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**International
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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 Response to the 'Defence Request for Disclosure of Article 67(2)
and Rule 77 Materials'**

Source: Office of the Prosecutor

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

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I. Introduction

- a) On 10 June 2011, the Defence filed the “Defence Request for Disclosure of Article 67(2) and Rule 77 Materials”¹ (Defence Request), in which it moves the Pre-Trial Chamber (“Chamber”) to have the Prosecution disclose, at this stage of the proceedings, material identified according to its own criteria.²
2. The Prosecution has met, and will continue to strive to meet, all of its disclosure obligations pursuant to the provisions of the Rome Statute (Statute) and relevant rulings from the Chamber. In the Prosecution’s view, the breadth of the Defence’s Request is legally unfounded and unreasonable in light of the current proceedings and the disclosure schedule imposed by the Chamber. A confirmation hearing is neither a trial nor a rehearsal of the trial. It is a mechanism to filter out unfounded criminal allegations. Accordingly, the Defence’s reliance upon decisions of various Trial Chambers to substantiate its right to the disclosure of certain categories of information at the pre-confirmation stage is misplaced. Decisions from Trial Chambers, as they relate to the rights of the accused to evidence at trial, do not apply automatically at this early stage of the proceedings.³ In fact, contrary to the Defence’s contention that the stage of a case has no bearing on the scope of the Prosecutor’s disclosure duties, the Appeals Chamber has clearly distinguished the two stages in terms of the Prosecution’s disclosure obligations.⁴

¹ ICC-01/09-01/11-117.

² The Defence also requests from the Chamber that the Prosecution’s deadline for filing its response to the Defence’s Request be shortened arguing that the Prosecution had prior notice of the content of, and the claims contained in the Defence Request from an earlier *inter partes* communication. However, since the Chamber did not order the Prosecution to expedite its briefing, this issue is now moot.

³ *Ibid*, paras. 6, 25.

⁴ *Prosecutor v. Lubanga*, 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

II. Procedural History

3. On 6 April 2011, the Single Judge established a calendar and the principles governing disclosure between the parties in preparation of the confirmation hearing.⁵
4. On 3 May 2011, the Defence sent two letters to the Prosecution demanding disclosure of various categories of information: the names and positions of co-perpetrators and physical perpetrators, information on the collection of evidence, information on contacts between and the credibility of witnesses and intermediaries, and information from the *Kenyatta et al.* case.
5. On 9 May 2011, the Prosecution filed the “Prosecution’s First Communication of Disclosure of Incriminating Evidence for Disclosure to the Defence”,⁶ and addressed the letters sent by the Defence by indicating therein that “the disclosure of all relevant materials will be subject to the disclosure calendar set by the Chamber and subject to any further modifications that the Chamber may make”.⁷
6. On 10 June 2011, the Defence filed the Defence Request, in which it reiterated its request - already formulated in its 3 May correspondence - to order the

Witness Statements”, ICC-01/04-01/07-475 (OA), para. 68 (footnote omitted) (“it may be permissible to withhold the disclosure of certain information from the Defence prior to the hearing to confirm the charges that could not be withheld prior to trial”).

⁵ “Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties”, ICC-01/09-01/11-44 (‘Second Decision’).

⁶ ICC-01/09-01/11-80.

⁷ Ibid, para. 7.

Prosecution to disclose the material identified in its prior *inter partes* communication.⁸

III. Submissions

7. The Prosecution opposes the Defence request in its entirety for the following reasons:

- a) The Prosecution has met, and will continue to strive to meet, all of its disclosure obligations pursuant to the provisions of the Rome Statute (Statute), the Rules of Procedure and Evidence (Rules) and relevant rulings from the Chamber.
- b) The Defence's blanket approach to 'categories' of disclosure is overbroad, legally without merit and unreasonable for the expeditious conduct of the confirmation hearing. Moreover, the Defence's reliance on disclosure orders and rulings in other cases is not persuasive because they were issued in case-specific situations and/or at trial. They are neither binding nor appropriately applied *mutatis mutandis* to the present proceedings.

A. The Prosecution has and will continue to meet its disclosure obligations in accordance with relevant statutory provisions and directions from the Chamber

8. The Prosecution's duties vis-à-vis disclosure are guided by the provisions in the Statute and Rules, and more particularly by rulings from the Chamber.

⁸ The categories of information the disclosure of which is requested by the Defence are the same categories requested in the two letters, copies of which were attached as annexes 2 and 3 to the Defence's Request.

9. The Prosecution takes its disclosure obligations seriously. It has met, and will continue to strive to meet, those obligations to the best of its ability and resources.

10. In fact, pursuant to the Second Decision, the Prosecutor has thus far:

- a) on 9 May 2011, disclosed 58 incriminating documents collected prior to 15 December 2010 for which no redactions were needed, four days earlier than the first deadline imposed by the Single Judge;⁹
- b) on 23 May 2011, submitted its proposals for redactions for documents collected prior to 15 December 2010;¹⁰
- c) on 23 May 2011, disclosed seven incriminating documents collected prior to 15 December 2010 for which no redactions were needed;¹¹
- d) on 23 May 2011, disclosed 34 documents collected prior to 15 December 2010 identified as potentially material to the defence under Rule 77 and for which no redactions were needed;¹²
- e) on 3 June 2011, disclosed six incriminating documents collected between 15 December 2010 and 31 March 2011 and for which no redactions were needed;¹³ and

⁹ ICC-01/09-01/11-80. The Second Decision ordered disclosure of materials collected by the Prosecution prior to 15 December 2010 and for which no redactions were required by 13 May 2011. This same deadline, also applicable to the Prosecution's submission of redaction proposals for documents collected by the Prosecution prior to 15 December 2010 and for which redactions were required, was subsequently extended until 23 May 2011 (see ICC-01/09-01/11-82).

¹⁰ ICC-01/09-01/11-96-Conf-Exp (public redacted version ICC-01/09-01/11-96-Red).

¹¹ *Ibid*, para. 5.

¹² *Ibid*, para. 5.

¹³ ICC-01/09-01/11-104.

f) on 3 June 2011, submitted its proposals for redactions for documents collected between 15 December 2010 and 31 March 2011.¹⁴

11. Materials collected in this case and in the case of the *Prosecution v Muthaura et al.* are registered and kept by the Prosecution in the same database. The complete collection is subject to regular searches and reviews in order to identify relevant materials for disclosure in both cases. The Prosecution is currently examining the collection for potentially exculpatory materials under Article 67(2) of the Statute. Upon completion of such review, the Prosecution will disclose, as soon as practicable, any material identified under that category.

B. The Defence's approach to 'categories' of disclosure is overbroad, legally without merit and unreasonable for the expeditious conduct of the confirmation hearing

12. In its Request, the Defence attempts to expand the scope of the Prosecution's disclosure obligations at the confirmation hearing well beyond what was intended by the Statute, the Rules or this Chamber.¹⁵ The Defence's blanket approach and far-reaching disclosure request are contrary to the ICC law and practice. They are also not feasible.

13. First, a confirmation hearing is neither a trial nor a rehearsal of the trial. It is a mechanism to filter out unfounded criminal allegations. Accordingly, the Defence's reliance upon decisions of various Trial Chambers to substantiate its right to the disclosure of certain categories of information at the pre-confirmation stage is misplaced. As the Prosecution stressed in another recent submission,¹⁶

¹⁴ ICC-01/09-01/11-105-Conf-Exp (public redacted version ICC-01/09-01/11-105-Red).

¹⁵ ICC-01/09-01/11-44, *passim*.

¹⁶ ICC-01/09-01/11-134.

decisions from Trial Chambers, as they relate to the rights of the accused to evidence at trial, do not apply automatically at this early stage of the proceedings.¹⁷ In fact, contrary to the Defence's contention that the stage of a case has no bearing on the scope of the Prosecutor's disclosure duties, the Appeals Chamber has clearly distinguished the two stages in terms of the Prosecution's disclosure obligations.¹⁸

14. Second, the Defence's proposal that the Prosecution disclose any and all material that satisfy criteria dictated by the Defence has no legal basis and contravenes the basic principle enshrined in the Statute that proceedings before this Court be conducted in an expeditious manner. For that reason, the Defence's blanket approach to disclosure of material considered relevant in cases at the trial stage is neither justifiable nor feasible in light of the scope of the current proceedings and the deadlines set in preparation of them. That is not to say that items of evidence with the attributes listed by the defence will not warrant disclosure. To comply with its disclosure obligations in the most diligent manner, the Prosecution examines and will continue to examine evidence contextually, based on its understanding of the case as a whole.¹⁹
15. Likewise, the request for disclosure of extensive information regarding intermediaries based on the *Lubanga* and *Katanga* cases is entirely misplaced.

¹⁷ *Ibid*, paras. 6, 25.

¹⁸ *Prosecutor v. Lubanga*, 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", ICC-01/04-01/07-475 (OA), para. 68 (footnote omitted) ("it may be permissible to withhold the disclosure of certain information from the Defence prior to the hearing to confirm the charges that could not be withheld prior to trial").

¹⁹ *Prosecutor v. Lubanga*, Judgment on Appeal against Oral Disclosure, ICC-01/04-01/06-1433 OA11, 11 July 2008, para. 36 ("the Prosecutor's ordinarily unfettered duty to disclose must necessarily be based, inter alia, on the Prosecutor's understanding of the case as a whole, including what is known or anticipated about possible defence(s).").

Even disregarding the critical difference between the pre-confirmation and trial stages, in those cases the Chambers directed the disclosure of information on intermediaries only because of case-specific developments and only after specific allegations were made against intermediaries.²⁰ No allegations have been made in this case. Moreover, requiring disclosure of intermediaries' information at this stage would harm the ongoing investigations and deter witnesses from cooperating.

16. The legality of the collection of evidence also was an issue that arose in case-specific circumstances. The Single Judge ordered the Prosecution to identify to the Defence in the *Lubanga* case those items seized in a search and seizure operation declared unlawful by a court in the DRC.²¹ Likewise, Pre-Trial Chamber I ordered disclosure of relevant information in the *Mbarushimana* case following an application challenging the admissibility of a telephone log.²² No similar or comparable situation applies here. Information related to the source and chain of custody of materials is included in the metadata provided to the Defence at the time of disclosure in accordance with the eCourt protocol. Absent specific cause to question or doubt the legality of the collection of particular items relied upon by the Prosecution, the disclosure of information generally concerning the manner in which evidence is collected and the methods used by the Prosecution is not merited.

C. The Defence's legal arguments are incorrect

17. Finally, the Prosecution submits that the Defence's legal authorities it cites in its motion do not support its argument.

²⁰ ICC-01/04-01/06-2434-Red2, see *inter alia* paras 141 and 147.

²¹ ICC-01/04-01/06-649, page 6.

²² ICC-01/04-01/10-87, para. 15.

18. For instance, the Defence based its argument that the Prosecution should provide certain information about other perpetrators of the crime on the Single Judge's implicit recognition in the *Katanga & Ngudjolo* case that the Defence must be able to ascertain "the identity of the co-perpetrators and their contributions, and the role played by other members in the common plan (i.e. physical perpetrators and their respective contributions)".²³ In fact, in that case, the Single Judge rejected the *Katanga* Defence's request for more information on co-perpetrators to prepare adequately for its defence. In doing so, the Single Judge determined that the Prosecution provided sufficient information about the co-perpetrators. Of note, what the judge found to be sufficient information regarding perpetrators for the Defence's preparation of its case is narrower in scope than what the Defence in this current case is requesting.²⁴ Last, in the *Katanga* case, the Single Judge did not specify, in terms of content or type of information, what was necessary for disclosure; the Single Judge merely concluded whether the information contained in the charging document was sufficient or not pursuant to Articles 61 and 67.²⁵

19. Furthermore, the Defence also claims that decisions of the *ad hoc* tribunals shed light on "the minimum type of information which must be disclosed to the Defence" because the obligation to disclose the identity of co-perpetrators is "more heightened at the ICC".²⁶ However, in the aforementioned *Katanga & Ngudjolo* case, cited by the Defence in its motion one paragraph earlier, the Single

²³ ICC-01/09-01/11-117, at para. 17, citing "Decision on the Defences' Motions Regarding the Document Containing the Charges", ICC-01/04-01/07-648.

²⁴ See ICC-01/04-01/07-648, paras. 23-27, holding that the Prosecution's submissions in ICC-01/04-01/07-584-Anx1A sufficed in light of the Prosecution's obligations pursuant to article 61 of the Statute.

²⁵ As cited by the Defence: ICC-01/04-01/07-648, paras. 23-26

²⁶ ICC-01/09-01/11-117, at para. 18

Judge held that because of the differences between Article 25(3)(a) and the *ad hoc* tribunals' endorsement of co-perpetration based on joint criminal enterprise, such jurisprudence is not directly applicable.²⁷ The rulings in the *Katanga & Ngudjolo* case seem to contradict the Defence's assertion that the Prosecution should "at the very least, identify the group to which these persons [the physical perpetrators] belonged."²⁸ The Single Judge held that "in the present case ... there is no need to specify in the Prosecution's Amended Charging Document to which of the two relevant groups the physical perpetrators of each of the relevant crimes belonged, although this may well be necessary in the determination of whether charges are to be confirmed."²⁹

VI. Relief Requested

20. For the above reasons, the Prosecution requests the Chamber to reject the relief requested in the Defence Request for Disclosure of Article 67(2) and Rule 77 Materials.



Luis Moreno-Ocampo
Prosecutor

Dated this 4th day of July 2011

At The Hague, The Netherlands

²⁷ ICC-01/04-01/07-648, paras. 17-18.

²⁸ ICC-01/09-01/11-17 at para. 14.

²⁹ ICC-01/04-01/07-648 at para 27.