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PRE-TRIAL CHAMBER III

Before: Judge Hans-Peter Kaul, Single Judge

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

Public Document

**Prosecution's Application for leave to Appeal Pre-Trial Chamber III's 31 July 2008
"Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure
between the Parties"**

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to:

The Office of the Prosecutor

**Counsel for the Defence of Jean-Pierre
Bemba**
M. Nkwebe Liriss

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

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**The Office of Public Counsel for the
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Introduction

1. On 31 July 2008, Pre-Trial Chamber III (“Pre-Trial Chamber”) issued a “Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties” (“Decision”), in which the Pre-Trial Chamber set out (i) the general principles relating to the system of disclosing evidence between the parties and its communication to the Chamber; (ii) the modalities for exchanging evidence; and (iii) the necessary analysis to be performed by the parties of each piece of evidence to be exchanged.
2. The Decision includes, *inter alia*, the following rulings:
 - “[T]he disclosure process between the parties shall be facilitated through the Registry”.¹
 - “[T]he Chamber shall be informed by way of communication of all the evidence disclosed between the parties”,² and “the Registrar [is instructed] to grant to the Chamber unrestricted access to all evidence disclosed between the parties”.³
 - “[T]he Chamber shall not be confined to the evidence which the parties intend to rely on for the purposes of the confirmation hearing.”⁴
 - “[W]hen submitting any evidence to the Registry, the parties shall provide the following accompanying documentation: ... [a]n analysis of each piece of evidence reflecting its relevance as described in part III of this decision”⁵ [...] “Each piece of evidence [including evidence disclosed pursuant to Articles 61(3)(b) and 67(2), and material subject to inspection pursuant to Rule 77] must be analysed – page by page, or where required, paragraph by paragraph – by relating each piece of information contained in that page or paragraph with one or more of the constituent elements of one or more of the crimes with which the person is charged, as well as the constituent elements of the mode of participation in the offence with which [the] person is charged.”⁶
3. The Prosecution submits that the system of disclosure put in place by the Decision was not requested by any party, is not established by law and further appears to contradict the Court’s disclosure and inspection scheme, including the disclosure of exonerating

¹ Decision, p. 22, disposition, letter a).

² Decision, para. 42.

³ Decision, p. 23, disposition, letter i). See also Decision, paras. 16, 19, 23 and 51.

⁴ Decision, para. 16; see also paras. 43-44.

⁵ Decision, p. 22, disposition, letter e) 3.

⁶ Decision, para. 69.

information under Article 67 (2). This provision regulates a duty of the Prosecution and a right of the defence, and not an authority of the Chamber. As the plain language of Article 67 (2) states, the Court only intervenes in case of doubt as to the application of the provision.

4. The new system deviates significantly from that applicable in the cases against *Lubanga*⁷ and *Katanga and Ngudjolo*,⁸ without providing reasons for so doing and without taking in consideration the fact that Pre-Trial Chamber I declined to follow a similar model after hearing submissions from both parties.⁹ This extraordinary step has been taken without giving the parties an opportunity to be heard on this complex and technical procedure, which goes to the heart of the fairness of the confirmation hearing and which, under the Statute and the Rules, is first and foremost a process that must be conducted between the parties themselves.¹⁰
5. The Prosecution respectfully submits that this unprecedented system of disclosure affects the fairness and efficiency of pre-trial proceedings, and therefore urgently requires scrutiny by the Appeals Chamber. In addition, and in light of the discrepancies between the system of disclosure adopted in the Decision and the one followed so far in the first two ICC-held confirmation hearings, the Prosecution submits that timely corrective action by the Appeals Chamber is needed in order to foster judicial certainty and predictability of ICC proceedings.

Procedural Background

⁷ See *Prosecutor v. Lubanga*, Decision on the final system of disclosure and the establishment of a timetable,, ICC-01/04-01/06-102, 15 May 2006 (“*Lubanga* Disclosure Decision”).

⁸ See *Prosecutor v. Katanga et al*, Decision establishing a calendar in the Case against German Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-259, 10 March 2008, (“*Katanga et al* Calendar-establishing Decision”), and see also the transcripts of the hearing of 14 December 2007, ICC-01/04-01/07-T-12-ENG ET WT 14-12-2007, (“*Katanga et al* Hearing setting out Disclosure System”)

⁹ See analysis in *Lubanga* Disclosure Decision paras 38-76, and see also "Decision Requesting Observations of the Prosecution and the Duty Counsel for the Defence on the System of Disclosure and Establishing an Interim System of Disclosure" ICC-01/04-01/06-58, 23 March 2006, and "the Decision Requesting further Observations from the Prosecution and the Duty Counsel for the Defence on the System of Disclosure", CC-01/04-01/06-54, 27 March 2006, establishing an interim system of disclosure pending the submissions of the parties on their views as to the most appropriate system of disclosure within the framework of the Rome Statute ("the Statute) and the Rules of Procedure and Evidence ("the Rules"), by which the parties submitted their observations in the manner set out in the procedural background in pp. 2-3 in *Lubanga* Disclosure Decision

¹⁰ Despite the recognition in the Decision that “the right to a fair trial includes the right of the parties to submit any observations that they consider relevant and that this right should be practical and effective” (para. 22), at no time did the Chamber seek the views of the parties prior to entering the Decision or engage in a consultative process of the type followed by Pre-Trial Chamber I in the *Lubanga* case (see prior footnote).

6. On 29 July 2008, the Chamber decided to designate Judge Hans-Peter Kaul as Single Judge of the Chamber for the situation in the Central African Republic and for any case emanating from it, including the case the *Prosecutor v. Jean-Pierre Bemba Gombo*, for the period of 1 to 31 August, inclusive.¹¹
7. On 31 July 2008, the Pre-Trial Chamber issued on its own motion a “Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties” (“Decision”).¹²
8. The Prosecution hereby seeks leave to appeal the Decision pursuant to Article 82(1)(d).

The issues for which leave to appeal is sought fulfil the criteria in Article 82(1)(d)

9. The Prosecution seeks leave to appeal three issues in the Decision, namely:
 - Whether the disclosure can be conducted through the Registry, or whether disclosure is a process to be conducted *inter partes* (“First Issue”).
 - Whether the Prosecution may be required to notify to the Chamber, by way of communication, material disclosed to the defence pursuant to Article 67(2) and material that is subject to inspection pursuant to Rule 77, which will then be fully accessible to the Chamber (“Second Issue”).¹³
 - Whether the Prosecution may be required to conduct an in-depth analysis of material that it has to disclose to the defence pursuant to Article 67(2) and material that is subject to inspection pursuant to Rule 77 (“Third Issue”).¹⁴
10. The Prosecution submits that these three issues clearly arise out of the Decision.¹⁵

¹¹ ICC-01/05-17.

¹² ICC-01/05-01/08-55.

¹³ The issue does not relate to material on which the Prosecution, or subsequently the Defence, intends to rely at the confirmation hearing and that will be communicated to the Pre-Trial Chamber pursuant to Rule 121(2)(c).

¹⁴ The issue also does not relate to material on which the Prosecution intends to rely at the confirmation hearing and that must be disclosed to the defence pursuant to Article 61(3)(b) and Rule 76. In accordance with the jurisprudence of Pre-Trial Chamber I, the Prosecution interprets its obligations under Rule 76 to be limited to evidence “on which it intends to rely at the confirmation hearing” (see *Lubanga Disclosure Decision*, para. 104; see also para. 100).

¹⁵ See para. 2 above, identifying the relevant rulings. The Appeals Chamber has held that “only 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 disagreement of a conflicting opinion. [...] 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. It may be legal or factual or a mixed one.” *Situation in the DRC*, ICC-01/04-168 OA3, 13 July 2006, paras. 9-10. See also *Prosecutor v. Lubanga*, Dissenting Opinion of Judge Song, ICC-01/04-01/06-1433 OA11, 11 July 2008, Diss. Op., para. 4, specifying that “[a] decision “involves” an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

11. As previously recognized, the correctness of a decision is irrelevant to an application for leave to appeal under Article 82(1)(d). The sole question is whether the issue(s) involved in the Decision meets the criteria set out in that provision. Thus, it is immaterial for the purposes of this Application whether the Prosecution is correct in its interpretation of the applicable law and jurisprudence governing the process of disclosure. The Chamber's analysis is confined to determining whether the issues identified by the Prosecution arise from the Decision and whether they are capable of affecting the fair and expeditious conduct of the proceedings or the outcome of trial, even if the Chamber disagrees with the Prosecution's underlying position; if they do, the Chamber must then determine whether intervention by the Appeals Chamber will materially advance the proceedings.
12. The Prosecution further notes that so far Chambers of this Court have granted applications for leave to appeal decisions involving substantive issues of disclosure on the basis of the fundamental importance of the disclosure process for the rights of the parties and the integrity of the proceedings.¹⁶ The Decision does not deal with confined or isolated matters of disclosure, but rather establishes a comprehensive framework detailing "the general principles relating to the system of disclosing evidence between the parties and its communication to the Chamber [...], the modalities for exchanging evidence and [...] the necessary analysis to be performed by the parties of each piece of evidence to be exchanged".¹⁷ A systemic decision of this kind necessarily has far-reaching consequences for the fair and expeditious conduct of the proceedings, including by affecting the rights of the Prosecution. According to the Prosecution's assessment, the Decision at a minimum affects the fairness and expeditiousness of the proceedings by imposing additional burdens on both parties, interfering with the parties' autonomy to conduct disclosure matters and forcing the parties to place on the record, material on which they do not intend to rely at the confirmation hearing, which then becomes accessible to the Pre-Trial Chamber and which the Pre-Trial Chamber considers that it can take into account for the decision on the confirmation of charges.

¹⁶ Both Pre-Trial Chamber I and Trial Chamber I have granted leave to appeal in relation to confined matters involving disclosure, such as admissible restrictions to disclosure under Rule 81, the scope of the defence intervention in any proceedings aimed at securing such restrictions, the possibility of late referral of a witness to the Court's protection program resulting in non-disclosure of that witness' identity, or whether a specific category of material fell within the purview of Rule 77. See: *Prosecutor v Lubanga*, Decision on Second Defence Motion for Leave to Appeal, ICC-01/04-01/06, 28 September 2006, and *Prosecutor v Lubanga*, Decision on the Prosecution Motion for Reconsideration and, in the Alternative, Leave to Appeal, ICC-01/04-01/06-166, 23 June 2006, and *Prosecutor v Lubanga*, Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of , ICC-01/04-01/06-1224-Anx1, 18 January 2008

¹⁷ Decision, para. 4.

The issues affect the fair conduct of the proceedings

13. The Appeals Chamber has ruled that “[t]he term fair in the context of article 82 (1) (d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it [...] and article 21 (3); making its interpretation and application subject to internationally recognized human rights”.¹⁸ It further stated that “[t]he principles of a fair trial are not confined to trial proceedings but extend to pre-trial proceedings as well as the investigation of crime, a fact directly borne out by the provisions of articles 54 (1) (c) and 55 of the Statute”,¹⁹ and that “[p]urging the pre-trial process for errors consequential to unfairness is designed as a safeguard of the integrity of the proceedings. This is at the core of article 82 (1) (d) of the Statute”.²⁰
14. The Prosecution submits that fairness requires that the procedural and substantive rights and obligations of all participants be respected,²¹ which has been held to include fairness to the Prosecution.²² Fairness has also been linked to the ability of a party to present its case.²³

The First Issue affects the fair conduct of the proceedings

15. The Decision expressly removes from the parties the ability to autonomously conduct both disclosure and inspection of materials – a core right under the Statute and the Rules – and forces them to communicate via the Registry. This already affects the fairness of the proceedings, since it imposes an extra-statutory limitation on the parties’ ability to efficiently communicate amongst them in the context of a critical procedural step, which

¹⁸ *Situation in the DRC*, ICC-01/04-168 OA3, 13 July 2006, para.11.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ See further *Situation in the DRC*, ICC-01/04-141, 25 April 2006, para. 48; *Prosecutor v Kony et al*, ICC-02/04-01/05-212, 26 February 2007, paras. 10-11. This has been held to include respect for the norms of a fair trial (*Situation in the DRC*, ICC-01/04-168, 13 July 2006, para. 11), equality and the principle of adversarial proceedings (*Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, para. 38)

²² *Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, paras. 38-39; *Prosecutor v Kony et al*, ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), 11 July 2006, para. 24.

²³ *Prosecutor v Kony et al*, ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), 11 July 2006, para. 24.

can be considered to violate the key governing provisions in the Statute and the Rules, as explained below.

16. The Prosecution submits that the Decision destroys the system of responsibilities and accountabilities foreseen by the Statute and the Rules and thereby creates unfairness to the parties. The Prosecution stresses that under the terms of the Decision, it will not be in a position to effectively discharge its duties of disclosure and inspection: the Prosecution will effectively lack control over the manner and form in which Registry transmits or makes accessible to the defence the material filed by the Prosecution. Yet, under the critical provisions of the Statute, it is *the Prosecution* which must disclose to the defence material captured by Article 67 (2) and allow the defence to inspect material falling under Rule 77. By precluding the Prosecution from fully discharging these critical duties – a matter for which it may be held accountable or sanctioned in the future – the Decision causes unfairness to the Prosecution.²⁴
17. The rights of the defence could also be affected by the Decision: under the Statute and the Rules, the defence has a right to receive directly *from the Prosecution* disclosure materials falling under Article 67 (2), and to access by means of inspection material in the Prosecution's control captured by Rule 77. The Decision involves an intermediary – the Registry – in the process, thereby adding an unnecessary step to the flow of material between the parties. In this sense, it should be beyond dispute that the inclusion of an intermediary in the disclosure process at a minimum introduces a gap between the release of the material by the Prosecution and the effective receipt of such material by the defence. In addition, mistakes or delays may occur. Certain documents may, for technical reasons, not be disclosed, or disclosed with delay. All this is inconsistent with the defence's statutory right to receive from the Prosecution, "as soon as practicable" any material falling under Article 67 (2).
18. Responsibility for disclosure lies with the Prosecution; the Registry cannot replace or surrogate it. The first control of the disclosure materials lies with the defence; the Registry should not replace it. In fact, the Registry, although ordered by the Chamber to organize a system of disclosure, will not be responsible for, or suffer the consequences of any shortcomings in the implementation of this process.

²⁴ See ICTR Trial Chamber II, *Prosecutor v. Bizimungu et al*, ICTR-99-50-T Decision on the Prosecution's Motion for certification to Appeal the Trial Chamber's Decisions on Protection of defence Witnesses, 28 September 2005 (certifying for appeal a decision arguably affecting the prosecution's ability to effectively discharge its disclosure duties)

19. Finally, the issue causes unfairness to both parties by affecting their ability to timely comply with the relevant deadlines established in the Rules or imposed by the Chamber. If disclosure is delegated to the Registry, the party who is bound by a deadline is no longer effectively in control of its ability to meet such deadline. The experience accumulated so far by the Court demonstrates that the introduction of an additional player in the disclosure field has a significant impact on the parties' abilities to disclose and receive disclosure materials within the allocated deadlines.²⁵

The Second Issue affects the fair conduct of the proceedings

20. The Prosecution submits that the Pre-Trial Chamber's finding that "it cannot fulfil its filtering function at the pre-trial stage without having access to the evidence exchanged between the Prosecutor and the defence, in particular to exculpatory evidence"²⁶ is in error and adversely affects the parties' rights and the impartial role of the Pre-Trial Chamber.

21. Firstly, the Chamber's ruling effectively means that the parties lose the control over the presentation of their cases. Under the disclosure regime established by the Statute and followed both in *Lubanga* and in *Katanga and Ngudjolo*, the parties have been the masters of their own cases, and it has been their province to decide which evidence would be placed before the Pre-Trial Chamber for the purposes of the confirmation hearing.²⁷ By adopting a system of compulsory filing and registration of all material disclosed and inspected by the parties,²⁸ the Decision effectively takes away from them the critical procedural right to remain in control of the selection and presentation of evidence for the purposes of the confirmation procedure. In practical terms, this means that evidence that neither the Prosecution nor the defence considered that should be placed before the Chamber – for instance, due to its inherent lack of reliability, its scarce probative value or its prejudicial effect – will nonetheless be filed on the record and become fully accessible to the Chamber, which will be free to use it as it deems fit.²⁹ Leaving aside whether this system is compatible with the Statute, the Rules and the Regulations of the Court – a

²⁵ See paras. 30-31 below.

²⁶ Decision, para. 19.

²⁷ See *Lubanga* Disclosure Decision, note 7 *supra* at pps 5-6 and paras 38-58 and *Katanga et al* Calendar-establishing Decision note 8 *supra* at pps 7,10 and 11 and *Katanga et al* Hearing setting out Disclosure System note 8 *supra* at p. 8 lines 18-25, p. 9 lines 1-3, P. 9 lines 24-25, P. 10 lines 1-5, P. 17 lines 12-13, P. 17 lines 19-15, P. 18 lines 1-3 and P. 18 lines 12-18

²⁸ Decision, paras. 16 and 42-51.

²⁹ The Decision's use of Regulation 28 of the RoR (para. 57) is proof of the tensions within the Court's system created by it: that provision relates to evidence submitted by participants or produced during a hearing, and yet the Decision applies it to evidence that neither party has submitted prior to or produced at a hearing.

matter that only the Appeals Chamber can elucidate – the Prosecution submits that the Decision’s impact on the parties’ ability to present their cases is of such a degree that it necessarily affects the fairness of the proceedings.³⁰

22. Further, the conflation of the related but nonetheless distinguishable processes of disclosure and inspection³¹, combined with the system of mandatory registration means that the Prosecution may be forced to file with the Registry vast amounts of the materials obtained in the CAR investigation. The Prosecution may be also forced to include hundreds of documents obtained in other investigations, in particular in the DRC situation, which may be of some relevance to the present case (for instance, because the name of the accused is mentioned). Thus, the Prosecution can be obliged to file in the record an extensive amount of investigative materials (collected within and outside the CAR situation) that it does not intend to use at the confirmation hearing or at trial. This is already an extraordinary interference with the Prosecution’s rights of control over its files, as enshrined in Articles 54 and Rule 10 of the Rules of Procedure and Evidence,³² which adversely affects the fairness of the proceedings vis-à-vis the Prosecution.³³

23. In turn, the defence, and despite the statement in the Decision that it has a right not to present evidence³⁴, loses control over any material disclosed under Article 67 (2) or provided for inspection under Rule 77 – which regulate a right of the defence, and not an authority of the Chamber – and is in no position to decide which of that material, if any, should be placed before the Chamber. Consequently, and only to give one example, material that the Prosecution has provided under Article 67 (2), but that under the defence’s assessment is of a highly prejudicial character, outweighing its exonerating nature, will be nonetheless filed in the record and remain accessible to the Chamber. In this manner, the defence’s rights of autonomy and control over Article 67 (2) or Rule 77 material are effectively denied, a further example of the Decision’s profound impact on the fairness of the proceedings.

³⁰ *Prosecutor v Kony et al*, ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), 11 July 2006, para. 24.

³¹ The Prosecution notes that at paragraph 48 of the Decision it is held that Rule 77 puts an obligation on Prosecutor to disclose. The obligation placed on the Prosecution is to permit inspection. The Chamber’s approach effectively expands Rule 77 into another disclosure obligation.

³² Rule 10 expressly states that “The Prosecutor shall be responsible for the retention, storage and security of information and physical evidence obtained in the course of investigations by his or her office”.

³³ The adverse results are aggravated by the Decision’s further departure from the *Lubanga* model in terms of the confidentiality levels of the evidence filed, and the default position that such evidence will be public (Decision, para. 63).

³⁴ Decision, para. 29.

24. Finally, it is submitted that full access and knowledge by the Pre-Trial Chamber of all evidence disclosed by the parties may hamper the exercise of the Chamber's function under Article 61(7) and thereby affect the fairness of the proceedings. According to Article 61(7), the Pre-Trial Chamber must "on the basis of the hearing, determine whether there is sufficient evidence". Under a reasonable interpretation of this provision, any other evidence that may be in the possession and has been brought to the knowledge of the Chamber may not be considered for the purposes of the decision. If the Chamber conducts a detailed examination of all the evidence provided to it will be impossible to fully prevent any undue influence stemming from material not discussed at the hearing on the decision making process.³⁵

The Third Issue affects the fair conduct of the proceedings

25. This aspect of the Decision imposes on the Prosecution a burden that is not contemplated in the Statute, the Rules or the Regulations of the Court, and it does so without differentiating between Article 61(3)(b) material, material disclosed under Article 67 (2) and material in the Prosecution's possession or control which the Prosecution allows the Defence to inspect under Rule 77. No precedent for such an onerous duty may be found in the existing Court's jurisprudence and practice. Pre-Trial Chamber I only required that the Prosecution presented, pursuant to Rule 121 (3) a "charging document and list of evidence" linking each item of evidence adduced in support of the charges to the factual statement to be proved, and each factual statement to a specific element of the crime or mode of liability.³⁶ Yet the Decision, without any legal foundation, obliges the Prosecution to present a detailed analysis of *each piece of evidence* – exculpatory or incriminatory – exchanged between the parties and communicated to the Chamber,³⁷ which must be performed "page by page or, where required paragraph by paragraph".³⁸

26. The Prosecution respectfully submits that the Decision imposes an exorbitant duty on the Prosecution, not contemplated under the Statute or the Rules, which cannot be reasonably complied with. The Decision does not appear to consider the scale of the material

³⁵ Ultimately, it will be for the Appeals Chamber to determine what is the proper scope of a Pre-Trial Chamber's scrutiny. It suffices here to note that under one highly plausible interpretation of Article 61, extending such scrutiny beyond the material discussed at the hearing can adversely affect the fairness of the proceedings.

³⁶ This has been the system followed both in the *Lubanga* and *Katanga and Ndgujolo* cases. See *Lubanga* Disclosure Decision, note 7 *supra* at p. 11 and *Katanga and Ndgujolo* Calendar-establishing Decision note 8 *supra* at p. 7 and *Katanga and Ndgujolo* Hearing setting out Disclosure System note 8 *supra* at p. 4 lines 14-17

³⁷ Decision, para. 66.

³⁸ Decision, para. 69.

involved, even adopting the strictest possible approach to the scope of Article 67 (2) and Rule 77.³⁹ For the purposes of this case, the relevant universe of material comprises the following collections:

CAR Collection (update) - 3,999 documents/ 10,174 pages;⁴⁰
DRC Collection - 32,366 documents/ 115,812 pages;
Darfur Collection - 16,327 documents/ 81,362 pages
Uganda Collection - 15,573 documents/ 76,588 pages.

27. Per its latest review of the CAR collection only (5 August 2008), and after examining 2,036 documents, comprising 5,593 pages, the Prosecution has already provisionally identified almost two hundred documents which are “purely” exonerating (comprising around one and a half thousand pages), dozens of documents which are of a “mixed” nature (comprising more than one thousand pages) and more than one hundred documents which are only incriminatory (comprising almost two thousand pages).⁴¹ Further reviews are being conducted within the CAR collection, and will be conducted through the other collections soon. Thus, the Prosecution can anticipate that additional amounts of material are still to be identified and reviewed.

28. In this already extremely taxing context, which demands substantial time and resources, the imposition of a non statutory duty to conduct an analysis of material “page by page” and even “paragraph by paragraph” directly affects the fairness of the proceedings vis-à-vis the Prosecution. Whether this aspect of the Chamber’s Decision – and its clear implications in terms of time and resources - is supported by the Statute and the Rules is a matter that only the Appeals Chamber can decide; however, the impact of this aspect of the Decision on the Prosecution’s rights and ability to fulfill its duties should not be in dispute.

The issues affect the expeditious conduct of the proceedings

³⁹ The Prosecution notes that the Chamber refers to “truly relevant evidence” in its decision (para. 68). However, the Chamber does not provide any further precision in relation to this novel concept, or its interplay with the rather generous language of Article 67 (2) (evidence which “shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence”) and Rule 77 (books, documents, photographs and other tangible objects which are “material to the preparation of the defence”, or are intended to be used as Prosecution evidence or “were obtained from or belonged to the person”).

⁴⁰ The Prosecution continues to collect evidence in the context of this investigation, which means that the numbers provided will necessarily increase.

⁴¹ The Prosecution is not including in this detail the documents that are neither exonerating nor incriminating in nature (more than 1,500 documents), but which may have future relevance under Rule 77 and documents that overlap with the ones specified above.

29. The Prosecution notes that it has submitted in the past that once a party has demonstrated that an issue affects the fair conduct of the proceedings, then any further showing that the issue also affects the expeditious conduct of the proceedings is superfluous for the purposes of obtaining leave to appeal under Article 82(1)(d).⁴² The Appeals Chamber also stated that “[t]he expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial”.⁴³ Nonetheless, the Prosecution submits that the relevant issues in the Decision significantly affect the expeditious conduct of the proceedings.

The First Issue affects the expeditious conduct of the proceedings

30. The Prosecution submits that the previous experience before this Court has shown that disclosure through the Registry hampers effective disclosure in preparation of the confirmation hearing and therefore affects the expeditious conduct of the proceedings: in the *Luganba* case, Pre-Trial Chamber I, prior to issuing its final Disclosure Decision, put in place an interim system of disclosure, which also provided that disclosure be conducted through the Registry.⁴⁴ The experience of disclosure through the Registry can be summarized as follows:⁴⁵ on two occasions - after having disclosed the very same materials to the defence - the Prosecution filed disclosure materials. Firstly, on 3 April 2006, the Prosecution filed the first set of disclosure materials, comprised of six documents only. Counsel for the Defence was notified on 6 April 2006. Accordingly, it took the Registry more than three working days to disclose six documents. Subsequently,

⁴² Similarly, if a party had demonstrated that the issue does affect the expeditious conduct of the proceedings, then any showing that it also affected the fair conduct of the proceedings would likewise be superfluous. See in particular *Situation in the DRC*, ICC-01/04-141, paras. 49-52; see further *Situation in the DRC*, ICC-01/04-103, footnote 5; *Prosecutor v Lubanga*, ICC-01/04-01/06-125, footnote 30.

The Prosecution considers that this requirement mirrors the obligation to ensure that proceedings are fair and expeditious (see e.g. Article 64(2)). In the same manner that once proceedings are no longer fair, or no longer expeditious, they are no longer “fair and expeditious”; so once an issue affects the fair conduct of the proceedings, or affects the expeditious conduct of the proceedings, it affects the “fair and expeditious conduct of the proceedings”. The jurisprudence of the ICTY and ICTR, adjudicating on the same text as is found in Article 82(1)(d), supports this proposition. In both tribunals, Chambers have often granted leave to appeal solely on the basis that the issue affects the fair conduct of the proceedings - see authorities set out in *Situation in the DRC*, ICC-01/04-141, paras. 49-52; see subsequently *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005.

⁴³ *Situation in the DRC*, ICC-01/04-168 OA3, 13 July 2006, para.11. For a wider discussion on this matter, see also *Interlocutory Appellate Review of Early Decisions by the International Criminal Court*, American University, War Crimes Research Office, January 2008, p. 66-67, *inter alia*.

⁴⁴ *Prosecutor v. Lubanga*, ICC-01/04-01/06-58, 23 March 2006.

⁴⁵ See also Prosecutions submissions in *Prosecutor v. Lubanga*, ICC-01/04-01/06-91, 2 May 2006, which led to the amendment of the system of disclosure put in place by Pre-Trial Chamber I in the *Lubanga* Disclosure Decision.

on Friday, 21 April 2006, the Prosecution filed the second set of disclosure materials, this time comprised of 24 documents. Counsel for the Defence was notified on Monday, 1 May 2006. Accordingly, it took the Registry almost six working days to disclose these documents to Counsel for the Defence.⁴⁶

31. The Prosecution submits that the experience to date demonstrates the practical difficulties and impediments of the system adopted in the Decision. This will in particular be the case when the parties disclose voluminous sets of materials and, in light of Article 61(3)(b) and Rule 121(3), have to do so under tight deadlines. It may be that ultimately it is decided that these adverse effects on the expeditious conduct of the proceedings are warranted in light of other relevant considerations. However, the question to be determined now is merely whether such an impact exists – and in light of the facts just described, the Prosecution submits that it does.

The Second Issue affects the expeditious conduct of the proceedings

32. The transformation of the confirmation hearing and of the scope of the Pre-Trial Chamber's scrutiny that the Decision entails directly impact on the expeditiousness of pre-trial proceedings and in particular the confirmation hearing. The Decision significantly expands the record under Rule 121 (10) and the universe of evidence potentially relevant to the confirmation proceedings and any decision under Article 61; depending on the amount of material involved, such increase may be an exponential one. This is an unavoidable consequence of the imposition on the parties of a duty to file with the Chamber all material communicated between them, instead of only the material that they intend to rely on at the confirmation hearing. In this manner, the Decision can have extremely severe damaging consequences, leading to the hypertrophy of the confirmation proceedings and the paralysis of the Chamber.
33. A quick review of the confirmation proceedings in the *Katanga and Ngudjolo* case illustrates with clarity the impact of this aspect of the Decision. In that case, the Prosecution relied for the purposes of the hearing on 258 documents, comprising 3,380 pages. Prior to the confirmation hearing, however, the Prosecution had either disclosed to the defence, or allowed inspection of additional 354 documents comprising 2,918 pages.

⁴⁶ The Prosecution stresses that nothing in this document should be seen as an attack on the professionalism of Registry. The Prosecution makes these observations for the sole purpose of showing the practical difficulties that the Pre-Trial Chamber's system causes for all parties and organs of the Court involved.

Thus, if Pre-Trial Chamber I had adopted a model similar to that enshrined in the Decision, it would have been faced with a totality of 612 documents comprising 6,298 pages, stemming from one party only; i.e., the Chamber would have doubled the amount of material in the record, to the clear detriment of the expeditious conduct of the proceedings.⁴⁷

34. Finally, the Prosecution notes that this aspect of the Decision also militates against the streamlining of submissions and the narrowing of issues at the confirmation hearing, with unavoidable consequences to its expeditious conduct, since the parties will be forced to address and respond to material which neither of them wanted to rely on or to have considered at the confirmation hearing, and to make submissions pertaining to such material.

The Third Issue affects the expeditious conduct of the proceedings

35. The Prosecution has already provided a description of the scale of the exercise that it is expected to undertake pursuant to the Decision, which would already force the Prosecution to conduct “page by page” and/or “paragraph by paragraph” analyses over 4,500 pages of material that has already been identified as relevant, stemming only from the CAR collection (and with further reviews over that collection still ongoing). The impact of a new duty of such a magnitude will be of huge proportions and, apart from demanding resources that are currently lacking, will unavoidably affect the pace of disclosure and inspection. As the experience accumulated by the Court so far establishes, obstacles or difficulties in the disclosure process directly impact on the expeditiousness of the proceedings.⁴⁸ Even acting with the utmost diligence and speed the Prosecution will only be able to produce a limited amount of analysis. Further, even such limited analysis will require the exclusive allocation of resources to this new and unforeseen task – resources which would otherwise be devoted to securing timely disclosure and inspection of material, thus delaying the performance of these core statutory obligations..

⁴⁷ The Prosecution further notes that in this case the Prosecution was not obliged to disclose the totality of the Article 67 (2) material prior to the confirmation hearing, but only a substantial amount of it (the “bulk rule”) See e.g. *Prosecutor v. Katanga et al*, Decision Requesting Observations Concerning Article 54 (3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material for the Defence's Preparation for the Confirmation Hearing, ICC-01/04-01/07-543, 2 June 2008, para. 27).

⁴⁸ See e.g. *Prosecutor v. Lubanga*, ICC-01/04-01/06-126, 24 May 2006, p.3 , *Prosecutor v. Katanga et al*, ICC-01/04-01/07-446, 25 April 2008, p.5

36. The Prosecutor notes that decisions impacting on a participant's activities and resources have been viewed as affecting the expeditious conduct of the proceedings for the purposes of deciding whether leave to appeal should be granted.⁴⁹

Immediate resolution of the issues by the Appeals Chamber may materially advance the proceedings

37. The Prosecution submits that immediate resolution of these issues will materially advance the proceedings. As stated by the Appeals Chamber, this requirement means that "prompt reference of the issue to the court of appeal" and its "authoritative determination" will help the proceedings "'move forward'; by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings."⁵⁰ The Appeals Chamber has also confirmed that proceedings are "not confined to the proceedings in hand but extends to the proceedings prior and subsequent thereto."⁵¹

38. As stated above, with respect to the three issues referred to in this application for leave to appeal, the Decision significantly deviates from the practice of the disclosure put in place by the Pre-Trial Chamber I in the *Lubanga* and the *Katanga and Ngudjolo* cases. Rather, the model adopted in the Decision closely resembles and even expands on an interim system that Pre-Trial Chamber I discarded after testing some of its main features and hearing submissions from the parties.⁵² In contradistinction, the model that the Decision

⁴⁹ For instance, creating two distinct procedures for victims' participation (i.e. the application process and the proceedings for the determination of the modalities of participation) has been considered by Pre-Trial Chamber I as an issue that "would significantly affect the expeditiousness of proceedings because of the risk of consecutive multiple applications under rule 89 of the Rules and regulation 86 of the Regulations, which would lead to a resource-intensive process for the parties as well as hamper the efficient and effective operation of the Court as a whole". See: Situation in Darfur, Sudan, Decision on Request for leave to appeal the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, ICC-02/05-118, 23 January 2008. And also, enlarging the scope of application of rule 81(2) of the Rules was similarly considered as an issue that would "significantly affect the expeditious conduct of the proceedings because, depending on the approach taken, it may have an impact on how the Prosecution goes about selecting its witnesses for the purpose of the confirmation hearing, or it may delay certain investigative steps by the Defence". See: *Prosecutor v. Katanga*, Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions, ICC-01/04-01/07-116, 19 December 2007

⁵⁰ *Situation in the DRC*, ICC-01/04-168, 13 July 2006, paras. 14-15, 18.

⁵¹ *Situation in the DRC*, ICC-01/04-168, 13 July 2006, para. 12, see also para. 17.

⁵² See "Decision Requesting Observations of the Prosecution and the Duty Counsel for the Defence on the System of Disclosure and Establishing an Interim System of Disclosure" ICC-01/04-01/06-58, 23 March 2006, and "the Decision Requesting further Observations from the Prosecution and the Duty Counsel for the Defence on the System of Disclosure", CC-01/04-01/06-54, 27 March 2006, establishing an interim system of disclosure pending the submissions of the parties on their views as to the most appropriate system of disclosure within the

declines to follow has been successfully used in the Court's first two cases and has showed to be a fair and efficient one, fully consistent with the rights of the parties and the specific nature of the confirmation hearing.

39. Immediate resolution of all three issues by the Appeals Chamber will advance these proceedings primarily by ensuring that disclosure of evidence, both pursuant to Articles 61(3)(b) and 67(2) and inspection pursuant to Rule 77, are dealt with correctly on an ongoing basis throughout this case. Disclosure and inspection are key features of this Court, and should be placed on a solid footing. In this sense, the Prosecution stresses that legal certainty is essential to the Court's proper functioning, including the ability of all participants and organs to fully understand their duties and responsibilities and to make the necessary plans and arrangements. In particular, legal certainty demands that critical issues going to the heart of the fairness of the Court's proceedings are treated in a uniform manner by Chambers of the Court.
40. The issues involved in this Decision have substantial ongoing impacts on the pre-trial proceedings and are integral to the fair and efficient preparation for, and conduct of the confirmation hearing. If these issues are not resolved immediately by the Appeals Chamber, then the preparation and conduct of the confirmation hearing may take place on, and be tainted by, an incorrect regime of disclosure and a flawed evidentiary basis. Immediate resolution by the Appeals Chamber will advance the proceedings by ensuring that disclosure for the confirmation hearing is carried out in a proper manner; that the parties are in a position to effectively and efficiently allocate their resources for the preparation for (and conduct of) the confirmation hearing; and that the confirmation hearing itself is conducted in a streamlined manner and on a proper evidentiary basis, safeguarding both its integrity and expeditious conduct.
41. It is submitted that to the extent that the Decision is, as demonstrated above, capable of affecting the fairness of the proceedings, timely intervention of the Appeals Chamber will avert the danger that subsequent proceedings affected by the Decision are later nullified, in whole or in part, by challenges brought by the parties. In this sense, the Prosecution stresses that the very role envisaged for Article 82(1)(d) by the Appeals Chamber is to

framework of the Rome Statute ("the Statute") and the Rules of Procedure and Evidence ("the Rules"), by which the parties submitted their observations in the manner set out in the procedural background in pp.. 2-3 in *Lubanga* Disclosure Decision

“rid [...] the judicial process of possible mistakes that might taint [...] the fairness of the proceedings”.⁵³

42. Further, a core function of the Appeals Chamber is to ensure that the law of the Court evolves in a coherent and standardised manner, and to provide guidance to Pre-Trial and Trial Chambers as to the correct interpretation of the law,⁵⁴ thereby enhancing clarity and predictability in the Court’s proceedings. The Prosecution submits that this is reflected in the present limb of Article 82(1)(d), which has been defined in terms of whether “immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination”.⁵⁵ Final determination of the critical issues raised in the Decision by the Appeals Chamber will provide clear guidance to all Pre-Trial Chambers and participants. This is of critical importance in relation to the current situation where different Pre-Trial Chambers are taking drastically different routes pertaining to a key element of the Court’s criminal process.⁵⁶
43. Furthermore, the issues involved in this Decision cut across all situations before the Court. Granting leave to appeal these issues at this stage would therefore also materially advance other proceedings,⁵⁷ by giving the Appeals Chamber an opportunity to confirm the procedural framework within which pre-confirmation disclosure is to be dealt with. This would significantly reduce the amount of litigation on those issues and allow future pre-trial proceedings to be dealt with promptly and in a streamlined fashion. While

⁵³ *Situation in the DRC*, ICC-01/04-168, 13 July 2006, para. 14. The Prosecution notes that the Appeals Chamber refers to “possible mistakes that might taint” (emphasis added).

⁵⁴ See e.g. *Prosecutor v. Krnojelac*, IT-97-25-A, Judgement, 17 September 2003, para. 7: one concern of the Appeals Chamber “is to ensure the development of the Tribunal’s case-law and the standardisation of the applicable law”. See also *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgement, 24 March 2000, para. 113(ii): “The fundamental mandate of the Tribunal to prosecute persons responsible for serious violations of international humanitarian law cannot be achieved if the accused and the Prosecution do not have the assurance of certainty and predictability in the application of the applicable law”.

⁵⁵ Judgment on Extraordinary Review, paras. 14 and 18. See also e.g. *Prosecutor v. Blagojević et al*, IT-02-60-PT, Decision on Joint Defence Motions for Certification of Decision on Joint Defence Motions for Reconsideration of Trial Chamber’s Decision to Review All Discovery Materials Provided to the Accused by the prosecution, and Request for Stay of Execution of Decision, 10 February 2003.

⁵⁶ The fact that different first instance Chambers have taken different approaches to a matter has been considered as a factor supporting a conclusion that immediate resolution would materially advance the proceedings. See e.g. *Prosecutor v. Milosevic*, IT-02-54-T, Decision on Prosecution’s Application for Certification under Rule 73(B) concerning the Evidence of an Investigator, 20 June 2002; *Prosecutor v. Milosevic*, IT-02-54-T, Decision on Prosecution’s Application for Certification under Rule 73(B) concerning Rule 70, 29 August 2002.

⁵⁷ While the impact of immediate resolution of the issue on other proceedings may not itself be sufficient to sustain a grant of leave under Article 82(1)(d), it is a factor which can be weighed in deciding whether to grant leave - see *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Decision on the Prosecutor’s Motion for Certification to Appeal the Trial Chamber’s Decisions on Protection of Defence Witnesses, 28 September 2005, para. 5; *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Certification of Appeal Concerning Access to Protected Defence Witness Information, 29 July 2005, para. 4; *Prosecutor v. Mrkšić*, IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003.

recognizing that issues of general importance, and the fact that an issue has not yet been considered by the Appeals Chamber, are not in themselves grounds for granting leave to appeal, the Prosecution submits that the importance of the issues raised by the Decision underscore the desirability of prompt consideration of this issue by the Appeals Chamber.⁵⁸

44. Finally, the Prosecution submits that granting leave to appeal may not necessarily cause any delay to the proceedings. Subject to an application and determination on suspensive effect of the disputed portions of the Decision by the Appeals Chamber, the Prosecution and the Defence may, as an interim solution disclose *inter partes* all necessary information within the time prescribed by the Pre-Trial Chamber, following the practice put in place by Pre-Trial Chamber I, which has proved to be fair and efficient.⁵⁹
45. On the basis of these considerations, the Prosecution respectfully submits that the Appeals Chamber ought to be given the opportunity to exercise its review functions in relation to the Decision and the crucial matters arising from it.

⁵⁸ It has been previously recognised that in certain circumstances, the potential impact on other proceedings may be “invoked as an additional argument in support of the alleged significant impact on the current proceedings” - “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”, ICC-01/05-20-US-Exp, 19 August 2005, para. 54 (unsealed pursuant to ICC-02/04-01/05-52).

⁵⁹ In addition, the Prosecution notes that the magnitude of the practical implications of the Chamber’s Decision already conspire against holding the confirmation hearing in the scheduled date.

Relief sought

46. For the reasons set out above, the Prosecution requests that the Trial Chamber grant leave to appeal the specific aspects of the Decision identified above.



Luis Moreno-Ocampo,
Prosecutor

Dated this 6th day of August, 2008
At The Hague, The Netherlands