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TRIAL CHAMBER III

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge Joyce Aluoch

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
*v. JEAN-PIERRE BEMBA GOMBO***

Public Document

**Response by the Legal Representative of Victims to the “Prosecution’s Request for
Leave to Appeal the Trial Chamber’s Oral Ruling Denying Authorisation to Add
and Disclose Additional Evidence after 30 November 2009”**

Source: The Office of Public Counsel for Victims

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. PROCEDURAL BACKGROUND

1. On 7 October 2009, Trial Chamber III (the “Trial Chamber”) ordered the Prosecution to disclose the entirety of remaining evidence yet to be disclosed to the Defence pursuant to the Prosecution’s obligations under the Rome Statute and the Rules of Procedure and Evidence by the deadline of 30 November 2009.¹ On 4 November 2009, the Trial Chamber confirmed this deadline in writing in its “Order on disclosure of evidence by the Office of the Prosecutor”.²

2. On 30 November 2009, the Prosecution filed a request for authorisation to add and disclose additional evidence to the one already disclosed beyond the 30 November 2009 deadline (the “Prosecution’s Request”).³ In said request, the Prosecution sought to add new evidence which, it argued, resulted from further investigations that had become necessary to present at trial as a result of Pre-Trial Chamber II’s confirmation of a different mode of liability, to wit under article 28(a) of the Rome Statute, from the one originally argued by the Prosecution.⁴ To that end, the Prosecution maintained that it still needed to undertake the following steps, which would put it past the Trial Chamber’s 30 November deadline: 1) re-interview two witnesses to obtain further evidence in relation to the mode of liability under article 28(a) and the evidence presented by the Defence at the confirmation hearing, 2) interview three new witnesses who had become available only recently, and 3) obtain access to information gathered by the Registry and to receive other material.⁵ The Prosecution thus requested an extension of time to add and disclose this

¹ See the Transcripts of the hearing, (Trial Chamber III), No. ICC-01/05-01/08-T-14-ENG ET, 7 October 2009, p. 16, lines 5-9.

² See the “Order on disclosure of evidence by the Office of the Prosecutor”, No. ICC-01/05-01/08-590, (Trial Chamber III), 4 November 2009, par. 7.

³ See the “Prosecution’s Request for Authorisation to Add and Disclose Additional Evidence to be relied on at trial beyond 30 November 2009”, 30 November 2009, No. ICC-01/05-01/08-626.

⁴ *Idem*, par. 25.

⁵ *Ibid.*

additional evidence until 27 January 2010, about three months prior to the scheduled date for the commencement of the trial.⁶

3. In its Oral Decision on 8 December 2009, the Trial Chamber rejected the Prosecution's Request, noting that the Prosecution failed in its submission to address the part of the Chamber's previous Order wherein the former was to apply in advance of the deadline of 30 November 2009 for an extension, if any, setting out the reasons for it and giving time for a hearing, if need be, to resolve the matter.⁷ According to the Trial Chamber, no reasons were provided in the Prosecution's Request or in its confidential, *ex parte* Prosecution only, Annex attached thereto, which provided a "*sufficiently compelling or explicable basis for the Chamber to allow [the] application*" with regard to the additional eight sources which the Prosecution wished to rely on and disclose to the Defence past the deadline ordered.⁸

4. On 14 December 2009, the Prosecution submitted a request for leave to appeal the Trial Chamber's Oral Decision pursuant to article 82(1)(d) of the Rome Statute and rule 155 of the Rules of Procedure and Evidence (the "Prosecution's Request for Leave to Appeal").⁹

5. In accordance with regulations 24(2) and 65(3) of the Regulations of the Court, the Principal Counsel of the Office of Public Counsel for Victims as Legal Representative of victims a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08,

⁶ *Idem*, par. 29.

⁷ See the Transcripts of the hearing, (Trial Chamber III), No. ICC-01/05-01/08-T-18-ENG ET, 8 December 2009, p. 31, lines 17-25.

⁸ *Idem*, p. 35, lines 12-15.

⁹ See the "Prosecution's Request for Leave to Appeal the Trial Chamber's Oral Ruling Denying Authorisation to Add and Disclose Additional Evidence after 30 November 2009", No. ICC-01/05-01/08-654, dated 14 December 2009 and filed on 15 December 2009.

a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08, a/0467/08 (the “Legal Representative”) files her response to the Prosecution’s Request for Leave to Appeal.

II. SUBMISSIONS IN SUPPORT OF THE PROSECUTION’S REQUEST FOR LEAVE TO APPEAL

a. Legal Standard under which the Prosecution’s Request for Extension of Time Limit should be examined

6. The Legal Representative supports the Prosecution’s Request for Leave to Appeal the Trial Chamber’s Oral Decision of 8 December 2009, and generally supports its advanced reasons therein.

7. In particular, and as previously noted by the Prosecution, the Legal Representative highlights that under articles 54(1) and 61(9) of the Rome Statute and the Appeals Chamber’s Decision in the case of the *Prosecutor v. Thomas Lubanga Dyilo* (the “*Lubanga* case”), the Prosecution must be granted the ability to continue its investigations beyond the confirmation of charges hearing so that it can satisfy its burden of establishing the truth.¹⁰

8. According to the Prosecution in the case *sub-judice*, it was faced with the thus-far unusual circumstance of having the majority of the charges presented to the Pre-Trial Chamber confirmed under a different form of criminal responsibility than the one espoused by it. This fact, according to the Prosecution’s Request, placed it in the position of having to conduct further investigations post the date of the confirmation

¹⁰ See the “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence””, (Appeals Chamber), No. ICC-01/05-01/08-568, 13 October 2006, par. 52.

of charges in June of 2009, in an attempt to collect additional evidence in relation to the accused's responsibility under article 28(a) of the Rome Statute.¹¹

9. Well aware of the fact that the above-mentioned reason does not explain why the Prosecution, contrary to the Trial Chamber's Order, filed its request for an extension of time on the same day of the deadline, the Legal Representative would nevertheless like to point out that in similar circumstances, Trial Chamber II has established a balancing test to be applied in its determination of whether to allow new evidence to be presented by the Prosecution at trial after a violation of the deadlines set by the Chamber. In particular, Trial Chamber II has allowed late applications by the Prosecution when it can be shown that "*i) the new material is either significantly more compelling than other items of evidence already disclosed to the Defence or brings to light a previously unknown fact which has a significant bearing upon the case, and (ii) the late addition will not cause undue prejudice to the Defence in relation to the latter's right to have adequate time and facilities to prepare in accordance with article 67(1)(b) of the Statute.*"¹²

10. Since the Legal Representative is not privy to the information contained in the confidential, *ex parte* Annex attached to the Prosecution's Request, she cannot comment on the substance of the Prosecution's newly proposed evidence or the specific reasons why it alleges it could not comply with the Trial Chamber's deadline. However, the Legal Representative respectfully submits that the additional criteria

¹¹ See *supra* note 3, par. 25.

¹² See the "Decision on the Prosecution's Application to Add P-317 to the Prosecution Witness List (ICC-01/04-01/07-1537)", (Trial Chamber II), No. ICC-01/04-01/07-1590, 03 November 2009, par. 12. According to Trial Chamber II, the Chamber should "*weigh the interest in having the additional information against the need for the Defence to usefully prepare its response to it. If the length of time and resources that are reasonably required by the Defence to prepare a meaningful response to the new items of evidence are disproportionate to the limited interest of the Chamber in having the additional item of evidence discussed at trial, the item may still be rejected.*" See the "Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29, and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)", (Trial Chamber II), No. ICC-01/04-01/07-1515-Corr, 09 October 2009, par. 26. See also the "Decision on the Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", (Trial Chamber II), No. ICC-01/04-01/07-1336, 27 July 2009, paras. 29-30

applied by Trial Chamber II to determine whether to ultimately grant or reject the Prosecution's requests for an extension of time to add new evidence are not only consistent with the Chamber's powers under articles 64(6)(d) and 69(3) of the Rome Statute, but also properly balance the right, on the one hand, of the Prosecution to exercise its powers to continue its investigations in the case under articles 54(1) and 61(9) of the Rome Statute, and of the Defence, on the other, to have adequate time for the preparation of its case pursuant to article 67(1)(b) of the Statute. Yet a third and just as important safeguard inherent in Trial Chamber II's approach to this issue is that a procedural transgression by a party will not ultimately cause substantial, substantive harm to that party's ability to present its case in full and therefore have a fair trial, while simultaneously facilitating the Trial Chamber's duty to establish the truth under article 69(3) of the Statute.

11. Finally, the Legal Representative would like to note that the decision of the Trial Chamber to not allow the Prosecution to disclose additional evidence has an impact on the personal interests of the victims participating in the proceedings in so far as it impacts on their right to seek the truth and justice. As put forward by the Single Judge in her "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case," *"when [the victim's right to truth] is to be satisfied through criminal proceedings, victims have a central interest in that the outcome of such proceedings (i) bring clarity about what indeed happened; and (ii) close possible gaps between the factual findings resulting from the criminal proceedings and the actual truth."*¹³

12. It goes without saying that the Chamber's procedural orders should always be followed and complied with by the parties and participants whenever possible. Nevertheless, it would be in the interests of justice and a fair trial for a chamber to

¹³ See the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victims, at the Pre-Trial Stage of the Case", (Pre-Trial Chamber I, Single Judge), 15 May 2008, No. ICC-01/04-01/07-474, par. 34.

determine on a case-by-case basis whether the benefit of considering the substantive merits of the issue in question outweighs the prejudice caused to the other party or participants in the case.

b. Legal Grounds in support of the Prosecution's Request to Appeal

13. Pursuant to article 82(1)(d) of the Rome Statute, the following criteria must be established for an issue to be subject to review by the Appeals Chamber, namely, that 1) the matter is an appealable issue, 2) the issue could significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial, and 3) in the opinion of the trial chamber, an immediate resolution by the Appeals Chamber could materially advance the proceedings. The three requirements described above are cumulative and therefore failure to establish one or more of them is fatal to the application for leave to appeal.¹⁴ Since an issue is made up of a subject "*the resolution of which is essential for the determination of matters arising in the judicial cause under examination*", and it may be a legal or factual or mixed one,¹⁵ the Legal Representative limits herself on this point to stating only that a chamber's decision as to whether or not to allow a party to introduce certain *prima facie* relevant evidence at trial is clearly an appealable issue as defined above.

14. With regard to the criterion of whether the issue could significantly affect the fair and expeditious conduct of the proceedings, the Appeals Chamber in the Situation of the Democratic Republic of the Congo stated that the term "fair" in the context of article 82(d)(1) of the Rome Statute relates to the norms of a fair trial.¹⁶ In the case at hand, the fact that the Prosecution would not be able to introduce

¹⁴ See the «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», (Trial Chamber I), No. ICC-01/04-01/06-1557, 17 December 2008, paras. 23-24.

¹⁵ See the "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", (Appeals Chamber) No. ICC-01/04-168 OA3, 13 July 2006, par. 9.

¹⁶ *Idem*, par. 11.

additional evidence that it collected or is in the process of collecting in order to establish the mode of criminal liability confirmed by the Pre-Trial Chamber would, from the standpoint of the Prosecution, affect its right to present its case in full and put forth all the evidence that is available to it, thereby affecting its right to have a fair trial.

15. With respect to whether the issue affects the expeditious conduct of the proceedings, the Appeals Chamber has stated that this also “*in one form or another constitutes an attribute of a fair trial.*”¹⁷ Indeed, as noted by the Prosecution in its Request for Leave to Appeal, the Appeals Chamber has held that when a party is able to show that an issue affects the fair conduct of the proceedings for purposes of article 82(1)(d) of the Rome Statute, a further showing that the issue also affects its expeditious conduct is surplus to the requirement needed to satisfy this prong for purposes of being granted leave to appeal.¹⁸ Notwithstanding, the Legal Representative respectfully argues that, when considering that the proceedings are not confined solely to the ones at hand but extend to proceedings prior and subsequent thereto,¹⁹ resolution of this issue on appeal does ultimately affect the expeditious conduct of the proceedings since, in the event of an acquittal of the accused, the Prosecution would likely appeal said acquittal on the ground that the Trial Chamber did not allow it to introduce critical evidence at trial affecting the outcome of the verdict, thereby extending the final determination of the trial past the verdict pending a post-acquittal appeal on the issue. This unnecessary extension of a final determination of conviction or acquittal, and possibly involving a re-trial, would be the direct result of the erroneous decision by the Trial Chamber not being corrected on appeal prior thereto.

¹⁷ *Ibid.*

¹⁸ See *supra* note 9, par. 19. See also the «Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal», (Appeals Chamber), No. ICC-01/04-141 OA3, 24 April 2006, paras. 51-52.

¹⁹ See *supra* note 14, par. 12.

16. The prong of whether the issue affects the outcome of the trial is set out as a separate and distinct consideration from that of whether the issue affects the fair and expeditious conduct of the proceedings, and one or the other in the alternative may be established.²⁰ The Legal Representative respectfully submits that the Trial Chamber's refusal to allow the addition and disclosure of the Prosecution's evidence *ipso facto* affects the outcome of the trial, since presumably, the Prosecution sought to add evidence that would help it prove the charges brought against the accused since, as it explained in its submission, the new evidence was necessary due to the Pre-Trial Chamber's confirmation of the mode of criminal responsibility under article 28(a) of the Rome Statute.

17. Lastly, concerning the final prong of whether immediate appellate resolution of the issue will materially advance the proceedings, the Appeals Chamber in the Situation in the Democratic Republic of the Congo has determined that the meaning of the term "advance" as used therein is to "*move forward [. . .] by ensuring that the proceedings follow the right course*", thereby "*ridding [. . .] the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.*"²¹ Clearly, and as the Appeals Chamber continued, "*a wrong decision on an issue [. . .] unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process.*"²² Therefore, the Legal Representative submits that not granting leave to appeal the Trial Chamber's Oral Decision would be contrary to moving forward the proceedings, since, if the Oral Decision is indeed erroneous, as the Prosecution asserts, then said Decision would surely taint the fairness of the proceedings and affect the outcome of the trial.

18. The Legal Representative submits that, pursuant to the above arguments as well as those of the Prosecution in its Request for Leave to Appeal, which she fully

²⁰ *Idem*, par. 13.

²¹ *Idem*, paras. 14-15.

²² *Idem*, par. 16.

endorses, the Trial Chamber should find that all three prongs required to establish the right to appeal under article 82(1)(d) of the Rome Statute have been met.

FOR THE FOREGOING REASONS, the Legal Representative respectfully requests that the Trial Chamber grant the Prosecution's request for leave to appeal the Trial Chamber's Oral Decision of 8 December 2009 denying authorization to add and disclose additional evidence, pursuant to article 82(1)(d) of the Rome Statute.

A handwritten signature in black ink, reading "Paolina Massidda". The signature is fluid and cursive, with a horizontal line drawn underneath the name.

Paolina Massidda
Principal Counsel

Dated this 21st December 2009

At The Hague, The Netherlands