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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 Document

Prosecution's Response to the Defence Request for Leave to Appeal the "Decision on Defence Request for Relief for Abuse of Process"

Source: The Office of the Prosecutor

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

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I. Introduction

1. The Defence application for leave to appeal¹ the “Decision on Defence Request for Relief for Abuse of Process”² should be dismissed. The 11 issues referred to in the Application³ neither arise from the Decision nor are they appealable issues within the meaning of article 82(1)(d). In addition, none of the Issues meet the criteria for leave to appeal under article 82(1)(d). The Application fails to show that the Issues would significantly affect the fair and expeditious conduct of the proceedings, *and* that the Appeals Chamber’s immediate resolution may materially advance the proceedings.

II. Submissions

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

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

2. The First Issue, namely whether the Trial Chamber incorrectly applied the legal standard for a stay of proceedings,⁴ does not arise from the Decision as it does not correctly represent the Decision. When setting out the legal test for a stay of proceedings, the Trial Chamber articulated the two possible situations that may justify a stay of proceedings.⁵ Contrary to the contention of the Defence, the Trial Chamber did not require the Defence to establish that both situations apply cumulatively, but held that either situation may justify a stay of proceedings. The word “and” used by the Chamber in this context simply lists the two situations that would justify a stay of proceedings. This is further evidenced by the manner in

¹ ICC-01/05-01/08-3260-Corr (“Defence Application”).

² ICC-01/05-01/08-3255 (“Decision”).

³ Defence Application, para.8 (“Issues”).

⁴ Defence Application, para.8(i) and footnote 11.

⁵ Decision, para.10: “a stay of proceedings is only justified where the situation is such that it is ‘impossible to piece together the constituent elements of a fair trial’, and ‘it would be ‘repugnant’ or ‘odious’ to the administration of justice to allow the case to continue’”.

which the Trial Chamber applied the law to the facts of the case. The Chamber repeatedly found that the Defence has failed to meet either of the two tests, namely that it is “‘impossible to piece together the constituent elements of a fair trial’ or that it would be ‘repugnant’ or ‘odious’ to the administration of justice to allow the cause to continue”.⁶

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

3. The Second Issue, namely whether the Trial Chamber erred in finding that it had no “positive obligation to take measures to ensure the confidentiality of Defence information” on the basis that this would have required the Chamber to review measures ordered by the Single Judge in the Article 70 Case,⁷ does not arise from the Decision. The Trial Chamber did not enter findings to that effect in this Decision. It merely recalled its prior findings on identical arguments from the Defence and declined to review the legality or propriety of measures conducted in the investigations in the Article 70 Case, because it had already ruled on the matter.⁸

(c) The Third Issue is not an appealable issue

4. The Third Issue, namely whether the Trial Chamber erred in rejecting the Defence’s arguments concerning the scope of lawyer-client privilege by reference to its prior decision,⁹ is not an appealable issue. It is a mere disagreement with the manner in which the Chamber disposed of the Defence’s repetitious submissions. In particular, the Defence disagrees that the Chamber’s earlier decision on the Defence Motion on Privileged Communications¹⁰ applies to “communications between Mr

⁶ Decision, paras.30, 47, 64, 72, 74 (emphasis added).

⁷ Defence Application, para.8(ii).

⁸ Decision, paras.17-18, 34.

⁹ Defence Application, para.8(iii).

¹⁰ ICC-01/05-01/08-3080, see in particular para.19.

Bemba and Mr Mangenda”.¹¹ Moreover, the Defence’s allegation that the Trial Chamber’s prior decision on the matter is inconsistent with a decision from a different Chamber is unsubstantiated and irrelevant in this context.¹²

(d) The Fourth Issue does not arise from the Decision

5. The Fourth Issue, namely whether the Trial Chamber erred in applying a different standard to Prosecution and Defence submissions on the question of the Prosecution’s access to privileged material, does not correctly represent the Decision and does therefore not arise from the Decision.¹³ Contrary to the Defence’s contention, the Decision does not accept unsubstantiated Prosecution submissions that it has no access to privileged material, while dismissing Defence submissions on the basis that they were unsubstantiated.¹⁴ Instead, the Chamber’s conclusion that it had no reason to doubt the Prosecution’s assertion that it is not privy to any privileged information was squarely based on the Single Judge’s assurance that he had put in place sufficient safeguards to prevent the Prosecution from accessing privileged material and that as a result, “no privileged documents came in the possession of the Prosecution”.¹⁵ The Trial Chamber has already noted in a previous decision that “the Defence has chosen to disregard that statement and to advance a set of unsubstantiated and speculative allegations instead”.¹⁶

¹¹ Decision, para.61.

¹² The Defence alleges that the Trial Chamber’s Decision on the Defence Motion on Privileged Communications is inconsistent with the decisions of Pre-Trial Chamber III in the Article 70 Case, namely ICC-01/05-01/13-983-Conf and ICC-01/05-01/13-907.

¹³ Defence Application, para.8(iv).

¹⁴ Defence Application, para.8(iv).

¹⁵ Decision, para.73; see also the Trial Chamber’s prior decisions referred to in this Decision, which clearly demonstrate that the Chamber’s conclusion is based on the Single Judge’s assurance: ICC-01/05-01/08-3059, para.19 and ICC-01/05-01/08-2965, para.2.

¹⁶ ICC-01/05-01/08-2965, para.2.

(e) The Fifth Issue is not an appealable issue and does not arise from the Decision

6. The Fifth Issue, namely whether the Trial Chamber erred in finding that no prejudice arose from the two-year delay in the disclosure of Rule 77 material,¹⁷ is not an appealable issue, but a mere disagreement with the manner in which the Chamber disposed of the Defence arguments. In particular, the Defence disagrees with the Chamber's finding that the Defence failed to make use of its ample opportunity to advance submissions as to any alleged prejudice caused by the timing of the disclosure of this material.¹⁸

7. The Fifth Issue also does not correctly represent the Decision and therefore does not arise from it. Contrary to the Defence's claim, the Decision does not fail to address the alleged inability of the Accused to contemporaneously confront his witnesses with information arising from the disclosure in 2012.¹⁹ Instead, the Trial Chamber examined the Defence's submissions as to the alleged prejudice caused by the delayed disclosure of Rule 77 material at great length.²⁰ In that context, it noted, among others, that the Prosecution put only open-ended questions to Defence witnesses regarding issues affecting credibility—without particularising allegations or presenting or referring to any undisclosed information. As a result, the Chamber concluded that the Defence was not precluded from following up by any lack of information.²¹

(f) The Sixth Issue does not arise from the Decision

8. The Sixth Issue, namely whether the Trial Chamber erred in finding that the relevant Rule 77 material was disclosed on 22 July 2014, does not arise from the

¹⁷ Defence Application, para.8(v).

¹⁸ Decision, para.84, cited in Defence Application, footnote 18.

¹⁹ Defence Application, para.8(v).

²⁰ Decision, paras.86-90.

²¹ Decision, para.87.

Decision. It wrongly assumes that the Trial Chamber was made aware prior to the rendering of the Decision that the Prosecution's disclosure violations were ongoing in this case.²² The Defence alleges that the Trial Chamber was made aware of this in a filing submitted by the Defence of Mr Bemba in the Article 70 proceedings.²³ However, the redacted version of this filing which was accessible to the Trial Chamber does not include the factual allegations upon which the Defence's claim is based.²⁴ Even if, *arguendo*, the Trial Chamber had had access to those allegations, the submissions made by the Defence in the Article 70 Case do not demonstrate that the Prosecution violated its disclosure obligations in the Main Case. The Defence's submissions to that effect are speculative and merely express a disagreement with the Decision that the "relevant" Rule 77 material was disclosed on 22 July 2014.

(g) *The Seventh Issue does not arise from the Decision*

9. The Seventh Issue, namely whether the Trial Chamber erred in excusing the Prosecution's non-disclosure of Rule 77 material on the basis that the undisclosed material "was neither submitted nor admitted into evidence in the Bemba case"²⁵ also does not arise from the Decision. The Chamber did not "excuse" the late disclosure of Rule 77 materials because they were not admitted or submitted into evidence in the *Bemba* case. Instead, the Trial Chamber extensively addressed and rejected the Defence's allegations that the Accused suffered prejudice from the delayed disclosure of Rule 77 material.²⁶ In so doing, it found among others, that the Prosecution had properly put its case to the Defence without referring to undisclosed information and that this did not unfairly impact on the Defence's ability to question

²² Defence Application, para.8(vi).

²³ Defence Application, footnote 19, referring to ICC-01/05-01/13-1005-Conf-Red, paras.52-55.

²⁴ The examples referred to in the Defence Application, footnote 19 are redacted from ICC-01/05-01/13-1005-Conf-Red, paras.53-54, as such, they were not available to the Trial Chamber. The unredacted versions of these submissions are classified *ex parte* (Bemba Defence and Prosecution only): see ICC-01/05-01/13-1005-Conf-Exp.

²⁵ Defence Application, para.8(vii).

²⁶ Decision, paras.86-90.

its witnesses.²⁷ In that context the Chamber merely noted the fact that the Rule 77 material was not admitted into evidence to illustrate its irrelevance to the Defence's ability to effectively question its witness.

(h) *The Eighth Issue is not an appealable issue and does not arise from the Decision*

10. The Eighth Issue concerns the Trial Chamber's alleged failure to address in its Decision its purported previous error in not referring the Prosecution's *ex parte* filings and submissions immediately to the Pre-Trial Chamber.²⁸ This is not an appealable issue. In fact, the Defence does not substantiate how the Chamber's alleged failure in *this* Decision was essential²⁹ to the rejection of the Fourth Allegation³⁰ and its conclusion that the Defence "fails to demonstrate any objective lack of impartiality on the part of the Chamber."³¹ The Defence speculates that the Trial Chamber has "entertain[ed]" the Prosecution's filings and submissions "for a period of five months".³² However, it does not indicate any concrete step that the Trial Chamber undertook with respect to those filings and submissions other than referring them to the Pre-Trial Chamber. Moreover, any alleged error in the Trial Chamber's decision to refer the Prosecution's filings and submissions to the Pre-Trial Chamber would arise from that prior decision and not from *this* Decision for which the Defence seeks leave to appeal.

²⁷ Decision, para.87.

²⁸ Defence Application, para.8(viii).

²⁹ The Appeals Chamber has held that an issue within the terms of article 82(1)(d) is "a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination". ICC-01/04-168 OA3, para.9; ICC-02/04-01/05-367, para.22; ICC-02/05-02/09-267, p. 6; ICC-01/04-01/06-2463, para.8; ICC-01/09-02/11-27, para.7. See also, ICC-01/04-01/06-1433 OA11, (Dissenting Opinion of Judge Song), para.4, specifying that "[a] decision 'involves' an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made."

³⁰ The Fourth Allegation concerned the Prosecution's alleged repeated attempts to contaminate the ability of the Trial Chamber to adjudicate the case impartially" (see Decision, para.12(iv)).

³¹ Decision, para.115.

³² Defence Application, para.8(viii).

(i) *The Ninth Issue does not arise from the Decision*

11. The Ninth Issue, namely whether the Trial Chamber failed to apply the correct legal standard of “whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias in the judge”³³ does not arise from the Decision. The Defence Application does not correctly portray the Decision, which correctly sets out the applicable legal threshold as developed by the jurisprudence from the Plenary and the Presidency.³⁴ It then proceeds to apply this standard to the facts of the case. Even if the Trial Chamber does not fully repeat and spell out the entire legal test to each of its factual findings, and instead uses a short form in its factual conclusions,³⁵ it cannot reasonably be concluded that the Chamber applied anything other than the objective standard that it articulated just a few paragraphs earlier.

(j) *The Tenth Issue is not an appealable issue*

12. The Tenth Issue, namely whether the Trial Chamber provided direct guidance to the Prosecution in connection with its *ex parte* investigations against the Defence,³⁶ is not an appealable issue. It is not a subject the resolution of which was essential for the determination of the Defence’s Request for Relief for Abuse of Process. In fact, the Trial Chamber observed that this issue “is not linked to the Defence’s Allegations or its broader submissions as to the Chamber’s objective impartiality”.³⁷ Moreover, the example referred to by the Defence in support of its submission³⁸ is nothing more

³³ Defence Application, para.8(ix).

³⁴ Decision, para.100.

³⁵ See Decision, para.103: “...the Chamber sees nothing giving rise to any doubts as to its impartiality”; para.104: “...the Chamber does not consider that ... raise reasonable doubts as to the Chamber’s impartiality”; para.113: “The Chamber sees nothing in the Defence’s submissions demonstrating any impropriety or the appearance of impropriety in the Chamber’s approach”.

³⁶ Defence Application, para.8(x).

³⁷ Decision, para.114.

³⁸ Defence Application, para.8(x).

than a disagreement with the Chamber's finding that it merely "facilitated discussion between the Prosecution and Registry".³⁹

(k) *The Eleventh Issue is not an appealable issue*

13. Finally, the Eleventh Issue on whether the Trial Chamber failed to address certain submissions of the Defence concerning P-178,⁴⁰ is also not an appealable issue. Contrary to the Defence's contention, the Decision does refer to the Defence's submissions in question.⁴¹ It may not have given those submissions the weight that the Defence was hoping for. However, that amounts to a mere disagreement on the manner in which the Chamber addressed the Defence's submissions. Moreover, the Defence does not demonstrate how giving more weight to those submissions would have been essential for the determination of the Defence's Request for Relief for Abuse of Process.

B. The Issues do not meet the criteria for leave to appeal under article 82(1)(d)

14. 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).

(a) *The Issues do not affect the fair and expeditious conduct of the proceedings*

15. The Defence's submissions that the Issues affect the fair conduct of the proceedings⁴² are unsupported. The Defence merely alleges in general terms that the Prosecution failed in the Article 70 investigations to give due regard to the fairness of the proceedings in the present case and that the Trial Chamber failed to ensure that

³⁹ Decision, para.114.

⁴⁰ Defence Application, para.8(xi).

⁴¹ Decision, para.97, footnote 228.

⁴² Defence Application, para.9.

the proceedings remain untainted by this process. However, it does not demonstrate how any of the eleven Issues affects the fairness of the proceedings. According to the settled law, it is not sufficient to provide a purely general complaint⁴³ or unsubstantiated arguments.⁴⁴ Nor can an applicant speculate in the abstract that the Decision causes prejudice to the rights of the accused⁴⁵ or argue that an issue has a hypothetical impact on the fairness of proceedings.⁴⁶ Instead, an applicant must articulate how the Issues “specifically affect” the fairness of the proceedings⁴⁷ and cause prejudice to the Defence.⁴⁸ The Defence has failed to do so in its Application.

16. The Defence’s arguments that the Issues affect the expeditious conduct of the proceedings⁴⁹ are similarly unsupported. In particular, the suggestion that the Issues are of such significance as to render any deliberations on the merits of the case unnecessary,⁵⁰ is entirely hypothetical. In fact, none of the eleven Issues has the slightest impact on the expeditious conduct of the proceedings. Moreover, the Defence’s suggestion that immediate appellate intervention will expedite the upcoming appellate proceedings against the Article 74 decision and therefore the proceedings in general, is illogical, especially since the Defence argues that it would advance the same arguments in a possible interlocutory appeal that it would otherwise raise in a final appeal against the final judgment.⁵¹

⁴³ ICC-01/04-01/06-2463, para.31.

⁴⁴ ICC-01/09-01/11-1154, para.26.

⁴⁵ See ICC-01/04-168 OA3, para.10; ICC-02/04-01/05-316, p.6; ICC-01/09-02/11-211 paras.33 and 39; ICC-01/09-02/11-88, para.25, see also paras.23-27; ICC-01/04-01/06-2109, para.22; ICC-01/05-01/08-680, para.36; ICC-01/09-02/11-275, paras.28-29; ICC-01/09-01/11-301, para.30.

⁴⁶ ICC-01/04-01/07-1958, para.20. See also: ICC-02/04-01/05-367, paras.21-22.

⁴⁷ ICC-01/05-01/08-2925, para.34.

⁴⁸ ICC-01/05-01/08-2925, para.34.

⁴⁹ Defence Application, paras.10-11.

⁵⁰ Defence Application, para.10.

⁵¹ Defence Appeal, para.11.

(b) *Immediate resolution of the Issues by the Appeals Chamber would not materially advance the proceedings*

17. Contrary to the contention of the Defence, none of the Issues, if wrongly decided at first instance, would have irreparable consequences on the proceedings.⁵² Not only has the Defence failed to support its allegations, but they are both speculative and premature. Whether the Prosecution's investigation into the Article 70 proceedings could have any possible impact on the outcome of the proceedings in the Main Case will depend on the upcoming final judgment by the Trial Chamber in the Main Case. And in that regard, the Trial Chamber has stressed that "its decision pursuant to Article 74 of the Statute will be based solely on evidence submitted and discussed before it at the trial"⁵³ and it has repeatedly considered "whether the Defence claim that the Accused in the [Main Case] has suffered prejudice as a result of the proceedings in [Article 70 Case] is substantiated".⁵⁴

18. Finally, an interlocutory appeal against the Decision at this advanced stage of the deliberations phase will ordinarily not materially advance the proceedings. To the contrary, it could delay the issuance of the Trial Chamber's final judgment. As a result, to the extent that any of the Issues could have an impact on that final judgment, the Defence has an adequate remedy as it could raise any of those Issues in the context of a final appeal.⁵⁵

⁵² Defence Appeal, paras.13-14.

⁵³ Decision, para.88.

⁵⁴ Decision, para.123; see also ICC-01/05-01/08-3059, para.18; ICC-01/05-01/08-3101, paras.23-26.

⁵⁵ 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.

III. Conclusion

19. For the above reasons, the Defence Application should be rejected.



Fatou Bensouda, Prosecutor

Dated this 26th Day of June 2015

At The Hague, The Netherlands