



Original: **English**

No.: ICC-01/09-01/11

Date: 13 April 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE REPUBLIC OF KENYA

*IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY
AND JOSHUA ARAP SANG*

Public Document

**Prosecution's Application for leave to Appeal the "Decision Setting the Regime for
Evidence Disclosure and Other Related Matters" (ICC-01/09-01/11-44)**

Source: The Office of the Prosecutor

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Introduction

1. On 6 April 2011, the Single Judge of Pre-Trial Chamber II (“Single Judge”) issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters” (“Decision”).¹ The Decision requires, *inter alia*, that in advance of the confirmation hearing² the Prosecution disclose to the Defence:

“all evidence in the Prosecutor's possession or control (pursuant to article 67(2) of the Statute) which he believes shows or tends to show the innocence of the suspects, or to mitigate their alleged guilt, or may affect the credibility of the Prosecutor's evidence; [as well as] all rule 77 material in possession or control of the Prosecutor (incriminatory, exculpatory, or mixed in nature), which is material to the preparation of the Defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or was obtained from or belonged to the person”.³

2. The Single Judge also required that the Prosecution analyze the evidence disclosed to the Defence “to ensur[e] that the Defence is prepared under satisfactory conditions”.⁴ She ruled that:

“the evidence exchanged between the parties [...] must be the subject of a sufficiently detailed legal analysis relating the alleged facts with the constituent elements corresponding to each crime charged [...] This analysis consists of presenting each piece of evidence according to its relevance in relation to the constituent elements of the crimes presented by the Prosecutor in his application under article 58 of the Statute and taken into account by the Chamber in its [decision on the application]. Each piece of evidence must be analyzed - page by page or, where required, paragraph by paragraph - by relating each piece of information contained in that page or paragraph with one or more of the constituent elements of one or more of the crimes with which the person is charged, including the contextual elements of those crimes, as well as the constituent elements of the mode of participation in the offence with which person is charged. The same analysis technique shall apply *mutatis mutandis* to photographs, maps, videodiscs, tangible objects and any other support disclosed by the Prosecutor [...] this analysis should be presented in the form of a summary table which shows the relevance of the

¹ ICC-01/09-01/11-44.

² Decision, para.3.

³ Decision, para.6 (emphasis added).

⁴ Decision, para.23.

evidence presented in relation to the constituent elements of the crimes with which the person is charged.”⁵

3. The Single Judge further ruled that “all evidence disclosed between the parties, shall be communicated to the Chamber, regardless of whether the parties intend to rely on or present the said evidence at the confirmation hearing.”⁶ She imposed this duty in order for her to be in a position to “organize the presentation of evidence by the parties”.⁷
4. The Decision creates extra-statutory duties for the Prosecution that go beyond the proper scope of pre-confirmation disclosure set out in the Statute and Rules. Moreover the Decision significantly deviates from the systems for pre-confirmation disclosure in the *Lubanga*⁸ and *Katanga*⁹ cases that did not require summaries of content and significance, much less disclosure of everything,¹⁰ But nonetheless sufficed to provide for fair and expeditious proceedings. The Decision also deviates from the equivalent disclosure decisions in the *Abu Garda*¹¹ and the *Mbarushimana*¹² cases where the Pre-Trial Chambers demanded that the Prosecution summarize each disclosed item but not that the Chamber receive the disclosed material. Instead, the Decision follows the disclosure system adopted in the *Bemba* case, which has not been followed by any other Chamber of the Court.¹³
5. Given the stark differences in approach to these issues from case to case, it is both appropriate and essential for the Appeals Chamber to bring uniformity to the

⁵ Decision, para.21.

⁶ Decision, para.6. See also paras.11, 21.

⁷ Decision, para.23.

⁸ ICC-01/04-01/06-102.

⁹ ICC-01/04-01/07-259; ICC-01/04-01/07-T-12-ENG ET WT 14-12-2007.

¹⁰In those cases, Pre-Trial Chamber I established the “bulk rule” according to which “the specific 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” 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.

¹¹ ICC-02/05-02/09-35.

¹² ICC-01/04-01/10-87.

¹³ ICC-01/05-01/08-55.

Court. Absent such intervention by the Appeals Chamber, 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.

6. The Decision also adversely impacts on the Prosecution's independence and authority by forcing it to divert its resources to extra-statutory duties instead of the investigation and prosecution of other cases. 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.
7. The Prosecution recently sought leave to appeal the disclosure decision in the *Mbarushimana* case on similar issues.¹⁴ It is desirable that both cases be authorized and appealed concurrently, so that the Appeals Chamber can finally resolve the conflicts and decide these significant issues of pre-confirmation disclosure.

The Issues for which leave to appeal is sought

8. The Prosecution seeks leave to appeal the following three issues:
 - Whether the Statute and Rules impose a duty (beyond the disclosure obligations in Article 67(2) and Rule 77) on the Prosecution to explain to the Defence the potential relevance of non-incriminatory evidence, and if no such duty is found in the Statute and Rules, by what authority may the Chamber require that the Prosecutor undertake this burden ("First Issue").
 - In light of the confined nature of the confirmation hearing, whether the Prosecutor is obliged to disclose to the Defence "all evidence in the

¹⁴ ICC-01/04-01/10-93.

Prosecutor's possession or control" that falls under Article 67(2) or to make available for inspection "all Rule 77 material in possession or control of the Prosecutor ("Second Issue"). The Second Issue thus involves the purpose of the confirmation hearing and the appropriateness of requiring disclosure of all the Prosecutor's evidence in advance of that hearing.

- Whether the Chamber may require the Prosecution to provide to the *Chamber* all the material made available to the Defence (under Article 67(2) and Rule 77) that is not intended to be introduced into evidence at the confirmation hearing ("Third Issue"). This issue addresses the role of the Pre-Trial Chamber in the inter partes disclosure process, and the appropriateness of requiring that all disclosure materials be submitted to the Chamber in advance of the hearing.

9. The three Issues arise out of the Decision¹⁵ and constitute appealable issues pursuant to Article 82(1)(d).¹⁶ They are also critical to the operation of this Court. They address core matters of judicial operation about which the Chambers have taken divergent positions. Given the persistent inconsistencies and the unavailability of any realistic likelihood that there will be review of these issues in an appeal from a final judgment, it is now imperative that the Appeals Chamber be permitted to resolve them.

10. Because of the importance of the Issues to the operation of the Court, the Prosecution further respectfully requests that the Application be considered by the full Chamber.¹⁷ The Issues have broad consequences beyond the everyday case management decisions normally entrusted to the Single Judge. Moreover, these are issues that recur steadily and will affect every upcoming case regardless which Pre-Trial Chamber is appointed.

¹⁵ The First Issues primarily arises out of paras.6 and 21-22 of the Decision; the Second Issue primarily arises out of para.6 of the Decision; the Third Issues primarily arises out of paras.6, 11 and 23 of the Decision.

¹⁶ ICC-01/04-168 OA3, paras. 9-10. See also, ICC-01/04-01/06-1433 OA11, DissOp. Judge Song, para.4.

¹⁷ The Prosecution made an equivalent request also in its recent application for leave to appeal the disclosure decision in the *Mbarushimana* case (ICC-01/04-01/10-93, para.40).

The Issues meet the criteria for leave to appeal

11. 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.¹⁸
12. Rather, an issue is appealable if it meets the statutory criteria for leave to appeal. They include that the “decision ... involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”¹⁹
13. “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 It “means that the Prosecutor must be able to exercise the powers and fulfil the duties listed in Article 54”.²¹ “Purging the pre-trial process for errors consequential to unfairness is designed as a safeguard of the integrity of the proceedings.”²²
14. Fairness is also linked to the ability of a party to present its case.²³ The Issues here implicate fairness to the Prosecution by subjecting it to a substantial burden that, if not authorized in the Statute or Rules, would be manifestly unfair. An issue that implicates the ability of the Prosecution to do its job satisfies that prong of Article 82(1)(d). The Issues, however, also implicate fairness to the Defence, since

¹⁸ ICC-02/04-01/05-20-US-Exp, para. 22. Issues equivalent to the First Issue and the Third Issue were previously found to be appealable (see ICC-01/05-01/08-75, paras. 63 and 46).

¹⁹ Article 82(1)(d).

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 *Ibid.*

²³ ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), para. 24.

these burdens were imposed on the Prosecution to ensure fairness to the suspects at the confirmation hearing.

15. The “expeditious conduct” means timely and efficient conduct of proceedings.²⁴

This principle requires that decisions at all stages do not unnecessarily delay the overall determination of responsibility. A decision that delays the determination of criminal responsibility for the alleged crimes or compromises the efficiency of the process affects the expeditious conduct.²⁵ This includes a delay to the pre-trial process that causes the investigatory or pre-trial phase to be unduly long or inefficient or otherwise affects the expeditiousness of later proceedings.²⁶

16. The Issues presented here also significantly affect the expeditious conduct of the proceedings. Indeed, the Decision is aimed at “streamlining the process of evidence disclosure”.²⁷ However, it requires a time-consuming analysis by the Prosecution: according to the Decision, the Prosecution must analyze -- page by page or even paragraph by paragraph -- each item of information in its possession or control that falls within the scope of Rule 76, Article 67(2) and Rule 77. The Prosecution must also link each item of information in that page or paragraph with one or more of the constituent elements of one or more of the crimes, contextual elements or modes of liability charged.²⁸ And it must “present a consolidated version of [the] in-depth analysis charge of incriminating evidence”, following a model applied in the Bemba case.²⁹

²⁴ Expediency of proceedings is intimately connected with the efficient administration of international justice. See *Prosecutor v Norman et al*, 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, paras. 6 and 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.

²⁵ 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. *Prosecutor v Norman et al*, SCSL-2004-07, para.8; and Terrier, Powers of the Trial Chamber in Cassese, Gaeta and Jones (ed) (2002) 1259 at 1264-65.

²⁶ *Prosecutor v Blagojevic et al.*, IT-02-60-PT, 10 February 2003.

²⁷ Decision, para.23.

²⁸ Decision, para.21.

²⁹ Decision, para.22.

17. In short, the Chamber intended expedition, but at the same time imposed burdens that cannot be met within the time allotted. The Decision therefore could cause delay to the confirmation proceeding to enable the Prosecution to provide broad and descriptive disclosure that may not be required at this stage.
18. Finally, the Prosecution notes that Chambers of this Court have authorized appeals from disclosure decisions, recognizing the fundamental importance of disclosure to the rights of the parties and the integrity of the proceedings.³⁰ The Decision establishes “a system that regulates the disclosure” for the purpose of the confirmation hearing in the present case.³¹ A systemic decision of 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 taxing extra-statutory duties, 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.

The First Issue

Whether the Statute and Rules impose a duty (beyond the disclosure obligations in Article 67(2) and Rule 77) on the Prosecution to explain to the Defence the potential relevance of non-incriminatory evidence, and if no such duty is found in the Statute and Rules, by what authority may the Chamber require that the Prosecutor undertake this burden.

19. The Decision imposes on the Prosecution a burden that is not written in the Statute, the Rules or the Regulations of the Court. Instead, the Decision merely states that it is intended to “streamlining the process of evidence disclosure, thus ensuring that the Defence is prepared under satisfactory conditions, and that the

³⁰ ICC-01/04-01/06-489; ICC-01/04-01/06-166; and ICC-01/04-01/07-365.

³¹ Decision, para.3.

Presiding Judge is in a position to ‘organize the presentation of evidence by the parties’”.³² Though seemingly grounded in fairness, this Chamber’s view does not appear to be based on empirical proof that in-depth analysis done by the Prosecution is particularly helpful to the defence or that its absence in the *Lubanga* or *Katanga* cases adversely affected the Defence rights in those confirmation proceedings. Further, while the Chamber appears to base its Decision mainly on ensuring that “the Defence is prepared under satisfactory conditions”,³³ there is no indication that the Chamber considered fairness vis-à-vis the rights of the Prosecution.

20. The Prosecution submits that the judicial imposition of a highly burdensome duty on the Prosecution that has no clear basis in the Court’s basic documents necessarily 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 that balance. This will unavoidably also impact on the Prosecution’s ability to present its case by forcing it to divert time and resources to the task of analyzing for the Defence “each piece of evidence [...] page by page or, where required, paragraph by paragraph”³⁴ instead of focusing on the effective presentation of its own case at the confirmation hearing.

21. 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 – consistent with the strict parameters of the Statute and Rules -- these resources are deployed and redeployed in furtherance of the Prosecution’s statutory mandate is a key attribute of prosecutorial independence. The Decision effectively demands allocation of resources to the performance of tasks that are

³² Decision, para. 23.

³³ Decision, para. 23.

³⁴ Decision, para. 21.

not required in the Statute or Rules.³⁵ 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 conduct investigations and prosecutions as required by the Statute.

22. 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.

23. As noted previously, the Issue also affects expeditiousness, since it imposes a massive burden that is likely to be impossible to complete within the time allotted. The Decision requires the Prosecution to analyze -- page by page or even paragraph by paragraph, and in writing -- each item of information in its possession or control that falls within the scope of Rule 76, Article 67(2) and Rule 77. It must also link each piece of information on the page or in the paragraph with one or more of the constituent elements of one or more of the crimes, contextual elements or modes of liability charged.³⁶ The Prosecution is further required to “present a consolidated version of [the] in-depth analysis chart of incriminating evidence”, following a model applied in the Bemba case.³⁷

24. In this case³⁸ the Prosecution estimates that the materials disclosable pursuant to the Decision amount to approximately 1,056 documents (a total of 12,947 pages).³⁹

³⁵ 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, among other reasons because the legal foundation of the order itself is challenged.

³⁶ Decision, para. 21.

³⁷ Decision, para. 22.

³⁸ The figures referred to in this paragraph relate to material that must be reviewed and analyzed for the purposes of the case ICC-01/09-01/11. Some materials, especially those relating to the pending admissibility challenge, must be reviewed for the purposes of this case and also the case ICC-01/09-02/11.

Out of these materials approximately 287 documents (8,506 pages) are to be disclosed pursuant to Article 67(2) and 185 documents (7,494 pages) are to be disclosed pursuant to Rule 77. Further, the Prosecution must disclose an additional 212 documents (5,500 pages) in relation to the challenge of admissibility raised by the Government of Kenya. Based on reviews conducted in the *Bemba* case, the Prosecution estimates that in order to comply with the terms of the Decision, it will require a total of 421 review days⁴⁰ -- 206 review days to conduct the disclosure review and 161 review days to produce the in-depth analysis chart.⁴¹

25. Obstacles or difficulties in the disclosure process directly impact on expeditiousness.⁴² Even with the utmost diligence and speed, and diverting substantial resources from other cases, the Prosecution will not be able to produce the full analysis prior to the confirmation hearing. This will by necessary implication require a postponement of the hearing date. Further, diverting its resources to this new and extra-statutory task will delay its performance of other core statutory obligations. Decisions impacting on a party's activities and resources have been viewed as affecting the expeditious conduct of the proceedings for the purposes of deciding whether leave to appeal should be granted.⁴³

The Second Issue

In light of the confined nature of the confirmation hearing, whether the Prosecutor is obliged to disclose to the Defence "all evidence in the Prosecutor's possession or

³⁹ These figures do not include the material in the possession of the Prosecution for which no metadata 3 review has yet been conducted. At this stage the Prosecution is not able to provide concrete figures for those materials, but it believes that they might amount to an additional 1,600 pages.

⁴⁰ A review day is defined as the work product of one reviewer in one working day.

⁴¹ In addition, the Prosecution requires 25 review days to conduct the review for the purposes of the pending admissibility challenge.

⁴² See ICC-01/04-01/06-126, p.3, ICC-01/04-01/07-446, p.5.

⁴³ See ICC-02/05-118; ICC-01/04-01/07-116.

control” that falls under Article 67(2) or to make available for inspection “all Rule 77 material in possession or control of the Prosecutor.

26. By departing from the “bulk rule” adopted in the *Lubanga* and *Katanga* cases,⁴⁴ and requiring disclosure of *all* Article 67(2) or Rule 77 material prior to the confirmation hearing, the Decision affects the fairness of the proceedings *vis-à-vis* the Prosecution. 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.
27. In addition, similar to the First Issue, the imposition of additional duties will unfairly hamper the Prosecution’s ability to prepare and present its case. Imposition at the pre-confirmation stage of a requirement to disclose the *totality* of the Article 67(2) and Rule 77 material, – instead of the balanced “bulk rule” disclosure permitting progressive disclosures as proceedings moved forward – affects the fairness *vis-à-vis* the Prosecution. And by suggesting that such disclosure is essential to the Defence’s ability to prepare for the confirmation, the Decision alters – and thus affects the fairness of – the nature of the confirmation proceeding itself.
28. The onerous requirement of disclosure of all Article 67(2) materials and inspection of Rule 77 materials unavoidably impedes the expeditious conduct of the proceedings. Disclosure is a time- and resource-consuming process of searches, identification, review, and redactions, even without the Chamber’s additional direction to conduct a page by page/paragraph by paragraph analysis of each document. Again, the imposition of this taxing requirement on the Prosecution renders it unavoidable that the Prosecution will need to delay and postpone the confirmation proceeding.

⁴⁴ 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.

The Third Issue

Whether the Chamber may require the Prosecution to provide to the Chamber all the material made available to the Defence (under Article 67(2) and Rule 77) that is not intended to be introduced into evidence at the confirmation hearing.

29. The ruling that “all evidence disclosed between the parties, shall be communicated to the Chamber, regardless of whether the parties intend to rely on or present the said evidence at the confirmation hearing”⁴⁵ adversely affects the parties’ rights. It exceeds the very scope of the Decision, which is to “ensure [...] that the Presiding Judge is in a position to ‘organize the presentation of evidence by the parties’”.⁴⁶
30. Simply put, the Presiding Judge does not need evidence that neither party seeks to introduce in order to organize the presentation of evidence at the confirmation hearing. The Decision thus imposes a burden without a benefit. Alternatively, it suggests that the Chamber is prepared to assume control over both parties’ presentation of their cases, which also implicates the fairness of the proceedings. Under the disclosure regime established by the Statute and followed in the *Lubanga*,⁴⁷ *Katanga*,⁴⁸ *Abu Garda*⁴⁹ and *Mbarushimana*⁵⁰ cases, the parties decide what evidence to offer at the confirmation hearing. By requiring that the Chamber be notified of all disclosed material,⁵¹ the Chamber intrudes into both the Prosecution’s and the Defence’s roles, thus implicating fairness to both parties. The Defence also loses control over any material disclosed under Article 67(2) or provided for inspection under Rule 77; the Decision deprives it of its right to

⁴⁵ Decision, para.6. See also para.11.

⁴⁶ Decision,para.23.

⁴⁷ ICC-01/04-01/06-102, pp.5-6 and paras.38-58.

⁴⁸ ICC-01/04-01/07-259, pp.7,10 and 11; ICC-01/04-01/07-T-12-ENG ET WT 14-12-2007, at p. 8 lines 18-25, p. 9 lines 1-3, P. 9 lines 24-25, P. 10 lines 1-5, P. 17 lines 12-13, P. 17 lines 19-15, P. 18 lines 1-3 and P. 18 lines 12-18.

⁴⁹ ICC-02/05-02/09-35, Partly DissOp Judge Tarfusser,p.21.

⁵⁰ ICC-01/04-01/10-87, para.10.

⁵¹ Decision, paras. 16 and 42-51.

decide which of the disclosed material, if any, should be placed before the Chamber. This is further particularly significant since the Defence has a right not to present evidence at all.

31. The Prosecution acknowledges that the single judge in the *Bemba* case rejected leave to appeal on an identical issue on the finding that the issue did not affect the fairness of the proceedings. That approach, however, in effect found no affect on fairness by considering the merits and concluding that the Decision was not unfair; indeed, he cited a ruling of the European Court of Human Rights as support for the finding of fairness.⁵² But the question before the Chamber is not whether in fact the Issue creates an unfair regime, that is a matter determined only by the Appeals Chamber. The question instead is just whether the Issue has an impact on the fairness of the proceedings.

32. The Prosecution also recognizes the possibility that the Decision may have been intended to require the Prosecution to filter its disclosed evidence in order to avoid registration of vast amounts of materials.⁵³ The Chamber in the *Bemba* case seemed to believe that the Prosecution discloses to the Defence “a considerable volume of evidence for which it is difficult or impossible to comprehend the usefulness for the case”.⁵⁴ If that is the philosophy underlying this Decision, however, it gives rise to additional concerns. The Prosecution’s discharge of its disclosure duties follows the broad approach to disclosure and inspection adopted by the Appeals Chamber.⁵⁵ Rather than restricting disclosure, it leans in favour of disclosure to ensure that persons being prosecuted before the Court receive everything to which they might arguably be entitled. In any event, however, if the purpose of the Decision is in fact to limit disclosure, in that respect it also affects fairness and meets the statutory criteria for appeal.

⁵² See ICC-01/05-01/08-75, para. 57.

⁵³ See prior decision in the *Bemba* case denying leave to appeal on an identical issue (IC-01/05-01/08-75, para.59).

⁵⁴ ICC-01/05-01/08-55, para.67.

⁵⁵ See ICC-01/04-01/06-1433 OA11, paras. 78, 80-81.

33. Finally, the Prosecution recognizes that the Decision is also designed to effect expeditiousness, by enabling the Chamber to organize the parties' presentations. But that too meets the statutory prong: despite the Chamber's best intentions the requirement has greater potential to slow the confirmation proceeding by expanding the universe of evidence that the Chamber on its own accord can decide to consider. If, as indicated by the Decision, the Chamber intends to use all the disclosed materials to "organize the presentation of evidence by the parties",⁵⁶ it follows that it can require the parties to address evidence that neither party intended to offer.

34. A quick review of the *Katanga and Ngudjolo* case illustrates with clarity how expanding the universe of evidence can affect the expeditiousness of the confirmation proceeding. The impact of this aspect of the Decision. In that case, the Prosecution relied at confirmation on 258 documents, comprising 3,380 pages. Prior to the confirmation hearing, however, the Prosecution had disclosed or allowed inspection of 354 additional documents, together comprising 2,918 pages. Had Pre-Trial Chamber I adopted a model similar to that enshrined in the Decision, it would have been faced with a totality of 612 documents comprising 6,298 pages, stemming from one party only; i.e., the Chamber would have doubled the amount of material in the record, to the clear detriment of the expeditious conduct of the proceedings.⁵⁷

Immediate resolution of the Three Issues by the Appeals Chamber may materially advance the proceedings

35. The Appeals Chamber has confirmed that proceedings are "not confined to the proceedings in hand but extends to the proceedings prior and subsequent

⁵⁶ Decision, para. 23.

⁵⁷ The Prosecution further notes that in this case the Prosecution was not obliged to disclose the totality of the Article 67(2) material prior to the confirmation hearing, but only a substantial amount of it (the "bulk rule").

thereto.”⁵⁸ Immediate resolution of all three Issues by the Appeals Chamber will advance these and future proceedings primarily by ensuring that disclosure and inspection (pursuant to Articles 61(3)(b) and 67(2) and Rule 77) are dealt with correctly, and that the Prosecution can undertake its responsibilities, allocate its resources, and make the necessary preparation for the confirmation hearing.

36. Legal certainty is essential to the Court’s proper functioning. 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. 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.⁵⁹ Given the divergent schemes for pre-confirmation disclosure by different Pre-Trial Chambers, subjecting the Prosecution to uncertainty and inconsistency in all its cases, “immediate resolution by the Appeals Chamber” is essential to “settle the matter posing for decision through its authoritative determination”.⁶⁰

37. Thus, the multiplicity of approaches itself substantiates that immediate resolution would materially advance the proceedings.⁶¹ This Decision adopts a process that significantly deviates from the systems of disclosure in previous cases, including one ordered in *Mbarushimana* just 7 days before. In the *Lubanga*⁶² and *Katanga*⁶³ cases, Pre-Trial Chamber I limited pre-trial disclosure to the “bulk” of the relevant material and required that the Prosecution present a “charging document and list

⁵⁸ ICC-01/04-168, para. 12; see also para.17.

⁵⁹ 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 [...] 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”.

⁶⁰ 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.

⁶¹ 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.

⁶² ICC-01/04-01/06-102, p.11.

⁶³ ICC-01/04-01/07-259, p.7; ICC-01/04-01/07-T-12-ENG ET WT 14-12-2007, p. 4 lines 14-17.

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. In the *Abu Garda*⁶⁴ and *Mbarushimana*⁶⁵ cases, the respective Pre-Trial Chambers required the Prosecution not only to conduct an in-depth analysis of all materials disclosed or inspected, but also ruled that the Prosecution shall prepare and disclose “a concise summary of the content” of each such piece of information. Contrary to the Decision in this case, none of the above decisions provided that the Chamber would also get access to disclosed material not relied on by either party at the confirmation hearing. Moreover, if charges are confirmed this process could unnecessarily encumber the trial record, since Rule 121(10) provides that the Pre-Trial Chamber record (containing vast amounts of material) is automatically transmitted to the Trial Chamber, diminishing its efficiency.⁶⁶

38. The fundamental deviation by the Decision from other systems, and their deviations from each other, indicates why clear and definitive guidance is required. The Prosecution cannot be confronted with different disclosure regimes in each case, depending on the composition of the Chamber. Certifying this issue for appeal will allow the Appeals Chamber to provide much-needed certainty.

39. Immediate resolution by the Appeals Chamber is also justified by the fact that a similar application is currently pending before Pre-Trial Chamber I in the *Mbarushimana* case.⁶⁷ If leave to appeal in that case is also granted – as they both should be, in tandem -- the Appeals Chamber can shed light on the disclosure system for confirmation hearings.

40. Finally, granting leave to appeal may not necessarily cause any delay to the proceedings. The Prosecution can disclose and provide inspection of the bulk of

⁶⁴ ICC-02/05-02/09-35, paras.15-16.

⁶⁵ ICC-01/04-01/10-87, para.11.

⁶⁶ The complications from such a process are evident in the Bemba trial proceedings, where it has been difficult to differentiate the materials that are actually being offered as trial exhibits from the entirety of the materials disclosed to the Defence and thereby automatically registered in the pre-trial record. See ICC-01/05-01/08-965.

⁶⁷ ICC-01/04-01/10-93.

Article 67(2)/Rule 77 material and, should the Appeals Chamber consider that complete disclosure, in-depth analysis and communication to the Chamber is warranted, the Prosecution can finalize the process after the ruling is made.

Relief sought

41. For the reasons set out above, the Prosecution requests that the Pre-Trial Chamber grant leave to appeal the specific aspects of the Decision identified above. As stated previously, the Prosecution also requests that the Application be considered by the full Chamber.



Luis Moreno-Ocampo,
Prosecutor

Dated this 13th day of April, 2011
At The Hague, The Netherlands