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

Public Document

Prosecution's Application for leave to Appeal the "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" (ICC-01/09-02/11)

Source: The Office of the Prosecutor

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Introduction

1. The Prosecution requested that it be allowed to disclose its witnesses' statements only after the Court makes a final decision on the admissibility challenge brought by the Government of Kenya. The Prosecution's explained that its right to a fair trial is affected by such decision. " The Prosecution may be required to prove its case at a confirmation hearing notwithstanding that it has been deprived of the opportunity to further and complete its pre-confirmation investigation. Combined with its inability to offer evidence without heavy redactions, the Prosecution will be deprived of a fair opportunity to present its best case."¹ The Prosecution did not request a suspension or a stay of the proceedings, because a less serious decision could be enough to protect its right to a fair trial.
2. On 20 April 2011 the Single Judge of Pre-Trial Chamber II ("Single Judge") issued her Decision.² The Single Judge ignored the Prosecution's concerns. She concluded solely that because there is no specific provision providing for "suspension of prosecution, or any impediment to disclosure, following a challenge to admissibility of a case" the request would be "rejected without further consideration".³
3. The Appeals Chamber has recognized that a fair trial includes respect for the rights of the Prosecution. The Decision summarily ignores the existence of a Prosecution's right to a fair trial.
4. As the Prosecution will demonstrate if leave to appeal is granted, the Decision fails to respect Article(54)(1)(b), which requires that the Prosecution "shall ...

¹ "Prosecution's application requesting disclosure after a final resolution of the Government of the Republic of Kenya's admissibility challenge", ICC-01/09-02/11-56, 14 April 2011, para. 10.

² "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" ("Decision"), ICC-01/09-02/11-64.

³ Ibid.

[t]ake appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court”.

5. There are conditions in this case currently affecting the ability of the Prosecution to ensure an effective prosecution: the disclosure of the names of the current witnesses request to take additional protective measures, the Suspects are not detained and are released in their home country; there are serious concerns about their ability to further increase an unsecure environment, the Government of Kenya has filed a State challenge to admissibility; the Prosecution cannot conduct further investigations while the admissibility challenge is pending; except with express permission in exceptional circumstances. The Prosecution submits that the PTC decision forcing it to move forward reduce the scope of the Prosecution right to a fair trial.
6. That the Chamber did so without exercising discretion, but as a strict matter of statutory interpretation, is further reason to permit appeal. The Chamber could use its powers to suspend the proceeding or to accept the Prosecution concerns based on its fair trial rights. The Appeals Chamber has recognized that the Chambers can stay the proceedings to protect the rights of a party (in those cases, the defence), and it has also recognized that the Prosecution has a right to a fair trial as well. The Appeals Chamber did it, notwithstanding the absence of an explicit mention of this power in the Statute or Rules of Procedure and Evidence.

The Issue for which leave to appeal is sought

7. The Prosecution seeks leave to appeal the following issue

Whether, the Decision affects the Prosecution fair trial right (“The Issue”).

8. The Issue arises out of the Decision⁴ and constitutes an appealable issue pursuant to Article 82(1)(d).⁵ It involves a number of novel aspects, including the scope of the Prosecution's fair trial right, the first challenge to admissibility filed by a State before the Court, and including the particularly difficult environment for victims and witnesses presented by the instant situation. It is the first time that a Chamber considered that steps in the process leading to the confirmation proceeding must go forward even when while an admissibility challenge is pending. It is also the first time that a Chamber of the Court categorically found that it cannot temporarily suspend steps in a proceeding absent any express statutory basis, without considering its duty to protect the Prosecution's right to a fair trial. The offer to accept extraordinary investigation measures can not solve the issue. There are measure that did not start and therefore authorization cannot be requested.
9. A ruling with such wide implications for the Court as a whole should be reviewed by the Appeals Chamber.

The Issue meets the criteria for leave to appeal

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.⁶
11. 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

⁴ The plain language of paras. 8, 9 and 10 of the Decision leave no margin of doubt as to the Chamber's reasoning and the consequences for the Prosecution's request.

⁵ ICC-01/04-168 OA3, paras. 9-10. See also, ICC-01/04-01/06-1433 OA11, Diss. Op. Judge Song, para. 4".

⁶ 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).

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.”⁷

12. The Decision establishes “a system that regulates the disclosure” for the purpose of the confirmation hearing in the present case.⁸ The Prosecution also 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.⁹

The Issue affects the fair conduct of the proceedings

13. “Fairness” within the terms of Article 82(1)(d) incorporates fairness towards the accused, the victims and the Prosecution. It requires that the procedural and substantive rights and obligations of all participants be respected.¹⁰ In particular, that “means that the Prosecutor must be able to exercise the powers and fulfil the duties listed in Article 54”.¹¹ Fairness has also been linked to the ability of a party to present its case.¹² “Purging the pre-trial process for errors consequential to unfairness is designed as a safeguard of the integrity of the proceedings.”¹³
14. The Decision affects the fairness of the proceedings in multiple ways. First, it affects the fairness of the proceedings vis-à-vis the Prosecution by subjecting the Prosecution to an unreasonable choice of facing detrimental consequences to its ability to effectively present its case at the confirmation stage or taking costly and difficult protective measures despite the reigning uncertainty on admissibility.

⁷ Article 82((1)(d).

⁸ Decision, para.4.

⁹ ICC-01/04-01/06-489; ICC-01/04-01/06-166; and ICC-01/04-01/07-365.

¹⁰ 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.

¹¹ ICC-01/04-135-tEN, paras. 38-39.

¹² ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), para. 24.

¹³ *Ibid.*

Although the Prosecution strongly opposes the admissibility challenge lodged by the Government of Kenya, the fact remains that the challenge has yet to be decided by this Chamber and thereafter the Appeals Chamber; the outcome cannot and should not be prejudged or appear to be prejudged at this stage.

15. As the Prosecution explained to the Pre-Trial Chamber, in light of the current security situation in the field, the Prosecution cannot disclose sensitive information unless significant steps are first taken to protect the witnesses. If the Prosecution heavily redacts the relevant evidence in order to prevent the disclosure of any identifying information, or provides summaries of the witnesses' evidence that will conceal their identity (and exclude information that could permit persons to speculate as to their identity), this will prejudice the Prosecution's case at the confirmation hearing. For example, Pre-Trial Chamber I and II attached no probative value to evidence, regardless how compelling it was on its face, because the Prosecution did not disclose at confirmation the identity of the witness who provided the statement.¹⁴

16. Alternatively, the Prosecution can put in place elaborate protection measures for witnesses and their families. These measures are costly and unnecessary if the Government of Kenya's admissibility challenge were to succeed. It is part of the Prosecution's responsibility not to undertake that expense without certainty. Additionally, once taken, some steps, such as relocation, cannot be easily undone. Thus, it is unreasonable to require this of the Prosecution and the witnesses absent certainty that the case will not be dismissed on jurisdictional grounds.

17. Thus, the Decision leaves the Prosecution in the unfair position where it may have to sacrifice the probative force of its case in order to avert harm to its

¹⁴ Prosecutor v. Bemba, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, 15 June 2009, para. 50; Prosecutor v. Abu Garda, "Decision on the Confirmation of Charges", ICC-02/05-02/09-243-Red, 08 February 2010, paras. 50-52.

witnesses and their families. The fact that the Single Judge does not even acknowledge these very serious concerns and weigh them in an exercise of discretion compounds the unfairness, to the extent that it also deprives the Prosecution of its right to have its arguments properly considered in a reasoned decision.¹⁵

18. Finally, the Decision creates a situation of unfairness vis-à-vis witnesses who have agreed to cooperate with the Prosecution and to provide evidence in the Court's criminal process. Considering the paramount importance of witness protection and the principle whereby "ensur[ing], as a matter of the highest priority, that witnesses are appropriately protected [...] is, pursuant to article 68 of the Statute, a responsibility of the Court as a whole",¹⁶ the importance of the issues at stake and the impact on the fairness of the proceedings of the Decision cannot be disputed. A ruling which, in a context of demonstrated risks, orders disclosure despite the existence of uncertainty as to the fate of the relevant case, must necessarily have substantial consequences for the fairness of the proceedings vis-à-vis the affected witnesses.

The issue affects the expeditious conduct of the proceedings

19. The "expeditious conduct" means timely and efficient conduct of proceedings.¹⁷

The issue presented here also significantly affect the expeditious conduct of the proceedings. First, a decision that imposes a substantial burden on a party and

¹⁵ See *Prosecutor v. Lubanga*, [Judgment on Appeal against First Redaction Decision](#), ICC-01/04-01/06-773 OA5, 14 December 2006, para. 20; *Prosecutor v. Lubanga*, [Judgment on Appeal against Second Redaction Decision](#), ICC-01/04-01/06-774 OA6, 14 December 2006, para. 30: "[T]he right to a reasoned decision is an element of the right to a fair trial and that only on the basis of a reasoned decision will proper appellate review be possible."

¹⁶ *Prosecutor v. Katanga*, [Judgment on Preventive Relocation](#), ICC-01/04-01/07-776 OA7, 26 November 2008, para. 101.

¹⁷ Expeditiousness 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.

involves the taking of procedural steps which may ultimately be completely futile if and when the relevant case is later determined to be inadmissible is supremely wasteful of resources, and therefore affects the expeditious conduct of the proceedings.

20. If the Prosecution determines to not take the extreme and intrusive protective steps at this time, and instead to go forward on secondary sources or heavily redacted evidence, it may be forced to request a postponement of the confirmation hearing if the redacted and/or anonymous summaries will not suffice to meet its burden of proof. Further, the pendency of the State's admissibility challenge freezes the Prosecution's continuing investigation even if the Chamber exceptionally authorizes some investigative activities.¹⁸ And if the Chamber were to deny delay and force the Prosecution to proceed to the hearing with inadequate evidence to permit confirmation, the Prosecution would have to restart the entire process.¹⁹ Thus, the Decision, could result in delay beyond that which would occur if the disclosure requirements were properly staggered to accommodate the pending jurisdictional challenge.

**Immediate resolution of the Issue by the Appeals Chamber may materially
advance the proceedings**

21. The Appeals Chamber has confirmed that proceedings are "not confined to the proceedings in hand but extends to the proceedings prior and subsequent thereto."²⁰ Immediate resolution by the Appeals Chamber is warranted when it

¹⁸ The Prosecution notes that under the plain language of Article 19(8) the Prosecution may only seek authority pertaining to a confined circle of investigative steps.

¹⁹ Article 61(7) authorizes the Prosecution, if confirmation is denied, to subsequently make a new request for confirmation with additional evidence. Article 61(10) clarifies that the original arrest warrant ceases to have effect if confirmation is denied, so it is at least arguable that the Prosecution would have to file a new Application even for the issuance of summonses with the Pre-Trial Chamber.

²⁰ ICC-01/04-168, para. 12; see also para. 17.

will “rid [...] the judicial process of possible mistakes that might taint [...] the fairness of the proceedings”.²¹

22. Timely intervention by the Appeals Chamber can avoid unnecessary expense of time and resources by the Court and prevent unnecessary risk or disruption to any witness. It will also ensure that the confirmation procedure remain a fair one, where the Prosecution is able to present evidence that meets the Chamber’s standards without subjecting the witnesses and their families to unnecessary risk or disruption to their lives.

Conclusion

23. For the reasons set out above, the Prosecution requests that the Single Judge grant leave to appeal the specific aspects of the Decision identified above.



Luis Moreno-Ocampo,
Prosecutor

Dated this 26th day of April, 2011
At The Hague, The Netherlands

²¹ *Situation in the DRC*, ICC-01/04-168, 13 July 2006, para. 14. The Prosecution notes that the Appeals Chamber refers to “possible mistakes that might taint” (emphasis added).