

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: **3 May 2016**

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 Document

**Public redacted version of “Prosecution’s Response to ‘Defence request to submit evidence on sentence and for leave to present additional written submissions’”,
29 April 2016, ICC-01/05-01/08-3372-Conf**

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") opposes the Defence request to recall General Jacques Seara - Defence Witness 53 ("D-53") - and [REDACTED] - Prosecution Witness 15 ("P-15") - at the sentencing phase of these proceedings ("Defence Request").¹

2. According to the Defence Request, D-53 can provide expert evidence on: (i) the command levels within a military structure in general, and within the *Mouvement de Libération du Congo* ("MLC") in particular, and ultimately on Jean-Pierre Bemba Gombo ("Bemba")'s remoteness from the crime base; and (ii) the efficacy ordinarily to be expected in general terms of the measures taken by Bemba.²

3. P-15 should provide character evidence, with particular regard to the aims and ambitions of the MLC and Bemba's contribution to the development of peace in the Democratic Republic of Congo ("DRC") and in the Central African region.³

4. Through D-53's evidence, the Defence is seeking to re-discuss issues directly relating to the legal elements of command responsibility pursuant to article 28 of the Rome Statute ("Statute"). Trial Chamber III ("Chamber") has already rendered its Judgment under article 74 of the Statute⁴ and made its decision on Bemba's guilt. Article 76 of the Statute establishes that at the sentencing phase the Chamber only has to consider evidence relevant to the determination of the appropriate sentence, according to the factors set out in article 78 and rule 145 of the Rules of Procedure and Evidence ("Rules"). Therefore, expert evidence on the matters indicated by the Defence is not admissible at this stage.

¹ ICC-01/05-01/08-3372-Conf.

² *Ibid.*, para. 5.

³ *Ibid.*, paras. 7-8.

⁴ ICC-01/05-01/08-3343 ("Bemba Judgment").

5. Moreover, the Chamber made findings on the issues to which the proposed testimony would relate. D-53's expert evidence cannot be authorised as it would intrude into the Chamber's role as the trier of fact.

6. P-15 has already testified before the Chamber during the Prosecution case. The Defence had therefore an opportunity to ask questions of this Witness relevant to sentencing. For the sake of the fair and expeditious conduct of proceedings, pursuant to article 64(2) of the Statute, the Defence should not be authorised to present his proposed evidence.

7. The Defence Request to recall Witnesses D-53 and P-15 should therefore be rejected.

8. The Defence also seeks authorisation to rely on and submit documents set out in Annex A attached to the Defence Request. The Prosecution defers any response on those documents to its final oral submissions.⁵

II. Request for Confidentiality

9. Pursuant to regulation 23(2) *bis* of the Regulations of the Court, the Prosecution requests that this document be received as "Confidential," as it responds to the Defence Request, which bears the same classification.

⁵ ICC-01/05-01/08-3372-Conf, paras. 13 to 15.

III. Prosecution's Submissions

a) Regarding D-53's Proposed Expert Evidence

- The proposed evidence cannot be admitted at the sentencing stage as it relates to the merits of the case

10. The Defence states that D-53 could provide expert evidence on the command levels within a military structure in general, and within the MLC in particular. The objective of presenting such evidence is to ultimately illustrate Bemba's remoteness from the crime base. Additionally, D-53's evidence would concern the expected efficacy of some measures taken by Bemba to address crimes committed by his subordinate troops in the Central African Republic ("CAR"). According to the Defence, the above-mentioned issues would be directly relevant to mitigating circumstances.⁶

11. The Chamber decided to issue separate decisions: one pursuant to article 74 of the Statute, on the guilt or innocence of the accused, and, in the event of a conviction, one on the determination of the sentence, pursuant to article 76 of the Statute.⁷ The Chamber added that, in the event of a conviction, the Parties would be provided with an opportunity to make focused and meaningful submissions on sentencing for the purposes of article 78 and rule 145 (2) of the Rules.⁸

12. The bifurcated structure of the proceedings adopted by the Chamber provides therefore for two separate and distinct phases. The phase for the determination of guilt or innocence of the accused is concluded. The Chamber declared the submission of evidence to that effect closed, pursuant to rule 141 of the Rules.⁹ On 21

⁶ *Ibid.* para. 5.

⁷ ICC-01/05-01/08-3071, para. 13.

⁸ *Ibid.* para. 13.

⁹ ICC-01/05-01/08-3035; ICC-01/05-01/08-3155.

March 2016 the Chamber rendered its Judgment whereby it found Bemba guilty beyond reasonable doubt of the crimes charged. The current phase of the proceedings, therefore, relates to the determination of an appropriate sentence. Accordingly, the Parties may only submit evidence relevant to the factors and circumstances listed in article 78 of the Statute and rule 145 of the Rules.

13. Contrary to the Defence assertion,¹⁰ the proposed evidence does not relate to mitigating circumstances. It rather directly concerns issues related to the legal requirements of command responsibility, therefore relevant to the guilt or innocence of the accused, that were discussed at trial and finally adjudicated by the Chamber.

14. The sentencing phase cannot provide the Defence with an opportunity to re-litigate issues relevant to the guilt or innocence that have already been adjudicated. The appeal is the appropriate procedural opportunity to that end. The proposed evidence cannot therefore be admitted at sentencing stage, as it relates to the merits of this case.

- D-53's testimony would violate the Chamber's exclusive fact finding authority

15. In accordance with its statutory authority, the Chamber has thoroughly considered and evaluated the evidence about the matters on which D-53 should present his expert opinion, and made detailed findings.

16. In particular, the Chamber has already analysed in its Judgment the specific structure of the MLC military wing, *Armée de Libération du Congo* ("ALC"), and its command levels, its *modus operandi*, and Bemba's position and role within the ALC chain of command, both in general and specifically during the CAR military

¹⁰ ICC-01/05-01/08-3372-Conf., para. 5.

operation.¹¹ The Chamber has also thoroughly considered some measures taken by Bemba with regard to crimes committed by the MLC troops in the CAR and made findings on their efficacy.¹²

17. The role of an expert witness is not to reconsider findings made by a Chamber upon evaluation of the evidence presented at trial. The presentation of D-53's proposed evidence should therefore not be authorised, as it would ultimately seek to usurp the Chamber's fact finding authority.

18. The *ad hoc* Tribunals have rejected attempts to introduce expert evidence intruding into the Trial Chamber's role as a trier of fact. In *Karemera*, the Trial Chamber of the International Criminal Tribunal for Rwanda ("ICTR") rejected the presentation of expert testimony by Bernard Lugan, a French historian specialising in Africa, who sought to give evidence on such matters including the planning of genocide in Rwanda, the legitimacy of civil defence, and the Accused's conduct.¹³ In rejecting the presentation of that evidence, the Trial Chamber ruled that "on each of these points there are factual considerations over which [the Trial Chamber] exercises the widest margin".¹⁴

19. In the present case, the Defence Request to present D-53's evidence is a clear attempt to introduce a different assessment of the evidence, in violation of the Chamber's exclusive fact finding authority. In the circumstances of this case and in light of Chamber's findings, in fact, the proposed expert opinion could not point out any mitigating factor.

¹¹ Bemba Judgment, paras. 382-390, 399-401, 427, 697-701.

¹² *Ibid.* paras. 719-734.

¹³ Prosecutor v. Karemera et al., Order Relating to Defence Witness Bernard Lugan, Case No. ICTR-98-44-T, 5 May 2008 ("Karemera 5 May 2008 Decision"), para. 5.

¹⁴ *Ibid.*, para. 7.

20. The Chamber has observed that “throughout the 2002-2003 CAR Operation, Bemba was predominantly based in Gbadolite and was therefore remote from the operations on the ground.

21. Despite being remote, Bemba exercised a degree of authority and control that is hardly conceivable for a military commander; his knowledge of the MLC crimes was detailed and constant throughout the CAR operation; Bemba had a full range of measures to prevent and repress those crimes. In light of the Chamber’s findings, Bemba’s remoteness cannot amount to a mitigating circumstance. D-53’s proposed evidence aims at re-litigating command responsibility related issues.

22. As regards the measures taken by Bemba, the Chamber has assessed their efficacy and ruled that they were not only “inadequate”, but also “not genuine and not sincerely and properly executed”.¹⁵ Again, the Defence is attempting to challenge the Chamber’s findings and present a different evaluation of the evidence submitted at trial.

23. As it is not the task of an expert Witness to reconsider and dispute the Chamber’s findings, D-53’s proposed evidence should not be authorized.

b) Regarding P-15’s Proposed Evidence

24. According to the jurisprudence of this Court, a party may question a witness it has not called, about matters that go beyond the boundaries of the witness’ initial evidence.¹⁶ Under rule 140 (2)(b) of the Rules, the prosecution and the defence have the right to question a witness about “other relevant matters”, including sentencing issues, such as mitigating and aggravating factors.¹⁷

¹⁵ Bemba Judgment, para. 727.

¹⁶ ICC-01/04-01/06-1140, para. 32.

¹⁷ *Ibid.*, para. 32. See also ICC-01/04-01/06-2360, paras. 36 to 38, reiterating the same principles.

25. This Chamber, in line with the jurisprudence above, ruled in its “Decision on Directions for the Conduct of the Proceedings” that questions on mitigating and aggravating factors could be asked of witnesses.¹⁸

26. The purpose of eliciting at trial evidence relevant to a possible sentencing stage is to ensure that the proceedings are expeditious and to avoid recalling witnesses unnecessarily.¹⁹

27. P-15 testified before the Chamber during the Prosecution case. The Defence had the opportunity to examine him on matters relevant to the sentencing phase and ask questions to elicit the evidence that the Defence is now seeking to present by recalling P-15. Nothing prevented or constrained the Defence from eliciting that evidence.

28. It is noteworthy that, while questioned by Mr Haynes, P-15 testified about the “cause defended by Mr Bemba and his movement...,”²⁰ “[REDACTED]”²¹ and [REDACTED].²² The Defence could have pursued those lines of questioning. The Defence instead would like now to recall P-15 to question him further on those matters.

29. The Defence argument that P-15 should be recalled because he was not questioned on certain sentencing related matters, as they were not relevant to Bemba’s guilt, has therefore no merit. Examination was not limited to guilt-related issues and accordingly, matters other than Bemba’s responsibility were explored during P-15’s testimony.

¹⁸ ICC-01/05-01/08-1023, para. 13.

¹⁹ ICC-01/04-01/06-2360, para.38.

²⁰ ICC-01/05-01/08-T-210-CONF-ENG CT, p. 33, lns. 9 to 11.

²¹ ICC-01/05-01/08-T-210-CONF-ENG CT, p. 33, lns. 14 to 25.

²² ICC-01/05-01/08-T-211-CONF-ENG CT, p. 16, ln. 16 to p. 18, ln. 14 and p. 23, ln. 11 to p. 24, ln. 13.

30. To ensure the expeditiousness of the proceedings and in compliance with the principle of judicial economy, this Witness should therefore not be recalled and the Defence Request to present his evidence during the sentencing phase should be rejected.

c) Regarding the Defence Request to submit documentary evidence

31. The Prosecution defers any response on the documents upon which the Defence intends to rely for sentencing purpose to its final oral submissions.

IV. Relief Sought

32. In light of the submissions above, the Prosecution respectfully:

- a) Requests that the Chamber reject the Defence Request to present the evidence of D-53 and P-15;
- b) Reiterates its request to be authorised to present final oral submissions, including its response on the relevance and admissibility of documents upon which the Defence intends to rely for sentencing purpose.



Fatou Bensouda, Prosecutor

Dated this 3rd Day of May 2016
At The Hague, The Netherlands