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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

Public Redacted Version

***Defence Request for Leave to Appeal the Decision on the 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. BACKGROUND

1. On 19 July 2013, the Defence filed its *Defence Motion on the Questioning of Defence Witnesses by the Legal Representatives of Victims* (“Defence Motion”),¹ before Trial Chamber III (“the Chamber”).

2. The Defence Motion challenged the current practice of questioning by the two Legal Representatives of Victims (“LRVs”) in the present proceedings, and set out seven discrete arguments, namely that: (a) the practice of LRV questioning is inconsistent with the Chamber’s own rulings, given that the Chamber permits the LRVs to ask follow up questions despite them having provided no prior justification or authorisation in violation of the *Decision on Directions for the Conduct of Proceedings*;² (b) that the practice is inconsistent with that of Trial Chambers I and II of the International Criminal Court, who have restricted questioning of LRVs to those witnesses whose testimony can facilitate the presentation of the views and concerns of the victims; have required the LRVs to provide a concrete link between proposed questions and the views and concerns of the victims they represent; and have restricted unauthorised or follow-up questions;³ (c) the LRVs ask Defence witnesses repetitive questions, with the Defence Motion setting out many occasions on which the LRVs have asked exact replicas of questions asked and answered during examination by the Defence and/or the Prosecution;⁴ (d) the LRVs consistently ask leading and non-neutral questions, conduct almost textbook cross-examinations, and openly mock Defence witnesses, despite an order from the Chamber preventing them from asking leading questions;⁵ (e) the LRVs inform each witness of their status as a Central African lawyer, despite Maitre Zarambaud’s acknowledgement of the discomfort this could cause Central African witnesses, and

¹ ICC-01/05-01/08-2733-Conf.

² ICC-01/05-01/08-2733-Conf, paras. 7-14, citing *Decision on the Directions for the Conduct of Proceedings*, ICC-01/05-01/08-1023, para. 19.

³ ICC-01/05-01/08-2733-Conf, paras. 15-21.

⁴ ICC-01/05-01/08-2733-Conf, paras. 22-30.

⁵ ICC-01/05-01/08-2733-Conf, paras. 31-37.

have impermissibly relied on their personal experience and knowledge of events in the case, and even made allusions to their political preferences during the examination of witnesses;⁶ (f) the LRVs are unrestrained by geographical scope, despite having been appointed to represent victims from different geographical areas, which undermines the rationale behind having two LRVs participating in the present case;⁷ and (g) the two-hour timeframe allotted to LRVs for questioning witnesses is no longer appropriate given the length of proposed testimony of the remainder of the Defence witnesses to be called in the present case.

3. Based on these seven arguments, the Defence asked the Chamber for the following specific relief:⁸

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*;⁹

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.

⁶ ICC-01/05-01/08-2733-Conf, paras. 38-40.

⁷ ICC-01/05-01/08-2733-Conf, paras. 41-43.

⁸ ICC-01/05-01/08-2733-Conf, para. 49.

⁹ ICC-01/05-01/08-1023, para. 19.

4. The Chamber dismissed the Defence request in two paragraphs of reasoning.¹⁰ The Chamber did not address each of the seven discrete arguments, nor address the arguments raised concerning prejudice to the accused, nor did the Chamber address arguments concerning the potential impact of the practice of repetitive and adversarial cross-examination by the LRVs on Defence witnesses.

5. The core of the Chamber's reasoning was that "the Chamber will continue to exercise control over the form and manner of the legal representatives' questioning **in order to ensure that the questions are not repetitive**, irrelevant or otherwise inappropriate."¹¹

6. The day following the Impugned Decision, by way of an oral decision, the Chamber specifically authorized both Maître Zarambaud and Maître Douzima-Lawson to put their entirety two lists of questions submitted in writing late on 20 August to Witness D04-23. The Defence observes that neither set of questions is in any way specific to the LRVs' respective client bases, they are substantially duplicative of each other, and in many cases have already been asked and answered.¹² To give a few examples, during his examination by the Defence, Witness D04-23 and Defence Counsel had the following exchange:¹³

[REDACTED]

The Prosecution then asked:

[REDACTED]

¹⁰ ICC-01/05-01/08-2751-Conf ("Impugned Decision"), paras. 10-11.

¹¹ Impugned Decision, para. 11.

¹² ICC-01/05-01/08-T-334-ENG RT 22-08-2013, p. 2: "On 20th August 2013, the Chamber received an application from Maître Douzima Lawson on behalf of the victims that she represents to question witness D04-0023, filing 2748, confidential. The application contains a list of 14 sets of questions. On the same day the Chamber received an application from Maître Zarambaud on behalf of the victims that he represents, filing 2749, confidential. The application contains a list of 11 sets of questions. Having considered the reasons given by both Maître Douzima and Maître Zarambaud as to why the personal interests of the victims they represent are affected, the Chamber allows the respective applications to question Witness D04-0023. Turning to the questions, both Legal Representatives are allowed to put all of their proposed questions as set out in their aforementioned filings.

¹³ ICC-01/05-01/08-T-332-ENG RT, pp. 24-25.

The Chamber then authorized Maître Zarambaud to put the following question to Witness D04-23:¹⁴

[REDACTED]

The Chamber then authorized Maître Douzima-Lawson to put the following question to the witness:¹⁵

[REDACTED]

7. On the first day of his testimony, Witness D04-23 explained the following to Defence Counsel concerning the way in which the troops were dressed:¹⁶

[REDACTED].

The Chamber then authorized Maître Douzima-Lawson to ask the following question: ¹⁷

[REDACTED]

8. On the first day of his testimony, Witness D04-23 explained the composition of Bozize's rebels following questions by the Defence:¹⁸

[REDACTED]

¹⁴ ICC-01/05-01/08-2749, Question 4.

¹⁵ ICC-01/05-01/08-2748, Question 4.

¹⁶ ICC-01/05-01/08-T-332-ENG RT, p.47.

¹⁷ ICC-01/05-01/08-2748, Question 6.

¹⁸ ICC-01/05-01/08-T-332-ENG RT, p.20.

The witness then repeated this information for the Prosecution:¹⁹

[REDACTED]

Despite this, the Chamber then authorized Maître Zarambaud to put the following question:²⁰

[REDACTED]

9. On the first day of his testimony, the Witness was questioned by the Defence concerning the languages spoken by the FACA troops:²¹

[REDACTED]

The Chamber then authorized Maître Douzima-Lawson to put the following question:²²

[REDACTED]

10. During his examination by the Defence, Witness D04-23 was asked as follows:²³

[REDACTED]

The witness then gave extremely detailed testimony about the areas which were occupied by Bozizé's rebels in Bangui, and even wrote these different areas down on a piece of paper under the heading of "The various neighbourhoods or locations invaded by General Bozizé."²⁴ The witness was then asked the following question by

¹⁹ ICC-01/05-01/08-T-334 –ENG RT, pp.14-15.

²⁰ ICC-01/05-01/08-2749, Question 3.

²¹ ICC-01/05-01/08-T-332-ENG RT, pp.28-29.

²² ICC-01/05-01/08-2748, Question 3.

²³ ICC-01/05-01/08-T-332-ENG RT, p.35.

²⁴ ICC-01/05-01/08-T-332-ENG RT, pp. 34-35, 38, 42.

the Prosecution:²⁵

[REDACTED]

The Chamber then authorized Maître Douzima-Lawson to ask the following question:²⁶

[REDACTED]

11. During his questioning by the Defence on the first day of his testimony, Witness D04-23 explained at length his knowledge about the crimes committed by Bozizé's rebels. The Chamber observed an extensive exchange between Witness D04-23 and Defence Counsel concerning the crimes about which he had knowledge, with the witness answering questions such as:

[REDACTED]?

The Chamber then authorized Maître Zarambaud to ask the following question:²⁷

[REDACTED]

12. Maître Zarambaud was authorized to ask Witness D04-23 [REDACTED] and [REDACTED].²⁸ In the same decision, Maître Douzima-Lawson was authorized to ask him [REDACTED]".²⁹ Maître Zarambaud was authorized to ask Witness D04-23 [REDACTED]".³⁰ In the same decision, Maître Douzima-Lawson was authorized to ask him [REDACTED]".³¹

13. Furthermore, the Defence observes that these requests, filed as they were after the conclusion of the witness' evidence on 20 August 2013, must be taken to have

²⁵ ICC-01/05-01/08-T-332-ENG RT, p.5.

²⁶ ICC-01/05-01/08-2748, Question 9.

²⁷ ICC-01/05-01/08-2749, Question 8.

²⁸ ICC-01/05-01/08-2749, Questions 5 and 6.

²⁹ ICC-01/05-01/08-2748, Question 5.

³⁰ ICC-01/05-01/08-2749, Question 9.

³¹ ICC-01/05-01/08-2748, Question 10.

been made in full cognizance of the transcripts of the evidence for that date. Accordingly, there can be no justification, in any event, for the putting of further questions, for which leave has not been sought, based upon the transcripts of 20 August. Notwithstanding that, the questioning of Maître Douzima Lawson, in particular, was substantially unauthorized, and was based upon transcript references from 20 August.³²

14. Neither did the Chamber give any or any proper consideration to the relevance or propriety of the LRV questions. As to propriety, the Defence had given notice of its concerns about the LRVs use of their Central African nationality as a tool in the questioning of witnesses. Notwithstanding this, the LRVs continued to introduce themselves not just as Central Africans, but as people with personal knowledge of events during the relevant period without restraint from the Chamber.³³ Maître Douzima Lawson was moreover, specifically authorised to ask two series of questions, in the face of objection by the Defence which could, in no circumstances, have been said to be proper or relevant to the personal interests of her clients.

15. The first concerned a witness' evidence of his knowledge of rapes in the Bangui area, where Mr Zarambaud represented the participating victims: (insert transcript from 23/8) The second are a series of questions which could only have been designed as an attack on the credibility of a defence witness. In permitting the questions to be put, the Chamber acknowledged the same:

According to what was the justification given by Maître Douzima Lawson, it appears that the question intends to prove the motivation of the witness to come and testify, which is a valid question; therefore the Chamber will allow the question.³⁴(insert transcript from 22/8).

³² T-335-ENG-CONF, RT, page 41, line 15 – page 42, line 5.

³³ T-334-ENG-CONF, RT, page 24, lines 3-4; T-334-ENG-CONF, RT, page 35, line 19 – page 36, line 2; T-334-ENG-CONF, RT, page 38, lines 10-12; T-335-ENG-CONF, RT, page 32, lines 11-12; T-335-ENG-CONF, RT, page 32, lines 16-20; T-335-ENG-CONF, RT, page 38, lines 5-9

³⁴ T-334-ENG-CONF, RT, paras. 11-14

16. As such, the Defence is extremely concerned that despite the Chamber's ruling in the Impugned Decision that it will ensure that questions are not repetitive, irrelevant or otherwise inappropriate,³⁵ this does not correspond to the reality of the practice in the courtroom. Given the ongoing prejudice being suffered by the accused by the exposure of his witnesses to examination by three adverse parties, the Defence seeks leave to appeal the Impugned Decision. The Defence submits the Impugned Decision gives rise to identifiable issues that would significantly affect both the fair and expeditious conduct of the proceedings, and that an immediate resolution of which would material advance the proceedings.

B. REQUEST FOR LEAVE TO APPEAL

(a) Conditions for Leave to Appeal

17. Leave to appeal pursuant to Article 82(1)(d) will be granted if the party submitting the application has identified at least one issue of appeal that has been addressed in the impugned decision, and that meets the following two cumulative criteria as set out in that provision:³⁶

a. It must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and

b. It must be an issue for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

18. The Defence notes that the Appeals Chamber has held that '[a]n issue is an identifiable subject or topic requiring a decision for its resolution, not merely a

³⁵ Impugned Decision, para. 11.

³⁶ ICC-01/04-01/07-108, Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions, 14 December 2007, p. 3; ICC-01/04-01/07-116, Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions, 19 December 2007, p. 4

question over which there is disagreement or conflicting opinion.’³⁷

(b) *Identification of Appealable Issues*

19. The Defence submits that the Impugned Decision gives rise to the following identifiable subjects or topics requiring a decision for their resolution, which meet the criteria set out under Article 82(1)(d), and warrant consideration by the Appeals Chamber. These appealable issues are not merely “disagreements” or “conflicts of opinion” between the Defence and the Chamber as to the general approach to the questioning by LRVs,³⁸ but rather consist of discrete legal questions which arise directly out of the Impugned Decision.

20. The appealable issues identified are as follows:

(a) Whether the Chamber erred generally in not providing a reasoned decision addressing the issues raised in the Defence Motion, particularly in light the Appeals Chamber’s instruction that “[t]he right to a reasoned decision is an element of the right to a fair trial and that only on the basis of a reasoned decision will proper appellate review be possible.”³⁹

(b) Whether the Chamber erred in failing to address the specific incompatibility between its prior ruling requiring LRVs to seek authorization and provide justifications for follow-up questions, and the practice of allowing follow-up questions with no prior authorization or justification having been provided.

³⁷ Situation in the Democratic Republic of the Congo, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber of 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, para. 9.

³⁸ PTCII Single judge, Decision on the Defence Request for leave to appeal the 21 November 2008 Decision, ICC-02/04-177, para. 13.

³⁹ ICC-01/04-01/06-773 OA5, para. 20.

(c) Whether the Chamber erred in not addressing arguments raised in the Defence Motion concerning the prejudice suffered by the accused due to the failure to draw any meaningful distinction between the role of the Prosecution and the two LRVs participating in his case.

(d) Whether the Trial Chamber erred in not addressing arguments raised in the Defence Motion concerning the potential impact on Defence witnesses of the manner and duration of cross-examination by the LRVs, particularly given the lack of concrete relief once repetitive, lengthy and improper questioning have impacted on the morale and mindset of Defence witnesses.

(c) *Satisfaction of the Conditions for Leave to Appeal*

21. Each of these identified appealable issues significantly affects the **fair conduct of the proceedings**. The current broad scope of LRV questioning in the present proceedings directly impacts on the accused's right to a fair trial, and the appealable issues arise out of the Chamber's failure to address the Defence arguments concerning the fair trial concerns which have arisen out of this practice. As such, each of the appealable issues is directly linked to the fairness of the proceedings, warranting appellate intervention.

22. The appealable issues also significantly affect the **expeditious conduct of the proceedings**. This is self-evident in terms of the Chamber's error in failing to provide reasons for refusing to reduce the two-hour time limit imposed on LRVs. Moreover, the practice of LRVs asking repetitive questions, and asking lengthy non-neutral and often leading questions also obviously impacts on the expeditious conduct of the proceedings, as does the time still being dedicated in the courtroom to Defence objections and litigation of the questions which were not sufficiently

addressed or addressed at all in the Impugned Decision.

23. **An immediate resolution by the Appeals Chamber** would materially advance the proceedings. Although the Defence notes that the current trial is entering its final phases, the Impugned Decision contains issues which can not be safely left for any potential appeal from a Judgement in first instance. Firstly, the appealable issues identified will have an impact on the ongoing trial. Should the Appeals Chamber determine that the practice of LRV questioning in the present proceedings is indeed inconsistent with the governing documents of the ICC and incompatible with the rights of the accused to a fair trial, this ruling could be implemented for the remainder of the Defence witnesses, or give rise to other remedies as deemed fit by the Appeals Chamber. As such, the late stage of the proceedings should not be used to deny the accused his right to an appeal of such a critical issue which has impacted the proceedings in their entirety.

C. RELIEF REQUESTED

24. In light of the above arguments, the Defence respectfully requests that the Chamber:

GRANT the Defence request for leave to appeal the *Decision on the Defence Motion on the Questioning of Defence Witnesses by the Legal Representatives of Victims* on the grounds set out herein.

The whole respectfully submitted.



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Lead Counsel



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Co- Counsel

Done on the 23rd of August 2013
At The Hague, The Netherlands