



Original: **English**

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

Date: **29/06/2017**

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

**Decision on the Defence request for leave to appeal the decision appointing
experts on reparations**

Order to be notified, in accordance with regulation 31 of the Regulations of the Court, to:

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Unrepresented Victims

**Unrepresented Applicants for
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REGISTRY

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**Victims Participation and Reparations
Section**

Mr Philipp Ambach

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Trial Chamber III (“Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, having regard to Article 82(1)(d) of the Rome Statute (“Statute”), Rule 155 of the Rules of Procedure and Evidence (“Rules”) and Regulation 65 of the Regulations of the Court (“Regulations”), issues the following “Decision on the Defence request for leave to appeal the decision appointing experts on reparations”:

I. Procedural background and submissions

1. Having rejected a request¹ from the Defence for Mr Bemba (“Defence”) for a suspension of the reparations proceedings on 5 May 2017 (“Suspension Decision”),² on 2 June 2017, the Chamber issued a decision (“Impugned Decision”)³ appointing four experts to assist in the reparations proceedings and setting the deadline for the submission of their report(s) as 15 September 2017. The Chamber also ordered the Legal Representative of Victims (“LRV”), the Office of Public Counsel for Victims (“OPCV”) and the Defence to submit any additional information they wish to be considered in the reparations order by 15 September 2017, and ordered the LRV, the OPCV, the Defence and the Trust Fund for Victims (“TFV”) to file 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, by 16 October 2017.⁴
2. On 12 June 2017, the Defence filed a request for leave to appeal the Impugned Decision (“Request”).⁵ The Defence submits that the Impugned Decision gives rise to three appealable issues requiring a decision for their resolution. These issues relate to the progress of the reparations proceedings pending resolution of

¹ Defence’s Observations on Trial Chamber III’s order inviting submissions on experts, ICC-01/05-01/08-3500-Conf, 3 April 2017, ICC-01/05-01/08-3513.

² Decision on the Defence’s request to suspend the reparations proceedings, 5 May 2017, ICC-01/05-01/08-3522.

³ Decision appointing experts on reparations, 2 June 2017, ICC-01/05-01/08-3532-Conf. For a full procedural history of the reparations proceedings to 2 June 2017, see Suspension Decision, ICC-01/05-01/08-3522, paras 1-10 and Impugned Decision, ICC-01/05-01/08-3532-Conf, paras 15-16.

⁴ Impugned Decision, ICC-01/05-01/08-3532-Conf, paras 15-16.

⁵ Mr. Bemba’s request for leave to appeal the “Decision appointing experts on reparations”, ICC-01/05-01/08-3532-Conf, 12 June 2017, ICC-01/05-01/08-3534.

Mr Bemba's appeal against the Chamber's Judgment pursuant to Article 74 of the Statute ("Conviction Decision"):⁶

- (i) "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"?" ("First Issue");
- (ii) "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?" ("Second Issue"); and
- (iii) "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?" ("Third Issue").⁷

3. No responses to the Request were filed.

II. Applicable Law

4. The Chamber recalls the applicable law pertaining to Article 82(1)(d) of the Statute, as set out in previous decisions. To this end, the Chamber has examined the Request against the following criteria:⁸

- i. whether the matter is an "appealable issue";
- ii. whether the issue at hand would significantly affect:

⁶ Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08-3343. On 4 April 2016, the Defence filed a notice of appeal against the Conviction Decision, Defence Notice of Appeal against the Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 4 April 2016, ICC-01/05-01/08-3348. On 19 September 2016, the Defence filed its document in support of the appeal against the Conviction Decision, Appellant's document in support of the appeal, 19 September 2016, ICC-01/05-01/08-3434-Conf.

⁷ Request, ICC-01/05-01/08-3534, para. 29.

⁸ *Situation in the Democratic Republic of the Congo*, Appeals Chamber, 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, paras 6-19; 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, paras 22-23. *See also e.g.* 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. 11; Decision on "Defence Request for Leave to Appeal the 'Decision on 'Defence Request concerning the Prosecutor's statement in Jeune Afrique'", 2 February 2016, ICC-01/05-01/08-3330, para. 8.

- a. the fair and expeditious conduct of the proceedings;
or
 - b. the outcome of the trial; and
 - iii. whether in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.
5. The Chamber recalls that the three 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.⁹
6. In relation to the first criteria, the Appeals Chamber has held that “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.”¹⁰ The Chamber recalls that Article 82(1)(d) of the Statute cannot be used to litigate abstract or hypothetical issues.¹¹
7. In addition, in analysing whether the matters in the Request constitute appealable issues, the Chamber recalls that it must first ascertain whether the issues identified actually arise from the Impugned Decision.¹²

⁹ ICC-01/05-01/08-1169, para. 24. *See also e.g.* ICC-01/05-01/08-2399, para. 12; ICC-01/05-01/08-3330, para. 8.

¹⁰ ICC-01/04-168, para. 9. *See also e.g.* ICC-01/05-01/08-2399, para. 10; ICC-01/05-01/08-3330, para. 7.

¹¹ 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; 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; *The Prosecutor v. Joseph Kony et al*, Pre-Trial Chamber II, Decision on the Defence Request for leave to appeal the 21 November 2008 Decision, 10 February 2009, ICC-02/04-01/05-367, para. 22; *The Prosecutor v. William Samoei Ruto et al*, Pre-Trial Chamber II, 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 32-34; *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Pre-Trial Chamber II, 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. *See also e.g.* ICC-01/05-01/08-3330, para. 7.

¹² *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Decision on 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,

III. Analysis

First Issue

8. In relation to the First Issue, the Defence submits that ordering Mr Bemba in the Impugned Decision to submit observations on the reparations order prior to an appeals judgement being rendered contradicts the Chamber's position in the Suspension Decision, which was that the current steps taken in the reparations proceedings are of simply a "preparatory" and "preliminary" nature.¹³
9. The Chamber considers that the First Issue misreads the Impugned Decision by incorrectly assuming that the order to make submissions is not within the "preparatory" framework of the reparations proceedings, as referred to in the Suspension Decision. The terms "preparatory" and "preliminary" in the Suspension Decision simply constitute references to the stages of the reparations proceedings leading up to the issuance of a reparations order.¹⁴ The Chamber therefore reiterates its position set out in the Suspension Decision and stresses that *any steps* taken during the reparation stage up until the issuance of a reparations order are of "preparatory" nature. This includes the order in the Impugned Decision to make submissions on the expert reports, the submissions of other participants or any other last arguments the Defence wishes the Chamber to consider before rendering its reparations order.
10. In light of the above, the Chamber finds that the First Issue does not arise from the Impugned Decision and is therefore not appealable under Article 82(1)(d).

1345, 1401, 1412, and 1456) of 7 October 2009", 18 December 2009, ICC-01/04-01/07-1732, para. 14. *See also e.g.* "Decision on the 'Defence Request for Leave to Appeal the Decision on in-court Protective Measures for Witness CAR-OTP-WWWW-0032'", ICC-01/05-01/08-1850 of 20 October 2011, 29 June 2016, ICC-01/05-01/08-1850-Conf, para. 11; Decision on the defence's "Request for leave to appeal the decision on in-court protective measures for Witness 45", 15 February 2012, ICC-01/05-01/08-2129, para. 11.

¹³ Request, ICC-01/05-01/08-3534, paras 5-7.

¹⁴ *See* Suspension Decision, ICC-01/05-01/08-3522, paras 13 and 15-16.

Second Issue

11. In respect of the Second Issue, the Defence submits that requiring Mr Bemba to make final submissions while questions about the scope of his conviction and liability for reparations remain unresolved is “unfair”, as the outcome of the appeal will affect the eligibility of victims, the types of harm suffered, the appropriate type and modalities of reparations and Mr Bemba’s scope of liability.¹⁵ It argues that Mr Bemba should be given the opportunity to file further submissions should the Conviction Decision be varied on appeal.¹⁶ The Defence further submits that such multiple filings would lead to duplication of work, unnecessary complication of the proceedings, and a waste of resources of both parties and the Court.¹⁷
12. The Chamber considers that the Second Issue represents a re-litigation of issues raised by the Defence in its 3 April 2017 request for suspension of the reparations proceedings,¹⁸ namely the questions of whether the reparations proceedings could continue pending the appeal against Mr Bemba’s conviction and whether, in the event that the Appeals Chamber would overturn or amend the conviction, the resources used during the preparation stage of the reparations proceedings would be wasted.¹⁹ The Chamber settled these matters in its Suspension Decision, in respect of which the Defence did not request leave to appeal.
13. Firstly, the Chamber held in the Suspension Decision, in accordance with the approach adopted by the *Lubanga* Appeals Chamber,²⁰ that it is the *execution* of the reparations order which depends on a conviction being confirmed on appeal, not its issuance or preparation.²¹ As noted above, the Impugned Decision requires the Defence to submit additional information it wishes to be considered in the

¹⁵ Request, ICC-01/05-01/08-3534, para. 33. *See also* paras 30-32 and 34.

¹⁶ Request, ICC-01/05-01/08-3534, para. 35.

¹⁷ Request, ICC-01/05-01/08-3534, para. 35.

¹⁸ ICC-01/05-01/08-3513.

¹⁹ ICC-01/05-01/08-3513, paras 2-3, 22-29.

²⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Decision on the admissibility of the appeals against Trial Chamber I’s “Decision establishing the principles and procedures to be applied to reparations” and directions on the further conduct of proceedings, 14 December 2012, ICC-01/04-01/06-2953, para. 86.

²¹ Suspension Decision, ICC-01/05-01/08-3522, para. 15.

reparations order, as well as its submissions on the expert report(s), the submissions of other participants and any other last arguments.²² These steps relate to the potential issuance of the reparations order, not to its execution or implementation.

14. Secondly, the Defence's submission that the preparation of the reparation order despite the pending appeal could potentially result in a waste of resources, questions the balance struck by the Chamber in the Suspension Decision between its obligation to make appropriate use of resources and its obligation to promote expeditious proceedings, taking into account the ultimate goal of victims' interests.²³

15. The Chamber considers that the Second Issue therefore represents a mere disagreement with the Chamber's conclusions in the Suspension Decision. The Defence, has, however, failed to identify any legal or factual error in the Impugned Decision. Based on the above, the Chamber does not consider the Second Issue to be an appealable issue arising out of the Impugned Decision.

16. The Chamber further notes that, should the Conviction Decision be amended by the Appeals Chamber, Mr Bemba will receive the opportunity to make submissions on the amendments, as relevant to the reparations order.

Third issue

17. The Third Issue appears to be premised on the assumption that the timetable set by the Chamber in the Impugned Decision prevents Mr Bemba from filing "meaningful" submissions on reparations.

18. To the extent the Third Issue relates to the pending resolution of Mr Bemba's appeal against the Conviction Decision, the Chamber refers to its reasoning in paragraphs 11 to 15 above and reiterates its statement in paragraph 16.

²² Impugned Decision, ICC-01/05-01/08-3532-Conf, paras 15-16.

²³ Suspension Decision, ICC-01/05-01/08-3522, para. 22.

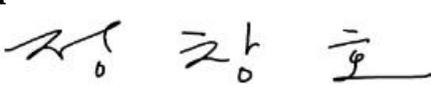
19. Insofar as the Third Issue is intended to oppose the length of the timeframes determined by the Chamber (by asserting, for instance that these are too short to enable Mr Bemba to instruct experts of his own), the Chamber concludes that the Defence, again, merely disagrees with the Chamber's exercise of discretion. Moreover, the Chamber notes that the Defence has failed to provide any explanation as to why the length of the timeframes set prevents Mr Bemba from filing "meaningful" submissions on reparations. Absent any such further explanation, the Chamber finds that the Third Issue represents an abstract concern and, as such, does not arise from the Impugned Decision. Therefore, in relation to the Third Issue, the Chamber considers that the Defence has failed to identify an appealable issue.

20. As none of the issues raised in the Request constitute appealable issues under Article 82(1)(d) of the Statute and given that the requirements of Article 82(1)(d) are cumulative, the Chamber need not address the subsequent criteria set out in paragraph 4 above.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request.

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

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|  <hr/> Judge Geoffrey Henderson |  <hr/> Judge Joyce Aluoch |  <hr/> Judge Chang-ho Chung |
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Dated this 29 June 2017

At The Hague, The Netherlands