

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 15 November 2011

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

**Public Redacted Version of the Chamber's 11 November 2011 Decision
regarding the prosecution's witness schedule**

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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**Victims Participation and Other
Reparations Section**

Trial Chamber III (“Chamber”) of the International Criminal Court (“Court”) in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* issues the following Public Redacted Version of the Chamber’s 11 November 2011 Decision regarding the prosecution’s witness schedule.

I. Background

1. On 21 October 2011, the Office of the Prosecutor (“prosecution”) provided the Chamber with a proposed schedule for the remaining prosecution witnesses in this case, in which it requested that the Chamber:
 - a. Approve “the postponement of the testimonies of Witnesses 44, 15 and 69 [until] after the winter judicial recess”;¹ and
 - b. “Grant the prosecution two additional hours for the examination of Witness 31, two additional hours for the examination of Witness 213 and four additional hours for the examination of Witness 219”.²
2. On 24 October 2011, the defence provided observations on the prosecution’s proposed schedule.³ The defence raised two objections:
 - a. That Witness 219 – the prosecution’s military expert – should testify after the four main “insider” witnesses (Witnesses 15, 36, 44 and 45) because, among other matters, Witness 219 will opine upon the insiders’ evidence;⁴ and
 - b. That the prosecution’s schedule contained an unacceptable number of non-sitting days.⁵

¹ Email from prosecution Trial Lawyer to Chamber’s Legal Officer, 21 October 2011, 11:12.

² Email from prosecution Trial Lawyer to Chamber’s Legal Officer, 21 October 2011, 11:12.

³ Email from defence Legal Assistant to Chamber’s Legal Officer, 24 October 2011, 15:46.

⁴ Email from defence Legal Assistant to Chamber’s Legal Officer, 24 October 2011, 15:46.

⁵ Email from defence Legal Assistant to Chamber’s Legal Officer, 24 October 2011, 15:46.

3. The defence also requested the Chamber to “set a date by which the Prosecution must complete the presentation of its evidence, whether it has been able to find and bring its witnesses or not”.⁶
4. On 27 October 2011, the Chamber ruled in part on the prosecution’s 21 October 2011 requests, approving the order of the next two witnesses scheduled at that point (Witnesses 47 and 31) and granting the prosecution two additional hours to question Witness 31.⁷ The Chamber also instructed the prosecution to provide information on the availability of Witnesses 36 and 45.⁸ Pending receipt of that information, the Chamber deferred its ruling on (i) the prosecution’s request for the testimony of Witnesses 15, 44 and 69 to be heard in 2012; (ii) the prosecution’s requests for additional time to question Witnesses 213 and 219; (iii) the defence’s request for a ruling that Witness 219 should be heard after the four remaining insider witnesses; and (iv) the defence’s request that an end-date be set for the completion of the prosecution’s evidence.⁹
5. On 2 November 2011, the prosecution filed its Response regarding the Witness Schedule (“Prosecution Submission”),¹⁰ in which it provided the information requested by the Chamber on 27 October 2011.
6. On 8 November 2011, the defence filed its response to the Prosecution Submission (“Defence Submission”),¹¹ in accordance with a decision of the Chamber shortening the defence’s time to respond.¹²

⁶ Email from defence Legal Assistant to Chamber’s Legal Officer, 24 October 2011, 15:46.

⁷ Transcript of hearing on 27 October 2011, ICC-01/05-01/08-T-176-CONF-ENG ET, page 2, line 6 to page 5, line 22.

⁸ Transcript of hearing on 27 October 2011, ICC-01/05-01/08-T-176-CONF-ENG ET, page 5, lines 4 to 9.

⁹ Transcript of hearing on 27 October 2011, ICC-01/05-01/08-T-176-CONF-ENG ET, page 5, lines 10 to 21.

¹⁰ Prosecution’s Response regarding the Witness Schedule, 2 November 2011, ICC-01/05-01/08-1874-Conf.

¹¹ Defence Response to Prosecution Further Revised Submissions on Scheduling, 8 November 2011, ICC-01/05-01/08-1893-Conf.

¹² Transcript of hearing on 3 November 2011, ICC-01/05-01/08-T-181-CONF-ENG ET, page 38, lines 14 to 23.

7. The prosecution requested leave to reply to the Defence Submission on 9 November 2011,¹³ which the Chamber granted the following day.¹⁴ The prosecution filed its reply on 11 November 2011.¹⁵

II. Submissions of the parties

Prosecution Submissions

8. The prosecution explains that due to [REDACTED], Witness 36's "[REDACTED] does not allow him to testify in the coming weeks".¹⁶ The prosecution also represents that Witnesses 15, 44 and 45, [REDACTED] are not available to testify prior to the Court's judicial recess, but can testify in January 2012.¹⁷
9. The prosecution also explains the rationale for calling its military expert, Witness 219, before the Court's winter recess.¹⁸ The prosecution asserts that it is appropriate to hear Witness 219's testimony, which will focus on "the functioning of the MLC as a military movement as well as the exercise of command and authority within the MLC", before the recess because at that point, "the Chamber would have heard at least five out of nine Prosecution insider witnesses regarding evidence on command and control" and because the remaining four insiders "are [REDACTED]".¹⁹ The prosecution asserts that the defence's proposal for Witness 219's testimony to be heard "after all insider witnesses have testified would further delay the proceedings" and that the defence would not be

¹³ Prosecution's Request for leave to reply to "Defence Response to Prosecution Further Revised Submissions on Scheduling", 9 November 2011, ICC-01/05-01/08-1896-Conf.

¹⁴ Order granting leave to reply, 10 November 2011, ICC-01/05-01/08-1899-Conf.

¹⁵ Prosecution's Reply to "Defence Response to Prosecution Further Revised Submissions on Scheduling", 11 November 2011, ICC-01/05-01/08-1901-Conf.

¹⁶ ICC-01/05-01/08-1901-Conf, paragraph 4; *see also* ICC-01/05-01/08-1874-Conf, paragraph 6.

¹⁷ ICC-01/05-01/08-1874-Conf, paragraphs 7-11.

¹⁸ ICC-01/05-01/08-1874-Conf, paragraph 14.

¹⁹ ICC-01/05-01/08-1874-Conf, paragraph 14.

prejudiced if Witness 219 were called before the recess because the defence can “explore the type of evidence upon which Witness 219’s testimony is based during its examination of the witness” and because “it has the option to make use of its own expert to opine upon the evidence on the record”.²⁰

10. The prosecution advances several arguments why the proposed schedule should be approved, including that (i) the delays contemplated in the proposed schedule are “not unreasonable” and are “not attributable to prosecutorial malfeasance or personal preference”;²¹ (ii) “the structure of [the prosecution’s] presentation of evidence [...] is generally within its prerogative” and while “subject to judicial scrutiny”, “should not be rearranged or restructured to suit the preference of the defence”;²² (iii) the proposed schedule appropriately “accommodat[es] the availability of witnesses, courtroom interpreters for Lingala and [the] remaining number of courtroom days prior to the judicial recess”;²³ and (iv) the defence request for a cut-off date for the presentation of the prosecution’s evidence “is both premature and disproportionate” because the proposed schedule “is based upon logistical concerns beyond [the prosecution’s] control” and because the establishment of a cut-off date would deprive the prosecution of its “right to an adequate opportunity to present its case”.²⁴

11. Finally, the prosecution argues that Witness 69 should remain as the last prosecution witness rather than being called before the winter recess.²⁵ The prosecution explains that “Witness 69’s testimony, in effect, summarizes the essence of the Prosecution’s case” and that as a result, “[t]he timing of

²⁰ ICC-01/05-01/08-1874-Conf, paragraph 14.

²¹ ICC-01/05-01/08-1874-Conf, paragraph 12; *see also* paragraph 13.

²² ICC-01/05-01/08-1874-Conf, paragraph 13.

²³ ICC-01/05-01/08-1874-Conf, paragraph 13.

²⁴ ICC-01/05-01/08-1874-Conf, paragraphs 15-16.

²⁵ ICC-01/05-01/08-1901-Conf, paragraphs 5-7.

his testimony [. . .] has a substantial strategic value for the Prosecution”.²⁶ The prosecution asserts that advancing Witness 69’s testimony would “provide[] no more than a marginal benefit” in terms of expeditiousness and that this marginal benefit “far outweighs” the prejudice the prosecution would suffer if his testimony were to be advanced.²⁷

Defence Submissions

12. The defence challenges the proposed schedule on several bases. *First*, the defence urges the Chamber to reject the prosecution’s proposal to call Witness 219 before Witnesses 15, 36, 44 and 45.²⁸ The defence argues that the prosecution’s proposal “represents a ‘false economy’” because, in the defence’s view, Witness 219 “will be of most assistance [. . .] in determining the relevant issues of command and control if he can comment on” the testimony of those witnesses.²⁹ The defence submits that the testimony of Witnesses 15, 36, 44 and 45 is “inextricably linked to that of [Witness 219]”, and argues that the latter may need to be recalled if his testimony is heard beforehand.³⁰ On this basis, the defence argues that Witness 219 should be called towards the end of the prosecution case and that the resulting gaps in the schedule should “be filled by the testimony of the ‘insider’ witnesses”.³¹

13. *Second*, the defence argues that “[REDACTED] does not justify” delaying the testimony of Witnesses 15, 44 and 45 until January 2012.³² Further, the defence submits that “even if [REDACTED] does justify the postponement [. . .] that justification will cease to exist [REDACTED], and that there is

²⁶ ICC-01/05-01/08-1901-Conf, paragraph 5.

²⁷ ICC-01/05-01/08-1901-Conf, paragraph 7.

²⁸ ICC-01/05-01/08-1893-Conf, paragraphs 9-17 and 22.

²⁹ ICC-01/05-01/08-1893-Conf, paragraphs 9-17.

³⁰ ICC-01/05-01/08-1893-Conf, paragraphs 10-17.

³¹ ICC-01/05-01/08-1893-Conf, paragraphs 16-18.

³² ICC-01/05-01/08-1893-Conf, paragraphs 19-20.

sufficient time [REDACTED] the start of the winter recess to hear “at least one, or even two of these witnesses”.³³

14. *Third*, the defence “reiterates its request that the Chamber set a date by which the Prosecution must close its case, regardless of whether it has been able to secure the attendance of its witnesses”.³⁴ The defence reasons that “[c]lear deadlines [would] avoid the concrete prejudice which would arise should the accused continue to be incarcerated as a result of inefficient and/or unrealistic scheduling” and would assist the defence in its planning and preparation.³⁵

15. *Fourth*, the defence requests the Chamber to order the prosecution to provide information regarding Witness 69’s availability to testify before the winter recess.³⁶

16. Finally, the defence “requests that the Chamber order the re-classification [...] as ‘Public’” of the filings related to witness scheduling, arguing that the “States Parties, and the public at large, have a legitimate interest in the scheduling of cases before the [...] Court”.³⁷

III. Analysis

17. In accordance with Article 21(1) of the Rome Statute (“Statute”), the Chamber has considered Articles 64(2), 64(6)(f), 64(7), 64(8)(b), 67(1) and 68 of the Statute, Rules 134(3) and 140(1) of the Rules of Procedure and

³³ ICC-01/05-01/08-1893-Conf, paragraph 20.

³⁴ ICC-01/05-01/08-1893-Conf, paragraph 20.

³⁵ ICC-01/05-01/08-1893-Conf, paragraph 21.

³⁶ ICC-01/05-01/08-1893-Conf, paragraphs 8 and 22.

³⁷ ICC-01/05-01/08-1893-Conf, paragraph 4.

Evidence ("Rules") and Regulations 23(1), 23*bis*, 43 and 54(d) of the Regulations of the Court ("Regulations").

Confidentiality

18. Articles 64(7) and 67(1) of the Statute establish a presumption in favour of public proceedings. While certain matters may be addressed confidentially to protect, *inter alia*, "confidential or sensitive information" or the safety and well-being of witnesses,³⁸ requests for confidential treatment must be appropriately justified.³⁹
19. The prosecution has requested confidential treatment of its Submission on the basis that "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".⁴⁰
20. The Chamber is not persuaded that confidential treatment is justified on this basis. As the defence correctly argues, there is a legitimate public interest in the scheduling and progress of cases before the Court, which demands that the present issue be addressed in public. That said, there are pending requests for protective measures for six of the seven remaining prosecution witnesses, whose testimony is the focus of the present dispute.⁴¹ To ensure that those requests are not rendered moot before they are ruled upon, identifying information regarding those six witnesses needs to remain confidential at this stage.

³⁸ Articles 64(7), 67(1) and 68 of the Statute.

³⁹ Regulation 23*bis* of the Regulations.

⁴⁰ ICC-01/05-01/08-1874-Conf, paragraph 5.

⁴¹ See Corrigendum to "Prosecution's Request for Protective and Special Measures for Prosecution Witnesses at Trial", ICC-01/05-01/08-800-Conf-Exp-Corr, 6 July 2010 (requesting protective measures for Witnesses 69 and 213, among others); Confidential Redacted Version of "Prosecution's Request for Protective and Special Measures for Witnesses CAR-OTP-PPPP-0015, CAR-OTP-PPPP-0032, CAR-OTP-PPPP-0036, CAR-OTP-PPPP-0044, CAR-OTP-PPPP-0045 at Trial", 16 September 2011, ICC-01/05-01/08-1743-Conf-Exp (requesting protective measures for Witnesses 15, 36, 44 and 45, among others).

21. To this end, the parties are instructed to provide the Chamber with proposed public redacted versions of their filings, redacting only such information as may identify the six witnesses for whom protective measures have been sought – namely, Witnesses 15, 36, 44, 45, 69 and 213. Information to be redacted will include, for example, the witnesses' occupations, places of residence and roles, if any, within the *Mouvement de Libération du Congo*. These public redacted versions are to be provided to the Chamber no later than 25 November 2011. The Chamber will issue a public redacted version of this Decision, as well as its Order of 10 November 2011, on the same basis.

Requests for additional time to question Witnesses 213 and 219.

22. The prosecution requests two additional hours to question Witness 213.⁴² The defence has not objected. While the prosecution has not explained why it needs the additional time, there is no reason not to grant the additional time requested because, even in the best case scenario, there will likely be a delay between the end of Witness 213's testimony and the next witness for logistical reasons.

23. The prosecution also requests four additional hours to question Witness 219, which would bring its total questioning time to eight hours.⁴³ The defence has estimated that it will need 20 hours to question the witness.⁴⁴ Neither party has explained why it needs the amount of time requested, as required by Regulation 23(1)(d) of the Regulations. The Chamber will not rule unless it is provided with a factual basis to do so. The parties may substantiate their requests if they wish. Otherwise, the Chamber will not

⁴² Email from prosecution Trial Lawyer to Chamber's Legal Officer, 21 October 2011, 11:12.

⁴³ Email from prosecution Trial Lawyer to Chamber's Legal Officer, 21 October 2011, 11:12; *see also* Prosecution's Revised Order of its Witnesses at Trial and Estimated Length of Questioning, 26 October 2010, ICC-01/05-01/08-975-Conf, paragraph 2.

⁴⁴ Email from defence Legal Assistant to Chamber's Legal Officer, 24 October 2011, 15:46.

grant fixed times for the parties' questioning of the witness, but will instead closely monitor the parties' questioning to ensure that it is limited to matters relevant to the case.

The prosecution's proposed witness schedule

24. As a general principle, the Chamber is of the view that it is for the parties to determine the manner in which they will present their cases. This discretion is not, however, unlimited. It is subject to judicial oversight from the Chamber, which has a statutory duty to "ensure that [the] trial is fair and expeditious and is conducted with full respect for the rights of the accused".⁴⁵ The Chamber is also required to ensure that the accused's right to be tried "without undue delay" is not violated by the manner in which the parties choose to present their cases.⁴⁶ In line with these statutory principles, Regulation 43 of the Regulations requires the Presiding Judge, in consultation with the other members of the Chamber, to ensure that the "mode and order of questioning of witnesses and presenting of evidence" is fair and is conducted in such a way to "avoid delays and ensure the effective use of time".

25. The Chamber will not interfere with a party's decisions regarding its selection and presentation of evidence unless there is a compelling reason to do so. This measure of deference permits the parties to shape their presentation of evidence in a manner that best fits their overall theory of the case. While the Chamber may intervene to ensure that the above-mentioned principles are respected, it will do so sparingly and only after considering the potential prejudice that may be caused.

⁴⁵ Article 64(2) of the Statute; *see also* Article 64(8)(b).

⁴⁶ Article 67(1)(c) of the Statute.

26. With these principles in mind, the Chamber turns to the two disputed issues regarding the prosecution's proposed schedule.

a. *The sequence of Witness 219's testimony*

27. In the Chamber's view, the key consideration in relation to Witness 219's testimony is that he is a prosecution witness. It is therefore for the prosecution to determine, in the first instance, the appropriate sequence of his testimony. Unless the prosecution's proposal impacts the considerations described above in paragraph 24, the Chamber will not intercede. In this circumstance, the Chamber is not persuaded that its intervention is required.

28. The Chamber is not convinced by the defence's argument that it would be prejudiced if Witness 219 is heard before the remaining insider witnesses. The defence argues that Witness 219's testimony may have less impact if it is heard before the remaining insider witnesses.⁴⁷ However, should this be true, it would prejudice the prosecution, not the defence. The prosecution has, presumably, considered this risk, and has nevertheless opted to call Witness 219 before the recess.

29. The Chamber therefore approves the prosecution's request for Witness 219's testimony to be heard before the winter recess.

b. *Remaining witnesses*

30. The Chamber is concerned that the prosecution's proposed schedule envisages a significant number of non-sitting days prior to the winter recess. With Witness 213's testimony commencing on 14 November 2011,

⁴⁷ ICC-01/05-01/08-1893-Conf, paragraphs 9-17.

there would be a break of two weeks between the projected completion of his testimony and the next witness.⁴⁸

31. The Chamber acknowledges that this gap is primarily a consequence of witness availability, which is largely outside the prosecution's control and is, to a greater or lesser degree, supported by legitimate considerations, such as the witnesses' health or professional commitments. However, the Chamber is of the view that all reasonable measures need to be taken to minimise breaks in the trial schedule, particularly because the accused is in detention.
32. Based on the information provided by the prosecution, the one realistic option to fill this gap appears to be bringing forward the testimony of Witness 69, who is currently scheduled to be the last prosecution witness. There is no information before the Chamber to suggest that he is unavailable to testify before the winter recess.
33. The Chamber has considered carefully the prosecution's arguments regarding the prejudice it may suffer if it were not able to close its presentation of evidence with Witness 69's testimony.⁴⁹ The Chamber understands the prosecution's desire to close with an overview witness who may be able to "summarize[] the essence of the Prosecution's case".⁵⁰ However, the Chamber concludes that this preference is outweighed by the requirement under Article 64(2) of the Statute that the trial proceed expeditiously and "with full respect for the rights of the accused", including his right under Article 67(1)(c) of the Statute to be tried "without undue delay". Witness 69's testimony is projected to last approximately

⁴⁸ See the parties' estimates of the time needed to question Witness 213: email from prosecution Trial Lawyer to Chamber's Legal Officer, 21 October 2011, 11:12; email from defence Legal Assistant to Chamber's Legal Officer, 24 October 2011, 15:46.

⁴⁹ See *generally* ICC-01/05-01/08-1901-Conf.

⁵⁰ ICC-01/05-01/08-1901-Conf, paragraph 5.

four days.⁵¹ The Chamber is of the view that four days is a meaningful saving and is particularly important given that the accused is in detention.

34. The Chamber is unpersuaded by the prosecution's arguments regarding the "strategic value for the Prosecution" in calling Witness 69 as its last witness and the suggested disruption to "its presentation of a cohesive case" that may result from calling Witness 69 before the winter recess.⁵² It is on the basis of the evidence that is presented, rather than the order of its presentation, that the case will be decided. The Chamber is well-equipped to synthesise the oral evidence irrespective of the sequence in which it is presented. In the final analysis, therefore, moving one prosecution witness forward will cause little, if any, prejudice to the prosecution case and certainly not sufficient prejudice to justify a delay in proceedings that would otherwise not exist.

35. For these reasons, the Chamber concludes that the prosecution must take all reasonable measures to secure the attendance of Witness 69 before the winter recess. Witness 69 may testify either before or after Witness 219, the dates of whose testimony may be moved to accommodate the four days estimated for Witness 69's testimony.⁵³ The last day the Chamber will sit before the winter recess will be Thursday, 15 December 2011.

36. Finally, the Chamber approves the prosecution request for Witnesses 15, 44 and 45 to testify in 2012. Under the schedule ordered above, there will be insufficient time to hear these witnesses before the winter recess. The defence's arguments regarding [REDACTED] are therefore rendered

⁵¹ See ICC-01/05-01/08-975-Conf, paragraph 2 (prosecution providing an eight hour estimate for its questioning of Witness 69); email from defence Legal Assistant to Chamber's Legal Officer, 24 October 2011, 15:46 (defence providing an eight hour estimate for its questioning of Witness 69).

⁵² ICC-01/05-01/08-1901-Conf, paragraphs 5-6.

⁵³ See ICC-01/05-01/08-975-Red, paragraph 2; email from defence Legal Assistant to Chamber's Legal Officer, 24 October 2011, 15:46.

moot. Similarly, Witness 36 may testify in 2012, given that [REDACTED] apparently prevents him from testifying before the winter recess.

The defence's request for an end-date for the prosecution's presentation of evidence

37. The Chamber does not consider it to be appropriate, at this stage of proceedings, to set an end-date for the prosecution's presentation of evidence. The material before the Chamber supports the prosecution's claim that it has acted diligently to present its case in an expeditious manner and to minimise breaks in the Court's schedule. To the extent that there have been delays, they have largely been caused by factors outside the prosecution's control, and, as the defence acknowledges, are attributable "to a combination of circumstances, such as arise in all trials of this sort".⁵⁴ For these reasons, the Chamber denies the defence request to set an end-date for the prosecution's presentation of evidence.

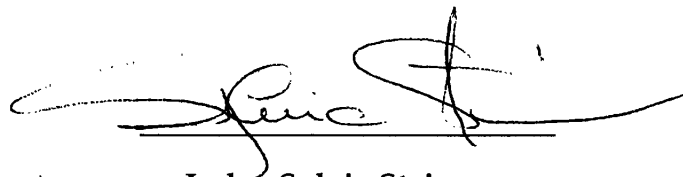
⁵⁴ ICC-01/05-01/08-1893-Conf, paragraph 5.

IV. Conclusion

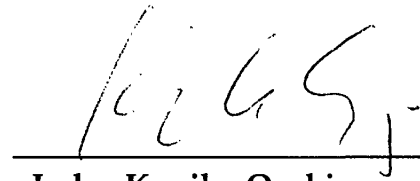
38. For the reasons above, the Chamber:

- a. ORDERS the parties to provide the Chamber with proposed public redacted versions of filings ICC-01/05-01/08-1874-Conf, ICC-01/05-01/08-1874-Conf, and ICC-01/05-01/08-1901-Conf no later than 25 November 2011, in accordance with the guidelines described above in paragraph 21;
- b. GRANTS the prosecution's request for two additional hours to question Witness 213;
- c. DECLINES to grant fixed times for the parties' questioning of Witness 219, without prejudice to the parties' ability to resubmit reasoned requests in accordance with Regulation 23(1) of the Regulations;
- d. INSTRUCTS the prosecution take all reasonable steps to secure the attendance of Witness 69 before the winter recess;
- e. APPROVES the prosecution's request for Witnesses 15, 36, 44 and 45 to testify when the trial resumes in 2012;
- f. DENIES the defence request for Witness 219's testimony to be deferred until after the testimony of Witnesses 15, 36, 44 and 45; and
- g. DENIES the defence request that an end-date be set for the completion of the prosecution's presentation of evidence.

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



Judge Sylvia Steiner

Judge Joyce Aluoch

Judge Kuniko Ozaki

Dated this 15 November 2011

At The Hague, The Netherlands