

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08
Date: 28 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

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"

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

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor

Ms Petra Kneuer, Senior Trial Lawyer

Legal Representatives of the Victims

Ms Marie Edith Douzima-Lawson

Counsel for the Defence

Mr Nkwebe Liriss

Mr Aimé Kilolo Musamba

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**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber III (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”) in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* hereby issues the following Decision on the defence request for leave to appeal “Decision on the defence application to obtain a ruling to correct the revised Second Amended Document containing the Charges”.¹

I. Background and Submissions

1. On 20 July 2010, the Chamber rendered its “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”² partially granting the defence application and ordering the Office of the Prosecutor (“prosecution”) to revise the Second Amended Document Containing the Charges (“Second Amended DCC”) and to re-file the document by 19 August 2010.³
2. On 18 August 2010, the prosecution filed a revised Second Amended DCC.⁴
3. On 22 September 2010, the defence filed its “Application to obtain a ruling to correct the revised Second Amended Document containing the Charges”⁵ (“defence application”), in which it submitted that the prosecution had not complied with the Chamber’s instructions and requested the Chamber to order the prosecution to re-file its revised Second Amended DCC.

¹Démande [sic] 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, 13 October 2010, ICC-01/05-01/08-949.

² 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, 20 July 2010, ICC-01/05-01/08-836.

³ ICC-01/05-01/08-836, paragraph 280.

⁴ Prosecution’s Submission of the Revised Second Amended Document Containing the Charges, 18 August 2010, 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. The confidential Annex B corresponds to the unofficial translation into French of the Revised Second Amended Document Containing the Charges, Traduction de la version révisée du Deuxième Document modifié de notification des charges, 18 August 2010, ICC-01/05-01/08-Conf-AnxB.

⁵ Requête de la Défense aux fins d’une ordonnance visant à corriger et à déposer à nouveau le Deuxième Document Amendé contenant les Charges, 22 September 2010, ICC-01/05/01/08-894-Conf and public redacted version, ICC-01/05-01/08-894-Red.

4. On 8 October 2010, the Chamber issued its “Decision on the defence application to obtain a ruling to correct the revised second Amended Document containing the Charges”⁶ (“8 October 2010 Decision”) rejecting the defence application *in limine* as it had been filed 12 days outside the time-limit referred to in Regulation 34 of the Regulations of the Court. By the same decision, the prosecution was requested to make a correction of a non-factual error contained in paragraph 79 of the revised Second Amended DCC.⁷ For the sake of clarity, the Chamber recalled the jurisprudence of the Court stating that in case of any disparity between the charges contained in the Document Containing the Charges (“DCC”) and the charges as confirmed by the Pre-Trial Chamber (“PTC”) and contained in the Confirmation Decision, the latter document takes precedence.⁸
5. On 13 October 2010, the prosecution filed a Corrected Revised Second Amended DCC.⁹
6. On 13 October 2010, the defence filed a “Démarche [*sic*] 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”¹⁰ (“Application for leave to appeal”), requesting leave to appeal the 8 October 2010 Decision on the basis that the Chamber has erred in law by considering the defence application as a response within the meaning of

⁶ Decision on the defence application to obtain a ruling to correct the revised Second Amended Document containing the Charges, 8 October 2010, ICC-01/05-01/08-935.

⁷ ICC-01/05-01/08-935, paragraph 10.

⁸ ICC-01/05-01/08-935, paragraph 12.

⁹ Prosecution’s Submission of its Corrected Revised Second Amended Document Containing the Charges, 13 October 2010, ICC-01/05-01/08-950 and Conf-Annexes A and B and public redacted version of Annex A, ICC-01/05-01/08-950-Red-AnxA. The confidential Annex B corresponds to the unofficial translation into French of the Revised Second Amended Document Containing the Charges, Traduction de la correction de la version révisée du Deuxième Document modifié de notification des charges, 13 October 2010, ICC-01/05-01/08-950-Conf-AnxB.

¹⁰ ICC-01/05-01/08-949.

Regulation 34 of the Regulations of the Court. The defence submits that its application was filed without any particular fixed deadline.¹¹

7. The defence argues that the request is based on a procedural question that relates to the proper application of Regulation 34 of the Regulations of the Court, which may have general consequences for all cases before the Court. The resolution of this issue would therefore serve not only the accused's purposes but also to consolidate the jurisprudence of the Court.¹² The defence suggests that dismissal of the application on merely procedural grounds would negatively impact upon the expeditious conduct and fairness of the proceedings, as the trial may be prolonged and the accused thereby forced to defend himself against alleged facts that were never confirmed by the Pre-Trial Chamber.¹³

8. On 18 October 2010, the prosecution filed its "Prosecution's response to the defence application for leave to appeal the "Decision on the defence application to obtain a ruling to correct the revised Second Amended Document containing the Charges""¹⁴ in which it requests the Chamber to reject the application for leave to appeal. The prosecution submits that the issue for which leave to appeal is sought does not fulfil the applicable statutory requirements provided for in Article 82(1)(d) of the Rome Statute ("Statute").

9. On the same day, the Office of Public Counsel for Victims ("OPCV") filed the "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

¹¹ ICC-01/05-01/08-949, paragraph 4 and footnote 5.

¹² ICC-01/05-01/08-949, paragraph 5.

¹³ ICC-01/05-01/08-949, paragraph 6.

¹⁴ Prosecution's response to the defence application for leave to appeal the "Decision on the defence application to obtain a ruling to correct the revised Second Amended Document containing the Charges", 18 October 2010, ICC-01/05-01/08-959.

to correct the revised Second Amended Document containing the Charges » du 8 Octobre 2010 »”,¹⁵ in which the OPCV requests the application for leave to appeal is denied. The OPCV submits that the defence fails to articulate precisely the particular reasons why the matter raised constitutes an appealable issue. In the alternative, the OPCV suggests that the application for leave to appeal should be denied as it fails to satisfy any of the criteria required for granting leave under Article 82(1)(d) of the Statute.

II. Relevant Provisions

10. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered the following provisions:

Article 82 of the Statute

Appeal against other decisions

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

[...]

(d) 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, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

[...]

Rule 155 of the Rules of Procedure and Evidence

Appeals that require leave of the Court

1. When a party wishes to appeal a decision under article 82, paragraph 1 (d), or article 82, paragraph 2, that party shall, within five days of being notified of that decision, make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal.

Regulation 34

Time limits for documents filed with the Court

Unless otherwise provided in the Statute, Rules or these Regulations, or unless otherwise ordered:

a) A Chamber may fix time limits for the submission of the initial document to be filed by a participant;

¹⁵ “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 »”, 18 October 2010, ICC-01/05-01/08-961.

- b) A response referred to in regulation 24 shall be filed within 21 days of notification in accordance with regulation 31 of the document to which the participant is responding;
- c) Subject to leave being granted by a Chamber in accordance with regulation 24, sub-regulation 5, a reply shall be filed within ten days of notification in accordance with regulation 31 of the response.

Regulation 65 of the Regulations of the Court

Appeals under rule 155

- 1. An application for leave to appeal under rule 155 shall state the name and number of the case or situation and shall specify the legal and/or factual reasons in support thereof [...]
- 2. An application for leave to appeal under article 82, paragraph 1 (d), shall specify the reasons warranting immediate resolution by the Appeals Chamber of the matter at issue.

III. Analysis and Conclusions

11. In analysing the present application, the Trial Chamber has followed the established jurisprudence of the Court in relation to Article 82(1)(d) of the Statute, which has consistently identified the specific requirements to be complied with in applying for leave to appeal under this Article.

12. The appellant should identify in the decision the specific “issue” that forms the subject of the appeal. In this respect the jurisprudence of the Court has consistently stated that:

[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. There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject. 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.¹⁶

¹⁶ Appeals Chamber, 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 *inter alia*: Trial Chamber II, Decision on the “Prosecution’s application for leave to appeal Trial Chamber II’s ‘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, 1401, 1412 and 1456)’ of 7 October 2009”, 18 December 2009, ICC-01/04-01/07-1732, paragraph 13; Trial Chamber I, Decision on the “Requête de la Défense sollicitant l’autorisation d’interjeter appel de la décision orale du 4 mars 2010 autorisant l’utilisation et le dépôt en preuve

13. Once the issue has been identified, it does not necessarily mean that it is an appealable subject, because as stressed by the Appeals Chamber, “not every issue may constitute the subject matter of an appeal”.¹⁷ Consequently, for leave to appeal to be granted, the issue identified by the appellant must:
- (i) have been dealt with in the relevant decision;
 - (ii) be an issue that would significantly affect:
 - a. both the fair and expeditious conduct of the proceedings; or
 - b. the outcome of the trial; and
 - (iii) be an issue for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings;¹⁸
14. The requirements of Article 82(1)(d) of the Statute, as set out above, are cumulative and therefore “failure to fulfil one or more requirement is fatal to an application for leave to appeal.”¹⁹

Whether the issue raised by the defence is an appealable issue

15. The defence seeks leave to appeal on a purely procedural matter, arguing that a ruling by the Appeals Chamber on the proper application of Regulation 34 of the Regulations of the Court will serve not only the accused but it will also contribute to consolidating the jurisprudence of the Court and will have general consequences for all judicial matters before the Court.

de trois photographies”, 29 April 2010, ICC-01/04-01/06-2404, paragraph 20; Pre-Trial Chamber I, Decision on the “Prosecution’s Application for Leave to Appeal the ‘Decision on the Confirmation of Charges’”, 23 April 2010, ICC-02/05-02/09-267, page 6.

¹⁷ ICC-01/04-168, paragraph 10.

¹⁸ ICC-02/05-02/09-267, page 6; ICC-01/04-168, paragraphs 9 to 14.

¹⁹ ICC-01/04-01/06-2404, paragraph 18, see also ICC-01/04-01/07-1732, paragraph 12.

16. As explained above, the potential effect that a matter may have in other cases before the Court or on its jurisprudence is not a criterion to be examined by the Chamber when determining whether to grant leave to appeal pursuant to Article 82(1)(d) of the Statute. Rather, the established jurisprudence of the Court demands that the appealable issue should be *essential for the determination of matters arising in the judicial cause under examination*, not in relation to other cases.
17. In the 8 October 2010 Decision, in keeping with the jurisprudence of the Court, the Chamber stressed that in case of “any disparity between the charges contained in the revised Second Amended DCC and the charges as confirmed by the PTC and contained in the Confirmation decision, the latter document takes precedence”.²⁰
18. Accordingly, a determination by the Appeals Chamber of the procedural question raised by the defence as to whether or not the defence application was a response subject to strict time-limits, will not materially change any subsequent ruling on the substantive matter in the defence application, since the Chamber has already made it clear that there is no need for any further revisions to the Second Amended DCC as the charges contained in the Confirmation Decision are the authoritative version in the event of a discrepancy or perceived discrepancy between the DCC and the Confirmation Decision.
19. Therefore, a determination by the Appeals Chamber on the correct interpretation of Regulation 34 of the Regulations of the Court is not essential for the determination of matters arising in the judicial cause under examination and therefore, the question raised by the defence does not

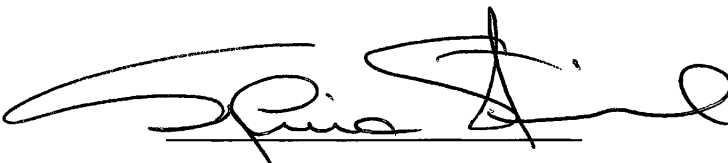
²⁰ ICC-01/05-01/08-935, paragraph 12.

constitute an appealable issue for the purposes of Article 82(1)(d) of the Statute.


20. Given that the requirements of Article 82(1)(d) of the Statute are cumulative, there is no need for the Chamber to consider any of the subsequent criteria, since the application for leave to appeal does not comply with the first requirement.

21. For the above reasons, the Chamber rejects the defence application for leave to appeal.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 28 October 2010

At The Hague, The Netherlands