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PRE-TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Sylvia Steiner
Judge Sanji Mmasenono Monageng

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

***IN THE CASE OF
THE PROSECUTOR v. CALLIXTE MBARUSHIMANA***

Public Document

Prosecution's Application for leave to Appeal the "Decision on issues relating to disclosure" (ICC-01/04-01/10-87)

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Court to:

The Office of the Prosecutor

Counsel for the Defence of Callixte

Mbarushimana

Mr Nicholas Kaufman

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

Mr Xavier-Jean Keita

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. On 30 March 2011, Pre-Trial Chamber I (“Chamber”) issued a “Decision on issues relating to disclosure” (“Decision”).¹ In addition to establishing a system and time frame for pre-confirmation disclosure,² the Decision requires, *inter alia*, the following:
 - to facilitate the Defence's ability to understand and use material disclosed as potentially exculpatory under article 67(2) of the Statute, the Prosecutor shall provide (i) a concise written summary of the content of each disclosed item; and (ii) an explanation how each item is potentially exculpatory;³
 - to facilitate the Defence's ability to identify (for inspection) items that may be material to the preparation of the defence under rule 77 of the Rules, the Prosecutor shall provide (i) a concise written summary of the content of each item; and (ii) an explanation how each item is material.⁴
2. Following this Decision, counsel emailed the Prosecution to express his expectation that the Prosecution’s summary and explanation will be elaborate: *“I do exceedingly look forward to reading (i) the concise summary of the content of these items – (and not just ‘SMS intercept’ or likewise); and (ii) an explanation of the relevance of these intercepts to the preparation of my defence of Mr. Mbarushimana (and not just ‘Mr. Mbarushimana is not mentioned’ or likewise...)”*.⁵
3. The Chamber also decided that for the purposes of the confirmation hearing “any” material in the Prosecution’s possession or control that falls within the scope of Rule 77 is subject to inspection⁶ and “any and all” potentially exculpatory material shall be disclosed.⁷ These rulings deviate from the “bulk rule” applied in the *Lubanga* and *Katanga* cases, according to which “the specific

¹ ICC-01/04-01/10-87.

² Decision, para. 2.

³ Decision, para. 11(a); see also disposition, pp. 14-15.

⁴ Decision, para. 11(b); see also disposition, p. 15.

⁵ Mr Kaufman’s email to Mr Steynberg of 4 April 2011, 4:15 PM.

⁶ Decision, p. 15 (last paragraph) and p. 16 (first paragraph).

⁷ Decision, paras. 2, 20 and p. 15.

features and limited scope and purpose of the confirmation hearing allow for the Prosecution to fulfil its article 67(2) and rule 77 disclosure obligations for the purposes of that hearing by disclosing, sufficiently prior to the start of the hearing, the bulk of the materials identified as potentially exculpatory or otherwise material to the Defence's preparation for the confirmation hearing".⁸

4. The Prosecution submits that these obligations go beyond the proper scope of pre-confirmation disclosure set out in the Statute and Rules. In particular, by imposing new extra-statutory duties, the Decision adversely impacts on the Prosecution's independence and authority by forcing it to divert its resources to these newly created duties instead of the investigation and prosecution of other cases.
5. Moreover, given the stark differences in approach to this issue from case to case, it is now appropriate for the Appeals Chamber to examine the process and bring uniformity to the Court. The Decision is consistent only with the approach in the case against *Abu Garda*,⁹ but it deviates significantly from the disclosure and inspection scheme in the cases against *Lubanga*,¹⁰ *Katanga/Ngudjolo*,¹¹ and *Bemba*.¹²
6. Absent appellate intervention, the Prosecution will continue to face uncertainty in each case as to whether extra-statutory disclosure/inspection obligations will be imposed, which hampers its right to intelligently prepare for and marshal its resources in advance of the confirmation hearing. If Chambers continue to require expenditure of significant prosecutorial resources in ways that are not required by the Statute or Rules, that will also improperly restrict the Prosecution's independent authority to undertake other investigations, including those referred by the Security Council or States.

⁸ See ICC-01/04-01/07-621, para. 8; ICC-01/04-01/06-102. para 124; and ICC-01/04-01/06-803. para 154.

⁹ See ICC-02/05-02/09-35 ("*Abu Garda* Disclosure Decision").

¹⁰ See ICC-01/04-01/06-102 ("*Lubanga* Disclosure Decision").

¹¹ See ICC-01/04-01/07-259, ("*Katanga et al* Calendar-establishing Decision"); ICC-01/04-01/07-T-12-ENG ET WT 14-12-2007 ("*Katanga et al* Hearing setting out Disclosure System").

¹² ICC-01/05-01/08-55, para. 68.

7. The issues regarding the inconsistent emerging systems of disclosure meet the criteria for leave to appeal under Article 82(1)(d).

The Issues for which leave to appeal is sought

8. The Prosecution seeks leave to appeal the following two issues:
- Whether the Chamber can order the Prosecution, in carrying out its statutory disclosure obligations, to also write, for the Defence, a concise summary of the content of each item and an explanation as to how each item may be potentially exculpatory or material to the preparation of the defence (“First Issue”). The First Issue concerns whether the Prosecution’s duty of pre-confirmation disclosure, set out in the Statute and Rules, includes a further duty to summarize and explain the potential relevance of non-incriminatory evidence to the defence; if it does not, by what authority may the Chamber require that the Prosecutor undertake these additional burdens.
 - Whether for the purposes of the confirmation hearing the Defence is entitled to inspect “any and all” material that falls within the scope of Rule 77 and to disclosure of “any and all” material covered by Article 67(2) (“Second Issue”). The Second Issue thus concerns, at its core, the scope of the Prosecution’s disclosure duties in light of the confined nature of the confirmation hearing.
9. The two Issues arise out of the Decision and both constitute appealable issues pursuant to Article 82(1)(d).¹³ With respect to the First Issue, the Decision clearly sets out the Prosecution’s duty to summarize each item falling within the scope of

¹³ A similar issue was found to be appealable (see ICC-01/05-01/08-75, para. 63). That issue concerned the question “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”. The Appeals Chamber has held that “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 disagreement of a 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. It may be legal or factual or a mixed one.” ICC-01/04-168 OA3, paras. 9-10. See also, ICC-01/04-01/06-1433 OA11, Dissenting Opinion of Judge Song, para. 4, specifying that “[a] decision “involves” an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

Article 67(2) or Rule 77 and to explain its relevance.¹⁴ With respect to the Second Issue, the Decision requires that prior to the confirmation hearing, the Prosecution allow the Defence to inspect “any remaining books, documents, photographs and other tangible objects in its possession or control which are material to the preparation of the defence, or intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing, or were obtained from or belong to the person”.¹⁵ The Chamber also appears to establish an equivalent rule with respect to the disclosure of all material that is potentially exculpatory: the Chamber ruled that “any and all material [...] covered by Article 67(2) [...] shall be disclosed as soon as practicable”.¹⁶

10. As established by the jurisprudence of the Court, the correctness of a decision is irrelevant to an application for leave to appeal under Article 82(1)(d). The sole question is whether the issues involved in the Decision meet the criteria set out in that provision.¹⁷ Reference to any errors contained in the Decision will only be made when necessary to demonstrate the appealability of the Decision.

The Issues meet the criteria for leave to appeal

11. Chambers of this Court have previously authorized appeals from decisions involving substantive issues of disclosure, recognizing the fundamental importance of disclosure to the rights of the parties and the integrity of the proceedings.¹⁸ The Decision establishes “the system governing disclosure for the purpose of the confirmation hearing in the present case”.¹⁹ A systemic decision of

¹⁴ See in particular Decision, para. 11 and disposition pp. 14-15.

¹⁵ Decision, p. 16 (first paragraph).

¹⁶ Decision, para. 20. Emphasis added.

¹⁷ ICC-02/04-01/05-20-US-Exp, para. 22. Thus, it is immaterial for the purposes of this Application whether the Prosecution is correct in its interpretation of the applicable jurisprudence. The Chamber shall only determine whether the issues arise from the Decision and are capable of affecting the fair and expeditious conduct of the proceedings or the outcome of trial and, if they do, whether appellate intervention will materially advance the proceedings.

¹⁸ See for instance ICC-01/04-01/06-489; ICC-01/04-01/06-166; and ICC-01/04-01/07-365.

¹⁹ Decision, para. 2.

this kind necessarily has far-reaching consequences for the fair and expeditious conduct of the proceedings, including by affecting the rights of the Prosecution through the imposition of a taxing extra-statutory duty, and by adopting a more burdensome rule for pre-confirmation disclosure which is excessive for a confined process aimed at filtering unsubstantiated charges such as the confirmation hearing. Immediate resolution by the Appeals Chamber will materially advance the proceedings.

The First Issue

The First Issue affects the fair conduct of the proceedings

12. "Fairness" within the terms of Article 82(1)(d) incorporates fairness towards the accused, the victims and the Prosecution. It requires respect for the procedural and substantive rights and obligations of all participants.²⁰ In particular, that "means that the Prosecutor must be able to exercise the powers and fulfil the duties listed in Article 54".²¹ Fairness is also linked to the ability of a party to present its case.²² "Purging the pre-trial process for errors consequential to unfairness is designed as a safeguard of the integrity of the proceedings."²³
13. The Decision imposes on the Prosecution a burden that is not contemplated in the Statute, the Rules or the Regulations of the Court, and it does so without differentiating between Article 61(3)(b) material, material disclosed under Article 67(2) and material in the Prosecution's possession or control that is available for inspection under Rule 77. The Decision has no legal foundation for this ruling, but merely states that it is intended to "further improve the current system [of disclosure] in order to facilitate the Defence's assessment of the potentially

²⁰ ICC-01/04-141, para. 48; ICC-02/04-01/05-212, paras. 10-11; ICC-01/04-135-tEN, para. 38. Fairness has also been held to include respect for the principles of equality and adversarial proceedings.

²¹ ICC-01/04-135-tEN, paras. 38-39.

²² ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), para. 24.

²³ *Ibid.*

exculpatory evidence disclosed or subject to inspection” and “enable the Chamber to better perform its rule under rule 121(2)(b) of the Rules to ‘ensure that disclosure takes place under satisfactory conditions’”.²⁴ The Prosecution notes that this proposition does not appear to be based on empirical proof that summaries and analysis – done primarily prior to trial, and only once in advance of a confirmation hearing – were particularly helpful to the Defence or that the absence of summaries and explanations in the *Lubanga* or *Katanga and Ngudjolo* cases adversely affected the fair and expeditious conduct of those confirmation proceedings or the rights of the defence.

14. Further, while the Chamber appears to base its decision mainly on the facilitation of “the Defence’s assessment of the potentially exculpatory evidence disclosed or subject to inspection”, there is no indication that the Chamber considered the rights of the Prosecution. Nor does the Chamber seem to have contemplated the possibility of alternative and less taxing means to reach the results sought by the Decision.²⁵
15. The Prosecution submits that the judicial imposition of highly burdensome duties on the Prosecution which have no basis in the Court’s basic documents in and of itself affects the fairness of the proceedings. The Statute and Rules establish a fair process by carefully crafting a balance between the rights and duties of the parties; an order directing the Prosecution to assume new duties skews the balance that the drafters elected and the States Parties accepted in ratifying the Statute. These additional prosecutorial duties will unavoidably impact on the Prosecution’s ability to present its case by forcing the Prosecution to divert time and resources to the task of preparing the summaries and explanations for the Defence instead of focusing on the effective presentation of its own case at the confirmation hearing.

²⁴ Decision, para. 11.

²⁵ For instance, the Prosecution offered to highlight the key Article 67(2) and Rule 77 materials within the bulk of the materials being disclosed. See T-2, p. 11, l. 20 to p. 12, l. 5.

16. The Decision also intrudes on the independence of the Prosecution in determining the use of its resources. The Prosecution has limited resources with which it must face the challenges of investigating and prosecuting international crimes. How these resources are deployed and redeployed in furtherance of the Prosecution's statutory mandate is a key attribute of prosecutorial independence. Yet the Decision effectively demands an allocation of resources to the performance of tasks ordered by the Chamber that are not required in the Statute or Rules. It thus renders those resources unavailable for carrying out the core functions that the Statute assigns to the Prosecution. As a consequence, it deprives the Prosecution of fairness by restricting its ability to do its job.
17. Nor can such a result be justified by the principle of equality of arms. The Prosecution alone bears the burden of proof. It is manifestly unequal to require the Prosecution to bear its own burden to establish substantial evidence to hold the person for trial and also to bear the burden to affirmatively guide the Defence to understand and fashion a responsive case.
18. In short, by impairing the Prosecution's ability to perform its central role in this and other cases and requiring it to assume Defence functions, the Chamber's imposition of these additional duties affects the fairness of the proceedings.
19. Whether the relevant aspect of the Decision is supported by the Statute and the Rules is a matter that the Appeals Chamber will ultimately decide; however, the huge impact of this aspect of the Decision on the Prosecution's resources, and thus on its abilities to fulfill its core duties, cannot be in dispute.²⁶

²⁶ When the Prosecution sought leave to appeal on a similar issue in a different case, the Single Judge of Pre-Trial Chamber III acknowledge the additional burden imposed by the challenged decision, but found that "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" (see ICC-01/05-01/08-75, paras. 65 and 70). That is simply not the case in this instance.

The First Issue affects the expeditious conduct of the proceedings

20. Chambers of this Court have taken different approaches to whether a party is also required to show that an issue affects the expeditious conduct of proceedings once it has been demonstrated that the issue affects fairness. Trial Chambers II and III have each granted leave to appeal when the issue bore on fairness alone, without making an additional finding that it affected the expeditious conduct of the proceedings.²⁷ Hence, 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).²⁸ Nonetheless, the Prosecution submits that the First Issue in this Decision also affects the expeditious conduct of the proceedings.

21. The expeditious conduct means timely and efficient conduct of proceedings.²⁹ This principle requires that decisions at all stages do not unnecessarily delay the overall determination of responsibility.³⁰ A decision that delays the determination of criminal responsibility for the alleged crimes or compromises the efficiency of the process affects the expeditious conduct.³¹ This includes a delay to the pre-trial

²⁷ ICC-01/04-01/07-2032, para. 28; ICC-01/04-01/07-1859, para. 18; See ICC-01/05-01/08-1169, para.35. But see ICC-01/04-01/06-2463-Conf, para. 27.

²⁸ If proceedings are no longer fair or no longer expeditious, they are no longer "fair and expeditious". Decisions from the ICTY and ICTR, construing the same text as is found in Article 82(1)(d), supports this proposition (see ICC-01/04-141, paras. 49-52).

²⁹ Expeditiousness of proceedings is intimately connected with the efficient administration of international justice. See *Prosecutor v Norman, Kallon and Gbao*, SCSL-2004-07, 08 and 09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003 ("Norman Decision on Application for Stay"): "the Court's obligation to do justice expeditiously and effectively, as well as fairly." (para. 6); "we can only do justice that is expeditious, fair and efficient" (para. 25); *Prosecutor v Milosevic*, IT-02-54-T, Decision on Two Prosecution Requests for Certification of Appeal Against Decision of the Trial Chamber, 6 May 2003, where in relation to each of the two grounds the Chamber noted that the issue "will significantly affect the efficient and expeditious conduct of the proceedings".

³⁰ Delay and promptness of proceedings must be judged in the context of the situations that the Court has jurisdiction over, the complexity of the issues and the circumstances in which investigations take place.

³¹ The prompt determination of responsibility is not just an interest of the defence, but also of the prosecution, victims, and the international community as a whole. See e.g. Norman Decision on Application for Stay, para. 8; and Terrier, Powers of the Trial Chamber in Cassese, Gaeta and Jones (ed) (2002) 1259 at 1264-65.

process that causes the investigatory or pre-trial phase to be unduly long or inefficient or otherwise affects the expeditiousness of later proceedings.³²

22. In addition, in the particular circumstances of this case, the newly imposed duty cannot reasonably be met in the time allotted. Unlike in the *Abu Garda* case (wherein the Prosecution identified 41 items as potentially exculpatory and no items as Rule 77 material)³³, the Prosecution expects to disclose thousands of pages under Rule 77. The Prosecution did not further anticipate the need to differentiate between the various categories of materials in that Rule, so it has not yet determined what percentage specifically is “material to the preparation of the defence”. However, the Prosecution has determined, for example, that the entire collection of German intercepts should be made available to the Defence, and accordingly has already disclosed over 5,800 items of Rule 77 material, comprising of audio files, SMSs, summaries thereof and other associated files items that, generously speaking, might be material to the preparation of the defence. Furthermore, German authorities are transmitting another batch of intercepted communications, which the Prosecution has been informed consists of approximately 1,000 communications, presumably also with associated files. The Prosecution estimates that it will require a minimum of 800 hours to write concise summaries of only these intercepts.³⁴ This estimate excludes all other Rule 77 and potentially exculpatory materials that may be found in the over 7,000 remaining items that comprise the evidence collected for the present case.

23. It should be thus clear that the requirement that the Prosecution annotate disclosed documents with descriptions of their content and potential materiality, , cannot realistically be implemented in a case like the present one, where 13,000 items must be reviewed in order to identify disclosable or inspectable materials.

³² *Prosecutor v Blagojevic et al.*, IT-02-60-PT, Decision on Accused Nikolic's Motion to Order the Prosecution to File Copies of All Witness Statements whom the Prosecution Intends to Call for Trial and Copies of all Exhibits the Prosecution Intends to Tender at Trial, 10 February 2003.

³³ See ICC-02/05-02/09-65-Conf-AnxA and ICC-02/05-02/09-80-Conf-AnxA.

³⁴ Practical experience has shown that it takes about half an hour to summarise a one-page of disclosable information. Hence, to summarize approximately 1,600 pages that would result from a full transcription of the German intercepts would take 800 hours.

24. In addition, the required summaries, although concise, nonetheless must be detailed.³⁵ If it is assumed that the Chamber had in mind the type of summaries provided in the *Abu Garda* case, those summaries provide considerable detail. That also appears to be the expectation of the Defence in this case. In his previously-referenced email (see above, paragraph 2), the suspect's counsel made clear that he expects details in both the summaries of the thousands of items – as he put it, the summaries must be “not just ‘SMS intercept’ or likewise” – and the explanations of the relevance to the preparation of the defence – “not just ‘Mr. Mbarushimana is not mentioned’ or likewise”. It is thus virtually certain that the Defence will initiate litigation, which in turn will delay the case, if it believes the Prosecution's summaries and explanations are inadequate.
25. The impact of an extra-statutory duty of such a magnitude cannot be overstated. Apart from demanding resources that are currently lacking, this requirement unavoidably will slow the pace of disclosure and inspection. If prior disclosure and inspection are essential for the confirmation hearing, by necessary implication the process will require postponement of the hearing date.
26. As the experience accumulated by the Court so far establishes, obstacles or difficulties in the disclosure process directly impact on the expeditiousness of the proceedings.³⁶ Even acting with the utmost diligence and speed, and diverting substantial prosecutorial resources even from other cases, the Prosecution will not be able to produce the full analysis of all the items within the allotted time. Further, diverting its resources to this new and unforeseen task will delay its performance of other core statutory obligations. The Prosecutor notes that decisions impacting on a participant's activities and resources have been viewed

³⁵ See e.g. ICC-02/05-02/09-65-Conf-AnxA and ICC-02/05-02/09-80-Conf-AnxA.

³⁶ See e.g. ICC-01/04-01/06-126, p.3, ICC-01/04-01/07-446, p.5.

as affecting the expeditious conduct of the proceedings for the purposes of deciding whether leave to appeal should be granted.³⁷

27. Although the Decision may ultimately be intended to facilitate the analysis of the disclosed or inspected information by the Defence, and thereby shorten the time that the Defence requires to prepare for the confirmation hearing,³⁸ the additional burden imposed on the Prosecution will delay rather than expedite the confirmation hearing.

Immediate resolution of the First Issue by the Appeals Chamber may materially advance the proceedings

28. Immediate resolution of the First Issue by the Appeals Chamber will advance these proceedings primarily by ensuring that disclosure of evidence pursuant to Articles 61(3)(b) and 67(2) and inspection pursuant to Rule 77 are dealt with correctly on an ongoing basis throughout this case. Legal certainty is essential to the Court's proper functioning, including the ability of the Prosecution to understand its responsibilities and make the necessary plans. In particular, it demands that critical issues going to the heart of the fairness of the Court's proceedings are treated in a uniform manner by all Chambers. Immediate resolution by the Appeals Chamber will "rid [...] the judicial process of *possible mistakes that might taint* [...] the fairness of the proceedings".³⁹ It will also advance the proceedings by ensuring that the parties are in a position to effectively and efficiently allocate their resources for the preparation for (and conduct of) the confirmation hearing.

³⁷ See Situation in Darfur, Sudan, Decision on Request for leave to appeal the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, ICC-02/05-118, 23 January 2008; *Prosecutor v. Katanga*, Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions, ICC-01/04-01/07-116, 19 December 2007

³⁸ See in this context also ICC-01/05-01/08-75, para. 69.

³⁹ *Situation in the DRC*, ICC-01/04-168, 13 July 2006, para. 14 (emphasis added).

29. Further, a core function of the Appeals Chamber is to ensure that the law of the Court evolves in a coherent and standardised manner, and to provide guidance to Pre-Trial and Trial Chambers as to the correct interpretation of the law.⁴⁰ In this sense, “immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination”.⁴¹
30. The different approaches by different Chambers supports a conclusion that immediate resolution would materially advance the proceedings.⁴² This Decision is a clear example of that proposition, since it adopts a process that significantly deviates from the system of disclosure put in place in previous decisions. In the *Lubanga* and the *Katanga and Ngudjolo* cases, Pre-Trial Chamber I required that the Prosecution present a “charging document and list of evidence” linking each item of incriminating evidence to the factual allegation that it would prove and to a specific element of the crime or mode of liability.⁴³ In the *Bemba* case the Chamber required the Prosecution to analyze only the “truly relevant evidence” but not every item in its evidence collection that fell within the scope of Article 67(2) or Rule 77.⁴⁴ And while it is similar in theory to the disclosure requirements in the *Abu Garda* case, even that is not a reasonable precedent, since in this case the disclosable material is potentially up to six times more voluminous than the material in *Abu Garda*.
31. Regardless whether the system provided for by the Decision constitutes an improvement over previous systems or enables the Chamber to better perform its

⁴⁰ See e.g. *Prosecutor v. Krnojelac*, IT-97-25-A, Judgement, 17 September 2003, para. 7: one concern of the Appeals Chamber “is to ensure the development of the Tribunal’s case-law and the standardisation of the applicable law”. See also *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgement, 24 March 2000, para. 113(ii): “The fundamental mandate of the Tribunal to prosecute persons responsible for serious violations of international humanitarian law cannot be achieved if the accused and the Prosecution do not have the assurance of certainty and predictability in the application of the applicable law”.

⁴¹ ICC-01/04-168 OA3, paras. 14 and 18. See also e.g. *Prosecutor v. Blagojević et al*, IT-02-60-PT, Decision on Joint Defence Motions ..., , 10 February 2003.

⁴² See e.g. *Prosecutor v. Milosevic*, IT-02-54-T, Decision on Prosecution's Application for Certification ..., 20 June 2002; *Prosecutor v. Milosevic*, IT-02-54-T, Decision on Prosecution's Application for Certification ..., 29 August 2002.

⁴³ See *Lubanga* Disclosure Decision, note 7 *supra* at p. 11 and *Katanga and Ngudjolo* Calendar-establishing Decision note 8 *supra* at p. 7 and *Katanga and Ngudjolo* Hearing setting out Disclosure System note 8 *supra* at p. 4 lines 14-17.

⁴⁴ ICC-01/05-01/08-55, para. 68.

role,⁴⁵ the fundamental deviation by the Decision from other systems indicate why clear and definitive guidance is required. At a minimum, the Prosecution is entitled to know what disclosure regime will be implemented so that it will not be taken by surprise as it prepares for a confirmation proceeding.

32. Finally, granting leave to appeal may not necessarily cause any delay to the proceedings. As noted previously, there is at least a likelihood of further litigation if the existing regime continues to be applied, in light of the clearly-stated defence understanding that the Prosecution's summaries and explanations will be detailed. Subject to an application and determination on suspensive effect of the disputed portions of the Decision by the Appeals Chamber, the Prosecution may, as an interim solution disclose all necessary information within the time prescribed by the Pre-Trial Chamber, without providing summaries or explanations of the relevance of the disclosed items.

The Second Issue

The Second Issue affects the fair conduct of the proceedings

33. By departing from the "bulk rule" and embracing a more onerous model of disclosure, requiring that the totality of the Article 67(2) or Rule 77 material be disclosed prior to the confirmation hearing, the Decision affects the fairness of the proceedings *vis-à-vis* the Prosecution. As already advanced, matters concerning the scope and breadth of the disclosure duties of the Prosecution have previously been certified for appeal, a natural outcome considering that disclosure-related matters go to the heart of the fairness of the criminal proceedings. The Decision involves a fundamental question, namely the scope of the Prosecution's disclosure duties - in particular the amount of material that must be disclosed to the defence - before the confirmation hearing takes place.

⁴⁵ Decision, para. 11.

34. In addition, fairness towards the Prosecution is affected by the imposition of a more onerous duty, which forces the Prosecution to disclose and/or permit inspection of the *totality* of items in the Prosecution's possession or control that fall within the scope of Rule 77 or Article 67(2). This implies, as in the case of the First Issue, the imposition of additional duties that will adversely affect the Prosecution's ability to present its case. It also implies that the confirmation proceeding can effectively amount to a mini-trial, at least in the sense of triggering the same prosecutorial disclosure obligations – albeit on a much tighter deadline – that will be required for trial. And it suggests that the defence preparation for the confirmation hearing are identical in substance to its later preparation for a trial on the merits. In contrast, the “bulk rule” accommodated the confined nature of the confirmation hearing and accordingly the more limited scope of the disclosure to ensure a fair and expeditious process.

The Second Issue affects the expeditious conduct of the proceedings

35. As with the previous issue, the adoption of a more taxing requirement for the inspection of Rule 77 materials and disclosure of Article 67(2) materials will unavoidably interfere with the expeditious conduct of the proceedings. Disclosure is a time- and resource-consuming exercise of searches, identification, review, and redactions, even without the Chamber's additional direction to write summaries (as to all non-incriminating items) of content and relevance. By moving from a system whereby the Prosecution was obliged only to disclose “the bulk of the materials identified as potentially exculpatory or otherwise material to the Defence's preparation *for the confirmation hearing*”⁴⁶ (emphasis added) to one where the Prosecution must disclose – and summarize and explain -- the *totality* of the material within the scope of Rule 77 or Article 67(2), the Decision directly impacts on the expeditious conduct of the proceedings.

⁴⁶ ICC-01/04-01/06-102, para. 129.

36. The imposition of this more taxing requirement on the Prosecution not only means that more time will be required to complete the disclosure and inspection processes, but also that complying with the Chamber's order will almost unavoidably lead to delays and postponements in the instant proceedings. Even with utmost diligence, the Prosecution cannot guarantee that this unexpected and extra-statutory disclosure and inspection regime can be completed within the time-lines ordered by the Chamber.

Immediate resolution of the Second Issue by the Appeals Chamber may materially advance the proceedings

37. The imposition of different standards pertaining to the scope of the Prosecution's disclosure and inspection duties prior to the confirmation hearing is a troubling development, adversely affecting the legal certainty of the Court's criminal process. What must be disclosed by the Prosecution at the pre-confirmation stage is a fundamental question that should not be answered in different ways by different Chambers, or different judges within the same Chamber. Certifying this issue for appeal will allow that the Appeals Chamber provide the needed certainty through its authoritative determination of the issue, benefiting this and other proceedings before the Court.

38. As with the First Issue, certifying this issue for appeal will not necessarily entail a delay in the proceedings. The Prosecution can disclose and provide inspection of the main Article 67(2)/Rule 77 material that has already been identified and, should the Appeals Chamber consider that complete disclosure is warranted, finalize the process after the ruling is made.

Relief sought

39. For the reasons set out above, the Prosecution requests that the Trial Chamber grant leave to appeal the specific aspects of the Decision identified above.
40. Recognizing that the Statute and Rules permit Pre-Trial Chambers to entrust case management decisions to a Single Judge, the Prosecution further respectfully requests that the Application for Leave to Appeal be considered by the full Chamber. Firstly, the Issues which the Prosecution seeks to appeal arise from a decision of the full Chamber. Secondly, the Issues have broad consequences beyond the everyday case management decisions. Moreover, these are issues that recur steadily; they will affect every upcoming case regardless of which Pre-Trial Chamber is appointed; and it is essential that there be uniformity so that the Prosecution and all suspects can anticipate and prepare. The Prosecution suggests that the appealability of these issues be considered by the three judge Chamber.



Luis Moreno-Ocampo,
Prosecutor

Dated this 5th day of April, 2011
At The Hague, The Netherlands