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TRIAL CHAMBER III

**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

Mr. Bemba's request for leave to appeal the "Decision appointing experts on reparations", ICC-01/05-01/08-3532-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:

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I. INTRODUCTION

1. This Trial Chamber, albeit differently composed, convicted Mr. Bemba on 21 March 2016 – over a year ago.¹

2. Mr. Bemba has brought seven grounds of appeal against this conviction.² He has alleged that the entire proceeding was a mistrial,³ and that the Trial Chamber's conviction is fatally flawed as a result of its abdication of its judicial responsibility to elaborate on an essential element of the sole mode of responsibility charged, which it then went on to apply to convict him.⁴ In addition to these overarching challenges, Mr. Bemba has pointed to specific errors of law and fact which undermine, for example, the murder conviction,⁵ convictions in particular geographical areas,⁶ and errors in the application of the law of pillage.⁷

3. In the history of international criminal appeals, the survival rate of Trial Judgements emerging from the appellate process unscathed is extremely low. Certainly, it cannot be **presumed** that the conviction in the present case will be upheld, either in its entirety or in part, on appeal. Neither the Trial Chamber, nor the Legal Representative of Victims ("LRV") or the Office of Public Counsel for Victims ("OPCV") has asserted, nor could they, that the scope of the conviction will remain unchanged.⁸

4. There is an undeniable link between the reparations process and the scope of the conviction.⁹ The Chambers and Appeals Chamber of this Court have previously taken into account a pending appeal and reserved their orders or decisions for after

¹ ICC-01/05-01/08-3343.

² ICC-01/05-01/08-3434-Red.

³ ICC-01/05-01/08-3434-Red, paras. 13-114.

⁴ ICC-01/05-01/08-3434-Red, paras. 381-388.

⁵ ICC-01/05-01/08-3434-Red, paras. 123, 321-324, 414-421, 479.

⁶ ICC-01/05-01/08-3434-Red, paras. 317-320, 472, 480-493.

⁷ ICC-01/05-01/08-3434-Red, paras. 445-461.

⁸ ICC-01/05-01/08-3519; ICC-01/05-01/08-3520; ICC-01/05-01/08-3522.

⁹ ICC-01/04-01/06-3129, para. 8.

the certainty of the conviction decision.¹⁰ As such, on 3 April 2017, Mr. Bemba asked the Trial Chamber to suspend the reparations proceedings until a final judgement was rendered on appeal.¹¹

5. In rejecting Mr. Bemba's request for a suspension of the reparations proceedings, the Trial Chamber emphasised the "preparatory" and "preliminary" nature of the steps it intended to take prior to an Appeal Judgement being rendered, stating that:¹²

In order to be able to address these elements adequately in its reparations order, the Chamber needs to take a number of **preparatory steps...** The reparations proceedings in the present case are, in contrast, **at a preliminary stage.** All currently envisaged steps in these proceedings, such as the appointment of experts, **are of a preparatory nature**

6. On 2 June 2017, the Trial Chamber rendered its *Decision appointing experts on reparations* ("Impugned Decision").¹³ In addition to appointing experts, the Trial Chamber ordered as follows:

SETS the LRV's, the OPCV's and the Defence's deadline for submitting **any additional information they wish to be considered in the reparations order** as 15 September 2017,

SETS the deadline for the LRV's, the OPCV's, the Defence's and the TFV's submissions on the expert report(s), the submissions of other participants and **any other last arguments they wish for the Chamber to consider before rendering its reparations order**, as 16 October 2017 [...]

7. Rather than taking "preliminary" or "preparatory" steps, Mr. Bemba is now being ordered to submit his observations on the reparations order prior to an

¹⁰ ICC-01/04-01/07-3532-tENG; ICC-01/04-01/06-3129.

¹¹ ICC-01/05-01/08-3513.

¹² ICC-01/05-01/08-3522 (hereinafter "Impugned Decision"), paras. 13, 16.

¹³ ICC-01/05-01/08-3532-Conf.

Appeal Chamber judgement being rendered. The timeframe for these submissions have left him with no opportunity to instruct experts of his own or, more importantly, to know the scope of his conviction. On this basis, he files the present application for leave to appeal this aspect of the Impugned Decision.

II. PROCEDURAL BACKGROUND

8. On 21 March 2016, the Trial Chamber delivered its Judgement under article 74 of the Rome Statute (“Statute”), convicting Mr. Jean-Pierre Bemba.¹⁴

9. 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.¹⁵

10. On 22 July 2016, the newly-composed Trial Chamber III made an Order requesting submissions relevant to reparations.¹⁶ The Trial Chamber set out issues upon which it requested submissions from the LRV, the Defence, the Prosecution, the Registry and the Trust Fund for Victims (“TFV”). The Chamber also ordered the Registry to provide a list of experts to assist the Chamber in its determinations relevant to reparations.

11. On 4 August 2016, the OPCV asked to submit observations on reparations.¹⁷ The Chamber granted this request on 5 August 2016.¹⁸ Four organisations, the QUB Human Rights Centre, the International Organisation for Migration (“IOM”), Redress and the United Nations (“UN”) were also granted leave to make

¹⁴ ICC-01/05-01/08-3343.

¹⁵ ICC-01/05-01/08-3348.

¹⁶ ICC-01/05-01/08-3410.

¹⁷ Email from the OPCV sent on 04 August 2016 at 09:12.

¹⁸ Email from the Chamber sent on 05 August 2016 at 12:42.

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”).¹⁹

12. On 19 September 2016, the Appellant filed his document in support of the appeal against conviction.²⁰

13. On 17 October 2016, the QUB Human Rights Centre,²¹ and the IOM²² filed observations before the Trial Chamber. On 18 October 2016, Redress²³ and the UN²⁴ filed their observations.

14. On 31 October 2016, the Prosecution,²⁵ the OPCV,²⁶ the TFV,²⁷ the Defence²⁸ and the LRV²⁹ filed their observations on reparations. The Registry filed on 1 November 2016.³⁰

15. On 22 December 2016, the Registry filed its list of proposed experts in which it identified 27 applications as meeting the basic requirements.³¹

16. 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 2017.³²

¹⁹ ICC-01/05-01/08-3430.

²⁰ ICC-01/05-01/08-3434-Conf.

²¹ ICC-01/05-01/08-3444.

²² ICC-01/05-01/08-3447.

²³ ICC-01/05-01/08-3448

²⁴ ICC-01/05-01/08-3449.

²⁵ ICC-01/05-01/08-3454.

²⁶ ICC-01/05-01/08-3455.

²⁷ ICC-01/05-01/08-3457.

²⁸ ICC-01/05-01/08-3458-Conf.

²⁹ ICC-01/05-01/08-3459-Conf.

³⁰ ICC-01/05-01/08-3460.

³¹ ICC-01/05-01/08-3487 with 28 confidential annexes.

³² ICC-01/05-01/08-3500-Conf.

17. On 24 February 2017, the LRV, the OPCV and the Defence sent an email to the Chamber requesting an extension of the deadline to file their submissions.³³ On the same day, the Chamber instructed them to submit the request through a formal filing.³⁴

18. 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 2017.³⁵ This request was granted by the Chamber on 2 March 2017.³⁶

19. Counsel for the Appellant met with counsel from OPCV and the LRV to discuss the proposed experts and the joint submissions on 9 March 2017 and on 30 March 2017. They decided to file separate submissions.

20. On 3 April 2017, the LRV and OPCD filed their *“Observations et proposition d’instructions des Représentants légaux des victimes suite à l’Ordonnance de la Chambre.”*³⁷ The Defence also filed its *“Observations on Trial Chamber III’s order inviting submissions on experts”*.³⁸

21. On 4 April 2017, the Chamber sent an email to the parties indicating that it considered *“the defence submission which seeks a formal suspension of the reparations proceedings to be a new request which triggers the deadline for responses”*.³⁹

22. On 13 April 2017, the Prosecution filed a response to the Defence’s request for suspension of the reparations proceedings.⁴⁰

³³ Email from the LRV, the OPCV and the Defence sent on 24 February 2017 at 09:19.

³⁴ Email from the Chamber sent on 24 February 2017 at 15:24.

³⁵ ICC-01/05-01/08-3503.

³⁶ ICC-01/05-01/08-3505.

³⁷ ICC-01/05-01/08-3512-Conf.

³⁸ ICC-01/05-01/08-3513.

³⁹ Email from the Chamber sent on 4 February 2017 at 16:33.

⁴⁰ ICC-01/05-01/08-3517.

23. On 24 April 2017, the OPCV⁴¹ and the LRV⁴² both filed a response to the Defence's request for suspension of the reparations proceedings.

24. On 22 May 2017, the Trial Chamber experts notified the parties and the participants that two members of the original list of experts were no longer available. Observations on proposed replacement experts were requested by 24 May 2017.⁴³

25. On 24 May 2017, the Defence filed its submissions, submitting that the availability of the proposed replacement experts should be first ascertained, in order not to further waste resources. The Defence also submitted that no meaningful submissions on the suitability of experts could be made pending the uncertain outcome of the appeal.⁴⁴

26. On 2 June 2017, the Trial Chamber rendered the Impugned Decision, in which it ordered Mr. Bemba to provide a formal filing with any additional information he wishes to be considered in the reparations order by 15 September 2017, and "any other last arguments" he wishes to be considered before the Trial Chamber renders its reparations order, by 16 October 2017.⁴⁵

III. REQUEST FOR LEAVE TO APPEAL

(a) Conditions for Leave to Appeal

27. Leave to appeal pursuant to Article 82(1)(d) will be granted if the party submitting the application has identified at least one issue of appeal that has been

⁴¹ ICC-01/05-01/08-3519.

⁴² ICC-01/05-01/08-3520.

⁴³ Emails from the Legal Advisor of the Trial Division to the parties, 22 May 2017, at 14:23 and 14:25.

⁴⁴ ICC-01/05-01/08-3525-Conf.

⁴⁵ ICC-01/05-01/08-3532-Conf.

addressed in the impugned decision, and that meets the following two cumulative criteria as set out in that provision:⁴⁶

- a. It must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
- b. It must be an issue for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

28. The Defence notes that the Appeals Chamber has held that “[a]n 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.”⁴⁷

(b) Identification of Appealable Issues

29. The Defence submits that the Impugned Decision gives rise to the following identifiable issues requiring a decision for their resolution, which meet the criteria set out under Article 82(1)(d), and warrant consideration by the Appeals Chamber:

1. Whether the Trial Chamber’s order that Mr. Bemba file his submissions on the reparations order prior to receipt of an Appeal Judgement is consistent with its ruling that it was only taking “preparatory steps” in this “preliminary phase”?
2. Whether the Trial Chamber erred in requiring Mr. Bemba to file his submissions on the reparations order prior to knowing the scope of his conviction?

⁴⁶ ICC-01/04-01/07-108, p. 3; ICC-01/04-01/07-116, p. 4.

⁴⁷ ICC-01/04-168, para. 9.

3. Whether the Trial Chamber erred in setting a timetable which would prevent Mr. Bemba from filing meaningful submissions on reparations by, for example, instructing experts of his own?

(c) Satisfaction of the Conditions for Leave to Appeal

(i) *The issue affects the fair and expeditious conduct of the proceedings*

30. The Appeals Chamber has held that “an order for reparations depends upon there having been a conviction.”⁴⁸

31. By the same logic, submissions from a defendant **on a reparations order** also depend upon there having been a conviction. In the same way that a Trial Chamber cannot render a reparations order when it does not know the scope of the conviction for which the reparations are being made, or the scope of the defendant’s liability for them, nor can the defendant make submissions in the absence of this knowledge.

32. To take a concrete example, Mr. Bemba was convicted at trial on the basis that troops for whom he was found to have a relationship of effective control, committed 28 rapes.⁴⁹ His liability for these rapes has been challenged on appeal. Of course, the Appeals Chamber may quash Mr. Bemba’s conviction in full. Or, it may find, for example, (i) that Mr. Bemba had no knowledge that his troops were committing rape,⁵⁰ (ii) that incidents of rape fell outside the scope of the Document Containing the Charges,⁵¹ or (iii) that no reasonable Trial Chamber could have found beyond reasonable doubt that the rapes in question were committed by

⁴⁸ ICC-01/04-01/06-2953, para. 86.

⁴⁹ Judgment, paras. 624, 633, 640.

⁵⁰ ICC-01/05-01/08-3434-Red, paras. 309-320.

⁵¹ ICC-01/05-01/08-3434-Red, paras. 122-128.

subordinates of Mr. Bemba rather than members of the other groups of armed troops who were present in the same area at the same time.⁵²

33. Any of these outcomes would necessarily affect (i) the eligibility of victims; (ii) the types of relevant harm suffered by direct or indirect victims, (iii) the type and modality of reparations that would be appropriate to address the harm, and (iv) Mr. Bemba's scope of liability for reparations. Requiring Mr. Bemba to finalise his submissions these questions when they remain unresolved is, accordingly, nonsensical. It is also unfair.

34. Principle 5 of the *Lubanga* principles provides that the convicted person's liability for reparations must be proportionate to the harm caused and his or her participation in the commission of the crimes for which he or she was found guilty, **in the specific circumstances of the case.**⁵³ It is possible that the Appeals Chamber may find that while Mr. Bemba did not "repress" crimes within the terms of Article 28 of the Rome Statute, he did "punish" them upon learning of their occurrence. This will necessarily affect the scope of his liability. He should be given an opportunity to explain why and by how much. The timetable as set in the Impugned Decision deprives him of this right.

35. Moreover, should the Appeal Judgement vary the Trial Judgement in any way, this will necessarily affect the scope of either the reparations or Mr. Bemba's liability. Fairness dictates that he should accordingly be given the opportunity to file further submissions on factors which were previously unknown. Even putting aside the fact that work would need to be done for a second time, multiple filings would unnecessarily expand the trial record, needlessly complicate the reparations process, and lead to resources of both the parties and the court being wasted.

⁵² ICC-01/05-01/08-3434-Red, paras. 465-478

⁵³ ICC-01/04-01/06-3129, para. 187.

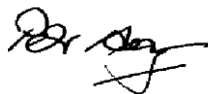
(ii) *An immediate resolution by the Appeals Chamber may materially advance the proceedings*

36. Moving forward with the reparations phase, on a wholly uncertain footing, and requiring the Defence to engage in work which may well be rendered useless or will have to be re-done using a different factual matrix, will not advance the proceedings but rather, the opposite. As such, a resolution of the issues identified by the Appeals Chamber may materially advance the proceedings, warranting the granting of leave to appeal in the present case.

IV. RELIEF REQUESTED

37. Based on the above submissions, the Defence respectfully requests that the Trial Chamber:

GRANT the Defence request for leave to appeal the “Decision appointing experts on reparations”.



Peter Haynes QC

Lead Counsel for Mr. Jean-Pierre Bemba

Done at The Hague, The Netherlands

12 June 2017