

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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

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

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Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber III (“Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (“Bemba case”), issues the following Decision on “Defence Request for Leave to Appeal the ‘Decision on ‘Defence Request concerning the Prosecutor’s statement in Jeune Afrique’” (“Decision”).

I. Background

1. On 8 January 2016, the Chamber issued its “Decision on ‘Defence Request concerning the Prosecutor’s statement in *Jeune Afrique*’” (“Impugned Decision”),¹ in which it rejected a request from the Defence for Mr Jean-Pierre Bemba Gombo (“Defence”) that the Chamber order the Prosecutor to retract a statement she made in *Jeune Afrique*.²
2. On 18 January 2016, the Defence filed its “Defence Request for Leave to Appeal the ‘Decision on ‘Defence Request concerning the Prosecutor’s statement in *Jeune Afrique*’” (“Request for Leave to Appeal”),³ in which it requests leave to appeal the Impugned Decision.⁴ The Defence submits that the Chamber “made several errors of fact and law”, which it alleges “give rise to distinct appealable issues that warrant review on the part of

¹ Decision on “Defence Request concerning the Prosecutor’s statement in *Jeune Afrique*”, 8 January 2016, ICC-01/05-01/08-3311.

² ICC-01/05-01/08-3311, para. 10.

³ Defence Request for Leave to Appeal the “Decision on ‘Defence Request concerning the Prosecutor’s statement in *Jeune Afrique*’”, ICC-01/05-01/08-3316.

⁴ ICC-01/05-01/08-3316, para. 16.

the Appeals Chamber, and justify the present request for leave to appeal”.⁵ The Defence identifies four allegedly appealable issues.⁶

3. The Defence submits that the Office of the Prosecutor’s (“Prosecution”) violation of the presumption of innocence, together with the Chamber’s “failure [...] to protect the Accused’s rights”, relate directly to the overall fairness of the proceedings and outcome of the trial.⁷ Further, it asserts that an immediate resolution by the Appeals Chamber would materially advance the proceedings, ensure the identified errors are corrected to protect Mr Bemba’s rights, and “allow the proceedings to continue to their natural conclusion without having been undermined in the eyes of the public”.⁸

4. On 22 January 2016, the Prosecution submitted its “Prosecution’s Response to the Defence Request for Leave to Appeal the ‘Decision on ‘Defence Request concerning the Prosecutor’s statement in *Jeune Afrique*’” (“Response”),⁹ in which it opposes the Request.¹⁰ The Prosecution makes specific submissions on each alleged appealable issue,¹¹ and submits that the Defence fails to show any impact on the fairness of the proceedings and fails to “argue [...] let alone persuade” with respect to demonstrating that the issues would significantly impact

⁵ ICC-01/05-01/08-3316, para. 6.

⁶ ICC-01/05-01/08-3316, para. 10.

⁷ ICC-01/05-01/08-3316, paras 11 to 13.

⁸ ICC-01/05-01/08-3316, paras 14 and 15.

⁹ Prosecution’s Response to the Defence Request for Leave to Appeal the “Decision on ‘Defence Request concerning the Prosecutor’s statement in *Jeune Afrique*’”, 21 January 2016, ICC-01/05-01/08-3318.

¹⁰ ICC-01/05-01/08-3318, paras 1, 2, and 25.

¹¹ ICC-01/05-01/08-3318, paras 4 to 19.

the expeditiousness of proceedings.¹² In addition, it argues that the Defence fails to demonstrate any impact on the outcome of the trial or that immediate resolution by the Appeals Chamber would materially advance the proceedings.¹³

II. Applicable law

5. In the present Decision, the Chamber has considered Articles 67 and 82(1)(d) of the Statute.
6. For a request for leave to appeal to be granted, the party seeking leave to appeal should identify specific “issues” which were dealt with in the relevant decision and which constitute the appealable subject.¹⁴
7. The Appeals Chamber has held that “[o]nly an ‘issue’ may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is a disagreement or conflicting opinion [...]. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one.”¹⁵ In addition, Article

¹² ICC-01/05-01/08-3318, para. 22.

¹³ ICC-01/05-01/08-3318, paras 23 and 24.

¹⁴ 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. *See also*, Decision on the “Defence Request for Leave to Appeal the Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute”, 30 October 2012, ICC-01/05-01/08-2399, para. 9.

¹⁵ ICC-01/04-168, para. 9. *See also*, ICC-01/05-01/08-2399, para. 10.

82(1)(d) of the Statute cannot be used to litigate abstract or hypothetical issues.¹⁶

8. Accordingly, the Chamber has examined the Request for Leave to Appeal according to the following criteria:¹⁷

- a) Whether the matter is an “appealable issue”;
- b) Whether the issue at hand would significantly affect:
 - i. the fair and expeditious conduct of the proceedings; or
 - ii. the outcome of the trial; and
- c) Whether, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

The three criteria above are cumulative and therefore, failure to fulfil one or more of these criteria is fatal to an application for leave to appeal.¹⁸

9. It is not sufficient for the purposes of granting leave to appeal that the issue for which leave to appeal is sought is of general interest or that it may arise in future pre-trial or trial proceedings.¹⁹ Further, it is insufficient

¹⁶ Decision on the Prosecutor’s Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 18 September 2009, ICC-01/05-01/08-532, para. 17; Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure, 25 August 2008, ICC-01/05-01/08-75, para. 11; and Decision on the Defence Request for leave to appeal the 21 November 2008 Decision, 10 February 2009, ICC-02/04-01/05-367, para. 22. *See also*, Decision on the “Defence Request for Leave to Appeal the ‘Urgent Decision on the ‘Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence’ (ICC-01/09-01/11-260)”, 29 August 2011, ICC-01/09-01/11-301, paras 32 to 34; and Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges, 9 March 2012, ICC-01/09-02/11-406, paras 50 and 61.

¹⁷ Decision on the prosecution and defence applications for leave to appeal the “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 26 January 2011, ICC-01/05-01/08-1169, para. 23; and ICC-01/05-01/08-2399, para. 11.

¹⁸ ICC-01/05-01/08-1169, para. 24; and ICC-01/05-01/08-2399, para. 12.

¹⁹ ICC-01/05-01/08-1169, para. 25. *See also*, Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58, 19 August 2005, ICC-02/04-01/05-20-US-Exp (unsealed pursuant to Decision ICC-02/04-01/05-52),

that an appeal may be legitimate or even necessary at some future stage, as opposed to requiring immediate resolution by the Appeals Chamber in order to materially advance the proceedings.²⁰

10. Lastly, the Chamber recalls that the Appeals Chamber has held that its function in relation to the exercise of discretion by a Pre-Trial or Trial Chamber is limited to ensuring that the Chamber properly exercised its discretion. The Appeals Chamber has held that it “will interfere with a discretionary decision only under limited conditions”, namely: “(i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on [a] patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion”.²¹

III. Submissions and analysis

First Issue

11. The first allegedly appealable issue identified by the Defence is:²²

Whether the Trial Chamber erred in its application of 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

para. 21; Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191, para. 11; and ICC-01/05-01/08-2399, para. 13.

²⁰ ICC-01/05-01/08-1169, para. 25; and ICC-01/05-01/08-2399, para. 13.

²¹ Judgment on the appeal of the Defence against the “Decision on the admissibility of the case under article 19(1) of the Statute” of 10 March 2009, 16 September 2009, ICC-02/04-01/05-408, para. 80.

²² ICC-01/05-01/08-3316, para. 10 (emphasis in original) (internal citations omitted).

decide whether to confirm charges and, if charges were confirmed, for the Trial Chamber to decide on [...] criminal responsibility". ("First Issue")

12. In its Response, the Prosecution submits that the First Issue “merely disagrees with the Decision”, expressing a contrary opinion as to whether the Chamber “erred in applying the *Gaddafi* Appeals Chamber’s law”.²³ Further, it argues that the Defence is wrong to “allege that there was ‘no indication’ that ‘the case was at an early stage’”, and that it fails to consider the Chamber’s full analysis.²⁴

13. The Chamber notes that the First Issue appears to be comprised of two separate alleged errors. In the first, the Defence asserts that the Chamber erred in applying a principle enumerated by the Appeals Chamber in the *Gaddafi* case,²⁵ which it quotes, without providing any basis or further explanation of its assertion. This argument identifies no legal or factual error, and appears merely to disagree with the outcome of the Chamber’s application of the law to the facts.

14. With respect to the second alleged error, the Defence submits – relying on the same Appeals Chamber decision²⁶ – that the Chamber erred in rejecting the original request “despite [there being] 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*

²³ ICC-01/05-01/08-3318, paras 4 to 5.

²⁴ ICC-01/05-01/08-3318, paras 6.

²⁵ *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, para. 30.

²⁶ ICC-01/11-01/11-175, para. 32.

responsibility”.²⁷ However, the Defence fails to explain why failure to require such indication would constitute a legal or factual error in the Impugned Decision. The passage cited by the Defence was part of the Appeals Chamber’s case-specific assessment of a statement made by the Prosecutor in relation to the *Gaddafi* case; it is not a generally applicable legal requirement which must be met by any and all public statements made by the Prosecutor relating to ongoing cases before the Court. Again, absent further explanation or identification of legal or factual errors, the Defence’s submissions appear to represent nothing more than its disagreement with the Chamber’s conclusions.

15. In light of the above, the Chamber finds that the First Issue does not constitute an appealable issue.

Second Issue

16. The second allegedly appealable issue identified by the Defence is:²⁸

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; (“Second Issue”)

17. In its Response, the Prosecution argues that in the Second Issue the Defence seeks to relitigate its prior arguments, misreading the Prosecutor’s statement, the Prosecution’s prior submissions, and the Impugned Decision.²⁹

²⁷ ICC-01/05-01/08-3316, para. 10 (emphasis in original) (internal citations omitted).

²⁸ ICC-01/05-01/08-3316, para. 10 (emphasis in original) (internal citations omitted).

²⁹ ICC-01/05-01/08-3318, paras 8 to 11.

18. The Second Issue alleges that the Chamber was not reasonable in its interpretation of “the context of the interview”.³⁰ In the Impugned Decision, the Chamber assessed the specific statement made by the Prosecutor, which it “plac[ed] [...] in the context of the Prosecutor’s interview as a whole”;³¹ it did not base its conclusions on “interpret[ation of] the context of the interview”. Having considered the specific statement, the Chamber found that the Prosecutor made “direct reference [...] to the warrants of arrest in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*”.³² As such, the Defence’s implication that the Chamber found that “the context of the interview [...] referr[ed] to warrants of arrest issued in the Article 70 case” is incorrect.

19. Insofar as the Second Issue challenges the reasonableness of the Chamber’s interpretation of the Prosecutor’s specific statement and its consequent conclusion that “the Prosecution’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”, the Chamber notes that the Appeals Chamber will only interfere with exercises of a Chamber’s discretion “[...] (ii) where it is exercised on [a] patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion”.³³ While the

³⁰ ICC-01/05-01/08-3316, para. 10.

³¹ ICC-01/05-01/08-3311, para. 8.

³² ICC-01/05-01/08-3311, para. 8.

³³ ICC-02/04-01/05-408, para. 80. The Appeals Chamber held that it “will interfere with a discretionary decision only under limited conditions”, namely: “(i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on [a] patently incorrect conclusion of fact; or

Defence refers to the concept of a “reasonable [t]rial [c]hamber”, it makes no argument, nor provides any elements on which to base the conclusion that either requirement (ii) or (iii) is met in the present case. Further, it is not self-evident that there exist elements on which to base such a conclusion.

20. In light of the above, the Chamber finds that the Second Issue does not constitute an appealable issue.

Third Issue

21. The third allegedly appealable issue identified by the Defence is:³⁴

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 [case ICC-01/05-01/13] and the absence of a final conviction; (“Third Issue”)

22. In its Response, the Prosecution asserts that the Defence misreads the Impugned Decision, taking parts of it and disregarding its totality and context, and that therefore the Third Issue does not arise from the Impugned Decision.³⁵

23. In the Impugned Decision the Chamber referred to the Prosecutor’s statement; it did not, itself, make any finding or pronouncement that anything had been “demonstrated” in case ICC-01/05-01/13.³⁶ Indeed, in

(iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion”. For the purposes of the present issue, item (i) is not called into question.

³⁴ ICC-01/05-01/08-3316, para. 10 (emphasis in original) (internal citations omitted).

³⁵ ICC-01/05-01/08-3318, paras 12 to 14.

³⁶ ICC-01/05-01/08-3311, para. 8, “she was referring to what was demonstrated in case ICC-01/05-01/13”.

the Impugned Decision, the Chamber's statement merely highlighted the fact that the Prosecutor's statement in *Jeune Afrique* related to case ICC-01/05-01/13, not the *Bemba* case. As such, the Third Issue misrepresents, and consequently does not arise from, the Impugned Decision.

Fourth Issue

24. The fourth allegedly appealable issue identified by the Defence is:³⁷

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. ("Fourth Issue")

25. In its Response, the Prosecution submits that in the Fourth Issue the Defence "merely disagrees" with the Impugned Decision, as well as that it speculates as to the Chamber having placed a burden on the public to "search for, locate and contextualise subsequent legal findings".³⁸

26. With respect to the Fourth Issue, the Chamber had already, in the paragraph prior, reached the finding that the Prosecutor's statement did "not infringe any of the aspects of Mr Bemba's presumption of innocence" and that there was no merit to the argument that "'a reasonable bystander' would infer impartiality [*sic*] by the Prosecutor".³⁹ Thereafter, the Chamber noted, "in addition", that the public nature of the filings related

³⁷ ICC-01/05-01/08-3316, para. 10 (emphasis in original) (internal citations omitted).

³⁸ ICC-01/05-01/08-3318, paras 15 to 19.

³⁹ ICC-01/05-01/08-3311, para. 8.

to this issue would “enabl[e] the public to further contextualise the Prosecutor’s Statement”.⁴⁰ As an additional factor, noted after the Chamber had reached its findings as to the merits of the Defence’s request, the Chamber finds that the Fourth Issue is about a subject the resolution of which was not “essential for the determination of matters arising in the judicial cause under examination”.⁴¹ As such, the Fourth Issue is not an appealable issue.

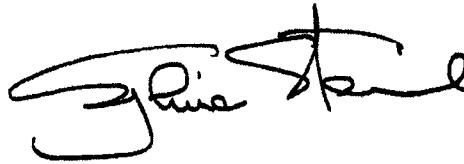
IV. Conclusion

27. In light of the foregoing, the Chamber hereby **DENIES** the Request for Leave to Appeal.

⁴⁰ ICC-01/05-01/08-3311, para. 9.

⁴¹ ICC-01/04-168, para. 9; and ICC-01/05-01/08-2399, para. 10.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 02 February 2016

At The Hague, the Netherlands