

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/05-01/08  
Date: 29 January 2010

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

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

**The Office of the Prosecutor**

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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**

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**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” or “ICC”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* hereby delivers the following Decision on the “Prosecution’s Submissions on the Trial Chamber’s 8 December 2009 Oral Order Requesting Updating of the In-Depth-Analysis Chart”.<sup>1</sup>

## I. Background and Submissions

1. On 31 July 2008, Pre-Trial Chamber III (“Pre-Trial Chamber”) issued a “Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties”<sup>2</sup> in which it decided, *inter alia*, that “when submitting any evidence to the Registry, the parties shall provide [...] [a]n analysis of each piece of evidence reflecting its relevance as described in part III of this decision”.<sup>3</sup>
2. On 24 November 2008, the Office of the Prosecutor (“prosecution”) filed an updated, consolidated version of its in-depth analysis chart of incriminatory evidence<sup>4</sup> and, on 30 March 2009, the Prosecution filed a further amended version of the in-depth analysis chart.<sup>5</sup>
3. At the status conference on 7 October 2009, the Trial Chamber requested, by 4 November 2009, any substantive submissions concerning whether the procedures developed in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (“*Lubanga* case”), namely those concerning the manner in which evidence is

<sup>1</sup> Prosecution’s Submissions on the Trial Chamber’s 8 December 2009 Oral Order Requesting Updating of the In-Depth-Analysis Chart, 15 December 2009, ICC-01/05-01/08-656.

<sup>2</sup> Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008, ICC-01/05-01/08-55.

<sup>3</sup> ICC-01/05-01/08-55, page 22, operative paragraph (e).

<sup>4</sup> Annex A to Prosecution’s Submission of an Updated, Consolidated Version of the In-depth Analysis Chart of Incriminatory Evidence, 24 November 2009, ICC-01/05-01/08-278-Conf-Exp-AnxA.

<sup>5</sup> Annex 2E to Prosecution’s Submission of Amended Document Containing the Charges, Amended List of Evidence, and Amended In-Depth Analysis Chart of Incriminatory Evidence, 30 March 2009, ICC-01/05-01/08-395-Conf-Anx2E.

submitted, should be varied during the course of the Jean-Pierre Bemba Gombo trial.<sup>6</sup>

4. At the status conference on 8 December 2009, the Chamber requested that the prosecution update its in-depth analysis chart<sup>7</sup> and revise its summary of presentation of evidence to include all witnesses, as well as each major piece of documentary evidence that the prosecution intends to rely on,<sup>8</sup> by 15 January 2010 or to file submissions by 15 December 2009 in the event that this timeframe was not achievable.<sup>9</sup>

#### *Prosecution*

5. On 15 December 2009, the prosecution filed its response to the Trial Chamber's 8 December 2009 oral order, submitting a proposal for an updated version of the chart and requesting an extension of time to file the chart until 28 February 2010.<sup>10</sup>
6. The prosecution contends that a detailed analytical chart is not a necessary component of a fair trial, submitting that the disclosure provisions contained in the Rome Statute ("Statute") and the Rules of Procedure and Evidence ("Rules") do not mention the preparation of an explanatory analytical chart and that such a document was not requested in the *Lubanga* case.<sup>11</sup>

<sup>6</sup> Transcript of hearing on 7 October 2009, ICC-01/05-01/08-T-14-ENG-ET, page 23, lines 6 – 11.

<sup>7</sup> Transcript of hearing on 8 December 2009, ICC-01/05-01/08-T-18-Red-ENG-WT, page 44, line 24 to page 45, line 10.

<sup>8</sup> ICC-01/05-01/08-T-18-Red-ENG, page 45, lines 11 – 18.

<sup>9</sup> ICC-01/05-01/08-T-18-Red-ENG, page 46, lines 19 – 23.

<sup>10</sup> ICC-01/05-01/08-656. The Chamber notes that 28 February 2010 falls on a Sunday.

<sup>11</sup> ICC-01/05-01/08-656, paragraphs 7 – 8.

7. The prosecution further contends that a charted, detailed, and subjective analysis of the prosecution's case falls within the category of work product and, under Rule 81(1) of the Rules, is not subject to disclosure.<sup>12</sup>
8. The prosecution notes that prior to the confirmation hearing it had, nonetheless, provided an in-depth analytical chart explaining its anticipated evidence and linking the evidence to the elements of each charge.<sup>13</sup> The prosecution submits that it is prepared to submit an additional in-depth analysis chart containing the incriminating evidence disclosed after the confirmation hearing, but proposes several conditions for the creation of this chart.<sup>14</sup>
9. The prosecution submits that the additional chart would be based on 403 documents and would follow the structure of the model chart provided by the Pre-Trial Chamber.<sup>15</sup> However, the prosecution emphasises the need for flexibility in the interpretation and use of the chart, contending that it should not be prevented from arguing at a later stage of the proceedings that certain evidence identified in the chart as relevant for one purpose had additional or alternative probative significance.<sup>16</sup>
10. The prosecution also submits that its proposed chart would not include witness statements. The prosecution maintains that, while the chart that it provided prior to the confirmation of the charges did contain witness statements, the inclusion of these statements in an additional chart could be misleading to the extent that it gave the impression that witnesses' testimony at trial would be identical to their prior statements. The prosecution proposes as an alternative a comprehensive analytical chart presented at the end of its

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<sup>12</sup> ICC-01/05-01/08-656, paragraph 9.

<sup>13</sup> ICC-01/05-01/08-656, paragraph 10.

<sup>14</sup> ICC-01/05-01/08-656, paragraph 11.

<sup>15</sup> ICC-01/05-01/08-656, paragraph 12.

<sup>16</sup> ICC-01/05-01/08-656, paragraph 13.

case, summarising how the witnesses' testimonies during trial supported the prosecution's factual allegations.<sup>17</sup>

11. Finally, the prosecution submits that it would be unable to complete an updated version of the in-depth analysis chart by 15 January 2010 due to a shortage of resources, and requests leave to submit the chart by 28 February 2010.<sup>18</sup> The prosecution contends that this delay would not prejudice the rights of the defence because its 4 November 2009 in-depth analysis chart has given the accused and the Chamber an understanding of the relevant evidence.<sup>19</sup>

### *Defence*

12. On 23 December 2009, the defence submitted its corrigendum response to the prosecution's submissions of 15 December 2009, disagreeing with the prosecution's proposed version of the updated in-depth analysis chart and requesting that the Chamber deny the prosecution's request for an extension of time to file this proposed version of the chart.<sup>20</sup>
13. The defence submits that the purpose of the prosecution's in-depth analysis chart is to streamline the judicial process, to help guarantee the complete disclosure of evidence and to maintain the equality of arms between the prosecution and the defence.<sup>21</sup> The defence cites in support the Chamber's statement during the status conference of 8 December 2009 that an update of the analysis chart would be "helpful to the accused" as well as to the Chamber.<sup>22</sup> The defence also makes reference to Trial Chamber II's statement

<sup>17</sup> ICC-01/05-01/08-656, paragraphs 14 – 15.

<sup>18</sup> ICC-01/05-01/08-656, paragraphs 16 – 17 and 19 – 20.

<sup>19</sup> ICC-01/05-01/08-656, paragraph 18.

<sup>20</sup> Corrigendum Réponse de la Défense aux soumissions du Procureur du 15 Décembre 2009 référencées ICC-01/05-01/08-656, 23 December 2009, ICC-01/05-01/08-664-Corr.

<sup>21</sup> ICC-01/05-01/08-664-Corr, paragraph 4.

<sup>22</sup> ICC-01/05-01/08-664-Corr, paragraph 3; ICC-01/05-01/08-T-18-Red-ENG, page 45, lines 5 – 7.

that “the supplementary investment of time and resources, required by the Prosecution for preparing the Table of Incriminating Evidence, will facilitate the subsequent work of the accused and the Chamber and thereby expedite the proceedings as a whole.”<sup>23</sup>

14. The defence acknowledges that an in-depth analysis chart was not required in the *Lubanga* case. However, the defence notes that in the case of *The Prosecutor v. Germain Katanga and Matthieu Ngudjolo Chui* (“*Katanga* case”), Trial Chamber II ordered the prosecution to submit not only a detailed chart linking all incriminatory evidence to the charges alleged, but also to indicate where evidence related to more than one factual allegation.<sup>24</sup>
  
15. The defence submits that in the absence of fixed jurisprudence from the Trial Chambers on this issue, Trial Chamber III should adopt the position most favorable to the accused. The defence submits that the provision of an in-depth chart is essential to permit the defence to concentrate its limited resources when preparing its strategy in response to the prosecution’s arguments.<sup>25</sup>
  
16. The defence objects to the prosecution’s proposal not to include witness statements in its chart and suggests that this proposal is based on a desire on the part of the prosecution to use witnesses in an interchangeable manner in order to fill in gaps in its evidence. While the defence accepts that witnesses on the stand have the right to clarify aspects of their previously-disclosed testimony that might be ambiguous, it contends that the prosecution should not be permitted to put spontaneous questions to witnesses on the stand in order to fill in evidentiary gaps left by other witnesses.<sup>26</sup>

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<sup>23</sup> ICC-01/05-01/08-664-Corr, paragraph 6; Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol, 13 March 2009, ICC-01/04-01/07-956, paragraph 15.

<sup>24</sup> ICC-01/05-01/08-664-Corr, paragraph 5; ICC-01/04-01/07-956, paragraphs 13 – 14.

<sup>25</sup> ICC-01/05-01/08-664-Corr, paragraphs 7 and 10.

<sup>26</sup> ICC-01/05-01/08-664-Corr, paragraphs 11 – 12, 18 – 19 and 28 – 32.

17. The defence also contends that in order to guarantee the accused's fair trial rights, the prosecution must be required to link, in a detailed and conclusive manner, all of the evidence upon which it intends to rely at trial to the elements of the charges. The defence underlines that there is no document dissecting the modes of liability contained in the Statute similar to the "Elements of Crimes" in the texts of the Court. The defence submits that the in-depth chart would be useful for evaluating the evidence that the prosecution intends to use to prove responsibility in conformance with Article 28(a) of the Statute.<sup>27</sup>
18. The defence also objects to the prosecution's proposal to present an analytical chart at the end of its case. The defence contends that this approach fails to provide adequate protection of defence rights prior to trial.<sup>28</sup>
19. Finally, the defence opposes the prosecution's request for an extension of time from 15 January 2010 to 28 February 2010 to submit an updated chart. The defence contends that the prosecution is obliged to maintain a detailed, permanent report on the state of its evidence.<sup>29</sup> The defence further submits that it is unclear whether the prosecution's request for an extension of time relates to the production of its own proposed version of the in-depth chart or the version requested by the Trial Chamber.<sup>30</sup>
20. The defence requests that the Chamber order (i) that the prosecution file an updated in-depth chart as requested by Trial Chamber III at the status conference of 8 December 2009; and (ii) that the version of the in-depth chart requested by the Trial Chamber should be filed by 15 January 2010. The

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<sup>27</sup> ICC-01/05-01/08-664-Corr, paragraphs 21 – 23.

<sup>28</sup> ICC-01/05-01/08-664-Corr, paragraphs 34 – 35.

<sup>29</sup> ICC-01/05-01/08-664-Corr, paragraphs 38 – 41.

<sup>30</sup> ICC-01/05-01/08-664-Corr, paragraph 45.



defence submits that in the absence of a grant of requests (i) or (ii) the prosecution request for an extension of time should be considered an “unjustifiable delay” under Article 60(4) of the Statute.<sup>31</sup>

## II. Analysis and Conclusions

21. Trial Chamber II has addressed and resolved similar submissions to those advanced by the prosecution, as set out above, during the pre-trial stage of the *Katanga* case.<sup>32</sup> In the Decision on the prosecution’s application for leave to appeal its order to submit a Table of Incriminating Evidence, Trial Chamber II considered whether or not “[...] the Prosecution may be required to create and provide to the Chamber and the Defence a detailed element-by-element analytical chart for all the evidence it intends to use during the trial”.<sup>33</sup> It is to be observed that the Table of Incriminating Evidence – the subject of that Decision – is broadly the equivalent of the in-depth analysis chart presently under consideration. Its form and content were described by Trial Chamber II in the “Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol”,<sup>34</sup> which was the subject of the application for leave to appeal.<sup>35</sup> The Chamber explained that the two-fold purpose of the Table was, first, to ensure there was no ambiguity in the alleged facts, and, second, to provide for the fair and effective presentation of the evidence which the prosecution intends to rely on at trial.<sup>36</sup> Against that background, Trial Chamber II set out that:

<sup>31</sup> ICC-01/05-01/08-664-Corr, paragraph 48.

<sup>32</sup> Decision on the “Prosecution’s Application for Leave to Appeal the ‘Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol’” and the “Prosecution’s Second Application for Extension of Time Limit Pursuant to Regulation 35 to Submit a Table of Incriminating Evidence and related material in compliance with Trial Chamber II ‘Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol’”, 1 May 2009, ICC-01/04-01/07-1088.

<sup>33</sup> ICC-01/04-01/07-1088, paragraph 11.

<sup>34</sup> ICC-01/04-01/07-956, paragraphs 13 – 14.

<sup>35</sup> Prosecution’s Application for Leave to Appeal the “Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol”, 23 March 2009, ICC-01/04-01/07-982.

<sup>36</sup> ICC-01/04-01/07-956, paragraph 5.

The table will ensure that the accused have adequate time and facilities for the preparation of their defence, to which they are entitled under article 67(1)(b) of the Statute, by providing them with a clear and comprehensive overview of all incriminating evidence and how each item of evidence relates to the charges against them. In this respect, the Chamber appreciates the concern expressed by both Defence Counsel that the amount of evidence in this case is such that, without the assistance of a structured preliminary analysis of the evidence by the Prosecution, the Defence will need more time to prepare. The Chamber further agrees with the Defence that it is entitled to be informed – sufficiently in advance of the commencement of the trial – of the precise evidentiary basis of the Prosecution case. Indeed, although the Prosecution rightly asserts a great level of discretion in choosing which evidence to introduce at trial, the Defence must be placed in a position to adequately prepare its response, select counter-evidence or challenge the relevance, admissibility and/or authenticity of the incriminating evidence. This is only possible if the evidentiary basis of the Prosecution case is clearly defined sufficiently in advance of the trial.<sup>37</sup>

22. Thereafter Trial Chamber II indicated that the Table was to be based on the charges confirmed and it was to follow the structure of the *Elements of crimes*. The Chamber emphasised that the prosecution needed only to enter those items of evidence that it had decided to use during the trial. Notwithstanding the Chamber's underlying "prerogatives", Trial Chamber II recognised that "[t]he Prosecution therefore remains master of its case and has full control over the selection and presentation of evidence in the Table".<sup>38</sup>

23. Trial Chamber II defined the Table as being "[...] nothing more than a procedural tool to make clear and accessible to the Defence and the Chamber the exact evidentiary basis of the Prosecution's case"<sup>39</sup> and "[...] a tool to structure the presentation of the evidence and to ensure that the Prosecution's evidentiary case is easily accessible and comprehensible".<sup>40</sup>

24. Having rehearsed the prosecution's main arguments before Trial Chamber II,<sup>41</sup> namely that the material covered by a Table of Incriminating Evidence was covered by Rule 81(1) of the Rules and that disclosure of the Table would

<sup>37</sup> ICC-01/04-01/07-956, paragraph 6.

<sup>38</sup> ICC-01/04-01/07-956, paragraphs 11 – 12.

<sup>39</sup> ICC-01/04-01/07-1088, paragraph 24.

<sup>40</sup> ICC-01/04-01/07-956, paragraph 12.

<sup>41</sup> ICC-01/04-01/07-1088, paragraph 32.

impose an unfair administrative burden on the prosecution (that was without any basis in the Rome Statute framework), Trial Chamber II concluded on the application for leave to appeal:

33. With regard to the first argument, the Chamber is of the view that it is based on a mistaken reading of the impugned order. The Prosecution's argument, that the impugned order's requirements for filling in the Table of Incriminating Evidence obliges the Prosecution to disclose its internal work product, which would be protected under rule 81(1) of the Rules, does not find any basis in the order. The order does not compel the Prosecution to provide a subjective analysis of the evidence contained within the Table of Incriminating Evidence. The impugned order directs the Prosecution to list its incriminating evidence and requires that "[w]ithin each item of evidence, the Prosecution shall *identify* the pertinent passage(s), which are directly relevant to the specific factual allegation [emphasis added]." Accordingly, the impugned order does not oblige the Prosecution to provide the Chamber or the Defence with any internal work product relating to the internal analysis by the Prosecution of the evidence listed in the Table.

34. The burden of proof in relation to the guilt of the accused lies with the Prosecution and the Defence is entitled to know the exact case against it, sufficiently in advance of the trial. Therefore, it is incumbent upon the Prosecution to transparently present its case against the accused, which is the sole purpose of the Table. The fact that the Prosecution is ordered to identify the relevant passages within the items of evidence relied upon cannot be considered to entail the kind of internal analysis that would be protected by rule 81(1) of the Rules.

35. Accordingly, the Chamber considers that the first aspect of the Second Issue, as identified by the Prosecution, is based on a mischaracterisation of the impugned order and the Chamber thus does not need to consider whether it amounts to an appealable issue in accordance with article 82(1)(d).

36. As regards the second aspect, that the impugned order imposes an additional administrative burden, which is unfair on the Prosecution and has no basis in the Statute or the Rules, the Chamber is of the view that this cannot be construed as an appealable issue. Without wishing to minimise the additional work that the production of the Table of Incriminating Evidence entails, the Chamber considers that workload, which is a consequence of the Chamber's normal exercise of its judicial powers and responsibilities under article 64 of the Statute, rule 134 of the Rules and regulation 54 of the Regulations, cannot be the legal basis for granting leave to appeal. The appropriate procedural avenue for raising such issues is by applying for a variation of time limit, as indeed the Prosecution has had occasion to do.

25. The Chamber indicates its surprise that the prosecution did not refer to these recent Decisions by Trial Chamber II in its submissions before this Chamber. Counsel has an obligation to bring any apparently relevant jurisprudence to the attention of the Bench, particularly in a situation such as the present when

the prosecution was one of the parties involved in a nearly identical issue before another Chamber of this Court.

26. The Chamber is wholly persuaded by the approach and the reasoning of Trial Chamber II, set out extensively above, and it therefore rejects the prosecution's submission that it is not legally obliged to provide the in-depth analysis chart, on the grounds – as it is argued – that it is an internal document covered by Rule 81(1) of the Rules and, furthermore, it is not a necessary ingredient of a fair trial, thereby falling outside the Chamber's court-management jurisdiction. In the view of the Chamber this document does not involve any of the prosecution's internal documents: to the contrary, it is based on material that has been filed as part of the prosecution's disclosure obligations; furthermore, it is a necessary and proportionate procedural tool that assists in revealing the prosecution's case against the accused, notwithstanding the resources that will be necessary for its completion.

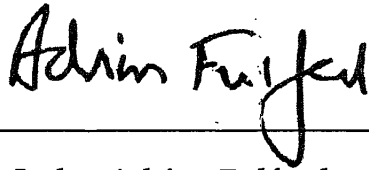
27. Otherwise, the Chamber simply adds to the reasoning provided by Trial Chamber II that trials are essentially organic in nature and it is inevitable that as the evidence and the issues in the case develop, the prosecution may in due course seek to argue that the probative value or significance of one or more areas of evidence described in the in-depth analysis chart have changed or developed. The prosecution will not be limited by this document as to the submissions that it is entitled to advance on the ultimate probative significance of any of the testimony of the witnesses it has called or the other materials it has introduced. Ultimately, it is for the Chamber to determine all issues of fact in a manner that is consistent with a fair trial.

28. The Chamber stresses that it is essential, in order to make the document complete, that the witness statements are included, in conformity with the

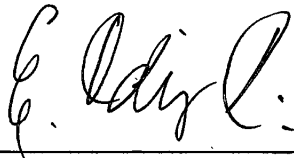
original version provided to the Pre-Trial Chamber. The prosecution's fears that their inclusion may lead to misunderstandings are ill-founded: it is self-evident that a witness's evidence at trial may not coincide with his or her pre-trial statements or interviews. There is a multiplicity of reasons why the testimony of a witness in court may depart from an earlier account, and this document is to be read on the basis of that understanding.

29. The Chamber accepts that the deadline for service should be extended: updating this document is a significant task, and it is essential that it is prepared carefully and accurately. Given that the defence is currently in possession of the original version provided to the Pre-Trial Chamber and the new proposed date for service is well in advance of the trial, there will be no prejudice to the accused.
30. It is likely that the Chamber and the defence will be significantly assisted at the end of the prosecution case by the service of a "comprehensive analytical chart", summarising how the witnesses' testimony at trial is relevant to the prosecution's underlying factual allegations. However, it is unnecessary to rule definitively at this stage on the issue, and it will be addressed by the Bench later in the case.
31. The Chamber, therefore, orders the prosecution to file its updated in-depth analysis chart by 16.00 on 1 March 2010, which should include the witness statements.

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



**Judge Adrian Fulford**



**Judge Elizabeth Odio Benito**



**Judge Joyce Aluoch**

Dated this 29 January 2010

At The Hague, The Netherlands