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**International
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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

Prosecution's Response to the Defence Request for Leave to Appeal the "Decision on Defence request for stay of proceedings and further disclosure"

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Introduction

1. The Bemba Defence's application for leave to appeal¹ Trial Chamber III's Decision—rejecting both its request for a stay of proceedings following the disclosure of two investigator reports of interviews with P31 and P7, and its request for further disclosure²—should be dismissed.

2. None of the five issues³ are appealable under article 82(1)(d). All five Issues misread the Decision; they do not therefore arise from the Decision. Not only does the Application represent the Decision in a piecemeal manner, it also speculates as to its import. Several of the Issues also only express a conflicting opinion.

3. Moreover, the Application does not meet the remaining 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. Likewise, given that the Application is filed on the eve of the delivery of the Trial Judgement on 21st March 2016,⁴ none of the Issues, if immediately resolved by the Appeals Chamber, would materially advance the proceedings. An interlocutory appeal is neither appropriate nor necessary at this penultimate stage of the trial proceedings.

Submissions

i. The Issues do not arise from the Decision and are not appealable

4. The five Issues raised by the Defence are not appealable. They fail to demonstrate “[a]n identifiable subject or topic requiring a decision for its resolution.”⁵ Nor do the Issues “[arise] in the judicial cause under examination.”⁶

¹ ICC-01/05-01/08-3338 (“Defence Application” or “Application”).

² ICC-01/05-01/08-3335 (“Decision”).

³ Here, “Issues”.

⁴ ICC-01/05-01/08-3329.

⁵ 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-

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

5. The First Issue—“whether the Trial Chamber erred in accepting that the Defence was prejudiced by the Prosecution’s disclosure violations, but failing to provide a remedy, given the established principle that ‘any violation, even if it entails only a relative degree of prejudice, requires a proportionate remedy’”⁷—does not arise from the Decision. The Bemba Defence misstates the Decision.

6. Contrary to the Application, which couches the Chamber’s findings in sweeping terms, the actual terms of the Decision were different. Indeed, with respect to the timing of the disclosure of the P31 Report, the Chamber found that the Defence’s preparation was *not* prejudiced.⁸

7. Moreover, with respect to the disclosure of the P7 Report and contrary to the Application, the Chamber’s individual findings on the content of that Report were nuanced. Significantly, regarding several of the materials, the Chamber plainly found that the Defence was not prejudiced.

- First, with respect to “the training of CAR soldiers in the DRC”, the Chamber found that “[t]he fact that the Defence became aware of this issue from another source limits any prejudice which the timing of the disclosure of the P7 Report may have caused.”⁹

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.

⁶ ICC-01/04-168 OA3, para. 9.

⁷ Application, para. 8(i).

⁸ Decision, para. 26 (emphasis added). *See also* Decision, para. 23, stating *inter alia* that “[...] the P31 Report provides only extremely limited and general information on the allegations against D51, the Chamber finds that the Defence suffered no prejudice from the timing of the disclosure of this information.”; para. 24, stating that “[w]ith respect to the information on D57 and CHM1”, “the Chamber finds that the Defence was not prejudiced by the timing of the disclosure of the P31 Report in relation to this information”; para. 25, stating “[r]egarding the information on D11 and D52”, “the fact that they ultimately did not testify before the Chamber renders any allegation that the Defence was prejudiced by not having possessed this information moot.”

⁹ Decision, para. 28.

- Second, with respect to the information on D64, the Chamber found that “[a]s such it may have aided the Defence in its preparation.”¹⁰
- Third, the Chamber categorically found that “[t]he information in the P7 Report on D57, D51, and D4 is of negligible value to Defence preparation and the Chamber finds no prejudice in the timing of its disclosure.”¹¹
- Fourth, with respect to the information on D11 and D52, who ultimately did not testify, the Chamber recalled its earlier findings that allegations of prejudice were moot.¹²
- Fifth, and likewise, the Chamber found that the “allegations, that D26 was involved in a killing, were detailed in other Prosecution disclosure.”¹³
- Sixth, the Chamber found that certain information on D23 and D26 “may have aided the Defence in its preparation.”¹⁴

8. Moreover, overall, the Chamber found that “only minimal, *if any*, prejudice was caused to the Defence’s preparation.”¹⁵ In particular, it held that “[...] *with respect to challenges made by the Prosecution to Defence witnesses’ credibility during the testimony*, the Defence was able to follow-up on the Prosecution’s assertions and was not hindered in this respect by a lack of access to the P31 and P7 Reports.”¹⁶ Critically, the Chamber found that the Defence’s request for a stay of proceedings, as a remedy, was undermined, because the Defence, having gained access to the P7 Report, “[...] waited almost 12 months before requesting a stay of proceedings, based in part upon

¹⁰ Decision, para. 29.

¹¹ Decision, para. 29.

¹² Decision, para. 29, fn. 77, referring to para. 25.

¹³ Decision, para. 29.

¹⁴ Decision, para. 30.

¹⁵ Decision, paras. 34, 35. *See also* Decision, para. 36, stating that “no prejudice was caused” by merely putting the P7 Report before the Chamber. The Defence submissions on being precluded from exploring the impact of P7’s conduct on the protection and security of Defence witnesses are “merely speculative”. The Defence’s submission that it was precluded from raising concrete issues of prejudice in a previous request for stay of proceedings is “unconnected to the relief requested in the Request.”

¹⁶ Decision, para. 32 (emphasis in original).

the argument that the late stage of proceedings made this the only available and appropriate remedy.”¹⁷

9. Not only does the First Issue fail to acknowledge the Decision’s language and nuance, it also fails to recognise the Defence’s own failure to request a relevant remedy in time. For these reasons, the First Issue does not arise from the Decision and should be dismissed.

(b) The Second Issue does not arise from the Decision

10. The Second Issue—“whether the Trial Chamber’s repeated excusal of the Prosecution’s non-disclosure on the basis that similar information was later made available to the Defence from another source, erroneously limits the Prosecution’s disclosure obligations to material which is not available elsewhere in the trial record, in violation of a plain reading of the Statute and Rules, and the jurisprudence of the Appeals Chamber”¹⁸—does not arise from the Decision. The Defence merely speculates and misreads the Decision.

11. Contrary to the Application, the Chamber simply did not “limit the Prosecution’s disclosure obligations to material which is not available elsewhere in the trial record”.¹⁹ Rather, the Chamber considered if the Defence already had access to the information it sought, when assessing if the Defence was prejudiced.²⁰ The Defence’s statement of the Second Issue is inaccurate: it confuses the Prosecution’s disclosure obligations with the Chamber’s assessment of potential prejudice caused by the non-availability of information. Likewise, although the Decision limited itself to the question of “whether the timing of the Prosecution’s disclosure caused

¹⁷ Decision, para. 33.

¹⁸ Application, para. 8(ii) (emphasis in original).

¹⁹ *Contra* Application, para. 8(ii).

²⁰ See e.g., Decision, paras. 24, 28.

prejudice to the Defence [...]",²¹ the Second Issue hypothesises, more broadly, on the scope of the Prosecution's disclosure obligations. Such speculation is irrelevant.

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

(c) The Third Issue does not arise from the Decision and is not appealable

13. The Third Issue—"whether this erroneous standard will have the effect of encouraging the Prosecution to delay or avoid disclosure on the basis that similar information may later become available to the Defence, and will deny the Defence the opportunity to bring corroborated evidence before the Trial Chamber"²²—does not arise from the Decision and is not appealable. Once again, the Defence (a) misreads the Decision, and (b) merely disagrees with it.

14. First, in assuming an "erroneous standard", the Third Issue rides on the Defence's misunderstanding reflected in the Second Issue.²³ Indeed, contrary to the Application, the Chamber simply did not find as the Defence claims it did. Second, the Defence's claims that the "standard" will "[encourage] the Prosecution to delay or avoid disclosure" and "[...] deny the Defence the opportunity to bring corroborated evidence" are speculative. Nor—because the Issue as such refers to a potential disclosure yet to be made and its hypothetical effect—does it even arise from this Decision. The Defence's conjecture and mere conflicting opinion is not appealable.

15. For these reasons, the Third Issue should be dismissed.

²¹ Decision, para. 19.

²² Application, para. 8(iii).

²³ See para. 11.

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

16. The Fourth Issue—“whether the Trial Chamber erred in finding that a remedy was not warranted due to disclosure in a parallel case in June 2014, when the prejudice identified by the Defence stemmed from non-disclosure of the Material **prior** to the presentation of the Defence case, rendering the precise timing of the post-testimony disclosure irrelevant”²⁴—does not arise from the Decision and is not appealable.

17. The Fourth Issue misstates the Decision. The Defence’s claim that the Chamber found that “a remedy was not warranted due to disclosure in a parallel case in June 2014”²⁵ is wrong. This claim ignores the larger context of the Decision. Rather, the Chamber found that given that only minimal, *if any*, prejudice was caused to the Defence’s preparation, no remedy was “necessary, warranted, or appropriate in the present circumstances.”²⁶ Indeed, in so finding, the Chamber held that the Defence’s request for a stay of proceedings as remedy was undermined because it waited almost 12 months before it requested the remedy.²⁷ Further, the Chamber found that the Defence’s assertions “grossly overstate[d] the impact of the timing of the Prosecution’s disclosure.”²⁸

18. Moreover, the Fourth Issue merely rehearses submissions that were rejected earlier.²⁹ Re-litigation of previously rejected arguments is not appropriate at this stage of the proceedings. Nor is such mere disagreement with the Decision appealable.

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

²⁴ Application, para. 8(iv) (emphasis in original).

²⁵ Application, para. 8(iv).

²⁶ Decision, para. 35 (emphasis added).

²⁷ Decision, para. 33.

²⁸ Decision, para. 34.

²⁹ See e.g., Decision, paras. 14, 15.

(e) *The Fifth Issue does not arise from the Decision and is not appealable*

20. The Fifth Issue—“whether the Trial Chamber’s finding that the Material provides only limited and general information on the allegations against D51, ignores the fact that even limited and general information would have afforded the Defence the opportunity to locate more specific and thorough information, in line with purpose of disclosure prior to testimony”³⁰—does not arise from the Decision. It ignores the larger context of the Decision. It is also speculative, and merely repeats failed submissions. It is therefore also not appealable.

21. First, the Defence’s statement of the Fifth Issue parcels out a single finding with respect to D51 in isolation, but fails to acknowledge several others. Indeed, in determining that the Defence was not prejudiced from the timing of the disclosure of information on D51, the Chamber considered not only its “extremely limited and general” nature,³¹ but also that the Defence “already had similar and more detailed information on these issues from prior Prosecution disclosure”³² and that the Defence had “a further opportunity to address those challenges to D51’s credibility.”³³

22. Second, the Fifth Issue merely reiterates the Defence’s earlier position³⁴ and expresses a conflicting opinion. Mere disagreement is not appealable.

23. For these reasons, the Fifth Issue should be dismissed.

³⁰ Application, para. 8(v).

³¹ Decision, para. 23.

³² Decision, para. 21.

³³ Decision, para. 22. The Chamber noted that putting questions to a witness in court cannot, in itself, replace disclosure.

³⁴ See *e.g.*, Decision, paras. 3-5, 13-15.

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

24. The article 82(1)(d) criteria are cumulative. Therefore, the Defence's failure to show that any of the Issues is appealable is fatal to the Application.³⁵ It should be dismissed on this basis alone.

25. Nevertheless, the Defence also fails to meet the remaining article 82(1)(d) criteria.

26. First, the Defence fails to show that the Issues affect the fairness of the proceedings. Its sweeping claim alleging "a litany of disclosure violations"³⁶ is simply unsupported. In fact, it runs counter to the Chamber's findings.³⁷ Nor does its claim alleging a "finding of prejudice" accurately present the Decision.³⁸ Rather, the Chamber found that "only minimal, if any, prejudice was caused to the Defence's preparation."³⁹

27. Second, apart from stating that it is so,⁴⁰ the Defence fails to demonstrate an impact on the expeditious conduct of the proceedings. To the contrary, its claim that "the continuing passage of time will continue to deplete the remedial options available"⁴¹ is unpersuasive, particularly in light of the Chamber's findings that the Defence delayed almost a year before it sought remedy.⁴²

28. Third, the Defence does not elaborate its argument that the outcome of the trial is affected.⁴³ Nor is there any such impact in terms of the article 74 decision.⁴⁴

³⁵ 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."

³⁶ Application, para. 11.

³⁷ Decision, paras. 16-40.

³⁸ *Contra* Application, para. 10. *See above*, paras. 5-9.

³⁹ Decision, para. 35. *See also* Decision, paras. 32-34.

⁴⁰ Application, para. 12.

⁴¹ Application, para. 13.

⁴² Decision, para. 33.

⁴³ Application, para. 9.

29. Finally, contrary to the Application,⁴⁵ the Appeals Chamber's immediate resolution of the matter will not materially advance the proceedings. Indeed, authorising an interlocutory appeal less than a week before the Trial Judgement is delivered is unnecessary—more so, when the Appeals Chamber will have the opportunity to address relevant issues in the context of a potential article 81 final appeal. Indeed, once the Trial Judgement is rendered, the Defence may raise issues that it considers necessary as part of the final appeal—the preferred procedural vehicle at this stage. Nor is the Appeals Chamber's intervention needed to address the Defence's abstract and hypothetical claims, nor to correct its misreading of the Decision.

Conclusion

30. The Defence Application should be rejected. None of the five Issues are appealable. Moreover, none of the Issues meet the article 82(1)(d) test.



Fatou Bensouda, Prosecutor

Dated this 17th day of March 2016

At The Hague, The Netherlands

⁴⁴ ICC-01/05-01/08-1169, para. 35.

⁴⁵ Application, para. 13.