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TRIAL CHAMBER III

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

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

**Public Document
URGENT**

Response by the Legal Representative to the “Requête de la Défense aux fins de faire intervenir un témoin-expert en Droit de Procédure Pénale de la République Centrafricaine”

Source: 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 25 February 2010, the Defence submitted a “*Requête en vue de contester la recevabilité de l’Affaire conformément aux articles 17 et 19(2)(a) du Statut de Rome*”, (the «Admissibility Motion» or the «Motion») of which a public redacted version was filed on 02 March 2010. Pursuant to the Trial Chamber’s subsequent instruction, said Motion was reclassified as confidential, and subsequently a public redacted version was filed by the Defence.¹

2. On 1 April 2010, the Principal Counsel for the Office of Public Counsel for Victims, as Legal Representative in the Case,² (the “Legal Representative”), submitted its “Response by the Legal Representative of Victims to the Defence's Challenge on Admissibility of the Case pursuant to articles 17 et 19 (2) (a) of the Rome Statute with 102 Annexes Confidential ex parte OPCV only and same Annexes Public Redacted” (the “Response”).³ On 16 April 2010, the Legal Representative filed a Corrigendum to the “Response by the Legal Representative of Victims to the Defence's Challenge on Admissibility of the Case pursuant to articles 17 et 19 (2) (a)

¹ See the “*Requête en vue de contester la recevabilité de l’Affaire conformément aux articles 17 et 19(2) (a) du Statut de Rome*”, No. ICC-01/05-01/08-704-Red2-Conf, 02 March 2010; See the “*Requête en vue de contester la recevabilité de l’Affaire conformément aux articles 17 et 19(2) (a) du Statut de Rome*”, No. ICC-01/05-01/08-704-Red3, 09 April 2010.

² The Office filed its Response on behalf of 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, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08 et a/0467/08, already authorised to participate at trial, and of applicants a/0280/08; a/0456/08; a/0541/08 to a/0543/08; a/0546/08 to a/0552/08; a/0555/08 to a/0557/08; a/0559/08; a/0560/08; a/0511/08 to a/0517/08; a/0562/08 to a/0573/08; a/0574/08 to a/0579/08; a/0582/08 to a/0606/08; a/0624/08; a/0625/08; a/0001/10 to a/0025/10; a/0129/09 to a/0141/09; a/0427/09; a/0428/09; a/0429/09; a/0430/09; a/0431/09 to a/0433/09; a/0651/09 to a/0653/09; a/0661/09 to a/0668/09; a/0155/10; a/0156/10; a/0160/10; a/0162/10 to a/0215/10; a/0297/10 to a/0332/10; as well as on behalf of 178 individuals having filed a request for participation and not having yet been assigned a VPRS number, and on behalf of those victims who have communicated with the Court, pursuant to rule 59(3) of the Rules of Procedure and Evidence.

³ See the “Response by the Legal Representative of Victims to the Defence's Challenge on Admissibility of the Case pursuant to articles 17 et 19 (2) (a) of the Rome Statute with 102 Annexes Confidential ex parte OPCV only and same Annexes Public Redacted”, No. ICC-01/05-01/08-742, 01 April 2010. Due to a major Outlook breakdown on 1 April 2010, this document was notified by Court Management – Court Records on the next working day of 6 April 2010.

of the Rome Statute with 102 Annexes Confidential ex parte OPCV only and same Annexes Public Redacted”.⁴

3. On 23 April 2010, the Defence filed a *“Requête de la Défense aux fins de faire intervenir un témoin-Expert en droit de Procédure Pénale de la République Centrafricaine”*, seeking the permission of the Chamber to introduce the expert testimony of Mr Edouard Franck on the judicial system of the Central African Republic (the “CAR”) in a written report, and if necessary, orally at the admissibility hearing of 27 April 2010 (the “Defence Request”).⁵

4. The Legal Representative hereby submits the following observations regarding the Defence Request.

II. The Defence Request is tardive and superfluous

5. The Legal Representative submits that the Defense Request aims only to further delay the proceedings. Indeed, the Defence argues that it was unable to ask for an expert advice in the matter before, since it only had knowledge of the CAR observations on 19 April 2010 and that at that point in time it became apparent that an expert advice was needed. In this respect, the Legal Representative submits that, having had already activated the proceedings challenging the admissibility of the Case before the Court, the Defence was in a position since the very beginning to assess whether an expert advice was needed.

⁴ See the “Corrigendum to the “Response by the Legal Representative of Victims to the Defence's Challenge on Admissibility of the Case pursuant to articles 17 et 19 (2) (a) of the Rome Statute with 102 Annexes Confidential ex parte OPCV only and same Annexes Public Redacted”, No. ICC-01/05-01/08-756, 16 April 2010, and No. ICC-01/05-01/08-742-Corr. In the present filing, references to the OPCV arguments in response to the Defence’s Admissibility Motion are taken from the latter citation.

⁵ See the *“Requête de la Défense aux fins de faire intervenir un témoin-Expert en droit de Procédure Pénale de la République Centrafricaine”*, No. ICC-01/05-01/08-760, 23 April 2010, paras 4, 17.

6. In any case, the Legal Representative further submits that such expert advice is not necessary for the Chamber to determine the matter *sub judice*. Indeed, the CAR authorities, who will be appearing at the hearing, are in the best position to provide the Chamber with any information it might need in relation to the national proceedings.

7. Furthermore, the Legal Representative notes that the Defence Request is in breach of the established procedure set by the Chamber in relation to expert-witnesses. Indeed, the Chamber, in its “Decision on the procedures to be adopted for instructing expert witnesses”⁶, instructed the parties and participants on the modalities to be applied for calling expert witnesses, indicating its preference for jointly instructed expert-witnesses. Furthermore, at the Status Conference of 29 April 2010, the Chamber provided further guidance as to deadlines to meet in order to jointly instruct expert witnesses.⁷ In doing so, the Chamber followed the jurisprudence established by Trial Chamber I in *The Prosecutor v. Thomas Lubanga Dyilo* Case (the “*Lubanga Case*”) on the issue of expert witnesses, the latter Chamber having previously emphasised that it favored the joint instruction of common experts agreed to by the parties and participants, whenever possible.⁸ Moreover, the practice of Trial Chamber I has been to require sufficient advance notice, on average three

⁶ See the “Decision on the procedures to be adopted for instructing expert witnesses”, (Trial Chamber III), No. ICC-01/05-01/08-695, 12 February 2010, par. 13.

⁷ See the Transcripts of the Status Conference of Trial Chamber III, No. ICC-01/05-01/08-T-21-ENG ET WT, p. 14, lines 18 to p. 15, line 24. The Chamber recalled that in its previous order, it had instructed as follows: “(i) the Prosecution is to provide the Defence with the name and curriculum vitae of the socio-linguistic expert witness, if possible with the agreement of the legal representatives, no later than 16.00 on 19 February 2010; (ii) the Defence is to file its observations on all the proposed expert witnesses, by no later than 16.00 on 26 February 2010; (iii) the joint experts are to be jointly instructed; iv) if the parties cannot agree joint instructions, the joint experts are to be given separate instructions, wholly or in part; v) the parties shall only instruct separate experts after that proposed course has been raised in a timely manner with the Chamber; (vi) to the extent that victims are participating on an issue or as regards evidence which is to be the subject of expert evidence, they are to be given an opportunity to contribute to the expert’s instructions (jointly with the parties or separately); (vii) whenever an expert is to be instructed jointly, the instructions to the expert should be filed with the Chamber at an early stage; (viii) counsel must ensure that for those experts who are not on the list of experts, they have applied to include their names on the list, and the Chamber is to receive confirmation of this step by way of email to the legal adviser to the Trial Division.”

⁸ See *supra* note 7, paras. 10-12, citing the “Decision on the procedures to be adopted for instructing expert witnesses”, (Trial Chamber I), No. ICC-01/04-01/06-1069, 10 December 2007, paras. 14-23.

weeks, for an expert witness report to be filed and issued to the parties and participants prior to his or her oral testimony at the hearing on the matter, thereafter granting the other parties and participants from ten days to two weeks to submit further proposed questions to be posed to the expert.⁹

8. In the present situation, the Defence has not only completely disregarded the instruction of the Chamber as its preference for jointly instructed expert-witnesses, but it has also put the Prosecution and Legal Representatives at an unfair disadvantage *vis a vis* this proposed expert witness, since, as they even write this response, they have not yet been able to examine the report of said expert witness, and even if they had, they will not have been given appropriate time, considering the admissibility hearing date of 27 April 2010, to raise any objections as to his qualifications, the contents of his report, or the areas as to which said expert witness should properly testify. It also does not go unnoticed that this expert witness is not on the Court's list of expert witnesses, a fact that the Defence has previously used to object to the proposal of certain expert witnesses by the Prosecution and agreed to by the Legal Representatives.¹⁰

9. Furthermore, the reasons why the Defence wants to call this particular expert witness show a misunderstanding on its part of the applicability of the use of expert witnesses before the Court. In its Request, the Defence states that it would like to have this particular expert witness testify as to the allegedly contradictory positions held by the "*Chef de l'Etat*" of the CAR and the "*Ministre de la Justice*".¹¹ The Legal

⁹ See the "See the "Instructions to the Court's expert on background and context" (Trial Chamber I), No. ICC-01/04-01/06-1558, 17 December 2008, par. 10 ; see the "Decision Inviting Observations from the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict", (Trial Chamber I), No. ICC-01/04-01/06-1175, 18 February 2008, par. 11; see the "Instructions to the Court's expert on child soldiers and trauma", (Trial Chamber I), No. ICC-01/04-01/06-1671, 06 February 2009, par. 15; See the "Instructions to the Court's expert on names and other social conventions in the Democratic Republic of Congo", (Trial Chamber I), No. ICC-01/04-01/06-1934, 05 June 2009, par. 17.

¹⁰ See *supra* note 8, p. 10, lines 8-24.

¹¹ See *supra* note 5, paras. 3-4.

Representative submits that this is not a valid ground for which to call an expert witness to the admissibility hearing. Any disagreement between the CAR national authorities as to the admissibility of the Case before the Court are factual in nature, and cannot *a fortiori* be resolved by an expert witness. For that, the CAR national authorities have submitted their observations as to the matter, and will be present at the hearing to answer any questions posed by the Defence or the Chamber on said issue, if deemed necessary.

10. Notwithstanding the vehement objections, for the reasons explained above, by the Legal Representative in allowing the Defence's proposed expert witness' report and testimony at the 27 April 2010 hearing, should the Chamber allow both, the Legal Representative submits that, by virtue of the fact that article 19(3) of the Rome Statute provides that victims may submit observations to the Court, she shall be allowed to provide observations on the report of the expert, as well as to question the expert on any matter raised in his report, should he appear at the hearing.

FOR THE FOREGOING REASONS, the Legal Representative respectfully requests that the Chamber dismiss the Defence's Request and consequently do not authorize the filing of the report by Mr Edouard Franck.

Should the Chamber decide to allow the filing of said report and authorise Mr Edouard Franck to appear as an expert-witness at the hearing, the Legal Representative respectfully requests to be allowed to provide observations on his report either in writing or orally, and to question him on any matter arising from the his report.

A handwritten signature in black ink, reading 'Paolina Massidda', with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 26 April 2010

At The Hague, The Netherlands