

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: 10/08/2012

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
with Confidential Annexes A - E

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

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. On 3 August 2012, the Prosecution filed its *Prosecution's Motion to Exclude Defence Political-Military Strategy Expert*,¹ ('Prosecution Motion') in which it asked Trial Chamber III ('the Chamber') to 'exclude the proposed Defence political-military strategy expert, D-59.'²

2. On 6 August 2012, the Chamber rendered its *Decision shortening time for observations on the Prosecution's Motion to Exclude Defence Political-Military Strategy Expert*, ordering the Defence to file any response by 10 August 2012.³

3. Pursuant to that order, the Defence makes the following submissions.

B. SUBMISSIONS

(a) The Prosecution Motion is vague and ambiguous

4. Contrary to standard practice before this Court, and this Chamber, the Prosecution Motion does not in fact contain a prayer for relief specifying precisely what orders it asks the Chamber to make. In the concluding paragraph of the filing, the Prosecution asks the Chamber to 'exclude the proposed Defence political-military strategy expert, D-59.'⁴ It is unclear in asking the Chamber to make this order whether the Prosecution wishes to prevent Mr. Dioba's report ('the Expert Report') from being admitted into evidence, or argues that he should be prevented from taking an oath and giving evidence at all, notwithstanding the concession that from the notice it has already received as to the content of his evidence, it is at least partially relevant.

¹ICC-01/05-01/08-2252-Conf

²ICC-01/05-01/08-2252-Conf, para. 18.

³ICC-01/05-01/08-2254-Conf

⁴ICC-01/05-01/08-2252-Conf, para. 18.

5. In the circumstances of this lack of clarity and/or ambiguity, the Defence will address both scenarios. The Defence submits that there is simply no legal basis for the Prosecution to seek an order preventing the attendance of a witness at court, and that the proper procedure, if the Prosecution is concerned to limit the extent of the evidence he gives at court is to constrain examination of Mr. Dioba to matters that are both relevant and properly within his expertise during his examination by the Defence. It is premature to seek to exclude his evidence *in toto* rather than objecting on a question by question basis.

6. Turning to the second possibility premised by the Prosecution's motion, the question of the admissibility of the Expert Report should be dealt with at the conclusion of his evidence as per the Chamber's proscribed procedure.

7. Whatever relief the Prosecution is in fact seeking, its submissions are based upon a misrepresentation and mischaracterization of Mr. Dioba's proposed expert testimony. Reliance in the Prosecution's submissions is placed almost exclusively on the summary on his testimony appended to the Pre-Defence Brief.⁵ The Prosecution ignores almost totally the contents of the witness' report from which a more complete and accurate understanding of the scope and relevance of his evidence are available.

(b) Mr. Dioba's evidence as to the background of the conflict is central to a proper understanding of a number of aspects of the case

8. It is inconceivable that the judgment in this case will not refer to the antecedent events to the arrival of the *Movement de liberation du Congo* ('MLC') in the Central African Republic ('CAR').

⁵ICC-01/05-01/08-2243-Conf with ICC-01/05-01/08-2243-Conf-AnxA

9. Indeed the Chamber has heard little or no evidence about the political background to the events in the CAR, the ethnic composition of the country, nor the pan-African arrangements for security in the area, all of which are relevant to the Prosecution allegations against Mr. Bemba.

10. Again, the Prosecution's brief submissions as to pertinence are oversimplified and mischaracterized. The Prosecution has, during the course of its case, tried to suggest that the entry of the MLC in the CAR was in some way unlawful and improper in a number of ways. The MLC involvement has been put down to *inter alia* a personal relationship between Mr. Bemba and President Patassé, and/or the desire of the accused to create a rear base, with the decision being described as secret and/or unilateral, with the MLC soldiers being characterized as 'rebels' in spite of their deployment in support of a democratically elected Head of State. This case has been presented without any evidence from the main players in this decision, many of whom are now in any event dead (for example, former President Patassé and Muammar el-Ghaddafi).

(c) Mr. Dioba is entitled to give evidence of his received knowledge of such matters

11. It lies ill in the mouth of the Prosecution to suggest, having either neglected to call such evidence, or chosen deliberately not to, that the Defence should be obliged to bring direct evidence of such matters.

12. The Chambers of the International Criminal Court can, and frequently do receive hearsay evidence, and there is no pre-requisite that a witness has a personal interest in events, as opposed to a general or even an academic interest.

13. Indeed, much of the evidence in this case, especially about the general politico-military situation, has been elicited from all manner of witnesses,

notwithstanding their expertise (or lack thereof), or the attributability of their sources. Indeed the Prosecution has frequently resorted to asking victim-witnesses to explain the background to and reasons for the war in the CAR, notwithstanding their remoteness from the political process. Contrary to the Prosecution submission, the sources of the Expert Report are identified with enormous particularity.⁶

14. Much of the source material for Mr. Dioba's evidence is public; publicly available reports and articles, and public statements. He is entitled, based upon his expertise, to opine upon how Central African states within CEN-SAD would have, and hence did respond to the crisis facing President Patassé, and how such actions fit within the legal framework created for the security of the region.

(d) The use of un-named sources goes to weight and not admissibility

15. The Defence would welcome a ruling to the effect that unattributed second and third-hand hearsay is without any evidential weight.

16. A large proportion of the evidence heard in the present case has been hearsay evidence, most of which is un-sourced, and a good deal of which has been second or third hand.

17. The Defence is more than content that the Chamber should issue a guideline decision as to the weight of such evidence at this juncture, as it would help focus its final written submissions as to much of the Prosecution evidence. However, as a matter of law, such evidence is not inadmissible as outlined above.

⁶CAR-D04-0003-0420 to CAR-D04-0003-0425.

(e) Mr. Dioba's academic qualifications⁷ give him the expertise to opine about military matters

18. In further support of its contention that a blanket prohibition on Mr. Dioba's attendance is not at this stage appropriate, as opposed to a proper monitoring of his evidence in court, the Defence asserts that is not its settled intention to elicit from Mr. Dioba his opinion on military matters. These topics will have been dealt with extensively by a prior witness by the time he attends to testify. Nonetheless, the Defence avers that his knowledge and training equip him perfectly well to advance such opinions, should anybody, the Defence included, seek to ask him about such things.

19. There is no requirement that an expert should have 'professional experience' of a particular situation, as opposed to having a sufficient level of knowledge of a subject to give weight to his opinions. The Prosecution's own submissions as to the definition of an expert witness concede as much.

20. Such knowledge can be gained in an academic environment in the same way as it can be gained in 'the field'.

21. The Prosecution's submissions in this regard are in contradiction with its own approach to the instruction of expert witnesses, for, if it is the Prosecution position that in order to qualify as an expert, a person must possess sufficient practical and/or professional experience in addition to academic qualifications, then it is frankly difficult to see how it can continue to put forward the testimony of certain so-called experts within its own case as being admissible or reliable.

⁷ See Annexes A to E

(f) The list of approved experts is an administrative convenience, and not a rule of evidence.

22. The list of approved experts is a useful tool for Judges and practitioners alike, however, inclusion on the list is not in itself any guarantee of expertise in a given set of circumstances.

23. By the same token, the fact that a person's name is not included on the list does not mean that they are not qualified to give opinions on about a relevant matter before the Chamber.

24. The Defence did not originally plan to call Mr. Dioba at this stage of its case. It was ordered to do so by the Chamber. If objection is truly taken on this basis, then the Defence will simply seek a deferment of Mr. Dioba's testimony until after such time that he is added on the Registry list. On this point, the Defence notes that it has sought inclusion of Mr. Dioba's admission to the list of experts, and is awaiting a response from the Registry.

25. To this end, the Defence appends relevant certificates and documents (which are in the possession of the Registry), further demonstrating that the Prosecution Motion challenging Mr. Dioba's expertise is premature.

C. RELIEF REQUESTED

26. Given the reasons cited above, the Defence respectfully requests that the Chamber:

REJECT the Prosecution Motion in its entirety

The whole, respectfully submitted.



Aimé Kilolo Musamba
Lead Counsel



Peter Haynes
Co- Counsel

Done on the 10th of August 2012

At The Hague, The Netherlands