

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 11 September 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

**Decision on Defence Request for Leave to Appeal the Decision on the Defence
Motion on the Questioning of Defence Witnesses by the Legal
Representatives of Victims**

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

The Office of the Prosecutor

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Counsel for the Defence

Mr Aimé Kilolo Musamba

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Legal Representatives of the Victims

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States Representatives

Amicus Curiae

Registrar

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Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber III (“Chamber”) of the International Criminal Court (“Court”) in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* issues the following Decision on Defence Request for Leave to Appeal the Decision on the Defence Motion on the Questioning of Defence Witnesses by the Legal Representatives of Victims.

I. Background and Submissions

1. On 19 July 2013, the defence filed the “Defence Motion on the Questioning of Defence Witnesses by the Legal Representatives of Victims” (“defence Motion”),¹ requesting the Chamber to place a number of restrictions on the legal representatives’ questioning of the remaining defence witnesses.
2. On 9 August 2013, the legal representatives filed a joint response, in which they ask the Chamber to deny the defence Motion in its entirety.²
3. On 21 August 2013, the Chamber issued a decision in which it held that the defence’s proposed additional restrictions were unwarranted (“Decision”).³
4. On 23 August 2013, the defence filed a request for leave to appeal (“defence Request”),⁴ setting out the following four issues of appeal :
 - (a) The Chamber’s alleged failure to provide a reasoned decision addressing the issues raised in the defence Motion (“First Issue”);
 - (b) The Chamber’s alleged failure to address the incompatibility between its prior ruling requiring legal representatives of victims to seek authorisation and provide justifications for follow-up questions, and the practice of

¹ 19 July 2013, ICC-01/05-01/08-2733-Conf.

² Réponse des Représentants légaux des victimes à la « Defence Motion on the Questioning of Defence Witnesses by the Legal Representatives of Victims – ICC-01/05-01/08-2738-Conf », 9 August 2013, notified on 12 August 2013, ICC-01/05-01/08-2738-Conf.

³ Decision on the Defence Motion on the Questioning of Defence Witnesses by the Legal Representatives of Victims, ICC-01/05-01/08-2751-Conf.

⁴ Defence Request for Leave to Appeal the Decision on the Defence Motion on the Questioning of Defence Witnesses by the Legal Representatives of Victims, 23 August 2013, ICC-01/05-01/08-2767-Conf.

allowing follow-up questions with no prior authorisation or justification having been provided ("Second Issue");

(c) The Chamber's alleged failure to address arguments concerning the prejudice suffered by the accused as a result of the lack of a meaningful distinction between the role of the prosecution and the legal representative ("Third Issue"); and

(d) The Chamber's alleged failure to address defence arguments concerning the potential impact of the manner and duration of the legal representatives' questions on defence witnesses ("Fourth Issue").

5. The defence submits that the four issues it identifies each affect the fair conduct of the proceedings, as "[t]he current broad scope of LRV questioning [...] directly impacts on the accused's right to a fair trial".⁵ The defence also submits that the four issues affect the expeditious conduct of the proceedings, because of "the Chamber's error in failing to provide reasons for refusing to reduce the two-hour time limit imposed on LRVs" and because of the "repetitive", "non-neutral", "lengthy" and "leading" questions asked by the legal representatives (including time for defence objections).⁶

6. Finally, the defence submits that an immediate resolution by the Appeals Chamber would materially advance the proceedings. In the event that the Appeals Chamber were to rule that the practice of legal representatives' questioning in this case was inconsistent with the fair trial rights of the accused, the defence submits "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".⁷

⁵ ICC-01/05-01/08-2767-Conf, para. 21.

⁶ ICC-01/05-01/08-2767-Conf, para. 22.

⁷ ICC-01/05-01/08-2767-Conf, para. 23.

7. On 29 August 2013, the prosecution filed a response to the defence Motion, arguing that the Chamber should reject the request for leave to appeal in its entirety.⁸
8. As an initial matter, the prosecution submits that for each of the four issues, the defence attempts to challenge the merits of the Chamber's decision rather than to explain why the issues satisfy the criteria for leave to appeal.⁹ The prosecution also points out that in attempting to rely on decisions taken after the issuance of the Decision, the defence fails to demonstrate how the alleged error arises from the Decision.¹⁰
9. The prosecution further argues that none of the four issues arise from the impugned decision.¹¹ It also submits that the four issues do not meet the criteria for leave to appeal under Article 82(1)(d) of the Rome Statute ("Statute"), as they do not significantly affect the fair and expeditious conduct of the proceedings nor would a resolution by the Appeals Chamber materially advance the proceedings.¹²

II. Analysis and Conclusions

10. For the purpose of the present Decision and in accordance with Article 21(1) of the Statute the Chamber has considered Articles 64(2), 64(7), 67(1) and 82(1)(d) of the Statute, Rule 155 of the Rules of Procedure and Evidence and Regulations 20 and 65 of the Regulations of the Court.
11. In deciding on the Request, the Chamber is guided by the established jurisprudence of this Chamber and of the Court regarding the interpretation of Article 82(1)(d) of the Statute. In line with this jurisprudence, for a request

⁸ 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, ICC-01/05-01/08-2786-Conf.

⁹ ICC-01/05-01/08-2786-Conf, paras 6 – 7.

¹⁰ ICC-01/05-01/08-2786-Conf, para. 7.

¹¹ ICC-01/05-01/08-2786-Conf, paras 8 – 14.

¹² ICC-01/05-01/08-2786-Conf, paras 15 – 18.

for leave to appeal to be granted, the party seeking leave to appeal should identify a specific “issue” which has been dealt with in the relevant decision and which constitutes the appealable subject.¹³

12. The Appeals Chamber has held that only an ‘issue’ may form the subject-matter of an appealable decision. An issue is “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is a disagreement or conflicting opinion [...]”. In addition, Article 82(1)(d) of the Statute cannot be used to litigate abstract or hypothetical issues.¹⁴

13. Accordingly, the Chamber has examined the Defence Motion according to the following criteria:

- a) Whether the matter is an “appealable issue”;
- b) Whether the issue at hand could significantly affect:
 - i. the fair and expeditious conduct of the proceedings; or
 - ii. the outcome of the trial; and
- c) Whether, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.¹⁵

¹³ Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, paragraph 9; *see also* Decision on the “Defence Request for Leave to Appeal the Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute”, 30 October 2012, ICC-01/05-01/08-2399, paragraph 9.

¹⁴ Decision on the Prosecutor’s Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 18 September 2009, ICC-01/05-01/08-532, paragraph 17; Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure, 25 August 2008, ICC-01/05-01/08-75, paragraph 11; Decision on the Defence Request for leave to appeal the 21 November 2008 Decision, 10 February 2009, ICC-02/04-01/05-367, paragraph 22; Decision on the “Defence Request for Leave to Appeal the ‘Urgent Decision on the ‘Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence’ (ICC-01/09-01/11-260)’”, 29 August 2011, ICC-01/09-01/11-301, paragraph 34; Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges, 9 March 2012, ICC-01/09-02/11-406, paragraphs 50 and 61.

¹⁵ Decision on the prosecution and defence applications for leave to appeal the “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 26 January 2011, ICC-01/05-01/08-1169, paragraph 23; *see also* ICC-01/05-01/08-2399, paragraph 11.

14. The three criteria mentioned above are cumulative and therefore, failure to fulfil one or more of these criteria is fatal to an application for leave to appeal.¹⁶
15. The First Issue identified by the defence is whether the Chamber “erred generally in not providing a reasoned decision addressing the issues raised in the Defence Motion”. This broad reference to “issues raised in the Defence Motion”, lacking as it does any reference to which issues the Chamber failed to address, does not satisfy the requirement that an issue be a concrete subject, the resolution of which is essential for the determination of matters arising at this particular stage of the proceedings. In its Decision, the Chamber addressed the authorisation given to the legal representatives to ask follow-up questions and the monitoring of these questions by the Chamber, the scope of legal representatives’ questioning and the Chamber’s scrutiny of the appropriateness of the proposed questions as well as the length of the questioning time granted to the legal representatives. Absent any more particularised formulation of the “issues” the Chamber allegedly failed to address, the Chamber concludes that the First Issue does not constitute an appealable issue.
16. The Chamber will address the three remaining defence issues together, as each issue involves the Chamber’s alleged failure to address a specific aspect of the defence Motion: the Chamber’s alleged failure to address the “incompatibility between its prior ruling requiring LRVs to seek authorization and provide justifications for follow-up questions” and its current procedure (Second Issue); the alleged failure to address arguments raised in the defence Motion concerning “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” (Third Issue); and the

¹⁶ ICC-01/05-01/08-1169, paragraph 24; *see also* ICC-01/05-01/08-2399, paragraph 12.

alleged failure to address the defence's arguments concerning the potential impact on defence witnesses of the manner and duration of "cross-examination by the LRVs" (Fourth Issue).

17. In contrast to the First Issue, the Chamber is persuaded that the remaining defence issues clearly set out which specific elements of the Chamber's decision the defence wishes to challenge on appeal, and can therefore be considered "issues" which could be resolved by an appellate decision. However, the Chamber is not convinced that the defence has demonstrated that the resolution of these issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, for the reasons set out below.

18. With regard to fairness, the defence submits only that "[t]he current broad scope of LRV questioning in the present proceedings directly impacts on the accused's right to a fair trial".¹⁷ This general statement is insufficient to meet the test articulated in Article 82(1)(d), and given that the defence does not explain how the rights of the accused are affected by the Chamber's decision as construed in Issues Two, Three and Four, the requirements of the fairness prong of the test for leave to appeal for these issues have not been satisfied.

19. As to the requirement that the issue must significantly affect the expeditious conduct of the proceedings, the defence advances the argument that the Chamber's failure to reduce the two-hour time limit will "self-evident[ly]" prolong the proceedings."¹⁸ Finally the defence suggests that "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" will significantly affect the expeditious conduct of the proceedings. The Chamber is not persuaded by these submissions. As an

¹⁷ ICC-01/05-01/08-2767-Conf, para. 21.

¹⁸ ICC-01/05-01/08-2767-Conf, para. 22.

initial matter, the Chamber notes that no party raised an issue when the two-hour time limit for questioning by the legal representatives was initially set. Given that the defence's presentation of evidence is now nearing its conclusion, the time to be gained from reducing the legal representatives' questioning time for the remaining defence witnesses would not significantly affect the expeditious conduct of the trial. Moreover, any future trial time spent addressing and ruling on defence objections to questions by the legal representatives is unlikely to significantly affect the expeditious conduct of the proceedings.

20. As to the defence reference in Issue Four to "the practice of LRVs asking repetitive [...] lengthy non-neutral and often leading questions", ¹⁹ the Chamber reiterates that the Presiding Judge has exercised, and will continue to exercise, control over the form and manner of the legal representatives' questioning to ensure that the questions are not repetitive, irrelevant or otherwise inappropriate.²⁰ In any event, the defence has failed to establish a link between any questions it considers "repetitive" or "non-neutral" and the expeditiousness of trial, particularly since in relation to the majority of witnesses, the legal representatives have not exceeded the two hours granted to them, and in fact have often completed their questioning in well under the time limit.

21. In sum, the defence has not satisfied the requirements of the expediency prong of the test for leave to appeal for Issues Two, Three and Four.

22. The defence does not argue that the resolution of the Second, Third or Fourth Issues would affect the outcome of the trial, and in any event the Chamber does not consider that a decision by the Appeals Chamber on these three issues – all involving prejudice allegedly caused by the questioning of defence

¹⁹ ICC-01/05-01/08-2767-Conf, para. 22.

²⁰ ICC-01/05-01/08-2751-Conf, para. 11.

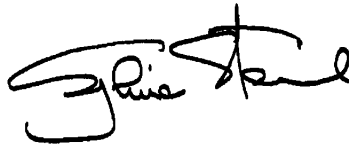
witnesses by the legal representatives – would have an impact on the outcome of the trial.

23. The Chamber therefore finds that the Second, Third and Fourth Issues, as construed and argued, would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Consequently, the Chamber need not consider whether a decision by the Appeals Chamber would materially advance the proceedings.

24. For the above reasons, the defence Motion is denied in its entirety.

25. The parties and the legal representatives of victims are ordered to file, by 20 September 2013, pursuant to Articles 64(7) and 67(1) of the Statute, public redacted versions of the documents related to the impugned decision and to the defence Motion. In the redacted versions, any references to statements and submissions made in closed and private session shall be redacted.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 11 September 2013

At The Hague, The Netherlands