

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-01/05-01/08  
Date: 25 August 2008

**PRE-TRIAL CHAMBER III**

**Before: Judge Hans-Peter Kaul, Single Judge**

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

**Public**

**Decision on the Prosecutor's application for leave to appeal  
Pre-Trial Chamber III's decision on disclosure**

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

**The Office of the Prosecutor**

Fatou Bensouda, Deputy Prosecutor  
Petra Kneuer, Senior Trial Lawyer

**Counsel for the Defence**

Nkwebe Liriss  
Tjarda E. Van der Spoel  
Aimé Kilolo-Musamba

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**Judge Hans-Peter Kaul**,<sup>1</sup> acting as Single Judge for Pre-Trial Chamber III (the “Chamber”) of the International Criminal Court (the “Court”), received an application by the Prosecutor<sup>2</sup> on 6 August 2008 entitled “Prosecution’s Application for leave to Appeal Pre-Trial Chamber III’s 31 July 2008 ‘Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties’ ” (the “Application”), asking for leave to appeal the “Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties” (the “Decision”)<sup>3</sup>, rendered by the Chamber on 31 July 2008. Even though the request to grant leave to appeal has been addressed to “the Trial Chamber”,<sup>4</sup> the Single Judge considers that under the present circumstances this Chamber was meant to be seized with this Application.

## **I. Procedural History**

1. The Single Judge recalls that the Chamber issued on 31 July 2008 the Decision establishing the evidence disclosure system and setting out a timetable for disclosure in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*. The Chamber’s rulings included the following:

a) decides that the disclosure process between the parties shall be facilitated through the Registry as described in letter (m) below.

(...)

e) decides that, when submitting any evidence to the Registry, the parties shall provide the following accompanying documentation:

1. A list of evidence enlisting all pieces of evidence enclosed with their respective document ID;
2. A list of identified recipients for each evidentiary item reflecting also the access and the level of confidentiality for each item vis-à-vis any party;
3. An analysis of each piece of evidence reflecting its relevance as described in part III of this decision.

f) orders the parties to comply with the registration procedure of any evidence as described in part II of this decision.

g) orders the Registrar to register electronic copies of any evidence in the record of the case and to store its original in the Registry vault.

<sup>1</sup> ICC-01/05-01/08-53.

<sup>2</sup> ICC-01/05-01/08-63.

<sup>3</sup> ICC-01/05-01/08-55.

<sup>4</sup> ICC-01/05-01/08-63, para. 46.

h) orders the Registrar to provide the parties with access to any evidence as indicated by the party in the list of recipients.

i) orders the Registrar to grant to the Chamber unrestricted access to all evidence disclosed between the parties.

(...)

m) decides to establish the following calendar for the disclosure between the parties and the related communication to the Chamber, subject to any ruling of the Chamber pursuant to rules 81 and 82 of the Rules and the implementation of any protective measures for witnesses, victims or other persons at risk:

1. orders the Prosecutor to disclose to the defence through the Registry all evidence in the Prosecutor's possession or control under article 67(2) of the Statute as soon as practicable and on a continuous basis.

2. orders the Prosecutor to disclose to the defence through the Registry all evidence under rule 76 of the Rules as soon as possible and no later than **3 October 2008** in original and a language which Mr Jean-Pierre Bemba Gombo fully understands and speaks.

3. orders the Prosecutor to permit the defence to inspect at a location agreed upon by them all evidence under rule 77 of the Rules as soon as possible and no later than **3 October 2008**.

4. orders the Prosecutor to submit after inspection to the Registry electronic copies, or electronic photographs in the case of tangible objects, of such evidence subject to inspection in order to be registered as evidence in the record of the case and to submit the original form of the respective piece of evidence to be stored in the Registry vault.

5. orders the defence to permit the Prosecutor to inspect at a location agreed upon by them all evidence under rule 78 of the Rules as soon as possible and no later than **20 October 2008**.

6. orders the defence after inspection to submit to the Registry electronic copies or, in the case of tangible objects, electronic photographs of the evidence subject to inspection in order to be registered as evidence in the record of the case and to submit the original form of the respective piece of evidence to be stored in the Registry vault.

7. orders the defence, for the purposes of the confirmation hearing and in case it intends, pursuant to rule 79 of the Rules, to raise the existence of an alibi or to raise a ground for excluding criminal responsibility, to comply with the technical modalities of the disclosure procedure as set out in this decision.

(...)

2. With his Application the Prosecutor seeks leave to appeal three issues in the Decision in accordance with article 82(1)(d) of the Rome Statute (the "Statute"), namely:

(1) "whether the disclosure can be conducted through the Registry or whether disclosure is a process to be conducted *inter partes* ("First Issue");

(2) whether the Prosecution may be required to notify to the Chamber, by way of communication, material disclosed to the defence pursuant to Article 67(2) and material that is subject to inspection pursuant to Rule 77, which will then be fully accessible to the Chamber (“Second Issue”);

(3) whether the Prosecution may be required to conduct an in-depth analysis of material that it has to disclose to the defence pursuant to Article 67(2) and material that is subject to inspection pursuant to Rule 77 (“Third Issue”).

3. The defence did not lodge a request for leave to appeal or otherwise present its views on the Prosecutor’s Application.

## **II. The Law**

4. The Single Judge first wishes to set out and interpret the relevant law which will be applied to the three issues under examination.

### **A. Structure and scope of article 82(1)(d) of the Statute**

5. Article 82(1)(d) of the Statute provides that either party may appeal

“(d) [a] decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial (...) Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”

6. Taking note of the relevant jurisprudence<sup>5</sup> of Pre-Trial Chambers I and II<sup>6</sup>, as well as that of the Appeals Chamber<sup>7</sup>, and being mindful of the restrictive character of

<sup>5</sup> See article 21(2) of the Statute.

<sup>6</sup> Pre-Trial Chamber I, “Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 7 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6”, ICC-01/04-135-tEN; Pre-Trial Chamber II, “Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58”, ICC-02/04-01/05-20; Pre-Trial Chamber II, “Decision on Prosecutor’s Applications for Leave to Appeal Dated the 15<sup>th</sup> day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal Dated the 11<sup>th</sup> day of May 2006”, ICC-02/04-01/05-90.

this remedy,<sup>8</sup> the Single Judge recalls that for a leave to appeal to be granted the following specific requirements need to be met:

(a) the decision involves an issue that would significantly affect (i) the fair and expeditious conduct of the proceedings (ii) or the outcome of the trial; and

(b) an immediate resolution by the Appeals Chamber may materially advance the proceedings. (emphasis added)

7. The Single Judge notes that the two requirements as set out in (a) and (b) above need *both* to be met for a leave to appeal to be granted. Should the first requirement, for instance the determination that the issue significantly affects the fair and expeditious conduct of proceedings, not be met, then the examination of the second requirement, namely that an immediate resolution by the Appeals Chamber may materially advance the proceedings, becomes irrelevant.

8. The Single Judge further wishes to clarify that the first requirement as set out in (a) contains two alternatives (as indicated by (i) and (ii) above), the first of which, according to the explicit wording of article 82(1)(d) of the Statute, is twofold, consisting of two cumulative conditions:<sup>9</sup> the issue on which the appeal is sought must significantly affect the proceedings both in terms of fairness and in terms of expeditiousness.<sup>10</sup> In the opinion of the Single Judge, this entails that, should one of the conditions in the first alternative not be met, the second condition need not be examined.

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<sup>7</sup> Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber’s 31 March 2006 Decision Denying Leave to Appeal”, ICC-01/04-168.

<sup>8</sup> For an extensive discussion see Pre-Trial Chamber II, ICC-02/04-01/05-20, paras 15-19 and ICC-02/04-01/05-90, paras 17-21.

<sup>9</sup> Pre-Trial Chamber II, ICC-02/04-01/05-20, para. 24; 02/04-01/05-90, para. 23; Pre-Trial Chamber I, 01/04-135-tEN, para. 28.

<sup>10</sup> Thus, the argument of the Prosecutor, which was rejected on previous occasions (see fn. 9), that, “once a party has demonstrated that an issue affects the fair conduct of the proceedings, then any further showing that the issue also affects the expeditious conduct of the proceedings is superfluous for the purposes of obtaining leave to appeal under Article 82(1)(d)”, cannot be followed (ICC-01/05-01/08-63, para. 29).

9. The Single Judge is well aware that the decision examining a request for leave to appeal is not an opportunity to explain the contested decision to the parties. However, where necessary, the Single Judge will provide clarifications if it is clear that a misrepresentation of the decision so warrants. The Single Judge finally recalls that arguments on the merits of the decision will be examined only to the extent that they have a bearing on the criteria set out in article 82(1)(d) of the Statute.<sup>11</sup>

## **B. The appealable “issue”**

10. The Appeals Chamber has previously held that

“[o]nly an ‘issue’ may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject. 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. The issue may be legal or factual or a mixed one.”

11. In addition, the Single Judge considers that the appealable issue, as defined by the Appeals Chamber, has to be an issue that emanates from the ruling of the decision concerned and does not merely represent an abstract question or a hypothetical concern.

## **C. The issue “significantly affects”**

12. The issue must significantly affect the fair and expeditious conduct of proceedings. To this end, reference is made to the Appeals Chamber’s finding that

“[n]ot every issue may constitute the subject of an appeal. It must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’. The issue must be

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<sup>11</sup> Pre-Trial Chamber II, ICC-02/04-01/05-20, paras 15 and 22-23; Pre-Trial Chamber I, ICC-01/04-135-tEN, paras 19 and 29-30.

one likely to have repercussions on either of the above two elements of justice.”<sup>12</sup>

#### D. Interpretation of the notion “fairness”

13. The principle of fairness of proceedings is a fundamental element in criminal proceedings, including its pre-trial phase,<sup>13</sup> and it is mirrored in many provisions of the relevant legal instruments of the Court.<sup>14</sup> As the Appeals Chamber previously held, article 82 like every other article of the Statute must be interpreted and applied in accordance with internationally recognized human rights, as provided for in article 21(3) of the Statute.<sup>15</sup> In this context, the Single Judge refers to the principle of “fair trial” as enshrined in international legal instruments, such as article 10 of the *Universal Declaration of Human Rights*,<sup>16</sup> article 14(1) of the *International Covenant on Civil and Political Rights*,<sup>17</sup> article 6(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*<sup>18</sup>, article 8(1) of the *American Convention on Human Rights*<sup>19</sup> and article 7(1) of the *African Charter on Human and Peoples’ Rights*<sup>20</sup>.

14. In interpreting the notion of “fairness”, the Single Judge also takes into consideration the findings of the Appeals Chamber and Pre-Trial Chambers I and II of the Court. The Single Judge holds that the wide principle of “fair trial” contains many features and guarantees inherent in this right.<sup>21</sup> As was stressed by the

<sup>12</sup> Appeals Chamber, ICC-01/04-168, paras 9 and 10.

<sup>13</sup> See also Pre-Trial Chamber I, ICC-01/04-135-tEN, para. 35; Appeals Chamber, ICC-01/04-168, para. 11.

<sup>14</sup> Most notably, this principle is set out in articles 64(2) and 67(1) of the Statute.

<sup>15</sup> Appeals Chamber, ICC-01/04-168, para. 38.

<sup>16</sup> United Nations General Assembly, GA/RES/217 A(III) of 10 December 1948.

<sup>17</sup> International Covenant on Civil and Political Rights (ICCPR, adopted and opened for signature on 19 December 1966), UN Treaty Series, vol. 999, p. 171.

<sup>18</sup> Convention of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, UN Treaty Series, vol. 213, p. 221.

<sup>19</sup> American Convention on Human Rights, also referred to as the Pact of San José, Costa Rica, adopted on 22 November 1969, UN Treaty Series, vol. 1144, p. 143.

<sup>20</sup> African Charter on Human and Peoples’ Rights, concluded at Nairobi on 27 June 1981, UN Treaty Series, vol. 1520, p. 217.

<sup>21</sup> Human Rights Committee, Communication no 207/1986, *Morael v. France*, para. 9.3; Communication no 514/1992, *Fei v. Colombia*, para. 8.4; M. Nowak (ed.), U.N. Covenant on Civil and Political Rights, CCPR Commentary, (Engel Publisher, 2<sup>nd</sup> rev. ed., 2005), p. 321, para. 28; European Court of Human Rights (ECtHR), *Kress v. France*, Judgment of 7 June 2001, Reports of Judgments and Decision 2001-VI, Application no 39594/98, para. 72; *Ruiz-Mateos v. Spain*, Judgment of 23 June 1993, vol. 262, Series A, Application no



Chamber in its Decision, the right to fair trial should be practical and effective.<sup>22</sup> One of the fundamental aspects of the right to fair trial is that proceedings should be adversarial in nature and that there should be equality of arms, in the sense of a fair balance between the parties.<sup>23</sup> Based on this finding, the Single Judge concurs with Pre-Trial Chamber II<sup>24</sup> in saying that fairness is preserved when a party is provided with the genuine opportunity to present its case – under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent – and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision. The Single Judge equally concurs with the finding of Pre-Trial Chamber I in that the respect for fairness of the proceedings with regard to the Prosecutor entails that the Prosecutor must be able to exercise his powers and fulfill his duties under article 54 of the Statute.<sup>25</sup>

15. The Single Judge notes that in the present context the principle of “impartiality” of judges has been raised by the Prosecutor as well,<sup>26</sup> which constitutes a further element of the right to a fair trial as referred to in article 82(1)(d) of the Statute.

16. The Single Judge considers that the right to be tried by an impartial judge or court is a fundamental guarantee of a fair trial which may not suffer exception.<sup>27</sup> In

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12952/87, para. 63; Inter-American Court of Human Rights (IACtHR), Advisory Opinion OC-11/90 of 10 August 1990, para 24; *Case of Lori Berenson-Mejía v Peru*, Judgment of 25 November 2004, para. 176.

<sup>22</sup> ICC-01/05-01/08-55, para. 22.

<sup>23</sup> See for instance, ECtHR, *Dombo Beheer B.V. v. The Netherlands*, Judgment of 27 October 1993, vol. 274, Series A, Application no 14448/88, para. 33; *Rowe and Davis v. United Kingdom*, Judgment of 16 February 2000, Application no 28901/95, para. 60; *Brandstetter v. Austria*, Judgment of 28 August 1991, vol. 211 Series A, Application nos 11170/04, 12876/87 and 13468/87, paras 66-67; *Jasper v. the United Kingdom*, Judgment of 16 February 2000, Application no 27052/95, para. 51; *Coëme and Others v. Belgium*, Judgment of 22 June 2000, Application nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, para. 102; Human Rights Committee, Communication no 307/1988, *John Campbell v. Jamaica*, para. 6.4; Communication no 779/1997, *Äärela and Näkkäläjärvi v. Finland*, para. 7.4; M. Nowak (ed.), U.N. Covenant on Civil and Political Rights, CCPR Commentary, (Engel Publisher, 2<sup>nd</sup> rev. ed., 2005), p. 321, para. 29.

<sup>24</sup> Pre-Trial Chamber II, ICC-02/04-01/05-90, para. 24.

<sup>25</sup> Pre-Trial Chamber I, ICC-01/04-135-tEN, para. 39; in this sense also Pre-Trial Chamber II, ICC-02/04-01/05-90, para. 24.

<sup>26</sup> ICC-01/05-01/08-63, paras 20 and 24.

<sup>27</sup> See for instance, principle 2 of the “UN Basic Principles on the Independence of the Judiciary”, adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August – 6 September 1985 and endorsed by GA resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985; article 10 of the Universal Declaration of Human Rights, article 6(1) of the (European)

light of internationally recognized human rights, impartiality of the judges normally denotes the absence of prejudice or bias. It must be ensured that the judge is free from any prejudice and brings to the case the utmost objectivity. In this area, it must also be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his or her impartiality.<sup>28</sup>

### **E. Interpretation of the notion "expeditiousness"**

17. The Single Judge reiterates that according to the wording of article 82(1)(d) of the Statute, the appealable issue must be such as to affect significantly the conduct of proceedings both in terms of fairness and in terms of expeditiousness.<sup>29</sup> The expeditiousness of proceedings is closely linked to the concept of judicial proceedings "within a reasonable time"<sup>30</sup> and complements the guarantees afforded to the suspect, such as the right to fair and public proceedings.

18. In this context, the Single Judge points out that the issue concerned must be of such nature as to have a significant affect on the expeditiousness of the proceedings, namely the speedy conduct of proceedings, without prejudice to the rights of the parties or participants concerned.

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Convention for the Protection of Human Rights and Fundamental Freedoms; article 8(1) of the American Convention on Human Rights and article 7(1)(d) of the African Charter on Human Rights and Peoples' Rights.; General Comment no 32 of the Human Rights Committee, CCPR/C/GC/32, 23 August 2007, para. 19.

<sup>28</sup> See also Pre-Trial Chamber II, ICC-02/04-01/05-90, para 34; IACtHR, *Case of Herrera-Ulloa v Costa Rica*, Judgment of 2 July 2004, paras 169-171; *Case of Palamara-Iribarne v. Chile*, Judgment of 22 November 2005, paras 145-147; the ECtHR, applies two tests to assess whether a tribunal is impartial, see *inter alia* in *Lindon, Otchakovsky-Laurens and July v. France*, Judgment of 22 October 2007, Application nos 21279/02 and 36448/02, paras 75-77; *Ekeberg and Others v. Norway*, Judgment of 31 July 2007, Application nos 11106/04, 11108/04, 11116/04, 11311/04 and 13276/04, paras 31-33; *Hauschildt v. Denmark*, Judgment of 24 May 1989, Application no 10486/83, paras 46-48; Human Rights Committee, Communication no 263/1987, *González del Rio v Peru*, para. 5.2; Communication no 387/1989, *Karttunen v. Finland*, para. 7.2; General Comment no 32 of the Human Rights Committee, CCPR/C/GC/32, 23 August 2007, para. 21; M. Nowak (ed.), U.N. Covenant on Civil and Political Rights, CCPR Commentary, (Engel Publisher, 2<sup>nd</sup> rev. ed., 2005), p. 321, para. 27; see also International Criminal Tribunal for the Former Yugoslavia (ICTY), Appeals Chamber, *The Prosecutor v. A. Furundžija*, Judgment of 21 July 2000, IT-95-17/1-A, para. 189.

<sup>29</sup> See paragraph 8 above.

<sup>30</sup> See e.g. ECtHR, *Pélissier and Sassi v. France*, Reports of Judgments and Decisions, 1999-II, Application no 25444/94, paras 67; IACtHR, *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Judgment of 21 June 2002, Series C, No 94 (2002), para. 143; M. Nowak (ed.), U.N. Covenant on Civil and Political Rights, CCPR Commentary, (Engel Publisher, 2<sup>nd</sup> rev. ed., 2005), p. 333 et seq., with further references to case law.

## **F. Interpretation of the requirement that the “immediate resolution by the Appeals Chamber may materially advance the proceedings”**

19. A determination that the issue significantly affects the fair and expeditious conduct of proceedings or the outcome of the trial does not automatically qualify it as a subject to appeal. Pursuant to article 82(1)(d) of the Statute, the issue must be such “for which, in the opinion of the Pre-Trial (...) Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”. The party requesting leave to appeal needs to demonstrate the existence of this requirement.

20. As the Appeals Chamber has previously determined, the issue must be such “that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.” “Advancing” the proceedings has been identified by the Appeals Chamber as “removing doubts about the correctness of a decision or mapping a course of action along the right lines” and the term “immediate” has been defined as “underlin[ing] the importance of avoiding errors through the mechanism provided by subparagraph (d) by the prompt reference of the issue to the court of appeal”.<sup>31</sup>

### **III. The First Issue**

21. The Prosecutor submits that the First Issue, namely “whether the disclosure can be conducted through the Registry or whether disclosure is a process to be conducted *inter partes*”, affects both the fair and expeditious conduct of the proceedings.

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<sup>31</sup> Appeals Chamber, ICC-01/04-168, paras 14-19.

## A. Submission of the Prosecutor

### (1) The First Issue affects the fair conduct of the proceedings

22. The Prosecutor submits that the First Issue affects the fair conduct of the proceedings by removing from the parties the ability to conduct autonomously both disclosure and inspection of material and forces them to communicate via the Registry. According to the Prosecutor, this “already affects the fairness of the proceedings since it imposes an extra-statutory limitation on the parties’ ability to efficiently communicate amongst them (...) which can be considered to violate key governing provisions in the Statute and the Rules (...)”.<sup>32</sup>

23. The Prosecutor further submits that the Decision “destroys the system of responsibilities and accountabilities foreseen by the Statute and the Rules and thereby creates unfairness to the parties.” He further alleges that under this system he will “not be in a position to effectively discharge [his] duties of disclosure and inspection” and that he will “effectively lack control over the manner and form in which Registry transmits or makes accessible to the defence the material filed”. The Prosecutor submits that following article 67(2) of the Statute it is the Prosecutor who must disclose to the defence and allow inspection of material under rule 77 of the Rules. By “precluding the Prosecut[or] from fully discharging these critical duties (...)”, he concludes, “the Decision causes unfairness to the Prosecut[or].”<sup>33</sup> He also argues that the rights of the defence could be affected which “has a right to receive directly” from the Prosecutor disclosure material falling under article 67(2) of the Statute and rule 77 of the Rules.<sup>34</sup>

<sup>32</sup> ICC-01/05-01/08-63, para. 15.

<sup>33</sup> ICC-01/05-01/08-63, para. 16.

<sup>34</sup> ICC-01/05-01/08-63, para. 17.

24. Moreover, the Prosecutor submits that the Decision involves the Registry as an “intermediary”, in the process thereby “adding an unnecessary step” to the flow of exchanged material. The involvement of an intermediary, he alleges, “introduces a gap between the release of the material by the Prosecut[or] and the effective receipt of such material by the defence.” The Prosecutor, in addition, contends that mistakes or delays in the disclosure process may occur, being inconsistent with the rights of the defence under article 67(2) of the Statute.<sup>35</sup>

25. In addition, the Prosecutor submits that “responsibility for disclosure lies with the Prosecut[or]” and cannot be replaced or surrogated by the Registry as envisaged in the Decision. “The first control of the disclosure material”, he continues, “lies with the defence and the Registry should not replace it.” The Prosecutor submits that the Registry will not be responsible for or suffer the consequences of any shortcomings in the implementation of the disclosure process, but for which he may be held accountable or sanctioned in the future.<sup>36</sup>

26. The Prosecutor lastly submits that “the issue causes unfairness to both parties” because “if disclosure is delegated to the Registry”, an “additional player in the disclosure field”, they will no longer effectively be in control of their ability to meet the relevant deadlines established in the Rules or imposed by the Chamber to which they are bound.<sup>37</sup>

## **(2) The First Issue affects the expeditious conduct of the proceedings**

27. The Prosecutor submits that based on the previous experience before the Court, “disclosure through the Registry hampers effective disclosure in preparation of the confirmation of charges hearing and therefore affects the expeditious conduct of the

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<sup>35</sup> ICC-01/05-01/08-63, para. 17.

<sup>36</sup> ICC-01/05-01/08-63, paras 16 and 18.

<sup>37</sup> ICC-01/05-01/08-63, para. 19.

proceedings.”<sup>38</sup> He alleges that the experience to date demonstrates the practical difficulties and impediments of the system adopted in the Decision, in particular when the parties disclose voluminous sets of material.<sup>39</sup>

## **B. Application of the law to the present case**

### **(1) Existence of an appealable “issue”**

28. The Decision must involve the First Issue which significantly affects the fair and expeditious conduct of the proceedings.

29. The Prosecutor in the First Issue seeks leave to appeal the issue “whether the disclosure can be conducted through the Registry or whether disclosure is a process to be conducted *inter partes*.”

30. The Single Judge recalls that the Chamber decided that the disclosure process *between the parties* shall be *facilitated* through the Registry (emphasis added; see paragraph 1 above).

31. At the outset, the Single Judge considers that it seems debatable whether the Prosecutor’s choice of wording (“disclosure ...conducted through the Registry or ... disclosure to be conducted *inter partes*”) can warrant an appealable issue as it appears to stem from a misrepresentation of the actual terms of the Decision. In any event, the Prosecutor’s argument that the Chamber “precluded” him from discharging his functions set forth in article 54 of the Statute and “removed” from the parties the ability to conduct autonomously the disclosure process cannot be followed. To the contrary, the Chamber in its Decision held that a “clear distinction

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<sup>38</sup> ICC-01/05-01/08-63, para. 30.

<sup>39</sup> ICC-01/05-01/08-63, para. 31.

between 'disclosure' which is *inter partes* and 'communication' to the Chamber must be drawn"<sup>40</sup> (emphasis added). The Chamber highlighted in numerous paragraphs that evidence is exchanged *between* the parties (i.e. *inter partes*), namely the Prosecutor and the defence.<sup>41</sup> It further emphasized:

"34. Vis-à-vis the parties, the Chamber considers that the Registry first and foremost has the role of a simple carrier, a communication channel between them. The Chamber recalls that the Registry must under no circumstances be considered a third party with a role in the assessment of the evidence to be disclosed.

35. The Chamber observes that the Registry fulfils a support function for the parties and for the Chamber. (...)"<sup>42</sup>

32. Further, it is recalled that the Chamber decided that the disclosure process between the parties be only **facilitated** through the Registry (emphasis added).<sup>43</sup> Facilitating the disclosure process means to provide assistance and help forward<sup>44</sup> and does not mean to "replace" by, "substitute" for or "delegate" the duties and functions of the parties to another organ of the Court, as alleged or implied by the Prosecutor. Thus, the First Issue presented in this spirit by the Prosecutor appears to be based on a clear misrepresentation of the Chamber's ruling and falls outside the scope of the Decision.

33. However, the Single Judge will consider the First Issue in light of the Prosecutor's submission that it restricts his control over the evidence submitted thus affecting his powers and duties under article 54 of the Statute. It therefore forms insofar an appealable issue as set out in paragraphs 10-11 above.

<sup>40</sup> ICC-01/05-01/08-55, para. 42.

<sup>41</sup> ICC-01/05-01/08-55, paras 2, 4, 7, 19, 23, 25, 35, 36, 37, 66, 71, the heading of part III of the Decision and letter (a) of the operative part of the Decision.

<sup>42</sup> ICC-01/05-01/08-55; it is worth noting that the Prosecutor in another set of proceedings confirmed the Chamber's finding with regard to the role and function of the Registry, see Pre-Trial Chamber II, ICC-02/04-01/05-90 with further references in paras 5 and 8.

<sup>43</sup> ICC-01/05-01/08-55, p. 22, letter (a) of the operative part of the Decision; see also paras 34-35, 52.

<sup>44</sup> L. Brown (ed.), *Shorter Oxford English Dictionary*, vol. 1, (OUP, 5th ed., 2002) at p. 911.

## (2) The issue affects significantly the fairness of proceedings

34. The Prosecutor submits that the evidence disclosure system “can be considered to violate the key governing provisions in the Statute and the Rules”.<sup>45</sup> In the introduction of his Application the Prosecutor contends that the Decision “is not established by law”.<sup>46</sup> The Single Judge considers that these arguments of a rather general nature do not seem convincing as the Prosecutor did not appropriately substantiate his submissions and did not challenge the legal bases set out by the Chamber in its Decision.<sup>47</sup>

35. The Prosecutor contends that by allowing the Registry to facilitate the disclosure process, this system restricts his control over the evidence submitted which significantly affects the fairness of the proceedings to the effect that the Prosecutor is not able to exercise his powers and to fulfill his duties under article 54 of the Statute.

36. However, the Decision states clearly that the rights and duties of the Prosecutor, in particular to disclose evidence, fully remain with the Prosecutor: it is the Prosecutor himself who determines and decides on the amount, timing, manner and format of, and access to the evidence submitted.<sup>48</sup>

37. With regard to the necessity that the Chamber treat both parties in an equal manner, the Single Judge does not consider that the established disclosure system – which equally applies to the defence and which has not been challenged by it – prejudices or affects the fair balance between the parties and that this system denies the Prosecutor the opportunity to present his case, including his evidence, under conditions that place him at a *substantial* disadvantage vis-à-vis the defence.

<sup>45</sup> ICC-01/05-01/08-55, para. 15.

<sup>46</sup> ICC-01/05-01/08-63, para. 3.

<sup>47</sup> ICC-01/05-01/08-55, paras 10, 16, 19 and 44.

<sup>48</sup> ICC-01/05-01/08-55, para. 35: “(...) [The Registry] is also the organ which *implements technically* the parties’ requests in respect of the level of confidentiality of the evidence disclosed between them and communicated to the Chamber and the extent and conditions of access to it” (emphasis added).



38. With regard to the argument of possible mistakes and delays within the Registry, the Single Judge considers that necessary safeguards have been established by the Decision to counterbalance any shortcomings which may occur during the disclosure process. Any possible delays, mistakes or technical impediments in the disclosure process have been taken into consideration and responsibilities have been accorded to each actor involved following his or her function.<sup>49</sup> Moreover, the Chamber made clear that any difficulties in the disclosure process can and should be brought to the immediate attention of the Chamber.<sup>50</sup>

39. In the light of the above, the Single Judge concludes that the First Issue does not, as claimed by the Prosecutor, significantly affect the fairness of the proceedings. Thus, the “expeditiousness tenet” and the second requirement pursuant to article 82(1)(d) of the Statute, namely whether the immediate resolution of the Appeals Chamber would materially advance the proceedings, will not be further examined.

#### **IV. The Second Issue**

40. The Prosecutor submits that the Second Issue, namely “whether the Prosecution may be required to notify to the Chamber, by way of communication, material disclosed to the defence pursuant to Article 67(2) and material that is subject to inspection pursuant to Rule 77, which will then be fully accessible to the Chamber”, affects both the fair and expeditious conduct of the proceedings.

#### **A. Submission of the Prosecutor**

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<sup>49</sup> See in particular the registration process as set out in part II of the Decision, ICC-01/05-01/08-55, paras 54-62 and in the Decision’s Annex (e-Court protocol), paras 4-7.

<sup>50</sup> ICC-01/05-01/08-55, p. 23, letter (k) of the operative part; p. 25, letter (n) of the operative part.

### **(1) The Second Issue affects the fair conduct of the proceedings**

41. The Prosecutor alleges that this issue significantly affects the fair conduct of proceedings as it “adversely affects the parties’ rights and the impartial role of the Pre-Trial Chamber”.<sup>51</sup> He submits that “the parties lose the control over the presentation of their cases” and that the Decision “takes away from them the critical procedural right to remain in control of the selection and presentation of evidence for the purposes of the confirmation procedure.”<sup>52</sup>

42. He further submits that by mandatory registration of the evidence through the Registry, the “Prosecut[or] may be forced to file vast amounts of the materials obtained in the CAR [Central African Republic] investigation” or in other investigations “which may be of some relevance to the present case (for instance, because the name of the accused is mentioned)”. According to the Prosecutor, this represents an “extraordinary interference” with the Prosecutor’s “right of control over [his] files” as enshrined in article 54 of the Statute and rule 10 of the Rules.<sup>53</sup>

43. The Prosecutor, seeking to argue on behalf of the defence, also sees the rights of the defence “effectively denied” as the defence would lose its autonomy and control over any material disclosed under article 67(2) of the Statute or rule 77 of the Rules.<sup>54</sup>

44. Finally he submits that full access and knowledge of all evidence disclosed under the disclosure scheme established by the Chamber may “hamper the exercise of the Chamber’s function under article 61(7) of the Statute and affect the fairness of the proceedings.” He further contends that the “detailed examination of all the evidence

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<sup>51</sup> ICC-01/05-01/08-63, para. 20.

<sup>52</sup> ICC-01/05-01/08-63, para. 21.

<sup>53</sup> ICC-01/05-01/08-63, para. 22.

<sup>54</sup> ICC-01/05-01/08-63, para. 23.

provided to it” would cause “undue influence stemming from material not discussed at the hearing on the decision making process.”<sup>55</sup>

## **(2) The Second Issue affects the expeditious conduct of the proceedings**

45. The Prosecutor submits that the Second Issue also significantly affects the expeditious conduct of proceedings. He alleges that the enormous amount of material involved would lead to a hypertrophy of the proceedings and a paralysis of the Chamber at the pre-trial phase thus impacting on the expeditiousness of proceedings. He further alleges that this aspect of the Decision “militates against the streamlining of submissions and the narrowing of issues at the confirmation hearing (...) since the parties will be forced to address and respond to material which neither of them wanted to rely on or to have considered at the confirmation hearing, and to make submissions pertaining to such material”.<sup>56</sup>

## **B. Application of the law to the present case**

### **(1) Existence of an appealable “issue”**

46. The Single Judge considers that the Second Issue submitted by the Prosecutor is an appealable issue.

### **(2) The issue affects significantly the fairness of proceedings**

47. The Single Judge recalls that for the applicable test to be met, the Prosecutor first needs to establish that the Decision prejudiced the fair balance between the parties, as elaborated above in paragraph 14. To this end, the Prosecutor raises two main arguments (see paragraph 41 above), that of a negative effect on the fair conduct of proceedings and that of the impartiality of the Chamber which are dealt with below.

<sup>55</sup> ICC-01/05-01/08-63, para. 24.

<sup>56</sup> ICC-01/05-01/08-63, paras 32-34.

48. As to the first line of argumentation, the Prosecutor alleges that by notifying the evidence disclosed under article 67(2) of the Statute and rule 77 of the Rules, he will lose control over the presentation of his case. The Single Judge wishes to clarify that material falling under the second category of inspection material under rule 77 of the Rules is to be communicated to the Chamber in any event, as it relates to material that the Prosecutor intends to use as evidence for the purposes of the confirmation hearing. Therefore, the only material falling under the two other categories of inspection material under rule 77 of the Rules is relevant for this question.

49. The Single Judge, however, does not consider that the Prosecutor will lose control over “his case” as it will be still for the Prosecutor to identify, investigate and present the case as well as adduce relevant evidence in court. The fact that all the evidence disclosed between the parties will be communicated to the Chamber, in the opinion of the Single Judge, will not interfere with the Prosecutor’s right and duty to investigate independently pursuant to article 54 of the Statute, gather all the evidence he deems relevant for the case and comply with his obligations stemming from article 61(3) of the Statute and rule 121(3) of the Rules.

50. With regard to the Prosecutor’s argument that the Decision interferes with his rights of “control over [his] files” as enshrined in article 54 of the Statute and rule 10 of the Rules, the Single Judge observes that article 54 of the Statute does not regulate the issue of storage of evidence or the maintenance of the record of proceedings. Rule 10 of the Rules, on the other hand, which falls under Chapter 2 of the Rules entitled “Composition and administration of the Court”, also does not support the Prosecutor’s argumentation. It stipulates a general responsibility of the Prosecutor with regard to evidence collected during investigation and does not provide an answer to the question of responsibilities once a case has been initiated, let alone in the framework of disclosure. In this respect, the Single Judge points out that rule 10

of the Rules must be interpreted in context with rules 15 and 121(10) of the Rules which provide for a particular responsibility of the Registry.<sup>57</sup>

51. In addition, it is recalled that under no circumstances does the Decision require the “investigation file” established by the Prosecutor to be communicated to the Chamber.

52. The Prosecutor further alleges that the Decision would force him to file vast amounts of material obtained in the CAR investigation and other investigations. The Single Judge notes that this argument is raised both with respect to the fair and expeditious conduct of proceedings. However, as the Prosecutor remains unclear how this issue could place him at a substantial disadvantage vis-à-vis the defence, the Single Judge considers this argument to pertain more to the “expeditiousness tenet” of the applicable test. It therefore falls to be examined under this category.

53. Further, the Single Judge considers untenable the arguments of the Prosecutor that the Decision puts the Prosecutor on an unequal footing with the defence. He notes that the requirement of mandatory registration and communication to the Chamber also applies to the defence. Moreover, in the absence of the views of the defence – which has not lodged a request for leave to appeal or otherwise presented its views – it seems debatable whether this argument that “the defence’s rights of autonomy and control over Article 67(2) or Rule 77 material are *effectively denied*” (emphasis added) can be entertained at all.

54. In any event, a specific methodology in the system of disclosure which applies equally to both parties in the proceedings, does not affect the fairness of proceedings *per se*.

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<sup>57</sup> ICC-01/05-01/08-55, para. 37.

55. In light of the above, the Single Judge concludes that since communication of material falling under article 67(2) of the Statute and rule 77 of the Rules to the Chamber has been established for both parties no substantial disadvantage can be ascertained with regard to the Prosecutor.

56. As to the second line of argumentation (see paragraph 41 above), the Prosecutor stresses that a detailed examination of the evidence by the Chamber would cause undue influence stemming from material not discussed at the hearing on the decision making process. This, the Prosecutor alleges, raises the question of impartiality of the Chamber when rendering its decision pursuant to article 61(7) of the Statute.

57. The Single Judge recalls that the principle of impartiality as an element of fair trial raises the question whether the judges are free of prejudice and bias and whether they bring to the case utmost objectivity. It entails that a judge does not have and does not appear to have pre-established viewpoints or a preference for one of the parties. Applying this standard to the present case, however, it is hard to understand how judges could be or appear to be biased due to communication of evidence submitted by the parties. With the communication of evidence, a technical feature of the disclosure system, the judges do not favour neither appear to favour any party. The nature of any disclosure system cannot plausibly affect the appearance of impartiality of judges. As the European Court of Human Rights has pronounced "(...) the fact that the judge has detailed knowledge of the case file does not entail any prejudice on his part that would prevent his being regarded as impartial when the decision on the merits is taken. Nor does a preliminary analysis

of the available information mean that the final analysis has been prejudged.”<sup>58</sup> In light of the above, the argument of the Prosecutor is therefore unfounded from this point of view.

58. In light of the above, the Single Judge concludes that the Second Issue does not, as claimed by the Prosecutor, significantly affect the fairness of the proceedings. Thus, the “expeditiousness tenet” and the second requirement pursuant to article 82(1)(d) of the Statute, namely whether the immediate resolution of the Appeals Chamber would materially advance the proceedings, will not be further examined.

59. As a side note and with reference to the Prosecutor’s argument recalled in paragraph 42, the Single Judge wishes to recall that the Chamber’s intention is precisely aimed at avoiding the registration of “vast amounts of the materials obtained in the CAR investigation” or “hundreds of documents obtained in other investigations (...) which may be of *some* relevance to the present case”, just “because the name of the accused is mentioned” (emphasis added). It is recalled that

“67. [i]n the Chamber’s opinion, the most important factor in both safeguarding the rights of the defence and enabling the Chamber to exercise its functions is not for the Prosecutor to disclose the greatest volume of evidence, but to disclose the evidence *which is of true relevance to the case*, whether that evidence be incriminating or exculpatory. In fact, disclosure of a considerable volume of evidence for which it is difficult or impossible to comprehend the usefulness for the case merely puts the defence in a position where it cannot genuinely exercise its rights, and serves to hold back the proceedings” (emphasis added).<sup>59</sup>

Even though the need to examine the “expeditiousness tenet” does not exist, the Single Judge observes that this requirement, namely to filter carefully the evidence relevant to the case, is directly aimed at strengthening the expeditiousness of the proceedings.

<sup>58</sup> ECtHR, *Morel v. France*, Judgment of 6 June 2000, Reports of Judgments and Decisions 2000-VI, Application no. 34130/96, para. 45; *Werner v. Poland*, Judgment of 15 November 2001, Application no. 26760/95, para. 43.

<sup>59</sup> ICC-01/05-01/08-55.

## **V. The Third Issue**

60. The Prosecutor submits that the Third Issue, namely “whether the Prosecution may be required to conduct an in-depth analysis of material that it has to disclose to the defence pursuant to Article 67(2) and material that is subject to inspection pursuant to Rule 77”, affects both the fair and expeditious conduct of the proceedings.

### **A. Submission of the Prosecutor**

#### **(1) The Third Issue affects the fair conduct of the proceedings**

61. The Prosecutor contends that this aspect of the Decision imposes a burden on him that is not contemplated in the Court’s normative framework. He further submits that this “exorbitant duty” on the Prosecutor to conduct the analysis as ordered by the Chamber “demands substantial time and resources” and “directly affects the fairness of the proceedings vis-à-vis the Prosecution” as the Decision does not seem to consider the scale of the material involved.<sup>60</sup>

#### **(2) The Third Issue affects the expeditious conduct of the proceedings**

62. The Prosecutor reiterates that the Decision imposes a burden on his office with regard to the time and resources which will “unavoidably affect the pace of disclosure and inspection”. The Prosecutor anticipates that he will only be able to produce a limited amount of analysis of the evidence submitted.<sup>61</sup>

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<sup>60</sup> ICC-01/05-01/08-63, paras 25-28.

<sup>61</sup> ICC-01/05-01/08-63, para. 35.



## **B. Application of the law to the present case**

### **(1) Existence of an appealable “issue”**

63. The Single Judge considers that the Third Issue submitted by the Prosecutor is an appealable issue.

### **(2) The issue affects significantly the fairness of proceedings**

64. The Prosecutor raises the argument of time and resources available to his office which applies both to the “fairness tenet” and “expeditiousness tenet” of the first requirement of article 82(1)(d) of the Statute.

65. The Single Judge acknowledges that the analysis to be conducted may possibly involve additional time and resources – an argument which the Single Judge can neither dismiss nor accept on the basis of pure assumptions. In any event, the internal organization of the Prosecutor’s office can only have a limited bearing on legal considerations and the efficient organization of the confirmation of the charges hearing.

66. Furthermore, the Single Judge considers that the Prosecutor, having investigated in the situation of CAR since May 2007, has an in-depth knowledge of his own file. It is assumed that the Prosecutor conducts the analysis of the material collected on a continuous basis in order to prepare and present properly his case.

67. In addition, this obligation has been imposed also on the defence which puts both parties on an equal footing and ensures equality of arms.

68. The Single Judge also notes that the Prosecutor opposes the elaboration of analysis summary tables concerning evidence falling under article 67(2) of the Statute and rule 77 of the Rules but not rule 76 of the Rules.<sup>62</sup> Against the background that a consistent practice with regard to *all* evidence submitted needs to be applied, and the fact that convincing arguments for this differentiation have not been provided by the Prosecutor, the Single Judge finds no reason to sustain the argument.

69. Moreover, the analysis in form of the summary table will further the goals as identified by the Chamber in its Decision to have fair and expedited proceedings as firstly the disclosure will be streamlined, secondly it is ensured that the defence is prepared under satisfactory conditions and thirdly the confirmation of charges hearing is properly prepared.<sup>63</sup> It is also recalled that this analysis will permit the Presiding Judge to organize the presentation of evidence by the parties accordingly pursuant to rule 122(1) of the Rules.<sup>64</sup>

70. Bearing this in mind, it cannot be accepted that a requirement which aims directly at the fairness of proceedings can in itself reasonably be viewed as “unfair”. The mere necessity to comply with the requirement of analysis in the framework of disclosure cannot be regarded as affecting the fairness of proceedings *per se*, even if this may lead to an increased amount of work for all concerned. The Single Judge therefore considers that the Third Issue as presented by the Prosecutor is unfounded.

71. Thus, the second requirement pursuant to article 82(1)(d) of the Statute, namely whether the immediate resolution of the Appeals Chamber would materially advance the proceedings, will not be further examined.

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<sup>62</sup> ICC-01/05-01/08-63, p. 5, fn. 14.

<sup>63</sup> ICC-01/05-01/08-55, para. 72.

<sup>64</sup> ICC-01/05-01/08-55, para. 73.

**FOR THESE REASONS, THE SINGLE JUDGE**

**rejects** the application of the Prosecutor for leave to appeal.

Done in both English and French, the English version being authoritative.

  
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**Judge Hans-Peter Kaul**  
**Single Judge**

Dated this 25 August 2008

At The Hague, the Netherlands