



Original: English

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

Date: 18/01/2016

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

**Defence Request for Leave to Appeal the 'Decision on "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:

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A. INTRODUCTION

1. A criminal trial is an extensive process during which evidence is examined at length by a panel of professional and impartial judges, and crucial importance is placed on the presumption of innocence of an accused. At every step of this process, particular attention must be given to any press statements about the ongoing proceedings. The choice of words in any such press statements must scrupulously avoid any confusion in the mind of a layperson as to the outcome of the trial or the presumed innocence of the accused, in order to avoid jeopardising the independence and fairness of the procedure.

2. The Prosecutor's statement in the 25 – 31 January edition of *Jeune Afrique*¹ violated the right of the Accused to be presumed innocent. The Prosecutor was unequivocal that the Prosecution **had been able to demonstrate** that the Defence produced false evidence and attempted to corrupt witnesses. The Prosecutor asserted that witness subordination had **actually occurred** in the Bemba Case.

3. The terminology employed by the Prosecutor did not leave any possibility for the public to understand anything other than the fact that the Prosecution has indeed proven its case in the parallel Article 70 proceedings, and that the Defence presented false evidence and tampered witnesses in the Main Case. In reality, none of these facts have been proved beyond reasonable doubt yet, and both trials are ongoing before the International Criminal Court.

4. The Defence Request² that the Prosecution be ordered to retract the statement published in *Jeune Afrique* raised a number of legal questions resulting from the Prosecutor's statement, including her reliance on issues that are awaiting

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

² ICC-01/05-01/08-3292.

adjudication as facts; the violation of the presumption of innocence of the Accused, and the prejudice of her declaration to the integrity of the proceedings.

5. The Defence Request was dismissed on the basis that *“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 [...]”*³ and 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.”*⁴

6. In its decision, the Trial Chamber made several errors of fact and law, notably in its appreciation of the Appeals Chamber jurisprudence and in its consideration of the context of the interview and the interpretation to be given to it. These errors give rise to distinct appealable issues that warrant review on the part of the Appeals Chamber, and justify the present request for leave to appeal.

B. REQUEST FOR LEAVE TO APPEAL

(a) Conditions for Leave to Appeal

7. Leave to appeal pursuant to Article 82(1)(d) will be granted if the party submitting the application has identified at least one issue of appeal that has been addressed in the impugned decision, and that meets the following two cumulative criteria as set out in that provision:⁵

- a. It must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and

³ ICC-01/05-01/08-3311, para. 8.

⁴ ICC-01/05-01/08-3311, para. 9.

⁵ ICC-01/04-01/07-108, Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions, 14 December 2007, p.3; ICC-01/04-01/07-116, Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions, 19 December 2007, p.4.

b. It must be an issue for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

8. The Defence notes that the Appeals Chamber has held that “[a]n issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.”⁶

(b) *Identification of Appealable Issues*

9. The Defence submits that the Impugned Decision gives rise to the following identifiable subjects or topics requiring a decision for their resolution, which meet the criteria set out under Article 82(1)(d), and warrant consideration by the Appeals Chamber. These appealable issues are not merely “disagreements” or “conflicts of opinion” between the Defence and the Chamber but rather consist of discrete legal questions which arise directly out of the Impugned Decision.

10. The appealable issues identified are as follow:

- (i) Whether the Trial Chamber erred in its application of the Appeals Chamber jurisprudence in the *Gaddafi* case⁷ which requires the Prosecutor to “*exercise due caution in his statements and refrain from creating the appearance of prejudging issues which are sub judice*”,⁸ and erred in rejecting the Defence request despite no indication that the Prosecutor clarified that the case “*was at an early stage or that it would be up to the Pre-Trial Chamber to decide whether to confirm charges and, if charges were confirmed, for the Trial Chamber to decide on [...] criminal responsibility*”.

⁶ Situation in the Democratic Republic of the Congo, "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, para. 9.

⁷ ICC-01/05-01/08-3311, paras. 6-7.

⁸ ICC-01/11-01/11-175, para. 30.

- (ii) Whether a reasonable Trial Chamber could have interpreted the context of the interview as referring to warrants of arrest issued in the Article 70 Case,⁹ when **not a single mention** is made of those proceedings, and given that the journalist's question referred to the crimes in Bangui in 2002;¹⁰
- (iii) Whether the Trial Chamber erred in stating that it had been "demonstrated in case ICC-01/05-01/13" that the Defence presented or fabricated false evidence,¹¹ given the presumption of innocence afforded to the accused in the Article 70 Case and the absence of a final conviction;
- (iv) Whether the Trial Chamber erred in relying on the public classification of the Defence's Request,¹² Prosecution's Response¹³ and its own Decision¹⁴ as allegedly enabling the public to further contextualize the Prosecutor's statement,¹⁵ thereby erroneously placing a burden on members of the public to search for, locate and contextualize subsequent legal filings, and setting an unacceptable precedent for future press statements by the Prosecutor which prejudice issues pending before Trial Chambers of the ICC.

(c) Satisfaction of the Conditions for Leave to Appeal

⁹ ICC-01/05-01/08-3311, para. 8.

¹⁰ See <http://www.jeuneafrique.com/33574/politique/fatou-bensouda-en-c-te-d-ivoire-personne-ne-sera-pargn/>

¹¹ ICC-01/05-01/08-3311, para. 8.

¹² ICC-01/05-01/08-3292.

¹³ ICC-01/05-01/08-3295.

¹⁴ ICC-01/05-01/08-3311.

¹⁵ ICC-01/05-01/08-3311, para. 9.

11. Each of these identified appealable issues significantly affects the fair and expeditious conduct of the proceedings and the outcome of the trial.

12. The violation by the Prosecution of the principle of the presumption of innocence, and the concurrent failure by the Trial Chamber to protect the Accused's rights, thereby jeopardising its own appearance of impartiality, relates directly to the overall fairness of the proceedings and the outcome of the trial. Doubt has been created in the mind of the public as to the capability of the Court to properly assess the responsibility of the Accused.

13. Where a public statement by a Prosecutor interferes with the Accused's right to a fair trial "[...] *it is the responsibility of the Pre-Trial and Trial Chambers to ensure fair and expeditious proceedings and that this responsibility empowers these Chambers to take measures where the Prosecutor's conduct is inappropriate*".¹⁶ As such, when the Trial Chamber fails to remedy conduct which goes to the core of the Accused's fundamental rights, it undermines the fair continuation of the trial.

14. The Appeals Chamber previously underlined that:¹⁷

A wrong decision on an issue in the context of Article 82(1)(d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process. In those circumstances, the proceedings will not be advanced but on the contrary they will be set back.

15. In this context, an immediate resolution by the Appeals Chamber would materially advance the present proceedings. Correction of the above errors by the Appeals Chamber is necessary to ensure that Mr. Bemba's rights are protected, and would allow the proceedings to continue to their natural conclusion without having

¹⁶ ICC-01/11-01/11-175, para. 35.

¹⁷ ICC-01/04-168, para. 16.

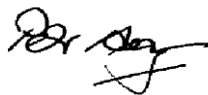
been undermined in the eyes of the public. It is also significant that the issues identified could not be resolved after the delivery of the judgment, further warranting the intervention of the Appeals Chamber at the present stage.

C. RELIEF REQUESTED

16. For the reasons set out above, The Defence respectfully requests that the Chamber:

GRANT the Defence Request for Leave to Appeal the Impugned Decision, in terms of the issues identified herein.

The whole respectfully submitted.



Peter Haynes QC

Lead Counsel for Mr. Jean-Pierre Bemba

Done at The Hague, the Netherlands, 18 January 2016