

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 18 October 2013

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 "Second decision on issues related to the closing of the case"

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

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REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

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Mr Patrick Craig

Detention Section

Other

Victims Participation and Reparations Section

Trial Chamber III ("Chamber") of the International Criminal Court ("Court" or "ICC"), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (the "*Bemba case*"), issues the following Second decision on issues related to the closing of the case ("Decision").

I. Background and Submissions

1. On 19 November 2010 the Chamber issued its "Decision on Directions for the Conduct of the Proceedings" ("Decision 1023"),¹ in which, *inter alia*, it decided that:

the trial will commence with the presentation of the prosecution's evidence, followed by the presentation of defence's evidence, should it elect to present such evidence. At the end of the presentation of the parties' evidence, the Chamber may decide to call additional witnesses. Victims suggested to be called by the legal representatives shall testify before the commencement of the presentation of the defence evidence. Further, the Chamber may intervene at any given time, *inter alia*, to order the production of such evidence as it considers necessary for the determination of the truth, in accordance with Articles 64(6)(d) and 69(3) of the Statute.²

2. The Chamber further noted that its directions were not intended to limit the right of the accused to make unsworn oral or written statements in accordance with Article 67(1)(h) of the Rome Statute ("Statute") without this affecting his right to remain silent.³ However, the Chamber stressed that, if the accused intended to exercise this right, he should so inform the Chamber in order for it to decide on the appropriate moment and modalities for him to do so.⁴

¹ Decision on Directions for the Conduct of the Proceedings, 19 November 2010, ICC-01/05-01/08-1023.

² ICC-01/05-01/08-1023, paragraph 5.

³ ICC-01/05-01/08-1023, paragraph 21.

⁴ *Ibid.*

3. On 23 November 2010, the prosecution commenced its presentation of evidence;⁵ the last witness called by the prosecution concluded his testimony on 20 March 2012.⁶ Over the course of its presentation of evidence, the prosecution called 40 witnesses, which it questioned for a total of 228 hours and 37 minutes, over a period of approximately 16 months including judicial recesses and gaps due to, *inter alia*, difficulties in the scheduling of witnesses.⁷ The legal representatives of victims were authorised to call two witnesses to testify before the Chamber; these witnesses provided testimony between 1 and 8 May 2012.⁸
4. On 7 June 2012, the Chamber issued its "Decision on the 'Submissions on Defence Evidence'" ("Decision 2225"),⁹ in which, *inter alia*, it granted the request of the defence of Mr Jean-Pierre Bemba ("defence") for 230 hours to question the witnesses included in its list and ordered the defence "to use the allocated number of hours in the most efficient manner possible and, in any case, that the defence presentation of evidence not exceed eight months."¹⁰
5. On 14 August 2012, the defence commenced its presentation of evidence;¹¹ through the year 2012, the defence presented the testimony of a total of 14 witnesses. On 13 December 2012, within the context of proceedings under Regulation 55 of the Regulations of the Court ("Regulations"),¹² the Chamber temporarily suspended the proceedings until 4 March 2013.¹³ On 6

⁵ Transcript of hearing of 23 November 2010, ICC-01/05-01/08-T-33-CONF-ENG ET.

⁶ Transcript of hearing of 20 March 2012, ICC-01/05-01/08-T-218-CONF-ENG CT.

⁷ Decision on the "Submissions on Defence Evidence", 7 June 2012, ICC-01/05-01/08-2225, paragraph 9.

⁸ Transcript of hearing of 1 May 2012, ICC-01/05-01/08-T-220-CONF-ENG ET and transcript of hearing of 8 May 2012, ICC-01/05-01/08-T-225-CONF-ENG ET.

⁹ ICC-01/05-01/08-2225.

¹⁰ ICC-01/05-01/08-2225, paragraphs 8, 10, 11 and 23(a) and (b).

¹¹ Transcript of hearing of 14 August 2012, ICC-01/05-01/08-T-229-CONF-ENG CT.

¹² See Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, 21 September 2012, ICC-01/05-01/08-2324.

¹³ Decision on the temporary suspension of the proceedings pursuant to Regulation 55(2) of the Regulations of the Court and related procedural deadlines, 13 December 2012, ICC-01/05-01/08-2480, paragraphs 13 to 15.

February 2013, pursuant to a defence motion,¹⁴ the Chamber lifted the temporary suspension and ordered the defence to continue with the presentation of its evidence as soon as practicable.¹⁵ On 25 February 2013, the defence resumed its presentation of evidence;¹⁶ between February and June 2013 the defence presented the testimony of 11 additional witnesses.

6. On 16 July 2013, the Chamber issued its “Decision on the timeline for the completion of the defence’s presentation of evidence and issues related to the closing of the case” (“Decision 2731”),¹⁷ in which, taking into account numerous vicissitudes in the presentation of the defence evidence,¹⁸ *inter alia*, it ordered that “the presentation of evidence by the defence be concluded by 25 October 2013, at the latest.”¹⁹ The Chamber stressed that the timeframe granted to the defence was based upon the time requested for questioning witnesses and found that the total of approximately 14 months granted – taking into account the two months of suspension due to the proceedings under Regulation 55 of the Regulations and the extended sitting hours adopted by the Chamber since June 2013 – “roughly ‘mirror that taken by the Prosecution to present its case’.”²⁰
7. The Chamber further noted that it did not “exclude the possibility that it may call witnesses after the conclusion of the presentation of evidence by the defence, pursuant to Articles 64(6)(d) and 69(3) of the Statute”.²¹ However, in order to facilitate the parties’ and participants’ preparation, the

¹⁴ Defence Motion to Vacate Trial Chamber’s “Decision on the temporary suspension of the proceedings” of 13 December 2012 and Notification Regarding the Envisaged Re-Qualification of Charges Pursuant to Regulation 55, 28 January 2013, ICC-01/05-01/08-2490-Conf. A public redacted version of this document was filed on the same day ICC-01/05-01/08-2490-Red.

¹⁵ Decision lifting the temporary suspension of the trial proceedings and addressing additional issues raised in defence submissions ICC-01/05-01/08-2490-Red and ICC-01/05-01/08-2497, 6 February 2013, ICC-01/05-01/08-2500, paragraph 34(i) and (ii).

¹⁶ Transcript of hearing of 25 February 2013, ICC-01/05-01/08-T-284-CONF-ENG ET.

¹⁷ Decision on the timeline for the completion of the defence’s presentation of evidence and issues related to the closing of the case, 16 July 2013, ICC-01/05-01/08-2731.

¹⁸ ICC-01/05-01/08-2731, paragraphs 1 to 20.

¹⁹ ICC-01/05-01/08-2731, paragraph 38(b).

²⁰ ICC-01/05-01/08-2731, paragraph 24 and footnote 99.

²¹ ICC-01/05-01/08-2731, paragraph 26.

Chamber decided that the deadlines for the filing of closing briefs were to be counted as from “the date on which the Presiding Judge declares the presentation of evidence in the case to be closed pursuant to Rule 141 of the Rules.”²²

8. On 23 July 2013, the defence filed its “Defence Request for Clarification of the *Decision on the timeline for the completion of defence’s presentation of evidence and issues related to the closing of the case*” (“First Motion for Clarification”),²³ in which it seeks clarification on whether the timeframes for the filing of the closing briefs, as laid out in Decision 2731, were to be suspended over the 2013-2014 winter judicial recess.²⁴
9. On 20 August 2013, the defence resumed its presentation of evidence;²⁵ between that date and 13 September 2013, the defence presented the testimony of seven additional witnesses.²⁶ At that point, the defence had presented the testimony of a total of 32 witnesses; no further witnesses have appeared before the Chamber since.
10. On 6 September 2013, pursuant to an oral order of the Chamber,²⁷ the defence filed its “Defence Submission as to the current timetable for the completion of its case” (“Submission 2796”),²⁸ in which, *inter alia*, it informed the Chamber that the remaining witnesses to be called were Witnesses D04-54, D04-14, D04-41 and D04-44 and that it did not currently anticipate calling any further witnesses.²⁹ In addition, the defence informed the Chamber that the accused will not be giving sworn evidence but that he

²² ICC-01/05-01/08-2731, paragraph 27.

²³ Defence Request for Clarification of the *Decision on the timeline for the completion of defence’s presentation of evidence and issues related to the closing of the case*, 23 July 2013, ICC-01/05-01/08-2735.

²⁴ ICC-01/05-01/08-2735, paragraphs 3 and 11.

²⁵ Transcript of hearing of 20 August 2013, ICC-01/05-01/08-T-332-CONF-ENG ET.

²⁶ Transcript of hearing of 13 September 2013, ICC-01/05-01/08-T-345-CONF-ENG ET.

²⁷ Transcript of hearing of 3 September 2013, ICC-01/05-08-T-342-CONF-ENG ET, page 32, line 20 to page 34, line 10.

²⁸ Defence Submission as to the current timetable for the completion of its case, 6 September 2013, ICC-01/05-01/08-2796.

²⁹ ICC-01/05-01/08-2796, paragraphs 1 to 4.

was “considering” giving a brief unsworn statement at the conclusion of all other oral evidence.³⁰ Lastly, the defence informed the Chamber that a “bar table motion” will be filed before 25 October 2013 and that “the formal closure of the Defence case will be consequent upon the Chamber’s decision upon the admission of documents from the Bar Table.”³¹

11. On 9 September 2013, also following an oral instruction of the Chamber,³² the prosecution filed its “Prosecution’s Response to ‘Defence Submissions as to the current timetable for the completion of its case’”,³³ in which it requested authorisation to put questions to the accused “should he choose to make an unsworn statement on substantive issues or make arguments in favour of his case.”³⁴ On 11 September 2013, taking into account the parties’ submissions, the Chamber instructed the defence “to provide information as to whether the accused intends to give an unsworn statement at the latest one week before the anticipated date of the ending of the testimony of the last defence witness.”³⁵

12. On 1 October 2013, the Chamber issued its “Order on the submission of final applications for the admission of material into evidence and seeking observations on the admission into evidence of witnesses’ written statements” (“Order 2824”),³⁶ in which, *inter alia*, it ordered the parties and participants to file any remaining applications for the admission of evidence within seven days of the completion of the testimony of the last witness to

³⁰ ICC-01/05-01/08-2796, paragraph 5.

³¹ ICC-01/05-01/08-2796, paragraph 6.

³² ICC-01/05-01/08-T-342-CONF-ENG ET, page 34, lines 8 to 10.

³³ Prosecution’s Response to “Defence Submissions as to the current timetable for the completion of its case”, 9 September 2013, ICC-01/05-01/08-2798.

³⁴ ICC-01/05-01/08-2798, paragraph 6.

³⁵ Transcript of hearing of 11 September 2013, ICC-01/05-01/08-T-343-CONF-ENG ET, page 3, lines 20 to 22.

³⁶ Order on the submission of final applications for the admission of material into evidence and seeking observations on the admission into evidence of witnesses’ written statements, 1 October 2013, ICC-01/05-01/08-2824.

be called by the defence, and in any event by no later than 31 October 2013.³⁷

13. On 7 October 2013, the defence filed its “Defence Motion on outstanding decisions on the admission of evidence” (“Second Motion for Clarification”),³⁸ in which it requested the Chamber to: (i) clarify whether the order to the defence to conclude its presentation of evidence by 25 October 2013 is or was intended to amount to a declaration under Rule 141(1) of the Rules of Procedure and Evidence (“Rules”); (ii) clarify whether the timelines for the submissions of final briefs will run from 25 October 2013 or from the date of a subsequent declaration under Rule 141(1) of the Rules; and, or in the alternative, (iii) stay the order in Decision 2731 requiring the accused to close the presentation of his evidence by 25 October 2013 and subsequent deadlines until decisions are rendered on the requests for the admission of evidence already submitted by the parties.³⁹

14. On 10 October 2013, the prosecution filed its “Prosecution’s Response to Defence Motion on outstanding decisions on the admission of evidence” (“Prosecution’s Response”),⁴⁰ in which it submits that the Chamber has already distinguished between the concepts of “completion of the defence’s presentation of evidence” and “formal closing of the presentation of evidence”.⁴¹ Therefore, it requests that the defence’s request to stay Decision 2731 be rejected as “premature and unnecessary”.⁴²

³⁷ ICC-01/05-01/08-2824, paragraph 13.

³⁸ Defence Motion on outstanding decision on the admission of evidence, 7 October 2013, ICC-01/05-01/08-2828.

³⁹ ICC-01/05-01/08-2828, page 12.

⁴⁰ Prosecution’s Response to Defence Motion on outstanding decisions on the admission of evidence, 10 October 2013, ICC-01/05-01/08-2832.

⁴¹ ICC-01/05-01/08-2832, paragraph 5.

⁴² ICC-01/05-01/08-2832, paragraph 7.

II. Analysis

15. For the purpose of the present Decision, the Chamber has considered, in accordance with Article 21(1) of the Statute, Articles 64(2), (6)(b) and (d) and (8)(b), 67(1) and 69(3) of the Statute, Rules 134(3), 140 and 141 of the Rules, and Regulations 19*bis*, 43 and 54 of the Regulations of the Court.

The distinction between the deadline for the conclusion of the presentation of evidence by the defence and the date of the formal closing of the case

16. In relation to the Second Motion for Clarification, as noted in the Prosecution's Response, the imposition by Decision 2731 of the deadline of 25 October 2013 for the defence to conclude its presentation of evidence did not amount to a decision to close the case pursuant to Rule 141(1) of the Rules, nor is this deadline related to any outstanding decisions of the Chamber on the admission of documentary evidence.⁴³

17. To avoid any further misunderstanding the Chamber reiterates that (i) the defence's presentation of oral evidence is to conclude by 25 October 2013 at the latest;⁴⁴ (ii) the final date for the parties and participants to submit the remaining material they would like to be admitted into evidence is 31 October 2013;⁴⁵ and (iii) the timeline for the submissions of the parties' closing briefs will run from the date - yet to be determined - on which the Chamber declares the case to be closed, pursuant to Rule 141(1) of the Rules.⁴⁶ The Chamber will render such decision at the opportunity it deems appropriate, in compliance with its duty to ensure that the trial is fair and expeditious and conducted with full respect for the rights of the accused

⁴³ See ICC-01/05-01/08-2828, page 12.

⁴⁴ ICC-01/05-01/08-2731, paragraphs 22, 24 and 38 (b).

⁴⁵ ICC-01/05-01/08-2824, paragraph 13.

⁴⁶ ICC-01/05-01/08-2731, paragraphs 26, 27, and 38 (e).

and due regard for the protection of victims and witnesses in accordance with Article 64(2) of the Statute.

18. In its First Motion for Clarification the defence requests the Chamber to consider a suspension of the time frames set out in Decision 2731 over the 2013-2014 winter judicial recess. As explained, the date on which the Chamber will declare the case to be closed pursuant to Rule 141(1) of the Rules is yet to be determined. However, at this stage, the Chamber does not consider a suspension over the winter recess to be warranted.

Presentation of evidence at the Chamber's request

19. As set out in Decision 1023 and reiterated in Decision 2731, at the end of the presentation of the parties' evidence the Chamber may decide to call additional witnesses and, at any time during the trial, order the submission of such evidence as it considers necessary for the determination of the truth pursuant to Articles 64(6)(d) and 69(3) of the Statute.

20. As to calling additional witnesses, the Chamber notes that, although the role of [REDACTED] at the time of the events has been extensively discussed at trial, the parties have not called to testify at trial any such [REDACTED] who may still be alive or able to testify. In this regard, the Chamber considers that it may be desirable to hear the testimony of the [REDACTED] and/or the [REDACTED], whose names have been repeatedly mentioned by both prosecution and defence witnesses.⁴⁷ For planning purposes and to ensure the expeditiousness of the trial, the Chamber has requested the Registry's assistance in determining the whereabouts of these two individuals and whether they would be willing and able to give evidence at trial.

⁴⁷ [REDACTED]

21. As the presentation of the parties' evidence is coming to an end, the Chamber hereby instructs the Registry to file a report on the results of the requested inquiry by no later than 23 October 2013. Thereafter, if at least one of those individuals is willing and able to testify, the Registry should proceed with the necessary arrangements, in order to obtain their voluntary appearance as from 28 October 2013. The modalities of the testimony will be addressed in due course.
22. As to the possibility of the Chamber requesting the submission of additional evidence, following the parties' observations received on 11 October 2013, the Chamber will render a decision on the submission into evidence of written witness statements, if any, in due course.⁴⁸ In addition, the Chamber is considering requesting the submission of additional material, which have been discussed at trial but so far not submitted into evidence. The parties and participants will be informed in due course of the specific documents under the Chamber's consideration, and will be given an opportunity to make observations on the issue.

The unsworn statement of the accused

23. In its Submission 2796, the defence informed the Chamber that it was "considering" the possibility of the accused making an unsworn statement at the conclusion of all oral evidence.⁴⁹ By way of an oral decision on 11 September 2013, the Chamber instructed the defence to inform it of whether the accused intends to make such a statement at least one week before the end of the testimony of the last defence witness.⁵⁰ Taking into account the

⁴⁸ Defence Submissions on the proposed *proprio motu* Admission of 100 transcripts of Prosecution witness interviews, 11 October 2013, ICC-01/05-01/08-2833 and Prosecution's Observations on the Admission into evidence of prior statements of trial witnesses, 11 October 2013, ICC-01/05-01/08-2834.

⁴⁹ ICC-01/05-01/08-2796, paragraph 5.

⁵⁰ ICC-01/05-01-08-T-343-CONF-ENG ET, page 3, lines 18 to 22.

uncertainty on the date of appearance of the remaining witnesses to be called by the defence and the deadline of 25 October 2013 for the defence to conclude with the presentation of its oral evidence, the Chamber instructs the defence to inform it, by no later than 21 October 2013, of whether the accused will provide an unsworn oral or written statement in accordance with Article 67(1)(h) of the Statute.

24. Should the accused decide to give an unsworn oral statement, the modalities of its presentation and the prosecution's request to question the accused will be decided upon in due course.⁵¹ Nonetheless, the Chamber notes that it shall be presented after the conclusion of the presentation of *all* evidence in the case or during the presentation, pursuant to Rule 141(2) of the Rules, of the final closing statements by the defence.

Issues related to the appearance of the remaining witnesses to be called by the defence

25. Pursuant to the defence's Submission 2796, Witnesses D04-54, D04-14, D04-41 and D04-44 are still expected to appear before the deadline of 25 October 2013. However, the Chamber notes that, from 13 September 2013 to the present date, all hearings have been cancelled because no further defence witnesses have been available to appear before the Chamber.
26. The Chamber is concerned that the deadline for the defence to conclude with its presentation of evidence is coming to an end, and that no concrete information has been provided on the exact dates of appearance of the remaining witnesses. Consequently, the Chamber will convene an *ex parte* status conference with the defence and the representatives of the Registry.⁵² In addition, in order for the parties and participants to be fully informed,

⁵¹ ICC-01/05-01/08-2798, paragraph 6.

⁵² Email sent from the defence to the Chamber at 16.11 on 17 October 2013.

the Chamber orders the defence and the Registry to jointly submit, by no later than 22 October 2013, a complete report on the measures taken in order to ensure the appearance of the remaining witnesses to be called by the defence before 25 October 2013.


III. Conclusions

27. For the above reasons, the Trial Chamber hereby:


- (i) In relation to the First Motion for Clarification, DECIDES that the time frames set out in Decision 2731 will not be suspended over the 2013-2014 winter judicial recess;
- (ii) In relation to the Second Motion for Clarification, REITERATES that
 - (a) the imposition of the deadline of 25 October 2013 for the defence to conclude its presentation of evidence did not amount to a decision to close the case pursuant to Rule 141(1) of the Rules, and
 - (b) this deadline does not related to any outstanding decisions of the Chamber on the admission of documentary evidence;
- (iii) ORDERS the Registry to file, by no later than 23 October 2013, a confidential report on the whereabouts, willingness, and availability to give evidence at trial of the two individuals referred to in paragraph 20 above;
- (iv) ORDERS the Registry, where one or both of the aforementioned individuals is/are willing and available to testify at trial, to proceed with the necessary arrangements in order to obtain their voluntary appearance as from 28 October 2013;
- (v) ORDERS the defence to submit, by no later than 21 October 2013, a public report confirming whether the accused will provide an unsworn oral or written statement; and
- (vi) ORDERS the defence together with the Registry to jointly file, by no later than 22 October 2013, a confidential report on the measures

taken in order to ensure the appearance of the remaining witnesses
to be called by the defence before the 25 October 2013 deadline.

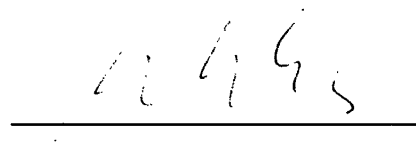
Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 18 October 2013

At The Hague, the Netherlands