



Original: **English**

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

Date: 19/07/2013

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**

Public Redacted Version

**Defence Motion on the Questioning of Defence Witnesses by the Legal
Representatives of Victims**

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. OVERVIEW

The scope of participation of the Legal Representatives of Victims (“LRVs”) in the *Bemba* case is far broader than that afforded to victims’ representatives in any other international criminal proceedings. Unlike the practice in other Trial Chambers of the International Criminal Court (“ICC”), the questioning by LRVs in the *Bemba* case is virtually unrestrained in its content. The blanket right afforded by the Chamber to ask “follow-up” questions means in practice that no demonstrable link is required between the majority of the LRVs questions, and the interests of the victims they represent, in violation of the constitutive documents of the ICC. The questions asked by LRVs to Defence witnesses are often repetitive, and rarely neutral. Accordingly, in practice, each Defence witness is subjected to three cross-examinations, giving rise to the impression - if not the reality - that the trial is weighted substantially in favour of those seeking a conviction.

1. The Defence acknowledges that the Chamber is not required to follow the practice of other ICC Trial Chambers. However, the broad scope of questioning by LRVs in the *Bemba* case reaches so far beyond that accepted in other Chambers, that it cannot be said that Mr. Bemba is receiving the same level of protection under Article 68(3) as his fellow accused, and the fairness of his trial is accordingly compromised.

2. The current motion stems from Defence concerns that quite simply, the LRVs have been allowed to become active parties in the proceedings, which has created an imbalance in the fact-finding mission of the trial. The broad mandate afforded to the LRVs has been the subject of consistent Defence objections throughout the trial.¹ However, the Defence is compelled again to raise this issue given that the next group of Defence witnesses is mainly comprised of victims. No reasonable argument can be made that Maitre Zarambaud and Maitre Douzima-Lawson are representing the views and concerns of the victims they represent by challenging the testimony of other Central African victims, nor should these vulnerable witnesses be subjected to three cross-examinations.

3. The present motion also stems from the LRVs’ questioning of the first such witness

¹ These objections have been in the form of formal written response to the requests of the LRVs to question witnesses. See ICC-01/05-01/08-1729; D04-45, T-201-ENG, pages 1-3, page 3 line 2 to page 4 line 16; D04-44, T-205-CONF-ENG, pages 1-2, page 2 lines 11-21; D04-47, T-176-CONF-ENG, pages 48-50, page 49 lines 14-23; D04-18, T-230-ENG, pages 44-45, page 45 lines 12-19; D04-59, T-238-Red-ENG, page 2 lines 3-12; D04-60, T-243-Red-ENG, pages 1-3; D04-65, T-246-Red-ENG, pages 29-30, page 30 lines 1-24; D04-07, T-248-Red-ENG, pages 56-57 lines 24-8; Objections have also been made on an ad hoc basis throughout the proceedings, see for example ICC-01/05-01/08-1936-CONF, rejected by the Chamber at D04-69, T-192-Red-ENG, p. 58. See also D04-53, T-234-Red-ENG, p. 28; D04-59, T-327-Red-ENG, page 52, lines 16-25.

presented by the Defence. Following a VWU psychosocial assessment, the Chamber allocated special measures to Witness D04-03, and directed the parties to adapt their questioning to the “needs and capacities of the witness by using short and simple open-ended questions to guide the witness through his testimony.”² The LRVs posed unauthorized, convoluted and compound questions, sometimes running to up to half a page of transcript. They consistently quoted at length from transcripts of this and other witnesses, reading long sections of text before asking a question.³ The Defence is greatly concerned that this style of questioning, which the Defence submits cannot possibly be characterized as “using short and simple open-ended questions”, is inconsistent with statutory obligations to protect the psychological well-being and dignity of victims and witnesses.⁴

4. As such, the Defence requests that the Chamber restrict the questioning of LRVs for the remainder of the Defence case in a manner consistent with the Statute, Rules and jurisprudence of the Court, and the rights of the accused.

B. APPLICABLE LAW

5. When providing for the participation of civil parties in of ICC trials, the drafters of the Statute clearly demarcated the scope of this participation, requiring that:⁵

Where the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and **in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.**

As such, participation is contingent on ensuring that the rights of accused persons are in no way compromised.

6. Nor did the drafters provide LRVs with an unfettered right to question witnesses during the trial. Rule 91(3) makes any questioning of witnesses contingent on an application to the Chamber, and a ruling on this request. When considering, the Chamber must take into account:

The stage of the proceedings, the rights of the accused, the interest of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to article 68(3). The ruling may include directions on the manner and order of the questions...

² ICC-01/05-01/08-2694-Conf

³ **One question from Maitre Zarambaud**, D04-03, T-330-CONF-ENG, p.25: [REDACTED]

One question from Maitre Douzima-Lawson: D04-03, T-330-CONF-ENG, pp. 38-39: [REDACTED]

⁴ Article 68(1) of the Statute.

⁵ Article 68(3) of the Statute.

C. THE SCOPE OF LRV QUESTIONING IS INCONSISTENT WITH STATUTE, RULES, AND PRACTICE OF THE ICC

a) The practice of LRV questioning is inconsistent with the Chamber's own decision on directions for the conduct of proceedings

7. Rule 91(3) requires that the questioning of witnesses by LRVs is contingent upon a written application being approved by the Trial Chamber. The practice of Trial Chamber III, however, has been to allow LRVs to pose "follow-up" questions on any topic ostensibly addressed by Defence witnesses during their testimony. The Chamber decided as follows:⁶

In addition to the application described above, the Chamber decides that victims may, at the end of the questioning by the prosecution, **request leave to ask questions in addition to those filed application** as set out in the paragraph above. Such **request must explain both the nature and the details of the proposed questioning as well as specify in what way the personal interests of the victims are affected**, in compliance with the conditions of Rule 91 of the Rules. The Chamber will determine such applications on a case-by-case basis.

8. It is questionable whether allowing LRVs to seek leave to ask questions outside the application process set out in Rule 91(3) is consistent with the Rules. In any event, the Chamber has allowed "follow-up" questions to be asked of every Defence witness without any request from the LRVs explaining "both the nature and the details of the proposed questioning as well as specify in what way the personal interests of the victims are affected", in violation of its own decision. No justification is given for "follow-up" questions; no link is made by the LRVs between the "follow-up" questions and the interests of victims; and the Chamber makes no assessment on a case-by-case basis. These questions are asked, and the witnesses must answer.

9. In effect, this practice allows the LRVs in the *Bemba* trial to circumvent the procedure set out in Rule 91(3). As long as the LRVs receive authorization to question a Defence witness, they are then able to ask any other questions under the guise that they are "follow-up" questions, which require no prior authorization.

10. It is the widespread nature of this practice which makes it so prejudicial to the Defence. Taking the examination of Witness D04-06 as a random example, [REDACTED].⁷

⁶ ICC-01/05-01/08-1023, para. 19. See also D04-22, T-42-Red-ENG, p.18: "Just to remind Maître Zarambaud, and as well Maître Douzima-Lawson, that according to decision 1023 issued by the Chamber on 19 November 2010, paragraph 19, in addition to the questions that legal representatives sent to the Chamber in advance, you may ask the Chamber to authorise you to put further questions that are related to the questioning made by the Prosecution. So if you have any further clarification you need, or any question that is directly linked to the Prosecution questioning or the witness's answers, you are **allowed to ask the Chamber's authorisation to do so.**"

⁷ Requête du Représentant légal des victimes afin d'être autorisé à interroger le témoin 06, Maître Zarambaud, 19 June 2013. Oral decision authorizing M. Zarambaud questions at D04-06, T-328-CONF-ENG, page 2, lines 7-18.

[REDACTED].⁸ [REDACTED].⁹ [REDACTED]¹⁰ [REDACTED],¹¹ [REDACTED].¹² [REDACTED].¹³ [REDACTED].¹⁴ There are similar statistics for each Defence witness. The process of requiring pre-authorization for questions from the Chamber, as required by Rule 91(3), has been effectively obliterated.

11. The problem with this practice is that Rule 91(3) was designed as a safeguard to ensure that LRVs, who are not parties to the proceedings, justify their intervention in the trial process. Only when questions are related to the interest of victims, will they be pre-authorized by a Chamber. The practice in the present trial where “follow-up” questions are asked with no prior justification or authorization means that, in reality, that there is no distinction being made between the Prosecution and the LRVs. For the majority of LRVs questions, no notice is given, or authorization granted, before the question is asked. The LRVs are indeed acting as a second (and third) Prosecutor, in express violation of the jurisprudence of the ICC.¹⁵

12. The LRVs have justified their need to ask “follow-up” questions during the Defence case on the basis that the witness summaries provided by the Defence setting out the anticipated testimony of Defence witnesses do not contain enough information to allow them to effectively prepare questions.¹⁶ This justification is without merit for two reasons. Firstly, the practice of asking unrestricted “follow-up” questions has not been limited to the Defence case, but was also prevalent during the examination of Prosecution witnesses where the LRVs had no such complaint. Secondly, the LRVs have now questioned two Defence witnesses who had given extensive pre-trial statements. In preparing their questions for Defence Witness D04-18, the LRVs were in possession of a Defence witness summary, a 4-page screening note,¹⁷ and 40 transcribed pages of detailed interviews.¹⁸ For Defence Witness D04-19, the LRVs could refer to pre-trial

⁸ D04-06, T-329-CONF-ENG, pages 30-48.

⁹ Requête du Représentant légal des victimes afin d’être autorisé à interroger le témoin 06, Maître Douzima Lawson, 17 June 2013. Oral decision authorizing M. Douzima questions at T-328-CONF-ENG, page 2, lines 7-18.

¹⁰ D04-06, T-329-CONF-ENG, pages 49-54.

¹¹ Requête du Représentant légal des victimes afin d’être autorisé à interroger le témoin 04, Maître Zarambaud, 16 May 2013. Oral decision authorizing M. Zarambaud questions at T-326-CONF-ENG, pages 23-24.

¹² D04-04, T-327-CONF-ENG, pages 41-55.

¹³ Requête du Représentant légal des victimes afin d’être autorisé à interroger le témoin 04, Maître Douzima Lawson, 24 May 2013. Oral decision authorizing M. Douzima questions at D04-03, T-326-CONF-ENG, pages 23-24.

¹⁴ D04-04, T-327-CONF-ENG, pages 56-60 ; D04-04, T-327bis-CONF-ENG, pages 1-16.

¹⁵ See ICC-01/04-01/06 A08, para. 28; See also Concurring Opinion of Judge Pikis, para. 19: “[e]quality of arms is another element of a fair trial, which in the context of the Statute, putting the burden of proof on the Prosecutor, means that the defendant cannot be required to confront more than one accuser. Holding the scales even between the parties with the burden of proof cast upon the Prosecutor rules out a second accuser.”

¹⁶ ICC-01/05-01/08-2586-CONF. See also ICC-01/05-01/08-T-331-CONF-ENG, p. 15

¹⁷ CAR-OTP-0040-0266.

¹⁸ CAR-OTP-0054-0005.

interviews running to over 450 pages.¹⁹

13. This mountain of material made no impact on the LRVs practice of asking “follow up” questions. [REDACTED].²⁰ [REDACTED].²¹ The same practice occurred with Witness D04-18.²² As such, any suggestion that the need for “follow-up” questions arises from allegedly deficient Defence witness summaries is simply not borne out by the facts.

14. One further by-product of the asking of questions without prior authorization being obtained, is that the parties and the Chamber are denied the opportunity of anticipating where the use of private session will be needed to protect the witness’ identity. Just by way of example, Maitre Douzima-Lawson has effectively unmasked Defence witnesses in open session on several occasions, by asking unauthorized questions.²³ Whilst, of course, the internet broadcast is delayed and immediate redactions of the transcripts can be ordered, the damage is already done so far as those in the public gallery are concerned. The effect on the witness,²⁴ and the ancillary impact on the fairness of the proceedings, is moreover, incalculable.

(b) The practice is inconsistent with that of other Trial Chambers of the ICC

15. There is a distinction between parties and participants to ICC proceedings. The Appeals Chamber has confirmed that participation pursuant to Article 68(3) “does not equate victims, as the case law of the Appeals Chamber conclusively establishes, to parties to the proceedings before a Chamber”.²⁵ Unlike the Prosecution which bears the burden of proving its case beyond a reasonable doubt, the LRVs are mandated by the Statute and Rules to present the views and concerns of victims.

16. This role been meticulously monitored by Trial Chambers I and II in the *Lubanga* and *Katanga* trials. In *Lubanga*, Trial Chamber I regularly intervened to limit and monitor the scope of questioning by LRVs to preserve the rights of the accused. It would perform a detailed analysis of

¹⁹ CAR-OTP-0020-0085_R02 until CAR-OTP-0020-0335_R02; CAR-OTP-0027-0536_R02 until CAR-OTP-0027-0735_R01.

²⁰ Requête du Représentant légal de victimes afin d’être autorisé à interroger le témoin 19, 20 February 2013, ICC-01/05-01/08-2511-Conf. Decision on the legal representatives of victim’s application to question Witness D04-19, ICC-01/05-01/08-2516-Conf.

²¹ D04-19, T-292-Red-ENG, pages 19-36.

²² [REDACTED]

²³ See D04-21, T-306-ENG, p. 56, lines 8-24 and again at pp. 67-68 lines 19-5; D04-45, T-300-ENG, p. 3, lines 19-25; D04-66, T-281-ENG, pp. 7-8, lines 10-7; D04-57, T-258-ENG, p.3, lines 3-6. For further examples of inappropriate introductory lines of questioning which might have been prevented by prior notice, see also D04-56, T-316-ENG, page 19, lines 13-25; D04-09, T-324bis-ENG, page 11, lines 1-21.

²⁴ See also paragraphs 39 et seq. below

²⁵ ICC-01/04-556, para.55.

whether the proposed questions would serve the interests of victims, before these questions were authorised. A “general interest in the outcome of the case or in the issues or evidence the Chamber will be considering at that stage” was deemed unlikely to be sufficient to warrant the questioning of witnesses.²⁶ Rather, Trial Chamber I required, for example “involvement in or presence at a particular incident which the Chamber is considering, or if the victim has suffered identifiable harm from that incident”.²⁷ A review of the trial transcripts of the *Lubanga* case reveal a consistent practice of requiring LRVs to provide a concrete link between their proposed questions and the views and concerns the particular victims they represented.²⁸

Second, we may be asking your assistance as to how it is in relation to that particular centre - that what happened at that centre is relevant to the position of the victims who you represent, and how it is that you're asking this witness questions about that centre is really going to improve the position as regards the views and concerns of the victims you represent.

17. As a result of Trial Chamber I enforcing the parameters set by the Statute, the LRVs in *Lubanga* were not simply authorized to question every witness (unlike in the *Bemba* trial where LRV questioning of every witness is a given). Rather, the LRVs were required to limit their requests for authorization to those witnesses who could actually speak to matters relevant to the views and concerns of witnesses. As such, the LRVs questioned only 25 of the 67 witnesses heard in that case.²⁹ Relevantly, when the LRVs attempted ask “follow up” questions going outside those pre-authorized, Trial Chamber I would prevent these questions being asked,³⁰ or consult with the Defence as to whether they objected to the new lines of questioning.³¹

18. Trial Chamber II adopted the same approach in *Katanga*. A review of the transcripts reveals numerous reminders to the LRVs that they: “are not objective or subjective allies of the prosecutor. They are simply seeking to better inform themselves within the framework of the

²⁶ ICC-01/04-01/06-1119, para. 96.

²⁷ ICC-01/04-01/06-1119, para. 96.

²⁸ *Lubanga*, T-200-ENG, pp. 52-54. See also, *Lubanga*, T-124-ENG, pp. 53-54.

²⁹ *Lubanga*, ICC-01/04-01/06-2842, para. 21, fn. 62.

³⁰ *Lubanga*, T-227-ENG, p.18: PRESIDING JUDGE FULFORD: I don't think this forms part of the three areas that you indicated to us last night, does it, Mr Keta? I wasn't aware in the application you made yesterday of the need at this stage to introduce additional material.

³¹ *Lubanga*, T-177-ENG, p. 33: PRESIDING JUDGE FULFORD: So the question is the control of that sector -- ...unless there's any objection you can certainly put suggestions to the witness to see whether or not they coincide with what he recalls. But pause for a moment so that Mr. Bijou-Duval can decide whether or not he wishes to oppose that procedure; *Lubanga*, T-201-ENG, p. 71-86, see p. 84: PRESIDING JUDGE FULFORD: Thank you very much. Maitre Mabilie, I think it's right to say that Mr. Diakiese has fairly considerably limited the area that he wishes to deal with on behalf of some of the victims he represents. The second area I've just referred to. The first area really relates on the potentially complex nature of the familial, societal, and economic circumstances in which children became child soldiers. And as I understand the point, although that is a matter of general interest, Mr. Diakiese submits that it is of particular interest to certain of the victims that he represents. Now, do you oppose either or both of the lines of questions which Mr. Diakiese wishes to pursue?

representation of the interests of their clients.”³² LRVs were consistently reminded that it was not their role to “reinforce the prosecution team”³³ or play “part two of the prosecution”,³⁴ and they were warned against putting questions to witnesses which would end up providing some form of direct or indirect assistance to the Prosecution team.³⁵

19. The scope of their questioning was also consistent with the role ascribed by the Statute and Rules. Attempts to ask questions for which the LRVs had not received authorization resulted in a rebuke from Trial Chamber I to return to the “questions they were expecting”.³⁶ Attempts to ask general questions were met with a request to ask specific questions:³⁷

PRESIDING JUDGE COTTE: Could you please restrict your questions to the victims you are representing and move away from this very broad framework and return to what conventionally legal representatives of the victims ask witnesses... Mr Luvengika, please come back to let's not say conventional or traditional questions, we are not prisoners of tradition, but what would appear to be more specific questions relevant with the mandate of a legal representative who would like to find out information about the mistreatment suffered by the victims you represent, because I am afraid we are spending a lot of time on general issues that would be more relevantly covered by other people in this Chamber than you.’

20. As such, like in the *Lubanga* case, the LRVs were required to limit their participation to questioning those witnesses who could provide information relevant to the views and concerns of victims. Accordingly, they questioned only 10 out of the 17 witnesses called by Katanga,³⁸ and 3 of the 11 witnesses called by Ngudjolo.³⁹

21. As set out in more detail below, the content of LRV questioning in the *Bemba* case is virtually unrestrained. This, coupled with the practice of LRVs asking follow-up questions without prior notice or authorization means that the *Bemba* trial stands alone in terms of the immense scope of LRV participation. For the reasons set out below, the Defence submits that the approach of Trial Chamber III to LRV participation is not only inconsistent with the practice of the ICC, and the limits as defined in the Statute and Rules, but also with the right of Mr. Bemba to a fair and expedient trial.

³² *Katanga/Ngudjolo*, T-127-ENG, p. 41

³³ *Katanga/Ngudjolo*, T-87-ENG, p. 26.

³⁴ *Katanga/Ngudjolo*, T-87-ENG, p. 33.

³⁵ *Katanga/Ngudjolo*, T-160-ENG, p. 20.

³⁶ *Katanga/Ngudjolo*, T-252-ENG, p. 40.

³⁷ *Katanga/Ngudjolo*, T-252-ENG, p. 42-43.

³⁸ *Katanga/Ngudjolo* ICC-01/04-02/12-3-tENG, para. 23. See public transcripts available at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/transcripts/trial%20chamber%20ii/Pages/index.aspx.

³⁹ *Katanga/Ngudjolo* ICC-01/04-02/12-3-tENG, para. 23. See public transcripts from 15 August 2011 to 16 September 2011 available at http://www.iccpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/ICC-01-04-02-12/transcripts/trial%20chamber%20ii/Pages/index.aspx

(c) The LRVs' questioning is repetitive

22. In practice, many of the LRVs' questions to Defence witnesses have been asked and answered. To quote just a few examples, Witness D04-04 was asked **four** times, by all the parties and participants, about the merging or mixing of FACA and MLC soldiers. Firstly, the Defence asked:

[REDACTED].⁴⁰

The Prosecution then asked:

[REDACTED]?⁴¹

Maitre Zarambaud then asked:

[REDACTED]⁴²

Maitre Douzima-Lawson then asked:

[REDACTED]”⁴³

23. Witness D04-50 explained during Defence questioning that the MLC troops who arrived in the CAR spoke Lingala.⁴⁴ He then repeated this during the Prosecution questioning.⁴⁵ Despite having heard the answer twice, Maitre Zarambaud asked the witness to repeat “what languages they spoke?” To which the witness answered “They all spoke Lingala.”⁴⁶ Finally, Maitre Douzima-Lawson then stated, “Let me now revisit the MLC soldiers. Which language did these soldiers speak among themselves?” He replied, for the fourth time “Lingala, Counsel”.⁴⁷

24. Witness D04-06 was repeatedly asked about the names of three bodyguards. The Defence first asked [REDACTED]”.⁴⁸ Maitre Zarambaud then asked “[REDACTED]?”⁴⁹ Not to be outdone, [REDACTED].⁵⁰

25. Witness D04-56 was subjected to a long line of questioning by the Prosecution about whether he had witnessed, or heard about crimes committed by MLC troops. He confirmed several times that he did not have firsthand knowledge of MLC crimes, but had heard people talk about

⁴⁰ D04-04, T-325bis-CONF-ENG, page 25, lines 19-23.

⁴¹ D04-04, T-327-CONF-ENG, page 12, lines 12-24.

⁴² D04-04, T-327-CONF-ENG, page 52, lines 13-14.

⁴³ D04-04, T-327-CONF-ENG, page 57, line 19.

⁴⁴ D04-50, T-261-Red-ENG, p.34.

⁴⁵ D04-50, T-261-Red-ENG, pp. 66-67.

⁴⁶ D04-50, T-263-Red-ENG, p. 26.

⁴⁷ D04-50, T-263-Red-ENG, p. 50.

⁴⁸ D04-06, T-328-CONF-ENG, page 10, page 37.

⁴⁹ D04-06, T-329-CONF-ENG, page 37, line 10.

⁵⁰ D04-06, T-329-CONF-ENG, page 52.

it.⁵¹ [REDACTED],⁵² [REDACTED].⁵³

26. The questions about his language capabilities were similarly oppressive. Witness D04-56 explained to the Defence that he speaks some Sango but “[REDACTED].”⁵⁴ [REDACTED].⁵⁵ While Maitre Zarambaud acknowledged that the question of language “[REDACTED]”, [REDACTED],⁵⁶ while Maitre Douzima-Lawson recalled his testimony that he speaks some Sango, and asked him “[REDACTED]?” [REDACTED]⁵⁷

27. Expert Witness D04-59, a geopolitical expert,⁵⁸ was questioned four times on his methodology. The LRVs questions were often exact replicas of those previously asked. Maitre Douzima-Lawson asked “Why did you not deem it necessary to travel to the CAR to interview people as well?”⁵⁹ Despite this being followed-up by Judge Ozaki, “does this mean... that you didn’t need to talk to anyone in the CAR?”,⁶⁰ Maitre Zarambaud then asked “Why did you not deem it necessary to travel to the CAR to interview people as well?”⁶¹ As for the Defence military expert, Witness D04-53, the Defence questioned him as to his methodology over 5 pages of transcript, and the Prosecution explored the same topic over 32 pages. Maitre Douzima-Lawson then asked him to explain “what method did you use to draft this report?” Then on the 6th day of his testimony, the witness replied “I believe I’ve already answered that question”, but went on to explain his methodology again.⁶²

28. Witness D04-64 explained in detail the payments made to the MLC troops during their stay in the CAR during his questioning by Defence Counsel, and described how these payments were made.⁶³ Regardless, Maitre Zarambaud then asked: “Were the MLC troops paid, and if so how?”, to which the witness’ reply was prefaced with: “Counsel, as I said yesterday...”.⁶⁴

29. The Defence could fill an entire motion with similar examples of the LRVs repeating

⁵¹ D04-56, T-314-CONF-ENG, pp. 22-24.

⁵² D04-56, T-316-CONF-ENG, p. 9.

⁵³ D04-56, T-316-CONF-ENG, p. 38.

⁵⁴ D04-56, T-313-CONF-ENG, p. 14.

⁵⁵ D04-56, T-314-CONF-ENG, p. 8-9.

⁵⁶ D04-56, T-315-CONF-ENG, p. 57-58.

⁵⁷ D04-56, T-316-CONF-ENG, p. 36.

⁵⁸ The Defence objected to the LRVs questioning the witness on the basis that they had failed to justify a “personal interest” of the victims in his contextual background evidence: ICC-01/05-01/08-2288-Conf.

⁵⁹ D04-59, T-240-Red-ENG, p. 21.

⁶⁰ D04-59, T-239-Red-ENG, p. 35.

⁶¹ D04-59, T-240-Red-ENG, p. 21.

⁶² D04-53, T-234-Red-ENG, p. 51.

⁶³ D04-64, T-259-Red-ENG, p.19-21.

⁶⁴ D04-64, T-260-Red-ENG, p. 64.

answered questions. These are not “follow-up” questions seeking to elicit further information, they are simply the same questions being asked again. Sometimes there is even an acknowledgement that “you have basically answered my second question, but I will put it to you all the same.”⁶⁵ The exhaustion felt by Defence witnesses following their examination by four different parties is palpable. It is not difficult to understand why witnesses become visibly agitated after having been asked the same questions on four occasions. Many responses are prefaced with “I answered this yesterday”, or “as I have already told the Chamber”, or “as I have already explained”. If the Chamber decides to read this agitation as anything other than exhaustion at the process, the prejudice to Mr. Bemba is plain.

30. The Defence acknowledges that it is a common cross-examination technique in adversarial systems for a party to re-ask an answered question, to try to elicit a different response, in order to attack the credibility of the witness. By consistently asking repetitive questions, the LRVs are openly exposing their intention of doing just that – to attack the credibility of Defence witnesses by acting a second Prosecutor, rather than using the Court’s valuable time to elicit information relevant to the views and concerns of the victims. The frequency with which the LRVs simply repeat the questioning of the parties precludes any argument that Mr. Bemba’s Defence witnesses are not being subjected to three cross-examinations. The balance of the proceedings is therefore weighted against the accused, who is forced to confront more than one accuser, and again distinguishes the practice of the *Bemba* Trial from that of Trial Chamber I and II where repetitive questions are prevented.⁶⁶

(d) The LRVs questions are not neutral

31. Rather than asking neutral questions to elicit evidence relevant to the views and concerns of their clients, the LRVs in the *Bemba* case are engaging in almost textbook adversarial-style cross-examinations; using leading questions to challenge the evidence of Defence witnesses with the use of allegedly contradictory documents or statements, attacking their character, suggesting bias, and questioning the basis of their knowledge. No aspect of the content of Defence witness’ testimony is out of reach, despite the fact that the LRVs’ statutory mandate is limited to presenting the views and concerns of victims.

⁶⁵ D04-65, T-247-Red-ENG, p. 21.

⁶⁶ *Lubanga*, T-145-ENG, pages 31-39: PRESIDING JUDGE FULFORD: Mr. Diakiese...I think this has been very fully covered and I don't see any benefit in us asking the witness, really, to repeat an account that she's already dealt with very fully. And so I think unless there is particular reason I'm going to ask you to move on to your next subject, please.

32. Despite the imbalance this causes in the trial proceedings (discussed below), this practice is in breach of the Chamber's own ruling that LRVs may not ask leading questions.⁶⁷ The LRVs regularly pose classic leading questions, such as "Did you learn that, once they got to the support regiment, the troops set up operations and they looted everything in that area?"⁶⁸ or "Did you learn, Mr Witness, that at that same place 30 CAR soldiers, including two lieutenants, had been disarmed, stripped and whipped, or beaten up, by MLC soldiers?"⁶⁹ or "Do you know that, when they got to PK12 Begoua, the ALC soldiers occupied private individuals' homes without their authorisation and got involved in pillaging, murders and theft?"⁷⁰ These questions are not only wildly leading and non-neutral, but in effect consist of the LRV putting issues in dispute as if they are established fact, and consistently without any reference being made to evidence in the case.

33. Other questions are openly designed to attack the credibility or character of Defence witnesses. After Witness D04-03 explained that he had looted during the events, Maitre Zarambaud asked "[REDACTED]"⁷¹ [REDACTED].⁷² She gave no basis for this assertion, no documentary or other evidence to challenge his evidence given under oath. The LRVs are experienced lawyers. Their questions and comments are not random, but designed to undermine the testimony and credibility of Defence witnesses.

34. The LRVs also openly mock Defence witnesses who have no knowledge of particular allegations in dispute. When Witness D04-57 explained that although he knew of complaints having been made about crimes, he didn't know the identity of the complainants, Maitre Douzima-Lawson stated "I see that you didn't see anything, you don't know exactly what happened, and I thank you for your co-operation."⁷³ When this witness stated he was not aware of a particular incident - which is in dispute - of the MLC looting musical instruments and other items at the support regiment, Maitre Zarambaud retorted "I beg your pardon, I'm asking you this question because since you were an ambassador, I thought that you would have been at your post and you would have been aware of a great many things. I see that that is not the case".⁷⁴ When another Defence witness also disputed the same event, Maitre Zarambaud commented "personally I am a little bit surprised by the fact that you would not be aware of what happened in your own

⁶⁷ W38, T-34-Red-ENG, p. 37 and W80, T-61-Red-ENG, p. 32.

⁶⁸ D04-49, T-274-Red-ENG, p. 54.

⁶⁹ D04-49, T-274-Red-ENG, p. 55.

⁷⁰ D04-45, T-299-Red-ENG, p.41; *See also* D04-39; T-310-CONF-ENG, p. 36, lines 5-8. D04-21, T-306-Red-ENG, pp. 70-71; D04-06, T-329-CONF-ENG, pp. 42-43.

⁷¹ D04-03, T-330-CONF-ENG, p. 25, line 10.

⁷² D04-06, T-329bis-ENG, pp. 4-5.

⁷³ D04-57, T-258-Red-ENG, p. 45.

⁷⁴ D04-57, T-258-Red-ENG, p.52.

regiment.”⁷⁵ This is at best, cross-examination, at worst sarcastic commentary, and certainly not neutral questioning.

35. LRVs also regularly put lengthy extracts from the testimony of other witnesses to the Defence witness on the stand, with a view to contradicting the testimony being heard.⁷⁶ Sometimes this prior testimony is simply read out or summarized, and no references given, in an apparent attempt to contradict the witness, without the witness even being given a chance to comment.⁷⁷ This lengthy process is not only procedurally questionable, but cannot be characterized as neutral questioning.

36. The LRVs also use documents to challenge the testimony of witnesses.⁷⁸ Maitre Douzima-Lawson’s examination of Witness D04-53 lasted nearly two hours, during which she put 14 documents or extracts of documents to him in an attempt to undermine aspects of his testimony; a complete second cross-examination. Of equal concern is the commentary which comes from both LRVs. For example, Maitre Zarambaud “questioned” the same witness as follows:⁷⁹

Now, I believe that it was Mr Kilolo, my learned friend opposite, who said at the beginning of the examination - and correct me if I’m wrong - he said “You are a general from one of the most powerful armies in the world,” and in fact France is indeed a great military power. It seems to me, and I’m coming to my question, it seems to me that in such an army an ordinary soldier, or a general, for those people it can be very difficult to wrap your minds around certain things, for example female soldiers with a belt of ammunition slung around the shoulder and a baby - - carrying a baby at the same time, or a soldier who has no knowledge of military matters, particularly for a general who leads a great army. Similarly, it is difficult to believe that in a democratic country it is difficult to believe that the supreme leader of an army is not the supreme leader as a civilian, for example in your country Mr Hollande is the supreme commander of the armed forces, but he acts as a civilian. Even in the case of General de Gaulle, he acted as a civilian despite his military past and yet retained his rank. So it’s difficult to understand how can it be that in a democratic country, how can such things come to be? It seems that there may be a great temptation when one comes from such a powerful and modern army, it is difficult to deal with not something that has existed, but rather with something that should have existed as if it were an army that operated normally. So I would think that you must have proceeded by deduction, but we are not at the theatre. This is not a novel. You’re not Sherlock Holmes. You cannot proceed by way of deductions. You are here to provide us with facts and that is why I would like to put a number of questions to you and please attempt to make a distinction between information and commentary, as the journalists say. If I ask you something I’m asking you to say what happened, not what should have happened. So there you have it. Now, my first question, and these are the questions that I have submitted to the Chamber and received permission to ask. My first question is: To your knowledge, are there documents from the international community that would have authorised the ALC to intervene in the Central African Republic?

37. The prejudice to Mr. Bemba arises out of the fact that the LRVs did not engage in this

⁷⁵ D04-07, T-250-Red-ENG, p. 59.

⁷⁶ See, for example, D04-56, T-316-CONF-ENG, p. 26-27; D04-65, T-247-Red-ENG, p. 32; D04-57, T-258-Red-ENG, p. 52; D04-57, T-258-Red-ENG, p. 55-56; D04-51, T-263-Red-ENG, p. 29; D04-51, T-263-Red-ENG, p. 36-37; D04-49, T-274-Red-ENG, p. 52; D04-21, T-306-Red-ENG, p. 59; D04-09, T-324-CONF-ENG, p. 13.

⁷⁷ See, for example, D04-57, T-258-ENG, p.53, lines 1-7; D04-57, T-258-ENG, p.54, lines 17-23.

⁷⁸ D04-53, T-234-Red-ENG, pp. 32-33, 38-39.

⁷⁹ D04-53, T-234-Red-ENG pp. 59-60.

adversarial style of questioning of Prosecution witnesses or the victim-witnesses they themselves called. They were not trying to challenge the credibility or the undermine testimony of the victims they represented, or witnesses called to inculcate the accused. This method of questioning has only been used on Defence witnesses, which means that the Prosecution and Defence evidence is being treated differently, in violation of Article 67(1)(e) which guarantees the right of Mr. Bemba to obtain the examination of witnesses on his behalf “under the same condition as the witnesses against him”. Prosecution witnesses were examined by one “adverse” party. Defence witnesses are examined by three.

(e) The LRVs should refrain from discussing or relying on their personal background

38. Since calling its first witness from the Central African Republic, the Defence has been concerned about the practice of the LRVs, especially with such witnesses, of emphasizing that they also come from the CAR. The LRVs are in fact known to many of the Defence witnesses, either personally or by reputation.⁸⁰ Nonetheless, the underlining of their background and beliefs in the courtroom is problematic. Maitre Zarambaud himself has acknowledged that Defence witnesses from the CAR may be aware of his personal opinion about individuals involved in the case, or the conflict at issue. As he stated to Witness D04-57:⁸¹

[REDACTED].

Leaving aside the appropriateness of appointing LRVs who appear to have an interest in the outcome of a case, the Defence’s concern is the effect that statements such as these will have on the comfort and morale of Defence witnesses intending to give testimony which may not align with the political views of the lawyers questioning them.

39. The second problem, as put succinctly by Maitre Zarambaud to Witness D04-50, is that:⁸²

[REDACTED].

Viewed objectively, such a remark is hardly comforting, for, if a witness was not having such concerns, a comment like that would certainly give rise to them. Neither have such comments been merely limited to introductions. On occasion the LRVs have gone further and relied on their

⁸⁰ D04-65, T-247-Red-ENG, p. 14: Good morning, Witness. We have known one another on a private basis for many years now, but here we find ourselves in official circumstances. I will introduce myself to you once again; Witness D04-07, T-250-Red-ENG, p. 59; When you started practising as a lawyer, I was not even born yet but when I was going to school, I was still quite little, in the city centre, when the parents came to look for us to fetch us in school, they would say, “Look, that is Mr Zarambaud,” and when someone said “That is Mr Zarambaud,” everyone would turn around to look.

⁸¹ D04-57, T-258-CONF-ENG, p. 49.

⁸² D04-50, T-255-CONF-ENG, p. 28.

Central African background and alleged knowledge of events as an apparent basis for challenging testimony. Maitre Zarambaud confirmed to Witness D04-51 that “I was also in Bangui” when the MLC troops arrived.⁸³ When Witness D04-50 testified about what he heard over the radio during the events, Maitre Douzima-Lawson stated - on this crucial live issue in the case - “I raised this question as a Central African Republic citizen myself, who was there and who heard about these things.”⁸⁴ The impropriety of a lawyer stating on the record that she had heard reports of crimes during the relevant events is patent.

40. The next group of witnesses will also be of Central African origin, and in the Defence submission are vulnerable witnesses. They have sought protective measures and may well experience the fears identified by Maitre Zarambaud. The Defence accordingly requests that the Chamber direct the LRVs not to provide information concerning their personal background to the witnesses, and to refrain from giving information about their own experiences during the events at issue in the present case.

(f) The LRVs are unlimited by geographical scope, undermining any basis for having two participating lawyers

41. In its original decision on common legal representation, the Chamber ordered the Registry to appoint two LRVs to “ensure the effectiveness of the proceedings”⁸⁵ Significantly, the two LRVs were designated to represent victims in two distinct geographical areas, with Maitre Zarambaud representing Group A, (Bangui and PK12); and Maitre Douzima-Lawson representing Group B (Damara and Sibut), Group C (Boali, Bossembélé, Bossangoa, Bozoum) and Group D (Mongoumba).⁸⁶ This was the sole distinction drawn between the two LRVs authorised to participate in the *Bemba* case.

42. This geographical distribution is in no way reflected in their participation. Maitre Zarambaud regularly asks Defence witnesses questions about events which occurred outside of Bangui and PK12,⁸⁷ and vice versa.⁸⁸ Witness 29 did not leave Mongoumba and its surrounds during the events,⁸⁹ but this did not stop Maitre Zarambaud from questioning her.⁹⁰ Witness D04-

⁸³ D04-51, T-263-Red-ENG, p. 25.

⁸⁴ D04-50, T-255-Red-ENG, pp. 45-46.

⁸⁵ ICC-01/05-01/08-1005, para. 7.

⁸⁶ *Ibid.*, para. 18.

⁸⁷ See, for example, D04-56, T-315-CONF-ENG, page 60, lines 15-22; D04-56, T-316-CONF-ENG, page 3, lines 9-12; D04-56, T-316-CONF-ENG, page 5, lines 8-12; D04-51, T-263-Red-ENG, pp. 35-36.

⁸⁸ See, for example, D04-64, T-260-Red-ENG, page 47; D04-64, T-260-Red-ENG, p. 48.

⁸⁹ W29, T-80-CONF-ENG, pp. 36-37

⁹⁰ W29, T-80-CONF-ENG, pp. 52 et seq.

65 was only in Bangui during the events. The Defence objected to Maitre Douzima-Lawson questioning him not only because there was no geographical link, but because she had only asked for general authorisation to pose questions, and had failed entirely to set out any specific questions that she wished to ask.⁹¹ The Chamber noted this irregularity, yet authorised her to put any “follow up” questions as long as they were relevant and non-leading. The Chamber did not deal with the substance of the Defence objection on the basis of geographical representation.⁹²

43. The lack of distinction in the practice of the two LRVs undermines any rationale for having both lawyers participating in the *Bemba* trial. If both LRVs are able to put questions to witnesses regardless of the geographical link of the testimony to the witnesses they represent, they are in effect doing exactly the same job. As such, having two LRVs participating simply prolongs the examination of each and every Defence witness for no justifiable basis. The Defence submits that the LRVs should properly be restricted to questioning only those of the remaining Defence witnesses who can testify about the geographical regions in which their clients are located.

(g) The two-hour limit for LRV questioning is no longer appropriate

44. In October 2012, nearly two years into the trial, the LRVs were restricted to examining each Defence witness for two hours in total.⁹³ This restriction was imposed in the context of the presentation of evidence by professional, educated and non-vulnerable Defence witnesses, who themselves were examined by the Defence for 5, 8 or even 10 hours.⁹⁴ The Defence examination of the majority of the remaining witnesses is estimated at 3 hours per witness. In such a context, the Defence submits that allocating two hours to the LRVs is now disproportionate to the time available to the calling party and excessive, and asks the Chamber to reduce this time frame by restricting the manner of questioning and, in any event, to one hour in total.

(D) IMPACT ON THE FAIRNESS OF THE TRIAL

45. Despite the limitation set down in Article 68(3) by the drafters of the Statute, in practice, Judges of the ICC have given “a very extensive interpretation of participatory rights”.⁹⁵ As stated by former Pre-Trial Judge of the ICC, His Honour Judge Jorda:

It is true that to authorize a victim to intervene in the proceedings in his personal capacity, with a view to expressing his concerns and obtaining reparation, is not in itself inconsistent,

⁹¹ ICC-01/05-01/08-2305-Conf

⁹² D04-65,T-246-CONF-ENG, p. 30.

⁹³ D04-50, T-254-Red-ENG, p. 66.

⁹⁴ The Defence examined Witness D04-53 for 10 hours and 12 minutes; Witness D04-19 for 8 hours and 50 minutes; Witness D04-45 for 6 hours and 5 minutes; Witness D04-49 for 5 hours and 14 minutes.

⁹⁵ Christine Van den Wyngaert, *Victims Before International Criminal Courts: Some Views and Concerns of an ICC Judge*, 44 Case W. Res. J. Int’l L, 475 at 483.

in formal terms, with the ICCPR. However, such a prerogative may undermine the rights of the accused if it is not strictly defined and meticulously organized.⁹⁶

Rather than being strictly defined, the participation of LRVs in the *Bemba* trial is immensely broad in scope and impact.

46. The Defence does not intend to repeat the wealth of academic commentary highlighting the perils of an imbalance between victims' participation and expedient trials at the ICC. However, no reasonable argument can be made that this extensive participation has had no impact on the pace and expediency of the *Bemba* proceedings. Four examinations of each witness take longer than two. Nor can it be said that the LRVs have only added two hours to the examination of each witness. Firstly, this time limitation was only introduced two years into the proceedings. Secondly, the "two hours" of actual questioning, excludes any technical or other delays, procedural debates or follow-up questions from the bench. LRV participation has made the proceedings much longer, and has impacted on Mr. Bemba's right to proceedings which are conducted in a "fair and expeditious" manner.⁹⁷

47. Of greater concern is the effect that the practice of LRV questioning is having on the balance of the proceedings. When a system is set up in such a way that there is a "delicate balance of power achieved through the clear delineation of roles of the prosecution and the defence, the system could be perceived as being 'out of balance' if another party were involved in the case that could actively work against the interests of the defence."⁹⁸ As stated by one leading academic:⁹⁹

What seems to be impermissible is allowing the victims to directly become active parties in the trial proceedings for the determination of guilt or innocence. This is because their presence in the courtroom as active parties would create a serious imbalance in the fact finding mechanism and would be inconsistent with the rights of the accused in that the defendant would be forced to confront more than one party (which would be in clear violation of the principle of equality and would alter the balance of the process in many other respects).

48. When both LRVs are permitted to question every Defence witness, on all aspects of their testimony, without necessarily requiring authorisation for each question, in an adversarial style with leading questions, there is effectively no distinction being drawn between the role of LRVs and that of the Prosecution. The Defence respectfully submits that this practice is undermining the fairness of the *Bemba* trial, is inconsistent with the principle of equality of arms, and the statutory restrictions on the role of LRVs at the ICC. In light of the upcoming victim-witnesses being called

⁹⁶ Claude Jorda and Jérôme de Hemptinne, *The Status and Role of the Victim, The Rome statute of the International Criminal Court: A Commentary*, Cassese et al. eds. (2002).

⁹⁷ Article 64 of the Statute, Rule 101 of the Rules.

⁹⁸ Jonathan Doak, *Victims' Rights in Criminal Trials: Prospects for Participation* (2005) J. of Law & Soc, p.298.

⁹⁹ Salvatore Zappalà, *The Rights of Victims v. The Rights of the Accused*, (2010) J. Int Crim J, p. 162.

next in the case, the Defence requests the relief set out below:

E. RELIEF REQUESTED

49. Based on the above submissions, the Defence respectfully requests that the Chamber:

ORDER that Legal Representatives of Victims ask only those questions for which they have received authorisation from the Chamber; or in the alternative

REQUIRE that the Legal Representatives of Victims seek leave to ask follow-up questions in the manner set out in the *Decision on Directions for the Conduct of the Proceedings*;¹⁰⁰

RESTRICT the Legal Representatives to asking questions which concern the geographical scope of their respective mandates, and prevent repetitive, leading or any non-neutral questions, or discussion of their personal background;

ORDER that the Legal Representatives of Victims comply with any instructions from the Chamber concerning the style and manner of questioning of vulnerable witnesses or those who require special assistance; and

ORDER that the Legal Representatives of Victims restrict their questioning to one hour in total for the remainder of the Defence witnesses.

The whole respectfully submitted.



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¹⁰⁰ ICC-01/05-01/08-1023, para. 19.

Done on the 19th of July 2013

At The Hague, The Netherlands