

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 28 September 2012

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

Public redacted version of "Decision on the "Third Defence Submissions on the Presentation of its Evidence" of 6 July 2012

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

The Office of the Prosecutor

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Counsel for the Defence

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Legal Representatives of the Victims

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Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber III ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court") in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* ("Bemba case") issues the following Decision on the "Third Defence Submissions on the Presentation of its Evidence" ("Decision").

I. Background and submissions

1. At an *ex parte* status conference, held on 10 May 2012 at the request of the defence,¹ the Chamber was informed of a series of issues faced by the defence in its preparation for the presentation of evidence. Consequently, the Chamber requested that defence provide detailed information on the witnesses it intended to call to testify at trial.²
2. On 11 May 2012, the defence filed its confidential *ex parte* "Defence submissions to the Chamber concerning its witnesses" ("First Defence Submission"),³ together with a table of witnesses contained in Annex A to that filing.
3. On 24 May 2012, the Chamber issued its "Decision on the starting date of the defence presentation of evidence and related issues" ("24 May 2012 Decision"),⁴ wherein, *inter alia*, it decided that the presentation of evidence by the defence would commence on 14 August 2012 at 9h30 and instructed the defence to provide the Chamber with further information regarding each of the anticipated defence witnesses.⁵

¹ Decision on the "Defence request for an *ex parte* status conference", 8 May 2012, ICC-01/05-01/08-2213.

² Transcript of the hearing on 10 May 2012, ICC-01/05-01/08-T-226-CONF-EXP-ENG ET, page 18 line 25 to page 19 line 4. Complemented by email sent from the Chamber's Assistant Legal Officer to the defence's Legal Assistant on 11 May 2012 at 10h45.

³ Defence submissions to the Chamber concerning its witnesses, 11 May 2012, ICC-01/05-01/08-2214-Conf-Exp and Confidential *ex parte* Annex ICC-01/05-01/08-2214-Conf-Exp-AnxA.

⁴ Decision on the starting date of the defence presentation of evidence and related issues, 24 May 2012, ICC-01/05-01/08-2221.

⁵ ICC-01/05-01/08-2221, paragraph 16.

4. On 28 May 2012, in compliance with the 24 May 2012 Decision, the defence filed its *Confidential Ex parte, defence and VWU only* "Submissions on Defence Evidence" ("Second Defence Submission"),⁶ together with detailed information on its proposed witnesses contained in Annex A to that filing.

5. On 7 June 2012, the Chamber issued its "Decision on the 'Submissions on Defence Evidence'" ("7 June 2012 Decision"),⁷ wherein, *inter alia* it (i) granted the defence the requested total of 230 hours for the questioning of its witnesses, to be used in the most efficient manner possible and within a time-frame of eight months; (ii) instructed the defence to review its list in order to determine whether there was any room for reducing the number of witnesses, avoiding the presentation of overly repetitive evidence and focusing on truly contentious issues falling strictly within the confirmed charges against the accused; (iii) ordered the defence to adjust the order of appearance of its witnesses so as to start with the testimony of the proposed expert witnesses, followed by those witnesses that were in possession of, or did not face obstacles in obtaining, travel documents; and (iv) ordered the defence, the VWU and the Registry to assess the feasibility of various alternatives to live testimony in The Hague and to inform the Chamber accordingly by no later than 29 June 2012.

6. On 29 June 2012, the defence filed its confidential *ex parte Defence and VWU only* "Third Defence Submissions on the Presentation of its Evidence" ("Third Defence Submission"),⁸ together with two annexes, Annex A

⁶ Submissions on Defence Evidence, 28 May 2012, ICC-01/05-01/08-2222-Conf-Exp, with Annex A ICC-01/05-01/08-2222-Conf-Exp-AnxA.

⁷ Decision on the "Submissions on Defence Evidence", 7 June 2012, ICC-01/05-01/08-2225.

⁸ 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 ICC-01/05-01/08-2238-Conf-Exp-AnxA and ICC-01/05-01/08-2238-Conf-Exp-AnxB.

("Annex A") and Annex B ("Annex B") corresponding to two different proposed orders of appearance of the defence's anticipated witnesses.

7. In the Third Defence Submission, the defence alleges that in its 7 June 2012 Decision the Chamber did not specify a "compelling reason" for altering the order of witnesses proposed by the defence and that it did not give a "reasoned opinion" justifying its order.⁹ The defence states that the VWU "did not necessarily anticipate obstacles with calling the witnesses in the order in which they appeared in the defence list",¹⁰ and that therefore there is "no compelling reason for the re-ordering of its witnesses."¹¹ Nevertheless, although reiterating its request to call its witnesses in the initial order indicated in Annex A, the defence submits in Annex B a proposed order of its first twenty-one witnesses in accordance with the Chamber's order in the 7 June 2012 Decision.
8. In relation to the Chamber's instruction for the defence to review the possibility of reducing its list of witnesses, the defence argues that "it should not be prevented from presenting corroborative testimony of the issues which go to the heart of the accusations against Mr Bemba"¹² and that "repetition or overlap in evidence does not constitute a sufficient basis for excluding a witness if his evidence is corroborative of another witness so as to render both testimonies more compelling."¹³ In addition, the defence informs the Chamber that, since the Second Defence Submission, it has been able to locate four additional witnesses that it wishes to add to its original list, and provides the Chamber with the relevant information for each of the proposed additional witnesses.¹⁴

⁹ ICC-01/05-01/08-2238-Conf-Exp, paragraph 8.

¹⁰ ICC-01/05-01/08-2238-Conf-Exp, paragraph 13.

¹¹ *Ibid.*

¹² ICC-01/05-01/08-2238-Conf-Exp

¹³ *Ibid.*

¹⁴ ICC-01/05-01/08-2238-Conf-Exp, paragraphs 18-30.

9. Finally, the defence expresses its “overriding preference for the presentation of live evidence from its witnesses in The Hague”¹⁵ and submits (i) that the presentation of testimony via video-link should be used only as an exceptional measure and not as a tool for facilitating the testimony of whole groups of witnesses in particular regions;¹⁶ (ii) that it does not agree to the testimony of defence witnesses being presented in accordance with Rule 68(a) of the Rules of Procedure and Evidence (“Rules”);¹⁷ and (iii) that it does not object, in principle, to hearings being held *in situ*, on the condition that this procedure would not interfere with Mr Bemba’s rights to weekly family visits and privileged communication with his counsel throughout the course of the hearings.¹⁸

10. On 29 June 2012, the Registrar submitted a “Report to the Chamber pursuant to the Chamber’s ‘Decision on the Submissions on defence Evidence’ dated 7 June 2012” (“VWU Submission”).¹⁹ The defence, which was notified of this report, did not file any observations in response.

11. In the VWU Submission, the Registrar reiterates that the VWU will be able to take concrete steps with the relevant authorities only on the basis of a finalised and approved order of appearance of witnesses. Only after concrete steps have been taken, will the VWU have a better idea of the level of difficulty in bringing all the proposed witnesses for testimony at the seat of the Court.²⁰ Nevertheless, the Registrar updates the Chamber of the following preliminary steps which have been taken:

¹⁵ ICC-01/05-01/08-2238-Conf-Exp, paragraph 32.

¹⁶ ICC-01/05-01/08-2238-Conf-Exp, paragraph 33.

¹⁷ ICC-01/05-01/08-2238-Conf-Exp, paragraph 34.

¹⁸ ICC-01/05-01/08-2238-Conf-Exp, paragraphs 35-36.

¹⁹ Report to the Chamber pursuant to the Chamber’s ‘Decision on the Submissions on defence Evidence’ dated 7 June 2012, 29 June 2012, ICC-01/05-01/08-2239-Conf-Exp.

²⁰ ICC-01/05-01/08-2239-Conf-Exp, paragraph 15.

- (i) In relation to the proposed witnesses located in REDACTED who do not have travel documents, general enquiries have been made with the REDACTED as to the possibility of these proposed witnesses obtaining REDACTED. The Registrar informs the Chamber that the information provided by REDACTED suggests that, in order to obtain such a document, each person must first be REDACTED, which could take up to six months.²¹

- (ii) In relation to the proposed witnesses located in REDACTED, the Registry indicates that although the situation is closely similar to that of those in REDACTED, it appears to be the most complex in relation to the witnesses' appearance at the seat of the Court. The Registrar suggests, as an option to be explored with the defence, REDACTED or, as a last resort, REDACTED.²²

- (iii) In relation to the proposed witnesses located in REDACTED, the Registrar affirms that it will be able to provide REDACTED. In addition, the Registrar informs the Chamber that in relation to those witnesses not in possession of passports, these can be requested REDACTED.²³

- (iv) In relation to other proposed witnesses, the Registrar informs the Chamber that it does not foresee considerable impediments to obtaining travel documents for them.²⁴

12. As regards alternatives to live testimony, the Registrar informs the Chamber that video-link testimony could be arranged from REDACTED

²¹ ICC-01/05-01/08-2239-Conf-Exp, paragraph 17.

²² ICC-01/05-01/08-2239-Conf-Exp, paragraph 19.

²³ ICC-01/05-01/08-2239-Conf-Exp, paragraph 20.

²⁴ ICC-01/05-01/08-2239-Conf-Exp, paragraph 21.

However, in relation to REDACTED the possibilities are more limited since REDACTED.²⁵

13. In relation to the possibility of holding *in situ* hearings, and after analysing the feasibility of holding such hearings in the various countries in which the proposed witnesses are located, the Registrar suggests considering the possibility of holding *in situ* hearings at the seat of the International Criminal Tribunal for Rwanda in Arusha, Tanzania. However, the Registrar submits that the main challenge with this option remains that concerned defence witnesses will have to be moved from their current location to Arusha.²⁶

II. Relevant provisions

14. In accordance with Article 21(1) of the Statute, the Chamber, in making its determination, has considered Articles 64(2), (6)(f), (8)(b) and (9)(a) and (b), 67(1)(b), (c), (e), and (i), 68, 69(2), (3), and (4) and 82(1)(d) of the Statute, Rules 16, 17, 18, 20, 63, 67, 86, 100, 134(3), 140 and 155 of the Rules, and Regulations 29, 43, 44(5) and 54 of the Regulations of the Court ("Regulations").

III. Analysis

Order of witnesses to be called by the defence

15. The defence submits that in its 7 June 2012 Decision the Chamber failed to provide a "compelling reason" or a "reasoned opinion" for altering the order of witnesses proposed by the defence.²⁷ The Chamber firmly

²⁵ ICC-01/05-01/08-2239-Conf-Exp, paragraphs 4-5.

²⁶ ICC-01/05-01/08-2239-Conf-Exp, paragraphs 10-13.

²⁷ ICC-01/05-01/08-2238-Conf-Exp, paragraph 8.

underscores that under the Court's legal framework – particularly under Articles 64(2), (6)(f), (8)(b) and (9)(a) and (b), 67(1)(c), 69(3) and (4) of the Statute, Rules 63(2) and 140(1) of the Rules and Regulations 43 and 54 of the Regulations – in the interests of justice, and in order to ensure the efficient presentation of evidence and that the trial is fair and expeditious, the Trial Chamber and its Presiding Judge are fully empowered to decide upon the scope of the evidence to be presented by the parties, the length of questioning of witnesses and the number, identity and order of witnesses to be called by the parties.

16. Notwithstanding the inherent powers identified above, the Chamber has expressed its preference for not interfering with the parties' presentation of evidence unless there is a compelling reason to do so.²⁸ In the case at hand, the Chamber has given the defence ample scope to determine the length and scope of its presentation of evidence and only when it found that there were compelling reasons for intervention did it decide to change the order of appearance of the witnesses to be called by the defence. In the view of the Chamber, the reasons for intervention are self-evident and recorded throughout the proceedings.

17. Indeed, at the *ex parte* Status Conference held on 10 May 2012, the Registry already stated that concrete steps in relation to organising the defence presentation of evidence would only be taken once a finalised and approved order of appearance of witnesses was provided.²⁹ In addition, although the defence affirmed several times that it would be ready to begin its presentation of evidence in July-August 2012,³⁰ by May 2012

²⁸ Decision Regarding the prosecution's witness schedule, 11 November 2011, ICC-01/05-01/08-1904-Conf, paragraph 25.

²⁹ ICC-01/05-01/08-T-226-Conf-Exp-Eng, at page 20 lines 2 to 8.

³⁰ Defence observations pursuant to the Chamber's order postponing the status conference, 5 March 2012, ICC-01/05-01/08-2152-Conf-Red, paragraph 9 (anticipating being able to start on 1 July 2012); Submissions concerning the scheduled Status Conference on the presentation of Defence evidence, 26 March 2012, ICC-01/05-01/08-2175-Conf-Red, paragraph 10 (seeking to push the date of commencement back to 15 July 2012);

almost half of the defence's proposed witnesses – indeed the *first* half of the witnesses in the defence's proposed order of appearance – still did not have passports or the ability to obtain them.³¹

18. Furthermore, the concerns of the Chamber that led to the 7 June 2012 Decision have been confirmed by the latest VWU Submission, which provides that for those witnesses without travel documents residing in REDACTED to be able to obtain travel documents, they would first need to REDACTED, which could take up to six months.³² Although this is only preliminary information related to procedures that do not fall under the control of the Chamber or the VWU, given the uncertainty that this information creates, the Chamber finds that to date there are compelling reasons for altering the order of witnesses proposed by the defence.

19. Further, if the defence was of the view that the 7 June 2012 Decision involved an issue affecting the fairness and expeditiousness of the proceedings, pursuant to article 82(1)(d) of the Statute and Rule 155(1) of the Rules, it should have filed an application for leave to appeal within five days of being notified of the decision.³³ In addition, the Chamber would like to stress that it will not reconsider its 7 June 2012 Decision in the absence of new information or circumstances and without a compelling reason for doing so.

20. In view of the foregoing, in the interests of justice and in order to ensure the efficient presentation of evidence and that the trial is fair and

and ICC-01/05-01/08-T-226-Conf-Exp-Eng, at page 14 line 6 (seeking to push the date of commencement back to August 2012).

³¹ ICC-01/05-01/08-2214-Conf-Exp-AnxA.

³² ICC-01/05-01/08-2239-Conf-Exp, paragraph 17.

³³ See Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", 8 October 2010, ICC-01/04-01/06-2582, paragraph 48.

expeditious, and given that the defence has only submitted an incomplete list detailing the order of appearance of its witnesses (Annex B), the Chamber hereby decides to hear the evidence of defence witnesses in the order detailed in Annex A to the present Decision, which follows the initial order proposed by the defence in Annex B.

Number of witnesses to be called by the defence

21. After reviewing the information submitted in relation to the four additional witnesses the defence wishes to call and taking into consideration that the final deadline for the defence to provide its list of proposed witnesses will expire on 13 July 2012,³⁴ the Chamber approves, on an exceptional basis, the inclusion of these four witnesses in the defence's list.

22. Notwithstanding the above, and taking into consideration that the total time granted to the defence for its presentation of evidence is 230 hours,³⁵ the Chamber orders the defence to adjust the questioning time of its witnesses in order not to exceed the total number of hours granted by the Chamber.

Expert evidence

23. The Chamber notes that, according to the defence, the linguistic expert identified by the defence may not be able to complete its report by the set deadline or testify before the Court in August.³⁶ However, the Chamber has not been seized of a proper request for variation of the deadline for disclosure of all experts' reports pursuant to Regulation 35 of the

³⁴ ICC-01/05-01/08-2221, paragraph 12(c).

³⁵ ICC-01/05-01/08-2225, paragraph 10.

³⁶ ICC-01/05-01/08-2238-Conf-Exp, paragraph 11.

Regulations. In the absence of such a request, the 13 July 2012 deadline for disclosure of all experts' reports, as set out in the 24 May Decision,³⁷ applies.

Handing over of witnesses from the defence into the care of the VWU

24. Given that the Chamber approves the list of witnesses to be called by the defence and decides on their order of appearance, as set out in annex A of the present Decision, the Chamber orders the defence and the VWU to start the preparation phase for witnesses to testify at trial³⁸ as soon as possible. This will enable the VWU to begin making the necessary arrangements to facilitate the witness's travel for the purposes of giving testimony.
25. The Chamber instructs the Registry and the VWU to initiate as soon as possible all practical arrangements necessary in order to ensure the efficient and continuous presentation of evidence by the defence within the time frame of eight months authorised for the defence's presentation of evidence.
26. The VWU should keep the Chamber regularly informed and should in particular make the Chamber aware, as early as possible, of any problems that may be encountered in ensuring the appearance of witnesses.

Alternatives to live testimony at the seat of the Court

³⁷ ICC-01/05-01/08-2221, paragraph 13.

³⁸ As defined in the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, *see* Victims and Witness Unit's amended version of the "Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial" submitted in 22 October 2010, 7 December 2010, ICC-01/05-01/08-1081-Anx, paragraphs 5 to 12.

27. The Chamber is mindful of and shares the defence's preference for the testimony of its witnesses to be presented live at the seat of the Court. The Chamber recalls that one of the criteria for determining whether or not a witness should be allowed to give video-link testimony is the witness's personal circumstances and that "[a]lthough personal circumstances have thus far been interpreted as linked to the well-being of a witness, the Chamber is not confined by the Statute in considering other types of personal circumstances which might justify a witness testifying by means of audio or video technology."³⁹ In line with this approach and in the interests of justice, the Chamber hereby stresses that it will exercise the full extent of its powers whenever necessary in order to ensure an efficient presentation of evidence and a fair and expeditious trial.

28. In view of the foregoing, the Chamber orders the Registry to continue with its consultations and feasibility, security and budgetary assessments, in order to determine whether it would be possible to hear the testimony of witnesses via video-link from REDACTED. These assessments should take into consideration the possibility that, in relation to the witnesses currently residing in REDACTED, the process for obtaining travel documents may take longer than expected or fail, and that in relation to the witnesses residing in REDACTED, they may not be able to obtain REDACTED.

29. By the same token, the Chamber orders the Registry to carry out consultations and feasibility, security and budgetary assessments as regards *in situ* hearings at the seat of the of the International Criminal Tribunal for Rwanda in Arusha, Tanzania. This assessment should consider whether it would be easier for proposed witnesses to travel to Tanzania than to The Hague and bear in mind the fact that Mr Bemba

³⁹ Decision on the "Request for the conduct of the testimony of witness CAR-OTPW-0108 by video-link", 12 October 2010, ICC-01/05-01/08-947-Red, paragraph 13.

would remain in detention in The Hague, and therefore, privileged communication with his counsel throughout the course of the hearings would have to be ensured.

30. In addition, the Registry is hereby instructed to submit reports every two weeks to keep the Chamber informed of the situation in relation to the arrangements for witnesses' appearance before the Court and any viable alternatives to live testimony at the seat of the Court.

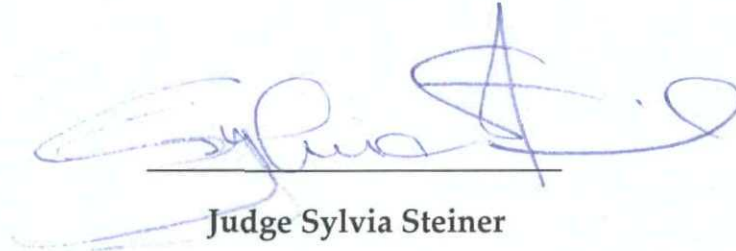
IV. Conclusion

31. In view of the foregoing, the Chamber hereby:


- (i) decides to hear the evidence of defence witnesses in the order detailed in Annex A to the present Decision;
- (ii) approves the inclusion of the four new witnesses identified in the Third Defence Submission in the defence's list of witnesses;
- (iii) orders the defence to adjust the questioning time of its witnesses in order not to exceed the total of 230 hours granted by the Chamber;
- (iv) orders the defence and the VWU to commence the preparation phase for defence witnesses as soon as possible;
- (v) orders the Registry to continue with consultations and feasibility, security and budgetary assessments, in order to determine whether it would be possible to hear the testimony of witnesses via video-link from REDACTED;
- (vi) orders the Registry to carry out consultations and feasibility, security and budgetary assessments as regards *in situ* hearings at the seat of the International Criminal Tribunal for Rwanda in Arusha, Tanzania; and
- (vii) instructs the VWU to submit reports every two weeks as of the date of notification of the present Decision to keep the Chamber

informed of the situation in relation to the arrangements for witnesses' appearance before the Court and any viable alternatives to live testimony at the seat of the Court.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 28 September 2012
At The Hague, the Netherlands