

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 8 January 2016

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

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 Representatives 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

REGISTRY

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 “Defence Request concerning the Prosecutor’s statement in *Jeune Afrique*” (“Decision”).

I. Background and submissions

1. On 7 September 2015, the Defence for Mr Jean-Pierre Bemba Gombo (“Defence”) filed its “Defence Request concerning the Prosecutor’s statement in *Jeune Afrique*” (“Defence Request” or “Request”), along with one public annex and five confidential annexes.¹ The Defence Request centres around an interview conducted by the magazine *Jeune Afrique* with the Court’s Prosecutor, Ms Fatou Bensouda, (“Prosecutor”), published in the print edition of 25 to 31 January 2015, and subsequently published online.² In the interview, the Prosecutor is quoted as saying:³

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. En novembre 2013, de 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. (“Statement”)

¹ Defence Request concerning the Prosecutor’s statement in *Jeune Afrique*, 7 September 2015, ICC-01/05-01/08-3292, AnxA, and Conf-AnxB to F. The Defence filed public redacted versions of the confidential annexes on the same day. See ICC-01/05-01/08-3292-Anx-B-Red to F-Red.

² ICC-01/05-01/08-3292, paras 1 and 4.

³ ICC-01/05-01/08-3292, para. 4, referring to “Fatou Bensouda: « En Côte d’Ivoire, personne ne sera épargné »” from 5 February 2015, available at <http://www.jeuneafrique.com/33574/politique/fatou-bensouda-en-c-te-d-ivoire-personne-ne-sera-pargn/>. The Chamber notes that the article was updated on 19 August 2015 and the phrase “Le mois dernier”, originally included, was replaced with “En novembre 2013”. See also ICC-01/05-01/08-3292-AnxA to AnxF, email exchange between the Defence and the Prosecution, discussing two inaccuracies in the interview attributed to “editorial/journalistic oversight” and a corrected version published online.

2. In its Request, filed after an exchange of emails between the Defence and the Office of the Prosecutor (“Prosecution”) regarding the interview,⁴ the Defence requests that the Chamber order the Prosecution to retract the Statement.⁵ In support of its Request, the Defence argues that the Statement misrepresents issues as final, despite awaiting adjudication by the Chamber.⁶ According to the Defence, by making a public statement on an issue *sub judice*, the Prosecution has violated Mr Bemba’s right to the presumption of innocence.⁷ Specifically, the Defence argues that because the Statement concerns a person charged with a criminal offence and reflects an opinion of guilt, “a reasonable bystander” could conclude that an official of the Court “lacks the requisite appearance of impartiality”.⁸ Referring to prior jurisprudence of the Court,⁹ and the European Court of Human Rights,¹⁰ the Defence argues that the Prosecutor’s Statement is incompatible with the presumption of innocence.¹¹ Accordingly, the Defence submits that, in order to protect the integrity of the proceedings, the Statement should be retracted publicly.¹²
3. On 10 September 2015, the Prosecution filed its “Prosecution’s Response to ‘Defence Request Concerning the Prosecutor’s Statement in *Jeune Afrique*’” (“Prosecution Response”), in which it requests that the Chamber dismiss the Defence Request.¹³ The Prosecution submits that: (i) the accusation that

⁴ See ICC-01/05-01/08-3292-AnxA to AnxF.

⁵ ICC-01/05-01/08-3292, para. 23.

⁶ ICC-01/05-01/08-3292, para. 19.

⁷ ICC-01/05-01/08-3292, para. 20.

⁸ ICC-01/05-01/08-3292, para. 20.

⁹ ICC-01/05-01/08-3292, paras 14 to 16.

¹⁰ ICC-01/05-01/08-3292, paras 17 to 18.

¹¹ ICC-01/05-01/08-3292, paras 18.

¹² ICC-01/05-01/08-3292, para. 20.

¹³ Prosecution’s Response to “Defence Request concerning the Prosecutor’s Statement in *Jeune Afrique*”, 10 September 2015, ICC-01/05-01/08-3295.

the Prosecutor misrepresented *sub judice* issues as final is incorrect;¹⁴ (ii) Mr Bemba's presumption of innocence was not violated, as the Prosecutor never stated that Mr Bemba was convicted of any charges and because the reference to warrants of arrest clearly conveys that the matter is still awaiting adjudication;¹⁵ and (iii) the Prosecutor acted properly and in good faith throughout the interview with the magazine, by not discussing the case in depth or any evidence, referring only to public information.¹⁶

II. Analysis

4. For the purpose of the present Decision and in accordance with Article 21(1) of the Rome Statute ("Statute"), the Chamber has considered Articles 64(2), 66(1), and 67(1) of the Statute.
5. The Chamber notes that while the Statute is silent on the relationship between the parties to the proceedings and the media and public statements outside the courtroom, other chambers have dealt directly with the issue.¹⁷ Specifically, Trial Chamber I, in the *Lubanga* case, held that the Chamber's role is not to comment on the relationship between the Court and the media, but instead to focus on the trial and as such "ensure that the interests of justice are upheld".¹⁸ Trial Chamber I further noted that in any statements to the press, parties to the proceedings are expected to not

¹⁴ ICC-01/05-01/08-3295, paras 12 to 17.

¹⁵ ICC-01/05-01/08-3295, paras 18 to 20.

¹⁶ ICC-01/05-01/08-3295, paras 21 to 22.

¹⁷ See, *inter alia*, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the press interview with Ms Le Fraper du Hellen, 12 May 2010, ICC-01/04-01/06-2433; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the Request for Disqualification of the Prosecutor, 12 June 2012, ICC-01/11-01/11-175; *The Prosecutor v. Muthaura, et al.*, Decision on the Defence "Application for Order to the Prosecutor Regarding Extra-Judicial Comments to the Press", 5 May 2011, ICC-01/09-02/11-83; and *The Prosecutor v. Callixte Mbarushimana*, Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings, 31 January 2011, ICC-01/04-01/10.

¹⁸ ICC-01/04-01/06-2433, para. 36.

misrepresent the evidence, wrongly describe the functions of the Chamber, or “imply without proper foundation that anyone in the case, including the accused, has misbehaved”.¹⁹

6. In addition, the Chamber notes that the Appeals Chamber in the *Gaddafi* case held that the presumption of innocence has two aspects. First, it noted that, within the context of court proceedings, the accused shall be presumed innocent until proven guilty beyond reasonable doubt and shall not have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.²⁰ However, the Appeals Chamber stressed, this aspect of the presumption of innocence “does not oblige the Prosecutor to refrain from expressing an opinion on the evidence in support of the guilt or innocence of a suspect or accused, at least within court proceedings.”²¹ To the contrary, the Prosecution has the burden of proof and should be, at each stage of the proceedings, “reasonably and objectively expected to be, convinced by the evidence in support of his claims and to seek to persuade the judges.”²²
7. As to the second aspect of the presumption of innocence, which extends beyond and applies even independent of any pending court proceedings,²³ the Appeals Chamber noted that it “does not necessarily require that a prosecutor remain silent and not comment on pending cases, but it imposes limitations on what he or she may say.”²⁴ The Appeals Chamber held that, as an elected official of the Court and given the specific role under the Statute, the prosecutor must take particular care to respect the

¹⁹ ICC-01/04-01/06-2433, para. 39.

²⁰ ICC-01/11-01/11-175, para. 25.

²¹ ICC-01/11-01/11-175, para. 25.

²² ICC-01/11-01/11-175, para. 25.

²³ ICC-01/11-01/11-175, para. 26.

²⁴ ICC-01/11-01/11-175, para. 27.

presumption of innocence; however, whether particular statements of the prosecutor violate the presumption of innocence needs to be considered in light of the relevant circumstances.²⁵ In addition, it stressed that the presumption of innocence and the impartiality of the prosecutor, while related, protect different interests and are evaluated under different standards.²⁶

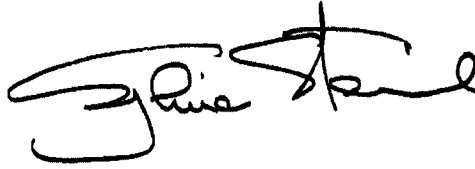
8. Turning to the Statement prompting the Request, and placing it in the context of the Prosecutor's interview as a whole, the Chamber notes that the direct reference made by the Prosecutor to the warrants of arrest issued in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, case ICC-01/05-01/13, supports the conclusion that, when stating that the Prosecution "had been able to demonstrate" ("*été en mesure de démontrer*") that the Defence presented or fabricated false evidence, she was referring to what was demonstrated in case ICC-01/05-01/13 and not in the *Bemba* case. In the view of the Chamber, the Prosecutor's Statement is nothing more than a comment on pending cases before the Court, which does not infringe any of the aspects of Mr Bemba's presumption of innocence as identified by the Appeals Chamber. Moreover, the Chamber finds no merit to the Defence's argument that based on the interview "a reasonable bystander" would infer impartiality by the Prosecutor.
9. In addition, the Chamber notes that the Defence Request, the Prosecution Response, and the present Decision are classified as public, thereby enabling the public to further contextualize the Prosecutor's Statement.

²⁵ ICC-01/11-01/11-175, para. 28.

²⁶ ICC-01/11-01/11-175, para. 29.

10. In view of the above, the Chamber hereby **REJECTS** the Defence Request.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 8 January 2016

At The Hague, the Netherlands