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No.: ICC-01/05-01/08
Date: 18 October 2010

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

Legal Representative's Response to the Defence's «Demande d'autorisation d'interjeter appel de la décision de la Chambre de Première Instance III intitulée « Decision on the defence application to obtain a ruling to correct the revised Second Amended Document containing the Charges » du 8 Octobre 2010

Source: 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, a/0461/08, a/0462/08, a/0463/08,
a/0464/08, a/0465/08, a/0466/08, a/0467/08, a/0130/09, a/0131/09, a/0132/09, a/0133/09,
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a/0432/09, a/0511/08, a/0512/08, a/0513/08, a/0515/08, a/0516/08, a/0562/08, a/0563/08,
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a/0572/08, a/0651/09, a/0652/09 and a/0653/09

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

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**Victims Participation and Reparations
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Other

I. Procedural Background

1. On 7 October 2009, Trial Chamber III (the “Chamber”) requested the Prosecution to submit a new document containing the charges (the “Document containing the Charges”), reflecting the Pre-Trial Chamber’s decision on the confirmation of the charges¹. Consequently, the Prosecution filed the “Second Amended Document containing the Charges” on 4 November 2009.²

2. On 12 February 2010, the Defence filed an application seeking revisions of the “Second Amended Document containing the Charges”.³ On 20 July 2010, the Chamber partially granted said defence application and ordered the Prosecution to revise the said document.⁴ Accordingly, on 18 August 2010, the Prosecution filed the “Revised Second Amended Document containing the Charges”.⁵

3. On 22 September 2010, the Defence filed another application seeking further modification of the “Revised Second Amended Document containing the Charges.”⁶ The Prosecution⁷ and the Legal Representative⁸ responded on 28 and 29 September 2010, respectively.

¹ See the Transcript of the hearing on 7 October 2009, No. ICC-01/05-01/08-T-14-ENG ET, page 13, lines 5 - 10.

² See the “Prosecution’s Submission of the Document Containing the Charges as Confirmed by the Pre-Trial Chamber filed in accordance with the Chamber’s Order of 7 October 2009”, No. ICC-01/05-01/08-593-Conf-Anx and Anx-Red, 4 November 2009.

³ See the « Requête aux fins d’obtenir une Décision ordonnant la correction et le dépôt du Second Document Amendé Contenant les Charges », No. ICC-01/05-01/08-694, 12 February 2010.

⁴ See the “Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges”, No. ICC-01/05-01/08-836, 20 July 2010.

⁵ See the “Prosecution’s Submission of the Revised Second Amended Document Containing the Charges”, No. ICC-01/05/01/08-856 and Conf-Annexes A and B and public redacted version of Annex A, ICC-01/05-01/08-856-Red-AnxA, 18 August 2010.

⁶ See the « Requête de la Défense aux fins d’une ordonnance visant à corriger et à déposer à nouveau le Deuxième Document Amendé contenant les Charges », No. ICC-01/05-01/08-894, 22 September 2010.

⁷ See the “Prosecution’s Response to “Requête de la Défense aux fins d’une ordonnance visant à corriger et à déposer à nouveau le Deuxième Document Amendé contenant les Charges”, No. ICC-01/05-01/08-907-Conf and public redacted version, No. ICC-01/05-01/08-907-Red, 28 September 2010.

⁸ See the “Legal Representative’s Response to the Defence’s Request for revision of the Revised Second Amended Document Containing the Charges, No. ICC-01/05-01/08-910, 29 September 2010.

4. On 8 October 2010, the Chamber rendered the *“Decision on the defence application to obtain a ruling to correct the revised Second Amended Document containing the Charges”* (the *“Decision”*) rejecting the Defence’s application *in limine* on the ground that it was filed outside the time-limit referred in regulation 34 of the Regulations of the Court.⁹

5. On 13 October 2010, the Defence filed an Application for Leave to Appeal the Decision (the *“Defence’s Appeal Application”*).¹⁰

6. 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, acting 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, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08, a/0467/08, a/0130/09, a/0131/09, a/0132/09, a/0133/09, a/0134/09, a/0135/09, a/0136/09, a/0137/09, a/0138/09, a/0139/09, a/0141/09, a/0427/09, a/0432/09, a/0511/08, a/0512/08, a/0513/08, a/0515/08, a/0516/08, a/0562/08, a/0563/08, a/0564/08, a/0565/08, a/0566/08, a/0567/08, a/0568/08, a/0569/08, a/0570/08, a/0571/08, a/0572/08, a/0651/09, a/0652/09 and a/0653/09 (the *“Legal Representative”*)¹¹, hereby respectfully submits her Response to the Defence’s Appeal Application.

⁹ See the *“Decision on the defence application to obtain a ruling to correct the revised Second Amended Document containing the Charges”*, No. ICC-01/05-01/08-935, 8 October 2010, paras. 7-9.

¹⁰ See the *“Demande d’autorisation d’interjeter appel de la décision de la Chambre de Première Instance III intitulée: ‘Decision on the defence application to obtain a ruling to correct the revised Second Amended Document containing the Charges’ du 8 Octobre 2010”*, No. ICC-01/05-01/08-949, 13 October 2010.

¹¹ See the *“Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties’ observations on applications for participation by 86 applicants”*, No. ICC-01/08-01/05-699, 22 February 2010; See also the *“Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings”*, No. ICC-01/05-01/08-807 and No. ICC-01/05-01/08-807-Conf-Exp-AnxA, 30 June 2010.

II. Response to the Defence's Appeal Application

A. Preliminary observations

7. The Legal Representative firstly recalls that the statutory provisions and the jurisprudence of the Court on the procedure of interlocutory appeals are clear and unambiguous.

8. As discussed in further detail below, various Chambers of the Court have consistently held that an interlocutory appeal under article 82(1)(d) of the Rome Statute shall be granted only if the specific conditions required by said article are met.

9. According to article 82(1)(d) of the Rome Statute and its interpretation by the Appeals Chamber, the following criteria must be met in order for a leave to appeal to be granted pursuant thereto: (a) the matter *sub judice* is an "appealable issue"; (b) said issue could significantly affect: (i) the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and (c) an immediate resolution by the Appeals Chamber could materially advance the proceedings.¹² The requirements set out in (a), (b) and (c) above are cumulative and thus the failure to fulfil one or more of them is fatal to an application for leave to appeal.¹³

10. Thus, the first condition for granting interlocutory appeals under article 82(1)(d) of the Rome Statute is the existence of an "appealable issue." The Appeals Chamber of the Court has explicitly defined the latter as "[a]n identifiable subject or topic requiring a decision for its resolution", or an issue which is "[c]onstituted by a subject

¹² 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", No. ICC-01/04-168 OA3, 13 July 2006, paras. 9-20.

¹³ See the "Decision on the Prosecution's Application for Leave to Appeal the "Decision on the Prosecution's Application to Lift the Stay of the Proceedings", No. ICC-01/04-01/06-1473, 24 September 2008, par. 22; See also 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", No. ICC-01/04-01/06-1557, 17 December 2008, paras. 23-24.

the resolution of which is essential for the determination of matters arising in the judicial cause under examination”, whether said issue is “[l]egal or factual or a mixed one.”¹⁴

11. Moreover, pursuant to the jurisprudence in the case of the *Prosecutor v. Katanga & Ngudjolo Chui*, “[it is] incumbent upon the party seeking leave to appeal to precisely and unequivocally identify the relevant part of an order or a decision which, in its view, gives rise to an appealable issue” and said party must precisely formulate “[w]hat it believes to be the appealable issue.”¹⁵

12. In analysing the Defence’s Appeal Application in light of the above, it fails to meet the required criterion when it only submits that:

« Conformément à l’Article 82(1)(d) du Statut de Rome ainsi que de la Règle 155(1) du Règlement de Preuve et de Procédure, la Défense de M. Jean-Pierre Bemba Gombo (“l’Accusé”) ci-après sollicite l’autorisation d’interjeter appel de la Décision sur le seul motif que la Chambre de Première Instance III a faillit en droit lorsqu’elle a considéré sa Requête comme étant “une réponse” en vertu de la Norme 34 du Règlement de la Cour (“Le Règlement”) affirmant ainsi qu’elle a été soumis sans délai prescrit ». ¹⁶

13. In its submission, the Defence’s Appeal Application abruptly turns to discussing the purported negative consequences of this “procedural question” and fails to “precisely formulate” how the matter is an appealable issue as prescribed by the Appeals Chamber. Therefore, the Defence failed to articulate with sufficient precision, or any precision at all for that matter, what makes the subject which it wants reviewed by the Appeals Chamber an appealable issue. Thus, the Legal Representative submits that the Defence’s Appeal Application failed to satisfy the first criterion for being granted leave to appeal pursuant to article 82(1)(d) of the Rome Statute.

¹⁴ See *supra* footnote 12, par. 9.

¹⁵ See the “Decision on the “Defence Request to review or, in the alternative, for leave to appeal, the Decision on a number of procedural issues raised by the Registry””, No. ICC-01/04-01/07-1301, 14 July 2009, par. 12.

¹⁶ See the Defence’s Appeal Application, *supra* footnote 10, par. 4

14. As there is no need for further analysis of the subsequent limbs of the test for interlocutory appeals under article 82(1)(d) laid out by the Appeals Chamber if there is no “appealable issue”,¹⁷ the Legal Representative submits that the Defence’s Appeal Application must be rejected in its entirety on this ground alone.

B. Subsidiary observations

15. Notwithstanding the above arguments, in the event that the Chamber considers the Defence’s Appeal Application did precisely formulate an appealable issue as required by the practice of the Court, the Legal Representative submits the following further observations concerning the other prongs of the interlocutory appeals test required to be fulfilled in accordance with article 82(1)(d) of the Rome Statute.

16. Pursuant to the clear jurisprudence of the Court, it is incumbent upon the party seeking leave to appeal to not only identify with exactitude the appealable issue, but also to further demonstrate how the issue significantly affects the fair and expeditious conduct of the proceedings or outcome of the trial, and how an immediate resolution by the Appeals Chamber would materially advance the proceedings.¹⁸

17. Notwithstanding the specific criteria required by said jurisprudence, the rest of the Defence’s Appeal Application follows its purported definition of an appealable issue with vague arguments that are irrelevant to the Chamber’s determination of whether to grant the Defence’s request for an interlocutory appeal. By way of example, the Defence argues that the matter may entail heavy consequences for all cases before the Court, which is not a criterion to be examined by the Chamber when deciding to grant or deny an interlocutory appeal under article 82(1)(d) of the Rome Statute. The Defence further argues that the resolution of the matter shall serve not

¹⁷ See *supra* footnote 12.

¹⁸ *Ibid.*

only the interest of the Accused but also to consolidate the jurisprudence of the Court regarding regulation 34 of the Regulations of the Court, which again, is not a specific criterion to be examined by the Chamber, is therefore also irrelevant to the Chamber's determination.

18. Yet other arguments made by the Defence in support of its Appeal Application go to the substantive nature of their arguments for opposing the Impugned Decision, instead of demonstrating how the matter at hand, if indeed it has been shown to be an appealable issue, would establish the further prongs to be met according to the Appeals Chamber and article 82(1)(d) of the Statute. For instance, the Defence argues that the failure to resolve this question will have a negative and delaying effect upon the conduct of the proceedings by requiring the Accused to defend himself against unconfirmed accusations¹⁹, yet the latter assertion is not an objective fact, but rather a subjective assessment by the Defence regarding the Prosecution's amended Document containing the Charges. The Chamber, rather, must make the objective determination of whether the issue, if it is appealable, could affect the fair and expeditious conduct of the proceedings, without having to make a determination as to the veracity of the assertion made by the party seeking to appeal. Indeed, the jurisprudence of the Court established that a party can only raise in its appeal application the arguments specifically related to whether the "appealable issue" arising from the impugned decision meets the conditions for granting a leave to appeal under article 81(2)(d) of the Rome Statute, and not arguments related to the substance of the issue to be appealed.²⁰

19. As for the prong of whether an appealable issue affects the outcome of the trial, it is set out as a separate and distinct consideration from that of whether the

¹⁹ See the Defence's Appeal Application, *supra* note 10, paras. 5-8

²⁰ See the "Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008", 26 February 2008, No. ICC-01/04-01/06-1191, par. 19; See also the "Decision on the "Defence Application for Leave to Appeal the Trial Chamber's Décision relative à la requête de la Défense de Germain Katanga en illégalité de la détention et en suspension de la procédure", No. ICC-01/04-01/07-1859, 12 February 2010, par. 15.

issue affects the fair and expeditious conduct of the proceedings, and one or the other, in the alternative, may be established.²¹ The Legal Representative points out that the Defence failed to cite this prong in support of its arguments for appealing the Impugned Decision.

20. Lastly, and concerning the prong of whether the issue materially advances the proceedings, the Defence argued that the immediate resolution of the question will significantly accelerate the conduct of the proceedings by allowing the Defence to streamline the presentation of evidence and concentrate its limited resources.²² The Appeals Chamber has determined that the meaning of the term “advance” as used in this prong for article 82(1)(d) is to “[m]ove forward [. . .] by ensuring that the proceedings follow the right course”, thereby “[r]idding [. . .] the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.”²³ The Legal Representative submits that the possibility of “streamlining evidence” or allowing a party to concentrate its resources in one legal matter versus the other does not satisfy this criterion, as interpreted by the Appeals Chamber.

21. In light of the above, the Legal Representative submits that the Defence’s Appeal Application does not satisfy any of the prongs required by the practice of the Court for granting leave under article 82(1)(d) and, as such, it must be rejected on all grounds.

²¹ 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», No. ICC-01/04-01/06-1557, 17 December 2008, par 13.

²² See the Defence’s Appeal Application, *supra* note 10, paras. 5-8.

²³ See *supra* footnote 21, paras. 14-15.

FOR THE FOREGOING REASONS, the 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, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08, a/0467/08, a/0130/09, a/0131/09, a/0132/09, a/0133/09, a/0134/09, a/0135/09, a/0136/09, a/0137/09, a/0138/09, a/0139/09, a/0141/09, a/0427/09, a/0432/09, a/0511/08, a/0512/08, a/0513/08, a/0515/08, a/0516/08, a/0562/08, a/0563/08, a/0564/08, a/0565/08, a/0566/08, a/0567/08, a/0568/08, a/0569/08, a/0570/08, a/0571/08, a/0572/08, a/0651/09, a/0652/09 and a/0653/09 respectfully requests the Chamber to reject the Defence's Appeal Application.

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

Paolina Massidda
Principal Counsel

Dated this 18 October 2010

At The Hague, The Netherlands