

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: 13/12/2011

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**

Confidential

**Defence Response to the Request of the Legal Representatives of Victims for
victims to present their views or concerns, or to present evidence**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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Ms. Marie-Edith Douzima-Lawson
Mr. Assingambi Zarambaud

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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A. BACKGROUND

1. On 22 November 2011, the Prosecution opened its case. The Prosecution indicated it would call 39 witnesses in total. Of these witnesses, 18 were characterised by the Prosecution as crime-base witnesses.¹ The Legal Representatives of Victims, Maitre Zarambaud and Maitre Douzima-Lawson have been authorized by the Chamber to examine these witnesses.

2. Over 12 months later, the Prosecution has now presented 35 witnesses, with four more scheduled for 2012. As such, the present trial is proceeding at an approximate rate of less than three witnesses per month.

3. On 21 November 2011, the Chamber rendered its *Order regarding applications by victims to present their views and concerns or to present evidence*,² in which it established the procedure to be followed by the Legal Representatives if they wish to seek leave to present evidence or for individual victims to present their views and concerns to the Chamber.

4. On 6 December 2011, the Legal Representatives for Victims both filed requests for authorisation for individual victims to present evidence and to present their views and concerns to the Chamber (collectively, the "Victims' Requests").³ In these requests, the Maitre Zarambaud asked for authorisation to call 9 witnesses to "présenter des éléments de preuves, et subsidiairement leurs vues et préoccupations".⁴ Maitre Douzima-Lawson asked for authorisation to call 10 witnesses to "présenter des éléments de preuves ainsi que leurs vues et préoccupations." »⁵

¹ ICC-01/05-01/08-793-AnxA.

² ICC-01/05-01/08-1935.

³ ICC-01/05-01/08-1989-Conf ; ICC-01/05-01/08-1990.

⁴ ICC-01/05-01/08-1989-Conf, para. 7.

⁵ ICC-01/05-01/08-1990, p.10.

5. Maitre Zarambaud asked for 9 hours to examine each of his 9 witnesses,⁶ while Maitre Douzima-Lawson asked for 7 hours and 30 minutes to examine each of her 10 witnesses.⁷

6. On 8 December 2011, the Defence was notified of the OPCV's *Request concerning the "Requête afin d'autorisation de présentation d'éléments de preuves et subsidiairement de présentation de vues et préoccupations par les victimes"*, in which the Principal Counsel of the OPCV asserted that she was the counsel to applicant a/0394/11, whom Maitre Zarambaud had included in the list of victims he wished to call to present evidence.⁸ The Principal Counsel of OPCV noted Maitre Zarambaud's representation to the Chamber that applicant a/0394/11 wished to lift his anonymity, and as such drew the attention of the Court to article 28 of the Code of Professional Conduct for Counsel which states that "*Counsel shall not address directly the client of another counsel except through or with the permission of that counsel.*"⁹ The Defence is yet to receive any further filings on this issue.

7. On 8 December, the Chamber wrote to Maitre Zarambaud in the following terms:¹⁰

The Chamber's records indicate that a/0394/11's application for participation was denied in Decision 1862 and that a/0194/11 is represented by Maitre Douzima. The Chamber would be grateful if Mr Zarambaud would clarify whether his reference to a/0194/11 and a/0394/11 is a typographical error or whether he in fact proposes to call them.

8. In response to the Chamber's query, Maitre Zarambaud confirmed that 2 of the 9 victims for whom he had requested authorisation to call as witnesses, were not in fact individuals for whom he was acting. Accordingly, he withdrew his request in relation to victims a/0194/11 and a/0394/11.¹¹

⁶ ICC-01/05-01/08-1989-Conf, para 12.

⁷ ICC-01/05-01/08-1990, paras 4, 28.

⁸ ICC-01/05-01/08-1993-Conf.

⁹ ICC-01/05-01/08-1993-Conf, para. 10.

¹⁰ Email Chamber to Maitre Zarambaud, 8 December 2011.

¹¹ Email Maitre Zarambaud to the Chamber, 8 December 2011.

9. The Chamber ordered that the parties file observations on the Victims' Requests within 7 days of receipt.¹² Pursuant to that order, the Defence files the following response. In the interests of expediency and judicial economy, the Defence responds to both requests simultaneously herein.

B. PRELIMINARY ISSUES

(a) Confidentiality of Maitre Zarambaud's filing

10. The Defences notes that Maitre Zarambaud filed his *Requête afin d'autorisation de présentation de preuves et subsidiairement de présentation de vues et préoccupation par les victimes*¹³ confidentially.

11. The Defence understands there to be nothing in the content of this filing which would prevent its public filing, but is obliged under Regulation 23 *bis* (2) of the Regulations of the Court to respond with a confidential filing. Should the Chamber order the re-classification of Maitre Zarambaud's filing, the Defence respectfully submits that the present filing could and should also be re-classified, with appropriate redactions if necessary, in order to preserve the publicity of the proceedings.

(b) Information available to the Defence

12. The Defence notes that in the *Katanga & Ngudjolo* trial, the Chamber ordered that if a victim wished to testify at trial, his or her Legal Representative was required to file a written application to the Chamber before the end of the Prosecution case, accompanied by a signed statement containing a comprehensive summary of the

¹² ICC-01/05-01/08-1935, p. 6.

¹³ ICC-01/05-01/08-1989-Conf.

testimony to be given. If the Chamber granted the application, the attached statement would count as disclosure within Regulation 54(f) of the Regulations.¹⁴ No such comprehensive statements have been sought, or provided in the present case. The primary submission of the Defence is that the absence of the provision of such advanced disclosure is a bar to the calling of any of the proposed witnesses by the Legal Representatives for Victims.

13. To further underline this point, the Defence notes that the application forms of each of the potential witnesses listed in the Victims' Requests remain heavily redacted. The redacted information generally includes the victim's name, date of the alleged crimes, location of the alleged crimes, details of other victims or witnesses to the alleged crimes, address, details of contact person, signature of the witness, photo, medical records (sometimes in total), and the vast majority of relevant details on any attached "proof" of identification.

14. Raising further difficulty is the fact that the Defence has never been given access to the Trial Chamber's reasoning as to why particular victims have been granted the right to participate in the proceedings, such reasoning being contained in *ex parte* annexes to decisions granting victims participatory rights. As such, the Defence has no means of knowing the personal interests of the victims identified by Maitre Zarambaud and Maitre Douzima-Lawson in the proceedings, and is therefore fundamentally handicapped in its ability to assess whether any proposed testimony is linked to their personal interests.

15. The Defence notes that 4 of the 17 applicants had indicated in their application forms that their identities and information could be provided to the Defence.¹⁵ As such, the Defence submits that there is no basis for VPRS having redacted these 4

¹⁴ ICC-01/04-01/07-1665, paras 25-27.

¹⁵ See the application forms of a/0511/08, a/1356/10, a/1828/10, a/2237/10.

application forms, and asks for the Chamber to order their provision in unredacted form to the Defence.

16. On 8 November 2011, the Defence wrote to the Chamber, requesting unredacted or lesser-redacted versions of the 19 application forms, in order to facilitate the preparation of the Defence response.¹⁶ On 12 December 2011, the Chamber informed the Defence that it would not be receiving lesser redacted versions of the relevant victims' application forms on the basis that "at this stage, there is unlikely to be any material prejudice to the defence" and that "the redactions continue to be proportionate and appropriate."¹⁷

17. While not seeking reconsideration of this decision, the Defence respectfully submits that it was disadvantaged by the lack of information with which to make a full and complete response to the Victims' Requests, and respectfully reserves its right to make additional submissions upon the provision of further information regarding the calling of these 17 alleged victims as witnesses.

18. The Defence moreover, observes that the possibility of the calling of alleged victims as witnesses was foreseeable from the outset of the trial. In such circumstances, it is submitted that the abridgment of the time limits for the Defence response in circumstances where the information available to the Defence effectively to respond is imperfect, represents a further prejudice. Nonetheless, the Defence responds as best it is able.

C. APPLICABLE LAW

19. The Appeals Chamber has established a strict regime for the presentation of evidence by victims. While finding that the possibility of victims leading evidence

¹⁶ Email Defence to Chambers, 8 December 2011, entitled "Lesser Redacted Victims' Applications".

¹⁷ Email Chambers to Defence, 12 December 2011, entitled "Lesser Redacted Victims' Applications"

pertaining to the guilt or innocence of the accused was not absolutely precluded by the Statute,¹⁸ the Appeals Chamber was clear in its guidance that:¹⁹

The Appeals Chamber considers it important to underscore that the right to lead evidence pertaining to the guilt or innocence of the accused and the right to challenge the admissibility or relevance of evidence in trial proceedings lies primarily with the parties. The first sentence of article 69 (3) is categorical: "[t]he parties may submit evidence relevant to the case, in accordance with article 64." It does not say "parties and victims may."... Article 66 (2) of the Statute provides: "[t]he onus is on the Prosecutor to prove the guilt of the accused". Presumptively, it is the Prosecutor's function to lead evidence of the guilt of the accused. In addition, the regime for disclosure contained in rules 76 to 84 of the Rules which sets out the specific obligations of the parties in this regard is a further indicator that the scheme is directed towards the parties and not victims.

20. The Appeals Chamber consequently determined the confined limits within which a Trial Chamber can exercise its powers to permit victims to present evidence: (i) a discrete application, (ii) notice to the parties, (iii) demonstration of personal interests that are affected by the specific proceedings, (iv) compliance with disclosure obligations and protection orders, (v) determination of appropriateness and (vi) consistency with the rights of the accused and a fair trial.²⁰

21. In the *Lubanga* case, the Trial Chamber made the following observation concerning the presentation of evidence by victims:²¹

It needs to be remembered that this is a court of law and, in particular, **this is the criminal trial of the accused**, and the presumption is that those who participate in the proceedings will be lawyers, lawyers acting for individuals or for bodies, for entities. If individuals are to be allowed to participate in person, there would have to be cogent, indeed powerful, reasons for that exceptional course [...] because [...] people without legal training coming to talk about very difficult things that have happened to them could have a real capacity for destabilising these court proceedings.

22. Similarly, in the *Katanga & Ngudjolo* proceedings, the Trial Chamber held applications for the giving of oral testimony would only be granted from victims

¹⁸ ICC-01/04-01/06-1432, para. 93.

¹⁹ ICC-01/04-01/06-1432, para. 93.

²⁰ ICC-01/04-01/06-1432, para. 104.

²¹ ICC-01/04-01/06-2032-Anx, para. 23.

whose testimony could make a genuine contribution to the ascertainment of the truth, and that victims were not to be allowed to turn into auxiliary prosecutors.²² The Legal Representatives for Victims were ordered to make a rigorous selection of the victims to be called.²³

23. In a similar vein, the Trial Chamber in the present proceedings has held that “victims are participants, rather than parties to the trial, and shall not be considered as a support to the Prosecution.”²⁴

D. SUBMISSIONS

(a) Failure of the Legal Representatives to make a “discrete” application

24. The Appeals Chamber has held that in order for a victim to be authorized to present evidence, the relevant Legal Representative must make a discrete application.²⁵

25. By contrast, the Victims’ Requests make only vague and collective submissions to justify their request to add 17 additional witnesses to the present proceedings. The Requests merely outline, in a collective manner and in very general terms the alleged relevance of the proposed witnesses to the proceedings, such as “[e]n effet, il s’agit de victimes de pillage, de viol, de meurtres de leurs proches,”²⁶ and “[t]outes les victimes demanderesses ont subi soit un viol, soit des blessures par balles, soit ont été pillées, soit ont été blessées tout en assistant dans le même temps aux meurtres de proches...”²⁷

²² ICC-01/04-01/07-1788, paras. 92-93.

²³ ICC-01/04-01/07-T-168-ENG ET WT 09-07-2010 23/42 (Open Session).

²⁴ ICC-01/05-01/08-1023, para. 17.

²⁵ ICC-01/04-01/06-1432, para. 104.

²⁶ ICC-01/05-01/08-1990, para. 6.

²⁷ ICC-01/05-01/08-1989-Conf, para. 13.

26. As such, the Defence submits that, at the outset, the Victims' Requests should be rejected as not conforming with the procedure set out by the Appeals Chamber on this question, given the failure of the Legal Representatives to make a discrete application on a victim by victim basis.

(b) Failure of the Legal Representatives to demonstrate how the personal interests of the participating victims would be affected by the presentation of the proposed evidence

27. The Chamber ordered that if the Legal Representatives wish to present evidence, their written applications were required to explain "[h]ow the personal interests of the participating victims would be affected by the presentation of the proposed evidence."²⁸

28. The Victims' Requests fail to do so. Again, the question of how their interests will be affected is dealt with in a collective manner, and no detail is given as to how their interests will be affected specifically by the presentation of the proposed evidence. The Defence submits that this failing also warrants rejection of the Victims' Requests.

29. Maitre Zarambaud, for example, argues that the question of whether the personal interests of the individuals proposed are affected by the presentation of the proposed evidence has already been resolved by previous decisions of the Chamber granting them status to participate as victims.²⁹ The Defence submits that this approach is manifestly incorrect. It cannot be the case that simply because a victim has been accepted to participate in the proceedings, this establishes that their personal interests would also be affected by the presentation of the proposed

²⁸ ICC-01/05-01/08-1935, p. 4.

²⁹ ICC-01/05-01/08-1989-Conf, para. 13 *bis*.

evidence. On this point, the Defence notes that the number of victims who will potentially be participants in the proceedings runs to the thousands.

30. The Defence, moreover, reluctantly submits that the manifest carelessness of the filing in question indicates a randomness in the selection of witnesses which is wholly inconsistent with the advancement of the personal interest of victims which he represents, rather a desire simply to adduce further similar evidence to that which already forms a substantial part of the Prosecution case, but without proper notice to the Defence as to what that evidence might be

31. The Defence also notes that Maitre Douzima-Lawson has justified the calling of witnesses based on a need for the Chamber to hear victims across a geographical spread. Maitre Douzima-Lawson asserts that "[c]ependant la quinzaine des témoins de l'accusation ayant le double statut (victimes/témoins) et ayant tous déjà déposé devant la Chambre ne sont que de Bangui, Capitale de la République centrafricaine et ses environs. »³⁰

32. The Defence makes two arguments in response. Firstly, the Prosecution has called 14 dual status victim/witnesses.³¹ It is not correct to state that these 14 are victims come only from Bangui and its surrounds. The Defence notes, for example, that the Prosecution called CAR-OTP-WWWW-0029 who was living in Mongoumba and testified about events there during the relevant period. CAR-OTP-WWWW-0075 testified about an attack in PK22, and pillage in Ngeurengou.

33. Moreover, the Chamber has heard extensive evidence about alleged crimes which occurred in other areas of the Central African Republic outside of Bangui and its surrounds. The Chamber has heard, for example, lengthy testimony about events in Damara from CAR-OTP-WWWW-0209. CAR-OTP-WWWW-0063 claimed to have

³⁰ IC-01/05-01/08-1990, para. 9.

³¹ See I ICC-01/05-01/08-1170-Conf.

been in PK12, Ngeurengou and Damara during the relevant events, and described what he saw. CAR-OTP-WWWW-0119 also spoke about alleged crimes in Bozoum, and on the Sibut Road. CAR-OTP-WWW-0079 testified that crimes had occurred in Damara, Sibut and Bozoum. There are other examples. As such, the Defence submits that Maitre Douzima-Lawson's justification for calling victim/witnesses from other geographical areas is without merit.

34. Secondly, and in any event, the Defence submits that it is not for the Legal Representatives to fill what they see as gaps in the Prosecution case, and present evidence on places, dates and facts that, although may fall within the scope of the charges, were not covered by the evidence of the Prosecution. The Defence submits that there can be no clearer example of the Legal Representatives acting as a "second prosecutor", than for them to seek to lead evidence on areas which they believe the Prosecution has not sufficiently covered in its own case. In this regard, the Defence recalls the Trial Chamber's ruling that "victims are participants, rather than parties to the trial, and shall not be considered as a support to the Prosecution."³² The Defence also recalls the ruling of the Appeals Chamber that in determining whether victims should be granted a right to participate, the Chamber must assess "whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor."³³

(c) The presentation of the proposed evidence would affect the rights of the accused and the fairness of the trial

35. At the date of the present filing, Mr. Jean-Pierre Bemba has been incarcerated for over 3.5 years. All requests for provisional release have thus far been rejected. The Defence of Mr. Bemba has been consistent in its commitment to the expeditious conduct of the proceedings.

³² ICC-01/05-01/08-1023, para. 17.

³³ ICC-01/04-01/06-925 at para. 28

36. Maitre Zarambaud has requested 9 hours for each of his 9 witnesses (now reduced to 7 witnesses due to the misrepresentations in his filing),³⁴ while Maitre Douzima-Lawson has asked for 7 hours and 30 minutes to examine each of her 10 witnesses.³⁵ The Defence understands that this does not include the time to be allocated for questioning by both the Prosecution, and the Defence, or for any potential re-examination or questioning on the part of the Chamber. At a conservative estimate, and considering the current pace of the proceedings, adding 17 witnesses to the present case will add between 4 and 6 months to the trial. In such circumstances, the Victims' Requests cannot be reconciled with the requirements of Article 68(3), that the presentation of the views and concerns of victims must not be prejudicial to, or inconsistent with the rights of the accused. Nor can the Legal Representatives claim to have made a "rigorous" selection of their witnesses, as has been required by another Chamber.³⁶

37. The Legal Representatives for Victims have already been given the opportunity examine 14 dual status victim/witnesses at length. Calling another 17 of these victim/witnesses is unnecessary, and disproportionate to their personal interests. The Defence notes that this is a criminal trial, the central purpose of which is the determination of the charges against the accused. This purpose will be distorted by the hearing of an additional 17 witnesses, who will testify on matters about which the Chamber has already heard months and months of testimony.

38. In such circumstances, particularly when the Legal Representatives of Victims have thus-far been afforded broad participatory rights in the present proceedings, the Defence submits that the calling of 17 witnesses cannot be justified, and will undoubtedly interfere with the accused's right to a fair and expeditious trial.

³⁴ ICC-01/05-01/08-1989-Conf, para 12.

³⁵ ICC-01/05-01/08-1990, paras 4, 28.

³⁶ ICC-01/04-01/07-T-168-ENG ET WT 09-07-2010 23/42 (Open Session).

(d) The request for individual victims to present their views and concerns has not been sufficiently justified

39. The Victims' Requests also fail to provide explanations as to the views and concerns which the proposed 17 victims intent to raise, or how these views and concerns could assist the Judges in their approach to the evidence.

40. The Defence notes that in the *Lubanga* case, the Trial Chamber held that before victims were authorized to present their views and concerns, "the individual circumstances of, and the detail of the requests" from each of the victims was required to be clear.³⁷ In treating the proposed victims collectively, rather than providing submissions on each of the individual circumstances warranting the presentation of views and concerns, the Victims' Requests fall far below this standard. As such, the Defence submits that the request for the 17 victims to present their views and concerns should also be rejected.

E. RELIEF SOUGHT

41. For the above reasons, the Defence requests that the Chamber:

ORDER VPRS to provide unredacted versions of applications a/0511/08, a/1356/10, a/1828/10, and a/2237/10.

REJECT the Victims' Requests in their entirety

³⁷ ICC-01/04-01/06-2032-Anx, para. 40.



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Done at The Hague, the Netherlands

13 December 2011