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**TRIAL CHAMBER III**

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC**

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

*Public*

**Defence request for Leave to Appeal the “Decision on requests to present additional evidence and submissions on sentence and scheduling the sentencing hearing”**

**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. BACKGROUND

1. On 4 May 2016, Trial Chamber III (“the Chamber”) issued its “Decision on requests to present additional evidence and submissions on sentence and scheduling the sentencing hearing” (“Impugned Decision”),<sup>1</sup> in which it ruled on the parties and participants’ requests to present additional evidence for the purpose of sentencing.

2. The Defence had sought to call three witnesses to give evidence relevant to mitigating circumstances: D53, P15 and Monseigneur Fridolin Ambongo.<sup>2</sup> The Trial Chamber rejected the request to call D53 and P15, finding that “the Defence has not demonstrated good cause to recall” them.<sup>3</sup> As such, the Trial Chamber invoked the standard of “recall”, which requires hearing evidence “only in the most compelling circumstances.”<sup>4</sup> In doing so, the Chamber relied on a decision from the *Lubanga* case, where Trial Chamber I had held **at the outset** of trial that “the hearing of evidence relevant to sentencing at the same time as hearing evidence relevant to guilt is in the interest of expeditious proceedings, particularly insofar as it avoids the unnecessary recall of witnesses.”<sup>5</sup> The parties had thereby been informed in *Lubanga* that they were required to elicit sentencing evidence during the trial phase, or risk having to meet the threshold for recall of witnesses during the sentencing phase. No such information was provided to the parties in the present proceedings.

3. The Trial Chamber did, however, grant the Prosecution request to call Dr. Reicherter, an expert on the impact of sexual violence.<sup>6</sup> The Prosecution request was granted over Defence objections that his evidence was repetitive of that already in

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<sup>1</sup> ICC-01/05-01/08-3384.

<sup>2</sup> ICC-01/05-01/08-3372-Red (“Defence Request”).

<sup>3</sup> ICC-01/05-01/08-3384, para. 21; ICC-01/05-01/08-3384, para. 24.

<sup>4</sup> ICC-01/05-01/08-3384, para. 18.

<sup>5</sup> ICC-01/04-01106-2360, para. 38.

<sup>6</sup> ICC-01/05-01/08-3362 (“Prosecution Request”).

the record.<sup>7</sup> The Prosecution presented two experts on the impact of sexual violence in the Central African Republic during the trial phase, Dr. André Tabo and Dr. Adeyinka Akinsulure-Smith. They testified over a period of five days, giving detailed evidence which was relied upon extensively by the Prosecution,<sup>8</sup> and accepted by the Trial Chamber.<sup>9</sup>

4. In its response to the Prosecution Request, the Defence set out in detail the direct overlap between the proposed testimony of Dr. Reicherter, and Drs. Tabo and Akinsulure-Smith.<sup>10</sup> The Impugned Decision did not address these areas of overlap, rather the Trial Chamber found that the proposed evidence included “aspects which have not previously featured in the evidentiary record thus far, for example, the effects of trauma on parenting, intergenerational transmission of trauma, and healing prospects.”<sup>11</sup> However, Dr. Tabo and Dr. Akinsulure-Smith had testified on the effect of trauma on parenting<sup>12</sup> and the healing prospects of victims,<sup>13</sup> and as such this evidence already formed part of the record of the case. The expert’s proposed testimony on “intergenerational transmission of trauma” is based on an experiment on rats, with no citation for the speculative hypothesis that “*we can expect that* the acts of rape and sexual assault committed in the CAR will correspond with alterations in the biological stress response...”.<sup>14</sup>

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<sup>7</sup> ICC-01/05-01/08-3379-Red, paras. 19-25.

<sup>8</sup> ICC-01/05-01/08-3079-Corr-Red, paras. 335-347.

<sup>9</sup> ICC-01/05-01/08-3343, paras. 563, 564, 567.

<sup>10</sup> ICC-01/05-01/08-3379-Red, paras. 19-25.

<sup>11</sup> ICC-01/05-01/08-3384, para. 12.

<sup>12</sup> See, for example, EVD-T-OTP-00003/CAR-OTP-0064-0560 at 0567-0568, 0570 and 0572; P-221, T-39-ENG-ET p. 9, line 16 – p. 10, line 2, p. 11, line 20 – p. 12, line 5; EVD-T-OTP-00607/CAR-OTP-0065-0043 at 0053; P-229, T-100-ENG-CT2, p. 20, lines 1-5, p. 31, line 17 – p. 32, line 2.

<sup>13</sup> See, for example, Prosecution’s Closing Brief, para. 345: “P229 explained that the symptoms of PTSD exhibited by CAR sexual violence victims that he examined included the symptoms of recollection and re-experiencing the rape incident; **these symptoms can last for months or remain continuous, depending on support system/treatment available**”, citing P221, T38-ENG-ET, p.27, line 12. See also P-221, T-38-ENG-ET, p. 37, lines 12-16, T-39-ENG-ET, p. 10, lines 12-25.

<sup>14</sup> CAR-OTP-0094-0493 at 0518.

5. Moreover the Prosecution, unlike the Defence, was not criticised for failing to lead this purported “additional evidence” through the two sexual violence expert witnesses it had called during the trial.

6. The Defence Request also included a request for authorisation “to rely on and/or submit” 51 documents listed in Annex A of the Defence Request.<sup>15</sup> Documents 27 to 42 are press releases and NGO and UN documents referring to allegations of crimes, notably rape and sexual abuse, alleged to have been more recently committed on the territory of the Central African Republic by French soldiers and other peacekeeping forces, ex-Seleka and anti-Balaka militias, and Bozizé's rebels. The Defence submitted that these documents were “material for the consideration of the Prosecution's proposed expert witness and any victim witness.”<sup>16</sup>

7. The Chamber ruled that that “actions taken and crimes committed by third parties - particularly when committed a decade after the events relevant to Mr Bemba's conviction - are, without more, irrelevant to sentencing.”<sup>17</sup> The Trial Chamber's finding cannot be reconciled with the fact that the Prosecution expert report directly addresses “actions taken and crimes committed by third parties”. For example, the report acknowledges that the Central African Republic is “historically affected by conflict and violence”,<sup>18</sup> that “[m]ultiple studies have found that an increase in the number of traumatic events is associated with increased psychiatric symptoms”,<sup>19</sup> and “the current instance of sexual assault were not the only traumatic experiences that individual victims had undergone across their lifetime”.<sup>20</sup> As such, in allowing the testimony of the Prosecution expert but denying the admission of Documents 27 to 42, the Trial Chamber applied a different

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<sup>15</sup> ICC-01/05-01/08-3372-Red, para. 13; and ICC-01/05-01/08-3372-Conf-AnxA.

<sup>16</sup> ICC-01/05-01/08-3372-Conf-AnxA, pp. 5 to 8.

<sup>17</sup> ICC-01/05-01/08-3384, para. 46.

<sup>18</sup> CAR-OTP-0094-0493 at 0503.

<sup>19</sup> CAR-OTP-0094-0493 at 0503.

<sup>20</sup> CAR-OTP-0094-0493 at 0503.

standard to the Prosecution and Defence Requests. The unfairness of this approach is amplified by the fact that the Chamber further denied the defence any or any sufficient opportunity to instruct an appropriate psychological witness of its own.

8. As such, the Defence respectfully seeks leave to appeal the Impugned Decision on the grounds set out below.

## **II. REQUEST FOR LEAVE TO APPEAL**

### **(a) Conditions for Leave to Appeal**

9. 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 addressed in the impugned decision, and that meets the following two cumulative criteria as set out in that provision:<sup>21</sup>

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.

10. 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.”<sup>22</sup>

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<sup>21</sup> ICC-01/04-01/07-108, Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions, 14 December 2007, p. 3; ICC-01/04-01/07-116, Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions, 19 December 2007, p. 4.

<sup>22</sup> Situation in the Democratic Republic of the Congo, "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, para. 9.

## (b) Identification of Appealable Issues

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

- a) Whether the Trial Chamber erred in refusing to hear D53 and P15 on the basis that “the Defence has not demonstrated good cause to recall” them,<sup>23</sup> through its erroneous reliance on a decision in *Lubanga* where, unlike the instant case, the parties had been informed at the outset of the trial to elicit evidence relevant to sentence during the trial phase;
- b) Whether the Trial Chamber’s refusal to hear P15 on the basis that “[t]he Defence could have further questioned P15 on these matters when he appeared” is inconsistent with the presumption of innocence; would oblige accused before the ICC to elicit evidence relevant to sentencing during the trial phase, undermining his or her right to expeditious proceedings; and is inconsistent with its decision to permit the testimony of a third Prosecution expert on sexual violence;<sup>24</sup>
- c) Whether the Trial Chamber erred in finding that the Prosecution’s proposed evidence included “aspects which have not previously featured in the evidentiary record thus far” when the Prosecution’s

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<sup>23</sup> ICC-01/05-01/08-3384, para. 21; ICC-01/05-01/08-3384, para. 24.

<sup>24</sup> ICC-01/05-01/08-3384, para. 24.

two prior experts on sexual violence had testified as to “the effects of trauma on parenting” and “healing prospects”;<sup>25</sup>

- d) Whether the Trial Chamber erred in refusing the admission of documents 27 to 42 in Annex A on the basis that “actions taken and crimes committed by third parties” are, without more, irrelevant to sentencing,<sup>26</sup> when the proposed expert report directly addresses “actions taken and crimes committed by third parties”.<sup>27</sup>

### **(c) Satisfaction of the Conditions for Leave to Appeal**

12. In the Impugned Decision, the Trial Chamber held that “[p]ursuant to Article 76(2), the sentencing hearing is part of the trial.”<sup>28</sup> The marked interference in Mr. Bemba’s ability to call evidence in mitigation will impact on the sentence, and as such will significantly affect the outcome of the trial, as defined by the Trial Chamber, thereby satisfying the conditions for leave to appeal.

13. A convicted person’s ability to present evidence in mitigation goes to the heart of any sentencing procedure. The Trial Chamber’s decision to hold a separate sentencing phase, taken over Defence objections as to expediency, was justified on the basis that it would allow the parties “to benefit from the judgment on the merits and make focused and meaningful submissions on sentencing for the purposes of Article 78 of the Statute, including submissions on mitigating or aggravating circumstances.”<sup>29</sup> P15 was presented as someone who could assist the Trial Chamber on matters directly relevant to mitigating factors. The Trial Chamber’s decision to decline to hear his evidence leaves Mr. Bemba without the ability to lead identified mitigating evidence, which undermines his ability to make the “focused

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<sup>25</sup> ICC-01/05-01/08-3384, para. 12.

<sup>26</sup> ICC-01/05-01/08-3384, para. 46.

<sup>27</sup> CAR-OTP-0094-0493 at 0503.

<sup>28</sup> ICC-01/05-01/08-3384, para. 18.

<sup>29</sup> ICC-01/05-01/08-3071, para. 13.



and meaningful submissions” within the terms of the Trial Chamber’s decision, and will impact on the overall outcome of the sentencing phase.

14. By the same token, the Trial Chamber’s decision to allow the Prosecution to call Dr. Reicherter to give evidence despite its error as concerns the repetitive nature of his evidence, and while denying the Defence the opportunity to counter his evidence on “actions taken and crimes committed by third parties”,<sup>30</sup> will also impact on the outcome of the sentencing phase, thus satisfying the conditions for leave to appeal.

15. An immediate resolution of the appealable issues by the Appeals Chamber will undoubtedly materially advance the proceedings.<sup>31</sup> As previously held by the Appeals Chamber:

A wrong decision on an issue in the context of Article 82(1)(d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process. In those circumstances, the proceedings will not be advanced but on the contrary they will be set back.

16. Should the Trial Chamber be found to have been in error by denying Mr. Bemba the opportunity to call the witnesses and evidence in the terms set out in the Defence Request, the parties will be required to attend an additional evidential hearing on sentence, and potentially further examination of the Prosecution expert. In such circumstances, an immediate resolution of the appealable issues would materially advance the proceedings, warranting granting of the present request.

#### **IV. RELIEF REQUESTED**

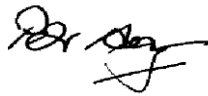
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<sup>30</sup> CAR-OTP-0094-0493 at 0503.

<sup>31</sup> ICC-01/04-01/06-168, para. 16.

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

**GRANT** the Defence request for leave to appeal the “Decision on requests to present additional evidence and submissions on sentence and scheduling the sentencing hearing”.



Peter Haynes QC

Lead Counsel for Mr. Jean-Pierre Bemba

Done at The Hague, the Netherlands

10 May 2016