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No.: ICC-01/05-01/08

Date: 24/05/2017

TRIAL CHAMBER III

Before: Judge Joyce Aluoch, Presiding Judge
Judge Geoffrey Henderson
Judge Chang-ho Chung

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF
THE PROSECUTOR
v. Jean-Pierre Bemba Gombo**

Public

Public Redacted Version of Defence's Observations on three alternative proposed experts

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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A. INTRODUCTION

1. The premature nature of selecting reparations experts at this stage finds useful illustration in the wasted time and resources of the Defence, the Legal Representative of Victims (“LRV”), the Office of Public Counsel for Victims (“OPCV”), the Registry, and Trial Chamber III (“the Chamber”), in seeking and providing submissions on experts who are unavailable.¹

2. As such, the Defence reiterates its primary position that the selection and appointment of experts should be postponed until the Appeals Chamber has issued a final judgement on appeal.² The information now before the Chamber and the parties self-evidently justifies reconsideration of the initial decision not to suspend the process pending the resolution of the appeal against conviction in the instant case.

3. However, in compliance with the Trial Chamber’s email of 22 May 2014,³ in which the parties were requested to provide their views on three proposed replacement experts, the Defence makes the following observations.

B. SUBMISSIONS

1. Availability of the Proposed Replacement Experts

4. The present filing is born out of the unavailability of two of the four experts originally proposed by the Trial Chamber,⁴ upon whom the Defence, the LRV, and OPCV have already submitted observations.⁵

¹ ICC-01/05-01/08-3500-Conf; ICC-01/05-01/08-3503; ICC-01/05-01/08-3505; ICC-01/05-01/08-3512-Conf; ICC-01/05-01/08-3513; Email from the Chamber sent on 22 May 2017 at 14:23.

² ICC-01/05-01/08-3513.

³ Email from the Chamber sent on 22 May 2017 at 14:23.

⁴ ICC-01/05-01/08-3500-Conf; Email from the Chamber sent on 22 May 2017 at 14:23.

⁵ ICC-01/05-01/08-3512-Conf; ICC-01/05-01/08-3513.

5. These observations were the result of a number of meetings between the Defence, the LRV and the OPCV,⁶ as well as research into the respective backgrounds and relevant experience of the original experts. The Defence necessarily took instructions from the Appellant as to the suitability of each candidate. The LRV, in the proper exercise of her mandate, would necessarily have communicated with and sought instructions from the victims whom she asserts are participating in the reparations process.

6. Given the apparent urgency which the Chamber has injected into the process of approving these replacement experts, no similar consultation or investigation has been possible to date. However, the Defence has to observe, as a preliminary point, that no indication has been provided that any of them are available to be assigned as experts in the present case. Indeed, their applications appear nearly six months out of date.⁷ More importantly, there is no indication that any of these three will be available at some future and unknown time when their expertise may in fact be required.

7. The briefing period in the appeal against conviction concluded on 9 February 2017.⁸ The parties to the appeal have received no notice as to the timing of any appeal hearing (or indeed whether there will be an appeal hearing), or the timing of the delivery of the Appeal Judgment. Trying to predict when the experts would need to be available to provide assistance to the Trial Chamber is accordingly impossible.

8. There is a concrete risk (assuming that the Chamber adopts a consistent practice) that the parties may again go through the process of taking instructions

⁶ ICC-01/05-01/08-3513, para. 20.

⁷ ICC-01/05-01/08-3487-Conf-Anx6; ICC-01/05-01/08-3487-Conf-Anx16 ; ICC-01/05-01/08-3487-Conf-Anx20.

⁸ ICC-01/05-01/08-3499-Conf.

and drafting submissions which are a waste of time and resources. Accordingly, at a minimum, the Defence submits that the Registry should be ordered to ascertain the on-going availability of any proposed experts to provide the assistance sought by the Trial Chamber.

2. Submissions on the Proposed Replacement Experts

9. The LRV, OPCV and the Defence have now provided the Trial Chamber with draft instructions to form the basis of the work of the designated expert(s).⁹ However, the parties have received no indication as to the scope of the instructions which will eventually be adopted. This is, in fact, unsurprising. Instructions to the expert(s), if any, will necessarily turn on the scope of the conviction on appeal.¹⁰ However, in the absence of finalised instructions, the Defence cannot make any meaningful submissions on the suitability of candidates to assist the Trial Chamber in fulfilling an unknown mandate.

10. By way of example, [REDACTED]'s expertise apparently lies in reparations to victims of sexual violence.¹¹ Even leaving aside whether her prior experiences will assist the Chamber in quantifying in financial terms appropriate levels of individual or collective reparations in a case substantially involving pillage, her assignment presupposes that the appellant's convictions will go undisturbed. Mr. Bemba was convicted of 28 instances of rape. The Appeals Chamber may find, for example (i) that Mr. Bemba had no knowledge that his troops were committing rape,¹² (ii) that incidents of rape fell outside the scope of the Document Containing the Charges,¹³ or (iii) that no reasonable Trial Chamber could have found beyond reasonable doubt that the rapes in question were committed by subordinates of Mr.

⁹ ICC-01/05-01/08-3512-Conf; ICC-01/05-01/08-3513-AnxA.

¹⁰ See, for example, ICC-01/04-01/06-3129, paras. 8, 65, 184.

¹¹ ICC-01/05-01/08-3487-Conf-Anx20.

¹² ICC-01/05-01/08-3434-Red, paras. 309-320.

¹³ ICC-01/05-01/08-3434-Red, paras. 122-128.

Bemba rather than members of the other groups of armed troops who were present in the same area at the same time.¹⁴ Any of these findings would necessarily further impact on the suitability of [REDACTED]'s candidature as a reparations expert in the present case.

11. The Defence reiterates its position that the continuation of the reparations proceedings at this stage gives rise to a concrete risk of wasted resources. Moreover, without doubt, no expert should be appointed who has a conflict of interest. To that end, the Defence notes that one of the other proposed replacements, [REDACTED],¹⁵ in which he [REDACTED].¹⁶ Accordingly, his suitability to provide expert advice on whether participating victims had been properly identified, for example, may objectively be viewed as compromised. At the very least, his own views as to his ethical position should be investigated.

3. Observations from the TFV, the Registry, and the Prosecution

12. The Prosecution, Registry, and the TFV were invited to file observations on the proposed instructions of experts by 13 April 2017,¹⁷ the original deadline having been extended from 13 March 2017.¹⁸

13. The Defence is unaware of any such observations having been filed.¹⁹ Given that the Registry has previously drawn the Chamber's attention to the "budgetary impact of the designation of experts",²⁰ and given the TFV's apparent expertise in many of the issues for which the Trial Chamber is seeking the assistance of

¹⁴ ICC-01/05-01/08-3434- Red, paras. 465-478.

¹⁵ ICC-01/05-01/08-3487-Conf-Anx16, p. 17.

¹⁶ ICC-01/05-01/08-3487-Conf-Anx16, p. 15.

¹⁷ ICC-01/05-01/08-3505, p. 5.

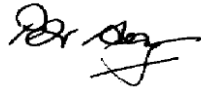
¹⁸ ICC-01/05-01/08-3500-Conf, p. 5.

¹⁹ The Prosecution only responded on the Defence's request for suspension of the reparations proceedings, ICC-01/05-01/08-3517. The Defence notes further that filings ICC-01/05-01/08-3515 and ICC-01/05-01/08-3521 are missing from the record of the case.

²⁰ ICC-01/05-01/08-3487, para. 6(7).

experts,²¹ the Defence would be grateful to be provided with these observations (if any) or, at the very least, given an indication of whether they will be forthcoming.

The whole respectfully submitted.



Peter Haynes QC
Lead Counsel of Mr. Jean-Pierre Bemba

Done at The Hague, The Netherlands, 24 May 2017

²¹ ICC-01/05-01/08-3500-Conf, para. 5.