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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. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI
KENYATTA AND MOHAMMED HUSSEIN ALI

PUBLIC

**Defence Response to the “Prosecution’s Application for leave to Appeal the
“Decision Setting the Regime for Evidence Disclosure and Other Related
Matters””**

Source: Defence

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

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Introduction

1. On 6 April 2011, the Single Judge of the Pre-Trial Chamber, issued ‘Decision Setting the Regime for Evidence Disclosure and Other Related Matters’ (the “Decision”).¹
2. 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” (the “Request”),² in which the Prosecution sought leave to appeal in relation to:
 - (a) 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 (the “First Issue”).
 - (b) Whether the Prosecutor is obliged to disclose to the Defence for the confirmation hearing “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”). 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.
 - (c) Whether the Chamber may require the Prosecution to provide to the *Chamber* all the material made available to the Defence (under Article 67(2)

¹ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 6 April 2011, ICC-01/09-02/11-48

² Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution’s Application for Leave to Appeal the Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 13 April 2011, ICC-01/09-02/11-55

and Rule 77) that is not intended to be introduced into evidence at the confirmation hearing (the “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.³

3. The Defence respectfully requests the Pre-Trial Chamber to dismiss the Prosecution Request for Leave to Appeal on the grounds that:

- (a) The first and second issues do not arise from the decision; and
- (b) The first, second and third issues do not affect the fair and expeditious conduct of the proceedings, and an immediate decision of the Appeals Chamber will not advance the proceedings.

Submissions

4. The right to file an interlocutory appeal under Article 82(1)(d) of the Statute is an exceptional remedy,⁴ which is only available if the party satisfies the Chamber that:⁵

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

³ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution’s Application for Leave to Appeal the Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 13 April 2011, ICC-01/09-02/11-55, at para. 8.

⁴ Pre-Trial Chamber II, Prosecutor v Muthaura 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.

⁵ Pre-Trial Chamber II, Prosecutor v. Muthaura 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.

and

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

The first and second issues do not arise from the Decision

5. The Prosecution's Request in relation to the first and second issue fails to satisfy the initial threshold of Article 82(1)(d), namely, the Prosecution has not identified a subject or topic, the resolution of which was necessary for the judicial determination in question.⁶

The first issue

6. The Prosecution's request for leave to appeal in relation to this issue is predicated on the erroneous belief that the Prosecution is not obliged to identify the relevance of Article 67(2) and Rule 77 materials as part of its duties under the Statute and Rules. In so doing, the Prosecution has failed to take into consideration its statutory mandate under Article 54(1).
7. Article 54(1) of the Statute imposes an identical obligation to investigate incriminating and exculpatory circumstances equally, and in so doing, to fully respect the rights of persons under the Statute, including the right of the defence under Article 67(2) and Rule 77 to receive exculpatory materials and material which is relevant to its preparation.
8. The obligation of the Prosecutor to disclose exculpatory materials has been held by the ad hoc Tribunals to be of equal importance as the obligation to

⁶ The Appeals Chamber, The Situation in the Democratic Republic of the Congo, 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.

investigate incriminating materials.⁷ This obligation is of heightened importance at the ICC in light of the fact that Article 54(1) imposes an obligation to investigate incriminating and exculpatory circumstances equally. This obligation resulted from the awareness of the drafters of the Rome Statute that the Defence “would not be able to wield similar authority [as the Prosecutor] to enlist support or assistance with a view to preparing the defence as broadly, if necessary. This is one area where the civil law approach of an investigative judge showed the way to a workable solution to this problem, which relates essentially to potential inequality of recourse between parties.”⁸

9. The ICC Appeals Chamber has thus confirmed that the Prosecutor’s broad investigative powers directly translate to broad disclosure obligations:

“The drafting history of the Statute supports the notion that the Prosecutor's disclosure obligations to the accused are linked to the Prosecutor's role in conducting the investigation, and stem from the Prosecutor's obligation to investigate incriminating and exonerating circumstances equally under article 54 (1) (a) of the Statute.”⁹

10. The ICC Appeals Chamber has also held that “[it] follows from article 54 (1) of the Statute that the investigatory activities of the Prosecutor must be directed towards the identification of evidence that can eventually be presented in open court, in order to establish the truth and to assess whether there is criminal

⁷ Kordic and Cerkez Appeal Judgement of 17 December 2004, at para. 242: “The significance of the fulfilment of the duty placed upon the Prosecution by virtue of Rule 68 has been stressed by the Appeals Chamber, and the obligation to disclose under Rule 68 has been considered as important as the obligation to prosecute. Indeed, the rationale behind Rule 68 is that the responsibility for disclosing exculpatory evidence rests solely on the Prosecution, and that the determination as to what material meets Rule 68 disclosure requirements falls within the Prosecution’s discretion.”

⁸ M. Bergsmo P. Krueger, ‘Duties and Powers of the Prosecutor’ page 715-725 in Commentary on the Rome Statute of the International Criminal Court (O. Triffterer ed. 1999) Nomos Verlagsgesellschaft, at page. 716 para. 2.

⁹ Appeals Chamber, 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”, 16 July 2010, ICC-01/04-01/07-2288, at para. 75, citing at footnote 125 “United Nations General Assembly, “Draft Report of the Preparatory Committee”, 23 August 1996, A/AC.249/L.15, p. 14: “Given the fact that the Prosecutor would have earlier access to evidence and other information, it was recommended that a mechanism be found that would neutralize any potential advantage that the Prosecution may have over the defence”.

responsibility under the Statute.”¹⁰ The Defence will not be in a position to use the fruits of the Prosecutor’s investigation unless it can clearly understand why such materials should be considered to be material of benefit to the preparation of the Defence as exculpatory evidence.

11. The Prosecutor’s duty to search for and disclose exculpatory information exists independently of the defence, in the sense that the Prosecution has a positive duty to identify information which could be useful for the defence, based on its understanding of the case.¹¹ Since the Prosecutor has spent far more time than the Defence in investigating this case, it is best placed to identify how each item fits within the factual matrix of the case and can thus be considered to fall under Rule 77 and Article 67(2).
12. The duty to investigate, identify and disclose Article 67(2) and Rule 77 materials is not met by simply transmitting thousands of documents without any explanation or analysis as to why the defence should apply its limited time and resources to a particular document. In this connection, the ICTR Appeals Chamber has also clearly stated that the Prosecution cannot use electronic databases to ‘bury’ or hide relevant and exculpatory materials under thousands of irrelevant documents.¹² The OTP must verify that the material being disclosed meets the requirements of relevance or is exculpatory.
13. Providing the defence with information concerning the relevance of non-incriminating materials is thus a fundamental aspect of the prosecutor’s mandate under Article 54(1) of the Statute, and as such, the first issue does not arise from the Decision.

¹⁰ Appeals Chamber, Prosecutor v Lubanga, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008" 21 October 2008, ICC-01/04-01/06-1486, at para. 41.

¹¹ Appeals Chamber, Prosecutor v Lubanga, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01-04-01-06-1433, at para. 36.

¹² Prosecutor v. Karemera, Decision On Interlocutory Appeal Regarding The Role Of The Prosecutor’s Electronic Disclosure Suite In Discharging Disclosure Obligations, 30 June 2006, at paras 10, 13 and 15.

The second issue

14. 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”.¹³ In so doing, the Prosecutor has misconstrued both the terms of the Impugned Decision and the bulk rule.
15. 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.”¹⁴
16. 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, for example, an order that they be able to redact, or disclose summaries in lieu of statements. It is therefore patently incorrect for the Prosecution to argue that the Decision requires them to disclose *all* materials.
17. Moreover, in ruling that the Prosecution was obliged to disclose all materials within its possession and control, part from passages which would be redacted or documents withheld, the Single Judge was merely applying the Appeals Chamber’s ruling from the *Katanga* case (which was issued in the context of the pre-confirmation phase) that “[t]he overriding principle is that full disclosure

¹³ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution’s Application for Leave to Appeal the Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 13 April 2011, ICC-01/09-02/11-55, at para. 26.

¹⁴ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 6 April 2011, ICC-01/09-02/11-48, at para. 13.

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", ¹⁵

18. The issue thus does not arise from the Decision, as it has already been resolved by prior appellate decision.
19. The Prosecution's contention that the Decision departs from the bulk rule is also based on a false premise concerning their interpretation of the bulk rule.
20. The bulk rule, as originated in the Lubanga case, essentially recognized that the right of the defence to a fair confirmation hearing would not be compromised if it did not receive all exculpatory information in the possession or control of the Prosecutor prior to the confirmation hearing because:
 - (a) *Firstly*, the Appeals Chamber had recognized that the Prosecution had a power to continue its investigations after the confirmation hearing, and as a result, some exculpatory information might only be collected after the hearing;¹⁶
 - (b) *Secondly*, the Pre-Trial Chamber has a duty to balance the rights of the defence with the protection and security of witnesses, and, taking into consideration the limited role of the confirmation hearing, some article 54(3)(e) or exculpatory/rule 77 information might need to be temporarily withheld from the Defence during the pre-confirmation phase, which could not be withheld during the trial stage.¹⁷ For example, the defence might not be provided with identifying features of witnesses, which could be exculpatory, or could be disclosed summaries in lieu of statements; and

¹⁵ The Appeals Chamber, 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.

¹⁶ The Appeals Chamber, 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", 13 October 2006, ICC-01/04-01/06-568, at para 49.

¹⁷ "Prosecutor v. Lubanga, Transcripts 10 November 2006 at page 31 lines 4-11.

- (c) *Thirdly*, if the Defence exercises its right of silence during the confirmation phase, the Prosecution might only become aware of the exculpatory nature of a particular issue, once the Defence has chosen to reveal its strategy.

21. Thus, whilst Judge Steiner recognized in the Lubanga case that the disclosure of some article 67(2) or rule 77 materials might need to be deferred due to the exigencies of protective measures, she emphatically rejected the argument of the Prosecution that its disclosure obligations were linked to the phase of the proceedings, and were therefore reduced in scope during the confirmation phase:

“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 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."¹⁸

22. The drafting history of the Statute further demonstrates that the Prosecutor's duty to disclose exculpatory material is independent of its duty to disclose the information it intends to utilize at the confirmation hearing.¹⁹

¹⁸ Pre-Trial Chamber II, Prosecutor v. Lubanga, 'Decision On The Final System Of Disclosure And The Establishment Of A Timetable', 15 May 2006, ICC-01/04-01/06-102, at para. 123-127.

¹⁹ The "Prosecutor is obliged to disclose all "other materials which are potentially exculpatory or otherwise material to Defence preparations", even if she does not intend to present them at the confirmation hearing." K. Ambos and D Miller Structure and Function of the Confirmation Procedure before the ICC from a Comparative Perspective' International Criminal Law Review 7 (2007) 335-360, at page 343.

See also H. Brady 'Disclosure of Evidence' The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence (Roy Lee ed., 2001) who observes that whereas there is no need for

23. The bulk rule was 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.

The issues do not affect the fairness and expeditiousness of the proceedings

The first issue

24. As set out above, 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. 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 resources of the defence are not overwhelmed by the disclosure of potentially irrelevant materials.
25. It is also 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.²⁰
26. It also bears noting that the Decision applies equally to the Defence, and as such, the Prosecution cannot claim to be procedurally disadvantaged vis-a-vis the Defence.

the Prosecutor to present or inform the person of all of its inculpatory evidence at the pre-confirmation stage, (page 407) the "Prosecutor's obligation to disclose *exculpatory* evidence is in a different category. By virtue of article 67 paragraph 2, the Prosecutor has an obligation to disclose such evidence "as soon as practicable"." (page 407 fn 16)

²⁰ 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", 16 July 2010, ICC-01/04-01/07-2288, at para. 75.

27. Finally, Trial Chamber II has also underscored in the Katanga and Ngudjolo case that the Prosecution cannot rely upon the resulting administrative workload occasioned by their compliance with a decision to establish the fairness and expeditiousness of the proceedings.²¹ The fact that due to the investigative zeal of the prosecution, it has collected approximately 980 documents 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 dumping the mass of documentation on the Defence, who, without any guidance as to the relevance, may be unable to conduct their pre-confirmation preparation in an expeditious manner.

The second issue

28. The Prosecution's arguments concerning the impact of this issue on the fairness and expeditiousness of the proceedings are based on the patently incorrect assumption that the bulk rule permits the Prosecution to simply sit on a portion of the evidence within its control during the confirmation phase and neither analyse it, seek protective measures in connection with it, or ultimately disclose it.
29. To the contrary, as set out *supra*, the bulk rule 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.

²¹ "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". Trial Chamber II, Prosecutor v Katanga and Ngudjolo, 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'", 1 May 2009, ICC-01/04-01/07-1088, at para. 36.

30. The present Decision thus does not increase or affect the Prosecution's existing duties or workload as concerns 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

31. 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.²²
32. Indeed, the Prosecution cited several domestic authorities, which permit the Judges to review materials in order to determine whether such materials are privileged, in support of the Prosecutor's argument that filing of material before the Chamber does not affect the fairness of the proceedings.²³
33. Judge Kaul has also rejected identical Prosecution arguments in the Bemba case that this system would infringe upon the Prosecution's statutory powers:

“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

²² Pre-Trial Chamber I, 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", 18 March 2011, ICC-01/04-01/10-83, at para. 26.

²³ Pre-Trial Chamber I, Prosecutor v. Mbarushimana, 'Prosecution's Response to the "Defence Request for suspensive effect of ICC-01/04-01/10-67"', 9 March 2011, ICC-01/04-01/10-73, at para. 13, and footnote 19.

the parties will be communicated to the Chamber, in the opinion of the 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.”²⁴

34. The Prosecution has also failed to adduce any concrete arguments as to how this issue significantly affects the expeditiousness of the proceedings. The Prosecution has only proffered the complete non-sequitur 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”.
35. By this logic – 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 a hypothesis lacks a causal nexus and relies upon pure speculation, which cannot possible form the basis of a request for leave to appeal.

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

36. If the Prosecution does not seek and obtain suspensive effect of the Decision, it will be required to implement the disclosure regime as soon as practicable

²⁴ Pre-Trial Chamber III, Prosecutor v. Bemba, ‘Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure’, 25 August 2008, ICC-01/05-01/85-75 at para. 49.

37. 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 position to issue a judgment until at least three months. The Appeals Chamber's ultimate decision will not materially advance the proceedings, as the Prosecution would have disclosed a substantial component of the materials by this date.
38. 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.²⁵
39. Alternatively, if the Prosecution does obtain suspensive effect of the Decision, since the preparation of analyses concerning the relevance of disclosure is a fundamental aspect of the Prosecution's disclosure obligations, deferring the implementation of this obligation until 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 retard rather than advance the proceedings.
40. In fact, the Prosecution has even 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

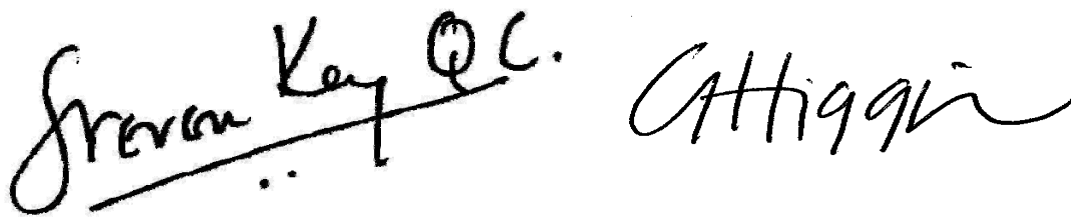
²⁵ Pre-Trial Chamber I, Prosecutor v. Banda and Jerbo, 'Decision on the "Defence Application for leave to Appeal the 'Decision on the Defence Application pursuant to article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of Sudan', 30 December 2010, ICC-02/05-03/09-109, at paras. 5 and 6.

unnecessarily delay the proceedings. It would almost inevitably result in the postponement of the confirmation hearing.”²⁶

41. Finally, since the Prosecution’s arguments concerning the third issue are speculative, an appellate resolution would only be required if and when such concerns crystallised.

Relief Sought

42. For the reasons set out above, the Defence respectfully requests the Single Judge of the Pre-Trial Chamber to reject the “Prosecution’s Application for leave to Appeal the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”.



Steven Kay QC and Gillian Higgins
On behalf of Uhuru Muigai Kenyatta



Karim A. A. Khan QC
On behalf of Francis Kirimi Muthaura

²⁶ Pre-Trial Chamber I, Prosecutor v Callixte Mbaruahimana, ‘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”, 18 March 2011, ICC-01/04-01/10-83, at para. 37.



Evans Monari and Gershom Otachi
On behalf of Mohammed Hussein Ali

Dated this Monday 18 April 2011

The Hague, Netherlands