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**International  
Criminal  
Court**

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Date: **21 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**

**Prosecution's Response to the Defence Request for Leave to Appeal the 'Decision on "Defence Request concerning the Prosecutor's statement in *Jeune Afrique*"'**

**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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## Introduction

1. The Bemba Defence's application for leave to appeal<sup>1</sup> Trial Chamber III's Decision rejecting its request to ask the Prosecutor to retract her statement to *Jeune Afrique*<sup>2</sup> should be dismissed. An article 82(1)(d) application is not the forum to merely disagree with the Decision. Nor is it an avenue to relitigate earlier failed submissions. Yet, the Bemba Defence does just that. Its Application represents the Decision in a piecemeal manner, merely disagrees with it, and rehearses arguments already rejected.

2. None of the four issues<sup>3</sup> are appealable under article 82(1)(d). Nor does the Application meet the criteria for leave to appeal: it fails to show that the Issues would significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial, and that the Appeals Chamber's immediate resolution of these Issues may materially advance the proceedings.

## Submissions

### *i. The Issues are not appealable*

3. The four Issues raised by the Defence are not appealable. They fail to demonstrate "[a]n identifiable subject or topic requiring a decision for its resolution."<sup>4</sup> Rather, the Defence merely disagrees with the Decision, and expresses its conflicting opinion. Nor is there any attempt to demonstrate that the Issues are appealable or even emanate from the Decision. Merely stating an Issue does not make it so. To the

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<sup>1</sup> ICC-01/05-01/08-3316 ("Defence Application" or "Application").

<sup>2</sup> ICC-01/05-01/08-3311 ("Decision").

<sup>3</sup> Here, Issues.

<sup>4</sup> See 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 (Partly 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." See also ICC-01/05-01/08-532, para. 17; ICC-02/05-02/09-267, para. 25; ICC-01/04-01/06-1557, para. 30; ICC-01/04-01/07-2035, para. 25; ICC-02/05-03/09-179, para. 27.

contrary—because the Defence reads the Decision in a selective manner, several of the Issues do not arise from the Decision, but instead impermissibly traverse ground already covered.

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

4. The First Issue—“whether the Trial Chamber erred in [applying] the Appeals Chamber jurisprudence in the *Gaddafi* case which requires the Prosecutor to “*exercise due caution in his statements and refrain from creating the appearance of prejudging issues which are sub-judice*”, 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*”<sup>5</sup>—is not appealable. It merely disagrees with the Decision. Moreover, because the Issue is based on an incorrect understanding of the Decision and earlier submissions, it does not arise from the Decision.

5. First, in claiming that the Chamber erred in applying the *Gaddafi* Appeals Chamber’s law, the Application only expresses a contrary opinion. In doing so, it scarcely acknowledges the Chamber’s findings and the Prosecution’s earlier submissions.<sup>6</sup> Absent any elaboration, this Issue remains the Defence’s conjecture.

6. Second, in selectively representing the Decision, the Defence fails to show that the Issue arises from this Decision. The Application is wrong to allege that there was “no indication” that “the case was at an early stage”.<sup>7</sup> Nor does the Application

<sup>5</sup> Application, para. 10(i) (italics in original).

<sup>6</sup> See e.g., Decision, paras. 6-9, where the Chamber not only detailed the law, but its application to the case. See also ICC-01/05-01/08-3295 (“Prosecution’s Response”), paras. 12-22, stating *inter alia* “[t]hat the Prosecutor was not asserting that a final decision on the guilt of the Accused had been rendered.”

<sup>7</sup> *Contra* Prosecution’s Response, paras. 12-22. See e.g., para. 18, stating “[t]o the contrary, by stating that arrest warrants had been issued in November 2013 against the suspects, the Prosecutor clearly indicated that the case was at an early stage and had not been concluded.”

properly consider the Chamber's analysis, in light of the *Gaddafi* Appeal Decision, 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 as identified by the Appeals Chamber."<sup>8</sup>

7. For these reasons, the First Issue should be dismissed.

*(b) The Second Issue is not appealable and does not arise from the Decision*

8. The Second Issue—"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, 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"<sup>9</sup>—is neither appealable, nor does it arise from the Decision. The Defence simply misreads the Prosecutor's statement, the Prosecution's submissions, and the Decision itself. It also impermissibly relitigates earlier submissions.

9. Contrary to the Application, the Prosecutor's statement clearly refers to the arrest warrants issued in the Article 70 case.<sup>10</sup> So does the Decision. Indeed, the Chamber considered the Prosecutor's interview as a whole and noted that "the [Prosecutor's direct reference] to the [Article 70] arrest warrants" ensured that her statement was "nothing more than a comment on pending cases before the Court[...]"<sup>11</sup> The Defence is therefore patently incorrect to allege that "not a single mention" of the article 70 proceedings was made.

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<sup>8</sup> Decision, para. 8.

<sup>9</sup> Application, para. 10(ii).

<sup>10</sup> Decision, para. 1, noting "[...] 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."

<sup>11</sup> Decision, para. 8.

10. Moreover, the Defence's reluctance to accept the Chamber's Decision cannot persuade. The Second Issue is but a veiled attempt to rehearse the Defence's failed arguments.

11. For these reasons, the Second Issue should be dismissed.

(c) *The Third Issue does not arise from the Decision*

12. The Third Issue—"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, given the presumption of innocence afforded to the accused in the Article 70 Case and the absence of a final conviction"<sup>12</sup>—misreads the Decision. It therefore does not arise from the Decision.

13. The Third Issue attempts to parcel out several aspects of the Decision, disregarding both its totality and context. Indeed, contrary to the Application, the Chamber stated the following<sup>13</sup>:

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**

<sup>12</sup> Application, para. 10(iii).

<sup>13</sup> Decision, para. 8 (emphasis added).

before the Court, which does not infringe any of the aspects of Mr Bemba's presumption of innocence as identified by the Appeals Chamber.

14. The Decision is clear. The Defence's attempt to pick and choose from among the Chamber's findings cannot assist its Application. The Third Issue does not arise from the Decision, and should be dismissed.

*(d) The Fourth Issue is not appealable and does not arise from the Decision*

15. The Fourth Issue—"whether the Trial Chamber erred in relying on the public classification of the Defence's Request, Prosecution's Response and its own Decision, as allegedly enabling the public to further contextualize the Prosecutor's statement, 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"<sup>14</sup>—merely disagrees with the Decision. It is also speculative and seeks to import to the Decision a meaning beyond its natural one. The Fourth Issue therefore is neither appealable nor does it emanate from the Decision.

16. Apart from claiming that the Chamber "erred in relying on the public classification" of the relevant documents, the Defence fails to further substantiate. In these circumstances, this Issue expresses no more than the Defence's discontent with the Decision's outcome.

17. Further, the Fourth Issue is mere supposition. It wrongly claims that the Chamber "[placed] a burden on members of the public to search for, locate and

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<sup>14</sup> Application, para. 10 (iv).

contextualize subsequent legal filings[...]"<sup>15</sup> Yet, the Decision makes no such mention. Nor is any such inference plausible.

18. To the contrary, the Chamber first rejected the Defence's argument that 'based on the Prosecutor's interview "a reasonable bystander" would infer impartiality (*sic*) by the Prosecutor.'<sup>16</sup> It then noted that the public could "further contextualise the Prosecutor's Statement" because the relevant documents were publicly available.<sup>17</sup> Contrary to the Application, nothing in the natural meaning of these findings suggests otherwise.

19. For these reasons, the Fourth Issue should be dismissed.

*ii. The Issues do not meet the article 82(1)(d) test*

20. The article 82(1)(d) criteria are cumulative. A failure to fulfil any one of these criteria is fatal to the Application.<sup>18</sup> Because the Application fails to demonstrate that any of the Issues are appealable, it should be dismissed on this basis alone.

21. Nevertheless, the Defence fails to meet the remaining article 82(1)(d) criteria. Significantly, the Defence offers conjecture, but fails to concretely demonstrate that the Issues have any impact whatsoever.<sup>19</sup> The Application is unpersuasive.

22. First, the Defence fails to show any impact on the fairness of the proceedings. Its claim that the Accused's presumption of innocence has been violated runs counter to the Chamber's own findings.<sup>20</sup> Nor, besides proffering its own opinion, has the

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<sup>15</sup> Application, para. 10(iv).

<sup>16</sup> Decision, para. 8.

<sup>17</sup> Decision, para. 9.

<sup>18</sup> ICC-02/11-01/15-117, para. 26. ICC-02/11-01/15-132, para. 5. *See also* ICC-01/05-01/08-3273, para. 8, stating that the article 82(1)(d) criteria are cumulative, and "[f]ailure to fulfil one or more of these criteria is fatal to an application for leave to appeal."

<sup>19</sup> Application, paras. 11-15.

<sup>20</sup> Decision, para. 8.

Defence shown what, and how, “[d]oubt has been created in the mind of the public as to the capability of the Court to properly assess the responsibility of the Accused.”<sup>21</sup> Nor are the Defence’s allegations that the “the Accused’s fundamental rights” are affected<sup>22</sup> persuasive when the Defence reads the Decision in a piecemeal manner. The arguments are hypothetical. And although the significant impact on the expedition of the proceedings must also be shown for a successful application, the Defence fails to argue this prong, let alone persuade.

23. Second, the Defence fails to demonstrate any impact on the outcome of the trial. As with its previous arguments, its claims that the Chamber “[jeopardised] its own appearance of impartiality”<sup>23</sup> are perfunctory.

24. Finally, contrary to the Application,<sup>24</sup> the Appeals Chamber’s immediate resolution of the matter will not materially advance the proceedings. Indeed, the Appeals Chamber’s intervention is not required to address the Defence’s mere dissatisfaction with the Decision. Nor is it needed to address the Defence’s abstract and hypothetical claims, nor to correct its misreading of the Decision.

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<sup>21</sup> Application, para. 12.

<sup>22</sup> Application, para. 13.

<sup>23</sup> Application, para. 12.

<sup>24</sup> Application, paras. 14-15.

## Conclusion

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



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**Fatou Bensouda, Prosecutor**

Dated this 21<sup>st</sup> Day of January 2016

At The Hague, The Netherlands