in any event before Witnesses 15, 36, 44 and 45;

ORDER the Prosecution to provide information as to the availability of Witness 69 to testify in the period between the end of Witness 213 and 16 December 2011;

SETS a date by which the Prosecution must complete the presentation of its evidence.



Aimé Kilolo Musamba
Associate Counsel

Done at The Hague, the Netherlands

8 November 2011