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TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Aluoch
Judge Kuniko Ozaki

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

***IN THE CASE OF
THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO***

Public document

**Prosecution's Response to Defence's Request for Leave to Appeal the
Chamber's Decision on Requests to Present Additional Evidence and Submissions
on Sentence and Scheduling the Sentencing Hearing**

Source: 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's Application¹ seeking leave to appeal the Decision on request to present additional evidence on sentence² should be dismissed *in limine* because it fails to provide reasons as to how *each* issue satisfies the relevant criteria under article 82(1)(d) of the Rome Statute.

2. In any event, the Defence's Application should be dismissed on the merit because the four proposed issues³ do not arise from the Decision, or they are not "issues" within the meaning of article 82(1)(d). They express mere disagreements with the Chamber's conclusions.

3. Moreover, the Issues do not meet the criteria for leave to appeal. They do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Nor may the Appeals Chamber's immediate intervention materially advance the proceedings. To the contrary: At this advanced stage of the proceedings, "any potentially reversible error" can be "justly deferred to any final appeal under [a]rticle 81."⁴

II. Submissions

A. The Application should be dismissed in limine

4. The Application should be dismissed *in limine* because the Defence has failed to comply with its burden to properly articulate, on an issue-by-issue basis, how *each* individual issue satisfies the relevant criteria under article 82(1)(d).⁵ Rather, the Defence discussed in general terms how the "interference in Mr. Bemba's ability to call evidence in mitigation will impact on the sentence [and] will significantly affect

¹ ICC-01/05-01/08-3386 ("Application").

² ICC-01/05-01/08-3384 ("Decision").

³ Collectively referred to as "Issues".

⁴ See ICC-01/05-01/13-T-10-RED-ENG, p. 11, lns. 3-12.

⁵ See ICC-01/05-01/08-3382, para. 12.

the outcome of the trial”⁶. By so doing, it failed to expressly link the relevant criteria for leave to appeal under article 82(1)(d) to the specific Issues.⁷ As this Trial Chamber has previously held, “[i]n [...] circumstances [where] the Defence fails to provide reasons as to how *each* Issue satisfies the relevant criteria, the Chamber is entitled to dismiss [the request] *in limine*.”⁸

B. The Issues do not arise from the Decision or are not appealable “issues”

i. The First Issue does not arise from the Decision and is not an appealable “issue”

5. The First Issue—whether the Chamber erred in finding that the Defence has not demonstrated good cause to recall D53 and P15 since Parties had not been informed at the outset “to elicit evidence relevant to sentence during the trial phase”⁹—does not arise from the Decision. This is because the Defence’s arguments do not correctly and completely reflect the Decision.

6. Contrary to the Defence’s submission,¹⁰ the Chamber recalled that Parties were in fact informed at the outset of the trial of the possibility to question witnesses on mitigating and/or aggravating circumstances.¹¹ In addition, contrary to the Defence’s contention, both witnesses have already provided the evidence that the Defence is seeking to elicit during the sentencing hearing.¹² The Trial Chamber held that (i) D53 has already testified upon the issues of command and control as well as the

⁶ Application, para. 12. See also Application paras. 13-14.

⁷ ICC-01/05-01/08-3382, para. 12.

⁸ ICC-01/05-01/08-3382, para. 12 (emphasis added).

⁹ Application, para. 11(a).

¹⁰ Application, paras. 2, 11(a).

¹¹ Decision, para. 18 referring to ICC-01/05-01/08-1023, Decision on Directions for the Conduct of the Proceedings, 19 November 2010, para. 13. The Prosecution further notes that the Trial Chamber needs not give notice to the parties at the outset of trial to elicit evidence on sentencing factors during the presentation of the evidence. As article 76 states, the evidence presented at trial is relevant for sentencing purposes while a sentencing hearing shall be held only upon request of the Accused or the Prosecution.

¹² ICC-01/05-01/08-3372-Red, Public Redacted Version of Defence request to submit evidence on sentence and for leave to present additional written submissions, 18 April 2015 (“Request to present additional evidence”).

disciplinary measures taken and their efficacy;¹³ and (ii) P15 has already testified about matters relevant to Mr Bemba's character and addressed his "contribution to the development of peace in the DRC".¹⁴

7. In any event, the First Issue is not an appealable "issue" within the terms of article 82(1)(d) as it expresses a mere disagreement with the Chamber's application of the standard for recalling witnesses¹⁵ and its assessment of the relevance of D53 and P15's proposed additional evidence to the issues before the Trial Chamber.¹⁶

ii. The Second Issue does not arise from the Decision and is not an appealable "issue"

8. The Second Issue—whether the Chamber erred in refusing to hear P15 on the basis that the Defence could have further questioned P15 on these matters when they appeared¹⁷—does not arise from the Decision because it mischaracterizes the Chamber's findings.

9. Contrary to the Defence's submission,¹⁸ the Chamber refused to recall P15 because P15—and many other witnesses—have already testified on the same matters that the Defence is now seeking to elicit from P15 additional evidence. This includes matters relevant to Mr Bemba's character and contribution to the development of peace in the DRC.¹⁹

10. In any event, the Second Issue is not an appealable issue as it expresses a mere disagreement with the Chamber's assessment of the relevance of P15's proposed additional evidence.²⁰

¹³ Cfr. Decision, para. 21 and Request to present additional evidence, para. 5.

¹⁴ Cfr. Decision, para. 24 and Request to present additional evidence, para. 8.

¹⁵ Application, para. 2.

¹⁶ Application, paras. 11(a), 13.

¹⁷ Application, para. 11(b).

¹⁸ Application, para. 11(b).

¹⁹ Cfr. Decision, para. 24 and Request to present additional evidence, para. 8.

²⁰ Application, paras. 11(b), 13.

iii. The Third Issue is not an appealable “issue”

11. The Third Issue—whether the Chamber erred in finding that the Prosecution’s proposed evidence included aspects which have not previously featured in the evidentiary record²¹—is not appealable, as it expresses nothing more than mere disagreement with the Chamber’s conclusion. In fact, the Defence merely disagrees with the Chamber’s assessment and seeks to revive arguments that have previously been advanced,²² considered²³ and dismissed²⁴ by the Chamber.

12. As noted in the Application, the Defence has already “set out in detail the direct overlap between the proposed testimony of Dr. Reicherter, and Drs. Tabo and Akinsulure-Smith”.²⁵ Contrary to the Defence’s submission,²⁶ the Chamber considered—but was not persuaded by—the Defence’s argument.²⁷ It found that the proposed testimony of Dr Reicherter goes beyond the scope of the testimonies Drs Tabo and Akinsulure-Smith and that it “could provide a unique perspective in relation to the impact of the crimes on the victims”.²⁸ By merely restating its position and expressing its disagreement with the Chamber’s Decision, the Defence has failed to properly identify a discrete topic requiring a decision for its resolution.²⁹

²¹ Application, para. 11(c).

²² ICC-01/05-01/08-3379-Red, Public Redacted Version of Defence Response to the Prosecution and LRV Requests to present additional evidence on sentence, 2 May 2016, paras. 13-25.

²³ Decision, paras. 11, 12.

²⁴ Decision, paras. 12, 52(ii).

²⁵ Application, para. 4.

²⁶ The Defence mischaracterizes the Decision when suggesting that the “[t]he Impugned Decision did not address these areas of overlap”. Application, para. 4.

²⁷ Decision, paras. 11, 12, 52(ii).

²⁸ Decision, para. 12.

²⁹ ICC-01/04-168 OA3, paras. 9; 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. See also, ICC-01/04-01/06-1433 OA11, (Dissenting Opinion of Judge Song), para. 4, specifying that “[a] decision “involves” an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

iv. The Fourth Issue does not arise from the Decision and is not an appealable “issue”

13. The Fourth Issue—whether the Chamber erred in refusing the admission of documents 27 to 42 on the basis that actions taken and crimes committed by third parties are, without more, irrelevant to sentencing³⁰—does not arise from the Decision because it mischaracterizes the Chamber’s findings.

14. Contrary to the Defence’s representation,³¹ the Chamber did not find that actions taken and crimes committed by third parties are *per se* irrelevant to sentencing. To the contrary, it noted that “[t]he Defence has not demonstrated how these documents are relevant to the purposes for which it submits them”.³²

15. Thus there is no contradiction³³ between this finding and the conclusion that the Expert’s anticipated evidence on longitudinal and intergenerational impact of mass rape and sexual violence is relevant in determining the appropriate sentence.³⁴

16. In any event the Fourth Issue is not an appealable “issue” as it expresses a mere disagreement with the Chamber’s assessment of the relevance of the proposed documents 27 to 42.³⁵

³⁰ Application, para. 11(d).

³¹ Application, para. 11(d).

³² Decision, para. 46.

³³ *Contra* Application, paras. 3, 7, 11(d).

³⁴ Decision, paras. 10-12.

³⁵ Application, paras. 11(b), 13.

C. The other requirements for leave to appeal under article 82(1)(d) are not met

i. None of the Issues significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

17. Even assuming, *arguendo*, that the Issues fall within the scope of article 82(1)(d), the Defence's submission that the Issues significantly affect the outcome of the trial³⁶ is based on the faulty premise that the Decision impaired Mr Bemba's "ability to present evidence in mitigation".³⁷ To the contrary, one of the three witnesses the Defence intended to call (Monseigneur Fridolin Ambongo) was allowed,³⁸ while the other two (D53 and P15) were rejected as they had already testified on the topics the Defence wanted to elicit during the sentencing hearing.³⁹

18. Further, the Defence fails to support its claim that allowing the Prosecution Expert and denying the admission of 16 documents impacts the "outcome of the sentencing phase".⁴⁰ Accordingly, it should be rejected.

ii. Immediate resolution of the Issues by the Appeals Chamber will not materially advance the proceedings.

19. Immediate resolution of the Issues by the Appeals Chamber will not materially advance the proceedings.⁴¹ To the contrary, an interlocutory appeal at this advanced stage of the proceedings—*after* the delivery of the judgement pursuant to article 74—will delay the proceedings.

³⁶ Application, paras. 12-13. The Defence does not argue that the proposed issues significantly affect the fair and expeditious conduct of the proceeding.

³⁷ Application, para. 13.

³⁸ Decision, para. 52(iv).

³⁹ Decision, paras. 21, 24.

⁴⁰ Application, para. 14 (emphasis added). The Prosecution notes that, in relation to the Second Third and Fourth issues, the Defence doesn't even attempt to show a significant impact on *the outcome of the trial*. Rather, the Defence argues they significantly affect *the outcome of the sentencing phase*. See Application, paras. 13-14.

⁴¹ *Contra* Application, paras. 15-16.

20. As this Trial Chamber observed in a recent decision,⁴² “the Defence is able, if it so wishes, to raise matters that it considers relevant directly with the Appeals Chamber”⁴³ under article 81. In other words, any potential error at this stage is “better and justly deferred to any final appeal”.⁴⁴ This is particular the case in the instant proceedings where the Defence has already filed its notice of appeal against the Trial Chamber’s decision under article 74.⁴⁵

III. Conclusion

21. For all the reasons above, the Application should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 13th Day of May 2016

At The Hague, The Netherlands

⁴² ICC-01/05-01/08-3382.

⁴³ ICC-01/05-01/08-3382, para. 13, stating that “[o]nce a judgement pursuant to Article 74 of the Statute is issued, the Defence is able, if it so wishes, to raise matters that it considers relevant directly with the Appeals Chamber.”

⁴⁴ ICC-01/05-01/13-T-10-RED-ENG, p. 11, lns. 3-12.

⁴⁵ ICC-01/05-01/08-3348 A.