

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: 19 November 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 “Corrigendum to Decision on issues related to the conclusion of the defence’s presentation of oral evidence at trial and on the ‘Defence Request for an Order for Cooperation’”

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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Legal Representatives of the Victims

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REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Mr Patrick Craig

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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*, issues the following Decision on issues related to the conclusion of the defence's presentation of oral evidence at trial ("Decision").¹

I. Background and Submissions

1. On 7 June 2012, the Chamber issued its "Decision on the 'Submissions on Defence Evidence'" ("Decision 2225"),² in which it, *inter alia*, granted the defence for Mr Jean-Pierre Bemba ("defence") the requested time to question its witnesses and ordered the defence to use the allocated number of hours in the most efficient manner possible and, in any case, within a timeframe of eight months.³
2. At a public status conference held on 3 May 2013, the Chamber reiterated its intention to adhere to its decision that the defence's presentation of evidence may not exceed eight months and decided that the defence "should be in a position to conclude the presentation of its evidence by approximately 19 July 2013, unless due to compelling reasons the Chamber decides otherwise."⁴
3. 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"),⁵ in which, taking into account

¹ The Chamber underlines that, in line with the principle of publicity of the proceedings enshrined in Articles 64(7) and 67(1) of the Statute, the present Decision is filed as confidential along with a public redacted version. To the extent that this Decision refers to information provided in the context of confidential or *ex parte* submissions, the Chamber considers that the information concerned does not warrant confidential or *ex parte* treatment at this stage.

² Decision on the "Submissions on Defence Evidence", 7 June 2012, ICC-01/05-01/08-2225.

³ ICC-01/05-01/08-2225, paragraphs 8, 10, 11 and 23(a) and (b).

⁴ Transcript of hearing of 3 May 2013, ICC-01/05-01/08-T-311-CONF-ENG ET, page 30 line 11 to page 31 line 2.

⁵ 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.

numerous vicissitudes and difficulties in the defence's presentation of evidence,⁶ it ordered, *inter alia*, that "the presentation of evidence by the defence be concluded by 25 October 2013, at the latest."⁷ 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'."⁸

4. On 6 September 2013, pursuant to an oral order of the Chamber,⁹ the defence filed its "Defence Submission as to the current timetable for the completion of its case" ("Submission 2796"),¹⁰ in which, *inter alia*, it informed the Chamber that the remaining witnesses to be called were Witnesses D04-15, D04-54, D04-14, D04-41, and D04-44 and that it did not currently anticipate calling any further witnesses.¹¹
5. On 23 October 2013, the Chamber issued its "Decision on the testimony of Witnesses D04-54, D04-14, D04-41 and D04-44" ("Decision 2842").¹² Taking into account long times of suspension in the proceedings due to the non-availability of witnesses,¹³ the defence's submissions as to the difficulties in arranging the appearance of its remaining witnesses,¹⁴ and the Registry's submission as to the inconsistent and constantly different requests

⁶ ICC-01/05-01/08-2731, paragraphs 1 to 20.

⁷ ICC-01/05-01/08-2731, paragraph 38(b).

⁸ ICC-01/05-01/08-2731, paragraph 24 and footnote 99.

⁹ 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.

¹⁰ Defence Submission as to the current timetable for the completion of its case, 6 September 2013, ICC-01/05-01/08-2796.

¹¹ ICC-01/05-01/08-2796, paragraphs 1 to 4.

¹² Decision on the testimony of Witnesses D04-54, D04-14, D04-41 and D04-44, 23 October 2013, ICC-01/05-01/08-2842.

¹³ ICC-01/05-01/08-2842, paragraph 3.

¹⁴ ICC-01/05-01/08-2842, paragraph 4.

submitted by the defence,¹⁵ the Chamber decided to further extend the 25 October 2013 deadline for the defence to present the testimony of Witness D04-54, which had to conclude by 1 November 2013 at the latest.¹⁶ As to Witnesses D04-14, D04-41, and D04-44, the Chamber ordered the Registry to continue making the necessary arrangements to facilitate their voluntary appearance and to report back to the Chamber by 30 October 2013 on their availability and the feasibility of hearing their testimonies as soon as practicable.¹⁷ The Chamber further stressed that, on the basis of this report, it would decide whether a further extension of the deadline in order to allow the defence to present the testimony of Witnesses D04-14, D04-41, and D04-44 would be appropriate.¹⁸

6. From 30 October 2013 to 1 November 2013, Witness D04-54 presented his testimony before the Chamber.¹⁹
7. On 30 October 2013, the Registry filed its “Registry report on the remaining Defence Witnesses in compliance with Decision ICC-01/05-01/08-2842” (“Registry Report”),²⁰ in which it informed the Chamber that the final arrangements for hearing Witnesses D04-44 and D04-14’s testimony, according to the defence’s most recent request, made on 11 October 2013, had not been concluded.²¹ In relation to Witness D04-41, the Registry informed the Chamber that it had not been able to establish contact with the witness through the contact details provided by the defence, and therefore, it could not confirm the availability of the witness.²² Consequently, the

¹⁵ ICC-01/05-01/08-2842, paragraphs 5 to 7.

¹⁶ ICC-01/05-01/08-2842, paragraphs 9 and 11(i).

¹⁷ ICC-01/05-01/08-2842, paragraphs 10 and 11(ii) and (iii).

¹⁸ ICC-01/05-01/08-2842, paragraph 10.

¹⁹ Transcript of hearing of 30 October 2013, ICC-01/05-01/08-T-347-CONF-ENG to transcript of hearing of 1 November 2013, ICC-01/05-01/08-T-349-CONF-ENG.

²⁰ Registry report on the remaining Defence Witnesses in compliance with Decision ICC-01/05-01/08-2842, 30 October 2013, ICC-01/05-01/08-2856-Conf.

²¹ ICC-01/05-01/08-2856-Conf, paragraphs 1 and 2.

²² ICC-01/05-01/08-2856-Conf, paragraph 4.

Registry submitted that it was not in a position to provide any estimate as to the feasibility of having the witnesses appear before the Court.²³

8. On 1 November 2013, the Chamber issued its “Decision on the time limit for the conclusion of the defence’s presentation of oral evidence at trial” (“Decision 2861”).²⁴ Taking into account the Registry Report, the Chamber considered that Witness D04-41 was not willing and available to testify, and decided that it did no longer expect him to provide testimony in the case and instructed the Registry to desist from taking any further measures to contact this witness.²⁵

9. As to Witnesses D04-44 and D04-14, the Chamber noted that “the delay in completing the necessary arrangements for their appearance appears to be attributable to the *continuous additional requests* made by the witnesses and the defence in relation to the conditions for their appearance, some of which required the Registry to seek the intervention of third parties and which required further administrative steps to be taken.”²⁶ Nonetheless, the Chamber stated that “taking into account the Registry’s continuous efforts to secure the appearance of the Witnesses D04-14 and D04-44, the Chamber considers it appropriate to grant an *additional limited extension* to the deadline for the defence to conclude with its presentation of oral evidence. Consequently, the Chamber *extends the deadline in order to allow the defence to present the testimony of Witnesses D04-14 and D04-44, provided that they both complete their testimony by 15 November 2013, at the latest.*”²⁷ This decision was not subject of any request for leave to appeal.

²³ ICC-01/05-01/08-2856-Conf, paragraph 5.

²⁴ Decision on the time limit for the conclusion of the defence’s presentation of oral evidence at trial, 1 November 2013, ICC-01/05-01/08-2861.

²⁵ ICC-01/05-01/08-2861, paragraphs 8 and 11(i).

²⁶ ICC-01/05-01/08-2861, paragraph 9 [emphasis added].

²⁷ ICC-01/05-01/08-2861, paragraph 10 [emphasis added]

10. On 7 November 2013, following a defence's motion,²⁸ the Chamber issued its "Decision on the defence's "Motion to replace a witness" ("Decision 2865"),²⁹ in which, *inter alia*, although noting that the general deadline for the defence to present its oral evidence has already lapsed,³⁰ it granted the defence's motion to reinstate Witness D04-13 to its list, "provided that the witness *completes* his testimony by no later than 15 November 2013, the final deadline for the conclusion of the defence's presentation of oral evidence at trial."³¹

11. From 12 to 14 November 2013, Witness D04-13 presented his testimony before the Chamber.³²

12. On 14 November 2013, the Registry informed the Chamber that, despite all efforts, the necessary authorisations for the appearance of Witnesses D04-14 and D04-44 have not been obtained.³³

13. On 15 November 2013, at 15.18 the Chamber was notified of the document filed at 13.20 by the defence, entitled "Defence Request for an Order for Cooperation" ("Defence Application"),³⁴ in which it requests the Chamber to (i) request the competent authorities of [REDACTED] to immediately facilitate the appearance of Witness D04-14 and D04-44 as witnesses in the present proceedings; and (ii) order that the defence presentation of evidence conclude upon the completion of the testimony of Witnesses D04-14 and D04-44, or by 15 December 2013 at the latest.³⁵

²⁸ Motion to replace a witness, 4 November 2013, ICC-01/05-01/08-2862-Conf.

²⁹ Decision on the defence's "Motion to replace a witness", 7 November 2013, ICC-01/05-01/08-2865-Conf, a public redacted version of this decision was filed on 8 November 2013, ICC-01/05-01/08-2865-Red

³⁰ ICC-01/05-01/08-2865-Red, paragraph 11.

³¹ ICC-01/05-01/08-2865-Red, paragraph 12 [emphasis added].

³² Transcript of hearing of 12 November 2013, ICC-01/05-01/08-T-350-CONF-ENG to transcript of hearing of 14 November 2013, ICC-01/05-01/08-T-352-CONF-ENG.

³³ Email from the Registry to the Chamber of 14 November 2013, at 16.21.

³⁴ Defence Request for an Order for Cooperation, 15 November 2013, ICC-01/05-01/08-2891-Conf.

³⁵ ICC-01/05-01/08-2891-Conf, paragraph 12.

II. Analysis

14. For the purpose of the present Decision, the Chamber has considered, in accordance with Article 21(1) of the Rome Statute ("Statute"), Articles 64(2) and (8)(b), 67(1)(c) and 69(3) and (4) of the Statute, Rule 134(3) of the Rules of Procedure and Evidence, and Regulations 24, 28, 34, 35 and 54 of the Regulations of the Court.

15. The Chamber notes that the defence commenced its presentation of evidence on 14 August 2012.³⁶ Over the course of its presentation of evidence, the defence called 35 witnesses -- including one witness who did not conclude his testimony, leaving his accommodation in The Hague for an unknown destination and one witness who did not board the plane expected to take him to the seat of the Court even though this had been arranged and paid for by the Court.³⁷ The original list of witnesses provided by the defence included 59 witnesses,³⁸ and was later increased to 63 witnesses.³⁹ On 10 May 2013,⁴⁰ 28 May 2013,⁴¹ 21 June 2013,⁴² 27 June 2013,⁴³ and 6 September 2013,⁴⁴ the defence notified the Chamber of its intention

³⁶ Transcript of hearing of 14 August 2012, ICC-01/05-01/08-T-229-CONF-ENG CT.

³⁷ Witness D04-07 disappeared before finishing his testimony and Witness D04-11 did not board the plane expected to take him to the seat of the Court. *See* Transcript of hearing of 2 November 2012, ICC-01/05-01/08-T-252-ENG ET WT, page 4 line 6 to page 5 line 13 and ICC-01/05-01/08-2731, paragraph 3 and Decision on "Defence Submissions on the Testimony of CAR-D04-PPPP-0007", 21 October 2013, ICC-01/05-01/08-2839.

³⁸ Defence submissions to the Chamber concerning its witnesses, 11 May 2012, ICC-01/05-01/08-2214-Conf-Exp, with Confidential Annex A, ICC-01/05-01/08-2214-Conf-Exp-AnxA.

³⁹ Third Defence Submissions on the Presentation of its Evidence, 29 June 2012, ICC-01/05-01/08-2238-Conf-Exp, paragraph 18.

⁴⁰ Defence submissions on the remaining Defence witnesses, 10 May 2013, ICC-01/05-01/08-2624, paragraph 16. The witnesses the defence decided not to call are witnesses D04-40, D04-63, D04-67, D04-46, D04-61, D04-12, D04-62, D04-20, D04-43, D04-42, D04-47, D04-28 and D04-23.

⁴¹ Second Further Revised Defence Submission on the Order of Witnesses, 30 May 2013, ICC-01/05-01/08-2644, paragraph 6. In this filing the defence informed the Chamber that, due to security concerns, it no longer intended to call Witness D04-08.

⁴² Email of 21 June 2013 at 15.58 from the defence to the Chamber, in which the defence informed the Chamber that, due to security concerns, it had decided not to call Witness D04-17.

⁴³ Transcript of hearing of 27 June 2013, ICC-01/05-01/08-T-331-CONF-ENG ET, page 24 lines 11-12 and page 28 lines 5-7. During that status conference the defence informed the Chamber of its intention not to call Witnesses D04-13, D04-11 and D04-52.

⁴⁴ ICC-01/05-01/08-2796, paragraph 4, in which the defence listed as its remaining witnesses only Witnesses D04-15, D04-54, D04-14, D04-41 and D04-44 and informed that the accused will not be giving sworn evidence, therefore, withdrawing from its list Witnesses D04-58, D04-32, D04-33, D04-27, D04-37, D04-38, D04-34, D04-35, D04-10 and D04-22.

not to call 28 witnesses from its list. On 12 August 2013,⁴⁵ and on 4 November 2013,⁴⁶ the defence requested leave to reinstate two witnesses in its list. As of 31 May 2013, and in order to contribute to streamline the presentation of evidence by the defence, the Chamber decided to sit for extended hours, that is to say six hours per day instead of the standard four hours.⁴⁷ The defence questioned its witnesses over a period of 15 months, including judicial recesses and multiples gaps due to, *inter alia*, the unavailability of witnesses.

16. The Chamber notes that, despite all efforts and numerous extensions granted by the Chamber, the Registry has not been able to conclude the necessary arrangements for Witnesses D04-14 and D04-44 to appear and conclude their testimony by no later than 15 November 2013.⁴⁸ The Chamber further underlines that the delay in ensuring that the testimony of the two remaining witnesses called by the defence within the final deadline set by the Chamber, despite the repeated extensions, are mostly attributable to the continuous additional requests made by the witnesses and the defence in relation to the conditions for their appearance.⁴⁹

17. Pursuant to Regulation 35(2) of the Regulations of the Court, the Chamber “may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard.” Consequently, by the wording used in the abovementioned

⁴⁵ See Submissions on the remaining Defence evidence, 12 August 2013, ICC-01/05-01/08-2739-Conf and Decision on the “Submissions on the remaining Defence evidence” and the appearance of Witnesses D04-23, D04-26, D04-25, D04-36, D04-29, and D04-30 via video-link, 15 August 2013, ICC-01/05-01/08-2740. By which witness D04-23 was reinstated in the defence’s list of witnesses.

⁴⁶ See Motion to replace witness, 4 November 2013, ICC-01/05-01/08-2862-Conf and Public redacted version of “Decision on the defence’s ‘Motion to replace a witness’” of 7 November 2013, 8 November 2013, ICC-01/05-01/08-2865-Red. By which Witness D04-13 was reinstated in the defence’s list.

⁴⁷ Decision on the “Second Further Revised Defence Submissions on the Order of Witnesses” (ICC-01/05-01/08-2644) and on the appearance of Witnesses D04-02, D04-09, D04-03, D04-04 and D04-06 via video-link, 31 May 2013, ICC-01/05-01/08-2646, paragraphs 8-13.

⁴⁸ Email from the Registry to the Chamber of 14 November 2013, at 16.21.

⁴⁹ ICC-01/05-01/08-2861, paragraph 9.

provision, it is clear that the Chamber enjoys discretion as to whether grant or reject the Defence Application.

18. The Chamber stresses once more that the final 15 November 2013 deadline set out in Decision 2861, was clearly granted provided that both, Witnesses D04-14 and D04-44 “complete their testimony by 15 November 2013, at the latest.”⁵⁰ This entails that the Chamber should have been notified of the request for extension of time sufficiently in advance and not just 40 minutes before the lapse of the time limit for the completion of the defence’s presentation of oral evidence. In addition, in this particular instance the Chamber finds that on such an application having crucial consequences on the conduct of the proceedings, the views of the parties and participants would have been essential for the Chamber’s determination. Given the timing of the Defence Application the Chamber had no opportunity to seek the views of the prosecution and the legal representatives of victims in order to make a timely decision.

19. Furthermore, the Chamber is of the view that the defence has not shown “good cause” within the meaning of Regulation 35(2) of the Regulations. In particular, the Chamber stresses once again the multiple and, at times, contradictory requests made by the defence regarding the appearance of the two witnesses involved.⁵¹ Remarkably, [REDACTED],⁵² and after the

⁵⁰ ICC-01/05-01/08-2861, paragraph 10 [emphasis added]

⁵¹ See, *inter alia*, transcript of the hearing of 11 December 2012, ICC-01/05-01/08-T-282-CONF-EXP-ENG ET, page 5, line 12 to page 7, line 4, page 14, lines 18 to 23, page 25, line 6 to page 30, line 7; Decision on measures to facilitate the continued presentation of evidence by the defence, 14 December 2012, ICC-01/05-01/08-2482-Conf-Exp; transcript of hearing of 11 February 2013, ICC-01/05-01/08-T-283-CONF-EXP-ENG ET, page 26, line 15 to page 32, line 14, page 37, line 20 to page 39, line 13; transcript of hearing of 27 June 2013, ICC-01/05-01/08-T-331-CONF-ENG, page 35, line 8 to page 37, line 22; Defence Submission as to the current timetable for the completion of its case, 6 September 2013, ICC-01/05-01/08-2796; and Submissions on the anticipated witness schedule and the testimony of Witness D04-54, 12 September 2013, ICC-01/05-01/08-2806-Conf.

⁵² See, *inter alia*, Transcript of the hearing of 11 December 2012, ICC-01/05-01/08-T-282-CONF-EXP-ENG, page 5, line 12 to page 7, line 4, page 14, lines 18 to 23, page 25, line 6 to page 30, line 7; transcript of hearing of 11 February 2013, ICC-01/05-01/08-T-283-CONF-EXP-ENG ET, page 26, line 15 to page 32, line 14, page 37, line 20 to page 39, line 13; and transcript of hearing of 27 June 2013, ICC-01/05-01/08-T-331-CONF-ENG, page 35, line 8 to page 37, line 22.

Registry has made arrangements in order to accommodate the witnesses' wishes,⁵³ the defence changed its position and requested the Registry to ask for the relevant authorisations only 2 weeks before the 25 October 2013 deadline.⁵⁴ The defence being fully aware of the usual required time for securing cooperation, should have reasonably anticipated that such late request on 11 October 2013 was likely to be problematic. Consequently, the Chamber in exercising its discretionary power, finds that no good cause has been shown in order to extend the deadline for the completion of the defence's presentation of oral evidence.

20. Considering that the last extended deadline for the conclusion of the defence's presentation of oral evidence has lapsed, the Chamber no longer expects Witnesses D04-14 and D04-44 to provide testimony in the present case and instructs the Registry to inform the relevant authorities that the requested authorisations are no longer required.

21. As the testimony of Witnesses D04-13 has now concluded, the Chamber orders the parties and participants to submit, by 21 November 2013 at the latest, any applications for the admission into evidence of material relevant to the testimony of the witness. Any responses to such applications shall be filed within seven days of their notification. Replies will be subject to leave being granted by the Chamber.

⁵³ Email from the Registry to the Chamber's Associate Legal Officer, sent on 28 March 2013 at 14.40; email from the Registry to the Chamber's Associate Legal Officer, sent on 24 June 2013 at 18.54; email from the Registry to the Chamber's Associate Legal Officer, sent on 5 August 2013 at 17.52; email from the Registry to the Chamber's Associate Legal Officer, sent on 2 September 2013 at 15.40; email from the Registry to the Chamber's Associate Legal Officer, sent on 13 September 2013 at 13.18; email from the Registry to the Chamber's Associate Legal Officer, sent on 27 September 2013 at 19.08; email from the Registry to the Chamber's Associate Legal Officer, sent on 15 October 2013 at 17.58.

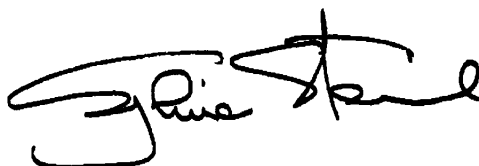
⁵⁴ Registry report on the measures taken in order to ensure the appearance of the remaining Defence witnesses, 22 October 2013, ICC-01/05-01/08-2840-Conf, paragraph 13.

III. Conclusions

22. For the above reasons, the Chamber hereby:

- (i) **REJECTS** the Defence Application;
- (ii) **ORDERS** the Registry to inform the relevant authorities that the authorisations requested for Witnesses D04-14 and D04-44 to provide testimony in the present case are no longer required;
- (iii) **ORDERS** the parties and participants to submit, by no later than 21 November 2013, any applications for the admission into evidence of material relevant to the testimony of the Witness D04-13; and
- (iv) **ORDERS** that any responses to such applications shall be filed within seven days of their notification.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 19 November 2013

At The Hague, the Netherlands