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Date: **5 November 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 Document

**Observations of the Legal Representative on the “Defence Application for
Appropriate Decisions by Trial Chamber III Prior to the Commencement of the
Trial Scheduled for 22 November 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,
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

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

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I. Procedural Background

1. At a status conference on 21 October 2010, Trial Chamber III (the “Chamber”) issued an oral decision (the “Decision”) setting 22 November 2010 as the date for the commencement of the trial.¹

2. During the abovementioned hearing, the Defence informed the Chamber that it would submit in writing its “[TRANSLATION] view in that regard”, stating that, in its opinion, the Chamber had not considered certain issues of importance to the setting of the date.² In response, the Chamber indicated that the date set for the commencement of the trial was not a proposal but a decision binding on the parties and participants.³

3. On 1 November 2010, the Defence filed a “Defence Application for Appropriate Decisions by Trial Chamber III Prior to the Commencement of the Trial Scheduled for 22 November 2010” (the “Defence Application”).⁴

4. Pursuant to regulation 24(2) of the Regulations of the Court, the Principal Counsel for 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, 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,

¹ See the transcripts from the status conference of 21 October 2010, No. ICC-01/05-01/08-T-30-FRA ET WT, p. 3, lines 27 and 28.

² *Idem*, p. 20, lines 13 to 20.

³ *Ibidem*, p. 20, lines 27 and 28.

⁴ See the “Defence Application for Appropriate Decisions by Trial Chamber III Prior to the Commencement of the Trial Scheduled for 22 November 2010” No. ICC-01/05-01-08-987-tENG, 1 November 2010.

a/0571/08, a/0572/08, a/0651/09, a/0652/09 and a/0653/09 (“the Legal Representative”), submits to the Chamber her observations on the Defence Application.

II. Observations on the Defence Application

5. As a preliminary matter, the Legal Representative wishes to observe that although the Defence announced its intention of filing observations regarding the date of the commencement of the trial during the status conference of 21 October 2010, it waited ten days before filing its Application, which it then filed as “Urgent”. The Legal Representative can thus only conclude that the said submission represents another example of the dilatory tactics employed by the Defence since the commencement of proceedings in this case.⁵

6. As her main argument, the Legal Representative submits that the Defence Application must be rejected *in limine*. Indeed, despite the Chamber’s clarification concerning its “*decision*” during the status conference, the Defence has filed its Application to obtain a *review* of the said Decision. That the Defence chose not to use the word “*review*” in the title of its request does not alter the fact that, despite the vague formulation of its submission, this clearly seems to be the purpose of its Application.

7. In this regard, the Legal Representative emphasises that the instruments which govern proceedings before the Court do not provide for any review or reconsideration of a decision issued by a Chamber. As has already been stated on several occasions by different Chambers of the Court, the reconsideration of decisions issued by them is only permitted in specific circumstances, which are explicitly set out in the Rome Statute and the Rules of Procedure and Evidence.

⁵ See, for example, the “Defence Application Informing Trial Chamber III of New Developments in Judicial Proceedings in the Central African Republic”, No. ICC-01/05-01/08-751-tENG, 13 April 2010. See also the “Second Defence Application Informing Trial Chamber III of a Further Development on 16 April 2010 in Judicial Proceedings in the Central African Republic”, No. ICC-01/05-01/08-757-tENG, 19 April 2010. See also the *Decision on the Admissibility and Abuse of Process Challenges* (Trial Chamber III), No. ICC-01/05-01/08-802, 24 June 2010, para. 231.

8. In particular, in the Situation in Uganda, Pre-Trial Chamber II, seized with a request from the Prosecutor for reconsideration of a decision on the redactions contained in warrants of arrest,⁶ stated that “there is no basis in the Statute, the Rules or the Regulations for a participant in the proceedings before the Court to submit a “position” aimed at instigating amendment or review of a Chamber’s decision”.⁷ According to the Pre-Trial Chamber:

The instruments governing the Court's procedure make no provision for such a broad remedy as an unqualified "motion for reconsideration". Review of decisions by the Court is only allowed under specific circumstances, explicitly provided in the Statute and the Rules. Suffice it to mention here article 15, paragraph 5, of the Statute, allowing the Prosecutor to request the Pre-Trial Chamber to review its denial of authorization of the investigation, based on new facts or evidence regarding the same situation; article 19, paragraph 10, of the Statute, allowing the Prosecutor to request a review of a decision of inadmissibility of a case when satisfied “that new facts have arisen which negate the basis on which the case had been previously found inadmissible”; article 61, paragraph 8, of the Statute, allowing the Prosecutor to request the Chamber to confirm a charge which had originally not been confirmed, based upon additional evidence; rule 118, sub-rule 2, of the Rules, allowing the person concerned or the Prosecutor to request the Pre-Trial Chamber to review its ruling on the release or detention of such person; rule 125, sub-rule 3, of the Rules, allowing the Prosecutor to request the Chamber to review its decision not to hold a hearing on the confirmation of the charges in the absence of the person concerned; rule 135, sub-rule 4, of the Rules, allowing the prosecution and the defence to request a review of the determination that the accused is unfit to stand trial. Outside such specific instances, the only remedy of a general nature is the interlocutory appeal against decisions other than final decisions, as set forth in article 82, paragraph 1(d) of the Statute [...].⁸

9. Moreover, the Single Judge of Pre-Trial Chamber I in the case of *The Prosecutor v. Thomas Lubanga Dyilo* further stated that “in principle, the statutory framework set out by the Statute and the Rules do not provide for a motion for reconsideration as a procedural remedy against any decision taken by the [...] Chamber [...]”.⁹ That same Chamber applied this general rule in another decision, emphasising that “[t]he

⁶ See the *Decision on the Prosecutor’s Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration and Motion for Clarification* (Trial Chamber II), No. ICC-02/04-01/05-60, 28 October 2005, para. 8.

⁷ *Idem*, para. 16.

⁸ *Ibidem*, para. 18.

⁹ See *Decision on the Prosecution Motion for Reconsideration* (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-123, 23 May 2006, p. 3.

instruments governing the Court's procedure make no provision for such a broad remedy as an unqualified 'motion for reconsideration'".¹⁰

10. Accordingly, the Legal Representative submits that the Defence Application has no legal basis in the Court's rules of procedure. Indeed, in light of the type of decision impugned in the instant case, the Legal Representative observes that the sole remedy that the Defence could possibly have sought is an interlocutory appeal against a decision "that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which [...] an immediate resolution by the Appeals Chamber may materially advance the proceedings", as set out at article 82(1)(d) of the Rome Statute. Moreover, such a remedy – as stated in the abovementioned article and the relevant settled jurisprudence¹¹ – is circumscribed by criteria which must be demonstrated in order to substantiate the merits of that remedy, the pursuance of which is time-bound, as prescribed by rule 155(1) of the Rules of Procedure and Evidence.¹²

11. In the alternative, the Legal Representative further notes that each of the arguments advanced by the Defence in support of its Application – (a) the Registry's decision on the monies granted to the Defence, (b) the alleged lack of actual time in which to prepare its Defence, (c) the time afforded to the Defence by the Chamber for the analysis of a considerable number of victims' applications for participation, and (d) the timing of the most recent disclosure by the Office of the Prosecutor – concerns issues that the Chamber has already determined¹³ and for which the Defence has so

¹⁰ See *Decision on the Prosecution Motion for Reconsideration and, in the Alternative, Leave to Appeal* (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-166, 23 June 2006, para. 10.

¹¹ See the jurisprudence recently cited by Trial Chamber III in its *Decision on the defence request for leave to appeal the "Decision on the defence application to obtain a ruling to correct the revised Second Amended Document containing the Charges"*, No. ICC-01/05-01/08-980, 28 October 2010.

¹² The Legal Representative will note only that, not only has the Defence failed to demonstrate the criteria in its Application, but that, further still, the five-day procedural time-limit which would have been applicable in the instant case has long since elapsed.

¹³ In this regard, the Legal Representative wishes in particular to point out that the Registry's decision in response to the Defence application for adjustment of the expenses and fees was issued on 25 October 2010; see the *Décision du Greffier relative à la « Requête de la Défense aux fins d'ajustement des* No. ICC-01/05-01/08

far not filed any application for leave to appeal, which is the sole statutory remedy for challenging a decision of the Chamber.¹⁴ In this regard, Pre-Trial Chamber II held that a participant's "failure to avail itself of the proper procedural mechanism in compliance with all relevant rules would be tantamount to that participant waiving its right to have its concerns regarding a given decision considered by the Chamber."¹⁵

12. Lastly, the Legal Representative wishes to call to mind the victims' interest in the prompt commencement of the trial. In this respect, the Legal Representative draws the Chamber's attention to the fact that the trial – which has already been postponed three times – is keenly anticipated by the victims, who are following proceedings closely and who have, on a number of occasions, conveyed to their Legal Representatives their concern at the continual postponement of the proceedings and their fear that the trial will not ultimately take place. The Legal Representative would further draw the Chamber's attention to the particularly precarious situation of certain victims who are already of an advanced age or suffering from serious illness, and are all the more concerned by delays in the proceedings.

FOR THESE 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,

frais et honoraires de la Défense avancés par le Greffe conformément à l'ordonnance de la Chambre de Première Instance III intitulée 'Décision on legal assistance for the Accused' du 20 octobre 2009» déposée devant la Chambre de Première Instance III le 11 août 2010 par les Conseils de Jean-Pierre Bemba Gombo, No. ICC-01/05-01/08-958-Anx1-Red, 25 October 2010; and that the Chamber took procedural measures to assist the Defence in light of submissions under rule 89 of the Rules of Procedure and Evidence, and specifically granted it an extension of time to that end; see the Chamber's Decision on the time granted to the Defence for its submissions on 176 applications for participation, transmitted by e-mail on 8 October 2010.

¹⁴ See *supra*, footnote 10, para. 20.

¹⁵ See *supra*, footnote 6, para. 21.

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 dismiss the Defence Application *in limine*.

[signed]

Paolina Massidda
Principal Counsel

Dated this 5 November 2010
At The Hague, The Netherlands