

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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***

Public

**Reasons for the Oral Decision on “Defence request for Leave to Appeal the
‘Decision on requests to present additional evidence and submissions on
sentence and scheduling the sentencing hearing’”**

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

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Other

Trial Chamber III (“Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (“Bemba case”), issues the following Reasons for the Oral Decision on “Defence request for Leave to Appeal the ‘Decision on requests to present additional evidence and submissions on sentence and scheduling the sentencing hearing’” (“Decision”).

I. Background and submissions

1. On 4 May 2016, the Chamber issued its “Decision on requests to present additional evidence and submissions on sentence and scheduling the sentencing hearing” (“Impugned Decision”),¹ in which it (i) scheduled a hearing from 16 to 18 May 2016 for the presentation of evidence and submissions on the appropriate sentence; (ii) decided to hear the testimony of Dr Daryn Reicherter and Monseigneur Fridolin Ambongo; (iii) decided to hear the views and concerns of victims a/0555/08 and a/0480/08; (iv) admitted into evidence eight documents, submitted by the Defence for Mr Jean-Pierre Bemba Gombo (“Defence”); (v) declined to recall witnesses P15 and D53; (vi) declined to hear the evidence or views and concerns of victims a/1226/11 and a/0272/08; and (vii) declined to admit into evidence 27 documents submitted by the Defence.²
2. On 10 May 2016, the Defence filed its “Defence request for Leave to Appeal the ‘Decision on requests to present additional evidence and submissions on sentence and scheduling the sentencing hearing’” (“Request”).³ The Defence identifies four allegedly appealable issues that

¹ Decision on requests to present additional evidence and submissions on sentence and scheduling the sentencing hearing, 4 May 2016, ICC-01/05-01/08-3384.

² ICC-01/05-01/08-3384, paras 21, 24, 37, 45 to 46, and 52.

³ Defence request for Leave to Appeal the “Decision on requests to present additional evidence and submissions on sentence and scheduling the sentencing hearing”, 10 May 2016, ICC-01/05-01/08-3386.

it submits meet the criteria established under Article 82(1)(d) of the Rome Statute ("Statute") and warrant consideration by the Appeals Chamber.⁴

The issues identified by the Defence are the following:⁵

- i. Whether the Trial Chamber erred in refusing to hear D53 and P15 on the basis that "the Defence has not demonstrated good cause to recall" them, through its erroneous reliance on a decision in Lubanga where, unlike the instant case, the parties had been informed at the outset of the trial to elicit evidence relevant to sentence during the trial phase ("Issue One");
- ii. Whether the Trial Chamber's refusal to hear P15 on the basis that "[t]he Defence could have further questioned P15 on these matters when he appeared" is inconsistent with the presumption of innocence; would oblige accused before the ICC to elicit evidence relevant to sentencing during the trial phase, undermining his or her right to expeditious proceedings; and is inconsistent with its decision to permit the testimony of a third Prosecution expert on sexual violence ("Issue Two");
- iii. Whether the Trial Chamber erred in finding that the Prosecution's proposed evidence included "aspects which have not previously featured in the evidentiary record thus far" when the Prosecution's two prior experts on sexual violence had testified as to "the effects of trauma on parenting" and "healing prospects" ("Issue Three"); and
- iv. Whether the Trial Chamber erred in refusing the admission of documents 27 to 42 in Annex A on the basis that "actions taken and crimes committed by third parties" are, without more, irrelevant to sentencing, when the proposed expert report directly addresses "actions taken and crimes committed by third parties" ("Issue Four").

3. On 13 May 2016, the Officer of the Prosecutor ("Prosecution") filed its "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",⁶ in which it requests that the Chamber dismiss the Defence's request for

⁴ ICC-01/05-01/08-3386, para. 11.

⁵ ICC-01/05-01/08-3386, para. 11 a) to d).

⁶ 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, 13 May 2016, ICC-01/05-01/08-3392.

leave to appeal *in limine*.⁷ The Prosecution argues that the Defence failed to articulate why each issue satisfies the requisite criteria in Article 82(1)(d) of the Statute.⁸ The Prosecution also makes individual submissions as to why each of the four identified issues is not appealable.⁹

4. On 16 May 2016, the Chamber issued an oral decision rejecting the Request, finding that the allegedly appealable issues did not meet the relevant criteria for leave to appeal under Article 82(1)(d) of the Statute to be granted.¹⁰ The Chamber stated that a written decision containing the reasoning underlying the Chamber's decision would be issued in due course.¹¹ In this Decision, the Chamber provides its reasoning.

II. Applicable law

5. For the present Decision, the Chamber has considered Articles 67 and 82(1)(d) of the Statute.
6. In deciding requests for leave to appeal, the Chamber is guided by the established jurisprudence of this Chamber and the Court regarding the interpretation of Article 82(1)(d) of the Statute. In line with this jurisprudence, for a request for leave to appeal to be granted, the party seeking leave to appeal should identify specific "issues" which were dealt with in the relevant decision and which constitute the appealable subject.¹²

⁷ ICC-01/05-01/08-3392, para. 4.

⁸ ICC-01/05-01/08-3392, para. 4.

⁹ ICC-01/05-01/08-3392, paras 5 to 16.

¹⁰ T-368, page 3, line 13 to page 4, line 7.

¹¹ T-368, page 4, lines 6 to 7.

¹² *The Situation in the Democratic Republic of Congo*, 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, para. 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, para. 9.

7. The Chamber reiterates that, as held by the Appeals Chamber:¹³

[o]nly 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 [...]. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one.

In addition, Article 82(1)(d) of the Statute cannot be used to litigate abstract or hypothetical issues.¹⁴

8. Accordingly, the Chamber has examined the allegedly appealable issues identified in the Request based on the following criteria:¹⁵

- a) Whether the matter is an "appealable issue";
- b) Whether the issue at hand would 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.

¹³ ICC-01/04-168, para. 9. *See also* ICC-01/05-01/08-2399, para. 10.

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, para. 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, para. 11; *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, and Dominic Ongwen*, 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; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, 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, paras 32 to 34; and *The Prosecutor v. Uhuru Muigai Kenyatta*, 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, paras 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, para. 23. *See also* ICC-01/05-01/08-2399, para. 11.

9. The 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 It is not sufficient for the purposes of granting leave to appeal that the issue for which leave to appeal is sought is of general interest or may arise in future proceedings.¹⁷ Further, it is insufficient that an appeal may be legitimate or even necessary at a future stage, as opposed to requiring immediate resolution by the Appeals Chamber in order to materially advance the proceedings.¹⁸

III. Analysis

10. The Chamber emphasises that, as set out above, each *issue* must satisfy the relevant criteria. The Request identifies, in list form, four allegedly “appealable issues”, but does not explain, on an issue-by-issue basis, how each issue satisfies the relevant criteria. Rather, the Defence submissions concern the general subject-matter of the sentencing proceedings and the Impugned Decision, without expressly linking the relevant criteria to the specific issues identified.¹⁹ In such circumstances, as the Defence fails to provide substantiated reasons as to how each issue satisfies the relevant criteria,²⁰ the Chamber is entitled to dismiss the Request *in limine*.
11. The Chamber further stresses the limited purpose and scope of the sentencing hearing and the ability of the parties, pursuant to Article 81(2)

¹⁶ ICC-01/05-01/08-1169, para. 24. *See also* ICC-01/05-01/08-2399, para.12.

¹⁷ ICC-01/05-01/08-1169, para. 25. *See also* *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, and Dominic Ongwen*, Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58, 19 August 2005, ICC-02/04-01/05-20-US-Exp (unsealed pursuant to Decision ICC-02/04-01/05-52), para. 21; and *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191, para. 11. *See also* ICC-01/05-01/08-2399, para. 13.

¹⁸ ICC-01/05-01/08-1169, para. 25. *See also* ICC-01/05-01/08-2399, para. 13.

¹⁹ ICC-01/05-01/08-3386, paras 2 to 7, and 12 to 16.

²⁰ *See, inter alia*, Rule 155 of the Rules of Procedure and Evidence (“Rules”); and Regulation 65 of the Regulations of the Court.

of the Statute, to appeal the Chamber's decision on sentence once it is rendered. It is therefore not satisfied that an immediate resolution by the Appeals Chamber would materially advance the proceedings.

12. Notwithstanding the above, the Chamber analysed each of the allegedly appealable issues against the standard set out above.²¹

Issue One and Issue Two

13. The Chamber considers that Issue One and Issue Two both primarily concern whether, in the *Bemba* case, the Defence was on notice that it could elicit evidence relevant to sentence at trial. In the Impugned Decision, the Chamber quoted its directions in the "Decision on Directions for the Conduct of the Proceedings" ("Decision 1023").²² From the commencement of the trial, the parties and participants were "permitted to question all witnesses on, *inter alia*, 'mitigating and/or aggravating circumstances' when they appeared".²³ The Defence assertion that the Defence was not on notice to elicit evidence relevant to sentencing at trial is therefore a misrepresentation not only of the Impugned Decision, but of the entire trial proceedings in the *Bemba* case.
14. Further, in formulating Issue One and Issue Two, the Defence neglects the reasoning underlying the Chamber's decision not to recall P15 and D53. In relation to D53, the Chamber noted that, on the anticipated topics of D53's testimony, "there is ample other evidence [from D53 and other sources] in the record" upon which the Chamber had already reached findings in the Judgment.²⁴ Likewise, in deciding whether to recall P15, the Impugned

²¹ See para. 8 above.

²² ICC-01/05-01/08-3384, para. 18 and footnote 36, *citing* Decision on Directions for the Conduct of Proceedings, 19 November 2010, ICC-01/05-01/08-1023, para. 13.

²³ ICC-01/05-01/08-3384, para. 18 and footnote 36.

²⁴ ICC-01/05-01/08-3384, para. 21.

Decision explicitly noted the duplicitous nature of the Defence's proposed testimony.²⁵ The Impugned Decision did not deny the recall of P15 solely on the "basis that '[t]he Defence could have further questioned P15 on these matters when he appeared'", as claimed by the Defence.²⁶ Instead, the Chamber also considered that throughout the trial, "the Chamber heard extensive evidence – from P15 and others – related to" the anticipated topics of the proposed testimony.²⁷

15. In sum, the Chamber considered that the anticipated evidence was cumulative of other evidence already in the record. In this regard, throughout the Impugned Decision, the Chamber specifically recalled the limited nature and scope of the sentencing proceeding, with the goal of ensuring expeditious proceedings and not as "an opportunity to re-litigate" matters previously addressed.²⁸ Insofar as the Defence does not take issue with the Chamber's finding that the evidence was cumulative of evidence already on the record, including that of the proposed witnesses themselves, resolution of Issue One and Issue Two are not "essential for the determination of matters arising in the judicial cause under examination".²⁹

16. Finally, the Chamber considers that, at least in part, both Issue One and Issue Two are essentially challenges to Decision 1023, via the Impugned Decision.

17. For the foregoing reasons, Issue One and Issue Two do not arise from the Impugned Decision and do not constitute appealable issues.

²⁵ See, *inter alia*, ICC-01/05-01/08-3384, para. 24.

²⁶ ICC-01/05-01/08-3384, para. 24.

²⁷ ICC-01/05-01/08-3384, para. 24.

²⁸ ICC-01/05-01/08-3384, paras 16, 21, 37, 45, and 50.

²⁹ ICC-01/04-168, para. 9.

Issue Three

18. In the Impugned Decision, the Chamber decided to hear the evidence of the expert proposed by the Prosecution (“Expert”) on the basis that his anticipated evidence would be “relevant”, “could provide a unique perspective in relation to the impact of the crimes on the victims”, and “may be of assistance to the Chamber in determining the sentence”.³⁰ Further, the Chamber recognized that the Expert would testify on the “‘longitudinal and intergenerational impact of crimes’, including aspects which have not previously *featured* in the evidentiary record thus far, for example, the effects of trauma on parenting, intergenerational transmission of trauma, and healing prospects”.³¹ In formulating Issue Three, the Defence only challenges two of the examples that the Chamber identified. The Defence does not allege that the “longitudinal and intergenerational impact of crimes”, generally, or the “intergenerational transmission of trauma” are cumulative of other evidence on the record. Accordingly, emphasising that Issue Three selectively challenges a limited part of the Chamber’s reasoning underlying its decision to call the Expert, the Chamber finds that Defence fails to demonstrate that resolution of the issue is “essential for the determination of matters arising in the judicial cause under examination”.³²
19. Finally, the Chamber notes that, in the Request, the Defence claims that P221 and P229 “testified as to ‘the effects of trauma on parenting’ and ‘healing prospects’”, yet failed to provide support for this contention or any examples of the alleged duplicitous evidence.³³

³⁰ ICC-01/05-01/08-3384, para. 12.

³¹ ICC-01/05-01/08-3384, para. 12 (emphasis added).

³² ICC-01/04-168, para. 9.

³³ See ICC-01/05-01/08-3386, para. 11(c) and footnote 25, *citing* only ICC-01/05-01/08-3384, para. 12.

20. Accordingly, the Defence fails to identify an appealable issue.

Issue Four

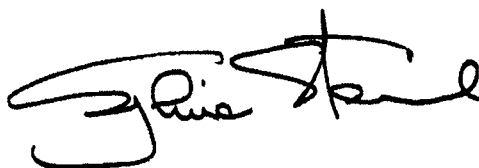
21. In the Impugned Decision, the Chamber declined to admit into evidence some of the documents submitted by the Defence because “[t]he Defence has not demonstrated how these documents are relevant to the purposes for which it submits them, let alone to the factors set out in Article 78 of the Statute and Rule 145 of the Rules”.³⁴ Thus, insofar as Issue Four is premised upon the misunderstanding that the Chamber rejected the documents solely because they concerned actions taken by third parties, the Defence misrepresents the Impugned Decision. Accordingly, Issue Four does not arise from the Impugned Decision.

IV. Conclusion

22. In view of the above, the Chamber **REJECTS** the Request.

³⁴ ICC-01/05-01/08-3384, para. 46.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 8 June 2016

At The Hague, the Netherlands