

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 1 December 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

**Decision on the prosecution's and defence's requests regarding Witness 219's
testimony**

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

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor
Ms Petra Kneuer, Senior Trial Lawyer

Counsel for the Defence

Mr Nkwebe Liriss
Mr Aimé Kilolo Musamba

Legal Representatives of the Victims

Ms Marie Edith Douzima-Lawson
Mr Assingambi Zarambaud

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

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber III ("Chamber") of the International Criminal Court ("Court") in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* issues the following Decision on the prosecution's and defence's requests regarding Witness 219's testimony.

I. Background and submissions

1. On 29 March 2010, the Chamber issued an oral decision approving the prosecution's proposed expert witnesses, including its military expert, Lieutenant General Daniel Opande ("Witness 219").¹
2. On 6 September 2010, the Chamber issued its Order setting, *inter alia*, deadlines for the filing of expert reports, in which it fixed 4 October 2010 as the deadline for the submission of expert reports.²
3. On 4 October 2010, the prosecution disclosed a 13 page military expert report compiled by Witness 219 ("First Report").³
4. On 11 November 2011, the Chamber issued its "Decision regarding the prosecution witness's schedule",⁴ in which it, *inter alia*, requested Witness 219 to testify before the winter recess⁵ and denied the defence request for Witness 219's testimony to be deferred until after the testimony of Witnesses 15, 36, 44 and 45, scheduled to testify after the winter recess.⁶ Witness 219 was finally scheduled to testify on Monday, 5 December 2011.⁷

¹ Transcript of hearing on 29 March 2010, ICC-01/05-01-T-21-ENG ET WT, pages 20-24.

² Order setting deadlines for agreements as to facts and evidence and for the filing of expert reports, 6 September 2010, ICC-01/05-01/08-872, paragraph 25.

³ Military Expert's Report, CAR-OTP-0064-0547.

⁴ Decision regarding the prosecution's witness schedule, 11 November 2011, ICC-01/05-01/081904-Conf. A public redacted version of this decision was issued on 15 November 2011: Public Redacted Version of the Chamber's 11 November 2011 Decision regarding the prosecution's witness schedule, 15 November 2011, ICC-01/05-01/081904-Red.

⁵ ICC-01/05-01/081904-Red, paragraph 35.

⁶ ICC-01/05-01/081904-Red, paragraph 38(f).

⁷ Email from the Chamber's Legal Officer to prosecution's Case Manager on 16 November 2011 at 18:29.

5. On 28 November 2011, the defence filed the “Defence Motion on the Re-Scheduling of the Prosecution Military Expert” (“Motion”),⁸ in which it sought leave from the Chamber not to close the defence questioning of Witness 219 until after the completion of the testimony of Witnesses 15, 36, 44 and 45; or, in the alternative, until such time as those witnesses are dropped from the prosecution’s list of witnesses.⁹

6. On the same day, the Office of the Prosecutor (“prosecution”) disclosed four documents to the defence under Rule 77 of the Rules of Procedure and Evidence (“Rules”).¹⁰ These documents consist of a 28 page supplementary expert report (“Supplementary Report”) from Witness 219,¹¹ which Witness 219 provided to the prosecution on 21 November 2011,¹² and three additional documents that are partial translations of logbooks already in possession of the defence.¹³

7. On 29 November 2011, the defence made an oral motion regarding the disclosure of the Supplementary Report.¹⁴ The defence argued that the prosecution’s disclosure of the Supplementary Report was untimely and that it should have been disclosed to the defence to allow it sufficient time to, for example “consult with experts that may have been instructed themselves to check the methodology and the validity of the opinions

⁸ Defence Motion on the Re-Scheduling of the Prosecution Military Expert, 28 November 2011, ICC-01/05-01/08-1943-Conf.

⁹ ICC-01/05-01/08-1943-Conf, paragraphs 9 and 10.

¹⁰ Prosecution’s Communication of Pre - Inspection Report for Material Provided to the Defence under Rule 77 on 28 November 2011, 28 November 2011, ICC-01/05-01/08-1946 and Annex A.

¹¹ Military Expert’s Report, CAR-OTP-0066-0002 (disclosed on 28 November 2011).

¹² ICC-01/05-01/08-1946, paragraph 2.

¹³ ICC-01/05-01/08-1946, paragraph 3. CAR-OTP-0066-0032, CAR-OTP-0066-0036, CAR-OTP-0066-0063 all disclosed 28 November 2011, are the partial translations of CAR-D04-0002-1514 and CAR-D04-0002-1641, disclosed by the defence under Rule 78 of the Rules of Procedure and Evidence to the prosecution on 8 September 2011; *See also* Communication par la Défense des documents divulgués au Bureau du Procureur pour pré-inspection en vertu de la Règle 78 du Règlement de Procédure et de Preuve, 8 September 2009, ICC-01/05-01/08-1719 and Annex A.

¹⁴ Transcript of hearing, 29 November 2011, ICC-01/05-01/08-T-193-CONF-ENG ET, page 3, line 14 to page 6, line 8.

expressed in the report”.¹⁵ The defence further suggested that “the only proper course at this stage is to suspend the attendance of this witness until at the earliest 28 December, 30 days after the service of the new report, which in effect means that he will not attend until January” and added that “it is an unavoidable consequence of the late service of a very substantial and new expert’s report”.¹⁶ As a result, the defence amended its request not to close the defence questioning of Witness 219 and rather requested that Witness 219 “not be permitted to attend next Monday, 5 December and not be permitted to attend until 30 days after the service of the report” (“Request for Postponement”).¹⁷

8. On 30 November 2011, upon oral instruction by the Chamber,¹⁸ the prosecution filed the “Prosecution Response to ‘Defence Motion on the Re - Scheduling of the Prosecution Military Expert’ and Subsequent Related Defence In-Court Submissions, and Request for Additional Examination Time for Witness CAR-OTP-PPP-0219”,¹⁹ in which it (1) responds to the defence Motion and Request for Postponement, and (2) substantiates its request for four additional hours for questioning Witness 219 (“Request for Additional Time”). The prosecution opposes the defence request to re-schedule Witness 219 after the winter recess but does not oppose the defence request to recall Witness 219 for further questioning if necessary, subject to his availability.²⁰ In response to the defence’s arguments regarding the suggested late disclosure of the Supplementary Report, the prosecution states that the:

¹⁵ Transcript of hearing, 29 November 2011, ICC-01/05-01/08-T-193-CONF-ENG ET, page 4, lines 5 to 9.

¹⁶ Transcript of hearing, 29 November 2011, ICC-01/05-01/08-T-193-CONF-ENG ET, page 5, lines 16 to 22.

¹⁷ Transcript of hearing, 29 November 2011, ICC-01/05-01/08-T-193-CONF-ENG ET, page 6, line 5 to 8.

¹⁸ Transcript of hearing, 28 November 2011, ICC-01/05-01/08-T-192-CONF-ENG ET, page 60, lines 11 to 24.

¹⁹ Prosecution Response to “Defence Motion on the Re - Scheduling of the Prosecution Military Expert” and Subsequent Related Defence In-Court Submissions, and Request for Additional Examination Time for Witness CAR-OTP-PPP-0219, 30 November 2011, ICC-01/05-01/08-1968.

²⁰ ICC-01/05-01/08-1968, paragraphs 1, 6 and 10.

“additional expert report is substantially similar to Witness 219’s 13 page original report and is based on the same materials Witness 219 previously reviewed. The bulk of the 28 pages restates verbatim the original report, cites to quotations in the materials, and contains blank spaces. The supplementary or new analysis contained in the additional expert report consists of 18 paragraphs filling about eight pages”.²¹

9. The prosecution further explains that the 18 new paragraphs in the Supplementary Report do not contain new factual findings but rather “re-evaluate[] information and provide[] more context to previous finding”.²²

10. In accordance with Article 21(1) of the Rome Statute (“Statute”), the Trial Chamber has considered Articles 64(2), 67(1)(b) of the Rome Statute (“Statute”), Rule 77 of the Rules and Regulations 23*bis*(3), 43 and 54(d) of the Regulations of the Court.

II. Analysis

11. The Chamber will *first* address the issue of the defence’s Request for Postponement and the related issue of disclosure of the Supplementary Report, including the potential prejudice to the defence, and *second*, will address the prosecution’s Request for Additional Time.

The disclosure of the Supplementary Report and the Request for Postponement

12. At the outset, the Chamber will not consider the three documents referred to in paragraph 6 above as they are merely translations of logbooks already in possession of the defence and are therefore not *newly* disclosed documents. Therefore, the Chamber will limit its consideration to the issue of the disclosure of the Supplementary Report.

²¹ ICC-01/05-01/08-1968, paragraph 3.

²² ICC-01/05-01/08-1968, paragraph 9.

13. In addition, despite the tardiness of the prosecution disclosure - a full week after receipt of the Supplementary Report -, the Chamber notes the prosecution's submission that it was not in possession of the Supplementary Report until 21 November 2011 and that the report was provided to the prosecution on the witness' own accord. The Chamber has no reason to doubt the prosecution's submission on this point and there is no suggestion of bad faith on the part of the prosecution.
14. The defence is entitled to have adequate time and facilities for its preparation pursuant to Article 67(1) of the Statute. The issue is whether the disclosure of the Supplementary Report a week before Witness 219 is scheduled to begin his testimony, and more than a year after the disclosure deadline of 4 October 2010, prejudices the defence to the extent that Witness 219 should be re-scheduled to testify after the winter recess.
15. To make its determination, the Chamber has analysed the extent to which the Supplementary Report contains "very substantial" and "new" information, as submitted by the defence.
16. As an initial matter, the Chamber observes that the lists of material examined by Witness 219 in support of both reports are identical.²³ The only difference appears to be Witness 219's reliance, in the Supplementary Report, upon the statements of one additional witness, Witness 65.²⁴ The Chamber also notes that the excerpts of statements of Witness 65 are quoted and analysed together with the statements of Witnesses 31, 33, 36 and 169, which were the basis for similar conclusions by the military

²³ See the respective sections in both reports entitled "Information and materials examined".

²⁴ Supplementary Report, paragraphs 32(a), 36 and 41.

expert in his First Report. Therefore, the addition of this material does not appear to have materially altered Witness 219's conclusions.

17. More significantly, the Chamber notes that, while the First Report is reproduced *in extenso* in the newly disclosed report, the Supplementary Report contains 18 new paragraphs. Having carefully reviewed the additions, the Chamber finds that the new material contains a more in-depth analysis of the documentation relied upon in the First Report and more detailed conclusions. This is illustrated, for example, by the last section of the report, entitled "Supplementary Analysis of the MLC command and control". While the Supplementary Report contains some new information, it does not, in the Chamber's view, appear to substantially alter Witness 219's opinions or the basis for them.

18. In these circumstances, the Chamber finds unjustified the Request for Postponement in which the defence seeks 30 additional days to analyse the new material in the Supplementary Report. The Chamber considers that the additional material in the Supplementary Report is not of such a character or complexity as to justify such a delay. While the defence points to the 30-day deadline previously established by the Chamber in relation to the disclosure of experts' reports,²⁵ that timeframe is inapplicable here because it applies to the provision of prosecution experts' report for the first time as incriminatory evidence, not the provision of a further detailed report, disclosed under Rule 77 of the Rules, which is the case here.

19. Having said this, the Chamber acknowledges that the Supplementary Report, although not substantially new and different may still require additional time for the defence to prepare for Witness 219's testimony. The Chamber will therefore grant the defence's Request for Postponement to

²⁵ Transcript of hearing, 29 November 2011, ICC-01/05-01/08-T-193-CONF-ENG ET, page 4, lines 10 to 12.

the extent necessary for the new information to be considered. In the Chamber's estimation, an additional day preparation time suffices for this purpose. Witness 219 will therefore begin his testimony on Tuesday 6 December 2011, instead of 5 December 2011, as previously scheduled.

20. The Chamber will not rule at this stage on the defence's Motion, and the request contained therein for the defence's questioning of the witness not to be closed until after the testimony of Witnesses 15, 36, 44 and 45. To support its Motion, the defence gives the example of *possible* contradictions that *may* arise between Witness 219 evidence and his report and the subsequent testimony of Witness 36. However, the Chamber finds the defence's argument hypothetical and its request premature at this stage. If, after Witnesses 15, 36, 44 and 45 have testified, the defence believes that good cause exists for Witness 219 to be questioned further, the Chamber will consider any substantiated request from the defence to recall Witness 219. The prosecution is directed to explain this possibility to Witness 219 before he starts testifying on 6 December 2011.

Prosecution's Request for Additional Time

21. The prosecution requests four additional hours to question Witness 219, explaining that the additional time would assist the Chamber in better understanding the witness' evidence as it would allow him to elaborate on documents disclosed by the defence and the questioning of prosecution witnesses by the defence on military matters, information not previously available for Witness 219's review.²⁶

22. The Chamber notes that previous insider witnesses, such as Witnesses 65 and 213, have already testified on military matters, which are related to

²⁶ ICC-01/05-01/08-1968, paragraph 12.

Witness 219's military expertise and is of the view that Witness 219 may be in a position, due to his background and experience, to give evidence on specific technical issues raised during previous testimonies and thus assist the Chamber in its duty to find the truth. Therefore, the Chamber finds the prosecution Request for Additional Time well-founded.

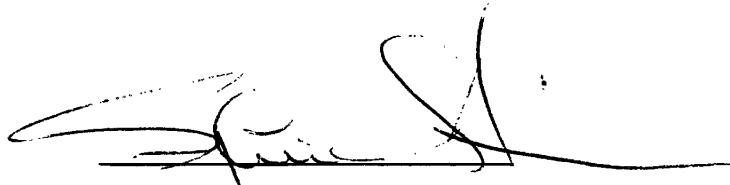
23. Finally, the defence will have, as the case may be, until 15 December 2011, at 11h00, to complete its questioning of Witness 219, without prejudice to its ability to request further questioning of the witness as a later date, as described in paragraph 20 above, in relation to the evidence given by witnesses 15, 36, 44 and 45.

III. Conclusion


24. For the reasons above, the Chamber:

- a. PARTIALLY GRANTS the defence Request for Postponement, to the extent that Witness 219 will start his testimony on 6 December 2011;
- b. DENIES the defence Motion as premature;
- c. GRANTS the prosecution Request for Additional Time for its questioning of Witness 219;
- d. ORDERS the prosecution or the Victims and Witnesses Unit, as appropriate, to inform Witness 219 that his testimony is scheduled to take place from 6 until no later than 15 December at 11h00; and
- e. ORDERS the reclassification as public of the defence Motion.


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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 1 December 2011

At The Hague, The Netherlands