

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/05-01/08
Date: 12 February 2010

TRIAL CHAMBER III

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge Joyce Aluoch

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
*v. JEAN-PIERRE BEMBA GOMBO***

Public Document

Decision on the procedures to be adopted for instructing expert witnesses

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor
Ms Petra Kneuer, Senior Trial Lawyer

Counsel for the Defence

Mr Nkwebe Liriss
Mr Aimé Kilolo-Musamba

Legal Representatives of the Victims

Ms Marie-Edith Douzima-Lawson

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber III ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, issues the following decision on the procedures to be adopted when instructing expert witnesses.

I. Background and submissions of the parties

1. On 7 October 2009, the Chamber requested the Office of the Prosecutor ("prosecution") to identify the expert witnesses that it intends to rely upon at trial. The parties and the participants were requested to consider the relevant jurisprudence of the Court on this issue and the possibility of joint instruction by the parties of any expert witnesses. The Presiding Judge added that the parties and the participants should indicate as early as possible "if there are any proposals that the established jurisprudence should be departed from".¹
2. On 9 October 2009, the prosecution filed the "Prosecution's submission re: prosecution's intention to rely on Expert Witnesses".² The prosecution submits that it anticipates introducing expert evidence, as follows: (a) an overview expert witness, (b) a gender crime expert witness, (c) a military expert witness and (d) a socio-linguistic expert witness.³
3. On 13 October 2009, the prosecution filed a corrigendum specifying that instead of attaching a list of the expert witnesses' names to its initial submission, it "will submit the names and profiles of the witnesses and will inform the Chamber and other parties and participants of their confirmed availability depending on the envisaged timeline of the trial".⁴

¹ ICC-01/05-01/08-T-14-ENG, page 18, lines 18 to 25 and page 19, lines 1 to 8.

² ICC-01/05-01/08-548.

³ ICC-01/05-01/08-548, paragraph 2.

⁴ Corrigendum to ICC-01/05-01/08-548 "Prosecution's submission re: Prosecution's intention to rely on Expert Witnesses", ICC-01/05-01/08-560, paragraph 3.

4. On 2 November 2009, the legal representatives filed a joint response to the prosecution's submission, and the corrigendum thereto.⁵ They submit that they have an interest in the procedures to be adopted in instructing expert witnesses as, in accordance with Regulation 44 of the Regulations of the Court ("Regulations"), these procedures apply to the participants.⁶ They inform the Chamber that they agree with the four subject areas proposed by the prosecution and they anticipate receiving additional details of the profile and availability of the expert witnesses.⁷ Referring to the jurisprudence of Trial Chamber I in the case *The Prosecutor vs Thomas Lubanga Dyilo*,⁸ with which they agree, the legal representatives underline the importance and advantages of selecting common expert witnesses and compiling joint instructions, to the extent that this is possible.⁹ Finally, the legal representatives inform the prosecution and the defence that they are available to participate in the instruction of the expert witnesses.¹⁰
5. On 5 November 2009, the Chamber decided that the trial will commence on Tuesday 27 April 2010.¹¹
6. The defence did not respond, pursuant to Regulation 24 of the Regulations, to any of the above submissions. However, the Chamber was informed that the defence will submit observations once they are notified of the names of the experts the prosecution intends to rely upon and after they have spoken with them.¹²

⁵ Réponse conjointe des représentants légaux des victimes à la soumission du Bureau du Procureur concernant les témoins experts, ICC-01/05-01/08-580.

⁶ ICC-01/05-01/08-580, paragraph 6.

⁷ ICC-01/05-01/08-580, paragraph 8.

⁸ ICC-01/04-01/06-1069.

⁹ ICC-01/05-01/08-580, paragraphs 9 and 10.

¹⁰ ICC-01/05-01/08-580, paragraph 11.

¹¹ Decision on the date of the trial, ICC-01/05-01/08-598, paragraph 6.

¹² Email communication from the defence to the Trial Chamber through the legal officer to the Presiding Judge on 7 December 2009 at 15.42: « La défense émettra ses observations au vue de la liste des experts que le Procureur propose de soumettre et ce, après les contacts qu'elle aura établi avec eux. »

7. On 28 January 2010, the prosecution filed the "Prosecution's Request for Approval of its Proposed Experts and Joint Instructions by the Prosecution and Legal Representatives".¹³ In annexes A, B, C, the prosecution with the agreement of the legal representatives,¹⁴ submitted the curriculum vitae of three expert witnesses: lieutenant-General Daniel Opande as the military expert; Dr Binaifer Nowroje, as the expert on gender crime and especially, sexual violence as a tool of war; and Dr Adeyinka M. Akinsulure-Smith as the expert on gender crime, focussing on post traumatic stress disorder.¹⁵ The prosecution informed the Chamber that these experts were requested immediately to seek inclusion of their names on the expert list maintained by the Registry pursuant to Regulation 44(1) of the Regulations.¹⁶ Finally the prosecution submits that it will no longer rely on an overview witness, and that the selection of the socio-linguistic expert witness is still ongoing.

II. Analysis and conclusions

8. Regulation 44 of the Regulations provides:

1. The Registrar shall create and maintain a list of experts accessible at all times to all organs of the Court and to all participants. Experts shall be included on such a list following an appropriate indication of expertise in the relevant field. A person may seek review by the Presidency of a negative decision of the Registrar.
2. The Chamber may direct the joint instruction of an expert by the participants.
3. On receipt of the report prepared by an expert jointly instructed, a participant may apply to the Chamber for leave to instruct a further expert.
4. The Chamber may *proprio motu* instruct an expert.
5. The Chamber may issue any order as to the subject of an expert report, the number of experts to be instructed, the mode of their instruction, the manner in which their evidence is to be presented and the time limits for the preparation and notification of their report.

9. Additionally, by Regulation 54 of the Regulations:

¹³ ICC-01/05-01/08-681 with confidential annexes A, B and C. The annexes were notified to the legal representatives on 12 February 2010 in accordance with an instruction from the Trial Chamber.

¹⁴ ICC-01/05-01/08-681, paragraph 4.

¹⁵ ICC-01/05-01/08-681, paragraphs 6 and 8.

¹⁶ ICC-01/05-01/08-681, paragraph 9.

At a status conference, the Trial Chamber may, in accordance with the Statute and the Rules, issue any order in the interests of justice for the purposes of the proceedings on, inter alia, the following issues [...]

(m) The joint or separate instruction by the participants of expert witnesses.

10. The Chamber notes that the parties or participants have not sought to depart from the jurisprudence of Trial Chamber I as regards expert witnesses in the case of *The Prosecutor v. Thomas Lubanga Dyilo*.

11. The following parts of the "Decision on the procedures to be adopted for instructing expert witnesses" issued by Trial Chamber I on 10 December 2007 are of particular relevance to the present issue:

14. The Chamber has been mindful of the obvious savings of costs and time if maximum agreement can be achieved by the parties (and, where relevant, the participants) in their instruction of expert witnesses. In achieving that end, the Bench has concluded the work of the Court - and the interests of justice as reflected in Regulation 54(m) - would be significantly assisted if a single, impartial and suitably qualified expert is afforded the best possible opportunity to investigate areas of dispute, having been provided with the detail of the rival contentions.

15. Therefore, the Chamber is of the view that the joint instruction of experts will potentially be of great assistance to the Court because through the exercise of identifying with precision the real areas of disagreement between the parties, the expert will be placed in the best possible position to achieve a balanced and comprehensive analysis. There are two particular dimensions to this procedure that deserve mention: first, given the single expert will not be in any sense influenced, however unconsciously, by the viewpoint of only one party, he or she will be particularly able to present a balanced view of the issues, informed by the particular concerns of both sides; second, this procedure avoids any later disagreement as to the qualifications and impartiality of an expert instructed by a single party, with all the potential for delay and disruption to the trial proceedings.

16. Accordingly, the Chamber favours, where possible, the joint instruction of expert witnesses. If the parties are unable to agree upon the joint instructions to be provided to the expert, they are to provide separate instructions on all the relevant issues. This approach will maintain the benefits of having agreement as to qualifications and expertise whilst also potentially keeping some of the advantages of limiting the areas of disagreement, following the discussions between the parties. The expert will then complete one report covering all the issues that have been raised in the competing instructions. Save in exceptional circumstances, the Bench considers it impractical for the joint expert to provide separate, private reports because he or she would usually be faced with insuperable difficulties as regards confidentiality, both when discussing the issues with the parties individually and when giving evidence. The Chamber, for similar reasons and unless exceptional circumstances exist, rejects the suggestion that the parties should be able to provide confidential instructions to a joint expert. It follows that the parties when providing their letter of instruction to a joint expert must realise that it may become a public document.

17. The parties may fail to agree on the desirability of appointing a joint expert witness and, moreover, it is possible there will be areas of enquiry that are only of interest to one side. Whenever it proves impossible to agree on the instruction of a joint expert and both parties as a result seek to instruct separate expert witnesses on the same issue, the matter is to be raised as a matter of urgency before the Chamber by way of a filing by each party, setting out with full particularity the reasons why a joint expert has not been retained. The Court should be informed as to the identities of the proposed experts.

18. If a participant has been given leave to participate in the trial as regards a particular issue or area of evidence which is to be the subject of expert evidence, the parties, whenever appropriate, should notify the participant and thereby provide him with the opportunity of contributing to the joint instructions or filing separate instructions.

19. If the parties or participants intend to appoint an expert jointly (whether instructed jointly or separately), the name of that expert is to be communicated in a public filing (unless there are good reasons for restricting the filing) in order to enable any question as to the expert's qualifications or professional standing to be raised at an early stage and before the expert has undertaken his or her work.

20. Furthermore, whenever an expert is to be appointed jointly, the instructions (whether joint or separate) are to be filed with the Chamber at an early stage to enable the Bench to provide additional instructions.

21. The Court will consider during the status conference on defence disclosure whether or not the defence is obliged to reveal the identity of, and the instructions to, any expert separately retained by the accused.

22. As envisaged in Regulation 44, the Chamber may separately instruct an expert witness if it believes there are relevant issues that are not under consideration by the parties.

23. Should the participants seek to introduce expert evidence they will need, in the first instance to make an application to the Chamber for leave. If the request is granted, the Chamber will apply the approach set out above, *mutatis mutandis*.

12. The Chamber is of the view that the procedure set out above by Trial Chamber I should apply to each of the expert witnesses identified by the prosecution to date, as well as to the socio-linguistic expert witness who is yet to be selected.

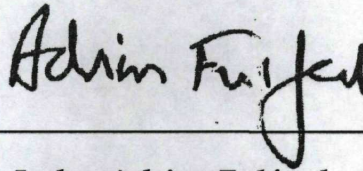
III. Orders of the Trial Chamber

13. For these reasons, the Chamber hereby orders the following:

- i) the prosecution is to provide the defence with the name and curriculum vitae of the socio-linguistic expert witness, if possible with the agreement of the legal representatives, no later than 16.00 on 19 February 2010;
- ii) the defence is to file its observations on all the proposed expert witnesses, by no later than 16.00 on 26 February 2010;
- iii) the joint experts are to be jointly instructed;
- iv) if the parties cannot agree joint instructions, the joint experts are to be given separate instructions, wholly or in part;

- v) the parties shall only instruct separate experts after that proposed course has been raised in a timely manner with the Chamber;
- vi) to the extent that victims are participating on an issue or as regard evidence which is to be the subject of expert evidence, they are to be given an opportunity to contribute to the expert's instructions (jointly with the parties or separately);
- vii) whenever an expert is to be instructed jointly, the instructions to the expert should be filed with the Chamber at an early stage;
- viii) counsel must ensure that for those experts who are not on the list of experts, they have applied to include their names on the list, and the Chamber is to receive confirmation of this step by way of email to the Legal Adviser to the Trial Division.

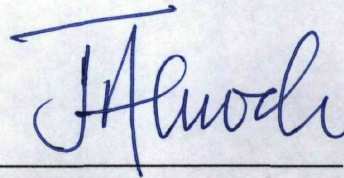
Done in both English and French, the English version being authoritative.



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge Joyce Aluoch

Dated this 12 February 2010

At The Hague, The Netherlands