



Original: English

No. ICC-01/14-01/22 OA2

Date: 27 September 2022

THE APPEALS CHAMBER

Before:

**Judge Solomy Balungi Bossa, Presiding
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Marc Perrin de Brichambaut
Judge Gocha Lordkipanidze**

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF THE PROSECUTOR v. MAXIME JEOFFROY ELI
MOKOM GAWAKA**

Public

Decision on the admissibility of the appeal

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

The Office of the Prosecutor

Mr Karim A. A. Khan, Prosecutor
Ms Helen Brady

Counsel for the Defence

Mr Gregory Townsend, Duty Counsel

The Office of Public Counsel for Victims

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Mr Pieter Vanaverbeke

Other

Mr Nicholas Kaufman

The Appeals Chamber of the International Criminal Court,

In the appeal against Pre-Trial Chamber II's "Decision on legal representation further to the Appeals Chamber's judgment of 19 July 2022" of 19 August 2022 (ICC-01/14-01/22-80),

After deliberation,

Renders, unanimously, the following

DECISION

- 1) The appeal against the decision of Pre-Trial Chamber II entitled "Decision on legal representation further to the Appeals Chamber's judgment of 19 July 2022" is dismissed.
- 2) This decision will not prejudice the right of the Defence to submit to Pre-Trial Chamber II an application for leave to appeal the "Decision on legal representation further to the Appeals Chamber's judgment of 19 July 2022". The time limit for any such application pursuant to rule 155(1) of the Rules of Procedure and Evidence shall run from the date of notification of this decision.

REASONS

I. PROCEDURAL HISTORY

1. On 25 March 2022, Pre-Trial Chamber II (hereinafter: "Pre-Trial Chamber") ordered the Registry to revoke its appointment of Mr Nicholas Kaufman (hereinafter: "Mr Kaufman") as counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka (hereinafter: "Mr Mokom"), finding that Mr Kaufman's representation of other clients in the "substantially related" investigative proceedings in the *Situation in the Central African Republic II* and *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*

constituted a conflict of interest under articles 12 and 16 of the Code of Professional Conduct for Counsel (hereinafter: “25 March 2022 Order”).¹

2. On the same day, in compliance with the order of the Pre-Trial Chamber, the Registry revoked its appointment of Mr Kaufman as counsel for Mr Mokom.²

3. On 4 April 2022, the Registry issued a notification that Mr Gregory Townsend had been appointed as duty counsel for Mr Mokom.³

4. On 14 April 2022, the Pre-Trial Chamber granted leave to the Defence to appeal the 25 March 2022 Order.⁴

5. On 19 July 2022, following written submissions from the Defence and the Prosecution,⁵ the Appeals Chamber issued its judgment on the Defence’s appeal reversing the 25 March 2022 Order and instructing the Pre-Trial Chamber to provide further reasons for its decision (hereinafter: “*Mokom* OA Judgment”).⁶

6. On 19 August 2022, the Pre-Trial Chamber issued a new decision on Mr Mokom’s legal representation, providing further reasons as instructed by the

¹ [Order to the Registry concerning the appointment of Mr Nicholas Kaufman as counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka](#), 25 March 2022, ICC-01/14-01/22-26-Conf-Exp (public redacted version filed on 13 June 2022 (ICC-01/14-01/22-26-Red)).

² See Annex I to the Order convening a status conference and instructing the Registry to appoint duty counsel for Mr Maxim Jeoffroy Eli Mokom Gawaka, 1 April 2022, ICC-01/14-01/22-32-Conf-Exp-AnxI-Red, p. 16.

³ Notification of the Appointment of Mr Gregory Townsend as Duty Counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka, ICC-01/14-01/22-33-Conf-Exp, with a confidential, *ex parte* annex, ICC-01/14-01/22-33-Conf-Exp-Anx1.

⁴ Pre-Trial Chamber II, [Decision on Mr Mokom’s requests for reconsideration and leave to appeal the ‘Order on appointment of Mr Kaufman as Counsel for Mr Mokom’](#), 14 April 2022, ICC-01/14-01/22-43, para. 28.

⁵ [Appeal brief of Maxime Mokom against Order ICC-01/14-01/22-26-Conf-Exp](#), 4 May 2022, ICC-01/14-01/22-46-Conf (public redacted version notified on 15 July 2022 (ICC-01/14-01/22-46-Red2)); Annex to the appeal brief of Mr Maxime Mokom against Order ICC-01/14-01/22-26-Conf-Exp, 9 May 2022, ICC-01/14-01/22-47-Conf; [Prosecution’s Response to Mr Mokom’s Appeal against Pre-Trial Chamber II’s Order concerning the appointment of Counsel, 16 May 2022](#), ICC-01/14-01/22-48-Conf-Exp (public redacted version notified on 29 June 2022 (ICC-01/14-01/22-48-Red)); Confidential Submission of Second Annex to the Appeal brief of Maxim Mokom against Order ICC-01/14-01/22-26-Conf-Exp with Confidential and Ex Parte Annex (Appeals Chamber) and Confidential (Redacted) Annex, 20 May 2022, ICC-01/14-01/22-51-Conf. See associated annex, ICC-01/14-01/22-51-Conf-Exp-Anx (redacted version ICC-01/14-01/22-51-Conf-Anx-Red).

⁶ Appeals Chamber, [Judgment on the appeal of Maxime Jeoffroy Eli Mokom Gawaka against the decision of Pre-Trial Chamber II of 25 March 2022 entitled “Order to the Registry concerning the appointment of Mr Nicholas Kaufman as counsel for Mr Maxime Jeoffroy Eli Mokom Gawaka”](#), 19 July 2022, ICC-01/14-01/22-70-Red (OA).

Appeals Chamber (hereinafter: “Impugned Decision”).⁷ In the Impugned Decision, the Pre-Trial Chamber granted Mr Mokom leave to appeal *proprio motu*.⁸

7. On 24 August 2022, the Defence submitted its appeal brief (hereinafter: “Appeal Brief”).⁹ The next day, the Prosecution submitted a response (hereinafter: “Prosecution Response”) indicating that it takes no position on the factual issues raised in the Defence’s appeal.¹⁰

II. ADMISSIBILITY OF THE APPEAL

A. Background and relevant part of the Impugned Decision

8. In the *Mokom* OA Judgment, the Appeals Chamber found that the reasons underlying the determination of the Pre-Trial Chamber were not fully set out in the 25 March 2022 Order.¹¹ Under the circumstances, the Appeals Chamber found that it was unable to discern how the Pre-Trial Chamber arrived at the ultimate determination that it would be necessary to remove Mr Kaufman as counsel. Accordingly, the majority of the Appeals Chamber, Judge Ibáñez Carranza and Judge Bossa dissenting, considered that remanding the matter to the Pre-Trial Chamber was the appropriate remedy.¹²

9. As a result, the Appeals Chamber directed the Pre-Trial Chamber to issue a new decision on the matter based upon all available information, setting out “precise and detailed reasons as to whether there [was] an impediment to representation or a conflict of interest within the meaning of articles 12 and 16 of the Code to Mr Kaufman’s representation of Mr Mokom that [could not] be remedied”.¹³

10. In the Impugned Decision, the Pre-Trial Chamber explained the nature and scope of the conflict of interest, as well as the roles and status of the relevant clients of Mr Kaufman. The Pre-Trial Chamber further considered that Mr Kaufman’s affidavit

⁷ [Decision on legal representation further to the Appeals Chamber’s judgment of 19 July 2022](#), ICC-01/14-01/22-80.

⁸ [Impugned Decision](#), para. 30.

⁹ [Appeal Brief against Pre-Trial Chamber Decision ICC-01/14-01/22-80](#), ICC-01/14-01/22-81.

¹⁰ [Prosecution’s Response to Mr Mokom’s Appeal against Pre-Trial Chamber II’s Decision on legal representation further to the Appeals Chamber’s judgment of 19 July 2022](#), ICC-01/14-01/22-84, para. 2.

¹¹ [Mokom OA Judgment](#), para. 68.

¹² [Mokom OA Judgment](#), para. 69.

¹³ [Mokom OA Judgment](#), para. 68.

purporting to cure any impediments to representation was insufficient. The Pre-Trial Chamber then granted leave to appeal to Mr Mokom on a *proprio motu* basis, noting the importance of the matter and with a view to expediting the proceedings. The issue set out by the Pre-Trial Chamber is as follows:¹⁴

Whether the Chamber, on the basis of the further reasons exposed in the “Decision on legal representation further to the Appeals Chamber’s judgment of 19 July 2022”, erred in finding that there is an impediment to representation or a conflict of interest within the meaning of articles 12 and 16 of the Code of Professional Conduct for Counsel to Mr Kaufman’s representation of Mr Mokom that cannot be remedied. [footnotes omitted]

11. Following the Impugned Decision, the Defence submitted the Appeal Brief, alleging three errors in the Impugned Decision, without having filed an application for leave to appeal the Impugned Decision under rule 155 of the Rules of Procedure and Evidence (hereinafter: “Rules”).

B. Determination by the Appeals Chamber

12. As a preliminary issue, the Appeals Chamber notes that the Defence and the Prosecution have requested, in their respective submissions, that the Appeals Chamber render its judgment as soon as possible.¹⁵ Noting that appeals shall be heard as expeditiously as possible, as set out in rule 156(4) of the Rules, the Appeals Chamber does not consider it necessary to comment on these submissions of the parties.¹⁶

13. Given the manner in which this appeal has come before the Appeals Chamber, as set out above, the Appeals Chamber will first consider the matter of admissibility. The Appeals Chamber will only pronounce on the merits of the appeal if the correct procedure was followed pursuant to article 82(1)(d) of the Statute and rule 155 of the Rules.

14. The Appeals Chamber recalls that in the *Mokom* OA Judgment, the Appeals Chamber instructed the Pre-Trial Chamber to provide further reasons for its decision. While this subsequent decision may be subject to a request for leave to appeal, the

¹⁴ [Impugned Decision](#), para. 30.

¹⁵ [Appeal Brief](#), para. 35; [Prosecution Response](#), para. 3.

¹⁶ See Appeals Chamber, *The Prosecutor v. Callixte Mbarushimana*, [Decision on the admissibility of the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 28 July 2011 entitled “Decision on ‘Second Defence request for interim release’”](#), 21 September 2011, ICC-01/04-01/10-438 (OA2), para. 14.

Pre-Trial Chamber granted leave to appeal *proprio motu* to Mr Mokom, absent a request from either party.

15. In support of its decision to grant leave to appeal *proprio motu*, the Pre-Trial Chamber relied on the precedent in the *Situation in the Democratic Republic of the Congo* (hereinafter: “DRC OA3 Judgment”), wherein the Appeals Chamber explained as follows:

Article 82(1)(d) of the Statute does not confer a right to appeal interlocutory or intermediate decisions of either the Pre-Trial or the Trial Chamber. A right to appeal arises only if the Pre-Trial or Trial Chamber is of the opinion that any such decision must receive the immediate attention of the Appeals Chamber. This opinion constitutes the definitive element for the genesis of a right to appeal. In essence, the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue. By the plain terms of article 82(1)(d) of the Statute, a Pre-Trial or Trial Chamber may certify such a decision on its own accord. If it fails to address the appealability of an issue it may do so on the application of any party to the proceedings. It may be regarded as axiomatic that, if any power is conferred upon a court to make an order or issue a decision, the parties have an implicit right to move the Chamber to exercise it.¹⁷

16. The Appeals Chamber observes that the aforementioned appeal reached the Appeals Chamber following the Prosecution’s application directly to the Appeals Chamber seeking the review of Pre-Trial Chamber I’s decision rejecting an application for leave to appeal under article 82(1)(d) of the Statute. In that appeal, the Appeals Chamber was tasked only with pronouncing upon the threshold question of whether a party has the right to move the Appeals Chamber to review decisions rejecting leave to appeal. Even if the words “on its own accord” – used in a single isolated paragraph under a separate sub-heading – can be taken to mean that a chamber may grant leave *proprio motu*, such a finding would be clearly *obiter dictum*, and thus of little precedential value.

¹⁷ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, [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 (OA3), para. 20. See also Appeals Chamber, *Situation in the Democratic Republic of the Congo*, [Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007](#), 19 December 2008, ICC-01/04-556 (OA4 OA5 OA6), para. 38.

17. In any event, the Appeals Chamber observes that the *DRC* OA3 Judgment was issued in 2006 and since that time the chambers of this Court have not taken that judgment to mean that there lies a *proprio motu* path to the Appeals Chamber under article 82(1)(d) of the Statute. Rather, the practice of this Court has been consistent – leave to appeal is initiated exclusively by the parties pursuant to rule 155(1) of the Rules.¹⁸

18. Indeed, neither the Statute nor the Rules provide for a first instance chamber to seize the Appeals Chamber of an appeal *proprio motu*. A review of the drafting history of article 82 of the Statute indicates that interlocutory appeals were only to be admissible under the limited and specific circumstances set out in article 82(1)(d) of the Statute.¹⁹ Furthermore, the Appeals Chamber notes that the legal framework contemplates only that “either party” who wishes to appeal a decision under article 82(1)(d) of the Statute must make a written application for leave to appeal to the chamber that rendered the impugned decision. On a plain reading, “either party” refers to the Prosecution and the accused,²⁰ although in determining who may qualify as a

¹⁸ The Appeals Chamber recognises that in *The Prosecutor v. Paul Gicheru*, Pre-Trial Chamber A granted leave to appeal despite the fact that the prospective appellant was neither the Prosecutor nor the Defence. The Chamber did so in part because “the power to *proprio motu* certify a decision under article 82(1)(d) of the Statute necessarily includes the authority to grant leave to appeal a decision on the application of any party or participant notwithstanding the formal standing of that party or participant” ([Decision on the “Request for leave to appeal the Decision on the Applicability of Provisional Rule 165”](#), 23 December 2020, ICC-01/09-01/20-68). The Appeals Chamber notes that this decision can be distinguished from the Impugned Decision, as it involves a matter of standing and it came following an application for leave to appeal under rule 155(1) of the Rules.

¹⁹ See Pre-Trial Chamber II, *Situation in Uganda*, [Decision on Prosecutor’s Application for Leave to Appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58](#), 19 August 2005, ICC-02/04-01/05-20, para. 16; Pre-Trial Chamber II, *Situation in Uganda*, [Decision on Prosecutor’s Applications for Leave to Appeal dated the 15th day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal dated the 11th day of May 2006](#), 10 July 2006, ICC-02/04-01/05-90, paras 20-21; Schabas, William A, *The International Criminal Court: A Commentary on the Rome Statute* (2nd Edition), 2016, p. 1231.

²⁰ Trial Chamber II, *The Prosecutor v. Thomas Lubanga Dyilo*, [Decision on the request of the Trust Fund for Victims for leave to appeal against the order of 9 February 2016](#), 4 March 2016, ICC-01/04-01/06-3202-tENG, para. 12, referring to Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008](#), 11 July 2008, ICC-01/04-01/06-1432, para. 93, in which the Appeals Chamber stated that “the right to challenge the admissibility or relevance of evidence in trial proceedings lies primarily with the parties, namely, the Prosecutor and the Defence”. See also Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision on “Narcisse Arido’s Request for Leave to Appeal the ‘Decision on “Registry Transmission of a Submission received from the Defence for Mr Narcisse Arido dated 18 August 2014” \(ICC-01/05-01/08-3134-Conf\)”](#), 26 September 2014, ICC-01/05-01/08-3152, para. 5; Appeals Chamber, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, [Decision on the admissibility of the “Appeal Against Decision on Application Under Rule 103” of Mr Mishana Hosseinioun of 7 February 2012”](#), Dissenting Opinion of Judge

party, consideration must be given to the type of decision that is the subject of the appeal.²¹

19. The application by a party must set out the reasons warranting immediate resolution by the Appeals Chamber of the matter at issue.²² After the application is filed, the opposing party may file a response, pursuant to regulation 65(3) of the Regulations of the Court (hereinafter: the “Regulations”). In its decision on the application for leave pursuant to rule 155(2) of the Rules, the chamber must consider the submissions of the parties and whether the criteria for an interlocutory appeal under article 82(1)(d) of the Statute are met. That is, the chamber must consider whether the prospective appellant has presented an “issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in

Nsereko, 9 March 2012, ICC-01/11-01/11-74, p. 9, para. 2; Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Reasons for the “Decision on ‘Victims and Witnesses Unit’s considerations on the system of witness protection and the practice of ‘preventive relocation’” and ‘Prosecution’s request for leave to file a response to ‘Victims and Witnesses Unit’s considerations on the system of witness protection and the practice of ‘preventive relocation’”](#) (OA7), Dissenting Opinion of Judge Pikis, 11 July 2008, ICC-01/04-01/07-675, p. 8, para. 4; Schabas, W A, *The International Criminal Court: A Commentary on the Rome Statute* (2nd Edition), 2016, p. 1224, which states that “Article 82 begins with the words ‘either party’, suggesting that only the Prosecutor and the defendant may actually lodge an appeal”.

²⁰ See Schabas, W A, *The International Criminal Court: A Commentary on the Rome Statute* (2nd Edition), 2016, p. 1230; see also War Crimes Research Office, *Interlocutory Appellate Review of Early Decisions by the International Criminal Court*, 2008, p. 2.

²¹ Appeals Chamber, *Situation in the Islamic Republic of Afghanistan*, [Reasons for the Appeals Chamber’s oral decision dismissing as inadmissible the victims’ appeals against the decision rejecting the authorisation of an investigation into the situation in Afghanistan](#), 4 March 2020, ICC-02/17-137 (OA OA2 OA3 OA4), para. 14. The Appeals Chamber recalls that the Office of Public Counsel for the Defence was found to qualify as a “party” within the meaning of article 82(1)(d) of the Statute in *The Prosecutor v. Gicheru*, while the Court has found that detained witnesses, *amicus curiae* applicants, and defence counsel from separate proceedings do not qualify as parties to the proceedings within the meaning of article 82(1) of the Statute, see Appeals Chamber, *The Prosecutor v. Paul Gicheru*, [Judgment on the appeal of the Office of Public Counsel for the Defence against the decision of Pre-Trial Chamber A of 10 December 2020 entitled ‘Decision on the Applicability of Provisional rule 165 of the Rules of Procedure and Evidence’](#), 8 March 2021, ICC-01/09-01/20-1071 (OA); Pre-Trial Chamber I, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, [Decision on the ‘Application of Mishana Hosseinioun for Leave to Appeal Against Decision on Application under Rule 103’](#), 14 February 2012, ICC-01/11-01/11-60, p. 4. See also Pre-Trial Chamber I, *Situation in Darfur, Sudan*, [Decision on the Application for Leave to Appeal the Decision on Application under Rule 103, 19 February 2009](#), ICC-02/05-192, p. 5; [Decision on the Application for Leave to Appeal the Decision on Application under Rule 103, 19 February 2009](#); Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision on “Narcisse Arido’s Request for Leave to Appeal the ‘Decision on “Registry Transmission of a Submission received from the Defence for Mr Narcisse Arido dated 18 August 2014”](#)” (ICC-01/05-01/08-3134-Conf)”, 26 September 2014, ICC-01/05-01/08-3152, para. 5.

²² Rule 155(1) of the Rules; regulation 65(2) of the Regulations of the Court.

the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

20. The above provisions set out the clear parameters for leave to appeal under article 82(1)(d) of the Statute, and do not provide for a power to grant leave to appeal absent an application from either party. Elsewhere in the Statute, in those instances where a chamber has the power to determine issues *proprio motu*, the Appeals Chamber notes that this appears to be conferred by legislative intent.²³ Given the absence of such a provision in article 82(1)(d) of the Statute, the Appeals Chamber infers that the drafters of the Statute did not intend to provide such a power. Moreover, the Appeals Chamber recalls that interlocutory appeals are of an exceptional nature,²⁴ and the Court has traditionally taken a limited approach thereto.²⁵

21. The Appeals Chamber notes that in granting leave on a *proprio motu* basis, the Pre-Trial Chamber referred to the importance of the matter and the need to expedite the proceedings. In addition, since the Appeals Chamber remanded the decision for the Pre-Trial Chamber to provide further reasons, the Pre-Trial Chamber considered that it was appropriate for the Appeals Chamber to be given an opportunity to pronounce on the further reasons set out. In this regard, the Appeals Chamber recalls that the fact that granting an appeal may appear necessary or appropriate to the Pre-Trial Chamber does

²³ See, for example, articles 19(1), 53(3)(b) and 56(3)(a) of the Statute.

²⁴ See Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision on the request for leave to appeal the ‘Decision on Mr Bemba’s claim for compensation and damages’](#), 1 October 2020, ICC-01/05-01/08-3697, para. 12; Pre-Trial Chamber I, *The Prosecutor v. Callixte Mbarushimana*, [Decision on the Defence’s Application for Leave to Appeal the Decision on Potentially Privileged Material dated 4 March 2011](#), 15 April 2011, ICC-01/04-01/10-106, p. 5; Pre-Trial Chamber II, *Situation in Uganda*, [Decision on the Prosecutor’s Applications for Leave to Appeal dated the 15th Day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal dated the 11th day of May 2006](#), 10 July 2006, ICC-02/04-01/05-90, para. 22.

²⁵ See, for example, Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision on the request for leave to appeal the ‘Decision on Mr Bemba’s claim for compensation and damages’](#), 1 October 2020, ICC-01/05-01/08-3697, para. 12; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision on “Narcisse Arido’s Request for Leave to Appeal the ‘Decision on “Registry Transmission of a Submission received from the Defence for Mr Narcisse Arido dated 18 August 2014” \(ICC-01/05-01/08-3134-Conf\)”](#), 26 September 2014, ICC-01/05-01/08-3152; Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Decision on the admissibility of the appeals against Trial Chamber I’s “Decision establishing the principles and procedures to be applied to reparations” and directions on the further conduct of proceedings](#) (A A2 A3 OA21), 14 December 2012, ICC-01/04-01/06-2953; Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Decision on the “Urgent Request for Directions” of the Kingdom of the Netherlands of 17 August 2011](#) (OA19), 26 August 2011, ICC-01/04-01/06-2799.

not justify acting outside the legal framework of the Court.²⁶ Indeed, when considering whether to grant leave to appeal, the inquiry is limited to determining whether the criteria under article 82(1)(d) of the Statute are met; the matter of the correctness of the impugned decision, however, is not at issue. More broadly, the Appeals Chamber finds that a chamber's duty to ensure the fairness and expeditiousness of the proceedings must be balanced against the need to ensure the proper administration of justice.²⁷ In the instant case, this means that, had the Pre-Trial Chamber followed the procedure as set out in the Court's legal texts, the parties would have been entitled to submit any requests for leave to appeal had they wished to do so, after the Pre-Trial Chamber had issued its decision setting out further reasons. The Appeals Chamber considers that by proceeding in a manner outside of the legal framework, the Pre-Trial Chamber interfered with the procedural right of the parties to seek leave to appeal, and deprived them of the right to formulate proposed issues as they saw fit.

22. As leave was improperly granted, the Appeals Chamber finds that the appeal is inadmissible. It is thus dismissed.

23. As explained above, the Appeals Chamber has identified a procedural defect in the Impugned Decision relating to the manner in which the Appeals Chamber has been seized *proprio motu* by the Pre-Trial Chamber. It would be inequitable if the parties were denied the opportunity to submit a request for leave to appeal against the Impugned Decision as a result of the present decision on admissibility. Therefore, the Appeals Chamber orders, pursuant to regulation 31(2) of the Regulations, that the calculation of the time limits for the application for leave to appeal the Impugned Decision and subsequent submissions, pursuant to rule 155(1) of the Rules and regulation 65 of the Regulations, will run from the date of notification of the present

²⁶ See Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Decision on the "Urgent Request for Directions" of the Kingdom of the Netherlands of 17 August 2011](#) (OA19), 26 August 2011, ICC-01/04-01/06-2799, para. 8.

²⁷ See Article 21(1)(a) of the Statute, which provides that the Court shall apply in the first place, the Statute, Elements of Crimes and the Rules of Procedure and Evidence. See also Pre-Trial Chamber A, *The Prosecutor v. Paul Gicheru*, [Decision on the postponement of the date of filing of written submissions and other related deadlines for the confirmation of charges proceedings](#), 26 February 2021, ICC-01/09-01/20-103, para. 29; Trial Chamber VII, *The Prosecutor v. Bemba et al.*, [Decision on the "Prosecution's Requests under Articles 64\(6\)\(b\) and 93 of the Rome Statute to Summon Witnesses"](#), 6 October 2015, (public redacted version notified on 3 December 2015) ICC-01/05-01/13-1343-Red, para. 27; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Second Order on the further conduct of the proceedings](#), 4 June 2018, ICC-02/11-01/15-1174, para. 9.

decision. If the Pre-Trial Chamber receives such an application, it will decide the application in accordance with rule 155(2) of the Rules.

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



Judge Solomy Balungi Bossa
Presiding



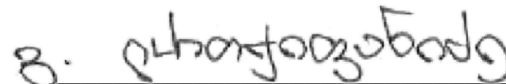
Judge Piotr Hofmański



Judge Luz del Carmen Ibáñez
Carranza



Judge Marc Perrin de Brichambaut



Judge Gocha Lordkipanidze

Dated this 27th day of September 2022

At The Hague, The Netherlands