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**International
Criminal
Court**

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

Date: **22 June 2016**

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

*IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG*

Public

Public redacted version of "Prosecution's Application for leave to Appeal the
"Decision on Disclosure of Information related to Prosecution Intermediaries"
(ICC-01/09-01/11-904-Conf)", 5 September 2013, ICC-01/09-01/11-910-Conf

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Introduction

1. On 4 September 2013, Trial Chamber V(A) (“Chamber”), issued a Decision requiring the Prosecution to disclose to the Defence pursuant to Rule 77 certain categories of information in relation to all the intermediaries that the Prosecution has used during its investigations (“Decision”).¹
2. The Prosecution seeks leave to appeal this Decision on two issues that relate to the process that the Chamber adopted in determining the materiality of the information to the preparation of the Defence and in particular the consistency of that process with the jurisprudence of the Appeals Chamber. The Prosecution is of the view that the two issues clearly arise from the Decision and that they meet the criteria for leave to appeal under Article 82(1)(d).
3. With a view to avoiding any undue impact of this application on the expeditious conduct of the proceeding, the Prosecution nevertheless undertakes to disclose to the Defence all the information referred to in the Decision that relates to the first two witnesses that are presently anticipated to give evidence in this case.

Pursuant to Regulation 23*bis*(2), the Prosecution files this application confidentially, as it relates to the Decision that is subject to the same classification.

Confidentiality

4. This Application is filed as confidential since it seeks leave to appeal against a confidential decision and references other confidential sources.²

¹ ICC-01/09-01/11-904-Conf.

² RoC 23 *bis* (2).

Submissions

5. Pursuant to Article 82(1)(d), the Prosecution seeks leave to appeal the Decision on the following two issues:
- Whether the Chamber, when ordering disclosure pursuant to Rule 77, correctly took into consideration the specific circumstances of the case and made case-by-case assessments of the materiality of the information sought by the Defence (“First Issue”).
 - Whether the Chamber correctly applied the Defence’s burden to establish *prima facie* the materiality of the requested information, or whether the Chamber instead applied a presumption of materiality with respect to certain categories of information (“Second Issue”).

A. The Issues arise from the Decision

6. The Chamber correctly refers to the jurisprudence of the Appeals Chamber when stating that “[t]he assessment of materiality is to be conducted on a *prima facie* basis which, [...] places ‘a low burden on the defence’” and that “the determination of what is ‘material’ will depend upon the specific circumstances of each case.”³ In this context, Trial Chamber I in the *Lubanga* case has found that “disclosure of [the identities of intermediaries] to the defence is to be decided on an individual-by-individual basis, rather than by way of general, undifferentiated approach”.⁴ Similarly, Trial Chamber II in the *Katanga et al.* case found that “[b]earing in mind the exceptional nature of every redaction measure, the Chamber intends to examine on a case-by-case basis any applications to institute, maintain, or lift the redaction of the names of intermediaries that might be

³ Decision, para.27, quoting ICC-02/05-03/09-501, paras.38, 42; and ICC-01/04-01/06-1433, paras.77-78.

⁴ ICC-01/04-01/06-2434-Red, para.139(a)-(b).

brought before the Chamber. In this particular case, the Chamber will not deal with all the intermediaries in general".⁵

7. In this case, the Chamber, despite its correct statement in law, appears to have taken a different approach in practice: it ruled on the materiality of information in the abstract, without assessing the specific circumstances of the case and without making findings on an intermediary-by-intermediary basis, as demonstrated by the following findings of the Chamber:

- The Chamber found that "knowledge of the existence of an intermediary, and their status as such, may in fact be material to defence investigations. For example, in combination with other information, knowledge of the involvement of an intermediary provides a context which could be used to guide certain lines of defence investigation. Similarly, the Chamber finds that knowing the number of witnesses with whom an intermediary had contact may provide an important context to the assessment of the testimony of those witnesses."⁶ On that basis, the Chamber concluded that "a list of all Prosecution intermediaries, to be identified by pseudonym, who had contact with trial witnesses in this case and indicating for each intermediary the trial witness(es) with whom they had contact, is of prima facie materiality to the preparation of the defence in this case".⁷
- In addition, the Chamber found that "dates of contact - particularly where an intermediary has had contact with more than one witness - may reveal a pattern which would prompt certain lines of defence inquiry. The Chamber therefore finds that, to the extent that such information is in the

⁵ ICC-01/04-01/07-T-150-Red-ENG CT WT 07-06-2010, p.6, lines 14-19.

⁶ Decision, para.48.

⁷ Decision, para.49.

possession or control of the Prosecution, it is *prima facie* material to the preparation of the defence”.⁸

- Next, the Chamber found that in its view, “[REDACTED].⁹
- Finally, the Chamber ruled that [REDACTED]¹⁰ [...] [REDACTED].¹¹

8. None of these findings is in any way related to the circumstances of the case or to individual intermediaries. Moreover, at no point does the Chamber examine how the defence arguments are relevant to meet the burden to establish *prima facie* materiality in the circumstances of this case and with respect to individual intermediaries. To the contrary, the Chamber’s findings are made as if materiality of specific types of information (that related to intermediaries and their interactions with witnesses) was to be assumed as a general principle regardless of the specific facts of the case and the circumstances surrounding each individual intermediary. This is in stark contrast with the Chamber’s analysis of the Defence request for the disclosure of the identities of intermediaries, where it found that the mere assertion of the Defence that it had a ‘clear interest’ in this information was unsupported by their submissions. In this instance, the Chamber insisted, correctly in the Prosecutions’s submission, on the existence of specific facts or circumstances upon which determinations of materiality might be made on a case by case basis.

9. That the issues arise from the Decision is further demonstrated by the different approach that the Chamber took with respect to [REDACTED], which the Prosecution does not challenge. In that case, and contrary to the above findings, the Chamber did indeed take into consideration the specific circumstances

⁸ Decision, para.52.

⁹ Decision, paras.59-60.

¹⁰ Decision, para.61.

¹¹ Decision, para.62.

applicable to the witness. The Chamber “[REDACTED]”.¹² Based on these specific circumstances, the Chamber found that *prima facie* materiality has been established for the disclosure of the identity of Witness [REDACTED],¹³ as well as for copies of all correspondence between the Prosecution and Witness [REDACTED].

B. The Issues meet the criteria for leave to appeal under Article 82(1)(d)

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.¹⁴

(i) *The Issues affect the fairness of the proceedings*

11. The Prosecution submits that fairness requires that the procedural and substantive rights and obligations of all participants – including the Prosecution – be respected.¹⁵ The concept of fairness is also directly linked to the ability of a party to present its case.¹⁶

12. The approach taken by the Decision, as identified in the two Issues, is inconsistent with the two-step approach identified by the Appeals Chamber in its most recent judgment on Rule 77.¹⁷ Under the terms of the Decision, the Defence is effectively relieved of its burden to demonstrate *prima facie* materiality of information that is highly sensitive for the Prosecution’s on-going investigations, as well as for the protection of persons at risk on account of their interaction with the Prosecution.

¹² Decision, para.45.

¹³ Decision, para.63.

¹⁴ ICC-02/04-01/05-20-US-Exp, para. 22 (unsealed pursuant to ICC-02/04-01/05-52); ICC-01/04-01/07-2032, paras.19 and 20.

¹⁵ ICC-01/04-141, para.48; ICC-02/04-01/05-212, paras.10-11. This has been held to include respect for the norms of a fair trial (ICC-01/04-168, para.11), equality and the principle of adversarial proceedings (*Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, para. 38), and fairness to the Prosecution (ICC-01/04-135-tEN, paras.38-39; ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), para.24).

¹⁶ ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), 11 July 2006, para.24.

¹⁷ ICC-02/05-03/09-501, para.1.

Instead, it creates a presumption of disclosability of certain types of information regardless of the specific circumstances of the case and of the individual intermediaries. This is unfair, first, because it effectively establishes an automatic entitlement of access to highly sensitive information the confidentiality of which is deemed essential by the Prosecution for the successful carrying out of operations; second, because it reverses the Defence's burden to demonstrate materiality to a burden of the Prosecution to demonstrate that any of the conditions for restrictions of disclosure under Rules 81 and 82 apply; and third because it places on the

13. Because the Decision requires the Prosecution to disclose significant amounts of sensitive information regarding the manner in which it conducts its investigations, this will unfairly impact on the Prosecution's ability to conduct further investigations. Moreover, the Prosecution's duty under the Decision to disclose sensitive security related information may force the Prosecution to withdraw evidence, as the Prosecution will under no circumstances be able to present evidence if it cannot manage the security risks to persons interacting with the Prosecution. The withdrawal of evidence is the ultimate measure that the Prosecution has at its disposal in order to prevent persons cooperating with it from being harmed.

14. Moreover, although the Decision allows the Prosecution to apply for protective measures in respect of information to be disclosed,¹⁸ it places an unfair burden on the Prosecution to make such a showing for all information related to intermediaries, and not just on that part for which the Defence has met its burden to demonstrate *prima facie* materiality. In sum, the Prosecution now faces the extremely onerous task of identifying broad categories of information it is now required to disclose, assessing the potential security risks posed by the disclosure of each individual item, applying redactions to the relevant information therein,

¹⁸ Decision, p.28.

and bearing the burden of justifying these redactions or other protective measures that may be required.

15. Finally, in this case that has a history of witness interference additional disclosure of sensitive information may easily result in further Prosecution evidence being tampered with or more persons being interfered with as a result of their interaction with the Prosecution.

(ii) *The Issues affect the expeditious conduct of the proceedings*

16. The Decision may cause delays in the trial proceedings that are scheduled to commence in a few days' time. In order to comply with the taxing duties imposed on it, the Prosecution may be forced to seek postponements of the testimony of the witnesses that are scheduled to testify. With a view to avoiding any delay from the outset, the Prosecution undertakes to disclose any information referred to in the Decision that relates to its first two witnesses it will call. However, this approach is not feasible with respect to all witnesses who are scheduled to give evidence in the near future.

17. Moreover, the loss of evidence that may take place as a result of disclosure referred to above may require the Prosecution to find alternative evidence and to disclose it to the Defence sufficiently in advance for it to prepare. This may also result in a delay of the proceedings, especially since on-going investigations will be more difficult if all of the information referred to in the decision must be disclosed.

(iii) *The Issues affect the outcome of the trial*

18. An issue affects the outcome of the trial, among others, when it "directly relates with the amount and type of evidence that the Chamber will have to consider

when making its final determination in accordance with Article 74".¹⁹ As found by Trial Chamber II, introducing certain particular pieces of incriminating evidence into the trial may have an impact on its outcome.²⁰

19. The Prosecution submits that the potential loss of evidence, its increased difficulties to conduct on-going investigations as well as the possibility of further witness interference as a result of the disclosure of sensitive information affects the outcome of the trial.

(iv) Immediate resolution by the Appeals Chamber of the Issues materially advances the proceedings.

20. Immediate resolution of the Issues will materially advance the proceedings. Unless the Appeals Chamber intervenes with an "authoritative determination" at this stage of the proceedings, there is a risk that as a result of the disclosure obligation imposed by the Decision, the Prosecution's ability to present its case is significantly affected. The impact that the Decision may have on the Prosecution's loss of evidence, its ability to conduct further investigations and the additional tampering of witnesses cannot be remedied through an appeal against the Trial Chamber's decision pursuant to Article 74. In that sense, removing doubts about the correctness of the Decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings.²¹ Otherwise, a wrong decision on an issue in the context of Article 82(1)(d), unless remedied on appeal, will entail a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process.²²

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

¹⁹ ICC-01/05-01/08-1169, para.35.

²⁰ ICC-01/04-01/07-2404, para.30.

²¹ ICC-01/04-168, paras. 14-15, 18.

²² ICC-01/04-168 OA3, para. 16.

thereto.”²³ Because the Chamber’s assessment of materiality is detached from the circumstances of the case and the individual intermediaries and effectively reliefs the Defence of its burden to establish *prima facie* disclosability, the types of information referred to in the Decision will automatically be disclosable for all intermediaries. If this principle is upheld by other Chambers, this will have serious implications on how the Prosecution uses intermediaries and conducts its investigations in other cases and situations. In this sense, allowing the Appeals Chamber to intervene at this stage will also assist to advance all other proceedings before this Court.²⁴

Relief sought

22. For the reasons set out above, the Prosecution requests that the Trial Chamber grant leave to appeal the two Issues identified above.



Fatou Bensouda,
Prosecutor

Dated this 22nd day of June, 2016
At The Hague, The Netherlands

²³ ICC-01/04-168, para. 12; see also para. 17: “The term ‘proceedings’ in the second part of article 82(1)(d) of the Statute can have no different meaning from the one ascribed to it in the first part of the paragraph, encompassing the proceedings in their entirety.”

²⁴ While the impact of immediate resolution of the issue on other proceedings may not itself be sufficient to sustain a grant of leave under Article 82(1)(d), it is a factor to be weighed in deciding whether to grant leave. Pre-Trial Chamber II has previously recognised that in certain circumstances, the potential impact on other proceedings may be “invoked as an additional argument in support of the alleged significant impact on the current proceedings” See ICC-01/05-20-US-Exp, para. 54 (unsealed pursuant to ICC-02/04-01/05-52). See also *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecutor’s Motion for Certification to Appeal the Trial Chamber’s Decisions on Protection of Defence Witnesses, 28 September 2005, para. 5; *Prosecutor v Mrksic*, IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003.