

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **24 January 2014**

TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
*THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO***

Public

Public Redacted Version of Prosecution's Response to the Defence Request for Leave to Appeal the "Decision on issues related to the conclusion of the defence's presentation of oral evidence at trial and on the 'Defence Request for an Order for Cooperation'", 22 November 2013, ICC-01/05-01/08-2905-Conf

Source: The Office of the Prosecutor

Document to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Fabricio Guariglia

Counsel for the Defence of Jean-Pierre Bemba Gombo

Mr Peter Haynes
Ms Kate Gibson

Legal Representatives of Victims

Ms Marie-Edith Douzima-Lawson

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms Paolina Massidda

The Office of Public Counsel for the Defence

Mr Xavier-Jean Keita

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Other Section

I. Introduction

1. The Defence seeks leave to appeal (“Application” or “Defence Application”)¹ the “Decision on issues related to the conclusion of the defence’s presentation of oral evidence at trial and on the ‘Defence Request for an Order for Cooperation’” (“Decision” or “Impugned Decision”)² on the following six issues:³

- a) “Whether the Trial Chamber erred in rendering the Impugned Decision in the absence of submissions from the Prosecution and Legal Representatives of Victims, and a response from the Defence, to ensure a full airing of the disputed issues” (“First Issue”);
- b) “Whether the Trial Chamber erred in law by failing to consider Defence arguments on the significance of the testimony of Witnesses D04-14 and D04-44” (“Second Issue”);
- c) “Whether the Chamber erred in law in applying a different standard to the presentation of evidence by the Prosecution and the Defence, in violation of Article 67(1)(e) of the Statute, particularly as concerns the availability of Prosecution witnesses CAR-OTP-PPPP-0015, CAR-OTP-PPPP-0045, and CAR-OTP-PPPP-0044” (“Third Issue”);
- d) “Whether the Trial Chamber erred in preventing the Defence from presenting the evidence of key exculpatory witnesses despite [REDACTED]” (“Fourth Issue”);
- e) “Whether the Trial Chamber erred in preventing the Defence from presenting critical exculpatory evidence on the basis of the “usual time required”, [REDACTED] thereby accepting the obstruction on the part of [REDACTED]

¹ ICC-01/05-01/08-2901-Conf-Red.

² ICC-01/05-01/08-2899-Conf. A corrigendum to the Decision was filed on 19 November 2013: ICC-01/05-01/08-2899-Conf-Corr-Anx and ICC-01/05-01/08-2899-Corr-Red.

³ Decision, para.19.

authorities and failing to ensure the provision of conditions for a fair trial pursuant to its obligation under Article 64(2) of the Statute” (“Fifth Issue”); and

- f) “Whether the Trial Chamber erred in failing to consider the lack of cooperation on the part of a State Party to the ICC as good cause for extending the deadline for the presentation of Defence oral evidence to afford the accused the right to bring evidence to counter the allegations against him” (“Sixth Issue”).

2. To the extent that the Prosecution can assess the content of the redacted version of the Defence Application, which is the only one available to it, the Application should be rejected. The issues as framed by the Defence do not constitute appealable issues within the terms of Article 82(1)(d) nor they do not arise out of the Decision. Even if they did, the Defence fails to demonstrate that these issues meet the criteria for leave to appeal under to Article 82(1)(d).

3. Pursuant to Regulation 23*bis* of the Regulations of the Court, the Prosecution files these submissions as confidential since they respond to a filing that is currently subject to the same classification.

II. Submissions

A. The Issues do not arise from the Decision or they do not constitute appealable issues

(a) The First Issue does not constitute an appealable issue

4. While it is true that the Chamber issued the Decision prior to seeking the views of the Prosecution and the Legal Representatives of the Victims,⁴ this does not constitute an appealable issue. As stated by the Appeals Chamber, an issue is “an

⁴ Decision, para.18.

identifiable subject or topic requiring a decision for its resolution”,⁵ the resolution of which is “essential for the determination of matters arising under the judicial cause under examination”.⁶ In this case, neither the Prosecution nor the Legal Representatives of the Victims claim any prejudice from the Decision being issued on an expedited basis. Therefore, no resolution of the First Issue is required to redress the fact that the Prosecution and the Legal Representatives of the Victims had no opportunity to “a full airing of the disputed issues”.⁷

(b) The Second Issue does not arise from the Decision

5. The Second Issue is based on a misreading of the Decision. In fact, the Chamber did not fail to consider the Defence arguments on the significance of the testimony of Witnesses D04-14 and D04-44. In its Decision, the Chamber recalled all the efforts that it had made to enable the Defence to call Witnesses D04-14 and D04-44, including granting the Defence several extensions of time and ordering the Registry to provide support.⁸ Since these procedural steps resulted in a delay of the proceedings, it must be assumed that the Chamber took them only because it was aware of, and gave due weight to, the potential relevance of the evidence of Witnesses D04-14 and D04-44. This is further supported by the Chamber’s reference to Articles 69(3) and (4), which deal with relevance of evidence, as the basis of the Decision.⁹ In this case, the Chamber, having considered all the relevant factors, exercised its discretion under Regulation 35(2) in a manner with which the Defence disagrees. Such a disagreement does not constitute an appealable issue arising from the Decision.¹⁰

⁵ ICC-01/04-168 OA3, para.9.

⁶ ICC-01/04-168 OA3, para.9.

⁷ Application, para.19(a).

⁸ Decision, paras.3, 5, 8-9.

⁹ Decision, para.14.

¹⁰ ICC-01/04-168 OA3, para.9; ICC-01/05-01/08-532, para.17; ICC-02/05-02/09-267, para.22; ICC-01/04-01/06-1557, para.30; ICC-01/04-01/07-2035, para.25; ICC-02/05-03/09-179, para.27.

(c) The Third Issue does not constitute an appealable issue

6. The Third Issue, whether the Chamber erred in applying a different standard to the presentation of the evidence by the Prosecution and the Defence in violation of Article 67(1)(e), is not an appealable issue. The Defence fails to demonstrate any basis for its allegation that there was a difference in treatment of Prosecution witnesses and Defence witnesses. While at this stage the Defence is not required to argue the merits of an alleged error, it must identify an issue with sufficient precision and cannot simply advance general and unsubstantiated allegations when requesting leave to appeal. Leave to appeal has been refused where there is a “lack of clarity of the Defence in formulating the issue at stake”¹¹ and where “the Defence failed in articulating clearly what the issue at stake actually is”.¹² Therefore, the Third Issue, rather than an appealable issue pursuant to Article 82(1)(d), is an abstract question or hypothetical concern.¹³

(d) The Fourth Issue does not constitute an appealable issue

7. Although the Decision makes it clear that the evidence of Witnesses D04-14 and D04-44 will not be heard during the trial of this case, the Defence misrepresents the nature of the Chamber’s ruling when alleging that the Decision “prevent[s] the Defence from presenting the evidence of key exculpatory witnesses”.¹⁴ In its Decision, the Chamber noted the “numerous vicissitudes and difficulties in the defence’s presentation of evidence”,¹⁵ and recalled the numerous efforts that it has undertaken to enable the Defence to call Witnesses D04-14 and D04-44, as well as the resulting delays in the trial proceedings.¹⁶ The Chamber further noted that the difficulties of calling Witnesses D04-14 and D04-44 are, to a significant degree,

¹¹ ICC-02/11-01/11-99-Conf, para 14.

¹² ICC-02/11-01/11-99-Conf, para 15. ICC-01/05-01/08-2800, paras.15, 17.

¹³ ICC-01/05-01/08-532, para.17. ICC-01/05-01/08-75 para.11, ICC-02/04-01/05-367, para.22; ICC-01/09-01/11-301 para.34, ICC-01/09-02/11-406, paras.50, 61.

¹⁴ Decision, para.19(d) – emphasis added.

¹⁵ Decision, para.3.

¹⁶ Decision, paras.3, 5, 8-9.

attributable to the Defence's contradictory requests in relation to those witnesses¹⁷ and that the Defence request was filed just 40 minutes before the lapse of the time limit for the completion of the Defence's presentation of oral evidence.¹⁸ Therefore, rather than preventing the Defence from calling evidence, the Chamber, having taken into consideration all relevant factors, exercised its discretion under Regulation 35(2) and rejected the Defence request that would have resulted in yet another delay of the proceedings. The Defence disagrees with the manner in which the Chamber exercised its discretion, but such a disagreement does not constitute an appealable issue.¹⁹

(e) The Fifth Issue does not arise from the Decision

8. The Fifth Issue is based on the erroneous assumption that the Chamber "accepted the obstruction on the part of the [REDACTED] authorities" having found that the Defence was aware of the "usual required time for securing cooperation" and should therefore have "reasonably anticipated that such a late request [...] was likely to be problematic".²⁰ However, the Chamber did by no means accept the alleged "obstruction on the part of the [REDACTED] authorities". Rather, when exercising its discretion under Regulation 35(2), the Chamber took into consideration, among others, the fact that the Defence failed to act diligently when making its request at such a late time, i.e. 40 minutes before the expiration of the deadline for the Defence to conclude the presentation of its oral evidence.²¹ The Chamber further emphasised in that context that the failure to act diligently was exacerbated by the Defence's knowledge that securing the cooperation of the [REDACTED] authorities

¹⁷ Decision, para.19.

¹⁸ Decision, para.18.

¹⁹ ICC-01/04-168 OA3, para.9; ICC-01/05-01/08-532, para.17; ICC-02/05-02/09-267, para.22; ICC-01/04-01/06-1557, para.30; ICC-01/04-01/07-2035, para.25; ICC-02/05-03/09-179, para.27.

²⁰ Application, paras.14, 19(e).

²¹ Decision, para.18.

to facilitate the testimony of defence witnesses takes some time.²² As a result, the Fifth Issue as framed by the Defence does not arise from the Decision.

(f) The Sixth Issue does not arise from the Decision and is not an appealable issue

9. Similarly to the Fifth Issue, the Sixth Issue is predicated on an erroneous assumption, namely that the Chamber failed to “consider the lack of cooperation on the part of a State Party to the ICC as good cause for extending the deadline for the presentation of [...] evidence”.²³ First, it is inaccurate to suggest that the [REDACTED] is not cooperating with the Court to support the presentation of evidence by the Defence. In fact, the [REDACTED] authorities have facilitated the testimony of Defence Witnesses D04-18, D04-19, D04-45, and D04-49, among others. Second, from the record available to the Prosecution, it appears that the [REDACTED] authorities took some time to grant authorization for witnesses to give evidence.²⁴ However, the Chamber did not fail to take that into consideration when rejecting the Defence request for an extension of the deadline. The Chamber expressly acknowledged the “usual required time for securing cooperation”,²⁵ and noted in that context that the delay in securing the testimony of Witnesses D04-14 and D04-44 is to a large extent attributable to the Defence having submitted its request at a very late stage whilst knowing the time requirements of the [REDACTED] authorities.²⁶ Therefore, the Sixth Issue does not arise from the Decision. In addition, the Defence merely disagrees with the manner in which the Chamber weighed the time requirements of the [REDACTED] authorities when exercising its discretion under Regulation 35(2). Such a difference in opinion does not constitute an appealable issue.

²² Decision, para.19.

²³ Application, para.19(f).

²⁴ See for instance the VWU’s submission in relation to Witness D04-54 at ICC-01/05-01/08-T-331-CONF-ENG, p.34, lns.3-8. Nevertheless, the [REDACTED] authorities eventually provided authorisation for Witness D04-54, who gave evidence from on 30 October to 1 November 2013 (see Transcripts T-347 to T-349).

²⁵ Decision, para.19.

²⁶ Decision, paras.16, 19.

B. The Issues do not affect the fair and expeditious conduct of the proceedings

10. The Defence does not provide any argument to support its submission that the Issues affect the fair and expeditious conduct of the proceedings, other than its general statement that “preventing an accused from presenting evidence to rebut the allegations against him goes to the heart of a fair trial”.²⁷ The Defence does not explain how the six Issues relate to this statement and how each of them individually impacts on the fairness of the proceedings. As established by the jurisprudence of this Court, a purely general complaint²⁸ or a merely hypothetical impact on the fairness and expeditiousness of the proceedings²⁹ does not suffice to meet the criteria for leave to appeal.

11. Moreover, the decision not to hear the evidence of Witnesses D04-14 and D04-44 does not, *per se*, affect the fair and expeditious conduct of the proceedings. Otherwise every refusal to admit a piece of evidence would automatically have the same effect. The burden on the Defence is to show why in the concrete circumstances of this case, the decision not to hear these specific witnesses impacts on fairness and expeditiousness. They have failed to do so.

12. As noted above, the difficulties of calling Witnesses D04-14 and D04-44 are to a significant degree attributable to the Defence’s contradictory requests in relation to those witnesses³⁰ and the Chamber’s Decision is based, among others, on the fact that the Defence submitted its request at a very late stage whilst knowing the time requirements of the [REDACTED] authorities.³¹ That the grounds for rejecting the Defence request are to a large extent attributable to the Defence is relevant when assessing whether the Issues significantly affect the fair and expeditious conduct of the proceedings. The Appeals Chamber found that “[r]equiring the accused person to

²⁷ Application, para.20.

²⁸ ICC-01/04-01/06-2463, para.31.

²⁹ ICC-01/04-01/07-1958, para.20; ICC-02/04-01/05-367, paras. 21-22.

³⁰ Decision, para.19.

³¹ Decision, para.18.

act in an expeditious manner is not in itself inconsistent with full respect for his rights”.³² It further ruled that “full respect for the rights of the accused does not mean that a Trial Chamber may not control the manner in which an accused person acts in the proceedings. Under article 64(2) of the Statute, the Trial Chamber has the power to regulate the conduct of the parties and participants so as to ensure among other considerations, that such conduct does not cause undue delay to the proceedings”.³³

13. In addition, the Defence argument is premature and speculative. The Chamber may take into consideration any difficulties encountered by the Defence in presenting evidence when weighing the entirety of the evidence at the end of the trial. In so doing, it may resolve any unfairness in favour of the Accused.³⁴ Since the Chamber is already fully briefed on the matter, no further litigation in the first instance is required. Whether any litigation on the matter at second instance is required will depend on the judgement of the Trial Chamber pursuant to Article 74.

C. Immediate resolution by the Appeals Chamber of the Issues would not materially advance the proceedings

14. Contrary to the contention of the Defence,³⁵ intervention by the Appeals Chamber at this highly advanced stage of the proceedings – the closure of the presentation of oral evidence - would not materially advance the proceedings. On the contrary, barring exceptional circumstances, when a case has reached such an advanced stage, issues concerning the proceedings raised by the parties can and should be dealt with in the context of a final appeal. It would be detrimental to the efficient conduct of the proceedings and cause unnecessary delay to allow an interlocutory appeal at this stage, when an adequate remedy will become available in

³² ICC-01/04-01/07-2259 OA10, para.64.

³³ ICC-01/04-01/07-2259 OA10, para.53.

³⁴ ICC-02/05-03/09-410, para.102.

³⁵ Application, para.21.

the near future as part of an appeal against the Trial Chamber's judgement under Article 74.³⁶

15. In this case, an appeal is also premature. As stated above, the Chamber may take into consideration any difficulties encountered by the Defence in presenting evidence when weighing the entirety of the evidence at the end of the trial and it may, at that stage, resolve any unfairness towards the Accused.³⁷ Such an approach would avoid all the hypothetical scenarios foreshadowed by the Defence, such as a retrial or the reopening of the proceedings.³⁸

³⁶ In the ICTY *Strugar* case, for instance, the Trial Chamber denied certification under Rule 73(B) to appeal a decision finding the accused fit to stand trial, noting that, should the accused be found guilty at the end of the trial, he was entitled to raise the issue as part of his final appeal ([Prosecutor v. Strugar, IT-02-54-T, Decision on Defence Motion for Certification, 17 June 2004](#), para.6); in *Halilovic*, certification to appeal a decision denying the Prosecution leave to amend charges was rejected due to, *inter alia*, considerations as to the further delay that an interlocutory appeal could cause to the proceedings; it was simultaneously noted that if the accused were acquitted of the charges, the Prosecution could appeal the judgment (see [Prosecutor v. Halilovic, IT-01-48-PT, Decision on Prosecution Request for Certification for Interlocutory Appeal of 'Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment,' 12 January 2005](#), and also [Prosecutor v. Halilovic, IT-01-48-PT, Separate and Concurring Opinion of Judge O-Gon Kwon Appended to Trial Chamber Decision Dated 12 January 2005 on Prosecution Request for Certification for Interlocutory Appeal of 'Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment,' 14 January 2005](#), para.6.

³⁷ ICC-02/05-03/09-410, para.102.

³⁸ Application, para.21.

III. Conclusion

16. For the above reasons, the Prosecution requests that the Chamber reject the Defence Application.



Fatou Bensouda, Prosecutor

Dated this 24th Day of January 2014

At The Hague, The Netherlands