

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08
Date: 19 November 2010

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 - URGENT

Decision on Directions for the Conduct of the Proceedings

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 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**

Ms Paolina Massidda

**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 (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (“Bemba case”) hereby delivers the following Directions on the conduct of the proceedings (“Directions”).

I. Background and Relevant Provisions

1. The present Directions are issued pursuant to Rule 140 of the Rules of Procedure and Evidence (“Rules”), with a view to determining the order and manner in which the evidence shall be submitted to the Chamber during the trial in the *Bemba* case.

2. In addition, in the present Directions, the Chamber addresses certain aspects of the confidential *ex parte* “Prosecution’s Request for Protective and Special Measures for Prosecution Witnesses at Trial”¹ filed on 24 June 2010 by the Office of the Prosecutor (“prosecution”). On 6 July 2010, the prosecution filed a corrigendum public redacted version of its initial request (“prosecution Request” or “Request”).² The prosecution also appended to its Request a public redacted Annex A wherein it proposed various types of protective measures.³

¹Prosecution’s Request for Protective and Special Measures for Prosecution Witnesses at Trial only available to the prosecution and the Victims and Witnesses Unit, 24 June 2010, ICC-01/05-01/08-800-Conf-Exp.

²Corrigendum to the Prosecution’s Request for Protective and Special Measures for Prosecution Witnesses at Trial, 6 July 2010, ICC-01/05-01/08-800-Corr-Red4; the prosecution also filed on 6 July 2010, a confidential redacted *ex parte* version of its corrigendum request available to the defence, ICC-01/05-01/08-800-Conf-Exp-Corr-Red; a confidential redacted *ex parte* version of its corrigendum request available to the OPCV, ICC-01/05-01/08-Conf-Exp-Corr-Red2; a confidential redacted *ex parte* version of its corrigendum request available to the legal representative, Ms Douzima, ICC-01/05-01/08-Conf-Exp-Corr-Red3.

³Public Redacted Annex A to the Corrigendum to the Prosecution’s Request for Protective and Special Measures for Prosecution Witnesses at Trial, 6 July 2010, ICC-01/05-01/08-800-AnxA-Corr-Red4; the

3. This Decision also addresses the defence request to receive regular schedules for the appearance of witnesses set out in its "Defence Observations on the VWU Unified Protocol on Practices for Witnesses Giving Testimony at Trial".⁴
4. In accordance with Article 21(1) of the Rome Statute ("Statute"), the Chamber, in making its determination has considered Article 64(2), (6)(d) and (f) and (8)(b), Article 67(1)(e) and (h), Article 68(2) and (3) and Article 69 of the Statute, Rule 88(5), Rule 87(3)(a), Rule 87(3)(e), Rule 91, Rule 134(1) and Rule 140 of the Rules, Regulation 43 of the Regulations of the Court and Regulation 94(d), (e) and (g) of the Regulations of the Registry.

II. Conduct of the Trial Proceedings

A. Preliminary Remarks

5. The Trial Chamber, consistent with the approaches adopted by Trial Chamber I and Trial Chamber II, determines that the trial will commence with the presentation of the prosecution's evidence, followed by the presentation of the 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

prosecution also filed on 6 July 2010, a confidential corrigendum to Annex A redacted *ex parte* available to the prosecution and the VWU, ICC-01/05-01/08-800-Conf-Exp-AnxA-Corr; a confidential corrigendum to Annex A redacted *ex parte* available to the defence, ICC-01/05-01/08-800-Conf-Exp-AnxA-Corr-Red; a confidential corrigendum Annex A redacted *ex parte* available to the OPCV, ICC-01/05-01/08-Conf-Exp-Corr-AnxA-Red2; a confidential corrigendum Annex A redacted *ex parte* available to the legal representative, Ms Douzima, ICC-01/05-01/08-Conf-Exp-Corr-AnxA-Red3.

⁴ Defence Observations on the VWU Unified Protocol on Practices for Witnesses Giving Testimony at Trial, 3 November 2010, ICC-01/05-01/08-992, paragraphs 5 to 7. See also Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 18 November 2010, ICC-01/05-01/08-1016, paragraph 14.

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 new evidence as it considers necessary for the determination of the truth, in accordance with Articles 64(6)(d) and 69(3) of the Statute.

6. For the purposes of the present Directions, and considering the limited time remaining before the commencement of the trial, the Chamber sets out the general procedural guidelines to be followed during the trial proceedings, but will defer some matters relating to the issue of disclosure and associated deadlines for the presentation of evidence by the defence. Further decisions will be issued by the Chamber as appropriate, at later stages of the proceedings.

B. Order, Scope and Mode of Questioning

7. The Chamber recalls its power under Rule 140(2)(c) of the Rules to question witnesses as it considers appropriate. The Chamber will ensure that the rights of the accused are respected at all times and will give the parties the opportunity to explore any new issue raised by the Chamber to the extent necessary.
8. Subject to any amendment by the Trial Chamber or any further specific order of the Presiding Judge pursuant to Article 64(8)(b) of the Statute and Regulation 43 of the Regulations of the Court, the order of questioning during the presentation of evidence by the prosecution shall be as follows: the prosecution will question the witness first; then, providing a written

application has been made and leave to ask questions has been granted, the victims' legal representatives may question the witness; finally, the defence will be given the opportunity to question the witness.

9. Following the questioning of the witness by the defence, the prosecution may request the Chamber's leave to ask additional questions of the witness, providing that these are limited to issues which have been first raised during questioning by the defence or the victims' legal representatives. If such additional questions are asked by the prosecution, the defence, pursuant to Rule 140(2)(d) of the Rules, shall have the right to question the witness last.
10. Taking into account the "Decision on the admission into evidence of materials contained in the prosecution's list of evidence" issued by the Chamber on 19 November 2010, prosecution witnesses, at the time of their testimony, will be first asked by the Chamber to confirm that written statements and related documents included in the prosecution's Revised List of Evidence reflect their voluntary declarations.⁵
11. The order of questioning during the presentation of evidence by the defence shall be as follows: the defence will question the witness first; then, the prosecution will be given the opportunity to question the witness. Finally, provided a written application has been made, and leave to ask questions has been granted, the victims' legal representatives may also

⁵ The disagreement of Judge Kuniko Ozaki with the "Decision on the admission into evidence of materials contained in the prosecution's list of evidence" will be set out in her Dissenting Opinion, which will be filed shortly.

question the witness. Pursuant to Rule 140(2)(d) of the Rules, the defence shall have the right to question the witness last.

12. As regards the scope of the questioning, the Chamber recalls that it may, at any time during the proceedings, rule on the relevance of questions put to witnesses, on its own motion, or at the request of a party. Therefore, the scope of questioning by the party calling the witness shall be limited to relevant and / or contested issues in the present case. The prosecution may also choose to refer to paragraphs in a witness's statement (s) that are clear and do not need further presentation, to avoid repetition of evidence.⁶
13. With regard to the scope of questioning by the party not calling the witness, the Chamber determines that, taking into consideration the "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", during the presentation of the evidence by the prosecution, the defence shall be authorised to question witnesses on the full content of their respective statements.⁷ During both phases of the trial, the party not calling the witness may ask questions related to the credibility of a witness, the reliability of the evidence presented, as well as on mitigating and/or aggravating circumstances and reparation issues.
14. As stated above, the scope of questioning for additional questions by the prosecution shall be limited to issues raised for the first time during questioning by the defence or the victims' legal representatives. Any

⁶ As this measure is adopted pursuant to the "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", Judge Kuniko Ozaki's disagreement will be further explained in her Dissenting Opinion, which will be filed shortly.

⁷ *Ibid.*

additional questions from the defence shall be limited to matters raised following its initial questioning.

15. With regard to the mode of questioning, the Chamber expects all parties and participants to ask neutral questions to the witnesses. In addition, the Chamber reminds the parties of their obligation under Rule 88(5) of the Rules and will be vigilant in controlling the manner of questioning witnesses who are vulnerable victims.

C. Use of Documents during Questioning

16. Should the parties intend to rely upon documents during the questioning of a witness, they shall do so in accordance with the following guidelines:

(i) The prosecution shall, at least seven working days before the testimony of the witness, provide a list of the documents it intends to use during the questioning. Such documents shall be made available to the Trial Chamber, the defence and the legal representatives of participating victims.

(ii) If the defence wishes to use documents when questioning a witness called by the prosecution, it must, at least three working days before questioning the witness, provide the Trial Chamber, the prosecution and the legal representatives with a list of documents it intends to use.

This information may be communicated by way of email sent to the Legal Adviser to the Trial Division.

D. Question by the Victims' Legal Representatives

17. The Trial Chamber firstly recalls that victims are participants rather than parties to the trial and shall not be considered as a support to the prosecution. However, as they have a unique role, separate from that of the parties, their participation can assist the Chamber in its determination of the truth.
18. The Chamber further recalls its Decision of 12 July 2010,⁸ and its recent Decision on common legal representation of victims,⁹ in which the Chamber has determined that legal representatives wishing to participate during the trial proceedings should set out in a discrete application the nature and detail of their proposed questions to witnesses at least seven days before the witness is scheduled to testify.¹⁰
19. In addition to the application described above, the Chamber decides that victims may, at the end of the questioning by the prosecution, request leave to ask questions in addition to those questions filed in the application as set out in the paragraph above. Such request must explain both the nature and the details of the proposed questioning as well as specify in what way the personal interests of the victims are affected, in compliance with the conditions of Rule 91 of the Rules. The Trial Chamber will determine such applications on a case-by-case basis.

⁸ Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, 12 July 2010, ICC-01/05-01/08-807-Corr.

⁹ Decision on common legal representation of victims for the purpose of trial, 10 November 2010, ICC-01/05-01/08-1005.

¹⁰ ICC-01/05-01/08-807-Corr, paragraph 102 h); ICC-01/05-01/08-1005, paragraph 39.

20. With regard to the scope of questioning, the legal representatives are expected only to question a witness to the extent relevant to the victims' interests. The scope of questioning is therefore limited to questions that have the purpose of clarifying the witness' evidence and to elicit additional facts, notwithstanding their relevance to the guilt or innocence of the accused.

E. Unsworn Statements by the Accused

21. Nothing in the present Directions is intended to limit the right of the accused to make unsworn oral or written statements in accordance with Article 67(1)(h) of the Statute without this affecting his right to remain silent. He may make an unsworn statement at his convenience but shall nonetheless inform the Trial Chamber in order that it may decide on the appropriate moment and modalities for so doing.

F. Recourse to Closed or Private Sessions

22. The Chamber observes that the prosecution, in the Prosecution Request for Protective and Special Measures for Prosecution Witnesses at Trial of 24 June 2010, requested testimony to be conducted in closed session in certain situations.

23. The Chamber considers that closed sessions should remain a protective measure granted only on an exceptional basis, as it deprives the public from understanding parts of, or the entirety of, a witness's testimony and therefore, may affect the overall fairness of the proceedings. The Chamber

notes that some Chambers at the Court have, in consultation with the parties and participants, established practices for the limited use of *in camera* hearings. Trial Chamber II recently issued an oral decision¹¹ which this Chamber intends to adopt in the main as regards the following best practices:

- a. the Chamber calls upon parties and participants insofar as possible, to endeavour to have witnesses' testimonies given in public;
- b. each request for private session should specify the grounds for such protective measure in a neutral and objective fashion, and try to specify the points that will be touched upon;
- c. parties and participants should provide the Chamber with reasons justifying the continuation of the private session if the reasons that motivated the Chamber's decision for such session have changed;
- d. parties and participants are encouraged not to request that the Court goes into private session unless there is a serious and established risk which needs to be explained to the Chamber as set out under letter b) above;
- e. in preparing their lines of questioning, parties and participants should be endeavour to group together all the identifying questions and to ask these questions at the beginning of the testimony;
- f. the Chamber calls upon each party calling a protected witness, to prepare and provide the Chamber, and the parties and participants, with a list of sensitive information and related questions to be dealt with in private session. This list will be classified as a confidential

¹¹ Trial Chamber II, Transcript of hearing on 20 September 2010, ICC-01/04-01/07-T-189-ENG, page 13, line 1 to page 16, line 17.

document and shall be provided to the Chamber, where applicable, **seven days before the first appearance of the relevant witness** or as soon as possible by way of an e-mail to the Legal Adviser to the Trial Division.¹²

- g. in addition to the Chamber's *proprio motu* power to reclassify a document, parties and participants should draw the attention of the Chamber to any part of the transcript of a private session that could be reclassified as public after more detailed analysis or a change in circumstances.

24. The Chamber considers that the implementation and respect for these best practices by the parties and the participants will enable the public to follow the proceedings, as required by the principle of publicity of the proceedings.

25. For the above reasons and in keeping with these best practices, the Chamber does not favour evidence being given entirely in closed session. The Chamber notes that there are other possible measures available to protect sensitive information such as witnesses' identities and identifying information. For example, pursuant to Regulation 21(2) of the Regulations of the Court, broadcasts of audio and video recordings of all hearings are delayed by at least 30 minutes. This measure, although at times insufficient, may still address, if taken as a complementary measure to the abovementioned best practices, the security concerns of protected

¹² See Decision on in-court protective measures for Witnesses 38, 22 and 87 issued on 19 November 2010.

witnesses in case of inadvertent disclosure of identifying information to the public.

G. Redactions to Public Records of the Chamber

26. The Chamber adopts the jurisprudence of the Court with regard to redactions to transcripts of hearings.¹³ This approach is based on the Victims and Witnesses' Unit's ("VWU") proposal originally made before Trial Chamber I, and in order not to defeat the in-court protective measures towards the public as decided by this Chamber.¹⁴

27. Pursuant to Rule 87(3)(a) of the Rules, the subsequent redactions to the public record should apply, *inter alia*, to the following identifying information for witnesses to whom the Chamber has granted protection:

- a. Identity, name and aliases;
- b. Gender;
- c. Previous and current location, specific dates and times;
- d. Information relating to family members of a protected witness;
- e. Nationality, ethnic origin or religious affiliations;
- f. Current or previous profession and functions;
- g. Identifying characteristics;
- h. Information relating to the ICCPP such as, location of a protected witness, relevant dates which could reveal crucial aspects of the

¹³ Trial Chamber I, Transcript of hearing on 22 January 2009, ICC-01/04-01/06-T-105-ENG, page 52, line 2 to page 60, line 8; Trial Chamber II, Ordonnance relative aux mesures de protection de certains témoins cités à comparaître par le Procureur et par la Chambre (règles 87 et 88 du Règlement de procédure et de preuve), 9 December 2009, ICC-01/04-01/07-1667-Red, paragraph 20.

¹⁴ ICC-01/04-01/06-T-105-ENG, page 56, lines 4-10.

functioning of the protection program and the VWU, including its plans and procedures, the identity of the court staff in contact with the witnesses included in the ICCPP.

28. Redactions to information listed above are to be applied whenever revealing such information to the public would lead to the identification of a specific witness. Therefore, redactions are to be granted on a case-by-case basis once the Chamber has analysed the context in which such information is disclosed and is satisfied that its disclosure would put a witness at risk. This proposal is proportionate and the above list is not exhaustive as it does not prevent the Chamber from applying additional redactions as necessary, if the disclosure of other information would lead to the identification of a protected witness.

29. With regard to evidence being shown to the public, the Chamber reminds the parties and participants that it is for the entity calling a witness who intends to use the evidence, to specify in advance the level of confidentiality of such evidence to be presented in court. Accordingly, the technicians will be in a position to know whether this evidence could be publicly broadcast or not.

H. Information on the scheduling of witnesses

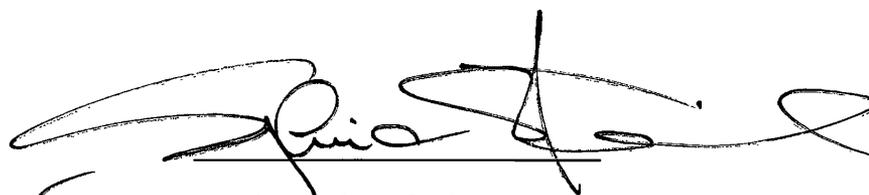
30. In order to ensure the efficient and smooth conduct of the proceedings, the Chamber instructs the prosecution, in close liaison with the VWU to inform the defence, participants and Chamber of the witness schedule on a weekly basis for the following week. In addition, a monthly schedule

should be provided each month. This information may be communicated by way of email sent to the Legal Adviser to the Trial Division.

III. Orders

31. In view of the foregoing, and subject to any further decision on the matter, the Chamber adopts the aforementioned guidelines for the duration of the presentation of the evidence.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 19 November 2010

At The Hague, The Netherlands