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**International
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Court**



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Date: **3 August 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***

**Confidential Document
With
Confidential Annex A**

Prosecution's Motion to Exclude Defence Political-Military Strategy Expert

Source: The Office of the Prosecutor

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

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I. Introduction

1. The Office of the Prosecutor ("Prosecution") moves to exclude Defence Witness CAR-D04-PPPP-0059 ("D-59"), designated by the Defence as an expert "specializing in the study of conflicts and geopolitics in Africa, in defence and security".¹ The proposed testimony of the witness is either not relevant to the issues in this case or, when arguably relevant, is not properly the subject of expert testimony. In reality, the Defence is seeking to call a witness for the purpose of summarizing the factual evidence of others, which is improper. Accordingly, the witness's testimony will be of no value to Trial Chamber III ("Chamber"), will simply be a waste of its time, and should therefore be excluded.

2. The Defence submits that D-59 can provide expert testimony on: (i) the politico-strategic decision, on the basis of a regional agreement, to request that the *Mouvement de Libération du Congo* ("MLC") send troops to the Central African Republic ("CAR") as a means of overcoming the unavailability of support from the Community of Sahel-Saharan States ("CEN-SAD"); (ii) the legitimacy of the MLC contingent intervening in the CAR in the prevailing context and; (iii) the crisis in the CAR between President Patassé and the authorities below him.²

3. The Defence further explains that "expert evidence that the involvement of the MLC was on the basis of a regional agreement and legitimate given the prevailing context is therefore relevant to the charges", given the Prosecution's factual assertions that the Accused sent MLC troops to the CAR in exchange for securing a strategic rear base to deter potential attacks from the Democratic Republic of the

¹ ICC-01/05-01/08-2243-Conf, Defence Disclosure of its List of Witnesses and the Factual and Legal Elements of its Case, 13 July 2012, para. 26; and ICC-01/05-01/08-2243-Conf-AnxA, Witness names and codes, 13 July 2012.

² CAR-D04-0003-0251 to 0252.

Congo ("DRC") government and took the decision to deploy MLC troops to the CAR as the sole decision-making authority of the MLC.³

4. The first proposed topic of the witness's testimony is arguably relevant, but it does not require expert testimony. Rather, the issue calls for fact evidence, which this witness is unable to provide, and not expert evidence. The last two proposed topics of the witness's testimony are not relevant to these proceedings, and should therefore not be permitted. Accordingly, there is no basis to permit the testimony of this witness.

5. There exist additional reasons to exclude this witness. To the extent the witness seeks to provide expert testimony on military subjects, the Prosecution submits that he lacks the requisite expertise. Further, the Defence is already calling a military expert during its case, and should therefore not be permitted to call a second one absent clear justification. Finally, the witness in his report relies on anonymous sources and fails to provide the sources for any of the assertions or conclusions, and on this basis also his evidence should be excluded.

II. Background

6. On 12 February 2010, the Chamber rendered a decision setting out the procedures to be adopted for instructing expert witnesses. It ruled, *inter alia*, that "the parties shall only instruct separate experts after that proposed course has been raised in a timely manner with the chamber"⁴ and "counsel must ensure that for those experts who are not on the list of experts, they have applied to include their names on the list".⁵

³ *Ibid.*

⁴ ICC-01/05-01/08-695, Decision on the procedures to be adopted for instructing expert witnesses, 12 February 2010, para. 13(v).

⁵ *Ibid* at para. 13(vii).

7. On 24 May 2012, the Chamber decided that the Defence would disclose the complete identities of prospective witnesses and statements or alternatively summaries of key elements that each witness will address during their testimony.⁶ Following a Defence request for delayed disclosure of witness identifying particulars,⁷ the Chamber reaffirmed the requirement of full disclosure.⁸

8. On 13 July 2012, the Prosecution received the "Defence Disclosure of its List of Witnesses and the Factual and Legal Elements of its Case", by which the Defence submitted its intention to call three expert witnesses, including D-59 as a political-military strategy expert.⁹ On that same day, the Defence disclosed witness summaries of its witnesses and provided information on the issues that each witness will testify about and how those issues relate to the charges.¹⁰

9. With respect to proposed Witness D-59, the Defence disclosed a 27 page report (though only 18 pages constitute the actual "substance" of the report). The report contains a section at the end entitled "Sources" in which some but not all of the sources relied upon are listed. The witness explains that he promised anonymity to some sources, on what authority it is not clear, and therefore requests that he not be required to disclose their identities ("*... permettez-moi de ne pas marquer leurs noms comme je le leur avais promis.*").¹¹ The report itself is unsourced (i.e. virtually no footnotes), so it is impossible to discern on what basis or information the witness purports to draw his specific conclusions. Finally, to the Prosecution's knowledge, the Defence failed to seek leave of the Chamber to call a separate expert on "political-

⁶ ICC-01/05-01/08-2221, Decision on the starting date of the defence presentation of evidence and related issues, 24 May 2012, paras. 12(c) and (e) and 19(b).

⁷ ICC-01/05-01/08-2226-Conf, Defence Request for Delayed Disclosure of Witness Identifying Particulars and Summaries of Anticipated Testimony, and other Related Requests, 13 June 2012.

⁸ ICC-01/05-01/08-2236-Conf, Decision on the "Defence Request for Delayed Disclosure of Witness Identifying Particulars and Summaries of Anticipated Testimony, and other Related Requests", 27 June 2012.

⁹ ICC-01/05-01/08-2243-Conf, para. 26; and ICC-01/05-01/08-2243-Conf-AnxA.

¹⁰ ICC-01/05-01/08-2245 + Conf-AnxA, *Communication par la Défense des documents divulgués au Bureau du Procureur pour pré-inspection en vertu de la Règle 78 du Règlement de Procédure et de Preuve*, 13 July 2012.

¹¹ CAR-D04-0003-0399 at 0420 (page 22 of the report).

military strategy" and did not seek to include the witness on the list of experts, as required by the Chamber.¹² Although the Chamber ruled that "prior inclusion of an expert's name in the Registry's list of experts is not a prerequisite for his eligibility to receive instruction", it stated that "admission onto the Registry's list must have been confirmed prior to the expert's testimony", which under the Defence's proffered schedule will be later this month.¹³

III. Request for confidentiality

10. Pursuant to Regulation 23(1) *bis* of the Regulations of the Court, the Prosecution files this document and the list of authorities (Annex A) as "Confidential" to maintain the classification awarded by the Defence in both its filing and evidentiary material disclosed.¹⁴

IV. Submissions

11. Pursuant to Articles 64(2), 64(9)(a) and 69(4) of the Rome Statute, the Prosecution submits that expert testimony to be provided by D-59 should be excluded in its entirety.

12. Of the three topics proposed by the Defence for this witness, only the first one is arguably relevant to the issues in this trial. The Defence seeks to show that the Accused sent troops to the CAR on the basis of a regional agreement, purportedly to counter Prosecution evidence that he did so in order to secure a strategic rear base.

¹² The Prosecution notes the Defence refusal of joint or separate instructions of experts proposed during the Prosecution's case, which further necessitated the Chamber's leave to call experts: ICC-01/05-01/08-695, para. 13(v). Additionally, both D-59 and CAR-D04-PPPP-0060 are not on the Registry's list of experts pursuant to Regulation 44(1) of the Regulations of the Court and the Chamber's rulings (see, ICC-01/05-01/08-695, para. 13(viii); ICC-01/05-01/08-928, Decision on the Prosecution's Request for Approval of a Proposed Expert and for Extension of Time for the Submission of the Expert Report, 7 October 2010, para. 12; and ICC-01/05-01/08-T-21-ENG ET, 29 March 2010, p. 20, lines 7-15).

¹³ ICC-01/05-01/08-928, para. 12; and ICC-01/05-01/08-T-21-ENG ET, 29 March 2010, p. 20, lines 7-15.

¹⁴ The Prosecution's classification is solely based on that of the Defence and for no other reason.

Putting aside whether the Defence's evidence really contradicts the Prosecution's evidence or simply provides an additional reason for the Accused's actions, the proposed topic does not require expert testimony.

13. An "expert" has been defined as "a person who by virtue of some specialised knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute".¹⁵ The attribution of expert status is a matter within the discretionary power of the Chamber.¹⁶

14. The topic identified by the Defence is a straightforward factual issue that does not require the assistance of an expert. The Chamber is fully capable of determining, based on evidence put before it, why the MLC intervened in the CAR, whether it was in furtherance of a regional agreement, and the rationale for the Accused's actions. No particular expertise or specialized knowledge is required to understand or assess these issues.

15. In fact, what is clear is that the Defence is improperly seeking to use the vehicle of an "expert" to put out-of-court factual evidence before the Chamber that the expert claims to have collected or reviewed himself. In the "Sources" section of the report, the witness lists the documents and witness statements that he reviewed, as well as the witnesses that he interviewed, but he does not source or document any of his specific assertions. Nor has the proffered expert provided any of the statements of witnesses he interviewed as annexes to his report, and the Defence has not disclosed them. To add even further to the secrecy of the underlying evidence, the witness declines to identify some of his sources, explaining that he promised them

¹⁵ See, for example: ICTY, *Prosecutor v Vojislav Šešelj*, Decision on Expert status of Andras Riedlmayer, IT-03-67-T, 8 May 2008, p. 3; ICTY, *Prosecutor v Vojislav Šešelj*, Decision on Anthony Oberschall's Status as an Expert, IT-03-67-T, 30 November 2007, p. 2; and ICTY, *Prosecutor v Strugar*, Decision on the Defence Motions to oppose Admissions of Prosecution Expert Reports pursuant to Rule 94 bis, IT-01-42-PT, 1 April 2004, p. 4.

¹⁶ See ICTY, *Prosecutor v Vojislav Šešelj*, Decision on Expert status of Andras Riedlmayer, IT-03-67-T, 8 May 2008, p. 3.

anonymity. In other words, rather than calling the fact witnesses directly, or even identifying them, the Defence proffers Witness D-59 to summarize and present, as established facts, evidence that he himself collected and reviewed, and the conclusions he drew from that evidence, without presenting the underlying evidence itself. That is neither a correct use of an expert nor a proper way to present evidence.

16. With respect to the second and third topics proposed by the Defence for this witness, they are not relevant to the issues in this trial and the Defence does not even attempt to justify why they should be the subject of testimony. The questions of the legitimacy of the MLC intervention in the CAR or of the crisis in the CAR between President Patassé and the authorities below him have no bearing on the responsibility of the Accused for the crimes alleged in this case. Moreover, even if these topics were somehow relevant, they would also not require “expert” testimony. As with the first topic, they should be addressed directly with factual evidence, rather than by a witness called to summarize the unsourced out-of-court evidence of others.

17. Finally, to the extent this witness seeks to testify as an expert on military subjects, he is not qualified. The second part of D-59’s report is dedicated to military matters such as the planning and management of the operations, military structure of CAR forces and their allies including deployment and roles, central command of the operations, military devices of the MLC and lapses in operational command during the operations.¹⁷ These issues fall outside the scope of D-59’s expertise. Nothing in D-59’s professional experience and publications, as detailed in his CV, qualify him as a military expert.¹⁸ Essentially, the Defence seeks to call a second military expert

¹⁷ CAR-D04-0003-0399 at 0409 to 0417 (p. 11 to 19).

¹⁸ CAR-D04-0003-0399 at 0399. In ICTY, *Prosecutor v Perišić*, Decision on Defence Motions to Exclude the Expert Reports of Mr. Patrick J. Treanor, IT-04-81-T, 27 October 2008, para. 11, the Trial Chamber stated that determining whether the witness qualifies as an expert, it “should take into account the witness’ former and present positions and professional experience through reference to the witness’ CV as well as the witness’ scholarly articles, other publications or any other pertinent information about the witness”. This Chamber

through the back-door. The Defence is already calling one military expert to testify to such matters, adding a second will waste time and lead to unnecessarily duplicative evidence.

V. Conclusion

18. For the reasons set out above, the Prosecution respectfully requests the Chamber to exclude the proposed Defence political-military strategy expert, D-59.



Fatou Bensouda, Prosecutor

Dated this 3rd Day of August 2012

At The Hague, The Netherlands

conducted a similar exercise in determining whether experts to be called by the Prosecution qualified as experts having due regard to information such as their experience and published material as detailed in their CVs and expert application forms submitted to the court: ICC-01/05-01/08-T-21-ENG ET, 29 March 2010, p. 20 to 24.