

**Cour
Pénale
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**International
Criminal
Court**

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Date: **15 May 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

**Prosecution's Response to the Defence Request for Leave to Appeal the "Decision
on Defence Request for Interim Relief"**

Source: The Office of the Prosecutor

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I. Introduction

1. The Defence seeks leave to appeal¹ the “Decision on the Defence Request for Interim Relief”² on the following three issues (“the Issues”):³

- (i) “Whether the Trial Chamber erred in law in requiring the Defence to provide concrete instances of prejudice when the Defence Request was one for interim relief; namely for steps to be taken to avoid prejudice occurring” (“First Issue”);
- (ii) Whether the Trial Chamber erred in failing to take steps to address the Prosecution’s failure to disclose identified materials by directing the Defence to a different Chamber before which (as the Chamber knew) the Prosecution concurrently submitted it had neither mandate nor *locus standi* (“Second Issue”); and
- (iii) “Whether the Trial Chamber erred in law in failing to consider Defence submissions concerning:
 - a. Disclosure of materials from States requested to monitor Defence communications or seize Defence property, and the immediate cessation of such monitoring;
 - b. The Prosecution’s violation of its obligation to notify the Defence of any requests or orders which impacted either on the ability of Counsel to communicate with the defendant in a confidential manner, or the ability of the defendant to communicate with other persons;

¹ ICC-01/05-01/08-3064 (“Application”).

² ICC-01/05-01/08-3059 (“Decision”).

³ Application, para.14.

c. Access of the Prosecution to materials that undoubtedly contain privileged information concerning Defence strategy in the main case" (together, "Third Issue").

2. The Prosecution submits that the Application should be rejected. The Issues are based on a misinterpretation of the Decision and therefore do not arise from the Decision. Even if they did, the Defence fails to demonstrate that the Issues meet the criteria for leave to appeal under Article 82(1)(d).

II. Submissions

A. The Issues do not arise from the Decision

(a) The First Issue does not arise from the Decision

3. The First Issue does not accurately reflect the Decision and therefore does not arise from it. According to the Defence, the First Issue is based on the Chamber's finding that the Defence has failed to demonstrate concrete instances of prejudice, while its request was aimed at seeking the assistance of the Chamber in "preventing prejudice **before** it occurred".⁴ However, the Chamber did not limit its consideration to the question whether "the accused *has suffered* [prejudice]" in the past, but it also examined whether he "*is suffering* prejudice in the Bemba case, caused by the proceedings related to case ICC-01/05-01/13".⁵ As a result, the Chamber took into consideration potential on-going and even future prejudice to the accused as a result of the Article 70 proceedings.

⁴ Application, para.7.

⁵ Decision, para.24 (emphasis added). The Chamber's appreciation of the potentially prospective nature of interim relief was further demonstrated by its emphasis in the same sentence on whether the facts gave "rise to 'an immediate need' for the Chamber to grant interim relief.

4. Moreover, while the Defence disagrees with the conclusions reached by the Chamber, it is incorrect to suggest that the Chamber “miss[ed] the point”.⁶ When making an assessment on prejudice, the Chamber must be guided by the arguments and the information before it. In this particular case, the Chamber carefully examined the submissions of the Defence and noted that “[the Defence’s] arguments as to prejudice ultimately amount to an inference that there is a risk that the prosecution has gained access to privileged material”.⁷ It concluded that the Defence has not supported these contentions⁸ and that it “has no reason to doubt the prosecution’s assertion that it ‘is not privy to any information that is protected by legitimate professional privilege’”.⁹ This further demonstrates that the Chamber fully addressed the arguments of the Defence and that accordingly the First Issue does not arise from the Decision.

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

5. The Second Issue is grounded on the incorrect and unsubstantiated assumption that the Prosecution failed to disclose materials in its possession that demonstrate that “Article 70 proceedings have been predicated on illegal evidence, or improper procedures”¹⁰ and, in particular, information that goes to demonstrate the Prosecution’s alleged “unparalleled incursion into the defendant’s right to legal professional privilege”.¹¹ Yet to the contrary, in its Decision, the Chamber expressly found that it “has no reason to doubt the prosecution’s assertion that it ‘is not privy to any information that is protected by legitimate professional privilege’”.¹² The Defence is thus incorrect to suggest that the Chamber “failed to address the central issue; namely that the Prosecution was obliged to disclose identified materials to the

⁶ Application, para.7.

⁷ Decision, para.20.

⁸ Decision, para.20.

⁹ Decision, para.19.

¹⁰ ICC-01/05-01/08-2945-Red (“Defence Request for Interim Relief”), para.43; Application, para.8.

¹¹ Defence Request for Interim Relief, para.44. See also Decision, para.9.

¹² Decision, para.19.

Defence”.¹³ Without any reason to believe that the Prosecution is withholding disclosable information, the question whether the Chamber erred in failing to take steps to address the issue of disclosure does not arise from the Decision.

6. Since the Chamber fully addressed the Defence’s arguments with respect to the alleged breach of the Prosecution’s disclosure obligations, the separate aspect advanced under the Second Issue—namely, that the Chamber directed the Defence to a different chamber to file requests for access to information—is irrelevant for the purposes of determining whether the Second Issue arises from the Decision.¹⁴

(c) The Third Issue does not arise from the Decision

7. As its Third Issue, the Defence raises the question whether the Chamber erred in failing to consider specific submissions made by the Defence in its request for interim relief. This issue does not arise from the Decision, because the Chamber did in fact address those submissions. Without rehearsing each and every argument of the Defence verbatim, the Chamber stated that “the defence sets out detailed arguments regarding a range of issues” and concluded that “its arguments as to prejudice ultimately amount to an inference that there is a risk that the prosecution has gained access to privileged material [...]”.¹⁵ In footnote 54 of the Decision, attached to the above quote, the Chamber expressly referred to those arguments that the Defence now claims were disregarded by the Chamber. Therefore, the Third Issue is “merely a question over which there is disagreement or conflicting opinion”.¹⁶ It is a disagreement with the manner in which the Chamber dealt with some of the arguments advanced by the Defence, which is insufficient to establish an appealable issue pursuant to Article 82(1)(d).

¹³ Application, para.8.

¹⁴ Application, para.14(ii).

¹⁵ Decision, para.20.

¹⁶ 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.

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

8. Even if, *arguendo*, the Issues were appealable issues arising from the Decision, they do not meet the criteria for leave to appeal under Article 82(1)(d).

9. The Defence's arguments on fairness—which relate to a) the protection of legal professional privilege; b) disclosure of information material to the preparation of the Defence; and c) the possibility that the Chamber may review its prior decision to reject admission of the Article 70 materials in the trial before it¹⁷—are unsupported. No unfairness related to violation of privilege or disclosure arises. In its Decision, the Chamber quoted the Single Judge in the Article 70 case who found that “we made sure that no privileged document came in the possession of the Prosecution”.¹⁸ The Chamber further found that it “has no reason to doubt the prosecution's assertion that it ‘is not privy to any information that is protected by legitimate professional privilege’”¹⁹ and it directed the Defence to file requests for access to information before the relevant chamber.²⁰ Moreover, the hypothetical possibility that the Chamber may admit into evidence some of the Article 70 materials (thereby reconsidering its prior decision to reject the evidence) is insufficient to establish any impact at this time on the fair conduct of the proceedings. The argument is premature, as the Defence has the option to challenge any future decision on the admissibility of these materials. The Defence argument also ignores the settled law that mere hypothetical impact on the fairness of the proceedings is insufficient for the purpose of Article 82(1)(d).²¹

10. The Defence claim that the Issues affect the expeditious conduct of the proceedings, based on the same arguments, is equally unfounded.²² In particular, the issues raised by the Defence in its Request for Interim Relief will not need to be re-

¹⁷ Application, paras.16-18.

¹⁸ Decision, para.10.

¹⁹ Decision, para.19.

²⁰ Decision, para.20.

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

²² Application, para.19.

litigated once “the full impact of the Article 70 case becomes more apparent”.²³ This argument is again predicated on the incorrect and unsubstantiated assumption that the Prosecution has accessed privileged information and failed to disclose relevant materials. As ruled by the Chamber, this fear is unfounded.

11. Finally, contrary to the contention of the Defence,²⁴ intervention by the Appeals Chamber at this highly advanced stage of the proceedings—the closure of the presentation of evidence—would not materially advance the proceedings. On the contrary, when a case has reached such an advanced stage, any potentially appealable issues can and should be dealt with in the context of a final appeal, barring exceptional circumstances. It will ordinarily be detrimental to the efficient conduct of the proceedings—and cause unnecessary delay—to allow an interlocutory appeal at this advanced stage, when an adequate remedy will become available in the near future as part of any appeal against the Trial Chamber’s judgement under Article 74.²⁵

12. An interlocutory appeal is, in any event, also premature. If, *arguendo*, the Defence could in the future substantiate its claim that the proceedings in the Article 70 case prejudice the rights of the accused in this case, the Defence could at that time file a new application. The Chamber could take such an application into consideration at the end of the trial and, at that stage and if necessary, resolve any unfairness towards the accused.²⁶ This approach would avoid all the hypothetical

²³ Application, para.19.

²⁴ Application, para.20.

²⁵ 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.

²⁶ ICC-02/05-03/09-410, para.102.

scenarios imagined by the Defence, such as a retrial or the reopening of the proceedings.²⁷

III. Conclusion

13. For the above reasons, the Application should be rejected.



Fatou Bensouda, Prosecutor

Dated this 15th Day of May 2014

At The Hague, The Netherlands

²⁷ Application, para.20.