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PRE-TRIAL CHAMBER II

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

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

Response on behalf of Henry Kiprono Kosgey to the 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: Defence

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

The Office of the Prosecutor

Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Counsel for William Samoei Ruto:
Kioko Kilukumi Musau, Joseph
Kipchumba Kigen-Katwa and Kithure
Kindiki
Counsel for Henry Kiprono Kosgey:
George Odinga Oraro, Julius Kemboy
and Allan Kosgey
Counsel for Joshua Arap Sang:
Joseph Kipchumba Kigen-Katwa, Joel
Kimutai Bosek and Philemon K.B. Koech

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

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Amicus Curiae

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Mr. Didier Daniel Preira, Deputy
Registrar

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I. INTRODUCTION

1. The Prosecution's Application for Leave to Appeal the 'Decision setting the regime for evidence disclosure and other related matters' should be rejected on the grounds that:
 - (1) None of the three issues raised by the Prosecution affect the fairness and expeditiousness of the proceedings;
 - (2) An immediate decision of the Appeals Chamber on any of the three issues raised would not materially advance the proceedings; and
 - (3) The second issue does not even arise from the Decision.

II. PROCEDURAL BACKGROUND

2. On 13 April 2011, the Honourable Single Judge issued her 'Decision setting the regime for evidence disclosure and other related matters' (the Impugned Decision).¹
3. On 13 April 2011, the Prosecution filed the 'Prosecution's Application for leave to Appeal the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters" (ICC-01/09-02/11-48)' (the Request),² in which the Prosecution sought leave to appeal in relation to three issues:

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

¹ ICC-01/09-01/11-44.

² ICC-01/09-01/11-50.

Statute and Rules, by what authority may the Chamber require that the Prosecutor undertake this burden.

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

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. 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.

4. Under Regulation 65 of the Regulations of the Court, participants may file a response within three days of notification of an application for leave to appeal. Since Regulation 33 of the Regulations of the Court specifies that neither the date of notification nor the date of filing are included in the calculation of a time limit, and in light of the fact that the date for submission would therefore fall on a Saturday, the deadline for filing a response to the Prosecution Request is Monday 21 April 2011.

5. The Defence for Henry Kirpono Kosgey hereby files this Response in accordance with Regulations 33 and 65.

III. THE LAW

6. As recently confirmed by the Single Judge in the *Kenyatta et al case*, the right to file an interlocutory appeal under article 82(1)(d) of the Statute is an exceptional remedy,³ which is only available if the party satisfies the Chamber that:⁴

- (1) The decision involves an “issue” that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and

- (2) In the opinion of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

IV. SUBMISSIONS

7. The Defence opposes the Prosecution’s Request on the following grounds:

- (1) None of the three issues raised by the Prosecution affect the fairness and expeditiousness of the proceedings;

- (2) An immediate decision of the Appeals Chamber on any of the three issues raised would not materially advance the proceedings; and

³ *Prosecutor v. Kenyatta et al*, ‘Decision on the “Prosecution’s Application for Leave to Appeal the Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali”’, ICC-01/09-02/11-27, 1 April 2011 at para 6.

⁴ At para 6.

(3) The second issue does not even arise from the Decision.

8. Each will be dealt with in turn.

i. None of the three issues raised by the Prosecution affect the fairness and expeditiousness of the proceedings

The first issue

9. The obligation to explain the relevance of material disclosed by the Prosecution is a fundamental component of the Prosecutor's mandate and duties under article 54(1) of the Statute which imposes upon him an obligation to investigate incriminating and exculpatory circumstances equally. Contrary to the Prosecution's arguments, the Decision imposes no extra-statutory duties upon the Prosecution, and rather than disturbing the balance between the parties, promotes such a balance by ensuring that the limited resources of the Defence are not overwhelmed by the disclosure of potentially irrelevant materials. Moreover, it is consistent with the drafters' intention that there should be a mechanism to neutralise the advantages the Prosecution enjoys by virtue of its earlier access to information and evidence.⁵

10. It must also be noted that the Decision applies equally to the Defence, and as such, the Prosecution cannot claim to be procedurally disadvantaged vis-à-vis the Defence.

11. Finally, Trial Chamber II has also underscored in the *Katanga and Ngudjolo* case that the Prosecution cannot rely upon the administrative workload

⁵ United Nations General Assembly, "Draft Report of the Preparatory Committee", 23 August 1996, A/AC.249/L.15, p. 14 cited with approval by the ICC Appeals Chamber in *Prosecutor v. Katanga and Ngudjolo*, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial", ICC-01/04-01/07-2288, 16 July 2010, at para 75.

occasioned by their compliance with a decision to establish that the fairness and expeditiousness of the proceedings are affected.⁶ The fact that the Prosecution has collected approximately 1056 documents as part of its investigation to date simply underscores the need for the Prosecution to identify the relevance of this material, and why it should be considered to fall under article 67(2) or rule 77, as opposed to providing a mass of documentation to the Defence, who, without any guidance as to its relevance, will be unable to conduct their pre-confirmation preparation in an expeditious manner.

The second issue

12. The Prosecution's arguments concerning the impact of this issue on the fairness and expeditiousness of the proceedings are based on the incorrect assumption that the bulk rule permits the Prosecution to leave to one side a portion of the evidence within its control during the confirmation phase and not analyse it, seek protective measures in connection with it, or ultimately disclose it. To the contrary, the bulk rule clearly requires the Prosecution to review all materials within its control with a view to determining what should be disclosed, and what information may need to be withheld as a result of protective measures.

13. The bulk rule, as devised in the *Lubanga* case, recognized that the right of the defence to a fair confirmation hearing would not be compromised if it

⁶ "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 Rules⁴⁴, 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". 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'", ICC-01/04-01/07-1088, 1 May 2009 at para 36.

did not receive *all* article 67(2) and rule 77 materials prior to the confirmation hearing due to the necessity to consider protective measures.⁷ However, Judge Steiner emphatically rejected the argument of the Prosecution in the *Lubanga* case that its disclosure obligations were linked to the phase of the proceedings, and were therefore reduced in scope during the confirmation phase:⁸

In the view of the single judge, the scope of the Prosecution's obligation under article 67 (2) of the Statute does not depend on the evidence the Prosecution intends to use at the confirmation. Instead, it depends only on the charges against Thomas Lubanga Dyilo and the factual allegations which support them. Hence, the single judge considers that whenever new charges, or new factual allegations supporting the current charges, are alleged, the scope of the Prosecution's obligation to disclose potentially exculpatory materials will widen.

The single judge disagrees with the Prosecution's view that the bulk of the disclosure of potentially exculpatory materials must take place after the confirmation hearing.

Considering that the Prosecution acknowledges that, unless the charges are amended, the material scope of its obligation to disclose potentially exculpatory materials is the same before and after the confirmation hearing, the single judge is of the view that a literal interpretation of article 67 (2) of the Statute leaves no doubt as to the requirement for the Prosecution to discharge this obligation "as soon as practicable". The fact that, as a result of the Defence's decision not to reveal its defence before the confirmation hearing, the Prosecution might identify some

⁷ *Prosecutor v. Lubanga*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", ICC-01/04-01/06-568, 13 October 2006, at para 49.

⁸ *Prosecutor v. Lubanga*, 'Decision On The Final System Of Disclosure And The Establishment Of A Timetable', ICC-01/04-01/06-102, at para 123-127.

materials as exculpatory after such a hearing can only be an exception and not the general rule.

Furthermore, in the view of the single judge, the period between the initial appearance of Thomas Lubanga Dyilo on 20 March 2006 and 27 June 2006, the date scheduled for the confirmation hearing, makes it fully practicable to disclose most of the potentially exculpatory materials in the Prosecution's possession or control before the confirmation hearing.

Moreover, although following the procedure provided for in articles 54 (3)(e), 72 or 93 of the Statute might delay disclosure of some potentially exculpatory materials, the single judge considers that (i) such instances can only amount to a fraction of the overall potentially exculpatory materials in the possession or control of the Prosecution; and (ii) the period between the initial appearance of Thomas Lubanga Dyilo and the above-scheduled date of the confirmation hearing enables the Prosecution to undertake the necessary efforts to undergo such a procedure and, if necessary, to file applications pursuant to rule 81 (4) of the Rules.

14. The bulk rule is a test for determining whether the defendant's right to a fair confirmation hearing had been respected in light of the non-disclosure of materials which need to be withheld for legitimate protective reasons: it does *not* give the OTP license to withhold key exculpatory documents which are within its possession during the pre-confirmation phase, and which are not subject to protective measures.

15. From the above, it is clear that the Impugned Decision should not materially increase or affect the Prosecution's existing duties or workload in relation to its duty under article 67(2) to disclose all exculpatory

material, which is not subject to protective measures, as soon as practicable.

The third issue

16. In arguing that providing all the disclosure materials to the Chamber improperly intrudes upon the role of the parties and thereby affects the fairness of the proceedings, the Prosecution is directly contradicting the submissions it recently made in the *Mbarushimana* case that granting the Chamber access to evidence and materials other than those which the Prosecution intends to rely upon at the confirmation hearing *does not* affect either the fairness or expeditiousness of the proceedings, for the purposes of article 82(1)(d) of the Statute.⁹ In that case, the Prosecution cited several domestic authorities which permit Judges to review materials in order to determine whether such materials are privileged, in support of the Prosecutor's argument that filing material before the Chamber does not affect the fairness of the proceedings.¹⁰

17. Judge Kaul has also rejected identical Prosecution arguments in the *Bemba* case that this system would infringe upon the Prosecution's statutory powers:¹¹

The Single Judge, however, does not consider that the Prosecutor will lose control over "his case" as it will be still for the Prosecutor to identify, investigate and present the case as well as adduce relevant evidence in court. The fact that all the evidence disclosed between the parties will be communicated to the Chamber, in the opinion of the

⁹ *Prosecutor v. Mbarushimana*, 'Prosecution's Response to the Defence "Application for leave to appeal Pre-Trial Chamber I's 'Decision on Prosecution's request for a review of potentially privileged material' of 4 March 2011", ICC-01/04-01/10-83, 18 March 2011 at para 26.

¹⁰ *Prosecutor v. Mbarushimana*, 'Prosecution's Response to the "Defence Request for suspensive effect of ICC-01/04-01/10-67"', ICC-01/04-01/10-73, 9 March 2011, at para 13, and footnote 19.

¹¹ *Prosecutor v. Bemba*, 'Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure', 25 August 2008, at para 49.

Single Judge, will not interfere with the Prosecutor's right and duty to investigate independently pursuant to article 54 of the Statute, gather all the evidence he deems relevant for the case and comply with his obligations stemming from article 61(3) of the Statute and rule 121(3) of the Rules.

18. The Prosecution has also failed in the current case to adduce any compelling arguments as to how this issue significantly affects the expeditiousness of the proceedings, merely proffering at paragraph 33 that the Decision may:

... slow the confirmation proceeding by expanding the universe of evidence that the Chamber on its own accord can decision 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”, it follows that it can require the parties to address evidence that neither party intended to offer.

19. Applying this reasoning, the mere fact that material is put before the Chamber for the purposes of adjudicating upon protective measure requests could result in the Chamber requesting the party to call that material as evidence. Such an analysis relies upon mere speculation and cannot properly form the basis of an application for leave to appeal.

Conclusion

20. In short, the Defence contends that there is nothing in any of the issues raised by the Prosecution which is liable to have a significant impact on the fairness of the proceedings. Indeed, were the appeal by the Prosecution to succeed, the net result would be to render the proceedings wholly unfair to the Defence.

21. Moreover, rejecting the Prosecutor's request would not have a significant impact on the expeditiousness of the proceedings. With its large investigation team, highly adept lawyers and state of the art case analysis software, the Prosecution should be presumed to have conducted a relatively focussed initial investigation which would now allow it to provide a prompt disclosure of and accompanying explanation as to the relevance of salient documents.

ii. An immediate decision of the Appeals Chamber would not materially advance the proceedings

22. As the Prosecution has not sought suspensive effect of the Decision, it will be required to implement the disclosure regime as soon as practicable. However, based on the regulatory time limits for interlocutory appeals and the practice of the ICC thus far, it is not feasible to expect that the Appeals Chamber will be in a position to issue a judgment on the matter for at least three months. The Appeals Chamber's ultimate decision will therefore not materially advance the proceedings as the Prosecution would have disclosed a substantial component of the materials by this date.

23. For this reason, the Single Judge in the *Banda and Jerbo* case declined to certify an issue for appeal in circumstances in which the Appeals Chamber would be unlikely to be able to adjudicate the issue sufficiently in advance of the confirmation hearing to have a material impact on the proceedings.¹²

24. Alternatively, if the Prosecution were to subsequently seek suspensive effect of the Decision, deferring the implementation of this obligation until

¹² *Prosecutor v. Banda and Jerbo*, 'Decision on the "Defence Application for leave to Appeal the 'Decision on the Defence Application pursuant to article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of Sudan' of 17 November 2010", ICC-02/05-03/09-109, 30 November 2010, at para 5 and 6.

the Appeals Chamber renders its judgment would severely hinder Defence preparation. In the event that the Appeals Chamber upholds the Single Judge's decision, the date of the confirmation hearing will likely be delayed, as the Prosecution would have to re-disclose all materials which did not include such analyses. Sending these issues for appellate scrutiny would thus inhibit rather than advance the proceedings.

25. Indeed, it is for these reasons that the Prosecution has argued in the *Mbarushimana* case that an appellate decision concerning the correct mechanisms for identifying and reviewing privileged materials would not materially advance the proceedings, because it "would interrupt the review and disclosure process and therefore unnecessarily delay the proceedings. It would almost inevitably result in the postponement of the confirmation hearing."¹³

26. Finally, since the Prosecution's arguments concerning the third issue are based on mere speculation, an appellate resolution would only be of assistance in the event that such concerns crystallised at a later stage in the proceedings. A resolution by the Appeals Chamber at the present time would not therefore materially advance the proceedings.

iii. The second issue does not arise from the Decision

27. The Defence accept that the first and third issues may arise from the Decision, however the Prosecution's Request in relation to the second issue fails to satisfy the initial threshold of article 82(1)(d), namely, the

¹³ 'Prosecution's Response to the Defence "Application for leave to appeal Pre-Trial Chamber I's 'Decision on Prosecution's request for a review of potentially privileged material' of 4 March 2011", ICC-01/04-01/10-83, 18 March 2011 at para 37.

Prosecution has failed to identify a subject or topic the resolution of which was necessary for the judicial determination in question.¹⁴

28. In its Request, the Prosecution argued that “[b]y departing from the “bulk rule” adopted in the *Lubanga* and *Katanga* cases, 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”.¹⁵ In so doing, the Prosecutor has misconstrued both the terms of the Impugned Decision and the bulk rule.

29. In the Decision, the Single Judge underscored that “[w]ith respect to the different requests related to protective measures for witnesses including redactions, the Single Judge wishes to make clear that any such request must be submitted as soon as practicable, but no later than the date which shall be specified in a calendar to be issued in due course.”¹⁶

30. The Single Judge therefore clearly recognized that the duty to disclose the material in question is subject to the Prosecution’s right to request protective measures, such as an order that witness statements be redacted or that summaries are disclosed in lieu of actual statements. It is therefore incorrect for the Prosecution to argue that the Decision requires them to disclose *all* materials.

31. Moreover, in ruling that the Prosecution was obliged to disclose all materials within its possession and control, apart from the components which may be redacted or withheld, the Single Judge was merely applying the Appeals Chamber’s ruling from the *Katanga* case (which was issued in

¹⁴ Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC/01/04-168 at para. 9.

¹⁵ At para 26.

¹⁶ At para 13.

the context of the pre-confirmation phase) that “[t]he overriding principle is that full disclosure should be made. It must always be borne in mind that the authorisation of non-disclosure of information is the exception to this general rule”.¹⁷

32. The Prosecution’s contention that the Decision departs from the bulk rule is also based on an error. As set out above, the bulk rule is a test for determining whether the defendant’s right to a fair confirmation hearing had been respected in light of the non-disclosure of materials which need to be withheld for legitimate protective reasons: it is expressly *not* a mechanism by which the OTP can withhold key exculpatory documents within its possession during the pre-confirmation phase.

33. The second issue does not therefore reveal criteria for disclosure which markedly depart from the practice applied, to date, by all Pre-Trial Chambers of the International Criminal Court. The second issue does not, therefore, arise out of the Impugned Decision and should be dismissed for this reason alone.

V. RELIEF REQUESTED

34. For the reasons set out above, the Defence requests that the Chamber dismiss the Prosecution’s Request.

¹⁷ *Prosecutor v. Katanga*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, ICC-01/04-01/07-475 at para 70.



George Odinga Oraro

On behalf of Henry Kiprono Kosgey

Dated this 15th April 2011

At The Hague, The Netherlands