

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 30/08/2012

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

**Defence Response to the Request by the Legal Representatives for leave to
examine Witness D-59**

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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**Unrepresented Applicants
(Participation/Reparation)**

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A. BACKGROUND

1. On 27 August 2012, both the Legal Representatives of Victims ('LRVs') sought leave from Trial Chamber III ('the Chamber') to question the Defence geo-political expert, Octave Dioba ('Witness D-59').¹

2. The Defence files the present response pursuant to Rule 91(3)(a) of the Rules of Procedure and Evidence; paragraphs 18-20 of the *Decision on the Directions for the Conduct of Proceedings of 19 November 2010*;² and paragraph 14 of the *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*.

B. SUBMISSIONS

(a) Questioning of Defence witnesses by the Legal Representatives of Victims

3. The Defence reiterates its concerns set out in its *Defence Response to the Request by the Legal Representatives for leave to examine Witness D-53*³ regarding the time frame provided for the presentation of the Defence evidence, and the questioning of its witnesses by the LRVs.

4. Article 68(3) of the Statute of the International Criminal Court ('Statute') provides that the participation of victims in the proceedings must not be in a manner which is 'prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial.'

5. The Defence is extremely concerned that lengthy questioning on their behalf will prevent the accused from obtaining the attendance and examination of

¹ ICC-01/05-01/08-2285-Conf; ICC-01/05-01/08-2286-Conf (together 'LRV Requests')

² ICC-01/05-01/08-1023

³ ICC-01/05-01/08-2599-Conf

witnesses on his behalf, as is his right pursuant to Article 67(1)(e) of the Statute, particularly in light of the length of the extensive questioning for which authorization is sought for the questioning of Witness D-59, the failure to make a link between these questions and the interests of the victims, and number of the proposed questions in the two requests which either overlap or are blatantly repetitive. As an example, Maitre Douzima-Lawson's proposed Question 6 (first question), and Maitre Zarambaud's proposed Question 4-4.3 are the same.

(b) Failure to demonstrate that the victims have a personal interest in examining Witness D-59

6. Neither Maitre Douzima-Lawson nor Maitre Zarambaud has demonstrated that the victims they represent have a personal interest in examining Witness D-59. Given the content of the scope of the Witness D-59's testimony, who is being called to explain the relevant geo-political background to the events in question, this is unsurprising.

7. Maitre Douzima-Lawson purports to justify her request to question the geo-political on the following basis:⁴

Les victimes ont le droit d'être situé sur le ou les personnes qui
avaient autorité sur leurs bourreaux, de sorte que les intérêts
personnels des victimes que je représente sont étroitement
concernés par les déclarations de ce témoin.

8. Witness D-59 is being called to opine on (a) the politico-strategic decision, on the basis of a regional agreement, to request that the MLC send troops to the Central African Republic as a means of overcoming the unavailability of support from CENSAD; (b) the legitimacy of the MLC contingent intervening in the Central

⁴ ICC-01/05-01/08-2285-Conf (no paragraph given)

African Republic in the prevailing context; and (c) the question of the crisis in the Central African Republic between President Patassé and the authorities below him.

9. Maitre Douzima-Lawson's brief 'justification' makes no link between the right of victims and this contextual background evidence, and as such her request to question the witness is without basis.

10. Maitre Zarambaud purports to justify his request to question the geopolitical on the following basis:⁵

La déposition de ce témoin vise à établir si les troupes du MLC envoyées en Centrafrique par l'accusé Jean-Pierre BEMBA étaient demeurées sous le commandement militaire de ce dernier, ou si le commandement militaire de ces troupes avait été transféré aux Autorités centrafricaines.

En d'autres termes, cette disposition vise à disculper l'accusé Jean-Pierre BEMBA des crimes qui lui sont reprochés, ce que le témoin sollicite d'ailleurs expressément de la Chambre.

Il s'ensuit que le représentant légal soussigné a le plus grand intérêt à interroger ce témoin, aux noms des victimes qu'il représente.

11. This 'justification' appears to be a direct cut-and-paste of Maitre Zarambaud's 'justification' to question the Defence military expert (Witness D-53).⁶ It does not relate to the content of the testimony of Witness D-59, and as such his request should be denied.

12. There is a clear difference between the testimony and expertise of the Defence Military Expert (Witness D-53) and who addressed issues relevant to military operations, and an expert in geopolitics and conflict who examines the

⁵ ICC-01/05-01/08-2286-Conf (no paragraph given)

⁶ ICC-01/05-01/08-2255-Conf (no paragraph given).

strategic political decisions affecting the organization of a command from a strategic level only.

13. In any event, it cannot be the case that simply because a witness is providing testimony which Maitre Zarambaud characterises as exculpatory, this gives rise to a 'personal interest' on the part of participating victims. Parties to the proceedings must be motivated by their duty to assist the Chamber in establishing the truth of the events in question, and not simply by ensuring that an accused is not acquitted.

14. It has been held at the ICC held that under no circumstances should legal representatives take on the role of Prosecutor.⁷ In seeking to question a witness solely on the basis that he provides exculpatory evidence is a clear example of Maitre Zarambaud seeking to act as Prosecutor*bis*, and hence falling outside the confines of his role in these proceedings.

15. The Chamber overruled Defence objections to the LRVs questioning the Defence military expert on the following basis:⁸

'it is in the victims' interests to better understand through the military expert's testimony whether the MLC troops, who allegedly committed the crimes, were under Mr Bemba's command during the 2002/2003 CAR events.'

16. Such a justification cannot, however, be made for the questioning of Witness D-59, the effect of whose proposed evidence is subtly, but significantly different, explaining as it does the politico-strategic decision to request that the MLC send troops to the Central African Republic; the legitimacy of the MLC contingent intervening in the Central African Republic in the prevailing context; and the relevant political crisis in place at the time of the relevant events. Unlike the

⁷ ICC-01/04-01/07-2844, 20 April 2011, para. 8: citing ICC-01/04-01/07-1665 (20/11/09), para. 83 ("The victims are not parties to the trial and certainly have no role to support the case of the Prosecution"); ICC-01/04-01/07-T-188-CONF-ENG-CT (15/10/10), p. 18 (Legal Representative (Victims) permitted on a case by case basis, to call evidence, but is not to act in this regard, as a Prosecutor *bis*).

⁸ ICC-01/05-01/08-T-230-ENG

Defence Military Expert (Witness D-53) who addressed issues relevant to military operations, and hence the issue of the command of those allegedly responsible for crimes, an expert in geopolitics and conflict examines the political decisions affecting the organization of a command from a strategic level only.

17. This is background information relevant to the Prosecution allegations as to the motivation for (and legitimacy of) the MLC's decision to send troops to the Central African Republic in October 2002. It is impossible to contemplate how either of the LRVs could be acting in the interests of victims or indeed on any instructions to seek to undermine (which appears to be the intention) or even explore this testimony, which is being lead to assist the Chamber in establishing the relevant background to the events in question.

18. Even if the Chamber considers that it is in the interest of the victims to have a 'better understanding' of the subject matter of Witness D-59's testimony; any decision authorising the LRVs questioning must necessarily be based on the presumption that neither Witness D-59's report, nor the examination by the Defence, nor the examination by the Prosecution, nor questioning from the Chamber provides such illumination. The Defence respectfully submits that it is not open to the Chamber to reach such a conclusion at this stage.

(c) Objections to Specific Questions

19. In addition to the general objections outlined above to LRV Requests as a whole, the questions identified below are particularly problematic and in the Defence submission, should be disallowed.

Maitre Zarambaud's Request

20. **Question 1:** This question requires the reading out of extensive passages before the question is posed. This manner of questioning is improper, inefficient, and unfair to the witness.

21. **Question 2:** As above

22. **Question 3:** As above

23. **Question 3.1 – 3.3, 3.5:** Through these questions, Maitre Zarambaud is putting propositions to the witness which have no basis in the evidence currently before the Chamber. These propositions are incorrect and/or misleading, and consequently manifestly unfair to the witness. In truth, these are not questions at all, but mere assertions, upon which the witness cannot properly comment.

24. In essence, Matire Zarambaud is attempting the exact same exercise which was the subject of a successful Defence objection during the questioning of the military expert, when Her Honour Judge Steiner prohibited Maitre Douzima-Lawson from putting statements to the witness which had no basis in the evidence before the Chamber. The exchange was as follows:⁹

Q. Well, sir, I'm no more of an expert either, but it's really quite striking. For your information, Mr Gambi was not a brigadier-general in November 2002 and he was not appointed Chief of Staff in November 2002. That's the information I would like to bring to your attention.

PRESIDING JUDGE STEINER: Maître Kilolo?

MR KILOLO: (Interpretation) Your Honour, I can see here that my learned friend opposite is really going too far. She is beginning to give testimony, rather than asking questions.

PRESIDING JUDGE STEINER: I fully support your objection Maitre Kilolo. Maître Douzima, you are not here giving testimony, nor is it expected to bring information that is not before our eyes, so please continue with your questioning of the witness.

⁹ ICC-01/05-01/08-T-234-CONF-ENG ET 22-08-2012

25. At the very least, Maitre Zarambaud should be required to give a citation to matters in evidence upon which his questions are based.

26. **Question 4:** This question involves the recitation of almost a whole page of text before a question is attempted. This method of questioning is improper, inefficient, and unfair to the witness.

27. **Questions 4.1 – 4-4.2** are irrelevant. **Questions 4-4.3 – 4-4.4** are outside the scope of the witness' testimony or expertise.

Maitre Douzima-Lawson's Request

28. **Question 5:** This question is outside the scope of the witness' testimony or expertise.

29. **Question 6:** At least the first part of this question is outside the scope of this witness' testimony or expertise.

C. RELIEF REQUESTED

30. On the basis of the arguments set out above, the Defence respectfully requests that the Chamber:

DENY the LRV Requests in their entirety; or alternatively,

RESTRICT the LRVs questioning of Witness D-59 as detailed herein

The whole respectfully submitted.



Aimé Kilolo Musamba
Lead Counsel



Peter Haynes
Co- Counsel

Done on the 30th of August 2012
At The Hague, The Netherlands