

**Cour
Pénale
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**International
Criminal
Court**

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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 Document

**Decision on the "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"**

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

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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

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber III (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, issues the following Decision on the “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” (“Application for Leave to Appeal”).¹

I. Background and Submissions

1. In an Oral Decision on 8 December 2009, Trial Chamber III refused an application by the Office of the Prosecutor (“prosecution”) to disclose “anticipated evidence” from eight sources outside the deadline for disclosure set by the Chamber.² The prosecution now seeks leave to appeal that Decision. The relevant history is summarised below.
2. During the first status conference before Trial Chamber III on 7 October 2009, the Bench asked the prosecution if it was ready for trial. Prosecution counsel replied without reservation, “Yes, the prosecution is ready”.³ The Bench asked if this answer had been given seriously, to which counsel replied, “Yes”.⁴
3. The following exchange ensued:

PRESIDING JUDGE FULFORD: The evidence on which you rely has been served and filed and there is nothing outstanding which the prosecution intends to introduce on which it is going to rely. Is that the position?

MS. KNEUER: The position is that, as I said, the prosecution is ready. However, we can anticipate to conclude the disclosure of the material that we are intending to rely on during trial will be concluded by the end of November 2009.⁵

¹ 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, 14 December 2009, ICC-01/05-01/08-654.

² Transcript of hearing on 8 December 2009, ICC-01/05-01/08-T-18-Red-ENG-WT, page 29, line 18 to page 37, line 2.

³ Transcript of hearing on 7 October 2009, ICC-01/05-01/08-T-14-ENG-ET, page 9, lines 8 – 10.

⁴ ICC-01/05-01/08-T-14-ENG-ET, page 9, lines 11 – 12.

⁵ ICC-01/05-01/08-T-14-ENG-ET, page 9, lines 13 – 18.

4. The Court gave the prosecution until 16.00 on 9 October 2009 to set out a summary of the unserved evidence, the issues to which the outstanding material was relevant and an explanation as to why it had not already been filed.⁶ This document was filed on 9 October 2009.⁷
5. Later during the hearing on 7 October 2009, the Chamber set 30 November 2009 as the cut-off date for disclosure, as follows:

PRESIDING JUDGE FULFORD: We now need to deal with any outstanding issues in relation to disclosure. We have dealt, to the extent that we need to, with the prosecution's incriminating case in the sense that any outstanding material has got to be dealt with in the way that I have already identified.⁸

6. The Court then set an identical deadline (30 November 2009) for disclosure of any exculpatory materials under Article 67(2) of the Rome Statute ("Statute"), or materials covered by Rule 77 of the Rules of Procedure and Evidence ("Rules"), after prosecution counsel indicated that she was able to conclude the review and disclosure of this material by that date.⁹
7. The Court concluded the issue of disclosure, albeit at that stage focusing on exculpatory and Rule 77 material, by stating:

PRESIDING JUDGE FULFORD: Right. You have until 4 p.m. on Monday, 30 November to complete that exercise. If it becomes clear that you are going to be unable to fulfil that obligation, we are not to be told 30 minutes before the deadline expires. You are to notify the Chamber sufficiently in advance so there can be a hearing so that we can resolve the issue.¹⁰

8. On 4 November 2009 the Chamber issued its "Order on disclosure of evidence by the Office of the Prosecutor".¹¹ At paragraph 7 the Chamber ordered:

⁶ ICC-01/05-01/08-T-14-ENG-ET, page 9, line 23 to page 10, line 5.

⁷ Prosecution's submission of summary and relevance of outstanding materials and reasons these have not been filed, 9 October 2009, ICC-01/05-01/08-552.

⁸ ICC-01/05-01/08-T-14-ENG-ET, page 15, lines 10 – 13.

⁹ ICC-01/05-01/08-T-14-ENG-ET, page 15, line 23 to page 16, line 6.

¹⁰ ICC-01/05-01/08-T-14-ENG-ET, page 16, lines 5 – 9.

¹¹ Order on disclosure of evidence by the Office of the Prosecutor, 4 December 2009, ICC-01/05-01/08-590.

Against the background of Articles 64(3)(c), 67 of the Statute and Rules 76 and 77 of the Rules and to ensure they are properly implemented, the Chamber reiterates the direction given during the status conference on 7 October 2009 that the prosecution must effect its disclosure obligations in their entirety by 16.00 on 30 November 2009, subject to paragraph 6 above. If the prosecution is unable to comply with this order, it is to set out the reasons in writing by way of a filing, sufficiently in advance of that date to enable the Chamber to resolve the issue, including by way of a hearing, before the deadline expires.

9. The orders relating to disclosure were not the subject of an application for leave to appeal, and thereafter the prosecution seemingly set about discharging its disclosure obligations by filing material with the Court. Particularly, on 6 November 2009, the prosecution filed its summary of the outstanding materials,¹² and on 10 November 2009 the prosecution communicated its incriminatory evidence, or rather the outstanding elements of it.¹³

10. On 30 November 2009, ten minutes before the deadline was due to expire, the prosecution filed a "Request for Authorisation to Add and Disclose Additional Evidence to be relied on at trial beyond 30 November 2009" ("Application for Disclosure of Additional Evidence").¹⁴ The prosecution, in a confidential Annex A, listed the eight items or sources of evidence that were the subject-matter of the application which contained "the reasons why it has not been collected to date".¹⁵

11. A summary of the principal arguments outlined in the Application for Disclosure of Additional Evidence is as follows:

¹² Prosecution's disclosure of summary of outstanding materials to the Defence pursuant to the Chamber's Order on disclosure of evidence by the Office of the Prosecutor of 4 November 2009, 6 November 2009, ICC-01/05-01/08-599.

¹³ Prosecution's Communication of Incriminatory Evidence (Items on List of Evidence attached to "Prosecution's Summary of Presentation of Evidence") Disclosed to the Defence on 10 November 2009, 11 November 2009, ICC-01/05-01/08-605.

¹⁴ Request for Authorisation to Add and Disclose Additional Evidence to be relied on at trial beyond 30 November 2009, 30 November 2009, ICC-01/05-01/08-626.

¹⁵ ICC-01/05-01/08-626, paragraph 16.

- i) other judicial systems allow “Rolling disclosure” or disclosure three months before trial (paragraph 4); although the prosecution does not seek rolling disclosure in this instance, it seeks the opportunity to serve its evidence well in advance of the trial (paragraph 23);
- ii) the Appeals Chamber has recognised the right of the prosecution to continue its investigations beyond the confirmation stage (paragraphs 18 to 20);
- iii) the prosecution is in the process of re-interviewing two witnesses, following the charges confirmed by the Pre-Trial Chamber (paragraphs 5 and 25);
- iv) the prosecution is seeking to access material in the possession of the Registry and it is in the process of receiving additional information pursuant to cooperation requests (paragraph 6);
- v) all of the outstanding evidence, in accordance with the request, will be submitted three months before the beginning of the trial (paragraph 7);
- vi) the new evidence will not materially affect the expeditiousness of the trial (paragraph 8);
- vii) the Chamber has the power to extend deadlines for good cause (see regulation 35(2) of the Regulations of the Court cited in paragraph 21, along with certain jurisprudence from the Lubanga case set out in paragraph 22);
- viii) together with the request to be permitted to re-interview two witnesses on the changed mode of liability, the prosecution seeks to interview three witnesses who only became available recently and “to access information collected by the Registry and to receive other material” (paragraph 25); and
- ix) the prosecution submits that the new material is highly relevant to, and probative of, the issues in the case (paragraph 26).¹⁶

12. As part of its Oral Decision on 8 December 2009 the Chamber made certain observations (without undermining confidentiality) on the information provided in Annex A, as follows:¹⁷

Source 1. Although the individual referred to [...] has recently moved country from a non-State Party to a State Party, no justification has been provided for the lack of contact with him to date. On the basis of the material provided to us, it appears that the prosecution has always been aware of his potential relevance to this case.

Source 2. The prosecution has attempted to interview this witness, but we are told that for reasons beyond its control the interviews have been postponed. However, no details have been provided of these difficulties and no mention was made of them at any stage until the filing of 30 November 2009. Furthermore, no details have been provided of this witness's anticipated testimony on the issues that have been

¹⁶ ICC-01/05-01/08-T-18-Red-ENG-WT, page 33, lines 2 – 25.

¹⁷ ICC-01/05-01/08-T-18-Red-ENG-WT, page 34, line 5 to page 35, line 16.

identified.

Source 3. The prosecution submits that it has had a number of logistical and cooperation problems as regards re-interviewing this witness since the confirmation decision, all based on factors beyond its control. With this source, the Chamber repeats all of its observations as regards source 2.

Source 4. Again, the prosecution submits it has experienced a number of cooperation and logistical problems in relation to interviewing this witness, although no details of these difficulties have been provided. Moreover, although the interview, we are told, is scheduled for December 2009, no indications have been given as to whether or not in fact this will take place.

Source 5. The Chamber is told that the prosecution discovered this witness after 4 November 2009, but no explanation has been given as to why the issue was not raised until 10 minutes to 4.00 in the afternoon of 30 November 2009. Although it is said that an interview is scheduled for December 2009, on the information provided there is no certainty that this will ever take place.

Source 6. No explanation has been provided as to why prosecution enquiries had not been made at a far earlier stage to locate and investigate the files referred to. In the judgment of the Chamber, the prosecution should have developed a strategy that would have ensured that this material was unearthed considerably earlier.

Source 7. Although it is suggested that the prosecution came into possession of this item after 4 November 2009, no details are provided of the circumstances in which the prosecution located it, or why the matter was not raised with the Chamber until the very last moment.

Source 8. Although the prosecution has been dependent on the cooperation of a State Party as regards these documents, no details are provided as to when the prosecution was told that the 20 or so pieces of evidence had been uncovered. The prosecution has failed to address substantively its seemingly dilatory approach to this application as regards source 8.

13. On the Application for Disclosure of Additional Evidence, the Chamber concluded as follows:

In the view of the Chamber, this is an unimpressive history. The case was referred on 22 December 2004 and the investigation was opened by a decision of the Prosecutor on 22 May 2007. The warrant of arrest for the accused was applied for on 9 May 2008 and the accused has been in the Court's detention since 3 July 2008. The prosecution has been aware of the changes to the case that have been the result of the decision of the confirmation of charges (15 June 2009), now nearly six months ago. The Trial Chamber was told on 7 October 2009, without reservation, that the prosecution was ready for trial and that all of the outstanding materials would be disclosed by 30 November 2009.

Orally and in writing the Chamber stressed that 30 November was the cut-off, the deadline, for the prosecution to satisfy the entirety of its disclosure obligations.

Additionally, the prosecution has been told twice that any application to vary that deadline was to be made sufficiently in advance to enable the Chamber to entertain submissions during a hearing. The prosecution has chosen not to address that latter and important aspect of our order in any way in this application. Indeed, it has simply made no reference to it and has accordingly provided no justification for the late filing, save by providing the generally inadequate information set out in annex A. Finally, the details of the history to, and the difficulties with, the additional eight sources which the prosecution wishes to rely on, reveal a picture that is partial and incomplete and the prosecution has failed to provide in each instance a sufficiently compelling or explicable basis for the Chamber to allow this application.

Whilst the Chamber recognises that in appropriate circumstances its case-management decisions can be varied, given the extensive problems experienced by the defence over funding it is, in our judgment, critical that the accused has sufficient time to prepare for a trial which will commence in just over four months' time. An important element of that case preparation, particularly in these adverse circumstances, is that he has certainty as to the case and the evidence he is to meet. In conclusion, therefore, insufficient information has been provided on the circumstances of each of the eight sources and no submissions have been made on the wholesale breach of the Chamber's order on 7 October and 4 November 2009. Bearing in mind the statutory responsibility to ensure the accused receives a fair trial, this application is refused.¹⁸

14. Against that background the prosecution submits its Application for Leave to Appeal. It argues that the Decision of the Chamber "raises the issue of the scope of the prosecution's right to present probative evidence going to the heart of the charges".¹⁹ The prosecution observes that, within the ambit of the request for authorisation to add and disclose additional evidence, it was intending to complete disclosure within the timeframe established in the case of *The Prosecutor v. Thomas Lubanga Dyilo* ("*Lubanga case*") (*viz.* 3 months), and it submits that the Decision is vitiated because it was made purely on procedural rather than substantive grounds: "[t]he Decision effectively imposes on purely procedural grounds an absolute bar to the introduction of the evidence at trial because of late disclosure [...]". It is suggested that 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 [...]".²⁰ It is argued that the Decision adversely affects the prosecution's ability to present its case, and that the Decision may be deleterious to the

¹⁸ ICC-01/05-01/08-T-18-Red-ENG-WT, page 35, line 17 to page 36, line 24.

¹⁹ ICC-01/05-01/08-654, paragraph 2.

²⁰ ICC-01/05-01/08-654, paragraph 2.

efficiency and expeditiousness of the trial.²¹ However, it is acknowledged that the Chamber had concluded that the prosecution's suggested justification for its inability to obtain and disclose the evidence was "insufficient".²²

15. It is suggested that "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".²³ Indeed, throughout the Application the prosecution avers that the Chamber founded its Decision on procedural reasons alone, ignoring the probative value of the evidence and failing, first, to assess the impact of the Decision on the fairness of the proceedings and, second, to weigh the relevant factors.²⁴ In developing these arguments, the Chamber is criticised for "fail[ing] 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 [...]",²⁵ and it is suggested that the Chamber failed to take into account "[...] the substantive factors as to each piece of evidence [...]".²⁶

16. The prosecution emphasises that it was only with the confirmation of charges that the Pre-Trial Chamber "[...] changed the mode of liability *solely* to that of command responsibility", and it is pointed out that that Decision was made on 15 June 2009, less than four months before the 7 October 2009 hearing. It is argued in the Application for Leave to Appeal that this necessitated the prosecution adjusting its case "[...] within a short span of time in order to

²¹ ICC-01/05-01/08-654, paragraphs 3 and 4.

²² ICC-01/05-01/08-654, paragraph 10.

²³ ICC-01/05-01/08-654, paragraph 4.

²⁴ ICC-01/05-01/08-654, paragraphs 2, 3, 9, 10, 12, 14, 17, 21, and 23.

²⁵ ICC-01/05-01/08-654, paragraph 12.

²⁶ ICC-01/05-01/08-654, paragraph 14.

substantiate the new elements beyond reasonable doubt”; moreover, it is suggested in the Application for Leave to Appeal that the impugned Decision has denied the prosecution the ability to introduce potentially probative evidence that addresses a “wholly new issue”.²⁷

17. It is argued that “[...] the Chamber did not dispute the apparent relevance of the evidence proposed by the prosecution” and that in the result the Chamber will be making a decision at the end of the trial on the basis of incomplete evidence.²⁸ Additionally, the prosecution advances a submission in support of this request for leave to appeal on the basis of inconsistent jurisprudence between Trial Chamber II and Trial Chamber III, in that in the instant Decision Trial Chamber III “[...] rejected the prosecution’s request to disclose evidence in part because it was not made sufficiently in *advance* of the deadline set, [whereas] in the Katanga and Ngudjolo proceedings Trial Chamber II considered the 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”.²⁹

18. The prosecution submits that the established jurisprudence of the Court leads to the result that “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”.³⁰ The prosecution reminds the Chamber of the obligation that the Court has to ensure that the proceedings are both expeditious and fair, and it is argued that leave to appeal should not be denied when the proceedings, although expeditious,

²⁷ ICC-01/05-01/08-654, paragraphs 16 and 17.

²⁸ ICC-01/05-01/08-654, paragraph 26.

²⁹ ICC-01/05-01/08-654, paragraph 30.

³⁰ ICC-01/05-01/08-654, paragraph 13.

will be unfair.³¹

19. Finally, it is suggested that the Chamber will in any event have to consider later in the proceedings admitting evidence of the kind set out in Annex A because of “its duty to establish the truth”,³² and it raises the spectre of a possible retrial if the accused is wrongly acquitted on the grounds of “[...] an erroneous and premature exclusion of evidence”.³³

20. The Office of Public Counsel for Victims filed a response on 21 December 2009, supporting the Application for Leave to Appeal.³⁴

21. Principal Counsel argues that the prosecution should be allowed to continue its investigations beyond the confirmation of charges hearing;³⁵ it is emphasised that the Pre-Trial Chamber confirmed a different form of criminal responsibility to that relied on by the prosecution;³⁶ and an argument is advanced on the basis of the jurisprudence of Trial Chamber II, which had allowed additional evidence to be served outside of the deadlines that had been set.³⁷ Principal Counsel acknowledges that the Chamber’s procedural orders should always be followed, but it is suggested that notwithstanding any breach of them, the substantive merits of the matter should be evaluated.³⁸

22. Principal Counsel argues that a decision as to whether a party can introduce certain *prima facie* relevant evidence at trial is an appealable issue.³⁹ It is

³¹ ICC-01/05-01/08-654, paragraph 19.

³² ICC-01/05-01/08-654, paragraph 21.

³³ ICC-01/05-01/08-654, paragraph 24.

³⁴ Response by the Legal Representative of Victims to the “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”, 21 December 2009, ICC-01/05-01/08-660.

³⁵ ICC-01/05-01/08-660, paragraph 7.

³⁶ ICC-01/05-01/08-660, paragraph 8.

³⁷ ICC-01/05-01/08-660, paragraph 9.

³⁸ ICC-01/05-01/08-660, paragraph 12.

³⁹ ICC-01/05-01/08-660, paragraph 13.

suggested that the prosecution's right to a fair trial is undermined if it is unable to present its case in full on the mode of criminal liability confirmed by the Pre-Trial Chamber.⁴⁰

23. Although Principal Counsel supports the prosecution's argument that leave to appeal should be granted if the issue affects the fairness of the proceedings, regardless of a conclusion on expeditiousness, it is observed that if the verdict of the Chamber at the conclusion of the case is the subject of an appeal on the basis that this evidence was wrongly excluded, this may have an adverse impact on the expeditiousness of the proceedings.⁴¹

24. Principal Counsel submits that the refusal to admit the proposed new evidence *ipso facto* affects the outcome of the trial, since the prosecution seeks to introduce it to prove the charges; furthermore it is suggested that the appeal should be granted to move the trial forward, and to ensure that the fairness of the proceedings and the outcome of the trial are not tainted.⁴²

25. The defence has not filed a response to the Application.

II. Analysis and Conclusions

A. General approach

26. In reaching its conclusions on the Application for Leave to Appeal, the Trial Chamber has followed the approach set out in Trial Chamber I's "Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008",⁴³ as well as its "Decision on the Defence and

⁴⁰ ICC-01/05-01/08-660, paragraph 14.

⁴¹ ICC-01/05-01/08-660, paragraph 15.

⁴² ICC-01/05-01/08-660, paragraph 17.

⁴³ Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008, 6 March 2008, ICC-01/04-01/06-1210-Corr-Anx.

Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008".⁴⁴ Both of these Decisions applied Article 82(1)(d) of the Statute and the Appeals Chamber's "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" of 13 July 2006.⁴⁵ There is jurisprudence from the Court to the effect that a restrictive approach should be applied to Article 82(1)(d) of the Statute, and the Appeals Chamber has observed:⁴⁶

19. This case-law shows that in striking the balance between the convenience of deciding certain issues at an early stage of the proceedings, and the need to avoid possible delays and disruptions caused by recourse to interlocutory appeals, the provisions enshrined in the relevant rules of the ad hoc Tribunals, and in the ICC Statute, favour as a principle the deferral of appellate proceedings until final judgment, and limit interlocutory appeals to a few, strictly defined, exceptions.

27. Accordingly, the Chamber has examined the Application for Leave to Appeal against the following criteria:

- a) Whether the matter is an "appealable issue" arising from the impugned decision;
- b) Whether the issue at hand could significantly affect:
 - i) the fair and expeditious conduct of the proceedings, or
 - ii) the outcome of the trial; and

⁴⁴ Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191.

⁴⁵ Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying leave to Appeal, 13 July 2006, ICC-01/04-168, paragraphs 9 – 15.

⁴⁶ Decision on Prosecutor's Application for Leave to Appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrant of Arrest under Article 58, 19 August 2005, ICC-02/04-01/05-20, paragraph 19; this approach was followed equally by Pre-Trial Chamber I, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, 24 May 2007, ICC-01/04-01/06-915, paragraph 20; see also Trial Chamber II, Decision on the Prosecutor's Application for Leave to Appeal the Decision on Redactions Rendered on 10 February 2009, 6 March 2009, ICC-01/04-01/07-946-tENG, paragraph 11.

- c) Whether in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber could materially advance the proceedings.

B. The Merits

28. The prosecution has failed to describe the reasoning of the Chamber accurately or sufficiently. It is clear that the Application for Disclosure of Additional Evidence was refused for the following three reasons, as set out expressly by the Chamber:

- first, the wholesale, unexplained and unjustified breach by the prosecution of the Chamber's disclosure orders of 7 October 2009 and 4 November 2009;⁴⁷
- second, the provision by the prosecution in its application of only partial and incomplete details of the history to, and the difficulties with, the additional eight sources that the prosecution sought to rely on, and the linked failure by the prosecution to provide, for each of the sources, a sufficiently compelling or explicable basis that would justify an order granting the application;⁴⁸ and
- third, against the background that in appropriate circumstances the Chamber's case-management decisions can be varied and the extensive problems experienced by the defence over funding, the Chamber focused on the critical consideration that

⁴⁷ ICC-01/05-01/08-T-18-Red-ENG-WT, page 35, line 24 to page 36, line 10.

⁴⁸ ICC-01/05-01/08-T-18-Red-ENG-WT, page 34, line 1 to page 35, line 16; page 36, lines 11 – 14 and lines 21 – 24.

the accused needs sufficient time to prepare for a trial which is to commence in April 2010 (just over four months from the date of the Decision). As the Chamber stressed in its Decision, an important element of the accused's case preparation, particularly in these adverse circumstances, is that he has certainty as to the case and the evidence he is to meet.⁴⁹

29. The Chamber summarised its reasoning as follows:

In conclusion, therefore, insufficient information has been provided on the circumstances of each of the eight sources and no submissions have been made on the wholesale breach of the Chamber's order on 7 October and 4 November 2009. Bearing in mind the statutory responsibility to ensure the accused receives a fair trial, this application is refused.⁵⁰

30. It is wrong, therefore, for the prosecution to suggest (repeatedly) in the Application for Leave to Appeal that the Chamber's Decision was taken wholly or essentially on procedural grounds, without consideration of the underlying merits of the request to add and disclose additional evidence. To the contrary, the Chamber, having reviewed the significant breach of its disclosure orders and the absence of any explanation or justification for the breach, focused on the markedly inadequate information that had been provided by the prosecution – information that in the circumstances failed to justify the application – only turning thereafter to consider the issue of fairness *inter partes*, on the basis of the relevant available material. Given the paucity of the information supplied by the prosecution, which effectively disabled the Chamber from assessing the *prima facie* weight of the eight sources of evidence, their relevance to the prosecution's case, or the impact on it if they are not admitted into the trial, the Bench focused on the consequences of the request for the defence, against the background of its chequered funding history, highlighting the consequential uncertainty as to

⁴⁹ ICC-01/05-01/08-T-18-Red-ENG-WT, page 36, line 15 – 20.

⁵⁰ ICC-01/05-01/08-T-18-Red-ENG-WT, page 36, lines 21 – 24.

the case that the accused has to meet if this material (to the extent that it is known) is “added and disclosed” in the way proposed by the prosecution.

31. It follows that this Decision does not, as the prosecution suggests, “[...] effectively impose on purely procedural grounds an absolute bar to the introduction of the evidence at trial because of late disclosure [...]”; nor does it raise “[...] the issue of the scope of the right of the prosecution to present probative evidence going to the heart of the charges”. Instead, it is a Decision, taken on its own particular (and, as far as the prosecution is concerned, markedly limited) facts, in which the Chamber reviewed each of the eight sources during its oral ruling. Decisions are, perforce, frequently made on the basis of the information supplied by the parties and participants, and the extent to which a court can make definitive or substantive factual assessments is dependent on the quality and the depth of the material supplied to it.

32. As regards the first five sources listed in Annex A, at the time of the request to add and disclose additional evidence, the prosecution was not in possession of the material it seeks permission to add and disclose (the interviews had not taken place), and the prosecution had not provided any indication as to whether the relevant individuals are prepared to give evidence. For source six, at the time of making the application the prosecution had not collected the relevant evidence from certain files, although “the prosecution expect that the process will be completed in the near future”. For the final two sources listed in Annex A, the prosecution was only partially in possession of this information, and there was uncertainty as to when or if the outstanding material would be forthcoming.

33. Against that background, the Chamber must assess whether the issue at hand is an appealable issue, and, depending on the answer to that question, whether it could significantly affect the fair and expeditious conduct of the

proceedings, or the outcome of the trial; and whether an immediate resolution by the Appeals Chamber could materially advance the proceedings.

34. The limited nature of the information provided by the prosecution in its Application for Disclosure of Additional Evidence has consequences for each of the preconditions for granting leave to appeal. The Appeals Chamber has defined an appealable issue as follows: “Only ‘an issue’ may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is a disagreement or conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one”.⁵¹ Furthermore, Pre-Trial Chamber III has determined:

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. In addition, as has this Chamber held, an appealable issue must emanate from the ruling of the decision concerned and does not merely represent an abstract question or a hypothetical concern.⁵²

35. The limited nature of the information provided, and the uncertainty as to the content of any future evidence, or whether it will be forthcoming, leads to the inevitable conclusion that this is not a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination; furthermore, it concerns abstract questions or hypothetical concerns. Accordingly, following the established jurisprudence of the Court, this is not an “appealable issue”.

36. Addressing the other criteria for the sake of completeness, it is impossible for the Chamber to conclude that any of this material will significantly affect

⁵¹ ICC-01/04-168, paragraph 9.

⁵² Decision on the Prosecutor’s Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 18 September 2009, ICC-01/05-01/08-532, paragraph 17.

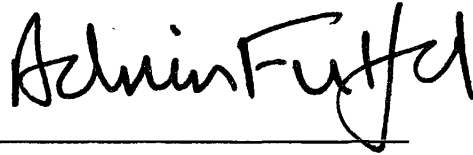
either the fairness or the expeditiousness of the proceedings, or the outcome of the trial, or that an immediate resolution of this application for leave to appeal could materially advance the proceedings. As just set out, in each instance the position as regards this proposed additional evidence is wholly speculative: the five relevant witnesses have not been interviewed, and the documentary evidence has not been compiled (certainly in its entirety), and in any event none of it has been provided to the Chamber in the form the prosecution seeks to “add and disclose”.

37. It follows that the Application for Leave to Appeal, on its merits, must be refused.

Postscript

38. As rehearsed above, the Oral Decision of 8 December 2009 was a case-management decision made on its own facts at a particular stage in the proceedings. It remains open to the prosecution to present a fresh application if there are significant new facts or developments that merit consideration by the Chamber, particularly if substantive, relevant evidence is obtained as a result of the enquiries and investigations set out in Annex A. The prosecution is not invited to make such an application, but this course remains open to it, although self-evidently the merits of any application may reduce the closer it is made to the beginning of the trial.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge Joyce Aluoch

Dated this 28 January 2010

At The Hague, The Netherlands