

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08
Date: 15 December 2010

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 the Prosecution's Request for Leave to Appeal the Trial
Chamber's Decision on Directions for the Conduct of the Proceedings**

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

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Legal Representatives of the Victims

Ms Marie-Edith Douzima-Lawson

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Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
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**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber III (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* hereby delivers the following Decision on the “Prosecution’s Request for Leave to Appeal the Trial Chamber’s Decision on Directions for the Conduct of the Proceedings” (“Request”):¹

I. Background and Submissions

1. On 19 November 2010, the Chamber issued its “Decision on Directions for the Conduct of the Proceedings” (“Decision”) in which it gave directions to regulate the conduct of the proceedings for the trial of Mr Jean-Pierre Bemba Gombo.²
2. On 29 November 2010, the Office of the Prosecutor (“prosecution”) filed its Request, in which it applied for leave to appeal the Decision on the following two issues:
 - (i) the Chamber’s prohibition on the use of leading questions during “cross-examination”; and,
 - (ii) the lack of obligation on the party not calling the witness to ask any questions related to the credibility of a witness, the reliability of the evidence presented as well as to mitigating and/or aggravating circumstances and reparation issues during “cross-examination.”

¹ Prosecution’s Request for Leave to Appeal the Trial Chamber’s Decision on Directions for the Conduct of the Proceedings, 29 November 2010, ICC-01/05-01/08-1060.

² Decision on Directions for the Conduct of the Proceedings, 19 November 2010, ICC-01/05-01/08-1023.

3. With regard to the first issue, the prosecution submits that the “ban” imposed by the Chamber on the use of leading questions throughout the proceedings, in particular during “cross-examination”, deprives the parties of an efficient tool with which to test the credibility of witnesses or to impeach hostile witnesses.³ Such “ban”, according to the prosecution, not only departs from the practice established by Trial Chambers I and II but also has an irreversible impact on the fairness and the expeditiousness of the proceedings.⁴
4. The prosecution argues that this issue affects the fair conduct of the proceedings, because in adversarial proceedings, it would not be fair to bar the parties from using “a tool of demonstrated effectiveness” to test the credibility of witnesses and elicit favourable facts from hostile witnesses.⁵ The prosecution further submits that a prohibition on the use of leading questions would impact on the quality of the evidence elicited from witnesses and on the Trial Chamber’s ability to determine the truth.⁶
5. It is also submitted that the apparent ban on leading questions affects the expeditious conduct of the proceedings, since leading questions permit the parties to “rapidly and efficiently identify and present the disputed issues and therefore save court time.”⁷

³ ICC-01/05-01/08-1060, paragraph 6.

⁴ ICC-01/05-01/08-1060, paragraphs 2, 6 and 10.

⁵ ICC-01/05-01/08-1060, paragraphs 14 and 16.

⁶ ICC-01/05-01/08-1060, paragraph 19.

⁷ ICC-01/05-01/08-1060, paragraph 21.

6. Finally, it is submitted that the “ban” on leading questions may affect the outcome of the trial, since it restricts the ability of the parties to test the evidence of witnesses called by the other party. Therefore, the prosecution submits that the Chamber “may lack relevant and necessary information to assess the weight and probative value of evidence that could have been otherwise obtained through leading questions.”⁸

7. Concerning the second issue raised in the Request, the prosecution submits that rather than being a mere option for the party not calling the witness to ask questions relating to the credibility of a witness, the reliability of the evidence presented as well as to mitigating and/or aggravating circumstances and reparation issues during “cross-examination”, this should be an obligation for the party not calling the witness.⁹ Further, the prosecution argues that should the Decision stand, questions relating to the credibility of prosecution witnesses may only arise for the first time during the presentation of the defence case, thus preventing the prosecution witness from being able to refute or explain any purported contradictions from suggestions made by the defence and consequently obliging the prosecution to recall the witness or to present rebuttal evidence to address the defence’s suggestions.¹⁰ The prosecution argues that in this regard, the Decision departs from the jurisprudence of Trial Chambers I and II.¹¹

⁸ ICC-01/05-01/08-1060, paragraph 24.

⁹ ICC-01/05-01/08-1060, paragraphs 7 and 11.

¹⁰ ICC-01/05-01/08-1060, paragraph 11.

¹¹ ICC-01/05-01/08-1060, paragraphs 7 and 11.

8. The prosecution submits that the second issue affects the fair conduct of the proceedings, as it would be unfair to deprive witnesses of “the opportunity to explain potential contradictions in their evidence or to respond to accusations to their credibility”.¹² The prosecution further submits that the Decision creates unfairness for the prosecution, “which may find itself ambushed with an unexpected line of defence at a later stage of the proceedings”.¹³

9. The prosecution suggests that the second issue also affects the expeditiousness of the proceedings, since should the defence address the credibility of prosecution witnesses during its own case, the prosecution may then have to recall its witnesses or present rebuttal evidence.¹⁴ The prosecution relies on the jurisprudence in *The Prosecutor v. Thomas Lubanga Dyilo* in arguing that the defence should be obliged to put its case to prosecution witnesses, in order to avoid unnecessary searches and to save invaluable time.¹⁵

10. The prosecution finally argues that the second issue affects the outcome of the trial, since if the defence chooses not to put its case to prosecution witnesses, these witnesses may have to be recalled at a later stage. If unavailable or unwilling to testify again, the Chamber may then have an incomplete presentation of the facts, thereby affecting the outcome of the trial.¹⁶

¹² ICC-01/05-01/08-1060, paragraph 26.

¹³ ICC-01/05-01/08-1060, paragraph 27.

¹⁴ ICC-01/05-01/08-1060, paragraph 30.

¹⁵ ICC-01/05-01/08-1060, paragraph 31.

¹⁶ ICC-01/05-01/08-1060, paragraph 32.

11. The prosecution concludes by arguing that the immediate resolution of these two issues by the Appeals Chamber will materially advance the proceedings, considering the importance of the issues, and the divergent approach of the Chamber, with that of Trial Chambers I and II.¹⁷

12. The defence did not file a response to the Request.

II. Relevant Provisions

13. In accordance with Article 21 (1) of the Rome Statute ("Statute"), the Chamber has considered the following provision:

Article 82 of the Statute

Appeal against other decisions

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

[...]

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

III. Analysis and Conclusions

14. In analysing the Request, the Chamber has followed the approach established by the jurisprudence of the Court¹⁸ with regard to Article

¹⁷ ICC-01/05-01/08-1060, paragraphs 34-35.

¹⁸ Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008, 6 March 2008, ICC-01/04-01/06-1210; 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; 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; Decision on the

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82(1)(d) of the Statute, which identifies the specific requirements that an application for leave to appeal should meet.

15. Accordingly, the Chamber has examined the Request for leave to appeal against the following criteria:

- i) whether the matter constitutes an appealable issue arising from the impugned decision;
- ii) whether the issue at hand would significantly affect:
 - a) the fair and expeditious conduct of the proceedings, or
 - b) the outcome of the trial; and
- iii) whether the immediate resolution of the issue by the Appeals Chamber would, in the opinion of the Trial Chamber, materially advance the proceedings.

16. The requirements set out in i), ii) and iii) above are cumulative. The failure to fulfil one or more of them is therefore fatal to an application for leave to appeal.

“Requête de la Défense sollicitant l'autorisation d'interjeter appel de la décision orale du 4 mars 2010 autorisant l'utilisation et le dépôt en preuve de trois photographies”, 24 April 2010, ICC-01/04-01/06-2404; Decision on the “Prosecution’s request for Leave to Appeal the Trial Chamber’s Oral Ruling Denying Authorisation to Add and Disclose Additional Evidence after 30 November 2009”, 28 January 2010, ICC-01/05-01/08-680, Decision on the defence request for leave to appeal the “Decision on the defence application to obtain a ruling to correct the revised Second Amended Document containing the Charges”, 28 October 2010, ICC-01/05-01/08-980.

Whether the matter raised is an appealable issue

17. As stated in previous decisions of the Court, an appealable issue is an “identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.”¹⁹ In analysing whether the matters raised by the prosecution in its Request constitute appealable issues, the Chamber must first ascertain whether the issues identified actually arise from the impugned Decision. In the absence of such a conclusion, leave to appeal cannot be granted.²⁰

18. With regard to the first issue raised by the prosecution, the Chamber recalls that the impugned Decision sets out that:

With regard to the mode of questioning, the Chamber expects all parties and participants to ask neutral questions to the witnesses. In addition, the Chamber reminds the parties of their obligation under Rule 88(5) of the Rules and will be vigilant in controlling the manner of questioning witnesses who are vulnerable victims.²¹

19. The prosecution seems to interpret this as an absolute, indiscriminate “ban” on the use by the parties of leading questions when questioning any witness. However, although the Chamber expressed a preference for neutral questions and stated that it expects the parties to use such questions as a general rule, the Chamber stopped short of imposing a

¹⁹ ICC-01/04-168, paragraph 9. See also, Decision in the “Prosecution’s application for leave to appeal Trial Chamber II’s ‘Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1401, 1412, and 1456)’ of 7 October 2009”, 18 December 2009, ICC-01/04-01/07-1732, paragraph 13; ICC-01/04-01/06-2404, paragraph 20; ICC-01/05-01/08-980, paragraph 12.

²⁰ See ICC-01/04-01/07-1732, paragraph 14.

²¹ ICC-01/05-01/08-1023, paragraph 15.

prohibition on asking leading questions.²² Therefore, the Chamber cannot conclude that the first matter raised by the prosecution arises from the impugned Decision. The Chamber therefore finds that the first issue does not constitute an appealable issue for the purposes of Article 82(1)(d) of the Statute.

20. As regards the second issue raised by the prosecution, the Chamber notes that the Decision determined that:

During both phases of the trial, the party not calling the witness may ask questions related to the credibility of a witness, the reliability of the evidence presented, as well as on mitigating and/or aggravating circumstances and reparation issues.²³

21. The prosecution alleges that this passage of the Decision implies that the party not calling the witness is not obliged to “put its case” to the witness during questioning, and that as a consequence, the witness may need to be recalled later in the proceedings. The prosecution contends that the wording of the Decision invites the defence to discredit prosecution witnesses and test the reliability of their evidence through evidence presented only during the defence case, thus rendering it impossible for the witnesses concerned to refute or explain the suggestions or contradictions made about their evidence.

22. The prosecution submits that the Chamber has omitted to place an obligation on the opposing party “to put its case” to the witness. The fact

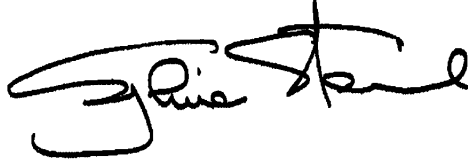
²² The Chamber notes that the terminology used in Rule 140 of the Rules refers to “questioning” or “examination” of witnesses as neutral terms, rather than using terms ordinarily associated with the common or Romano-Germanic systems.

²³ ICC-01/05-01/08-1023, paragraph 13.

that the Chamber's Decision is silent on this issue does not interfere with counsel's obligations in either presenting evidence or acting on behalf of the accused pursuant to the Rules and in keeping with counsel's respective codes of conduct. Moreover, the Chamber disagrees that the above cited paragraph can be interpreted as having the consequences described in the prosecution's Request. Therefore, the Chamber cannot conclude that this matter arises from the impugned Decision. As such, the Chamber finds that the second issue raised by the prosecution does not constitute an appealable issue for the purposes of Article 82(1)(d) of the Statute.

23. Given that the requirements of Article 82(1)(d) are cumulative, there is no need for the Chamber to address the subsequent criteria, since the two issues raised in the prosecution's Request do not comply with the first requirement.
24. For the foregoing reasons, the Chamber rejects the prosecution Request for leave to appeal.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 15 December 2010

At The Hague, The Netherlands