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**International
Criminal
Court**

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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 Supplemental Applications of the Legal Representatives
of Victims 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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A. BACKGROUND

1. Trial Chamber III ("the Chamber") is currently seized with Legal Representatives' second request to present evidence.¹ (together, "Supplemental Applications").

2. The first request² (together, "Initial Applications") contained "insufficient detail regarding the proposed testimony of the victims concerned", with the Chamber holding that it was "unable to make an informed decision on whether it is appropriate for individual victims to testify or to present their views or concerns unless it is provided with a detailed description on the substance of the proposed testimony."³

3. Rather than rejecting the Initial Applications, the Chamber issued a Second Order⁴ reiterating the procedure which set out in its First Order of 21 November 2011,⁵ and ordering the Legal Representatives to re-file. The Chamber also ordered that the Legal Representatives reduce their combined list of 17 proposed individuals to "no more than eight".⁶

4. The Chamber abridged the time period within which the Defence was required to respond to the Supplemental Applications to 7 days, requiring filing by 12.00 on 9 February 2012.⁷ Pursuant to that order, the Defence files the following

¹ Complément de la requête d'autorisation de présentation d'éléments de preuves et subsidiairement de présentation de vues et préoccupations par les victimes du 6 décembre 2012, ICC-01/05-01/08-2058-Conf ("Maitre Zarambaud's Supplemental Application"); Requête de la Représentante légale de victimes concernant des informations supplémentaires à sa requête du 6 décembre 2011 afin d'autoriser des victimes à témoigner et à faire valoir leurs vues et préoccupations devant la Chambre, ICC-01/05-01/08-2061-Conf ("Maitre Douzima-Lawson's Supplemental Application").

² ICC-01/05-01/08-1989-Conf-Corr; ICC-01/05-01/08-1990-Conf.

³ ICC-01/05-01/08-2027, para. 14.

⁴ Second Order regarding the application of the legal representatives of victims to present evidence and the views and concerns of victims, ICC-01/05-01/08-2027 ("Second Order").

⁵ *Order regarding applications by victims to present their views and concerns or to present evidence* ICC-01/05-01/08-1935 ("First Order").

⁶ ICC-01/05-01/08-2027, para. 12.

⁷ ICC-01/05-01/08-2091, para. 21(d).

response. In the interests of expediency and judicial economy, the Defence responds to both requests simultaneously herein.

B. PRELIMINARY ISSUES

(a) Abridgement of time for the Defence response

5. Regulation 34(b) gives parties 21 days to respond to written filings. The Supplemental Applications are significant filings, given that the potential outcome could not only substantially increase the length of the trial, but could considerably enlarge the quantity of inculpatory evidence presented. The Defence response requires an analysis of the arguments and submissions not only two substantive filings, but also an additional disclosure of seven appended witness statements. Despite this, the Chamber has shortened the time within which the Defence can respond to 7 days.⁸

6. The possibility of the calling of alleged victims as witnesses was foreseeable from the outset of the trial. That the issue has become pressing is due to the deficiencies in the Initial Applications.⁹ To hold the Legal Representatives' failings against the Defence is prejudicial, particularly given the significance of the question at hand. The Defence subsequently reserves its right to file supplemental submissions within the timeframe set out in the Regulations.

(b) Confidentiality of the Filings

7. Both Maitre Zarambaud and Maitre Douzima-Lawson have filed their Supplemental Applications confidentially, despite only referring to the proposed victim/witnesses by reference number.

⁸ ICC-01/05-01/08-2027, para. 23.

⁹ ICC-01/05-01/08-2027, para. 23.

8. The Defence reiterates its concerns as regards the public nature of the proceedings, but notes that it 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 the Supplemental Applications, the Defence submits that the present filing could and should also be re-classified, with appropriate redactions if necessary.

C. APPLICABLE LAW

9. The Appeals Chamber has established a strict regime for the presentation of evidence by victims. While finding that the possibility of victims leading evidence pertaining to the guilt or innocence of the accused was not absolutely precluded by the Statute,¹⁰ the Appeals Chamber was clear in its guidance that:¹¹

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.

10. The Appeals Chamber consequently determined the confined bounds 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.¹²

¹⁰ ICC-01/04-01/06-1432, para. 93.

¹¹ ICC-01/04-01/06-1432, para. 93.

¹² ICC-01/04-01/06-1432, para. 104.

11. In the *Lubanga* case, the Trial Chamber made the following observation concerning the presentation of evidence by victims:¹³

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.

12. Similarly, in the *Katanga & Ngudjolo* proceedings, the Trial Chamber held applications for the giving of oral testimony would only be granted from victims 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.¹⁴ The Legal Representatives for Victims were ordered to make a rigorous selection of the victims to be called.¹⁵

13. 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.”¹⁶

D. SUBMISSIONS

(a) **Maitre Douzinma-Lawson has failed to make a “discrete” application for each applicant**

14. 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.¹⁷ In the *Lubanga* case, the Trial Chamber held that before victims were

¹³ ICC-01/04-01/06-2032-Anx, para. 23.

¹⁴ ICC-01/04-01/07-1788, paras. 92-93.

¹⁵ ICC-01/04-01/07-T-168-ENG ET WT 09-07-2010 23/42 (Open Session).

¹⁶ ICC-01/05-01/08-1023, para. 17.

¹⁷ ICC-01/04-01/06-1432, para. 104.

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.¹⁸ Collective submissions do not satisfy this standard.

15. The obligation on the Legal Representatives to bring an application for **each** of the witnesses it sought to call was clear from the First Order of 21 November 2011.¹⁹

16. The Second Order again spelt out that each applicant must be the subject of a discrete application. The Chamber set out six matters which the Legal Representatives were required to address for each proposed witness, and then stated "[t]hese matters are to be addressed **on a victim-by-victim basis**".²⁰

17. Maitre Douzima-Lawson is asking for authorization for five victims to give evidence.²¹ She has failed to bring discrete application for each. Nor has she addressed the matters identified by the Chamber "on a victim-by-victim" basis. Rather, she has made **collective** submissions in three paragraphs which are applicable to the group of five victims.²² This is impermissible, and renders her second request also insufficient.

18. The provision of individual witness statements does not satisfy the requirement of a "discrete" application. The Second Order is clear that "**in addition to the written statements**, for **each** Relevant Victim, the Legal Representatives shall explain... (iii) how the presentation of the victim's testimony and/or views and concerns would affect the overall interests of the participating victims in the case; (iv) the relevance of the victim's testimony to the charges; (v) how the victim's testimony would assist in the Chamber's determination of the truth; and (vi) the reasons why the victim's testimony would not be cumulative of evidence that has been presented

¹⁸ ICC-01/04-01/06-2032-Anx, para. 40.

¹⁹ ICC-01/05-01/08-1935, paras. 2 – 3.

²⁰ ICC-01/05-01/08-2027, para. 17.

²¹ ICC-01/05-01/08-2061-Conf, para.4; amended from six victims by ICC-01/05-01/08-2091.

²² ICC-01/05-01/08-2061-Conf, paras. 7 – 9.

to date.”²³ This is not information which can be provided collectively for a group of proposed witnesses.

19. As such, Maitre Douzima-Lawson’s Supplemental Application should be rejected as not conforming with the procedure set out by the Appeals Chamber or the Second Order.

(b) Maitre Zarambaud is seeking to present evidence of crimes which fall outside the Document Containing the Charges and is therefore irrelevant

20. The “Revised Second Amended Document Containing the Charges” (“Revised Second Amended DCC”) charges Mr. Jean-Pierre Bemba of rape, pillage and murder.²⁴

21. Maitre Zarambaud seeks to call victims to who will testify as to crimes outside those in the DCC; “blessures”, et “blessures par balles.”²⁵ As such, his applications should be rejected as being irrelevant to the case against Mr. Bemba.

22. The first proposed victim is a/2475/10, will testify about having been shot and wounded. The evidence of wounding is not relevant to the charges confirmed against Mr. Bemba. Maitre Zarambaud asserts that “ce sera le premier cas d’une victim ayant subi des blessures graves par balle en PK12”. This statement overlooks the fact that the Prosecution has not called witnesses to testify about crimes that fall outside those relevant to the case.

23. While the victim also claims to be able to testify indirectly about a rape, he was not an eyewitness to this event. As such, the only link to the charges in this case is hearsay indirect evidence of someone having been raped. Maitre Zarambaud

²³ ICC-01/05-01/08-2027, para. 17.

²⁴ ICC-01/05-01/08-856-Conf-AnxA

²⁵ ICC-01/05-01/08-2058-Conf, paras. 12-4; 13-2, 13-4.

claims that this testimony is “corroborative” of other witnesses.²⁶ The Defence submits that this argument necessarily renders it impossible for this witness to fulfill the criteria that the testimony “would not be cumulative of evidence that has been presented to date.”²⁷

24. The second victim proposed by Maitre Zarambad, a/2475/10, also claims to have been wounded in the leg. Again, this proposed testimony is irrelevant to the charges as confirmed. The victim also claims to be an eyewitness to the murder of his mother. Again, the Chamber has already heard testimony of killings, and as such this evidence is cumulative. Maitre Zarambaud claims that this evidence will not repeat that brought by the Prosecution because “les faits se sont déroulés dans une zone dont les témoins du Procureur... n’ont pas parlé, zone située sur l’avenue Koudoukou...”²⁸ Given that Avenue Koudoukou is located in Bangui, about which the Prosecution has presented a profusion of evidence, any argument that this is a new “zone” renders this evidence unique is without merit.

25. As such, Maitre Zarambaud’s Supplemental Application should also be rejected. Should the Chamber authorize either of these two victims to give testimony, their evidence should be limited to that which is relevant to the charges against Mr. Bemba.

(c) The Legal Representatives are seeking to bring evidence which is cumulative of that already heard

26. As noted above, Matire Zarambaud’s two proposed witnesses are being sought to give evidence which is directly reflective of that already presented by the Prosecution. The same fatal flaw also applies to Maitre Douzima-Lawson’s Supplemental Application.

²⁶ ICC-01/05-01/08-2058-Conf, para.13-4

²⁷ ICC-01/05-01/08-2027, para.17.

²⁸ ICC-01/05-01/08-2058-Conf, para.12-4

27. Maitre Douzima-Lawson is open in her collective submissions that the witnesses she is seeking to call will testify about²⁹

- “- Les exactions réellement commises par les troupes en présence dans leurs localités à l’époque des événements;
- Les atrocités perpétrées par les éléments du MLC sur les populations des villes concernées
- La visite de Jean-Pierre Bemba à ses troupes notamment à Sibut
- L’identification des « Banyamulengués » à travers leur langue et leur langage, leur mode opératoire, leur accoutrement, leur état d’esprit etc...

28. The Defence agrees with Maitre Douzima-Lawson that these are “grey areas”, but in fact, the four points set out by Maitre Douzima-Lawson are a fair summary of the case the Prosecution has already endeavoured to present.

29. 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 which merely mirrors the Prosecution 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.”³⁰

30. This is not a case where the Prosecution has, for example, concentrated on presenting witnesses who speak to command responsibility or other matters divorced from the evidence of alleged victims. Rather, the Prosecution themselves characterised 18 of their proposed 39 witnesses as being “crime base” witnesses.³¹ The Prosecution has presented extensive evidence of witnesses alleging to be victims of the crimes relevant to the DCC. In such circumstances, and particularly where the evidence proposed by the Legal Representatives is so obviously duplicative, the

²⁹ ICC-01/05-01/08-2061-Conf, para. 9.

³⁰ ICC-01/05-01/08-1023, para. 17.

³¹ ICC-01/05-01/08-793-AnxA.

necessity of calling further evidence of this type is to be seriously doubted, particularly when weighed against the already excessive length of the proceedings.

(d) The Legal Representatives have failed to demonstrate how the personal interests of the participating victims would be affected by the presentation of the proposed evidence

31. The Legal Representatives' Supplemental Applications were required to explain "how the presentation of the victim's testimony and/or views and concerns would affect the overall interests of the participating victims in the case." The Supplemental Applications again fail to do so.

32. Maitre Douzima-Lawson deals with this question in a collective manner, and gives no details given as to how the interests of participating will be affected specifically by the presentation of the proposed evidence.

33. Maitre Zarambaud also addresses this question collectively, giving exactly the same answer for each of his proposed witnesses, namely "le cas de cette victim est similaire à ceux du plus grand nombre de victims dont la plupart, compte tenu de ce que les coups de feu tires par les Banyamulengés avaient fait fuir les éventuels témoins, éprouvent des difficultés à prouver leurs dires. This reasoning, in addition to being impermissibly collective, is insufficient. Maitre Zarambaud is in effect arguing that since other victims fled, the two proposed witnesses will be able to speak of things they won't. This logic is flawed, and doesn't recognize that those who fled will necessarily have very different interests from those who experienced the events from a completely different perspective.

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

34. 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.³² The Legal Representatives of Victims, Maitre Zarambaud and Maitre Douzima-Lawson have, on the authorization of the Chamber, examined these witnesses, often at length. Basic calculations show that the present trial is proceeding at an approximate rate of less than three witnesses per month.

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

36. Maitre Zarambaud has requested 6 hours for each of his 2 proposed witnesses.³³ Maitre Douzima-Lawson has asked for 4 hours to examine each of her 5 proposed witnesses.³⁴ This does not include the time to be allocated for questioning by the Prosecution, questioning by 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 8 witnesses to the present case will add 2 to 3 months to the trial. In such circumstances, the Supplemental Applications 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.

37. The Legal Representatives for Victims have already been given the opportunity examine 14 dual status victim/witnesses at length. Calling another 7 of these victim/witnesses is unnecessary, and disproportionate to their interests. The Defence notes that this is a criminal trial, the central purpose of which is the

³² ICC-01/05-01/08-793-AnxA.

³³ ICC-01/05-01/08-2058-Conf, para. 15.

³⁴ ICC-01/05-01/08-2058-Conf, para.6.

determination of the charges against the accused. This purpose will be distorted by the hearing of an additional 8 witnesses, who will testify on matters about which the Chamber has already heard months of testimony.

38. The Legal Representatives in the present proceedings have been given a broad right to question witnesses, participate in the proceedings through written filings, and also gave opening statements during which, unlike in other trials, submissions were made implicating the accused, in a similar manner to the Prosecution. This approach can be directly contrasted with that of the *Katanga & Ngudjolo* trial, where Trial Chamber II consistently prevents the Legal Representatives for Victims from questioning witnesses about the guilt of the accused.³⁵

39. In such circumstances, particularly when the Legal Representatives of Victims have thus-far been afforded such a broad participatory rights, the Defence submits that the calling of 8 witnesses cannot be justified, and will undoubtedly interfere with the accused's right to a fair and expeditious trial.

E. RELIEF SOUGHT

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

REJECT the Victims' Requests in their entirety; or, in the alternative

ORDER that any victims authorised to give testimony are restricted to presenting evidence relevant to the charges as confirmed in the present case.

³⁵ *Ibid.*, pp. 296 – 300.



Aimé Kilolo Musamba

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Done on the 9th of February 2012

At The Hague, The Netherlands