

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 03 May 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

**Reasons for Decision on “Defence Request for Leave to Appeal the
‘Decision on Defence request for stay of proceedings and further
disclosure’” and “Defence Request for Leave to Appeal the ‘Decision on
Defence requests for further disclosure’”**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr Jean-Jacques Badibanga

Counsel for the Defence

Mr Peter Haynes
Ms Kate Gibson
Ms Melinda Taylor

Legal Representatives of the Victims

Ms Marie-Edith Douzima Lawson

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

**Other
Trial Chamber VII**

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 Reasons for Decision on “Defence Request for Leave to Appeal the ‘Decision on Defence request for stay of proceedings and further disclosure’” and “Defence Request for Leave to Appeal the ‘Decision on Defence requests for further disclosure’” (“Decision”).

I. Background and submissions

1. On 7 March 2016, the Chamber issued its “Decision on Defence request for stay of proceedings and further disclosure” (“First Impugned Decision”),¹ in which it rejected the Defence for Mr Jean-Pierre Bemba Gombo (“Defence”) requests for (i) a stay of proceedings; (ii) the Chamber to order the Office of the Prosecutor (“Prosecution”) to review its archives and ensure that all material that is material to the preparation of the Defence has been disclosed; and (iii) the Chamber to “remain seized” of the issues that the Defence addressed in its request.²
2. On 9 March 2016, the Chamber issued its “Decision on Defence requests for further disclosure” (“Second Impugned Decision”; together with the First Impugned Decision, “Impugned Decisions”),³ in which it rejected the Defence requests that the Chamber order the Prosecution to disclose (i) all material in its possession relevant to the credibility of Defence witnesses in the *Bemba* case; (ii) the interview records of P261, a witness 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”); (iii) all

¹ Decision on Defence request for stay of proceedings and further disclosure, 7 March 2016, ICC-01/05-01/08-3335.

² ICC-01/05-01/08-3335, para. 40.

³ Decision on Defence requests for further disclosure, 9 March 2016, ICC-01/05-01/08-3336.

materials generated during contact with Defence witnesses falling within the terms of the Chamber's Decision on the "Defence Motion on Prosecution contact with its witnesses"⁴; (iv) certain material disclosed in case ICC-01/05-01/13, including material relating to the Prosecution's procurement of financial records; (v) material relating to the Prosecution's contact with witness D55 in the *Bemba* case; and (vi) all Requests for Assistance concerning Defence witnesses or team members.⁵ The Chamber partially granted the Defence's request, ordering the Prosecution to disclose a lesser redacted version of the Prosecution's contact log with D55.⁶

3. On 14 March 2016, the Defence filed a request for leave to appeal the First Impugned Decision ("First Request"),⁷ raising five "appealable issues". On 15 March 2016, the Defence filed a request for leave to appeal the Second Impugned Decision ("Second Request"; together with the First Request, "Requests"),⁸ raising four "appealable issues" (together with issues identified in the First Request, "Issues"). In both Requests, the Defence submits that the Issues (i) meet the criteria set out under Article 82(1)(d) of the Rome Statute ("Statute"),⁹ (ii) are "discrete legal questions which arise directly out of the Impugned Decision[s]";¹⁰ and (iii) significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial.¹¹

⁴ Decision on the "Defence Motion on Prosecution contact with its witnesses", 22 May 2014, ICC-01/05-01/08-3070.

⁵ ICC-01/05-01/08-3336, paras 15, 38, and 60.

⁶ ICC-01/05-01/08-3336, paras 38 and 60.

⁷ Defence Request for Leave to Appeal the "Decision on Defence request for stay of proceedings and further disclosure", 14 March 2016, ICC-01/05-01/08-3338.

⁸ Defence Request for Leave to Appeal the "Decision on Defence requests for further disclosure", 15 March 2016, ICC-01/05-01/08-3339.

⁹ ICC-01/05-01/08-3338, para. 7; and ICC-01/05-01/08-3339, para. 5.

¹⁰ ICC-01/05-01/08-3338, para. 7; and ICC-01/05-01/08-3339, para. 5.

¹¹ ICC-01/05-01/08-3338, paras 9 to 13; and ICC-01/05-01/08-3339, paras 7 to 10.

4. On 17 March 2016, the Prosecution filed responses to the First¹² and Second Requests,¹³ in which it opposed both.¹⁴ As to the First Request, the Prosecution submits that (i) the Issues do not arise from the First Impugned Decision and are not appealable issues;¹⁵ (ii) the Defence failed to demonstrate an impact on the fair and expeditious conduct of the proceedings;¹⁶ and (iii) the Appeals Chamber's immediate resolution of the matter will not materially advance the proceedings.¹⁷
5. As to the Second Request, the Prosecution submits that (i) none of the Issues constitute appealable issues and are rather mere disagreements with the Chamber's decision;¹⁸ (ii) the Issues do not meet the criteria for leave to appeal under Article 82(1)(d) of the Statute;¹⁹ (iii) the Defence's arguments on fairness are made in the abstract and are speculative;²⁰ (iv) the Defence provides no arguments on expeditiousness;²¹ and (v) the Appeals Chamber's determination of the Issues would not materially advance the proceedings.²²
6. On 21 March 2016, before issuing its Judgment pursuant to Article 74 of the Statute ("Judgment") on the same day,²³ the Chamber issued an oral decision rejecting both the First and Second Requests, finding that the Requests did not meet the relevant criteria for leave to appeal

¹² Prosecution's Response to the Defence Request for Leave to Appeal the "Decision on Defence request for stay of proceedings and further disclosure", 17 March 2016, ICC-01/05-01/08-3342.

¹³ Prosecution's Response to the Defence Request for Leave to Appeal the "Decision on Defence Requests for further disclosure", 17 March 2016, ICC-01/05-01/08-3341.

¹⁴ ICC-01/05-01/08-3342, para. 30; and ICC-01/05-01/08-3341, para. 12.

¹⁵ ICC-01/05-01/08-3342, para. 4.

¹⁶ ICC-01/05-01/08-3342, paras 26 to 28.

¹⁷ ICC-01/05-01/08-3342, para. 29.

¹⁸ ICC-01/05-01/08-3341, para. 2.

¹⁹ ICC-01/05-01/08-3341, para. 3.

²⁰ ICC-01/05-01/08-3341, para. 9.

²¹ ICC-01/05-01/08-3341, para. 10.

²² ICC-01/05-01/08-3341, para. 11.

²³ Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08-3343.

under Article 82(1)(d) of the Statute.²⁴ The Chamber stated that a written decision containing the reasoning underlying the Chamber's decision would be issued in due course.²⁵ In this Decision, the Chamber provides its reasoning.

II. Applicable law

7. For the present Decision, in accordance with Article 21 of the Statute, the Chamber has considered Articles 67 and 82(1)(d) of the Statute.
8. In deciding requests for leave to appeal, the Chamber is guided by the established jurisprudence of this Chamber and of the Court regarding the interpretation of Article 82(1)(d) of the Statute. In line with this jurisprudence, 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.²⁶
9. The Chamber reiterates that, as held by the Appeals Chamber:²⁷

[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.

²⁴ T-367, page 3, lines 3 to 16. The Chamber notes that the transcript erroneously refers to Article 81, rather than 82.

²⁵ T-367, page 3, lines 16 to 17.

²⁶ *The Situation in the Democratic Republic of 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, paragraph 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.

²⁷ ICC-01/04-168, para. 9. *See also* ICC-01/05-01/08-2399, para. 10.

In addition, Article 82(1)(d) of the Statute cannot be used to litigate abstract or hypothetical issues.²⁸

10. Accordingly, the Chamber has examined the Requests for Leave to Appeal in light of the following criteria:²⁹

- 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.

11. The three criteria mentioned above are cumulative and therefore, failure to fulfil one or more of these criteria is fatal to an application for leave to appeal.³⁰ 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 may arise in future pre-trial or trial proceedings.³¹ Further, it

²⁸ 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; *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, and Dominic Ongwen*, Decision on the Defence Request for leave to appeal the 21 November 2008 Decision, 10 February 2009, ICC-02/04-01/05-367, paragraph 22; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, 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 *The Prosecutor v. Uhuru Muigai Kenyatta*, 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.

²⁹ 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. *See also* ICC-01/05-01/08-2399, para. 11.

³⁰ ICC-01/05-01/08-1169, para. 24. *See also* ICC-01/05-01/08-2399, para.12.

³¹ ICC-01/05-01/08-1169, paragraph 25. *See also The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, and Dominic Ongwen*, Decision on Prosecutor’s Application for Leave to Appeal in Part

is insufficient 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.³²

III. Analysis

12. The Chamber emphasises that, as set out above, each *issue* must satisfy the relevant criteria. The First and Second Requests identify, in list form, allegedly “appealable issues”, but do not explain, on an issue-by-issue basis, how each satisfies the relevant criteria. Rather, the Defence submissions concern the general subject-matter of disclosure in the *Bemba* case, failing to expressly link the relevant criteria to either the specific issues identified or even the specific Impugned Decisions.³³ In such circumstances, as the Defence fails to provide reasons as to how each Issue satisfies the relevant criteria,³⁴ the Chamber is entitled to dismiss the First and Second Requests *in limine*.

13. Further, the Chamber recalls that the Impugned Decisions were issued after the Chamber scheduled the delivery of the Judgment on 2 February 2016.³⁵ In accordance with the applicable filing deadlines,³⁶ the Defence filed the Requests roughly one week before the Judgment was scheduled to be issued. The deadlines for responses to the Requests were 18 and 21 March 2016, the latter being the same day the

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), para. 21; and *The Prosecutor v. Thomas Lubanga Dyilo*, 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. *See also* ICC-01/05-01/08-2399, para. 13.

³² ICC-01/05-01/08-1169, para. 25. *See also* ICC-01/05-01/08-2399, para. 13.

³³ ICC-01/05-01/08-3338, paras 9 to 13; and ICC-01/05-01/08-3339, paras 7 to 10.

³⁴ *See, inter alia*, Rule 155 of the Rules of Procedure and Evidence; and Regulation 65 of the Regulations of the Court.

³⁵ Order Scheduling the Delivery of the Judgment Pursuant to Article 74 of the Rome Statute, ICC-01/05-01/08-3329, 2 February 2016.

³⁶ Rule 155(1) of the Rules of Procedure and Evidence.

Judgment was scheduled to be delivered.³⁷ The Chamber notes that once a judgment pursuant to Article 74 of the Statute is issued, the Defence is able, if it so wishes, to raise matters that it considers relevant directly with the Appeals Chamber.³⁸ In these circumstances, and regardless of whether or not the other cumulative leave to appeal criteria are satisfied, the Defence has not demonstrated that immediate, interlocutory resolution of the issues by the Appeals Chamber would have materially advanced the proceedings.³⁹

IV. Conclusion

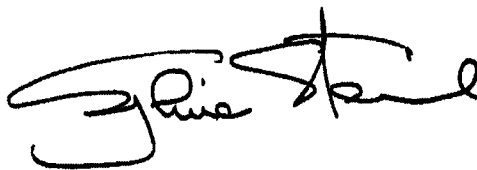
14. In view of the above, the Chamber **REJECTS** the Requests.

³⁷ Regulation 65(3) of the Regulations of the Court. .

³⁸ Article 81(1)(b)(iv) of the Statute.

³⁹ *See, inter alia, The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the prosecution and defence applications for leave to appeal the Trial Chamber's "Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters", 16 December 2008, ICC-01/04-01/06-1557, para. 26, *quoting* ICC-02/04-01/05-20, para. 19, finding that "[the] case-law shows that in striking the balance between the convenience of deciding certain issues at an early stage of the proceedings, and the need to avoid possible delays and disruptions caused by recourse to interlocutory appeals, the provisions enshrined in the relevant rules of the *ad hoc* Tribunals, and in the Statute, favour as a principle the deferral of appellate proceedings until final judgment, and limit interlocutory appeals to a few, strictly defined, exceptions."

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 03 May 2016

At The Hague, the Netherlands