

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/05-01/08
Date: 26 August 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

**Decision on the Defence Request for Leave to Appeal
the Decision on the Defence Request for Interim Relief**

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr Jean-Jacques Badibanga

Counsel for the Defence

Mr Peter Haynes

Ms Kate Gibson

Ms Melinda Taylor

Legal Representative of the Victims

Ms Marie Edith Douzima-Lawson

Legal Representatives of the 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 Keïta

States Representatives

Amicus Curiae

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber III ("Chamber") of the International Criminal Court ("Court" or "ICC") in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* ("Bemba case") issues the following Decision on the Defence Request for Leave to Appeal the Decision on the Defence Request for Interim Relief.

I. Background and submissions

1. On 2 May 2014, the Chamber issued its "Decision on the Defence Request for Interim Relief" ("Impugned Decision"),¹ in which it analysed the "Defence Request for Interim Relief" ("Interim Relief Request").² The Interim Relief Request was denied on the grounds that the defence "failed to substantiate its claim that the accused has suffered or is suffering prejudice in the *Bemba* case, caused by the proceedings related to case ICC-01/05-01/13, giving rise to 'an immediate need' for the Chamber to grant interim relief".³
2. On 9 May 2014, the defence for Mr. Jean-Pierre Bemba Gombo ("defence") filed its "Defence Request for Leave to Appeal the Decision on the Defence Request for Interim Relief" ("Defence Request"),⁴ requesting leave to appeal on the following three issues:⁵
 - (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*

¹ Decision on the Defence Request for Interim Relief, 2 May 2014, ICC-01/05-01/08-3059.

² Defence Request for Interim Relief, 24 January 2014, ICC-01-05-01/08-2945-Conf and confidential Annex A, ICC-01/05-01/08-2945-Conf-AnxA. A public redacted version was filed on 23 January 2014; Public Redacted Version of Defence Request for Interim Relief, 23 January 2014, ICC-01/05-01/08-2945-Red.

³ ICC-01/05-01/08-3059, paragraph 24.

⁴ Defence Request for Leave to Appeal the Decision on the Defence Request for Interim Relief, 9 May 2014, ICC-01/05-01/08-3064.

⁵ ICC-01/05-01/08-3064, paragraph 14.

standi; ("Second Issue")

(iii) Whether the Trial Chamber erred in law in failing to consider Defence submissions ("Third Issue") concerning:

- a. Disclosure of materials from States requested to monitor Defence communications or seize Defence property, and the immediate cessation of such monitoring; ("Sub-Issue (a)")
- 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 communication with other persons; ("Sub-Issue (b)")
- c. Access of the Prosecution to materials that undoubtedly contain privileged information concerning Defence strategy in the main case. ("Sub-Issue (c)")

3. The defence claims that the Trial Chamber "refused to take measures to protect Mr. Bemba's privileges under Article 67(1)(b) and Rule 73(1) in relation to the seizure and review of privileged Defence materials..."⁶ It argues that the Interim Relief Request was aimed at seeking the assistance of the Chamber in preventing prejudice before it occurred,⁷ meaning before the procedural steps taken by the prosecution to build the Article 70 case⁸ caused irremediable prejudice and undermined the fairness of the proceedings in the *Bemba* case.⁹

4. The defence states that the Chamber failed to consider whether the prosecution was obliged to disclose certain identified materials.¹⁰ The defence also stresses that the Chamber failed to consider whether the prosecution was obliged to disclose any requests or orders which impacted Counsels' ability to communicate with the defendant in a confidential manner, or the defendant's

⁶ ICC-01/05-01/08-3064, paragraph 2.

⁷ ICC-01/05-01/08-3064, paragraph 7.

⁸ *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu and Narcisse Arido* ("case ICC-01/05-01/13").

⁹ ICC-01/05-01/08-3064, paragraph 7.

¹⁰ ICC-01/05-01/08-3064, paragraph 8.

ability to communicate with other persons.¹¹ In the view of the defence, the Chamber “failed to acknowledge the Prosecution’s access to privileged information setting out Defence strategy and information” and “ignored the Defence request that the Chamber order [the s]tates of Belgium, France, the Democratic Republic of Congo, The Netherlands, and the United Kingdom to desist from taking any legal steps in connection with materials seized from the Defence.”¹²

5. The defence argues that each of the three issues identified above significantly impacts the fair conduct of the proceedings¹³ and the expeditious conduct of the proceedings.¹⁴ The defence claims that the Chamber did not definitively refuse the admission of items from the Article 70 investigation into evidence in the Bemba case, leaving open the possibility that, at some unspecified stage in the future, the Chamber may admit evidence gathered in case ICC-01/05-01/13 without having regulated the fairness of the conduct of the prosecution in gathering such evidence.¹⁵ Consequently, the defence argues, the accused has no means of knowing “what case he will ultimately have to meet, nor how to approach the drafting of his final submissions”.¹⁶ Thus, the Chamber should either proceed “to deal with the main case and [in]junct] further prejudicial conduct towards the accused in the interim, or [stay] the process in the main case pending a full examination of the probity and probative value of the evidence gathered in the Article 70 case”.¹⁷

6. The defence argues that “[a]n immediate resolution by the Appeals Chamber would ... materially advance the proceedings”¹⁸ because if the Appeals

¹¹ ICC-01/05-01/08-3064, paragraph 9.

¹² ICC-01/05-01/08-3064, paragraph 9.

¹³ ICC-01/05-01/08-3064, paragraphs 15 and 16.

¹⁴ ICC-01/05-01/08-3064, paragraph 19.

¹⁵ ICC-01/05-01/08-3064, paragraph 18.

¹⁶ ICC-01/05-01/08-3064, paragraph 18.

¹⁷ ICC-01/05-01/08-3064, paragraph 18.

¹⁸ ICC-01/05-01/08-3064, paragraph 20.

Chamber finds that the Trial Chamber erred in its approach and overturns the decision, the error could be corrected before the final judgment is rendered thereby avoiding a retrial or the reopening of the proceedings.¹⁹

7. On 15 May 2014, the prosecution filed its "Prosecution's Response to the Defence Request for Leave to Appeal the 'Decision on Defence Request for Interim Relief'" ("Prosecution Response"), in which it requests that the Chamber deny the Defence Request in its entirety.²⁰
8. The prosecution submits that "[t]he 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)."²¹
9. In relation to the First Issue, the prosecution contends that the Chamber took into consideration "potential on-going and even future prejudice to the accused as a result of the Article 70 proceedings" and that rather than "miss[ing] the point", the Chamber fully addressed the defence's arguments and concluded that these were unsupported.²²
10. The prosecution alleges that the Second Issue does not arise from the Impugned decision and argues that after the Chamber found that it had "'no reason to doubt the prosecution's assertion that it is not privy to any information that is protected by legitimate professional privilege'...the question of whether the Chamber erred in failing to take steps to address the issue of disclosure does not arise".²³

¹⁹ ICC-01/05-01/08-3064, paragraph 20.

²⁰ Prosecution's Response to the 'Defence Request for Leave to Appeal the 'Decision on Defence Request for Interim Relief'', 15 May 2014, ICC-01/05-01/08-3067, paragraphs 2 and 13.

²¹ ICC-01/05-01/08-3067, paragraph 2.

²² ICC-01/05-01/08-3067, paragraphs 3 and 4.

²³ ICC-01/05-01/08-3067, paragraph 5 (internal quotation omitted).

11. The prosecution argues that the Third Issue does not arise from the Impugned Decision as, contrary to the defence's contention, the Chamber did in fact address the arguments cited by the defence in its Request for Leave to Appeal as having been left unanswered.²⁴

12. Lastly, the prosecution submits that even if the issues "were appealable issues arising from the Decision, they do not meet the criteria for leave to appeal under Article 82(1)(d)".²⁵ It indicates that: (i) the defence's arguments relating to protection of legal privilege and disclosure of information are unsupported;²⁶ (ii) the possibility that the Chamber "may admit into evidence some of the Article 70 materials is insufficient to establish any impact at this time on the fair conduct of the proceedings";²⁷ (iii) the defence ignores the settled law that hypothetical impact on the fairness of the proceedings is insufficient to grant leave to appeal under Article 82(1)(d);²⁸ (iv) the defence argument that the issues affect the expeditious conduct of the proceedings in the case is unsubstantiated and is based on the incorrect and unsupported assumption that the prosecution has accessed privileged information and failed to disclose relevant materials;²⁹ (v) intervention by the Appeals Chamber would not materially advance the proceedings but would instead be detrimental to the efficient conduct of the proceedings and cause unnecessary delay;³⁰ and (vi) any appealable issues can and should be addressed in the context of a final appeal, barring exceptional circumstances.³¹

II. Analysis

²⁴ ICC-01/05-01/08-3067, paragraph 7.

²⁵ ICC-01/05-01/08-3067, paragraph 8.

²⁶ ICC-01/05-01/08-3067, paragraph 9.

²⁷ ICC-01/05-01/08-3067, paragraph 9.

²⁸ ICC-01/05-01/08-3067, paragraph 9.

²⁹ ICC-01/05-01/08-3067, paragraph 10.

³⁰ ICC-01/05-01/08-3067, paragraph 11.

³¹ ICC-01/05-01/08-3067, paragraph 11.

13. For the purpose of the present Decision and in accordance with Article 21(1) of the Rome Statute ("Statute"), the Chamber has considered Articles 67 and 82(1)(d) of the Statute and Rule 155 of the Rules of Procedure and Evidence.
14. In deciding on the Request for Leave to Appeal, the Chamber is guided by the established jurisprudence of this Chamber and of the Court regarding the interpretation of Article 82(1)(d) of the Statute. In line with this jurisprudence, for a request for leave to appeal to be granted, the party seeking leave to appeal should identify specific "issues" which were dealt with in the relevant decision and which constitute the appealable subject.³²
15. The Appeals Chamber has held that "[o]nly an 'issue' may form the subject-matter of an appealable decision. 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."³³ In addition, Article 82(1)(d) of the Statute cannot be used to litigate abstract or hypothetical issues.³⁴
16. Accordingly, the Chamber has examined the Request for Leave to Appeal according to the following criteria:

³² 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, paragraph 9; *see also* 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, paragraph 9.

³³ ICC-01/04-168, paragraph 9; *see also* ICC-01/05-01/08-2399, paragraph 10.

³⁴ 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, paragraph 17; 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, paragraph 11; Decision on the Defence Request for leave to appeal the 21 November 2008 Decision, 10 February 2009, ICC-02/04-01/05-367, paragraph 22; 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, paragraphs 32 to 34; 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, paragraphs 50 and 61.

- a) Whether the matter is an “appealable issue”;
- b) Whether the issue at hand would significantly affect:
 - i. the fair and expeditious conduct of the proceedings; or
 - ii. the outcome of the trial; and
- c) Whether, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.³⁵

17. 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.³⁶

18. It is not sufficient for the purposes of granting leave to appeal that the issue for which leave to appeal is sought is of general interest or that it may arise in future pre-trial or trial proceedings.³⁷ Further, it is insufficient that an appeal may be legitimate or even necessary at some future stage, as opposed to requiring immediate resolution by the Appeals Chamber in order to materially advance the proceedings.³⁸

19. In addition, a party seeking leave to appeal should take into account that the Appeals Chamber’s function in relation to the exercise of discretion by a Pre-Trial or Trial Chamber is limited to ensuring that the Chamber properly exercised its discretion. The Appeals Chamber has held that it “will interfere with a discretionary decision only under limited conditions”,³⁹ namely: “(i)

³⁵ 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, paragraph 23; *see also* ICC-01/05-01/08-2399, paragraph 11.

³⁶ ICC-01/05-01/08-1169, paragraph 24; *see also* ICC-01/05-01/08-2399, paragraph 12.

³⁷ ICC-01/05-01/08-1169, paragraph 25. *See also* Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58, 19 August 2005, ICC-02/04-01/05-20-US-Exp (unsealed pursuant to Decision ICC-02/04-01/05-52), paragraph 21; Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191, paragraph 11; *see also* ICC-01/05-01/08-2399, paragraph 13.

³⁸ ICC-01/05-01/08-1169, paragraph 25; *see also* ICC-01/05-01/08-2399, paragraph 13.

³⁹ Judgment on the appeal of the Defence against the “Decision on the admissibility of the case under article 19(1) of the Statute” of 10 March 2009, 16 September 2009, ICC-02/04-01/05-408, paragraph 80.

where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion".⁴⁰

First Issue

20. According to the defence, the Chamber erred by requiring the defence to provide concrete instances of prejudice in the *Bemba* case when making a request for *interim* relief, that is, relief aimed at preventing prejudice *before* it occurs.⁴¹

21. While a request for interim relief is by its nature forward-looking, any request for such relief must be substantiated. In this regard, the defence's request for interim relief was based upon the argument that the defence "may have been and may continue to be gravely prejudiced",⁴² giving rise to an "immediate need to take steps to prevent or at least, mitigate any further prejudice".⁴³ Indeed, the defence requested the Chamber to order the prosecution to "*desist*" from ongoing actions.⁴⁴

22. In the Impugned Decision, the Chamber considered these arguments and analysed whether the defence had substantiated the prejudice it alleged.⁴⁵ The Chamber noted that the defence had failed "to articulate any concrete instance of prejudicial impact" in the *Bemba* case and that it had only presented arguments which "ultimately amount to an inference that there is a risk that the prosecution has gained access to privileged material".⁴⁶ In key part, the

⁴⁰ ICC-02/04-01/05-408, paragraph 80.

⁴¹ ICC-01/05-01/08-3059, paragraph 7.

⁴² ICC-01/05-01/08-2945-Conf, paragraph 1.

⁴³ ICC-01/05-01/08-2945-Conf, paragraph 9.

⁴⁴ ICC-01/05-01/08-2945-Conf, paragraph 78 (emphasis added).

⁴⁵ ICC-01/05-01/08-3059, paragraphs 2, 6, and 17.

⁴⁶ ICC-01/05-01/08-3059, paragraph 20.

Chamber determined that “the defence has failed to substantiate its claim that the accused has suffered or is suffering prejudice in the Bemba case, caused by the proceedings related to case ICC-01/05-01/13”.⁴⁷ As such, the findings of the Chamber were not contingent upon the timing of the alleged prejudice which the defence sought interim relief to address, but rather on a lack of proper substantiation of such prejudice.

23. Consequently, the First Issue does not constitute an appealable issue arising out of the Impugned Decision.

Second Issue

24. The Second Issue is premised on the assumptions that: (i) the prosecution is in possession of, and has failed to disclose, material revealing “information setting out Defence strategy and information” and “the innermost strategies and internal communications concerning the Defence case”; and (ii) the Chamber failed to take steps to address this omission.

25. Contrary to the defence’s contention, the Chamber did address the prosecution’s alleged failure to disclose material to the defence. The Chamber assessed whether the defence’s allegation was substantiated⁴⁸ and noted the prosecution’s statement that it “is not privy to any information that is protected by legitimate professional privilege”.⁴⁹ After assessing the information before it, the Chamber concluded that the defence’s allegation was not properly substantiated and accordingly, rejected the defence’s requests.⁵⁰ Consequently, the Second Issue does not arise from the Impugned Decision.

⁴⁷ ICC-01/05-01/08-3059, paragraph 24.

⁴⁸ ICC-01/05-01/08-3059, paragraph 18.

⁴⁹ ICC-01/05-01/08-3059, paragraph 19.

⁵⁰ ICC-01/05-01/08-3059, paragraphs 20 and 24.

Third Issue

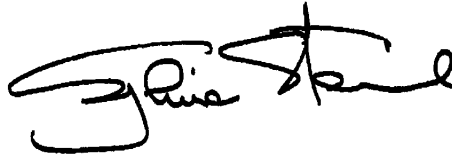
26. The third issue is composed of three sub-issues. Sub-Issue (c), related to an alleged failure by the Chamber to consider some defence submissions, does not arise from the impugned decision for reasons identical to those set out with respect to the Second Issue.
27. With regards to Sub-Issues (a) and (b), whereby the defence argues that the Chamber failed to consider a number of submissions advanced by the defence, the Chamber notes that the Impugned Decision did in fact address those submissions. The Chamber took these arguments into account and concluded that they “ultimately amount to an inference that there is a risk that the prosecution has gained access to privileged material [and that] the defence does not articulate any concrete instance of prejudicial impact on the accused’s interests in the *Bemba* case that would justify the broad interim relief it seeks”.⁵¹
28. Consequently, the Third Issue does not constitute an appealable issue arising from the Impugned Decision.
29. As none of the issues raised in the Request for Leave to Appeal 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 specified above.

III. Disposition

30. For the foregoing reasons, the Chamber hereby DENIES the Request for Leave to Appeal.

⁵¹ ICC-01/05-01/08-3059, paragraph 20.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 26 August 2014

At The Hague, the Netherlands