

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/05-01/08
Date: 11 October 2010

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

**Legal Representative's Observations on the potential submission into evidence of
the prior recorded statements of Prosecution witnesses testifying at trial**

Source: Office of Public Counsel for Victims, as Legal Representative of Victims
a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08,
a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08,
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a/0432/09, a/0511/08, a/0512/08, a/0513/08, a/0515/08, a/0516/08, a/0562/08, a/0563/08,
a/0564/08, a/0565/08, a/0566/08, a/0567/08, a/0568/08, a/0569/08, a/0570/08, a/0571/08,
a/0572/08, a/0651/09, a/0652/09 and a/0653/09

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

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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

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Registrar & Deputy Registrar

Mrs. Silvana Arbia & Mr. Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Procedural Background

1. On 4 October 2010, the Chamber issued an “Order for submissions on the presentation of evidence at trial”, requesting the parties and participants to give their observations on the submission into evidence of the statements given by the witnesses the Prosecution intends to call at trial (the “Chamber’s Order”)¹.

2. Following the Chamber’s Order, the Principal Counsel of the Office of Public Counsel for Victims (the “OPCV”), acting as Legal Representative of victims a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08, a/0467/08, a/0130/09, a/0131/09, a/0132/09, a/0133/09, a/0134/09, a/0135/09, a/0136/09, a/0137/09, a/0138/09, a/0139/09, a/0141/09, a/0427/09, a/0432/09, a/0511/08, a/0512/08, a/0513/08, a/0515/08, a/0516/08, a/0562/08, a/0563/08, a/0564/08, a/0565/08, a/0566/08, a/0567/08, a/0568/08, a/0569/08, a/0570/08, a/0571/08, a/0572/08, a/0651/09, a/0652/09 and a/0653/09 (the “Legal Representative”)², respectfully submits her observations with regard to this issue.

II. Observations on the submission into evidence of the prior recorded statements of Prosecution witnesses testifying at trial

3. The Legal Representative notes that, with regard to the application of the principle of fair and expeditious proceedings, she does not believe that the admission into evidence of the prior recorded witness statements of each and every Prosecution witness called at trial, in addition to their oral testimonies, would facilitate the expeditious conduct of the proceedings. On the contrary, the Legal Representative

¹ See the “Order for submissions on the presentation of evidence at trial” (Trial Chamber III), No. ICC-01/05-01/08-921, 4 October 2010.

² See the “Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties’ observations on applications for participation by 86 applicants” (Trial Chamber III), No. ICC-01/08-01/05-699, 22 February 2010; see also the “Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings” (Trial Chamber III), No. ICC-01/05-01/08-807 and No. ICC-01/05-01/08-807-Conf-Exp-AnxA, 30 June 2010.

submits that although such statements can serve in the preparation of the trial, systematically admitting them into evidence would considerably and unjustifiably overburden and slow down the trial itself. Indeed, notwithstanding the fact that these statements may be used as a tool by the parties, participants and the Chamber to prepare the questioning of witnesses in the course of the trial, article 69(2) of the Rome Statute mandates that the core evidence from that witness come from his or her “live” testimony (whether it is given at the seat of the court or *via* video/audio technology). In this matter, said live testimony is thus subjected to the questioning and scrutiny by the parties, the participants and the Chamber³. Therefore, the aim of the adversarial system involving questioning of witnesses renders the systematic admission into evidence of witness statements not only superfluous but generally unnecessary and not helpful.

4. In addition, certain information contained in witness statements may be later adduced by the Chamber as irrelevant and inadmissible testimony during the trial, which would be inconsistent with the previous evidentiary ruling to admit said witness statements into evidence.

³ Article 69-2 of the Rome Statute states as a general principle that the testimony of a witness at trial shall be given in person. According to this article, this principle applies except to the extent provided by article 68 (protection of victims and witnesses) and by the measures set forth in the Rules of Procedure and Evidence. In this regard, rule 68 enounces that the introduction of a witness' prior recorded testimony can be allowed by the Trial Chamber in two circumstances only: either if the witness concerned is not present at trial and if both the Prosecution and the Defence had the opportunity to examine him or her during the recording, or if the witness concerned is present at trial and does not object to the submission of his/her previously recorded testimony and the Prosecution, the Defence and the Chamber will have the opportunity to examine him/her during the proceedings. See also the “Decision on the prosecution's application for the admission of the prior recorded statements of two witnesses” (Trial Chamber I), No. ICC-01/04-01/06-1603, 27 January 2009 (dated 15 January 2009), par. 21: “*Depending on the circumstances, there can be material advantages in testimony being given in its entirety viva voce before the Court, particularly when evidence of significance is challenged or requires comprehensive investigation. The live questioning of a witness in open court on all aspects of his or her evidence can have a material impact on the Chamber's overall assessment of the evidence, since oral testimony is, for obvious reasons, of a different nature to a written statement: most importantly the evidence can be fully investigated and tested by questioning, and the Court is able to assess its accuracy, reliability and honesty, in part by observing the conduct and demeanour of the witness.*”

5. Moreover, the Legal Representative underlines the existence of specific criteria regarding evidence generally, in accordance with articles 64 and 69(3) and (4) of the Rome Statute and rules 63 and 64 of the Rules of Procedure and Evidence. Pursuant to these provisions, the Chamber shall verify that such evidence is necessary for the determination of the truth, that the trial is conducted in a fair and expeditious manner and that the appropriate balance is struck between the *prima facie* probative value of the evidence and the possibility that this evidence would impede the fairness of the trial or the fair assessment of the witness testimony⁴.

6. In this context, the Legal Representative finally submits that, should the Chamber deem it appropriate to have the written statements of witnesses admitted into evidence in addition to their oral testimony at trial, she advocates such a scenario only in exceptional circumstances when the Chamber considers it necessary in its determination of the truth⁵.

7. The Legal Representative submits that such an approach is in direct line with the legal texts of the Court, in particular with article 69(2) of the Rome Statute and rule 68 of the Rules of Procedure and Evidence. In accordance with rule 68 in particular, the Legal Representative can envision a scenario where the Chamber may wish to exceptionally admit into evidence the prior recorded written statement along with the oral testimony of the witness. Such scenario may arise when the protection and privacy of the witness needs to be guaranteed, when such admission would avoid unnecessarily repeating the witness' evidence once it has been recorded or when it could expedite the proceedings⁶. In those circumstances, Trial Chamber I

⁴ See in this regard the "Decision on the prosecution's application for the admission of the prior recorded statements of two witnesses" (Trial Chamber I), No. ICC-01/04-01/06-1603, 27 January 2009 (dated 15 January 2009), paras. 20 to 23 and 27 to 31.

⁵ In this regard, the Legal Representative recalls the core principle according to which the "Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth". See article 69(3) of the Rome Statute.

⁶ See *supra* note 4, par. 22.

found that prior recorded testimony could replace live testimony in full or *in part*⁷. The Legal Representative further submits that questioning of witnesses in those specific instances could theoretically be limited to what is only necessary and not involve a full questioning of the witness at trial.

⁷ *Idem*, par. 20. See also for instance the “Decision on Prosecutor’s request to allow the introduction into evidence of the prior recorded testimony of P-166 and P-219” (Trial Chamber II), No. ICC-01/04-01/07-2362, 3 September 2010. These decisions confirm the approach taken by the other trial chambers of the court not to admit generally all prior recorded statements as evidence at the beginning of the trial but rather admit some or parts of them in the course of the trial.

FOR THE ABOVE-MENTIONED REASONS, the Legal Representative of victims a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08, a/0467/08, a/0130/09, a/0131/09, a/0132/09, a/0133/09, a/0134/09, a/0135/09, a/0136/09, a/0137/09, a/0138/09, a/0139/09, a/0141/09, a/0427/09, a/0432/09, a/0511/08, a/0512/08, a/0513/08, a/0515/08, a/0516/08, a/0562/08, a/0563/08, a/0564/08, a/0565/08, a/0566/08, a/0567/08, a/0568/08, a/0569/08, a/0570/08, a/0571/08, a/0572/08, a/0651/09, a/0652/09 and a/0653/09 respectfully submits to the Chamber that the admission into evidence of the prior recorded witness statements of each and every witness called by the Prosecution at trial would not be in favour of the expeditious conduct of the proceedings in accordance with article 64(2) of the Rome Statute, and as such, she recommends that said witness statements be admitted into evidence, in addition to live testimony, only in exceptional circumstances as delineated above.



Paolina Massidda
Principal Counsel

Dated this 11 October 2010

At The Hague, The Netherlands