

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 9 September 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 - URGENT

**Decision (i) ruling on legal representatives' applications to question Witness
33 and (ii) setting a schedule for the filing of submissions in relation to
future applications to question witnesses**

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

Ms Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

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 in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* issues the following Decision (i) ruling on legal representatives’ applications to question Witness 33 and (ii) setting a schedule for the filing of submissions in relation to future applications to question witnesses.

I. Background

1. On 26 May and 29 August 2011, Mr Zarambaud and Ms Douzima submitted applications to question Witness 33 on behalf of the victims they represent (“Mr Zarambaud’s Application” and “Ms Douzima’s Application” respectively, and together, “Legal Representatives’ Applications”).¹ Mr Zarambaud’s Application contains a list of 10 sets of questions. Ms Douzima’s Application contains a list of 13 sets of questions.
2. On 1 September 2011, the defence filed its “Defence Response to the application of the Legal Representative of Victims Mr Zarambaud to question witness 0033” (“Defence Response to Mr Zarambaud’s Application”).²
3. On 6 September 2011, the Chamber issued its “Decision inviting observations on ‘Defence Response to the application of the Legal Representative of Victims Mr Zarambaud to question witness 0033’”, inviting the prosecution and Mr Zarambaud to submit their observations by 7 and 8 September 2011.³

¹ Requête du Représentant légal de victimes afin d’être autorisé à interroger le témoin W33, 26 May 2011, ICC-01/05-01/08-1458-Conf; Requête de la Représentante légale de victimes afin d’être autorisée à interroger le témoin 33, 29 August 2011 (notified on 30 August 2011), ICC-01/05-01/08-1669-Conf.

² Defence Response to the application of the Legal Representative of Victims Mr Zarambaud to question witness 0033, ICC-01/05-01/08-1679-Conf.

³ Decision inviting observations on “Defence Response to the application of the Legal Representative of Victims Mr Zarambaud to question witness 0033”, 6 September 2011, ICC-01/05-01/08-1707-Conf. The prosecution was authorized to provide its observations by 7 September while Mr Zarambaud was granted authorisation to submit his observations by 8 September 2011.

4. On 7 September 2011, the Office of the Prosecutor (“prosecution”)⁴ and Mr Zarambaud⁵ filed their observations on the Defence Response to Mr Zarambaud’s application.
5. On 8 September 2011, the defence filed its “Defence Response to the ‘Requête de la Représentante légale de victimes afin d’être autorisée a [sic] interroger le témoin 33’ of 29 August 2011” (“Defence Response to Ms Douzima’s Application”, and, together with the Defence Response to Mr Zarambaud’s Application, “Defence Responses”).⁶
6. On 8 September 2011, the Chamber invited the prosecution and Ms Douzima to submit observations on the Defence Response to Ms Douzima’s Application by 12:30 on 9 September 2011.⁷
7. On 9 September 2011, Ms Douzima⁸ and the prosecution⁹ filed their observations on the Defence Response to Ms Douzima’s Application.

II. Submissions

8. The defence argues that the forthcoming witnesses are mainly “insider witnesses” who are “collectively unlikely to be able to give evidence

⁴ Prosecution’s Observations on the “Defence Response to the application of the Legal Representative of Victims Mr Zarambaud to question witness 0033”, 7 September 2011, ICC- 01/05-01/08-1712-Conf.

⁵ Observations du Représentant légal de victimes Maître Zarambaud Assingambi sur le document de la Defense du 1^{er} septembre 2011, intitulé “Defense response to the application of the Legal Representative of Victims Mr. Zarambaud to question witness 33 [sic]”, 7 September 2011, ICC-01/05-01/08-1713-Conf.

⁶ Defence Response to the “Requête de la Représentante légale de victimes afin d’être autorisée a [sic] interroger le témoin 33” of 29 August 2011, 7 September 2011, ICC-01/05-01/08-1716-Conf and Confidential Annex A.

⁷ E-mail from the legal officer, Trial Chamber III, to the prosecution and Ms Douzima, copying the defence and Mr Zarambaud, 8 September 2011 at 12:11.

⁸ Observations de la Représentante légale des victimes, Maître DOUZIMA-LAWSON suite à la “Response Defence to the ‘Requête de la Représentante légale de victimes afin d’être autorisée à interroger le témoin 33’ of 29 August 2011’ [sic], 9 September 2011, ICC-01/05-01/08-1720-Conf.

⁹ Prosecution’s Observations on the “Defence Response to the ‘Requête de la Représentante légale de victimes afin d’être autorisée à interroger le témoin 33’ of 29 August 2011”, ICC-01/05-01/08-1721-Conf.

which impacts upon the personal interests of the victims”.¹⁰ On this basis, the defence urges the Chamber to limit the questioning of the legal representatives.¹¹

9. In relation to Mr Zarambaud’s Application, the defence submits that his first set of questions is wholly inadmissible because it is not relevant to the issues in the case, is not connected to the personal interest of the victims he represents and is solely designed to elicit prejudicial material.¹² With regard to sets of questions 2, 3, 5, 6, 7 and 8, the defence objects on the basis that the questions are either speculative, not relevant to the personal interests of the victims, misleading, leading, or outside the witness’ knowledge or expertise.¹³ Finally, the defence requests that questions 4.1, 4.2, 9 and 10 be put in a different form and without quoting passages of the witness’ written statements.¹⁴

10. With regard to Ms Douzima’s Application, the defence formulates objections with regard to questions 1, 2, 4, 5, 8, 9, 10 and 12, maintaining that these questions are either irrelevant to the victims’ personal interests or the confirmed charges, unfounded, leading, speculative, misleading or based upon a misstatement of the witness’ account.¹⁵ As for question 3, the defence has no objection to the question being asked, under the condition that it is reformulated.¹⁶

11. The prosecution and the legal representatives urge the Chamber to dismiss the Defence Responses and to permit the legal representatives to pose their

¹⁰ ICC-01/05-01/08- 1679-Conf, paragraphs 3 and 5; ICC-01/05-01/08-1716, paragraph 2.

¹¹ ICC-01/05-01/08- 1679-Conf, paragraph 21; ICC-01/05-01/08-1716, paragraph 17.

¹² ICC-01/05-01/08-1679-Conf, paragraphs 9 to 10.

¹³ ICC-01/05-01/08-1679-Conf, paragraphs 11, 12, 15, 16, 17, 18.

¹⁴ ICC-01/05-01/08-1679-Conf, paragraphs 13, 14, 19, 20.

¹⁵ ICC-01/05-01/08-1716-Conf, paragraphs 4, 5, 7, 11, 12, 13, 15.

¹⁶ ICC-01/05-01/08-1716-Conf, paragraph 6.

questions to the witness.¹⁷ Contrary to the position advanced by the defence, the prosecution argues that because the testimony of insider witnesses relates to the accused's superior responsibility, it "may very well impact upon the personal interests of the victims".¹⁸ In addition, the prosecution submits that "it is for the Chamber and not for the Defence to determine on a case-by-case basis whether the personal interests of the victims are affected."¹⁹ Mr Zarambaud, for his part, underlines that Witness 33's statements refer to the alleged contact between Mr Bemba and MLC troops on the ground, as well as to the acts of pillage committed by the Banyamulengués.²⁰ Ms Douzima, for her part, explains the relevance of the questions challenged by the defence and urges the Chamber to authorize all of her proposed questions.²¹

III. Relevant Provisions

12. In accordance with Article 21(1) of the Rome Statute ("Statute"), the Chamber has considered Article 68 of the Statute, Rules 91 and 93 of the Rules of Procedure and Evidence and Regulations 24 and 34 of the Regulations of the Court ("Regulations").

IV. Analysis and Conclusions

A. On the schedule for the filing of submissions in relation to future applications to question witnesses

¹⁷ ICC-01/05-01/08-1712-Conf and ICC-01/05-01/08-1713-Conf (in relation to the Defence Response to Mr Zarambaud's Application); ICC-01/05-01/08-1720-Conf and ICC-01/05-01/08-1721-Conf (in relation to the Defence Response to Ms Douzima's Application).

¹⁸ ICC-01/05-01/08-1712-Conf, paragraph 6; ICC-01/05-01/08-1721-Conf, paragraph 2.

¹⁹ ICC-01/05-01/08-1721-Conf, paragraph 2 (footnote omitted).

²⁰ ICC-01/05-01/08-1713-Conf, paragraphs 6 to 10.

²¹ ICC-01/05-01/08-1720-Conf.

13. Before ruling on the merits of the applications, the Chamber will address a procedural issue regarding the timing for the filing of responses to applications by legal representatives to question witnesses. This is governed by Rule 91(3)(a) of the Rules, which allows the parties to make observations on the legal representatives' applications "within a time limit set by the Chamber". While the Chamber decided that legal representatives are required to file their applications to question witnesses "at least seven days before the witness is scheduled to testify",²² the Chamber has never set such a time-limit for the filing of observations thereto and considers it appropriate to do so now.

14. The Chamber decides that from now on, any observations on, or objections to, applications by legal representatives to question witnesses are to be submitted at least four days before the relevant witness is scheduled to testify. Any replies to those observations are to be filed at least two days before the witness is scheduled to testify.

B. On the merits of the Applications

15. The Chamber will now turn to the merits of the applications and related observations. As an initial matter, the Chamber rejects the defence suggestion that so-called "insider witnesses" are "collectively unlikely to be able to give evidence which impacts upon the personal interests of the victims"²³. In the view of the Chamber, the interests of victims are not limited to the physical commission of the alleged crimes under consideration. Rather, their interests extend to the question of the person or persons who should be held liable for those crimes, whether physical perpetrators or others. In this respect, victims have a general interest in the

²² Corrigendum to 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, paragraph 102 (h).

²³ ICC-01/05-01/08-1679-Conf, paragraph 5.

proceedings and in their outcome. As such, they have an interest in making sure that all pertinent questions are put to witnesses. This is borne out by Rule 91(3) of the Rules, which provides that legal representatives may be permitted to question experts and the accused, as well as fact witnesses.

16. For the purpose of questioning Witness 33, the Chamber is of the view that both Ms Douzima and Mr Zarambaud have provided sufficient reasons to demonstrate that the victims they represent have a personal interest in putting questions to Witness 33. Indeed, Witness 33 is an insider witness who will testify, *inter alia*, on the alleged mode of liability of the accused and on the alleged crime of pillage in the Central African Republic, which, according to the victim application forms received by the Chamber, appears to have directly affected a significant number of victims.

17. For these reasons, the Chamber grants the legal representatives' applications to question the witness. Turning to the proposed questions, the Majority of the Chamber, Judge Ozaki dissenting, allows the questions to be asked under the following conditions:

(i) The Chamber allows Mr Zarambaud to put his questions to Witness 33 with the following restrictions:

- Question 1 is rejected for security reasons;
- Questions 5.2 and 5.3 are rejected since they are not relevant to the personal interests of victims or speculative; and
- Questions 4.2, 5.1 and 9 are allowed under the condition that they are reformulated in a manner establishing a connection between the questions and the quoted passages of the witness' written statement.

(ii) Ms Douzima is allowed to put all of her proposed questions to the witness, except for question 13.

18. Judge Ozaki dissents with respect to Mr Zarambaud's questions 2, 3, 4, 5.1, 6, 7, 8, 9 and 10, for reasons already explained in paragraph 13 of her Partly dissenting opinion on the Order on the procedure relating to the submission of evidence.²⁴

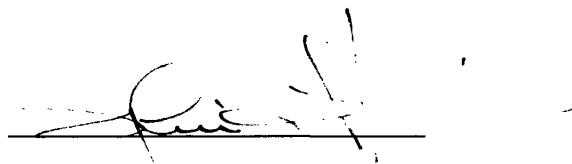
V. Orders

19. For these reasons,

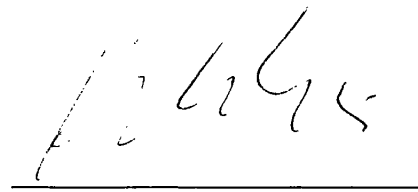
- (a) The Majority of the Chamber authorizes Mr Zarambaud to ask his questions with the restrictions set out in paragraph 17 (i);
- (b) The Chamber authorizes Ms Douzima to ask her questions with the restriction set out in paragraph 17 (ii);
- (c) The Chamber orders the parties and participants to follow the schedule set out in paragraph 14 when filing any submissions in relation to applications by legal representatives to question witnesses.

²⁴ Partly Dissenting Opinion of Judge Kuniko Ozaki on the Order on the procedure relating to the submission of evidence, 31 May 2011, ICC-01/05-01/08-1471.

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



Judge Sylvia Steiner

Judge Joyce Aluoch

Judge Kuniko Ozaki

Dated this 9 September 2011

At The Hague, The Netherlands