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No.: **ICC-01/05-01/08**
Date: **3 November 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 Document

**Defence Observations on the VWU Unified Protocol on Practices for Witnesses
Giving Testimony at Trial**

Source: Defence team of Mr Jean-Pierre Bemba Gomba

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

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A. PROCEDURAL BACKGROUND

1. The Prosecution case in the present proceedings is scheduled to commence on 22 November 2010.¹
2. On 25 October 2010, the Victims and Witnesses Unit ('VWU') filed its 'Victims and Witnesses' Unit's Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial.'²
3. By way of an email on 28 October 2010, the Chamber ordered that any observations to the VWU unified protocol be filed by 3 November 2010. Pursuant to this order, the Defence makes the following submissions:

B. SUBMISSIONS

4. The Defence does not object to the terms of the VWU Protocol, subject to the observations below, as it applies during the Prosecution case. The Defence reserves the right to revisit the terms of this protocol, and make additional submissions on its application prior to the commencement of the Defence case. At this stage, however, the Defence limits its observations to the points discussed briefly below.

(a) Scheduling of Witnesses

5. Paragraphs 13 to 19 of the VWU Protocol address the scheduling of witnesses. In particular, VWU notes:³

"Notwithstanding the prerogative of the entity calling the witness to determine both the order and the scheduling of witnesses, the VWU strongly recommends

¹ ICC-01/05-01/08-T-30-ENG ET WT 21 October 2010, p. 4.

² ICC-01/05-01/08-972-Anx, 25 October 2010.

³ ICC-01/05-01/08-972-Anx, 25 October 2010, paras. 15, 16.

avoiding unnecessary waiting times or last minute changes to the schedule of witness appearance for the benefit of the witness well-being. The VWU emphasizes the fact that the practice of standby witnesses is not only extremely resource-intensive but can also significant impact on a witness's well-being due to the unpredictable waiting times and the constant pressure of being prepared to give testimony. For this reason, the VWU strongly recommends to have one stand-by witness only ready to testify by the time the preceding witness is scheduled to finish giving testimony."

6. The Defence not only agrees with but actively endorses these submissions. In the light of these observations the defence would support the implementation by the Chamber of concrete procedures to effect these objectives. In the submission of the defence, the practice during the prosecution phase of the trial should be as follows :
 - a. That by no later than close of business on the 15th day of each calendar month, the prosecution should file a notice containing a list of the witnesses it proposes to call in the following month;
 - b. That the notice should contain an estimate of the amount of time which the prosecution requires to examine each witness together with a list of the documents it is proposed that the witness should refer to in evidence;
 - c. That, additionally, the prosecution should file each week by close of business on Thursday, a notice containing a list of the witnesses it proposes to call in the following week, the said list containing revised time estimates for examination for each, and list of exhibits intended to be used.
 - d. That by close of business on Friday, each party who proposes to examine any witness on the prosecution's weekly list, should indicate the amount of time required for its examination.

7. Such a system would be beneficial to all parties intending to question the witnesses in order to allow efficient planning and division of work. It would also be beneficial to the witnesses themselves as VWU could more accurately plan and facilitate which witnesses should be on 'stand-by', and which witnesses could be engaged in other activities. It would also assist the Chamber, being charged with the efficient running of the trial, to have a regular and updated indication of the upcoming witnesses. Of course, the Defence is well aware that unexpected changes which are outside the hands of a party may inevitably cause schedules to be changed during the course of the trial weeks. However, a concerted attempt to give sufficient prior notice of witness scheduling will, the Defence submits, be beneficial to all those involved in the present proceedings, not least the witnesses themselves.

(b) Joint Housing of Prosecution Witnesses

8. Paragraph 36 of the VWU Protocol provides as follows:

"Wherever possible, VWU will arrange for witnesses to be accommodated jointly at the location of testimony. This practice benefits the well-being of the witnesses. Sharing the same accommodation will allow witnesses to stay together with individuals from the same cultural background and thus allow them to communicate in their own language about the more general experiences of travelling abroad..."

9. No explicit distinction is made between the housing of witnesses prior to their testimony, and the housing of those witnesses who have commenced or completed their testimony. The Defence submits that if VWU does indeed intend to separate witnesses who have commenced or completed their

testimony from other Prosecution witnesses in this case, then the Defence has no objection to the proposed procedure.

10. If, however, VWU intends to house witnesses together after one or more of them has started their testimony, the Defence reiterates the position expressed during the Status Conference of 24 September 2010,⁴ and requests that the Chamber order that in general, witnesses who have started testifying be separated from those who have not.
11. Alternatively, the Defence invites the situation to be reviewed on a case-by-case basis, having particular regard to the possibility of the tainting of evidence by contact during and after testimony. The entity calling should be careful not to bring witnesses to the Hague at the same time witnesses who are expected to testify about the same or similar facts, and should be under an obligation to alert the VWU of the dangers of accommodating together certain witnesses (for example, where they are said to corroborate each other). The problem will be the more easy to anticipate if the protocol for the scheduling of witnesses, suggested above, is implemented.

(c) Provision of Materials to Witnesses

12. The Defence has no particular observation to make about the amount of material which is provided to a witness in advance of his/her testimony as referred to in the observations of the VWU at paragraphs 81-98 of its protocol. The defence however, submits that it is desirable that a proper record is kept of all material provided to a witness prior to his testimony, and that the same be disclosed to all parties well in advance of the hearing of the witness 'evidence.

⁴ ICC-01/05-01/08-T-25-CONF-ENG ET 24 September 2010 , p. 35, 36.

13. This procedure is most fair to the witness and will prevent any disagreement during the course of examination of the witness as to what he or she has seen prior to giving evidence.
14. Clarity as to this issue is equally important during examination by the “entity calling”(should there be for example an application to treat a witness as adverse or hostile), as it is during examination by any other party (where there may be a suggestion that the witness is inconsistent or has adopted an averment from something read).
15. In relation to the procedure to be adopted in the case of a witness who cannot read (paragraph 96 of the Protocol), it is submitted that the involvement of the entity calling in such a process is inconsistent with the general scheme of the protocol, and that any assistance merely in reading statements or supporting documents should come in the first instance at least from the VWU. A request that the entity calling be involved should require good cause to be shown why this further assistance is deemed necessary.

C. REQUESTED RELIEF

16. For the reasons set out above, the Defence respectfully requests that the Chamber:

ORDER that the parties circulate (a) monthly schedules for the appearance of witnesses; and (b) revised weekly schedules for the appearance of witnesses in the terms set out above



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Dated this 3 November 2010
At The Hague, The Netherlands