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Date: 16/01/2018

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

**Public Redacted Version of "Defence request for a further extension of time for
Final Submissions on reparations"**

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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A. INTRODUCTION

1. Between 9 and 11 January 2018, the Appeals Chamber in the case of *Prosecutor v Jean-Pierre Bemba-Gombo* heard oral submissions from the parties to that appeal.¹

2. The Appeal Hearing revealed the extraordinary number of legal and factual questions that are currently “live” in Mr. Bemba’s appeal.

3. The Appeals Chamber sought submissions and arguments from the parties and participants on questions ranging from (i) the deference to be afforded to the Trial Chamber’s findings; (ii) the proper scope of pleading facts and circumstances in a DCC; (iii) the meaning of the “knowledge” standard in Article 28 of the Statute; (iv) the ability of the Appeals Chamber to recharacterise the charges under Regulation 55 on appeal; (v) the evidence which can be used to establish the failure to take “necessary and reasonable measures” under Article 28 of the Statute; (vi) the notice required to be given to a commander of “measures” under Article 28 of the Statute; (vii) the definition of the “causal nexus” standard under Article 28 of the Statute; (viii) the knowledge requirements of a commander necessary to establish crimes against humanity; (ix) the proper definition, pleading and scope of an “organizational policy” under Article 28 of the Statute; (x) the quality of evidence which can be relied upon to establish the contextual elements of crimes against humanity.²

4. The parties were asked to make submissions and answer questions from the Appeals Chamber on these, and other topics, stemming from Mr. Bemba’s challenges to the Trial Judgement in the present case.³ Evidently, had these

¹ T-372-CONF-ENG; T-373-ENG; T-374-ENG (hereinafter “Appeal Hearing”).

² ICC-01/05-01/08-3579, para. 1.

³ ICC-01/05-01/08-3579, para. 2.

questions been settled on appeal, such detailed submissions and lengthy questioning would neither have been sought, nor provided.

5. Significantly, during the hearing, the Presiding Judge noted that the way in which the Appeals Chamber would settle the law on the interpretation of underlying acts would impact not only on the scope of the conviction, but the reparations process:⁴

PRESIDING JUDGE VAN DEN WYNGAERT: If you allow me, I may have another follow-up question. I'm thinking a bit ahead about the implications of what we now define as underlying acts for which the conviction has been pronounced or the broader scope of the charges as they were before the Chamber as you were indicating. What are the implications for reparations? Will the reparations be attached to those specific underlying acts for which a conviction has been pronounced? Or is it the broader scope? It's something that really depends on how one interprets these terms that we are discussing about now.

6. In such circumstances, requiring Mr. Bemba to make Final Submissions on the reparations proceeding,⁵ given the manifest possibility that the scope of the conviction will alter on appeal, is inappropriate.

7. At the very least, Mr. Bemba's deadline for Final Submissions should be further extended in light of the Appeals Chamber's invitation for further written submissions on appeal in this case.

⁴ ICC-01/05-01/08-T-372-CONF-ENG, p. 84, lines 15-22.

⁵ See ICC-01/05-01/08-3532-Red; ICC-01/05-01/08-3559-Red; ICC-01/05-01/08-3569; ICC-01/05-01/08-3576; ICC-01/05-01/08-3587.

B. PROCEDURAL HISTORY

8. On 2 June 2017, the Chamber appointed four experts to assist in the reparations proceedings, and ordered them to submit their report(s) by 15 September 2017.⁶ The Chamber also ordered the Legal Representative of the 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, by 16 October 2017.⁷

9. On 11 August 2017, the Appointed Experts transmitted to the Registry a request for an extension of time until 20 November 2017 to submit their joint report.⁸ On 15 August 2017, the Registry transmitted the Request to the Chamber.⁹

10. On 30 August 2017, the Chamber granted the Experts’ request for extension on time and ordered to submit their joint report to the Chamber on 20 November 2017. The LRV, the Defence and the OPCV were also permitted to file any additional information they wish to be considered in the reparations order on 20 November 2017.¹⁰

11. On 30 October 2017, the Appeals Chamber ordered the Appellant to file further submissions on the issue of the contextual elements of crimes against humanity by 13 November 2017.¹¹

⁶ ICC-01/05-01/08-3532-Red.

⁷ ICC-01/05-01/08-3532-Red, paras. 15-16.

⁸ ICC-01/05-01/08-3554-Conf-Anx.

⁹ ICC-01/05-01/08-3554.

¹⁰ ICC-01/05-01/08-3559-Red.

¹¹ ICC-01/05-01/08-3564.

12. On 1 November 2017, the Defence filed a request for extension of time to file additional observations for reparations.¹² On 3 November 2017, Counsel for OPCV and LRV sent a joint email to the Chamber indicating they did not oppose the Defence's request.¹³

13. On 7 November 2017, The Appeals Chamber issued a scheduling order for the hearing of oral arguments. It set aside 5 days of hearings, between 9 and 16 January 2018.¹⁴

14. On 8 November 2017, the Trial Chamber partially allowed the Defence application for an extension of time for the filing of additional information on reparations by amending the deadline to 27 November 2017. The same deadline was applied to the LRV and OPCV.¹⁵ The Trial Chamber amended the deadline having found "the Appeals Deadline to amount to good cause for extending the Additional Information Deadline for the Defence, considering the proximity of the two deadlines, the potentially substantial nature of the two filings, and the reduced resources of the Defence".¹⁶

15. On 8 November 2017, the Defence submitted its "Defence's further request for a revision of the timetable for the filing of documents" ("Defence's further Request for extension of time") submitting that the current schedule in the reparations proceedings before the Trial Chamber places an "intolerable burden upon the Defence's resources at crucial times in both sets of proceedings".¹⁷

¹² ICC-01/05-01/08-3565.

¹³ Email from Counsel from OPCV and LRV to the Chamber and parties sent on 03 November 2017 at 10:48.

¹⁴ ICC-01/05-01/08-3568.

¹⁵ ICC-01/05-01/08-3569.

¹⁶ ICC-01/05-01/08-3569, para. 7.

¹⁷ ICC-01/05-01/08-3570, para. 14.

16. On 20 November 2017, the Registry filed the joint report of the appointed experts (“Expert Report”), in a version available to the Chamber only.¹⁸ A confidential redacted version of the report available to the Defence, LRV, OPCV and TFV was filed on 21 November 2017.¹⁹ A corrigendum to this version of the report was filed on 28 November 2017.²⁰

17. On 22 November 2017, the Chamber granted the Defence’s further request for extension of time, and ordered the Defence to file combined final covering both, the Additional Information, if any, and the Final Submissions on 31 January 2018.²¹

18. On 27 November 2017, the Appeals Chamber issued an order in relation to the conduct of the Appeal Hearing scheduled between 9 and 16 January 2018 in the appeals of Mr. Bemba against his conviction and sentence.²² The 27 November order set out five sets of questions that the parties were asked to be prepared to address during the course of the hearing:

i. Group A - Preliminary issues:

a. What level of deference should the Appeals Chamber accord to the Trial Chamber’s factual findings?

b. Article 81 (1) (b) of the Statute reads in its relevant part:

*“The convicted person, or the Prosecutor on that person’s behalf, may make an appeal on any of the following grounds: [...] (iv) Any other ground that affects the fairness **or** reliability of the proceedings **or** decision”. [emphasis added]*

Can the convicted person appeal on a ground that affects the fairness of the proceedings, but does not affect the reliability of the decision?

¹⁸ ICC-01/05-01/08-3575-Conf-Exp-Anx.

¹⁹ ICC-01/05-01/08-3575-Conf-Anx-Red.

²⁰ ICC-01/05-01/08-3575-Conf-Anx-Red-Corr.

²¹ ICC-01/05-01/08-3576.

²² ICC-01/05-01/08-3579.

ii. Group B - Issues relating to the Second Ground of the appeal of Mr Jean-Pierre Bemba Gombo ("Mr Bemba") against the decision of Trial Chamber III entitled "Judgment pursuant to Article 74 of the Statute" of 21 March 2016 ("Conviction Decision"):

- a. *What are "the facts and circumstances described in the charges", within the meaning of article 74 (2) of the Statute? In particular, which of the following examples is a "fact":*
 - (i) *the rape of P22 in PK12 on or around 6 or 7 November 2002, or*
 - (ii) *rape committed by the MLC soldiers in the Central African Republic between on or about 26 October 2002 and 15 March 2003?*
- b. *What is the minimum level of detail required for "[a] statement of the facts" to be included in the document containing the charges pursuant to regulation 52 (b) of the Regulations of the Court, especially regarding "the time and place of the alleged crimes"? Does the required detail depend on the form of individual criminal responsibility charged in the case? In particular, would the required detail in a case of criminal responsibility as a co-perpetrator under article 25 (3) (a) differ from the required detail in a case of command responsibility under article 28 (a) of the Statute?*
- c. *Must acts underlying the crimes charged be exhaustively listed in the document containing the charges?*
- d. *Must the Pre-Trial Chamber determine whether there is sufficient evidence to support, to the requisite standard, each underlying act (a criminal act underlying one of the crimes charged) included in the document containing the charges and enter a finding on each such act in the confirmation decision?*
- e. *Can the Prosecutor notify the accused person of other underlying acts in auxiliary documents provided after the confirmation decision was rendered, without seeking to add additional charges under article 61 (9) of the Statute? Can the accused person be notified of other underlying acts through the*

provision of statements of victims? If the Prosecutor or the legal representative of victims notifies the accused person of other underlying acts after the confirmation decision, do they exceed “the facts and circumstances described in the charges”?

iii. Group C - Issues relating to the Third Ground of Mr Bemba’s appeal against the Conviction Decision:

- a. Would a change from the “knew” standard to the “should have known” standard in article 28 (a) (i) of the Statute amount to a modification of the legal characterisation of the facts, which would need to comply with the requirements of regulation 55 of the Regulations of the Court (including that it not exceed the facts and circumstances of the charges)?*
- b. Does the Appeals Chamber have the power to change the legal characterisation of the facts itself?*
 - (i) If it does not have such power, why is this the case?*
 - (ii) If it does have the power to re-characterise, on what legal basis may it do so?*
 - (iii) To what extent is it relevant that the Trial Chamber gave notice under regulation 55 (2) in the course of the trial?*
- c. How must the “knew” standard be interpreted? To what extent is the definition of knowledge in article 30 (3) of the Statute relevant to article 28 (a) (i) of the Statute?*
- d. How must the “should have known” standard be interpreted? Does the “should have known” standard differ materially from the “had reason to know” standard in article 7 (3) of the ICTY Statute and in its jurisprudence? How does this standard relate to the “consciously disregarded” standard in article 28 (b) (i) of the Statute?*

iv. Group D - Further issues relating to the Third Ground of Mr Bemba's appeal against the Conviction Decision:

- a. *To what extent is a commander's motivation for taking necessary and reasonable measures of relevance in the assessment of their adequacy?*
- b. *Must the accused be given notice of the measures which the Trial Chamber finds he could have taken as a commander? If so, how must such notice be given – must it be given specifically with respect to measures or may it be given in the course of pleadings on the commander's material ability?*
- c. *Mr Bemba argues that causation is required in the context of article 28 (a) of the Statute, whilst the Prosecutor argues that causation is not required. If causation is required pursuant to article 28 (a) of the Statute, what degree of nexus is required - "but-for", "high probability", "reasonable foreseeability" or other?*
- d. *Does an assessment of causation overlap with an assessment of whether a commander has taken necessary and reasonable measures or is an additional element required?*
- e. *Is a commander under a legal duty to withdraw his troops in the event that he becomes aware that they are committing crimes? If so:*
 - (i) *What is the legal basis for this duty?*
 - (ii) *When does this duty arise?*
 - (iii) *Would it extend to all troops or only to those alleged to have committed crimes?*
 - (iv) *Is it of any import that withdrawal, either full or partial, would, in all likelihood, lead to military defeat?*

v. Group E - Issues relating to the Fourth Ground of Mr Bemba's appeal against the Conviction Decision:

- a. *The elements of crimes against humanity include the requirement that "[t]he perpetrator knew that the conduct was part of or intended the*

conduct to be part of a widespread or systematic attack directed against a civilian population". In cases of individual criminal responsibility under article 28 of the Statute, does this requirement apply to the direct perpetrator of the crime or to the accused person or both?

- b. Can a Trial Chamber rely on the war crime of pillaging to establish that there was an organizational policy?*
- c. Responses to and/or replies to responses to the questions listed in the Appeals Chamber's "Order for submissions on the contextual elements of crimes against humanity" of 30 October 2017 (ICC-01/05-01/08-3564).*

19. On 1 December 2017, the LRV and OPCV filed joint submissions containing additional information they wish to be considered in the reparations order ("Joint Submissions").²³

20. On 5 December 2017, the LRV submitted its "Demande d'extension de délai suivant «Decision on the Defence's further request for a revision of the timetable for the filing of documents», ICC-01/05-01/08-3576" ("LRV Request"), in which it sought to extend its Final Submissions deadline from 18 December 2017 to 5 February 2018.²⁴

21. On the same day, the OPCV notified the Chamber by email that it supported the LRV Request, and requested that any extension granted apply equally to it. It also notified the Chamber that the LRV and OPCV were consulting on the opportunity to file joint Final Submissions.²⁵

22. On 12 December 2017, the TFV filed "Observations on the legal representative of victim's further request for an extension of time," ("TFV

²³ ICC-01/05-01/08-3581.

²⁴ ICC-01/05-01/08-3583.

²⁵ Email from the OPCV to the Chamber sent on 5 December 2017 at 09:31.

Observations”), in which it (i) supported the LRV Request and requests that it be included in any extension of time granted to the LRV, or in the alternative (ii) requested, for different reasons, that its Final Submissions deadline be extended in line with the current Defence deadline of 31 January 2018.²⁶

23. On 14 December 2017, the Chamber granted an extension of time for the Final Submissions deadline for the LRV. The Chamber considered that an extension to 31 January 2018, in line with the current Defence deadline, was sufficient in the circumstances. It similarly extended the Final Submissions deadline for the OPCV and TFV.²⁷

24. On 22 December 2017, the Chamber filed an “Order regarding follow-up matters arising from Expert Report” whereby it directed the Experts to file, by 31 January 2018 either jointly or separately, an addendum to the Expert Report on the calculation of “the scope of Mr Bemba’s liability, or a range thereof, based on the forms of reparations they themselves recommend, and taking into consideration that the victims eligible for reparations may extend beyond those who participated at trial or have participation and/or reparation applications presently pending.”²⁸

25. In the same decision, the Chamber directed the Registry to provide logistical assistance to the experts and an update on the security situation in the CAR by 31 January 2018,²⁹ and invited [REDACTED] to file, by 31 January 2018, observations on the feasibility of implementing the types and modalities of reparations.³⁰ The LRV, the OPCV, the Defence and the TFV were ordered to file a response, by 8

²⁶ ICC-01/05-01/08-3586, paras. 10-11, 16.

²⁷ ICC-01/05-01/08-3587, paras. 12-13.

²⁸ ICC-01/05-01/08-3588-Conf, para. 8 and p. 8.

²⁹ ICC-01/05-01/08-3588-Conf, paras. 10, 13 and p. 8.

³⁰ ICC-01/05-01/08-3588-Conf, para. 11 and p. 8.

February 2018, to any (i) addendum or addenda of the Experts and (ii) observations of [REDACTED], filed in accordance with its order.³¹

26. On 9 January 2018, the Appeals Chamber commenced the Appeal Hearing in the present case.³² The hearings concluded on 11 January 2018, after three days of argument.³³ At the conclusion of the Appeal Hearing, the Presiding Judge invited the parties to make additional written submissions not exceeding 15 pages in length by this Friday, 19 January 2018.³⁴

C. SUBMISSIONS

(i) The filing of Mr. Bemba's Final Submissions should be delayed until there is a final conviction

27. An accused is not required to remedy harms that are not the result of the crimes for which he was convicted.³⁵

28. Reparation orders are "intrinsicly linked to the individual whose criminal responsibility is established in a conviction and whose culpability for these criminal acts is determined in a sentence."³⁶

29. In filing the present submissions, the Appellant is not anticipating the outcome of the appeal process, nor is he in a position to do so. However, it can no longer reasonably be discounted, given the length, detail, and content of the Appeal Hearing, that the scope of the conviction in the present case may alter.

³¹ ICC-01/05-01/08-3588-Conf, p. 8.

³² T-372-CONF-ENG.

³³ T-374-ENG.

³⁴ T-374-ENG, p. 88, lines 18-25.

³⁵ ICC-01/04-01/06-3129, para. 8.

³⁶ ICC-01/04-01/06-3129, para. 65.

30. Should this be the case, the parties to the reparations proceedings will have been required to file submissions which will become irrelevant, either in whole or in part. More significantly, it will have required the Appellant to divert resources away from his appeal process to the reparations proceedings, to file submissions which will ultimately be disregarded.

31. However, the waste of the Appellant's resources is not the sole concern. It is not difficult to anticipate how requiring the Appellant to file Final Submissions before the scope of his conviction is known, could give rise to concrete prejudice. Mr. Bemba would be "on the record" in relation to the appropriateness (or otherwise) of proposals for reparations which may never come to fruition. Such submissions could easily be used against him as an indication of his willingness (or otherwise) to provide reparations in a wholly hypothetical case.

32. The risk is a real one. Should the Appeals Chamber accept the Appellant's submission that two thirds of the conviction fall outside the confirmed case,³⁷ this will necessarily have a significant impact on the scope of Mr. Bemba's liability. Should the Appeals Chamber accept that Mr. Bemba did not have actual knowledge of the crimes found to have been committed by his subordinates,³⁸ this will necessarily have a significant impact on the level of his culpability and thus his liability for reparations. Should the Appeals Chamber quash Mr. Bemba's convictions for crimes against humanity, this will necessarily have a significant impact on the scope of eligible victims. On this point, it is worth noting that the Appeals Chamber not only asked the parties for additional submissions during the course of the Appeal Hearing, but had previously required 80 total pages of written

³⁷ T-372-CONF-ENG, p. 86, lines 5-7.

³⁸ T-373-ENG, p. 29, line 10 – p. 32, line 1.

filings on the question of whether the Trial Chamber erred in its finding that the contextual elements of crimes against humanity in the present case.³⁹

33. Moreover, the forthcoming Appeal Judgement in this case will necessarily clarify the law on underlying acts and the scope of the conviction. In the view of the Presiding Judge of the Appeals Chamber, the interpretation of these terms (still a contested issue on appeal) will necessarily have implications for reparations.⁴⁰ For this reason alone, continuing with the reparations process in the absence of this clarification from the Appeals Chamber is unreasonable, and likely to contribute to the ongoing confusion and uncertainty which surrounds this novel legal question at the ICC.

(ii) The filing of Mr. Bemba’s Final Submissions should be delayed to take into account the additional submissions on appeal.

34. This Trial Chamber has previously found good cause for an extension of time within the meaning of Regulation 35(2) on the grounds that the parties and participants were subject to “competing deadlines before this Chamber and the Appeals Chamber”.⁴¹

35. Given the Presiding Judge’s invitation to the parties and participants to file additional submissions on appeal by this Friday, 19 January 2018,⁴² Mr. Bemba again finds himself subject to overlapping and competing deadlines in both the Appeal proceedings and the reparations proceedings. As such, and without prejudice to his primary submission articulated above, he requests an additional extension within which to file his Final Submissions.

³⁹ ICC-01/05-01/08-3564, para. 4. The parties and participants filed a total of 71 pages of written filings on this question of the contextual elements of crimes against humanity.

⁴⁰ T-372-CONF-ENG, p. 84, lines 15-24, p. 85, lines 11-15.

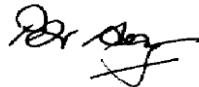
⁴¹ ICC-01/05-01/08-3576, para. 10.

⁴² T-374-ENG, p. 88, lines 18-25.

36. This would also permit the filing of a consolidated submission on the part of Mr. Bemba which could also respond to any (i) addendum or addenda of the Experts and (ii) observations of [REDACTED], filed in accordance with its order,⁴³ such responses currently being due to be filed by 8 February 2018.

37. Mr. Bemba has no objection to the other parties and participants in the reparations proceedings to benefitting from any extension of time granted to him.

The whole respectfully submitted.



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

Done at The Hague, The Netherlands, 16 January 2018

⁴³ ICC-01/05-01/08-3588-Conf, p. 8.