

**Cour
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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 Document

Prosecution's Response to the Defence Request for Leave to Appeal the "Decision on Defence requests for further disclosure"

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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I. Introduction

1. The Defence application for leave to appeal¹ the “Decision on Defence requests for further disclosure”² should be dismissed. The four issues referred to in the Application³ are not appealable issues within the meaning of article 82(1)(d). The Defence improperly seeks to re-litigate before the Appeals Chamber matters already decided by the Trial Chamber. In addition, none of the Issues meet the criteria for leave to appeal under article 82(1)(d).

II. Submissions

A. The four Issues are not appealable issues

2. None of the four Issues identified by the Defence constitute appealable issues; rather, they are mere disagreements with the Chamber’s Decision.⁴ The Defence simply reiterates prior arguments and disagrees with the Chamber’s analysis and conclusions.⁵ Because there are no appealable issues, the Application must be rejected.

3. In its First Issue, namely, whether a reasonable Trial Chamber would accept the Prosecution’s explanation of the content of its contacts with D-2 and D-3,⁶ the Defence reiterates that the Prosecution gave contradictory accounts on this matter.⁷

¹ ICC-01/05-01/08-3339 (“Application”).

² ICC-01/05-01/08-3336 (“Decision”).

³ Application, para.6 (“Issues”).

⁴ ICC-01/04-168 OA3, para. 9; ICC-01/05-01/08-532, para.17; ICC-02/05-02/09-267, para.22; ICC-01/04-01/06-1557, para.30; ICC-01/04-01/07-2035, para.25; ICC-02/05-03/09-179,para.27.

⁵ ICC-02/11-01/11-350, para.40.

⁶ Application, para.6(i): “Whether a reasonable Trial Chamber would accept ‘the Prosecution’s explanation’ of the content of its contacts with D-2 and D-3, while being in possession of information that the Prosecution had given directly contradictory accounts of the contents of this contact” (“First Issue”).

⁷ Application, para.6(i). Compare to ICC-01/05-01/08-3310-Red, para.5, p.5 (“Defence Reply”).

The Defence disagrees with the Chamber's dismissal of this argument and acceptance of the Prosecution's explanation.⁸ No appealable issue therefore arises.

4. In its Second Issue, namely, whether the Trial Chamber erred in failing to consider that the RFAs were relevant to the abuse of process litigation,⁹ the Defence reiterates its general assertion that the RFAs were relevant,¹⁰ and disagrees with the Chamber's conclusion that the Defence provided no arguments to justify this claim.¹¹ The Application however fails to acknowledge that the Trial Chamber considered—and dismissed—the Defence's general submission as to the RFAs' materiality.¹² In sum, there is no appealable issue.

5. The Third and Fourth Issues refer to the Chamber's finding that the Prosecution did not disclose the identities of Defence witnesses, as such, to external sources.

6. In the Third Issue,¹³ the Defence reiterates that this occurred.¹⁴ In addition, it improperly introduces a new argument and faults the Chamber for not addressing it: in its Second Request, the Defence argued that the Prosecution had improperly identified Defence witnesses in its RFAs¹⁵ and, as a result, the RFAs were relevant to

⁸ Decision, para.34.

⁹ Application, para.6(ii): "Whether the Trial Chamber erred in failing to consider the Defence submissions that 'the content of the RFAs were directly relevant to the Defence's pleadings on abuse of process', particularly in light of its erroneous conclusion that the Defence 'does not make any submissions as to why the RFAs themselves are material to the preparation of the Defence'" ("Second Issue").

¹⁰ Application, para.6(ii). Compare to ICC-01/05-01/08-3305-Red, paras.26-27 ("Defence Second Request").

¹¹ Decision, para.54.

¹² Decision, para.54 where the Trial Chamber referred to the Defence's submissions that "through the RFAs the Prosecution sought information relevant to the credibility of Defence witnesses". Subsequently, the Chamber found that this submission does not address as to "why the RFAs themselves are material to the preparation of the Defence".

¹³ Application, para.6(iii): "Whether the Trial Chamber's finding that the Defence submissions concerning: (a) the divulgation of the list of Defence witnesses to Western Union; and (b) the disclosure of witness identities to the DRC authorities, do not 'necessarily contradict the Prosecution's submission that no information divulged to external sources 'identified Defence witnesses as such', can stand in light of the Chamber's failure to consider the first half of the Prosecution's incorrect assertion that it disclosed '[n]o confidential information concerning the Defence case'" ("Third Issue").

¹⁴ Application, para.6(iii). Compare to Defence Second Request, paras.30-32.

¹⁵ Defence Second Request, paras.30 (see text in bold) and 31.

challenge the legality of the Prosecution's investigation.¹⁶ In the Decision, the Chamber dismissed these arguments.¹⁷ The Defence now submits that the Prosecution, by enquiring about Defence witnesses – even without identifying them as such, it improperly disclosed confidential information concerning the Defence case.¹⁸ Regardless of the inappositeness of this new submission, as the Defence did not advance this argument in its Second Request, the Chamber cannot be expected to address it.

7. In its Fourth Issue,¹⁹ the Defence reiterates that the Prosecution identified Defence witnesses to external sources and that this prompted the arrest of one witness by the DRC authorities.²⁰ The Chamber addressed and dismissed this argument in its Decision.²¹ Thus, as with the First and Second Issues, the Third and Fourth Issues are not appealable issues.

B. The Issues do not meet the criteria for leave to appeal under article 82(1)(d)

8. Because the article 82(1)(d) criteria are cumulative, the Defence's failure to demonstrate that the Issues are appealable is fatal to the Application.²² Nevertheless, even if, *arguendo*, the Issues were appealable issues arising from the Decision, they do not meet the criteria for leave to appeal under article 82(1)(d).

¹⁶ Ibid., para.33.

¹⁷ Decision, para.54.

¹⁸ Application, para.6(iii).

¹⁹ Application, para.6(iv): "Whether any reasonable Trial Chamber could accept the Prosecution submission that 'no information divulged to external sources identified Defence witnesses as such', in light of (a) the timing of the Prosecution RFAs, and (b) the cause and effect of this disclosure to, at a minimum the DRC authorities" ("Fourth Issue").

²⁰ Application, para.6(iv). Compare to Defence Second Request, para.27.

²¹ Decision, para.54.

²² 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."

9. First, the Defence's arguments on fairness are made in the abstract and are speculative.²³ This does not suffice to invoke that the fairness of the proceedings are significantly affected.²⁴ Moreover, chambers of this Court have already found that the mere fact that an issue relates to disclosure is insufficient to satisfy the first prong of article 82(1)(d).²⁵

10. Second, the Defence provides no arguments on expeditiousness and merely quotes an extract from an appeals judgement.²⁶ Because the criteria of "fair and expeditious" are cumulative, the Application fails.

11. Third, and were the Trial Chamber minded to consider whether the Appeals Chamber's determination of the purported issues would materially advance the proceedings,²⁷ the Application also fails. The article 74 judgement on this case is expected this coming Monday, 21st March 2016. Hence, granting any application for leave to appeal at this stage would only delay the trial proceedings which are about to conclude. Any arguments regarding disclosure and its impact in the proceedings can be raised on appeal.

²³ Application, para.8.

²⁴ See ICC-01/04-168 OA3, para. 10; ICC-02/04-01/05-316, p. 6; ICC-01/09-02/11-211 para. 33 and 39; ICC-01/09-02/11-88, para. 25, see also paras. 23-27; ICC-01/04-01/06-2109, para.22; ICC-01/05-01/08-680, para. 36; ICC-01/09-02/11-275, paras. 28-29; ICC-01/09-01/11-301, para. 30.

²⁵ ICC-01/05-01/08-75 paras.34- 39. See also ICC-01/04-01/10-116 paras.18-25.

²⁶ Application, para.9.

²⁷ Application, para.10.

III. Conclusion

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



Fatou Bensouda, Prosecutor

Dated this 17th day of March 2016

At The Hague, The Netherlands