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Pénale
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**International
Criminal
Court**

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TRIAL CHAMBER III

Before: Judge Adrian Fulford, Presiding Judge
Judge Elisabeth Odio-Benito
Judge Joyce Aluoch

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

**Public document
with
Confidential, *Ex parte*, Prosecution Only Annex A**

**Prosecution's Request for Authorisation to Add and Disclose Additional Evidence
to be relied on at trial beyond 30 November 2009**

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for the Defence of Jean-Pierre Bemba

Mr Nkwebe Liriss

Mr Aimé Kilolo Musamba

Legal Representatives of Victims

Ms Marie-Edith Douzima-Lawson

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Other Section

Introduction

1. On 7 October and further on 4 November 2009, Trial Chamber III (“the Chamber”) ordered the Office of the Prosecutor (“the Prosecution”) to effect its disclosure obligations in their entirety by 30 November 2009.¹

2. As the Chamber acknowledged in its Decision setting a date for trial, a significant part of the trial material was served on the Defence prior to the confirmation hearing.² On 10 November 2009, the Prosecution disclosed to the Defence incriminatory evidence in its possession and control, on which it intends to rely at trial.³ The Prosecution also disclosed all the material under Article 67(2) of the Rome Statute (“the Statute”) and Rule 77 of the Rules of Procedure and Evidence (“the Rules”) in accordance with the deadline set by the Chamber. The Defence thus has the overwhelming bulk of the Prosecution’s evidence.⁴

3. The Prosecution respectfully requests the Chamber to grant an extension of the time-limit pursuant to Regulation 35(2) of the Regulations of the Court (“the Regulations”) and permit it to disclose and rely on a limited amount of additional evidence. This evidence for reasons out of the Prosecution control is not currently

¹ ICC-01/05-01/08-T-14-ENG, p.16, lines 5-6. Order on Disclosure of Evidence by the Office of the Prosecutor, ICC-01/05-01/08-590 at para. 7. The Chamber ordered the Prosecution to effect disclosure in its entirety by 30 November 2009.

² ICC-01/05-01/08-598, para. 5.

³ ICC-01/05-01/08-605, and ICC-01/05-01/08-605-Conf-Exp-AnxA, and ICC-01/05-01/08-606 and ICC-01/05-01/08-606-Conf-Exp-AnxA. It is worth noting that the Prosecution has already informed the Chamber of the difficulties it encountered in attempting to disclose to the Defence since 4 November 2009. Given that members of the Defence team were not available, the Prosecution was unable to serve the material to the Defence on 4 November 2009. The Prosecution subsequently contacted the Defence, who undertook to contact the Prosecution, once they are available. On 10 November 2009, the Case Manager for the Defence contacted the Prosecution and indicated their availability. Consequently, the Prosecution disclosed to the Defence on 10 November 2009.

⁴ See the Defence’s Written Submissions Supplementing Oral Submissions made by the Defence at the hearing of 29 June 2009, ICC-01/05-01/08-432.

within the Prosecution's possession, but it expects to have collected and be able to disclose by 27 January 2010, three months before the start of the trial.⁵

4. The Prosecution submits that there is sufficient legal basis to permit the disclosure, beyond the 30 November deadline, of limited additional evidence that is relevant and necessary for the determination of the truth. Because the Prosecution intends that the new evidence be disclosed three months before trial is due to begin, the requested additional time will not unfairly prejudice the Accused ability to prepare his case or interfere with the expeditiousness of the trial.⁶ National and international systems indeed routinely allow rolling disclosure or disclosure in the time frame we request, recognizing that it is consistent with the rights of all parties.

5. The Prosecution is still in the process of re-interviewing two witnesses, taking into account the new mode of liability retained in the confirmation of charges decision and to interview for the first time three new witnesses that were not available previously. For reasons set out in the accompanying Annex, the Prosecution was unable to complete these witness interviews before the 30 November deadline set by the Chamber.

6. Additionally, the Prosecution is seeking access to information collected by the Registry that is not in the Prosecution's possession and is in the process of receiving additional information from cooperation requests.

⁵ Trial Chamber II ruled that when a party anticipates obtaining additional evidence and knows that it will not be able to meet the set time limit, it must file an application to extend time-limit under Regulation 35(2) of the Regulations of the Court before the deadline. See "Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009" (ICC-01/04-01/07-1305,1345,1360,1401,1412 and 1456), ICC-01/04-01/07-1515-Corr, 9 October 2009, at para. 33. For that reason, the Prosecution files this motion now even though it has not yet collected the additional evidence.

⁶ The Prosecution notes that Trial Chamber I established a cut-off date for disclosure of incriminatory evidence at three months before the commencement of trial. See ICC-01/04-01/06-1019, para. 21.

7. The Prosecution will be in a position to make this limited additional evidence available to the defence three months before the start of trial, which is the time frame the Court ordered in the *Lubanga* case, and which is adequate to preserve the rights of all parties. Consistent with its obligations under Articles 54(1) (a) and (b) of the Statute, the Prosecution submits that collection of this limited amount of further evidence will be relevant and necessary to assist the Chamber in determining the truth.⁷

8. The Prosecution submits that the introduction of new material will not affect the expeditiousness of the trial. The Prosecution will, after collection of the new material, evaluate its case, with a view to determining whether the additional material may replace some of its existing evidence, or whether the new material will be placed towards the end of its List of Evidence/Witnesses – measures designed to enable the Defence to sufficiently prepare for trial. The Prosecution also notes that Trial Chambers I and II have each allowed continuing submission of additional evidence, as have Pre-Trial Chambers in advance of confirmation hearings.⁸

Relevant procedural background

9. On 1 October 2008, the Prosecution filed the Document Containing the Charges (“DCC”). It filed Amended DCCs on 17 October and 19 November 2008. In

⁷ Trial Chamber II decided that when a party intends to obtain additional evidence and knows that it will not be able to meet a set time limit, but still has every intention of obtaining material in order to present it at a later stage, it must, file a formal application to extend time-limit under Regulation 35(2) of the Regulations of the Court before the deadline. See “Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009” (ICC-01/04-01/07-1305,1345,1360,1401,1412 and 1456), ICC-01/04-01/07-1515-Corr, 9 October 2009, at para. 33.

⁸ See; *Prosecutor v Lubanga*; Decision on the prosecution’s requests to add items to the evidence to be relied on at trial filed on 21 April and 8 May 2008, (ICC-01/04-01/06-1377), 4 June 2008 at 27. See also; *Prosecutor v Lubanga*; Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters (ICC-01/04-01/06-1295), 24 April 2008 at 86, See also; (ICC-01/04-01/07-1260), 27 July 2009 at 6, See further; *Prosecutor v. Katanga and Ngudjolo*; Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28,29 and 31 March 2009 (ICC-01/04-01/07-1305,1345,1360,1401,1412 and 1456) 7 October 2009 at 28. For continuing submission of additional evidence in advance of confirmation hearings, see; ICC-01/04-01/06-593-Conf, p.5.

conjunction with the DCC, the Prosecution filed a List of Evidence and Amended List of Evidence that identified and explained the evidence on which it would rely to substantiate the allegations in the DCC.⁹ In addition, following an order by the Pre-Trial Chamber II (“PTC II), on 24 November 2008 - 49 days before the start of the Confirmation Hearing, the Prosecution submitted an In-Depth Analytical Chart of Incriminatory Evidence.¹⁰

10. The Confirmation Hearing was held from 12 to 15 January 2009. Thereafter the parties submitted written observations. On 30 March 2009, responding to a request by PTC II, the Prosecution filed an Amended DCC along with an Amended List of Evidence and In-Depth Analytical Chart of Incriminatory Evidence. The documents presented an alternative mode of liability under Article 28 of the Statute.

11. On 15 June 2009, PTC II issued its Confirmation Decision. The Decision confirmed Article 28(a) of the Statute as the applicable mode of liability, distinct from the Article 25(3)(a) mode of liability which the Prosecution had pleaded in its case.

12. On 7 October 2009, following its constitution, the Chamber held its first status conference. At the status conference of 7 October and further on 4 November 2009, the Chamber ordered the Prosecution to effect its disclosure obligations in their entirety by 30 November 2009.¹¹

13. On 9 October 2009, pursuant to the Chamber’s order, the Prosecution submitted a summary of outstanding materials it seeks to introduce.¹² On 6

⁹ ICC-01/05-01/08-264, 19 December 2008: List of Evidence on 1 October 2008, and Amended List of Evidence on 17 October 2008, 7 November 2008, 19 November 2008, and 19 December 2008

¹⁰ ICC-01/05-01/08-278, 24 November 2008.

¹¹ ICC-01/05-01/08-T-14-ENG, p.16, lines 5-6. See also; ICC-01/05-01/08-590 at para. 7.

¹² ICC-01/05-01/08-552.

November 2009, pursuant to the Chamber's order, the Prosecution disclosed to the Defence a redacted version of the summary.¹³

14. In compliance with the Chamber's order, the Prosecution disclosed to the Defence the evidence on which it intends to positively rely upon at trial on 10 November 2009 - 20 days before the deadline of 30 November 2009 set by the Chamber.¹⁴

15. On 5 November 2009, the Chamber decided that trial will commence on 27 April 2010.¹⁵

Request for the receipt of Annex A as Confidential, *Ex parte*, Prosecution Only

16. In order to assist the Chamber in determining the relevance of the additional evidence that it seeks to introduce beyond 30 November deadline, the Prosecution attaches as Annex A, a document which lists the outstanding evidence and cites the reasons why it has not been collected to date. Because the additional proposed evidence listed in Annex A is connected to its ongoing investigations, the Prosecution requests that the Chamber receives the said Annex as Confidential, *Ex Parte*, Prosecution Only pursuant to Rule 81(2) of the Rules.¹⁶

Prosecution's submission

Legal basis for the Prosecution's request

¹³ ICC-01/05-01/08-599.

¹⁴ ICC-01/05-01/08-605 and ICC-01/05-01/08-606. As submitted in these two filings, the Prosecution was prepared to disclose to the Defence on 4 November 2009 but was unable to do so because members of the Defence team were unavailable to receive the material to be disclosed.

¹⁵ ICC-01/05-01/08-598

¹⁶ The Prosecution notes that applications pursuant to Rule 81(2) may be made on an *ex parte* basis.

17. The overall objective of the trial is a fair proceeding that elicits the truth. In pursuit of this objective, the Chamber must balance the rights of the Prosecution to continue its investigation and the defence to sufficient advance disclosure to allow it to prepare for trial. To protect those interests, the Chamber is empowered to set appropriate deadlines to manage the trial and guarantee expeditiousness.

18. First, the Statute grants to the Prosecution the right and the duty to continue its investigation beyond the confirmation hearing. The Appeals Chamber noted in *Lubanga*: “the duty to establish the truth is not limited to the time before the confirmation hearing. Therefore the Prosecution must be allowed to continue its investigations beyond the confirmation hearing, if this is necessary in order to establish the truth.”¹⁷

19. Nothing in the Statute or the Rules sets any time limit on the Prosecution’s discharge of its investigative obligation under Article 54(1)(a) and (b) of the Statute. The acknowledgement of the possibility of amending charges clearly contemplates the continuation of the investigation after the confirmed case is referred to a Trial Chamber. In this regard, the Prosecution recalls that the Appeals Chamber noted in *Lubanga*: “the duty to establish the truth is not limited to the time before the confirmation hearing. Therefore the Prosecution must be allowed to continue its investigations beyond the confirmation hearing, if this is necessary in order to establish the truth.”¹⁸ The Appeals Chamber thus recognized that limiting the Prosecution’s post-confirmation right to investigate conflicts with Article 61(9) of the Statute.

¹⁷ *Prosecutor v Lubanga*, “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence”, ICC-01/04-01/06-568, 13 October 2006 at para. 52

¹⁸ *Prosecutor v Lubanga*, “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence”, ICC-01/04-01/06-568, 13 October 2006 at 49-56

20. Second, the Accused has a right to adequate notice and time to prepare a defence. The Appeal Chamber explained in *Lubanga*:

“the Statute and Rules of Procedure and Evidence provide for mechanisms that ensure that the suspect can properly prepare for the trial even if the investigation of the crimes with which he is charged continues beyond the confirmation hearing.... If the Prosecutor in the course of investigations post-confirmation hearing discovers further evidence on which he intends to rely at the trial or which is exonerating, the evidence must be disclosed to the suspect.... sufficiently in advance of the commencement of the trial to enable adequate preparation for trial’. Thus, the rights of the defence to have adequate time and facilities for the preparation of the trial can be safeguarded even if the investigation continues beyond the confirmation of the charges.”¹⁹

21. The Statute and Rules provide the Chamber with case-management responsibility and authority. Pursuant to that responsibility, the Chamber set the date of 30 November 2009 for disclosure of all evidence the Prosecution intended to use in its case, to ensure that the Defence had adequate time to prepare for trial. The Trial Chamber also has the power, however, to extend deadlines for good cause under Regulation 35(2) of the Regulations. The Appeals Chamber sought to define good cause in the context of the Regulation: “Such reasons as may found a good cause are necessarily associated with a party's duties and obligations in the judicial process. A cause is good, if founded upon reasons associated with a person's capacity to conform to the applicable procedural rule or regulation or the directions of the Court. Incapability to do so must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations.”²⁰

¹⁹ Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled Decision Establishing General principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence”, 13 October 2006, ICC-01/04-01/06-568, para 55.

²⁰ ICC-01/04-01/07-653 OA7, para. 5.

22. Chambers of this Court thus have granted reasonable requests for extensions of time limits for submission of evidence pursuant to Regulation 35(2) of the Regulations and in the interests of justice as stipulated in Regulation 29 of the Regulations. For example, Trial Chamber I in *Lubanga* granted the Prosecution's request for an extension of time for the submission of additional evidence.²¹ In deciding on the request, it determined that it should consider the context of the history of the case, the manner in which the Prosecution sought to introduce the evidence, and its impact on the rights of the accused.²² Trial Chamber II also granted the Prosecution's request for extension of time for the submission of additional evidence on the ground that it was necessary for the determination of the truth and did not jeopardize the Defence's right to have adequate time in order to prepare.²³

23. The Prosecution notes that other common and civil law jurisdictions subject the Prosecution to continuous disclosure obligations, thereby demonstrating that Prosecutors may continue to investigate and thereafter disclose evidence to the Defence after the stage of authorizing prosecution.²⁴ Rolling disclosure and late disclosure are also common practice at the *ad hoc* international tribunals.²⁵ The

²¹ ICC-01/04-01/06-1633.

²² ICC-01/04-01/06-1295 at para. 86.

²³ Trial Chamber II decided that even if the applications for extension of time are not "sufficiently motivated and justified", the Chamber may "assess whether the new material is more compelling than evidence already disclosed to the Defence, or if it brings to light previously unknown facts, which have a significant bearing on its case" and "using its authority under article 64(3)(c) and 6(d) and article 69(3), allow for its late submission if it deems this necessary for the determination of the truth and as long as this does not jeopardize the Defence's right to have adequate time in order to prepare." ICC-01/04-01/07-1515-Corr, para. 26.

²⁴ See for example; Criminal Disclosure Act 2008 (New Zealand), s 13(6); *R. v. Chaplin* [1995] 1 S.C.R. 727 (Supreme Court of Canada); Queensland Criminal Code, s 590AL (Australia); Criminal Procedure and Investigations Act 1996 (c. 25) (United Kingdom), s 9. See also Section 169a StPO (German Code of Criminal Procedure); Articles 113-3, 114 et 114-1 of Code de procédure pénale of France.

²⁵ According to the jurisprudence of international criminal courts late disclosure of evidence does not entail its automatic exclusion. The Chambers looked at the impact of the late disclosure on the rights of the Accused; the nature of the information disclosed and whether the Prosecution was acting diligently and in good faith. See inter alia: Prosecutor v. Nahimana et al., Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures, ICTR-99-52-I, 14 September 2001, paras. 17, 19-20; Prosecutor v. Bagasora et al., Decision on Certification of Appeal Concerning Will-Say Statements of Witnesses DBQ, DP AND DA, 5 December 2003, ICTR-98-41-T, para.10; Prosecutor v. Bagasora et al., Decision on Defence Motion to Preclude Portions of the Testimony of Prosecution Witness DCH, for the Postponement of Witness DCH's testimony, and for the Appointment of Defence Counsel for DCH, ICTR-98-41-T, 29 March 2004, para.6; Prosecutor v. Karemera et al., Decision on Defence Motions to Exclude Testimony of Professor Andre Guichaoua, Article 20 of the Statute and Rule 94 bis (A) of the Rules of Procedure and Evidence, ICTR-98-44-T,

Prosecution does not request rolling disclosure here. Its policy is to have all its evidence well in advance of the beginning of the trial. The practice of national and international tribunals, however, establishes that this request is not extraordinary or prejudicial to the Defence.

24. In this case, the Prosecution has demonstrable and reasonable “good cause” for an extension of the time limit.

Factual basis for the Prosecution’s request

25. The Prosecution’s initial investigation was based on Article 25(3)(a) of the Statute as presented at the confirmation hearing. On 15 June 2009, PTC II rendered its Confirmation Decision,²⁶ confirming a different mode of liability not originally argued as part of the Prosecution’s case. As is within both its rights and obligations, the Prosecution pursued further investigation with a view to locating and collecting additional evidence, including through interviews and re-interviews of potential prosecution witnesses in relation to the Accused’s criminal responsibility under Article 28(a) of the Statute as confirmed by PTC II.²⁷ Despite its best efforts, the Prosecution envisages the need to conduct a limited number of investigative steps beyond the 30 November deadline: a) to re-interview two witnesses to obtain further

20 April 06, para. 8; Prosecutor v. Karemera et al., Decision on Defence Motions to Exclude the testimony of witness QBG, Rules 66 (A)(ii) and 73 of the Rules of Procedure and Evidence, ICTR-98-44-T, 11 July 07, para. 6; Prosecutor v. Karadzic, Decision on Accused’s Motion to set deadlines for Disclosure, 1 October 09, IT-95-5/1 8-PT, para. 18. Also in Kordic, even after the close of the Prosecution case, additional evidence was admitted and further witnesses were heard as they had only become available to the Prosecution during the trial. See Prosecutor v. Kordic & Cerkez, Judgment, 26 February 2001, Annex IV, para. 6.

²⁶ ICC-01/05-01/08-424

²⁷ In this regard, the Prosecution submits that it was not in a position to direct its investigations to the command responsibility following a notice given by the decision of the PTC on 3 March 2009 titled “Decision adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute”, ICC-01/05-01/08-388, in which the PTC II found that the evidence submitted appeared to establish a different crime and requested the Prosecution to consider submitting an Amended Document Containing the Charges (ADCC) addressing Article 28 of the Statute as a possible mode of criminal responsibility, since a presentation of the evidence in this ADCC was limited to evidence already submitted to the Chamber. In addition, while the Prosecution was alerted to the possibility of confirming the criminal responsibility under Article 28(a) of the Statute, it had to await a decision on the matter in order to completely alter its investigative strategy. A total shift in the investigative strategy to a new case theory without a decision from the PTC II to that effect would have been prejudging the outcome of the confirmation decision.

evidence relevant to the changed mode of liability and the evidence presented by the Defence at the confirmation hearing; b) to interview three new witnesses who became available only recently²⁸ and c) to seek access to information collected by the Registry and to receive other material.

26. The Prosecution submits that the limited evidence it seeks to introduce after 30 November 2009 is highly relevant and probative to the issues underlying this case. It is relevant and necessary for determining the truth because they will provide the Chamber with a complete picture of events forming the basis of the Prosecution's case.

27. On 10 November 2009, the Prosecution disclosed to the Defence all incriminatory evidence presently in its possession and control which it intends to rely on at trial.²⁹ The Prosecution disclosed material under Article 67(2) of the Statute and Rule 77 of the Rules in accordance with the 30 November 2009 deadline set by the Chamber - five months before the commencement of trial. Moreover, the Prosecution recalls that before disclosing its incriminatory evidence to the Defence on 10 November 2009, it had filed the list of outstanding material that it seeks to introduce as well as the evidence on which it positively intends to rely upon at trial.³⁰

²⁸ Similar circumstances warranted extensive investigation in other jurisprudence. See for instance: *Prosecutor v. Hadžihasanović et al*, IT-01-47-T, in which indictment of command responsibility was confirmed on 13 July 2001 and the trial commenced on 2 December 2003; *Prosecutor v. Tihomir Blaškić*, IT-95-14, in which indictment of command responsibility was confirmed on 10 November 1995 and the trial commenced on 24 June 1997; *Prosecutor v. Halilović*, IT-01-48, in which indictment of command responsibility was confirmed on 12 September 2001 and the trial commenced on 31 January 2005 and *Prosecutor v. Orić*, IT-03-68, in which indictment of command responsibility was confirmed on 28 March 2003 and the trial commenced on 6 October 2004.

²⁹ ICC-01/05-01/08-605, and ICC-01/05-01/08-605-Conf-Exp-AnxA, and ICC-01/05-01/08-606 and ICC-01/05-01/08-606-Conf-Exp-AnxA. It is worth noting that the Prosecution has already informed the Chamber of the difficulties it encountered in attempting to disclose to the Defence since 4 November 2009. Given that members of the Defence team were not available, the Prosecution was unable to serve the material to the Defence on 4 November 2009. The Prosecution subsequently contacted the Defence, who undertook to contact the Prosecution, once they are available. On 10 November 2009, the Case Manager for the Defence contacted the Prosecution and indicated their availability. Consequently, the Prosecution disclosed to the Defence on 10 November 2009.

³⁰ ICC-01/05-01/08-592 and ICC-01/05-01/08-592-Conf-Exp-AnxA.

28. In light of the foregoing, the Prosecution will take measures which will limit the scope of the additional evidence it seeks to introduce. The anticipated evidence will largely address matters which are within the knowledge of the Defence as they relate to the Accused role as well as to the issues raised as part of his defence at the confirmation hearing.³¹ In addition, the Prosecution is prepared to call any additional evidence it introduces beyond 30 November deadline towards the end of its case - in order to enable the Defence to prepare adequately for trial. The Prosecution will also seek to explore areas of agreement with the Defence, after collection of additional evidence. These measures, coupled with the material already disclosed to the Defence, will limit any potential prejudice to the Accused preparation of his case.³²

Conclusion

29. For all the above reasons, the Prosecution requests that the Chamber grant an extension of time-limit to add and disclose additional evidence to be relied on at trial by 27 January 2010 or at least three months before the start of trial in the event that trial date is postponed.



Luis Moreno-Ocampo, Prosecutor

Dated this 30th Day of November 2009

At The Hague, The Netherlands

³¹ See the Defence's Written Submissions Supplementing Oral Submissions made by the Defence at the hearing of 29 June 2009, ICC-01/05-01/08-432.

³² See ICC-01/04-01/07-1553. Trial Chamber II introduced measures to limit any potential prejudice which may accrue to the Defence, in light of the introduction of additional evidence.