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TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Fumiko Saiga

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

***IN THE CASE OF
THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Public Document

**Prosecution's Application for Leave to Appeal the "Order concerning the Presentation of
Incriminating Evidence and the E-Court Protocol"**

Source: The Office of the Prosecutor

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Introduction

The Prosecution seeks leave to appeal Trial Chamber II's 13 March 2009 "Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol" ("Decision").¹ The Decision directs the Prosecution to prepare a detailed and comprehensive analytical chart of all the incriminatory evidence it intends to offer at trial and to provide that chart to the Court and the Defence at least several months in advance of the trial. It further provides that the Prosecution thereafter may not introduce any evidence at trial that is not contained within the analytical chart unless it obtains leave of the Court.

The Application for Leave to Appeal concerns the timing and the scope of the pre-trial disclosure and the rights of the Prosecution to continue to investigate the case before trial.

First, the Decision provides that after disclosure of its incriminating evidence and its witness list, the Prosecution will thereafter be unable to add prospective evidence or witnesses except with the Court's permission. The Prosecution is ready for trial. However, the Prosecution cannot discount possibilities to strengthen its case. The deadline, imposed excessively in advance of the trial and without a concrete trial date, unreasonably limits the discretion of the Prosecution to gather and analyze its evidence and present its case at trial, and it does so while leaving unrestricted the Defence's ability to investigate beyond that deadline.² Second, the Decision requires a breadth of disclosure, including a scheme for organization and a degree of subjective analysis, far beyond that authorized by the Rome Statute or the Rules of Procedure and Evidence. Combined, these two facets of the Decision mean that the Prosecution must present its case in full analytical detail, months in advance of the trial; compounding this unfairness, it thereafter has no right to supplement its case with additional evidence or to offer existing documents and evidence to prove additional elements without express leave of the Court. At the same time, the Defence will have both advance disclosure of the Prosecution's perception of its evidence and the unrestricted ability over the upcoming months to investigate and strengthen the defence case. The Decision alters the balance between the Prosecution and Defence and creates issues that relate to fairness and the potential outcome of the trial.

¹ ICC-01/04-01-07-956.

² Rule 84 suggests that any time limits regarding disclosure must relate to "the set date" of trial". It provides that any orders concerning disclosure "shall ensure strict time limits" so as to "ensure that the trial commences on the set date".

On both issues this Decision departs from decisions of Trial Chamber I in the only case to have proceeded to trial so far. In the proceedings in *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I linked disclosure deadlines to a concrete trial date.³ And its requirement of a pre-trial explanation of the Prosecution's evidence did not require the sort of analysis that the Decision in this case calls for. Trial Chamber I ordered the Prosecution to serve a "summary of presentation of evidence", which it described as "a document which explains its case by reference to the witnesses it intends to call and the other evidence it intends to rely upon. Furthermore, the document shall explain how the evidence relates to the charges".⁴ The Prosecution responded with a legal brief that provided a narrative and lists of witnesses and documentary evidence, without subjective analysis⁵ or detailed references to the exact locations of every bit of incriminating evidence within the evidence lists.⁶ That production accommodated the needs of the parties without intruding unfairly on the Prosecution or limiting its ability to present its case.

The Prosecution thus applies for leave to appeal to address the issues presented and to seek authoritative determinations that will provide uniformity among the Trial Chambers. The Prosecution does not specifically contend – and this Chamber should not consider – that the Decision is erroneous in order to establish an entitlement to leave to appeal under Article 82. It is accepted that judges perform their functions in good faith and issue only decisions that they believe are legally correct. For that reason, the application for leave to appeal appropriately does not ask the Chamber to conclude that its findings or legal reasoning are flawed. Thus, the *sole* question for this Chamber is whether the issues on which leave to appeal is sought meet the criteria set out in Article 82(1)(d).⁷ If they do, the Chamber should authorize appeal notwithstanding its view on the merits and leave the evaluation of the underlying legal issues to the competency of the Appeals Chamber.

³ ICC-01/04-01/06-1019, 9 November 2007, para. 29, where the Prosecution was required to file the summary of the presentation of evidence three months prior to the start of trial.

⁴ ICC-01/04-01/06-1019, 9 November 2007, para. 26.

⁵ At the pre-trial stage of the Lubanga case, the Prosecution was ordered to provide e-court data linking incriminating documents to paragraphs of the documents containing the charges. This requirement was dropped by the Trial Chamber (ICC-01/04-01/06-1127, 24 January 2008, paras. 19-21).

⁶ See ICC-01/04-01/06-1099, 17 December 2007; and ICC-01/04-01/06-1354, 23 May 2008.

⁷ *Situation in Uganda*, ICC-02/04-01/05-20-US-Exp 19 August 2005, para. 22.

Procedural Background

1. On 27 November 2008, Trial Chamber II (the “Trial Chamber”) asked the Prosecution to submit a proposal for “an ordered and systematic presentation of [its] evidence”.⁸ This request was reiterated in the Trial Chamber’s decision of 10 December 2008, in which it directed the Prosecution to submit a proposal for a table linking the charges confirmed by Pre-Trial Chamber I and the modes of responsibility with the alleged facts and the evidence on which it intends to rely at trial.⁹
2. On 9 January 2009, the Prosecution submitted its proposal.¹⁰ On 23 January 2009, the Defences of the two accused filed their responses.¹¹
3. On 3 March 2009, at a pre-trial conference, the Trial Chamber proposed a tentative schedule for trial.¹²
4. On 13 March 2009, the Trial Chamber issued the “Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol” (“Decision”).¹³

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

5. The Prosecution seeks leave to appeal two issues in the Decision, namely:
 - Whether the Prosecution may be required to present all its incriminating evidence and its list of witnesses many months in advance of the trial and without reasonable certainty as to the actual trial date (“First Issue”).
 - Whether the Prosecution may be required to create and provide to the Chamber and the Defence a detailed element-by-element analytical chart for all the evidence it intends to use during the trial (“Second Issue”).
6. The two issues identified above clearly arise out of the Decision.¹⁴ These issues further affect the fair and expeditious conduct of the proceedings and the outcome of the trial, and

⁸ ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, p. 56, lines 9-10.

⁹ ICC-01/04-01/07-788, 10 December 2008, para. 7.

¹⁰ ICC-01/04-01-07-813.

¹¹ ICC-01/04-01-07-844; ICC-01/04-01-07-845.

¹² ICC-01/04-01/07-T-61-ENG, 03 March 2009, p 29, lines 1-29.

¹³ ICC-01/04-01-07-956.

¹⁴ 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

their immediate resolution by the Appeals Chamber may materially advance the proceedings.

The First Issue is Appealable under Article 82(1)(d)

a. The First Issue Arises from the Decision

7. The Trial Chamber ordered the Prosecution to “submit a Table of Incriminating Evidence following the above guidelines and Annex A no later than Friday, 3 April 2009, at 4 p.m.”¹⁵ The Trial Chamber further ordered the Prosecution to submit on the same date “a list of all the witnesses it intends to call, together with a Witness Information List” and to “file all the items of evidence listed in the Table of Incriminating Evidence with the Registry”.¹⁶ Anything not produced and included in this analytical table cannot be introduced at trial unless the Court grants leave to do so.¹⁷ The Decision thus anticipates that the Prosecution’s selection of documentary and other evidence, its decision regarding which witnesses it will call at trial and its determination as to the relevance of every item of evidence essentially will be completed by 3 April 2009.
8. It is incontestable that “the Defence [...] is entitled to be informed – sufficiently in advance of the commencement of the trial”.¹⁸ The Prosecution is ready for trial. That said, however, the Prosecution submits that the Chamber cannot restrict its right to add prospective evidence or witnesses excessively in advance of the trial and before a concrete trial date is set.
9. That is precisely the result that this Decision imposes. Though the Decision linked the issue of advanced notice of the evidentiary basis to the Defence to the commencement of the trial,¹⁹ it did so in the absence of an actual trial date or any certainty that trial shall

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.”

¹⁵ Decision, p. 17.

¹⁶ Ibid. See also Decision, para. 28.

¹⁷ Decision, para. 30.

¹⁸ Decision, para. 6.

¹⁹ The Trial Chamber found that “the Defence [...] is entitled to be informed – sufficiently in advance of the commencement of the trial – of the precise evidentiary basis of the Prosecution case”, which in the view of the Trial Chamber “is only possible if the evidentiary basis of the Prosecution case is clearly defined sufficiently in advance of the trial” (Decision, para. 6).

start within the reasonably near future. The Chamber previously suggested that the evidentiary portion of the trial might begin after the summer recess, a tentative proposal that is awaiting the views of the parties and participants.²⁰ Assuming that to be the anticipated schedule, it means that the Prosecution may effectively be bound by its evidentiary submissions approximately five months, at least, before the first witness testifies. And even the feasibility of that suggested timetable is itself open to doubt in light of Katanga's recent admissibility challenge. The parties and participants have not completed briefing.²¹ Once the Trial Chamber resolves the issue, there will be an appeal as of right from that determination.²² A decision in Katanga's favour would effectively stop the case in its tracks.²³ A decision in the Prosecution's favour might similarly stop the case from proceeding, since if the Defence appeals it would likely request an order for suspensive effect of the appealed decision from the Appeals Chamber.²⁴

10. Consequently, whether the Chamber may, before the trial date is set and many months in advance of the trial, order the Prosecution to compile, analyze, and produce all its evidence, with no right later to offer additional evidence at trial without judicial approval, clearly arises from the Decision.

b. The First Issue affects the fair conduct of the proceedings

11. The Prosecution submits that fairness requires that the procedural and substantive rights and obligations of all participants – including the Prosecution – be respected.²⁵ The concept of fairness is also directly linked to the ability of a party to present its case.²⁶

²⁰ ICC-01/04-01/07-T-61-ENG, 03 March 2009, p 29, lines 1-29.

²¹ The authorities of the DRC and the victims were granted until 16 April 2006 to make their submissions pursuant to Rule 59(3) (ICC-01/04-01/07-943-Conf, 5 March 2009, p. 7). The Prosecution and the Defence have a right to respond to any submissions made by the authorities of the DRC and the victims pursuant to Regulation 24(1). In addition, pursuant to Regulation 24(5), the Defence may seek leave to reply to the Prosecution's response to Katanga's admissibility challenge.

²² Article 82(1)(a). The document in support of the appeal shall be filed 21 days of notification of the relevant decision (Regulation 64(2)). A response may be filed within 21 days of notification of the document in support of the appeal (Regulation 64(4)). Participants may seek leave to reply to the response of the other party (Regulation 25(5)). Victims have a right to participate in the appeal by making representations in writing (Rule 59(3)). The authorities of the DRC also have a right to participate in the appeal (Rule 59(3)). The parties have a right to respond to any submissions made by victims or the authorities of the DRC.

²³ If the Trial Chamber were to agree with Katanga, it would then have to decide the consequences of its determination. Notably, in his admissibility challenge, Katanga "reserves" the right to litigate future the consequences of a ruling that the case is inadmissible; it suggests that the determination of consequences will require new submissions and a new hearing (see ICC-01/04-01/07-949, 11 March 2009, para. 66).

²⁴ Article 82(3) and Rule 156(5). See also ICC-01/04-01/06-1290 OA11 of 22 April 2008, para. 7; and ICC-01/04-01/06-1444 OA12, 22 July 2008, para. 8.

²⁵ 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

12. Rule 84, headed “Disclosure and additional evidence for trial,” provides:

“[i]n order to enable the parties to prepare for trial, and to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber shall, in accordance with article 64, paragraphs 3(c) and 6(d), and article 67, paragraph (2), and subject to article 68, paragraph 5, make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence. To avoid delay and to ensure that the trial commences on the set date, any such orders shall include strict time limits which shall be kept under review by the Trial Chamber.”

13. Rule 84 makes clear that, in promoting the timely disclosure of evidence, the Trial Chamber shall set time limits for disclosure “to avoid delay and to ensure that the trial commences on the set date.” It thus provides that the Court’s obligation to set time limits stems from its duty to avoid delay and enable a scheduled trial to proceed.

14. This Decision does not reasonably relate to those fair trial purposes. It imposes a cut-off date for the Prosecution’s investigation that has nothing to do with avoiding delay to the trial as there is no trial date set and the pending admissibility challenge makes it unlikely that trial can commence in the next few months. The decision prematurely, and thus unfairly, hampers the ability of the Prosecution to carry out its functions, including its mandate of establishing the truth.

15. The Trial Chamber emphasized that under its system “the Prosecution [...] remains master of its case and has full control over the selection and presentation of evidence in the Table”²⁷ That statement is only partially correct. The Prosecution is free to select evidence before the analytical table is submitted to the Trial Chamber, but thereafter it loses “full control” over its selection of evidence. Control instead will have shifted to the Trial Chamber, through the exercise of its prerogative to allow or deny amendments to the list of evidence.

16. The Decision accordingly impedes the Prosecution’s ability to select and present evidence in the months leading up to trial, as well as to re-examine its evidence, improve on its

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), and fairness to the Prosecution (*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).

²⁶ *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.

²⁷ Decision, para. 12.

presentation of the case, and respond to new discoveries or a new appreciation of the significance of previously-disclosed information.

17. Nor is it an answer that the Decision allows the Prosecution to seek leave of the Court to amend the list of evidence.²⁸ The Appeals Chamber expressly held that the Prosecution must be allowed to continue its investigation until the trial begins.²⁹ The right to investigate assumes that there will be a right to introduce the fruits of that investigation at the trial. The Decision, however, grants only the right to ask permission to introduce the evidence, which is a different matter. The Decision thus affects the fairness of the proceeding by interfering at an unreasonably early stage with the Prosecution's prerogative under the Statute to conduct an investigation directed at finding usable evidence in advance of trial.³⁰ The Prosecution is ready for trial. However, it could find alternative evidence that would reduce the number of witnesses or avoid a witness's exposure to risk, or would strengthen critical aspects of the case. These are prerogatives of the Prosecution and the Chamber should not interfere.
18. Finally, the Decision denies the equality of arms, because it imposes no parallel limitations on the ability of the defence to prepare, adapt, and amend its case. The imposition of substantial burdens on only one party separately affects the fair conduct of the proceedings.

c. The First Issue affects the expeditious conduct of the proceedings

19. The Prosecution notes that once a party has demonstrated that an issue affects the fair conduct of the proceedings, 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).³¹ Nonetheless, the Prosecution submits that the issue in this Decision separately affects the expeditious conduct of the proceedings.

²⁸ Decision, para. 30.

²⁹ ICC-01/04-01/06-568 OA3, 13 October 2006, paras. 49-52.

³⁰ The Appeals Chamber acknowledged that "[m]anifestly, authority for the conduct of investigations vests in the Prosecutor" ICC-01/04-556 OA4 OA5 OA6, 19 December 2008, paras. 52 and 45.

³¹ 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

20. The Decision does not bar the Prosecution outright from continuing its investigation at least until the start of the trial; it could not, since the Prosecution has both the duty and the right to do so.³² A continuing investigation will result in the collection of additional relevant information. The premature cut-off date can therefore result in an excessive number of requests for amendments of the Table and an extra burden on the Chamber to decide these requests. It may also result in related litigation by the parties. This affects the expeditious conduct of the proceedings.
21. Moreover, the Prosecution submits that the Decision imposes a prejudicial limitation on the rights of the Prosecution. If that prejudice were to result in the Chamber's refusal to convict on one or more counts at the end of the trial, then that could form the basis for a successful post-trial claim on appeal. In that sense, the issue affects the expeditiousness of the entire proceedings.

d. The First Issue affects the outcome of the trial

22. The Appeals Chamber has ruled that "[t]he outcome of the trial is postulated as a separate and distinct consideration warranting the statement of an issue for consideration by the Appeals Chamber, where the possibility of error in an interlocutory or intermediate decision may have a bearing thereupon. The Pre-Trial Chamber or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence."³³ For leave to appeal to be granted, an issue must not affect both the fair and expeditious conduct of the proceedings and the outcome of the trial. It is sufficient if the party seeking leave to appeal shows that the issue affects "either the fair and expeditious conduct of the proceedings *or* the outcome of the trial".³⁴
23. As the Prosecution will have to seek leave of the Chamber to amend the list of evidence, any decision on the Prosecution's request will impact on the ultimate trial record and therefore also on the outcome of the trial.

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.

³² ICC-01/04-01/06-568 OA3, 13 October 2006, paras. 49-52.

³³ ICC-01/04-168 OA3, 13 July 2006, para.13.

³⁴ ICC-01/04-01/06-1191, 26 February 2008, para. 8, emphasis added.

The Second Issue is Appealable under Article 82(1)(d)

a. The Second Issue arises from the Decision

24. The Trial Chamber ordered the Prosecution to “submit an analytical table of all the evidence it intends to use during the trial. The table shall be based on the charges confirmed and follow the structure of the *Elements of crimes*.”³⁵ The Trial Chamber further specified that “for each element, the Prosecution shall set out the precise factual allegations which it intends to prove at trial in order to establish the constituent element in question. For each factual allegation, the Prosecution shall specify which item(s) of evidence it intends to rely on at trial in order to prove the allegation. Within each item of evidence, the Prosecution shall identify the pertinent passages(s), which are directly relevant to the specific factual allegation”.³⁶ The format of the table required by the Trial Chamber is attached in Annex A to the Decision.
25. The Decision thus requires the Prosecution to provide the Trial Chamber and the Defence with a precisely charted, detailed, and subjective analysis of its own case. Such an analysis, however, falls squarely within the category of work product that cannot be ordered disclosed.³⁷ Rule 81(1) provides that “Reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure.” In contravention of both the literal language of this Rule and its intent, the Decision compels the Prosecution first to create an internal document that reflects its analysis and preparation of the case (to prepare the work product) and then to give it to both the Trial Chamber and to the Defence (thus, to disclose the work product).³⁸ The Second Issue arises clearly from the Decision.
26. Further, the Prosecution submits that the guarantee of a fair and expeditious trial *cannot* require that the Prosecution undertake an onerous task, nowhere provided in the Statute or

³⁵ Decision, para. 11.

³⁶ Decision, para. 13.

³⁷ The Decision further clarifies in another respects that it demands the Prosecution’s work product to be disclosed: it assumes that the Prosecution must know its case in full detail and be able to present it in a detailed analytical form (Decision, para. 15).

³⁸ A Trial Chamber of the ICTY found that Rule 70(A) protecting work product from disclosure also entails that “legal theories, strategies and investigations” are “privileged and not subject to disclosure to the opposing party” (*Prosecutor v. Blagojevic*, IT-02-60-T, Decision on Vidoje Blagojevic’s Expedited Motion to Compel the Prosecution to Disclose its Notes From Plea Discussions With the Accused Nikolic & Request for an Expedited Open Session Hearing, 13 June 2003, p. 6). “At its core the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client’s case.” [*United States v. Nobles*, 422 U.S. 225, 238, 95 S.Ct. 2160, 2170, 45 L.Ed.2d 141 \(1975\)](#).

the Rules, simply in order to “facilitate the [pre-trial preparation] of the accused and the Chamber.”³⁹ Nor can it require specifically that the Prosecution organize and set out for the accused and the Chamber its internal, subjective, and detailed analysis of each item of incriminating evidence.

27. Finally, such a chart is particularly inappropriate with respect to witness statements. Prior witness statements are ordinarily not evidence, and witnesses at trial may predictably produce a different account of events than was previously recorded or may testify about other matters than appear in the earlier recorded statement. A comprehensive analytical chart showing how each textual fact in a prior witness statement supports each factual allegation put forward by the Prosecution would also affect the right of the Defence. Evidence is produced in public hearings and not in form of charts. The judges will decide on the probative value of such evidence and the merits of the case at the end of the trial.
28. If and when leave to appeal is granted, the Prosecution will show that the Trial Chamber exceeded its discretionary power under Article 64, Rule 134 and Regulation 54 by requiring the Prosecution to provide to the Chamber and the Defence a minutely detailed analysis of all of its evidence in order to facilitate their pre-trial preparation.⁴⁰

b. The Second Issue affects the fair conduct of the proceedings

29. As noted previously, fairness requires that the procedural and substantive rights and obligations of the Prosecution be respected, and that the Prosecution be allowed to present its case.⁴¹
30. The Decision forces the Prosecution to produce, disclose to the Defence, and submit to the Chamber a complete and detailed internal analysis of its case. The “analytical”⁴² chart demanded from the Prosecution will include a detailed internal appraisal – i.e. work product – addressing its proof as to each element of each offense charged. The requirement both burdens the Prosecution and prejudices it, thus affecting the fair conduct of the proceedings. Nor is this analytical chart necessary to protect the fair trial rights of

³⁹ Decision, para. 15.

⁴⁰ The Prosecution submits that the Chamber can also not base its decision on a table of the Prosecution’s internal analysis of the case made months before the start of the trial. Such an analysis does not constitute part of the proceedings and does therefore not fall under Article 74(2).

⁴¹ *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.

⁴² Decision, para. 11.

the accused. The Prosecution must provide access to the relevant evidence and the Court must guarantee sufficient time to prepare. If information and time are provided, the Defence can perform its role, to prepare the case for the Accused.

31. The unfairness of imposing the duty to provide this analysis is additionally compounded by the timing of the required disclosure. As noted in connection with the First Issue, the submission of the detailed analytical chart closes the door on the Prosecution's right to freely gather and introduce additional evidence at the trial.
32. The structured presentation in the proposed analytical chart also unfairly deprives the Prosecution of critical flexibility in the preparation and presentation of its case. The Decision requires the Prosecution to analyze, and presumably present, its case in a particular mode, even if the Prosecution determines that that mode is not the most effective means of assembling and presenting its case. The rule imposed by the Chamber not only limits the introduction of new evidence, it may also bar the Prosecution from relying on evidence previously disclosed (in connection with one element) to prove other elements, since that might require amendments to the table.⁴³ Having proposed that its evidence ought to be interpreted in a certain manner, the Prosecution may be prevented from giving the evidence a different interpretation at a later stage of the proceedings. Since evidence frequently unfolds differently than anticipated, this premature limitation affects the fairness of the proceedings.
33. It is also manifestly unfair to impose this additional administrative burden on the Prosecution alone in order to "facilitate the subsequent work of the accused and the Chamber".⁴⁴ The Prosecution submits that the Decision effectively requires the Prosecution to conduct evidentiary analysis on behalf of another party, and to take time away from its own trial preparation to do that task. This duty exceeds the scope of the Prosecution's disclosure obligations under the Statute and the Rules and the Prosecution's duty under the Statute to exercise its functions objectively and with a view to establishing the truth.

⁴³ The Chamber explained that "[a]fter the Tale of Incriminating Evidence has been filed and notified to the Defence, the Prosecution shall not add new prospective witnesses or other incriminating evidence to the Table, except with leave of the Chamber." Decision, para. 30.

⁴⁴ Decision, para. 15.

c. The Second Issue affects the expeditious conduct of the proceedings

34. The Trial Chamber acknowledges that “the task of filling in the Table of Incriminating Evidence might entail an additional administrative burden”, but “is convinced that the supplementary investment of time and resources, required by the Prosecution for preparing the Table of Incriminating Evidence, will facilitate the subsequent work of the accused and the Chamber and thereby expedite the proceedings as a whole”.⁴⁵ However, when making this assumption, the Trial Chamber did not take into consideration that (a) the analysis provided way ahead of the start of the trial will not include all of the evidence that will ultimately be proffered by the Prosecution during its case, given the Prosecution’s responsibility to continue its investigations; (b) some of the information that is included in the Prosecution’s analysis provided at this early stage of the proceedings may not be admitted by the Chamber into evidence; and (c) the Defence and/or the Chamber may interpret the Prosecution evidence differently from the Prosecution’s subjective analysis of its evidence. Hence, the analysis provided by the Prosecution months before the start of the trial may be of limited use to, or may affirmatively mislead, the Defence and the Chamber. Therefore, while the Second Issue affects the expeditious conduct of the proceedings prior to the start of the trial, the Table of Incriminating Evidence may not at all expedite the preparation by the Defence of its case and the conduct of the proceedings during trial.
35. In addition, having to produce an analysis of its incriminating evidence for the Defence and the Chamber, particularly at this early stage and without reasonable certainty as to the actual trial date, will require the Prosecution to repeat the analysis in light of the further evidence that it will collect, once the proceedings move closer to the actual start of the trial. This will also require the Defence and the Trial Chamber to consider successive analytical products.

d. The Second Issue affects the outcome of the trial

36. The Rome Statute established a balanced system, assigning distinct duties, roles, responsibilities, prerogatives, and burdens to the parties. The Decision disrupts the balance and thus affects the outcome of the trial. It obligates the Prosecution not simply to disclose and analyse its evidence in detail. It also terminates the Prosecution’s right to

⁴⁵ Decision, para. 15.

disclose and offer at trial newly acquired or newly appraised evidence, subjecting that right instead to the permission of the Chamber.

37. In addition, the submission to the Trial Chamber of a subjective analysis of incomplete evidence made months in advance of the start of the trial has the potential to predispose the Trial Chamber in its view of the case, which can have an impact on the outcome of the trial. To the extent that the Chamber makes use of the work product of the Prosecution prior to the start of the trial – and the Chamber has expressly stated that it intends to base its preparative work on the Prosecution’s Table of Incriminating Evidence⁴⁶ – this has the potential to influence the judgment of the Trial Chamber.

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

38. 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.”⁴⁷ 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.”⁴⁸

39. In this case, where a course of action has been mapped along allegedly incorrect lines, the appealable issues focus both on error and on the risk of ensuing prejudice that should be cured before it affects the integrity of the upcoming proceedings. The need to prevent prejudicial error is, in operation, similar to the requirement that the issues affect the fair conduct and expeditiousness of the proceedings and the outcome of the trial.

40. For reasons similar to those previously stated, the Prosecution submits that an authoritative determination of the principles underlying the Court’s ability to set deadlines for disclosure, and whether such deadlines must be reasonably related to a trial date, will materially advance these proceedings. So too will an authoritative determination about the Prosecution’s obligation to create and disclose (to both the Chamber and the Defence) its subjective in-depth analysis of all its evidence linked to every factual allegation and

⁴⁶ The Chamber ruled that “the Table of Incriminating Evidence will facilitate the subsequent work of [...] the Chamber” (Decision, para. 15).

⁴⁷ ICC-01/04-168, 13 July 2006, paras. 14-15, 18.

⁴⁸ ICC-01/04-168, 13 July 2006, para. 12; see also para. 17.

legal element to be proved. If the Trial Chamber's decisions on either or both of these issues are incorrect, it is important that they be remedied before the pre-trial preparations go permanently off course.

41. Additionally, authoritative determinations of these issues will aid other proceedings by providing guidance for future cases. This Chamber, in anticipation of the Court's second trial, is imposing procedures and requirements that appear to depart significantly from those imposed in the first trial. It is desirable that there be relative consistency among Chambers on fundamental matters. The Trial Chamber has itself acknowledged the need for consistency in the approach followed throughout the Court⁴⁹ and adopted, in an amended form, the E-Court Protocol followed by Trial Chamber I in the Lubanga case.⁵⁰ Given the different systems put in place by various Pre-Trial Chambers⁵¹ and Trial Chambers, authoritative determination from the Appeals Chamber will remove any doubt about the correctness of a course of action.⁵² Experience before this Court has shown that delayed referral of an issue to the Appeals Chamber has caused uncertainty and a considerable loss of time and resources.⁵³

⁴⁹ Decision, para. 19.

⁵⁰ Decision, paras. 10, 17-22.

⁵¹ ICC-01/05-01/08-55, 31 July 2008; ICC-01/04-01/06-1127, 24 January 2008.

⁵² ICC-02/04-01/05-20-US-Exp 19 August 2005, para. 22. When deciding on whether the issues identified in the Decision meet the requirements for leave to appeal under Article 82(1)(d), the Prosecution submits that the Trial Chamber should not follow the approach taken by Pre-Trial Chamber III when rejecting leave to appeal on similar issues (ICC-01/05-01/08-75, 25 August 2008). The Prosecution strongly objects to the manner in which Pre-Trial Chamber III interpreted the applicable criteria under Article 82(1)(d), especially the criteria regarding the issues' impact on the fairness of the proceedings.

⁵³ In January 2006, Pre-Trial Chamber I issued a decision on the victims' participation in the proceedings. On 23 January 2006, the Prosecution sought leave to appeal on the issue of whether victims may participate under Article 68(3) in the investigation stage of a situation (ICC-01/04-103). The Pre-Trial Chamber rejected leave to appeal (ICC-01/04-135-tEN). As a consequence, numerous victims applied and were granted a procedural status of victims at the investigation stage of the proceedings in the Situation in the DRC, the Situation in Darfur and the Situation in Uganda. Over two years later, on 6 February 2008, the Single Judge of Pre-Trial Chamber I in the situation in the DRC granted the prosecution and the OPCD leave to appeal a decision of 24 December 2007 (ICC-01/04-423) on that issue (see ICC-01/04-444). On 19 December 2008, the Appeals Chamber ruled that "victims cannot be granted procedural status of victim entitling them to participate generally in the investigation" (ICC-01/04-556). In so doing, the Appeals Chamber effectively overturned all prior decision that granted victim status and made those applications and the intervening related litigation redundant.

Relief sought

42. For the reasons set out above, the Prosecution requests that the Trial Chamber grant leave to appeal the specific identified issues set out above.



Luis Moreno-Ocampo,
Prosecutor

Dated this 23rd day of March, 2009
At The Hague, The Netherlands