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TRIAL CHAMBER III

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge Joyce Aluoch

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

Public

**Prosecution's Request for Leave to Appeal the Trial Chamber's Oral Ruling
Denying Authorisation to Add and Disclose Additional Evidence after 30
November 2009**

Source: Office of the Prosecutor

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Introduction

1. On 8 December 2009, the Trial Chamber denied an application by the Prosecution to be permitted to disclose anticipated evidence from eight sources (including the re-interviews of two witnesses whose statements have already been produced) after the deadline set by the Chamber (“the Decision”).¹ The Trial Chamber did so despite the fact that the Prosecution disclosed to the Defence all the relevant evidence in its possession, sufficiently in advance of the deadline set by the Chamber. The Prosecution only requested a finite and reasonable extension, outlined why it had been unable to collect the additional evidence before the deadline, and proposed to disclose the further evidence at least three months before the commencement of the trial.
2. The Prosecution seeks leave to appeal this Decision. The Decision raises the issue of the scope of the Prosecution’s right to present probative evidence going to the heart of the charges. The Decision effectively imposes on purely procedural grounds an absolute bar to the introduction of the evidence at trial because of late disclosure, even though the Prosecution’s request proposed to disclose evidence within the same time period ordered by Trial Chamber I in *Lubanga*.² In so deciding, the Chamber failed to consider the full range of appropriate factors – not simply the timing, but also the probative value and prejudice to the fairness of the trial – that are articulated in Article 69(4) and that have been considered by the Trial Chambers in the *Katanga and Ngudjolo* proceedings.³
3. The exclusion of this evidence will affect the fair conduct of the proceedings. Fair proceedings require that the interests of all relevant parties and participants be taken into account,⁴ including “that the Prosecutor must be able to exercise the

¹ ICC-01/05-01/08-T-18-ENG RT, p. 31, line 3 to p. 37, line 13.

² ICC-01/04-01/06-1019, 9 November 2007.

³ In the *Katanga and Ngudjolo* case, for example, the Trial Chamber authorized a very late disclosure of a new United Nations witness (whose late disclosure resulted from delays in obtaining UN consent) because of the relevance and importance of the witness’s evidence. ICC-01/04-01/07-1590, 3 November 2009; see also ICC-01/04-01/07-1515-Corr, 9 October 2009; ICC-01/04-01/07-1553, 23 October 2009.

⁴ 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; *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; *Situation in the DRC*, ICC-01/04-135-

powers and fulfill the duties listed in Article 54".⁵ Fairness has also been linked to the ability of a party to present its case.⁶

4. The Decision directly impairs the Prosecution's right and duty to present its case at trial and the Court's obligation to determine the truth. It will also affect the expeditious conduct of the proceedings, as it impacts on the manner in which the Prosecution selects its evidence for trial and eliminates the possibility of offering highly probative evidence. The new evidence could also reduce the need for some other witnesses and shorten the Prosecution's case. The Decision may also lead to substantial delays on appeal. Most importantly, the exclusion of such a body of evidence on particular procedural grounds without considering its substance or relevance may affect the outcome of the trial. Immediate resolution of this issue is required by the Appeals Chamber to define the scope of the Prosecution right to present evidence and to ensure that the Trial Chamber considers all relevant evidence to establish the truth and for the purposes of its judgment.

Procedural background

5. At an oral hearing on 7 October 2009, the Trial Chamber ordered that the Prosecution disclose all of its evidence by 30 November 2009.⁷ This timeline was confirmed by a written order of 4 November 2009.⁸
6. Shortly before the expiry of the deadline, the Prosecution requested an extension of time to disclose a defined body of additional evidence, coming from eight specified sources, which was relevant and necessary for the determination of the truth. The Prosecution specified that it sought a confined extension only until 27

tEN, 31 March 2006, para. 38. Fairness has also been held to include respect for the principles of equality and adversarial proceedings.

⁵ *Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, paras. 38-39.

⁶ *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. See also *Prosecutor v. Tadic*, IT-94-1-A, Appeal Judgment, 15 July 1999, para. 48 (the right to a fair trial requires that neither party is put at a disadvantage when presenting its case).

⁷ ICC-01/05-01/08-T-14-ENG ET, p. 16, lines 5-9.

⁸ ICC-01/05-01/08-590, para. 7.

January 2010, or three months prior to the date on which trial is scheduled to commence.⁹

7. On 8 December 2009, the Trial Chamber rejected the Prosecution's request because it was filed late in the day on 30 November, which the Chamber noted was inconsistent with its previous orders, and because the explanations for delay were insufficiently detailed.¹⁰
8. The Prosecution hereby seeks leave to appeal the Decision under Article 82(1)(d) and Rule 155.

The issue for which leave to appeal is sought

9. The Decision involves the issue of the Trial Chamber's exclusion, *ab initio* on specific procedural grounds and without consideration of its probative value and any prejudice caused, of eight items of relevant evidence which is proposed to be disclosed three months prior to trial.
10. The Chamber rejected the Prosecution's application on the ground that the Prosecution had not complied with its direction that any request for an extension of time should be filed sufficiently in advance of the 30 November deadline to allow for a hearing to discuss the submissions, and that the Prosecution failed to justify this late application.¹¹ Additionally, the Chamber considered the Prosecution's explanation of its inability to obtain and disclose the evidence before 30 November was insufficient. The Chamber thus prohibited the Prosecution from disclosing this evidence, and thereby automatically barred its use in the Prosecution's case, without assessing the impact of its decision in the upcoming proceedings and balancing the different interests at stake.

⁹ ICC-01/05-01/08-626, paras. 3, 28-29.

¹⁰ ICC-01/05-01/08-T-18-ENG RT, p. 37, lines 9-12. See also p. 36, lines 15 -25 to p. 37, lines 1-2.

¹¹ The direction that parties make an application sufficiently in advance to permit a response and a hearing was designed so that the Chamber will be able to rule in time for the requesting party to conform its conduct to the decision. But since the Prosecution did not have the evidence on 30 November, it would not have been able to disclose it had an earlier application been timely rejected by the Chamber.

11. The Prosecution respects the role of the Trial Chamber in managing the judicial process. The Prosecution attempted to obtain the new materials and statements on time, recognizing the importance of abiding by the Trial Chamber's instructions. The Prosecution aimed at presenting all its evidence within the time ordered by the Chamber. However, as this Chamber is aware, the speed of legal assistance is beyond the full control of the Prosecution. The Prosecution faced logistical and operational constraints that limited its ability to secure critical evidence at the desired pace and to anticipate which evidence could not be secured on time. Additionally, the Prosecution also considered that its request was not extraordinary in light of the practice established by Trial Chamber I, under which the Prosecution disclosed all the evidence within its possession three months before the beginning of the trial.
12. The Prosecution submits that before penalizing the Prosecution by rejecting evidence that it seeks to adduce, a Trial Chamber should carefully consider all interests and values at stake. In this case, the Chamber failed to consider the right of the Prosecutor to present relevant evidence and its potential probative value; it did not conduct a detailed assessment of the impact on the rights of the Defence of disclosure of a small body of additional materials three months before trial; and it disregarded the consequences of excluding relevant evidence from the Prosecution's case on the Court's ability to fulfill its obligation to establish the truth.
13. As established by the jurisprudence of the Court, 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 meets the criteria set out in that provision.¹² Therefore at this stage, for the purposes of whether to grant leave to appeal, it is not relevant whether the Trial Chamber was correct in rejecting the evidence; whether the timing of the Prosecution's request justified this rejection; or whether or not the Prosecution had indeed made out the requirement for an extension of

¹² *Situation in Uganda*, ICC-02/04-01/05-20, 19 August 2005, para. 22.

the deadline. All of those questions go to the merits, and are thus matters exclusively for the consideration of the Appeals Chamber if leave to appeal is granted. Rather, the sole question that this Chamber must consider is whether the underlying issue, in this case the rejection of that evidence, will have an impact on the proceedings that is sufficient to justify leave to appeal.

14. The summary rejection of a body of *prima facie* relevant and probative evidence, on procedural grounds and without full consideration of the substantive factors as to each piece of evidence, directly impacts on the rights of the Prosecution to continue to investigate and to present its case. It also impacts on the manner in which this trial will proceed, and its outcome. Leave to appeal should be granted to ensure that such evidence has not been improperly excluded without regard to the appropriate factors and the scope of the trial erroneously limited before it has even begun.

The issue fulfils the criteria in Article 82(1)(d)

(a) The issue affects the fair conduct of the proceedings

15. The issue firstly affects the fair conduct of the proceedings. “Fairness” within the terms of Article 82(1)(d) incorporates fairness towards the accused, the victims and the Prosecution. It requires that the procedural and substantive rights and obligations of all participants be respected.¹³ In particular, that “means that the Prosecutor must be able to exercise the powers and fulfill the duties listed in Article 54”.¹⁴ Fairness has also been linked to the ability of a party to present its case.¹⁵

¹³ 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; *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; *Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, para. 38. Fairness has also been held to include respect for the principles of equality and adversarial proceedings.

¹⁴ *Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, paras. 38-39.

¹⁵ *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. See also *Prosecutor v. Tadic*, IT-94-1-A, Appeal Judgment, 15 July 1999, para. 48 (the right to a fair trial requires that neither party is put as a disadvantage when presenting its case).

16. The fairness of the proceedings is fundamentally affected by the Decision's impact on the Prosecution's right and ability to present its best case. The *ab initio* exclusion of *prima facie* relevant and probative evidence that the Prosecution may consider important for the full presentation of its case at trial, without analysing its relevance or the impact of its exclusion, affects the fair conduct of the proceedings *vis-à-vis* the Prosecution.¹⁶ The Prosecution bears the burden of presenting a coherent case and proving every element beyond reasonable doubt.¹⁷ A decision denying it the opportunity and facilities to do so by refusing to allow it to offer directly relevant evidence at trial necessarily affects the fairness of the proceedings.¹⁸ The Prosecution, moreover, recalls that while notice was provided on 3 March 2009 that the Pre-Trial Chamber was considering another mode of liability, it was only in its decision on the confirmation of charges that the Pre-Trial Chamber changed the mode of liability to *solely* that of command responsibility. This decision was rendered on 15 June 2009, less than four months before the hearing of 7 October. As a result, the Prosecution was required to adjust its case within a short span of time in order to substantiate the new elements beyond reasonable doubt.¹⁹

¹⁶ For examples of decisions granting leave to appeal in relation to the exclusion of Prosecution evidence, see *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. Bagosora et al.*, Decision on Prosecution's Request for Certification of Appeal on Admission of Testimony of Witness DBY, 2 October 2003; *Prosecutor v. Milutinovic et al.*, IT-05-87-T, Decision on Prosecution Request for Certification of Interlocutory Appeal of Second Decision on Addition of Wesley Clark to Rule 65 Ter List, 14 March 2007 (the Chamber notes at para. 13 that the core issue is about "the right of a party to adduce potentially important evidence at trial" which "would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial").

¹⁷ Article 66(2); see also *Prosecutor v. Oric*, IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005, para. 7.

¹⁸ *Prosecutor v. Milutinovic et al.*, IT-05-87-T, Decision on Prosecution Request for Certification of Interlocutory Appeal of Second Decision on Addition of Wesley Clark to Rule 65 Ter List, 14 March 2007, para. 14; *Prosecutor v. Milosevic*, IT-02-54-T, Decision on Two Prosecution Requests for Certification of Appeal Against decisions of the Trial Chamber, 6 May 2003, para. 2; *Prosecutor v. Milosevic*, IT-02-54-T, Decision on Prosecutor's Application for Certification under Rule 73(B) Concerning the Evidence of an Investigator, 20 June 2002.

¹⁹ This rejection directly impacts on the Prosecution's exercise of its primary right and duty; by affecting the ability of the Court to determine the truth it can also affect the fairness of the proceedings more broadly, in particular *vis-à-vis* victims. Furthermore, it is possible that in obtaining the evidence from the sources identified, the Prosecution might have unveiled potentially exculpatory evidence or material relevant to the preparation of the Defence case. The Decision now effectively precludes this possibility.

17. In rejecting the Prosecution's application on procedural grounds, the Trial Chamber did not consider the impact on the Prosecution of denying its ability to introduce potentially probative evidence, much of which addresses a wholly new issue that was not central to the presentation of the case prior to the confirmation decision. It also failed to consider the impact of excluding relevant evidence on the Court's ability to fulfill its function to determine the truth. Nor did it consider that the Prosecution had disclosed to the Defence all evidence in its possession before 30 November, and that it would be able to complete disclosure of the additional limited material which it was gathering and for which it sought the extension of time within the period which had been considered fair and appropriate in the *Lubanga* case.

18. Fair proceedings require that the interests of all relevant parties and participants be taken into account. Regardless of the outcome, the Decision's failure to give full consideration to the factors and to balance them against the rights of the Defence impacted, and will continue to impact, on the fairness of the proceedings.

(b) The issue affects the expeditious conduct of the proceedings

19. The Prosecution submits that if an issue affects the fair conduct of the proceedings, any further showing that the issue also affects the expeditious conduct of the proceedings is rendered superfluous for the purposes of obtaining leave to appeal under Article 82(1)(d).²⁰ Given its impact on the fairness of the proceedings, leave to appeal should not be denied simply because these unfair

²⁰ 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.

proceedings will take place expeditiously. The Trial Chamber has an obligation to “ensure that a trial is fair and expeditious”. But the expeditious conduct of proceedings cannot be maintained at the cost of their fairness. As a result of the Decision, these proceedings are no longer fair, and thus cannot be said to be “fair and expeditious”. The first limb of Article 82(1)(d) is therefore met. However, in this case the Prosecution submits that the issue also affects the expeditious conduct of the proceedings.

20. The expeditious conduct of proceedings includes the timely and efficient conduct of proceedings, including appellate proceedings.²¹ Expeditiousness is served when facts are proved as simply and clearly as possible. Denying the Prosecution the opportunity to offer its best evidence will slow the process if the Prosecution is required instead to prove the same facts through several witnesses or multiple pieces of evidence.
21. Whether or not the Chamber allows the Prosecution to introduce this evidence in its case in chief, the Chamber will likely have to entertain this, or similar, evidence at some point during the trial. This is because the Chamber has a duty to establish the truth. The Chamber cannot ignore potentially relevant evidence as it fulfills this obligation, and the evidence at issue does not become irrelevant simply because the Chamber prohibited the Prosecution from introducing it on the procedural grounds set out in the Decision. The refusal to allow the Prosecution to adduce this evidence will ultimately undermine the efficient conduct of the trial. It will lead to further litigation over the production of this, or similar evidence – in particular raising the prospect that the Chamber may instead be required to call the evidence itself, either *proprio motu* or on application by the victims.

²¹ The expeditiousness of proceedings is intimately connected with the efficient administration of international justice. See *Prosecutor v. Norman, Kallon and Gbao*, SCSL-2004-07, 08 and 09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003: “the Court’s obligation to do justice expeditiously and effectively, as well as fairly.” (para. 6); “we can only do justice that is expeditious, fair and efficient” (para. 25); *Prosecutor v. Milosevic*, IT-02-54-T, Decision on Two Prosecution Requests for Certification of Appeal Against Decision of the Trial Chamber, 6 May 2003 (where in relation to each of the two grounds the Chamber noted that the issue “will significantly affect the efficient and expeditious conduct of the proceedings”); Jones and Powles, *International Criminal Practice* at para. 8.5.60.

22. By excluding the evidence of proposed witnesses, in part with reference to the manner in which the Prosecution has planned and conducted its investigation, the issue also has “an impact on how the Prosecution goes about selecting its witnesses”,²² as it is denied the opportunity to pursue and call at trial witnesses that it has identified as relevant and important to its case and to the determination of the truth. This may also impact on the strategy and line of questioning of the Prosecution.
23. Finally, the Prosecution recalls that Pre-Trial Chamber II considered that one aspect of expeditiousness is if an issue “would entail the risk that lengthy and costly trial activities are nullified at a later stage.”²³ This is the situation faced here, as the issue concerns the exclusion of potentially important evidence on a procedural ground, without considering its relevance or making a factual assessment of the prejudice to the Defence of disclosure at this stage.
24. If the Trial Chamber were to consider that the Prosecution’s other evidence was insufficient, and thus acquit the accused in relation to these events, then the Prosecution would appeal a decision infected by an erroneous and premature exclusion of this evidence. If the Appeals Chamber overturns an acquittal of the accused because the Trial Chamber wrongly excluded relevant evidence, that could result in a re-trial against the accused before a different Trial Chamber.²⁴ Such an outcome will impact the expeditiousness of the proceedings. Alternatively, the Appeals Chamber may be faced with the task of assessing for itself this new evidence – evidence which was available to the Trial Chamber. This course would also significantly impact the expeditious conduct of the proceedings as a whole,²⁵ especially as on the appeal the Defence would have to

²² *Prosecutor v. Katanga*, ICC-01/04-01/07-116, 19 December 2007, p. 6.

²³ *Prosecutor v. Kony et al.*, ICC-02/04-01/05-20, 19 August 2005 (unsealed pursuant to ICC-02/04-01/05-52, 13 October 2005), para. 36. The Prosecution notes that this can also be properly viewed as an element relevant to whether the immediate resolution of the issue will materially advance the proceedings – see e.g. *Situation in the DRC*, ICC-01/04-168 OA3, 13 July 2006, para. 16.

²⁴ Article 83(2)(b).

²⁵ According to the Appeals Chamber, for the purposes of assessing the impact of an issue on the fair and expeditious conduct of the proceedings, one must look not only at the present proceedings but also at the impact on subsequent proceedings in the case - *Situation in the DRC*, ICC-01/04-168 OA3, 13 July 2006, para. 12. The

be provided with sufficient time to investigate, prepare its cross-examination, and respond. Excluding this evidence from the outset will inevitably fragment the consideration of the case and result in a verdict that fails to assess all relevant evidence. It therefore affects the expeditious conduct of the proceedings.

(c) The issue affects the outcome of the trial

25. Exclusion of evidence of this nature, in particular going to the Accused's mode of liability, without consideration of its relevance or the prejudice will directly impact on the outcome of the trial. The requirement that an issue affects the outcome of the trial is an alternative basis for granting leave to appeal under Article 82(1)(d).²⁶ In other words, an issue only needs to impact on the fair and expeditious conduct of the proceedings or on the outcome of the trial.²⁷
26. Notably, the Chamber did not dispute the apparent relevance of the evidence proposed by the Prosecution.²⁸ The impossibility to bring before the Court relevant and probative facts capable of assisting the Chamber in establishing the truth about the responsibility of the accused for the crimes charged means that the Chamber will be delivering a verdict based on incomplete evidence. Whether that is proper or even unavoidable is a question for the merits. But by creating this situation regarding the automatic exclusion of evidence from eight sources more than four months before trial begins and without considering the relevance of the evidence, the Decision has a clear effect on the outcome of the trial.

ICTY has also recognized that in assessing leave to appeal one must consider whether the issue would cause the inefficient or expeditious nature of later proceedings. *Prosecutor v. Blagojevic et al.*, IT-02-60-PT, Decision on Accused Nikolic's Motion to Order the Prosecution to File Copies of All Witness Statements whom the Prosecution Intends to Call for Trial and Copies of all Exhibits the Prosecution Intends to Tender at Trial, 10 February 2003.

²⁶ *Situation in Uganda*, ICC-02/04-112, 20 December 2007, para. 17; *Prosecutor v. Lubanga*, ICC-01/04-01/06-1417, 2 July 2008, paras. 17-18; *Prosecutor v. Lubanga*, ICC-01/04-01/06-1473, 24 September 2008, paras. 21-22.

²⁷ *Prosecutor v. Bemba*, ICC-01/05-01/08-75, 25 August 2008, para. 8.

²⁸ In contrast, the Chamber did express its disagreement with the sufficiency of the reasons provided for the Prosecution not having already obtained the evidence in question.

(d) Immediate resolution of this issue by the Appeals Chamber will materially advance the proceedings

27. Immediate resolution of the issue 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.”²⁹
28. The immediate intervention of the Appeals Chamber is required to ensure that all of the proper and relevant evidence is placed before this Trial Chamber, which is the body charged with the primary duty of assessing the evidence, adjudicating guilt or innocence, and establishing the truth. It must be recalled that this is the *ab initio* exclusion of evidence stemming from eight different sources, directed in substantial part to the newly imposed mode of liability, and is evidence that the Prosecution proposed to disclose three months before the beginning of the trial.
29. Without the resolution of this issue now, the Chamber will be unable to perform these functions fully. The trial will be conducted on a partial basis which was flawed from the outset. This would, in the language of the Appeals Chamber, leave a decision fraught with error to cloud or unravel the judicial process³⁰ - precisely the scenario that a grant of leave under Article 82(1)(d) was designed to avoid.
30. Finally, immediate resolution of this issue by the Appeals Chamber is required to ensure consistency in the standards applied to the timing of the disclosure and presentation of evidence. While in this instance the Chamber rejected the Prosecution’s request to disclose the evidence in part because it was not made sufficiently in *advance* of the deadline set, in the *Katanga and Ngudjolo* proceedings

²⁹ *Situation in the DRC*, ICC-01/04-168 OA3, 13 July 2006, paras. 14-15, 18.

³⁰ *Situation in the DRC*, ICC-01/04-168 OA3, 13 July 2006, para. 16.

Trial Chamber II considered applications (and in some cases permitted the disclosure and introduction of evidence) even after the deadline, based on careful balancing of the relevance and probative value of the evidence, the impact on the rights of the defence, and the efficiency of the trial proceedings.³¹ Moreover, the disclosure proposed by the Prosecution for eight additional pieces of evidence would have satisfied the rule set by Trial Chamber I in *Lubanga*. The Prosecution submits that on such a crucial matter, common standards must apply to all cases before this Court.

Relief sought

31. For the reasons set out above, the Prosecution requests that the Trial Chamber grant leave to appeal pursuant to Article 82(1)(d).



Luis Moreno-Ocampo, Prosecutor

Dated this 14th day of December 2009

At The Hague, The Netherlands

³¹ See authorities referred to in footnote 3, above.