

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 24 May 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 Document

With ex parte Annex-A Defence and VWU only

**Decision on the starting date of the defence presentation of evidence and
related issues**

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

The Office of the Prosecutor

Ms Fatou Bensouda

Ms Petra Kneuer

Counsel for the Defence

Mr Aimé Kilolo Musamba

Mr Peter Haynes

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

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 starting date of the defence presentation of evidence and related issues (“Decision”).

I. Background and submissions

1. On 14 December 2011 the defence submitted, as requested by the Chamber,¹ its “Filing on Preliminary Information on the Defence Case”,² wherein, *inter alia*, it submitted that on the basis of its early estimates, the defence would need approximately four months for its presentation of evidence, with approximately 15 witnesses to be called.
2. On 24 February 2012 the Chamber issued its “Decision on defence disclosure and related issues” (“Defence Disclosure Decision”),³ wherein it set a series of deadlines and instructed the defence to comply with a number of obligations related to disclosure, preparation for its presentation of evidence and the information to be provided in relation to the defence presentation of evidence to the Office of the Prosecutor (“prosecution”), the legal representatives of victims and the Chamber.
3. On 5 March 2012, following the Chamber’s instructions,⁴ the defence filed its “Defence observations pursuant to the Chamber’s order postponing the status conference”,⁵ wherein it informed the Chamber that it anticipated being able to start its presentation of evidence on 1 July 2012 and that it

¹ Transcript of hearing on 8 December 2011, ICC-01/05-01/08-T-199-CONF-ENG ET, pages 64-65. See clarification at paragraph 10.

² Filing on Preliminary Information on the Defence Case, 14 December 2011, ICC-01/05-01/08-2005-Conf-Exp. See clarification at paragraph 10.

³ Decision on defence disclosure and related issues, 24 February 2012, ICC-01/05-01/08-2141.

⁴ Order postponing a status conference and on issues related to the presentation of evidence by the defence, 24 February 2012, ICC-01/05-01/08-2145.

⁵ Defence observations pursuant to the Chamber’s order postponing the status conference, 5 March 2012, ICC-01/05-01/08-2152-Conf-Red. See clarification at paragraph 10.

intended to call approximately 40 witnesses. The defence further stated that the time needed to present its evidence “would mirror that taken by the Prosecution to present its case.”

4. On 26 March 2012 the defence filed its “Submissions concerning the scheduled Status Conference on the presentation of Defence evidence”,⁶ wherein it submitted that due to a series of setbacks to its preparation for its presentation of evidence resulting from the passing of the late lead defence counsel, it intended to push back the projected date for the start of its presentation of evidence to 15 July 2012.
5. At the status conference held on 27 March 2012, the defence confirmed that the presentation of evidence by the defence “will be of a similar size to the prosecution case, at least in terms of the number of witnesses called.”⁷ However, defence counsel stressed that, in terms of the length of the presentation of its evidence, the defence was “looking at a period in excess of a year, probably as long as two years.”⁸
6. At an *ex parte* status conference, held on 10 May 2012 (“10 May Status Conference”) at the request of the defence,⁹ the Chamber was made aware of the intention of the defence to call “approximately 60 people”.¹⁰ Further, the defence again sought to push back the intended starting date for its presentation of evidence, this time to August 2012.¹¹ The defence also explained to the Chamber a series of difficulties that it was facing in preparing for its presentation of evidence. Taking into account these

⁶ Submissions concerning the scheduled Status Conference on the presentation of Defence evidence, 26 March 2012, ICC-01/05-01/08-2175-Conf-Red. See clarification at paragraph 10.

⁷ Transcript of hearing on 27 March 2012, ICC-01/05-01/08-T-219-ENG ET, page 21 lines 2 to 4.

⁸ ICC-01/05-01/08-T-219-ENG ET, page 22 lines 2 to 3.

⁹ Decision on the “Defence request for an *ex parte* status conference”, 8 May 2012, ICC-01/05-01/08-2213.

¹⁰ Transcript of the hearing on 10 May 2012, ICC-01/05-01/08-T-226-CONF-EXP-ENG ET, page 2 line 22. See clarification at paragraph 10.

¹¹ ICC-01/05-01/08-T-226-CONF-EXP-ENG ET, page 14 line 6.

difficulties and the repeated changes in the information provided by the defence in relation to its presentation of evidence, the Chamber requested that the defence provide concrete and detailed information in relation to the witnesses it intended to call.¹² Accordingly, the Chamber ordered the defence to submit for the Chamber's consideration, by 21 May 2012 at the latest, a full and exhaustive list, including (i) the names and codes of proposed defence witnesses; (ii) the proposed order of appearance; (iii) the number of hours requested by the defence for its questioning of each witness; (iv) the issues that would be addressed in the proposed witnesses' testimony; and (v) the problems that might be encountered in relation to each witness.¹³

7. On 11 May 2012, the defence filed its confidential *ex parte* "Defence submissions to the Chamber concerning its witnesses" ("Defence Submission"),¹⁴ together with a table of witnesses in an Annex, which does not contain the full information requested by the Chamber. The defence states that the defence team has been in contact with the VWU since February 2011 with a view to organising the defence presentation of evidence.¹⁵ The defence further submits that it was only at the 10 May Status Conference that the Chamber "without reference to any provision of either the Statute or Rules" requested the defence to provide concrete information about each of its witnesses.¹⁶ Lastly, the defence acknowledges the alleged ability of the Chamber "pursuant to Rule 73 *ter* to order the Defence to "reduce the number of victims, if the Chamber considers that an **excessive number** of witnesses are being called to **prove**

¹² ICC-01/05-01/08-T-226-CONF-EXP-ENG ET, pages 10 to 13.

¹³ 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 10:45am.

¹⁴ 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.

¹⁵ ICC-01/05-01/08-2214, paragraph 1.

¹⁶ ICC-01/05-01/08-2214-Conf-Exp, paragraph 7.

the same facts””.¹⁷ The defence submits that this is not the case in relation to its proposed witnesses.

8. On 14 May 2012, the prosecution filed its “Request for Status Conference” (“Prosecution Request for Status Conference”),¹⁸ wherein the prosecution requests a status conference in order to address the Chamber on the following issues: (i) the date for the commencement of the defence presentation of evidence; (ii) the modalities of regulating contact between the prosecution and defence witnesses; and (c) the intent of the defence to call expert witnesses which it has previously expressed on the record. On 18 May 2012, the defence responded to the Prosecution Request for Status Conference, asking the Chamber to (i) refuse the request for a status conference; and (ii) issue a scheduling order for the commencement of the defence case as soon as practicable.¹⁹

II. Relevant provisions

9. In accordance with Article 21(1) of the Rome Statute (“Statute”), the Chamber, in making its determination, has considered Article 64(2), (3)(c), (6)(c) and (f), (7), (8)(b) and (9)(a), Article 67(1)(b), (c), (e) and (i) and Article 69 of the Statute, Rules 63, 78, 79, 101, 134(3) and 140 of the Rules of Procedure and Evidence (“Rules”), Regulations 19 *bis*, 20(1) and (3), 43, 44(5) and 54 of the Regulations of the Court (“Regulations”).

III. Analysis

10. At the outset, the Chamber considers that, although the present Decision refers to the existence of documents and, to a limited extent, the content of

¹⁷ ICC-01/05-01/08-2214-Conf-Exp, paragraph 8.

¹⁸ Request for Status Conference, 14 May 2012, ICC-01/05-01/08-2216.

¹⁹ Defence Response to the Prosecution request for a Status Conference, 18 May 2012, ICC-01/05-01/08-2217.

filings and transcripts of hearings which are currently classified as *ex parte* or confidential, it may be issued publicly. In the Chamber's view, the references made in the present decision are required by the principle of publicity of the proceedings and to enable the Chamber to state the reasons upon which its decision is based. Moreover, the Chamber is of the view that the references do not undermine and are not inconsistent with the confidential or *ex parte* nature of the documents referred to.

Starting date of the presentation of evidence by the defence and related deadlines

11. The Chamber is mindful of its duty to ensure the fair and expeditious conduct of the proceedings which should be balanced with the accused's right to have adequate time and facilities for the preparation of his defence. Taking into account the parties' submissions, the Chamber hereby decides that the presentation of evidence by the defence will commence on 14 August 2012 at 9h30.

12. The Defence Disclosure Decision established a series of deadlines for the fulfilment of the defence's obligations that will now fall within the Court's summer recess. While in accordance with Regulation 19 *bis*(2) of the Regulations time limits are not suspended during the judicial recess unless otherwise determined by the Chamber, the Chamber is of the view that in order to ensure fairness and expeditiousness a variation of the time limits originally imposed is warranted. Accordingly, the defence is hereby ordered to:
 - a. file as soon as practicable and in any event no later than 16h00 on 13 July 2012, any requests for redactions to material it intends to use at trial, if applicable;

- b. disclose and permit the prosecution to inspect any Rule 78 material as soon as it makes the decision to use an item as evidence and in any event no later than 16h00 on 13 July 2012;
- c. provide the prosecution, legal representatives and the Chamber with the complete identity of its prospective witnesses, their anticipated order of appearance, the estimated length of questioning for each witness as well as any requests for in-court protective measures, as soon as practicable and no later than 16h00 on 13 July 2012;
- d. provide the prosecution, legal representatives and the Chamber with a list of all the documents it intends to rely upon as evidence, indicating (1) those that have already been admitted as evidence; and (2) the level of confidentiality of each item, as soon as practicable and no later than 16h00 on 13 July 2012;
- e. provide the prosecution, legal representatives and the Chamber with statements of the witnesses whom it intends to call to testify or a summary of the key elements that each witness will address during their testimony, as soon as practicable and no later than 16h00 on 13 July 2012;
- f. provide the prosecution, legal representatives and the Chamber with a document outlining the legal and factual issues that it intends to raise during its presentation of evidence as well as the defences to be advanced by the accused, if any, as soon as practicable and no later than 16h00 on 13 July 2012; and

g. in relation to the testimony of the first witness to be called by the defence, provide the prosecution, legal representatives and the Chamber, no later than 16h00 on 6 August 2012, with a list of the documents it intends to use during questioning, identifying the material it intends to submit as evidence during questioning and the level of confidentiality of each document;

13. The Chamber notes that in case the defence is allowed to call expert witnesses the prosecution should have the reports of these expert witnesses disclosed to it well in advance of the beginning of the defence's presentation of evidence. The Chamber hereby notes that in the event that the defence is allowed to call expert witnesses, the reports of such experts shall be disclosed to the prosecution no later than 16h00 on 13 July 2012.

Issues related to the presentation of evidence by the defence

14. The Chamber would like to stress that, contrary to the assertions of the defence, the Court's legal framework provides a wide range of mechanisms for the Chamber or its Presiding Judge to rule on the submission, admissibility or relevance of any type of evidence, give any directions for the conduct of the proceedings and testimony, and issue orders on, *inter alia*, the length of the evidence to be relied upon, the length of questioning of witnesses, and the number and identity of witnesses to be called by the parties.²⁰ This range of powers entrusted to the Chamber and its Presiding Judge are necessary tools for the Chamber's full compliance with its obligation to ensure a fair and expeditious trial conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses. Further, Rule 73 *ter* does not

²⁰ See *e.g.* Articles 64(8)(b), 67(6)(f), (8)(b), (9)(a), 69(2), (3) and (4) of the Statute; Rules 63(2), 79(4), 134(3) and 140(1) of the Rules; and Regulation 43, 44(5) and 54 of the Regulations.

exist in the Rules of Procedure and Evidence of this Court, and therefore, the restrictions imposed by such rule on the Chamber's ability to make orders regarding the defence's presentation of evidence do not apply.²¹

15. In the exercise of its powers and in light of its obligations, the Chamber is considering – if necessary in order to ensure the fairness and expeditiousness of the proceedings – limiting the total number of witnesses to be called by the defence, in view of the relevance, probative value and potential prejudice to a fair trial of their proposed testimonies; altering the order of appearance of the defence witnesses, particularly by calling any expert witnesses at the commencement of the presentation of evidence by the defence; and limiting the number of hours and total length of the defence's presentation of evidence. The Chamber invites the defence to review its list accordingly.

16. That notwithstanding, in order to make an informed decision the Chamber needs to be provided by the defence with additional information regarding each of its anticipated witnesses. To date this information has not been provided in full. Therefore, the Chamber hereby orders the defence to provide in full, no later than 16h00 on Monday 28 May 2012, the complete and detailed information indicated in Annex A to the present Decision.

The Prosecution Request for Status Conference

17. The prosecution has requested that the Chamber hold a status conference in order to discuss: (i) the date for the commencement of the defence presentation of evidence; (ii) the modalities of regulating contact between

²¹ The defence's reference to "Rule 73 *ter*" appears to be a reference to the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, which, the Chamber would like to point out, are not applicable before this Court.

the prosecution and defence witnesses; and (iii) the intention of the defence to call expert witnesses as it has previously stated on the record.

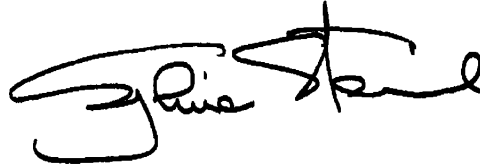
18. The Chamber notes that the date of the commencement of the presentation of evidence by the defence is set in this Decision. In addition, the modalities of contact between the parties or participants and the witnesses to be called by other parties or participants are regulated by the Chamber's "Decision on the Prosecution's request to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents",²² which shall apply *mutatis mutandis* during the presentation of evidence by the defence. As such, the Chamber considers issues (i) and (ii) of the Prosecution Request for Status Conference moot. The issue of potential expert witnesses to be called by the defence will be decided upon separately and in due course.

IV. Conclusion

19. In view of the foregoing, and subject to any further decision on the matter, the Chamber hereby:
- a. decides that the presentation of evidence by the defence will commence on 14 August 2012 at 9h30;
 - b. orders the defence to comply with the obligations and deadlines as set out in paragraphs 12 and 13 above;
 - c. orders the defence to provide in full, no later than 16h00 on Monday 28 May 2012, the complete and detailed information indicated in Annex A to the present Decision.
 - d. rejects the Prosecution Request for Status Conference.

²² Decision on the Prosecution's request to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents, 7 July 2012, ICC-01/05-01/08-813-Conf, paragraphs 66 to 68.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 24 May 2012

At The Hague, the Netherlands