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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**

Confidential

**Prosecution's Response to the Defence Request for Leave to Appeal the Decision
on the Defence Motion on the Questioning of Defence Witnesses by the Legal
Representative of Victims**

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 Defence seeks leave to appeal ("Defence Application")¹ the "Decision on the Defence Motion on the Questioning of Defence Witnesses by the Legal Representatives of Victims" ("Decision" or "Impugned Decision")² on the following issues: Whether Trial Chamber III ("Chamber") erred:

- o 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"³ ("First Issue");
- o in failing to address the specific incompatibility between its prior ruling requiring the Legal Representatives of Victims ("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 provided⁴ ("Second Issue");
- o 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 case⁵ ("Third Issue"); and
- o 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

¹ ICC-01/05-01/08-2767-Conf.

² ICC-01/05-01/08-2751-Conf.

³ Defence Application, para.20(a).

⁴ Defence Application, para.20(b).

⁵ Defence Application, para.20(c).

once repetitive, lengthy and improper questioning have impacted on the morale and mindset of Defence witnesses⁶ ("Fourth Issue").

2. The Prosecution submits that the Defence Application should be rejected. The issues as framed by the Defence do not arise out of the Impugned Decision. Even if they did, the issues do not meet the criteria for leave to appeal pursuant to Article 82(1)(d) of the Rome Statute ("Statute").

II. Procedural History

3. On 19 July 2013, the Defence filed the Defence Motion on the Questioning of Defence Witnesses by the Legal Representatives of Victims ("Motion on questioning Defence Witnesses").

4. On 21 August 2013, Trial Chamber issued the Impugned Decision, rejecting the Motion on questioning Defence Witnesses. On 23 August 2013 the Defence submitted the Defence Application seeking leave to appeal the Impugned Decision.

III. Confidentiality

5. Pursuant to Regulation 23*bis* of the Regulations of the Court, the Prosecution classifies this submission as confidential since it is submitted in response to a filing that is currently classified as confidential. The Prosecution does not object to the re-classification of the present filing as public.

⁶ Defence Application, para.20(d).

IV. Submissions

A. The Four Issues do not arise from the Decision

- (i) *General observation applicable to all Four Issues: The Defence Application challenges the merits of Decisions issued subsequently to the Impugned Decision*

6. The Defence devotes most⁷ of its application to arguing the *merits* of various alleged errors on the part of the Chamber. This approach is inappropriate. The correctness of a decision is irrelevant to an application for leave to appeal under Article 82(1)(d) of Statute. The sole question is whether the issue meets the criteria set out in the provision.⁸ The Four Issues are only identified at the *end* of the Defence Application⁹ without any explanation as to how they relate to the alleged errors described previously. In such circumstances, where the party seeking leave cites various alleged errors but “does not explain their relationship with the issue as defined in the application”,¹⁰ this Chamber has previously rejected the relevant application.¹¹

7. Moreover, the Defence appears to be directing its criticism principally towards decisions taken *after* the issuance of the Impugned Decision. In fact, the Defence acknowledges that in the Impugned Decision, the Chamber found that it will “continue to exercise control over the form and manner of the legal representatives’ questioning in order to ensure that they questions are not repetitive, irrelevant or

⁷ Defence Application, paras.1-16.

⁸ ICC-02/04-01/05-20-US-Exp, para.22 (unsealed pursuant to ICC-02/04-01/05-52). ICC-01/04-01/07-2032, paras.19 and 20.

⁹ Defence Application, para.20.

¹⁰ ICC-02/11-01/11-307, para.72.

¹¹ ICC-02/11-01/11-307, para.72.

otherwise inappropriate”.¹² However, it then continues to describe the manner of questioning conducted as of “the day following the Impugned Decision”¹³ and submits that the Chamber’s ruling “does not correspond to the reality of the practice in the courtroom”.¹⁴ As a result, the Defence claims “on-going prejudice” as a result of “the exposure of his witnesses to examination by three adverse parties”.¹⁵ This demonstrates that the alleged error challenged by the Defence does not arise from the Impugned Decision, but from subsequent decisions that implement the principles set out in the Impugned Decision. This cannot support an application for leave to appeal against the Impugned Decision. A party seeking leave to appeal must identify “a specific ‘issue’ which has been dealt with in the relevant decision and which constitutes the appealable subject.”¹⁶

(ii) *The First Issue does not arise from the Decision*

8. The First Issue is whether the Chamber “erred generally in not providing a reasoned decision addressing the issues raised in the Defence Motion”.¹⁷ The Defence does not identify an individual matter that the Chamber has failed to address in this context, but makes generic reference to the “issues raised in the Defence Motion”. This is not sufficiently precise to support an application for leave to appeal,¹⁸ as the Defence has failed to identify a concrete “subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.”¹⁹ The Prosecution notes that leave to appeal has been refused in similar circumstances

¹² Defence Application, para.5.

¹³ Defence Application, paras.6-15.

¹⁴ Defence Application, para.16.

¹⁵ Defence Application, para.16.

¹⁶ ICC-02/05-03/09-428, para.7.

¹⁷ Defence Application, para.20(a).

¹⁸ Since the Second, Third and Fourth issues *also* raise the matter of the Chamber “not addressing” or “failing to address”, in the Impugned Decision, certain questions raised by the Defence, it is unclear how the First Issue can be distinguished from the other three Issues.

¹⁹ ICC-01/04-168 OA3, para.9; ICC-02/11-01/11-307, para.70; ICC-02/04-01/05-367, para.22; ICC-02/05-02/09-267, p.6; ICC-01/04-01/06-2463, para.8; ICC-01/09-02/11-27, para.7.

where there is a “lack of clarity of the Defence in formulating the issue at stake”²⁰ and where “the Defence failed in articulating clearly what the issue at stake actually is”.²¹

(iii) *The Second Issue does not arise from the Decision*

9. The Defence claims that 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.²² This issue is based on a mischaracterization of the Impugned Decision. The Chamber explicitly acknowledged that it had previously “held that legal representatives must request leave to ask additional questions at the end of the questioning by the prosecution.”²³ The Chamber then explained that “[a]lthough it is true that, in order to expedite the proceedings, the Chamber has not requested a new application each time the legal representatives wish to ask follow-up questions, the Chamber has closely monitored the nature of the follow-up questions and has requested clarification when the relationship of the questions to the personal interests of victims was not clear”.²⁴

10. It is clear from the above that the Chamber took note of and addressed the potential incompatibility between its prior ruling and the practice of allowing follow-up questions with no additional authorization. Hence the Second Issue does not arise from the Decision. The Defence merely disagrees with the conclusions arrived at by the Chamber, which does not constitute an appealable issue.²⁵

²⁰ ICC-02/11-01/11-99-Conf, para.14.

²¹ ICC-02/11-01/11-99-Conf, para.15.

²² Defence Application, para.20(b).

²³ Decision, para.9.

²⁴ Decision, para.10.

²⁵ ICC-01/04-168 OA3, para.9; ICC-01/05-01/08-532, para.17; ICC-02/05-02/09-267, para.22; ICC-01/04-01/06-1557, para.30; ICC-01/04-01/07-2035, para.25; ICC-02/05-03/09-179, para.27; ICC-02/11-01/11-99-Conf, para.21.

(iv) *The Third Issue does not arise from the Decision*

11. Under its Third Issue, the Defence claims that 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 this case.²⁶ This issue is also based on a mischaracterization of the Decision. The Chamber explicitly took note that “the defence raises concerns about the manner in which the legal representatives for victims have been questioning witnesses during the defence case, contending that ‘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 o[f] the LRVs and that of the prosecution’”.²⁷ The Chamber then individually addressed the Defence complaints made in this context, including the scope of questioning,²⁸ authorization for questions,²⁹ and manner of questioning.³⁰

12. It is clear from the above that the Chamber explicitly took note of and addressed the Defence’s complaint regarding the alleged lack of any meaningful distinction between the role of the LRVs and that of the Prosecution. In fact, the

²⁶ Defence Application, para.20(c).

²⁷ Decision, para.2.

²⁸ Impugned Decision, para.10 (e.g. “During the course of the defence presentation of evidence, the Chamber has always been mindful of the need to restrict the legal representatives to *only those questions which are relevant to the interests of the victims they represent*” [emphasis added]).

²⁹ Impugned Decision, para.10 (e.g. “Far from allowing “virtually unrestrained” questioning, as alleged by the defence, the Chamber has *carefully considered the legal representatives’ applications* to question each defence witness, and has issued oral and written decisions authorising some questions *and not others*, on the basis of, inter alia, whether the questions were sufficiently linked to the personal interests of the victims” [emphasis added]).

³⁰ Decision, para.10 (e.g. “...the Chamber has closely monitored the nature of the follow-up questions”), para.11 (e.g. “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*” [emphasis added]).

Defence merely disagrees with the conclusions arrived at by the Chamber, which does not constitute an appealable issue.³¹

(v) *The Fourth Issue does not arise from the Decision*

13. Under its Fourth Issue, the Defence claims that the 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.³² This issue is also based on a mischaracterization of the Impugned Decision. As noted in the context of the Third Issue above, the Chamber took note of and addressed the Defence's complaint regarding the *manner of questioning* by the Legal Representatives. As for the *duration* of examination, the Chamber took note³³ of the Defence's submissions in this context and held that it "declines to reconsider the questioning time for the legal representatives for the remaining defence witnesses, as it does not find the two hours it previously authorised to be excessive".³⁴

14. It is clear from the above that the Chamber explicitly took note of and addressed the Defence arguments raised concerning the potential impact on Defence witnesses of the manner and duration of examination by the Legal Representatives. The Defence merely disagrees with the conclusions arrived at by the Chamber, which does not constitute an appealable issue.³⁵

³¹ ICC-01/04-168 OA3, para.9; ICC-01/05-01/08-532, para.17; ICC-02/05-02/09-267, para.22; ICC-01/04-01/06-1557, para.30; ICC-01/04-01/07-2035, para.25; ICC-02/05-03/09-179, para.27; ICC-02/11-01/11-99-Conf, para.21.

³² Defence Application, para.20(d).

³³ Decision paras.3-4.

³⁴ Decision, para.11.

³⁵ ICC-01/04-168 OA3, para.9; ICC-01/05-01/08-532, para.17; ICC-02/05-02/09-267, para.22; ICC-01/04-01/06-1557, para.30; ICC-01/04-01/07-2035, para.25; ICC-02/05-03/09-179, para.27; ICC-02/11-01/11-99-Conf, para.21.

B. The Four Issues do not meet the criteria for leave to appeal under Article 82(1)(d) of Statute

15. Although the Defence generally claims that the Four Issues affect the fair conduct of the proceedings,³⁶ it fails to support this statement. The Defence merely states that the “current broad scope of LRV questioning in the present proceedings directly impacts on the accused’s right to a fair trial” and it refers to “the Chamber’s failure to address the Defence arguments concerning the fair trial concerns which have arisen out of this practice”.³⁷ However, the Defence does not mention which aspect of the accused’s right to a fair trial is affected, or explain how it is affected by any of the Four Issues. It is settled law that the Defence cannot speculate in the abstract that the Impugned Decision causes prejudice to the rights of the Accused in order to invoke that the fairness of the proceedings are affected.³⁸ A purely general complaint of this type does not suffice.³⁹

16. Moreover, as demonstrated above, an analysis of the various alleged procedural violations relating to fair trial concerns arising from decisions issued subsequently to the Impugned Decision does not demonstrate that any issue arising from the Impugned Decision itself affects the fair conduct of the proceedings. Even if, *arguendo*, the allegations in the Defence Application were found to be linked to the Impugned Decision, issues arising from that Decision do not have a significant impact on the fair conduct of proceedings. The Impugned Decision expressly states 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.”⁴⁰ If the Defence wants to challenge

³⁶ Defence Application, para.21.

³⁷ Defence Application, para.21.

³⁸ See ICC-01/04-168 OA3, para.10; ICC-02/04-01/05-316, 7 October 2008, p.6; ICC-01/09-02/11-211, 4 August 2011, paras.33 and 39; ICC-01/04-01/06-2109, para.22; ICC-01/05-01/08-680, 28 January 2010, para.36;

³⁹ ICC-01/04-01/06-2463, para.31.

⁴⁰ Decision, para.11.

a particular decision authorizing certain questions by Legal Representatives, it can seek leave to appeal that particular decision. However, it cannot use the Impugned Decision as a vehicle to litigate its disagreements with separate decisions that follow from the Impugned Decision.

17. The Defence further claims that the Issues raised in the Defence Application significantly affect the expeditious conduct of proceedings since they relate to the two hour time limit imposed on Legal Representatives as well as the issue of lengthy repetitive questioning, and since they trigger Defence objections and litigation.⁴¹ Although the Prosecution agrees that these procedures may result in some delay, they do not *significantly* affect the expeditious conduct of the proceedings, especially bearing in mind that the trial is in its final phase and that it will only affect the questioning by Legal Representatives of the remaining five Defence witnesses. Appeal procedures concerning the Four Issues, on the other hand, may have a much more profound impact on the expeditious conduct of the proceedings.

18. Contrary to the contention of the Defence,⁴² an appeal at this late stage of the trial will also not materially advance the proceedings. Moreover, as submitted above, many of the Defence allegations do not relate to the substantive content of the Impugned Decision, but rather to the question of whether the Chamber has followed to the letter the Impugned Decision in *later* decisions issued during the day-to-day running of the minutiae of court-room administration. Appellate review of the Impugned Decision in this context cannot provide relief to either party.

⁴¹ Defence Application, para.22.

⁴² Defence Application, para.23.

V. Conclusion

19. For the above reasons, the Prosecution requests that the Chamber reject the Defence Application.



Fatou Bensouda, Prosecutor

Dated this 29th Day of August 2013

At The Hague, The Netherlands