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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 with Public Annex A

**Defence's Observations on Trial Chamber III's order inviting submissions on
experts, ICC-01/05-01/08-3500-Conf**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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A. INTRODUCTION

1. The Defence files the instant Observations separately from those filed jointly by the Legal Representative of Victims (“LRV”) and the Office of Public Counsel for Victims (“OPCV”). It does so for two reasons. Firstly, because it wishes to apply for specific relief in relation to the reparations process, and, secondly, because, having met and discussed the question of the appointment of experts with representatives of those organs, it was plain that there was a limit to the extent to which matters herein could be agreed. The Defence has no observations to make about the identity of the experts preferred by OPCV and LRV, but appends its own draft letter of instruction to this filing.

2. The primary position of the Defence is that whilst the selection of experts may be a prudent and forward-looking step at this stage, their instruction would be premature.

3. Given the budgetary and time cost of such a step and the serious implications of the Chamber’s order concerning the rights of the Accused, it is submitted that this process should be postponed until, if any, the final conviction of the Accused on appeal. The Defence invites the formal suspension of any further step in the reparations process until after that event.

B. PROCEDURAL BACKGROUND

4. On 21 March 2016, the Trial Chamber delivered its Judgement under article 74 of the Rome Statute (“Statute”), convicting Mr. Jean-Pierre Bemba.¹ The conviction encompassed 3 murders, 28 rapes, and 16 instances of pillage.²

¹ ICC-01/05-01/08-3343.

² ICC-01/05-01/08-3343, paras. 624, 633, 640; *See also*, ICC-01/05-01/08-3376-Conf, para. 15; ICC-01/05-01/08-T370-ENG, p. 27, lines 12-13.

5. On 4 April 2016, the Appellant filed a notice of appeal against the Judgment pursuant to Rule 150(1) of the Rules of Procedure and Evidence, and Regulation 57 of the Regulations of the Court.³

6. On 21 June 2016, the Trial Chamber rendered its Decision on Sentence pursuant to Article 76 of the Statute and sentenced Mr. Bemba to a total of 18 years of imprisonment.⁴ On 22 July 2016, both the Prosecution and the Defence filed a notice of appeal against the Decision on Sentence.⁵

7. On 22 July 2016, the newly-composed Trial Chamber III made an Order requesting submissions relevant to reparations.⁶ The Trial Chamber set out five issues upon which it requested submissions from the LRV, the Defence, the Prosecution, the Registry and the Trust Fund for Victims (“TFV”).⁷ The Chamber also ordered the Registry to provide a list of experts to assist the Chamber in its determinations relevant to reparations.⁸ The Chamber initially set the deadline for the parties and participants of 15 September 2016, but this was extended until 17 October 2016⁹ and a second time until 31 October 2016.¹⁰ Finally, the Registry requested an extension of time to identify experts¹¹ which was granted by the Chamber and set to 31 December 2016.¹²

8. On 4 August 2016, the OPCV asked to submit observations on reparations.¹³ The Chamber granted this request on 5 August 2016.¹⁴ Four organisations, the QUB

³ ICC-01/05-01/08-3348.

⁴ CC-01/05-01/08-3399.

⁵ ICC-01/05-01/08-3411 A2 and ICC-01/05-01/08-3412 A3.

⁶ ICC-01/05-01/08-3410.

⁷ ICC-01/05-01/08-3410, para. 7.

⁸ ICC-01/0501/08-3410, para. 9a.

⁹ ICC-01/05-01/08-3429, p.7.

¹⁰ ICC-01/05-01/08-3442, p. 5.

¹¹ ICC-01/05-01/08-3452.

¹² ICC-01/05-01/08-3453, p.5.

¹³ Email from the OPCV sent on 04 August 2016 at 09:12.

¹⁴ Email from the Chamber sent on 05 August 2016 at 12:42.

Human Rights Centre, the International Organisation for Migration (“IOM”), Redress and the United Nations (“UN”) were also granted leave to make submissions on the five identified issues pursuant to Article 75(3) of the Statute and Rule 103 of the Rules of Procedure and Evidence (“Rules”).¹⁵

9. On 19 September 2016, the Appellant filed his document in support of the appeal against conviction.¹⁶

10. On 17 October 2016, the QUB Human Rights Centre,¹⁷ and the IOM¹⁸ filed observations before the Trial Chamber. Redress¹⁹ and the UN²⁰ filed their observations on 18 October 2016.

11. On 21 October 2016, both the Prosecution²¹ and the Appellant²² filed their documents in support of appeal against sentence.

12. On 31 October 2016, the Prosecution,²³ the OPCV,²⁴ the TFV,²⁵ the Defence²⁶ and the LRV²⁷ filed their observations on reparations. The Registry filed on 1 November 2016.²⁸

13. On 21 November 2016, the Prosecution filed its response to the Appeal Brief against conviction.²⁹

¹⁵ ICC-01/05-01/08-3430.

¹⁶ ICC-01/05-01/08-3434-Conf.

¹⁷ ICC-01/05-01/08-3444.

¹⁸ ICC-01/05-01/08-3447.

¹⁹ ICC-01/05-01/08-3448.

²⁰ ICC-01/05-01/08-3449.

²¹ ICC-01/05-01/08-3451 A2.

²² ICC-01/05-01/08-3450-Conf A3.

²³ ICC-01/05-01/08-3454.

²⁴ ICC-01/05-01/08-3455.

²⁵ ICC-01/05-01/08-3457.

²⁶ ICC-01/05-01/08-3458-Conf.

²⁷ ICC-01/05-01/08-3459-Conf.

²⁸ ICC-01/05-01/08-3460.

14. On 30 November 2016, the Appellant requested leave to file a reply to the Prosecution Response Brief against conviction.³⁰ Leave was granted on 7 December 2016.³¹ On 20 December 2016, the Appellant filed his reply to the Prosecution's Response to its appeal brief against conviction.³²

15. On 21 December 2016, the Appellant filed its response to the Prosecution's appeal against sentence.³³ On 22 December 2016, the Prosecution filed its response to the Appellant's Appeal against sentence.³⁴ Neither party requested leave to reply

16. On 22 December 2016, the Registry filed its list of proposed experts in which it identified 27 applications as meeting the basic requirements.³⁵

17. On 21 February 2017, the Chamber filed an order inviting submissions on experts, considering the appointment of four experts and directing the LRV, OPCV and the Defence to file joint observations on the experts identified by 3 March 2017.³⁶ It also ordered the Registry to provide the CV and application of one of these four experts to the parties and participants who was not part of the list provided by the Registry on 22 December 2016 but added to the general list of experts after that date.³⁷

18. On 24 February 2017, the LRV, the OPCV and the Defence jointly sent an email to the Chamber requesting an extension of the deadline to file their

²⁹ ICC-01/05-01/08-3472-Conf.

³⁰ ICC-01/05-01/08-3475.

³¹ ICC-01/05-01/08-3480.

³² ICC-01/05-01/08-3483-Conf .

³³ ICC-01/05-01/08-3485 A2.

³⁴ ICC-01/05-01/08-3486-Conf-Red A3.

³⁵ ICC-01/05-01/08-3487 with 28 confidential annexes.

³⁶ ICC-01/05-01/08-3500-Conf.

³⁷ ICC-01/05-01/08-3500-Conf, para. 2 and p. 5.

submissions.³⁸ On the same day, the Chamber instructed them to submit the request through a formal filing.³⁹

19. On 28 February 2017, the LRV, the OPCV and the Defence jointly filed a formal request for an extension of the deadline to file their submissions, proposing a new deadline of 3 April 2017.⁴⁰ This request was granted by the Chamber on 2 March 2017.⁴¹

20. On 9 March 2017, counsel for the Appellant met with counsel from OPCV and the LRV to discuss the proposed experts and the joint submissions. They met a second time on 30 March 2017.

21. The meetings and discussions between the Defence, OPCV and the LRV were constructive and conducted in good faith by all parties. However, having been provided with a draft copy of the compendious list of questions proposed by the other parties, the Defence appends its own draft letter of instruction for expert(s) at Annex 1 hereto.

C. SUBMISSIONS

1. The Instruction of Experts is Premature

22. Mr. Bemba has filed appeals against both the Judgment,⁴² and Sentencing Decision.⁴³ The Chamber cannot operate on the assumption that his convictions will

³⁸ Email from the LRV, the OPCV and the Defence sent on 24 February 2017 at 09:19.

³⁹ Email from the Chamber sent on 24 February 2017 at 15:24.

⁴⁰ ICC-01/05-01/08-3503.

⁴¹ ICC-01/05-01/08-3505.

⁴² ICC-01/05-01/08-3434-Conf.

⁴³ ICC-01/05-01/08-3450-Conf.

remain completely undisturbed on appeal. The conviction could be overturned or modified. Given that:⁴⁴

[r]eparation orders are intrinsically linked to the individual whose criminal responsibility is established in a conviction and whose culpability for these criminal acts is determined in a sentence

and that an accused should not have to remedy harms that are not the result of the crimes for which he was convicted,⁴⁵ continuing with the reparations process whilst there is an extant live appeal against conviction is, in the Defence submission, inappropriate.⁴⁶

23. Firstly, such a process is inconsistent with the rights of the accused in two ways; it operates as an effective presumption of guilt, and secondly, places a burden on his miniscule resources at a time when he is fighting appeals against conviction and sentence. Such is plain from the coincidence of the procedural steps set out in the procedural history above.

24. Secondly, it represents the pursuit of a potentially misguided process. The work of the expert(s) in this case will be determined in no small way by the parameters of the convictions herein. Obviously, if Mr. Bemba were to be acquitted on appeal, then any work carried out up till that point would have been entirely wasted. The same would be no less true, however, in the event that the Appeals Chamber modified the extent of his conviction by, for example determining that Mr. Bemba had no knowledge of the commission of murder, or that MLC soldiers committed no offences in a particular location.

⁴⁴ ICC-01/04-01/06-3129, *Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations"*, para. 65.

⁴⁵ ICC-01/04-01/06-3129, para. 8.

⁴⁶ See also ICC-01/09-01/11-2038, paras. 6-7.

25. Further, the financial consequences of instructing experts cannot be ignored. The Registry has already drawn the attention of the Chamber to that aspect:⁴⁷

The Registry would also like to inform the Chamber of the **budgetary impact of the designation of experts** in the Case, depending on the number of experts to be appointed by the Chamber, and on the exact modalities of intervention which the Chamber may want to establish for each expert.

26. The Defence wishes to emphasise that the process up to the point of the selection of expert(s) (and perhaps even the finalisation of the letter of instruction) is expedient. However, it submits that it would be premature, unnecessarily costly, and unfair to the accused actually to issue instructions at this stage.

27. Thirdly, suspension of the reparations process pending the outcome of any appeal is consistent with the prior practice of the Court. In the *Katanga* case, the reparation proceedings started only after the withdrawal of the appeals when the LRVs asked the Chamber to set a schedule for filing observations on the principles for reparations in August 2014,⁴⁸ two months after the parties had withdrawn their appeal.⁴⁹

28. In *Lubanga*, it was only after the Appeals judgment against conviction, that the Appeals Chamber gave its decision on the principles to be applied to reparations,⁵⁰ almost two years after the last document in support to the appeal against the decision establishing the principles and procedures to be applied to reparations had been filed.⁵¹

⁴⁷ ICC-01/05-01/08-3487, para. 6(7) (emphasis added).

⁴⁸ ICC-01/04-01/07-3507.

⁴⁹ ICC-01/04-01/07-3497; ICC-01/04-01/07-3498.

⁵⁰ *Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations"*, ICC-01/04-01/06-3129, delivered on 03-03-2015 (3 months after the *Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction*, ICC-01/04-01/06-3121-Red delivered on 01-12-2014).

⁵¹ *See*, ICC-01/04-01/06-3129, para. 27.

29. It is only logical that the reparations phase begins after all the proceedings are concluded. The Chambers and Appeals Chamber of this Court have previously taken into account a pending appeal and reserved their orders or decisions for after the certainty of the conviction decision.⁵²

30. Lastly, there is no reason to suppose that any period of suspension would be lengthy or prejudicial to victims claiming reparations in particular. The briefing schedule on appeal has been concluded for some time now and the Appeals Chamber is in deliberation. Certainty as to the conviction may, in fact, not be too far distant in the future. Moreover, as is apparent from the draft list of questions proposed by OPCV and the LRV, there is concern about the process of locating and identifying claimants. That process will benefit rather than suffer from a delay in the instruction of experts.

2. Experts to be appointed and modalities

31. The Defence have discussed with the LRV and OPCV their joint preferences on the issue of the experts from the list provided by the Chamber. The Defence has no observations to make as to their views on that issue. The Defence assumes that each of the expert witnesses eventually designated will be subject to appropriate contractual and/or professional ethical duties to disclose any potential conflict of interest known to them which might prevent them from acting in this case. The Defence has no observations to make as to whether one or more experts is designated by the Chamber, nor as to whether one or multiple reports are produced.

32. The Defence of course reserves the right to present evidence, whether factual or expert, in any reparations process which may in due course take place.

⁵² ICC-01/04-01/07-3532-tENG; ICC-01/04-01/06-3129.

3. Letter of Instruction

33. The Defence appends at Annex 1 hereto a draft letter of instruction. It commends the same to the Chamber. It is, in the Defence submission, concise, comprehensive and functional, and would form at least a good basis for the instruction of expert(s) in due course.

D.RELIEF SOUGHT

34. For the reasons outlined above, the Appellant respectfully requests that the Trial Chamber:

REFRAIN at this stage from the instruction of expert witnesses in the instant proceedings;

SUSPEND the reparations process herein at the latest after the selection of any expert(s) and the finalisation of any letter of instruction; and

ADOPT in whole or in part as the basis for the instruction of any expert(s) in due course the draft letter of instruction at Annex 1 to these Observations.

The whole respectfully submitted.



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

Done at The Hague, The Netherlands, 3 April 2017