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Date: **15 December 2009**

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 Document

Prosecution's Submissions on the Trial Chamber's 8 December 2009 Oral Order Requesting Updating of the In-Depth-Analysis Chart

Source: **The Office of the Prosecutor**

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

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REGISTRY

Registrar Ms Silvana Arbia	**Defence Support Section**
Victims and Witnesses Unit	**Detention Section**
Victims Participation and Reparations Section	**Other**

Relevant Procedural Background

1. On 31 July 2008, Pre-Trial Chamber III ("PTC III") issued its "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties", [1] ordering the Office of the Prosecutor ("the Prosecution"), *inter alia*, to submit an in-depth-analysis chart, including the analysis of each piece of evidence reflecting its relevance.

2. Further directions were given by PTC III in its 10 November 2008 "Decision on the Submission of an Updated, Consolidated Version of the In-depth Analysis Chart of Incriminatory Evidence". [2]

3. Pursuant to the above-mentioned Decisions, on 24 November 2008, the Prosecution filed an updated, consolidated version of the in-depth analysis chart of incriminatory evidence. [3]

4. On 30 March 2009, the Prosecution submitted a further amended version of the in-depth-analysis chart of incriminatory evidence,[4] in compliance with the "Decision Adjourning the Hearing pursuant to Article 67(7) (c) (ii) of the Rome Statute". [5]

5. At the 8 December 2009 Status Conference, the Trial Chamber III ("the Chamber") issued an oral order ("the Order") requesting the Prosecution to submit by 15 January 2010 an updated version of the in-depth-analysis chart,

[1] ICC-01/05-01/08-55.
[2] ICC-01/05-01/08-232.
[3] ICC-01/05-01/08-278-Conf-Exp-AnxA.
[4] ICC-01/05-01/08-395-Conf-Anx2E.
[5] ICC-01/05-01/08-388, 3 March 2009.

reflecting the variation of the evidence relied upon by the Prosecution since March 2009. [6]

6. Upon request, the Prosecution was granted the opportunity to file its submissions as to the Order by 15 December 2009. [7]

Prosecution's Submissions

a. General observations as to the in-depth-analysis chart

7. The Prosecution observes that a previous detailed analytical chart is not a necessary component of a fair trial, as it was not requested in the case of *The Prosecutor v. Thomas Lubanga Dyilo*.

8. As part of the protection of the Accused's right to a fair trial, the Prosecution pursuant to Articles 64(3)(c), 64(6)(d) and 67(2) of the Rome Statute ("the Statute") and Rules 76 and 77 of the Rules of procedure and evidence ("the Rules") has a duty to make full and sufficiently timely "disclosure" of incriminatory and exculpatory evidence and information that could be material for the Defence. Disclosure in the Statute and Rules, however, does not include the preparation of an explanatory analytical chart.

9. The Prosecution also considers that the charted, detailed, and subjective analysis of the Prosecution's case, which an in-depth-analysis chart involves, is not required by the Statute or the Rules and falls squarely within the category of work product. Rule 81(1) of the Rules expressly provides that "Reports, memoranda, or other internal documents prepared by a party, its

[6] ICC-01/05-01/08-T-18-CONF-ENG, 8 December 2009, pages 44-45 (lines 24-9).
[7] ICC-01/05-01/08-T-18-CONF-ENG, 8 December 2009, page 46 (line 5-20).

assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure."

10. Notwithstanding that, prior to the confirmation hearing, the Prosecution presented a chart explaining its anticipated evidence in detail and linking the evidence to every element of every charge. Now, prior to trial, the Prosecution is willing to assist the Chamber and the Defence in a similar analysis of the material subjected to disclosure, presenting an internal work product that reflects the Prosecution analysis and preparation of the case.

11. The Prosecution proposes to submit an additional in-depth analysis chart of the incriminating evidence disclosed after the confirmation hearing with the following provisions.

12. The chart will be based on 403 documents and will follow the structure of the model chart provided by the PTC III, where each alleged fact has to be related to one or more pertinent constituent elements.

13. However, the structured presentation in the requested analytical chart should not deprive the Prosecution of critical flexibility in the presentation and evaluation of its case. If, for example, the chart identifies or interprets evidence as relevant for one purpose, it should not prevent the Prosecution from arguing at a later stage of the proceedings that the evidence has an additional or alternative probative significance. The denial of such flexibility in the interpretation and use of the chart, the Prosecution submits, will affect the fairness of the proceedings.

14. Additionally, the chart the Prosecution proposes to offer before trial would not include witness statements. Such statements were included in the

pre-confirmation chart because a confirmation decision may be based on out-of-court statements and no witnesses testified at that hearing. The criminal trial, however, contemplates the in-court appearance of witnesses. And at trial witnesses will predictably produce different accounts of events than were previously recorded or may testify about other matters than appear in their earlier recorded statements. The inclusion in the chart of witness statements is thus potentially both over-inclusive and under-inclusive, since the statements are likely not going to be identical to the evidence that emerges at trial. More than simply being inaccurate, however, a chart including witnesses statements could mislead the Chamber and the Defence, since it would be based on an unfounded assumption that the witnesses' prior statements will be identical to their testimony at trial.

15. As an alternative to the inclusion of witness statements in the proposed pre-trial chart, the Prosecution would present at the end of the case a comprehensive analytical chart summarizing how the witnesses' testimonies during the trial supports the factual allegations put forward by the Prosecution. Therefore, the final chart will accurately reflect the evidence actually introduced at trial, not anticipated evidence analyzed and explained in advance.

b. As to the updating of the in-depth-analysis chart in the instant case

16. In order to update the in-depth analysis chart, the Prosecution would need to perform a detailed analysis of every piece of the incriminating evidence disclosed since the pre-confirmation hearing disclosure and insert the relevant information into Casemap. These materials should then be related to the pertinent legal elements. The updating of the chart would also require

removing facts currently included in the chart that originate from pieces of evidence upon which the Prosecution no longer intends to rely.

17. At the same time, the Prosecution is preparing for trial. The last-minute redirection of the necessary resources to the chart would seriously and unfairly hinder its ongoing trial preparations. Taking into account the previously scheduled vacation and home travel plans of the staff, the Prosecution concludes that it would be unable to complete the updated version of the in-depth-analysis chart by the requested date and requests leave to submit the chart by 28 February 2010.

18. The Prosecution submits that the requested delay in the preparation of the chart will not prejudice the Defence or interfere with the Chamber's ability to prepare for trial. The "Prosecution's submission of its Summary of Presentation of Evidence" filed on 4 November 2009, [8] in compliance with the 7 October 2009 Order, already gives the Accused and the Chamber an understanding of the relevant evidence. Further, by providing the relevant incriminatory materials five months in advance of the trial, the Prosecution has enabled the Defence to perform its role and prepare the case for the Accused. The creation and disclosure of an additional analytical chart by 15 January 2010 is not necessary to protect his fair trial rights.

19. The complexity of the tasks involved by updating the in-depth-analysis chart, as well as the need to complete the trial preparation, constitute good cause justifying a variation of the time limit set by the Chamber.

[8] ICC-01/05-01/08-595-Conf-Exp-AnxA, 4 November 2009.

20. In order to avoid disruption of its trial preparation, the Prosecution therefore requests an extension of time, to and including 28 February 2010, within which to provide its updated version of the in-depth-analysis chart.

Conclusion

21. For the foregoing reasons, the Prosecution respectfully requests that the Chamber accept the Prosecution proposal for an updated version of the in-depth-analysis chart and grant an extension of the time limit to 28 February 2010.

Luis Moreno-Ocampo, Prosecutor

Dated this 15th day of December 2009

At The Hague, The Netherlands