



Original: English

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

Date: 07/09/2015

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

*With Public Annex A and Confidential Annexes B, C, D, E and F
And Public Redacted Versions of Annexes B, C, D, E and F*

Defence Request concerning the Prosecutor's statement in *Jeune Afrique*

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

The Office of the Prosecutor

Fatou Bensouda

Jean-Jacques Badibanga

Counsel for the Defence

Peter Haynes QC

Kate Gibson

Melinda Taylor

Legal Representatives of the Victims

Marie-Edith Douzima-Lawson

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for the Victims

Paolina Massidda

The Office of Public Counsel for the Defence

Xavier-Jean Keita

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Nigel Verril

Detention Section

Victims Participation and Reparations Section Other

A. INTRODUCTION

1. In early 2015, the Chief Prosecutor of the ICC gave an interview to the magazine *Jeune Afrique*. The interview was published in the form of a transcript of a question and answer session, under the title “Fatou Bensouda: En Côte d’Ivoire, personne ne sera épargné”. In the interview, the Prosecutor is quoted as saying that the Prosecution has been able to demonstrate that the Defence presented false evidence in the *Bemba* case, and witness tampering has occurred in these proceedings.¹

2. In doing so, the Prosecutor has misrepresented as final, issues that are still awaiting resolution by the Court. This cannot be reconciled with the presumption of innocence enjoyed by accused before the ICC, and the requirement that the Prosecutor refrain from expressing opinions on the guilt or innocence of the accused or the merits of issues which are *sub judice*, outside of court proceedings. As previously held by the Appeals Chamber, “such behaviour not only reflects poorly on the Prosecutor but also, given that the Prosecutor is an elected official of the Court and that his statements are often imputed to the Court as whole, may lead observers to question the integrity of the Court as a whole.”²

3. Attempts on the part of the Defence to secure retraction or correction over the course of six months have been unsuccessful. In such circumstances, the Defence seizes the Trial Chamber with a request to order the Prosecutor to publish an immediate retraction of the misleading statement in question.

B. BACKGROUND

¹<http://www.jeuneafrique.com/33574/politique/fatou-bensouda-en-c-te-d-ivoire-personne-ne-sera-pargn/>

² ICC-01/11-01/11-175, para. 33.

4. The interview with the Prosecutor which includes the impugned statement was published in *Jeune Afrique's* hardcopy edition of 25 – 31 January. It was also published online. The interview quoted the Prosecutor as saying:

Dans le cas Bemba, nous avons été en mesure de démontrer que c'est la défense qui a présenté ou fabriqué de fausses preuves et que des témoins ont fait l'objet de tentatives de corruption. Le mois dernier, des mandats d'arrêt ont été lancés contre les suspects. Tout ceci montre qui a vraiment eu recours à de la subornation de témoin dans ce dossier.

5. On 6 February 2015, the Defence wrote to the Prosecutor, pointing out the inaccuracies in this statement. The Defence asked that if the statement had been attributed to her in error, that she contact the publication and ask that it issue a retraction and correction in the forthcoming issues, or alternatively issue a press release correcting any false impression.³

6. After a follow-up email from the Defence on 18 February 2015, the Prosecutor replied on 27 February 2015 that the inaccuracies contained in the article were the result of "editorial/journalistic oversight" and that the magazine would implement corrections shortly.⁴

7. A follow-up email from the Defence on 14 April 2015 went unanswered. The Defence wrote again to the Prosecutor on 18 August 2015 asking that, in the absence of a correction by *Jeune Afrique*, the Prosecutor could publish a retraction itself, either in the form of a letter to the editor or a press release.⁵

8. The Prosecutor replied on 18 August 2015 that although corrections had been implemented, "the initial version of the interview is now available on the magazine's website". The Prosecutor undertook to liaise with the magazine to

³ Annex A, Letter Defence to Prosecutor, 6 February 2015.

⁴ Annex B, Email Prosecutor to Defence, 27 February 2015.

⁵ Annex C, Email Defence to Prosecution, 18 August 2015.

ensure that the “previously corrected version of the interview is once again uploaded”.⁶ A request from the Defence for copies of the Prosecutor’s correspondence with the magazine and a copy of the corrected article was ignored.

9. On 25 August 2015, the Prosecutor provided the Defence with a link to the *Jeune Afrique* website, purporting to host the re-corrected article.⁷ This version of the interview quotes the Prosecutor as saying:⁸

Dans le cas Bemba, nous avons été en mesure de démontrer que c’est la défense qui a présenté de fausses preuves et que des témoins ont fait l’objet de tentatives de corruption. En novembre 2013, des mandats d’arrêt ont été lancés contre les suspects. Tout ceci montre qui a vraiment eu recours à de la subornation de témoin dans ce dossier.

10. On 2 September 2015, the Defence wrote again to the Prosecutor, noting that she has not established that the Defence presented false evidence in the *Bemba* case, nor that witness tampering occurred. The Prosecutor was asked to confirm by 4 September 2015 whether she would be making any further attempts to have the statement retracted.⁹ No response was received.

C. APPLICABLE LAW

11. Accused before the ICC benefit from a presumption of innocence.¹⁰

12. Article 67(1) of the ICC Statute guarantees the rights of an accused, including that right that he “shall be entitled ... to a fair hearing conducted impartially.” Article 64(2) of the Statute empowers the Trial Chamber with the duty “to ensure

⁶ Annex D, Email Prosecution to Defence, 18 August 2015.

⁷<http://www.jeuneafrique.com/33574/politique/fatou-bensouda-en-c-te-d-ivoire-personne-ne-sera-pargn/>.

⁸ Annex E, Email Prosecution to Defence, 25 August 2015.

⁹ Annex F, Email Defence to Prosecution, 2 September 2015.

¹⁰ Article 66, ICC Statute.

that a trial is fair and expeditious and conducted with full respect for the rights of the accused.”

13. Relevant codes of conduct, and prosecution standards across international jurisdictions indicate that a prosecutor should refrain from expressing any opinion on the guilt or innocence of the accused or the merits of issues which are *sub judice*, outside of court proceedings.

14. In the *Muthaura et al.* case, it was held that as a matter of principle, the safeguarding of the proper administration of justice and the integrity of the judicial proceedings requires the parties, participants and any person involved in the proceedings, to refrain from making public statements or engage in any other activity which could have an impact on the evidence or the merits of the case or could be perceived as showing a predetermination of the cause pending before the Court.¹¹

15. The ICC Prosecutor has previously been reprimanded by the Court for suggesting, incorrectly, that cases at the ICC have been decided prior to a Chamber’s Article 74 decision.¹² In *Lubanga*, the Prosecution was instructed not to express views on matters that are awaiting resolution by the Chamber, thereby intruding on the latter’s role.¹³ The Pre-Trial Chamber in *Mbarushimana*, of which the Presiding Judge of the present proceedings formed a part, again reminded the Prosecutor that when making future public statements, he should be mindful of the suspects’ right to be presumed innocent until proved guilty.¹⁴

¹¹ ICC-01/09-02/11-83, para. 6.

¹² ICC-01/04-01/06-2433, para. 51.

¹³ ICC-01/04-01/06-2433, para. 52.

¹⁴ ICC-01/04-01/10-51, para. 17.

16. The *Mbarushimana* Pre-Trial Chamber also held that Article 66 of the ICC Statute, setting out the presumption of innocence,¹⁵ must be interpreted and applied consistently with internationally recognized human rights, as required by Article 21(3) of the ICC Statute. Consequently, the case law of the European Court of Human Rights ("European Court") and the European Commission of Human Rights ("Commission") was found to be of relevance to the question of prejudicial statements made to the press.

17. To this end, the European Court has held that while the presumption of innocence cannot prevent the authorities from informing the public about criminal investigations in progress, it requires that they do so "with all the discretion and circumspection necessary if the presumption of innocence is to be respected."¹⁶ Similarly, the Commission held that the presumption of innocence "protects everybody against being treated by public officials as being guilty of an offence before this is established according to law by a competent court."¹⁷ The Commission further emphasized that public authorities, in particular those involved in criminal investigations and proceedings, "should be careful when making statements in public, if at all, about matters under investigation and on the persons concerned thereby, in order to avoid as much as possible that these statements could be misinterpreted by the public and possibly lead to the [person]'s innocence being called into question even before being tried."¹⁸

18. The European Court has held that "[a] fundamental distinction must be made between a statement that someone is merely suspected of having committed a crime and a clear declaration, in the absence of a final conviction, that an individual

¹⁵ ICC-01/04-01/10-51, para. 9.

¹⁶ *Allenet de Ribemont v. France*, "Judgment", 10 February 1995, application no. 15175/89, para. 38.

¹⁷ *Krause v. Switzerland*, "Decision", 3 October 1978, application no. 7986/77. The Chamber notes that the "public officials" referred to in this and other cases discussed in this section were in fact prosecutors or other persons in charge of the relevant investigations. The Chamber thus finds these cases to be of sufficient similarity to the present case to be of direct relevance.

¹⁸ *X. V. the Netherlands*, "Decision", 17 December 1981, application no. 8361/78.

has committed the crime in question.”¹⁹ It is incompatible with the presumption of innocence when statements made by public officials encourage the public to believe the suspect to be guilty and prejudice the assessment of the facts by the competent judicial authority.²⁰

D. SUBMISSIONS

19. In direct contravention to the internationally established legal principles cited above, and the unequivocal jurisprudence of the Court on the question of prosecutorial statements in the press, the Prosecutor misrepresented as final, issues that are awaiting resolution by the Court.

20. By stating that in the *Bemba* case, the Defence has presented false evidence, and that witness tampering has occurred, the Prosecutor is stating as fact, issues that are awaiting adjudication. In doing so, the Prosecutor has violated the presumption of innocence through providing a public statement, concerning a person charged with a criminal offence, which reflects an opinion that he is guilty before he has been proved so according to law.²¹ Moreover, as has been emphasised by the Appeals Chamber of the Special Court for Sierra Leone, the publication of predetermined views concerning the criminal responsibility of a defendant can lead a reasonable bystander to conclude that the official in question lacks the requisite appearance of impartiality.²² As such, this statement should be publicly retracted in order to preserve the integrity of these proceedings.

¹⁹ Fatullayev v. Azerbaijan, "Judgment", 22 April 2010, application no. 40984/07, para. 160.

²⁰ ECtHR, *Alenet de Ribemont v. France*, "Judgment", 10 February 1995, application no. 15175/89, para. 41; ECtHR, *Khuzhin and Others v. Russia*, "Judgment", 23 October 2008, application no. 13470/02, para. 93.

²¹ *Daktaras v. Lithuania*, Application no. 42095/98, 10 October 2000, para. 41. See also *Alenet de Ribemont v. France* judgement of 10 February 1995, Series A no. 308, p.16, para. 35.

²² *Prosecutor v. Sesay*, 'Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber', 13 May 2004, at para. 15.

21. The Prosecutor herself has recently reiterated the inappropriate nature of such public statements. On 30 July 2015, the Prosecutor seized the Appeals Chamber with a request to instruct the parties and participants from commenting on the merits of a case in the media, in the *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*. The Prosecutor stated:²³

Parties and participants must refrain from commenting on the merits of an ongoing case in the press. **Litigation needs to be done in the courtroom and not in the media.** Moreover, given the high profile cases before this Court, and the sensitive nature of the facts underlying this appeal, Parties and participants should exercise caution and ensure the accuracy of their remarks in making any public statements. Indeed, the public needs to be able to trust the published statements of those involved in the case.

22. The same principles must apply across all ICC cases, and to all parties and participants equally. It cannot be the case that the Prosecutor can malign Defence counsel for statements in the press commenting on live issues in a case, while representing that live issues have been resolved in others.

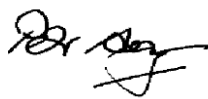
D. RELIEF REQUESTED

23. In light of the above, the Defence respectfully requests that the Trial Chamber:

ORDER the Prosecutor to retract the statement, published in *Jeune Afrique*, that the Prosecution has been able to demonstrate that the Defence presented false evidence in the *Bemba* case, and witness tampering has occurred in these proceedings.

²³ ICC-01/13-36, para. 4.

The whole respectfully submitted.

A handwritten signature in black ink, appearing to read 'Peter Haynes', with a stylized flourish at the end.

Peter Haynes QC

Lead Counsel for Mr. Jean-Pierre Bemba

Done at The Hague, the Netherlands

7 September 2015