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No.: ICC-01/09-02/11

Date: 2 May 2011

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 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: Defence

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

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I. PROCEDURAL BACKGROUND

1. On 31 March 2011, the Government of Kenya filed its “Application on behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute” to challenge to the admissibility of the proceedings (the “GoK Application”).¹
2. On 6 April 2011, the Single Judge of the Pre-Trial Chamber (the “PTC”) issued her “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”.²
3. The initial appearance took place on 8 April 2011. At this hearing, the PTC scheduled the confirmation hearing to take place on 21 September 2011. The Presiding Judge noted that the filing by a State of a challenge to the admissibility of a case would not “in any way disrupt the proper conduct of the disclosure of what...[the Prosecution] have up until now”.³
4. On 14 April 2011, the Prosecution filed the “Prosecution’s application requesting disclosure after a final resolution of the Government of the Republic of Kenya’s admissibility challenge”, in which the Prosecution sought to suspend its disclosure obligations pending the outcome of the admissibility challenge (the “Application for Deferral of Disclosure”).⁴

¹ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Application on behalf of the Government of The Republic of Kenya pursuant to Article 19 of the ICC Statute, 31 March 2011, ICC-01/09-02/11-26.

² 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.

³ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Transcript of the Initial Appearance, 8 April 2011, ICC-01/09-02/11-T-1-ENG ET WT, at page 20.

⁴ Pre-Trial Chamber II, Prosecutor v Muthaura et al., ‘Prosecution’s application requesting disclosure after a final resolution of the Government of the Republic of Kenya’s admissibility challenge’ 14 April 2011, ICC-01/09-02/11-56.

5. On 20 April 2011, the Single Judge issued her “Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of the Republic of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties” in which she rejected the Application for Deferral of Disclosure (the “Impugned Decision”).⁵
6. On 26 April 2011, the Prosecution filed the “Prosecution’s Application for leave to Appeal the “Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of the Republic of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure” (ICC-01/09-02/11)” (the “Application for Leave”).⁶
7. The Prosecution sought leave to appeal on the following issue: “Whether the Decision affects the Prosecution fair trial right” (the “Issue”).⁷

II. LEAVE TO FILE INTERLOCUTORY APPEAL

8. The right to file an interlocutory appeal under Article 82(1)(d) of the Rome Statute (the “Statute”) is an exceptional remedy, which is only available if the party satisfies the Chamber that strictly defined conditions are met.⁸

⁵ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of the Republic of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties, 20 April 2011, ICC-01/09-02/11-64.

⁶ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution’s Application for leave to Appeal the “Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of the Republic of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure (ICC-01/09-02/11), 26 April 2011, ICC-01/09-02/11-69.

⁷ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution’s Application for leave to Appeal the “Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of the Republic of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure (ICC-01/09-02/11), 26 April 2011, ICC-01/09-02/11-69 at para. 7.

⁸ 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’”,

9. The decision must involve (a) an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings (ii) or the outcome of the trial; and (b) in the opinion of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁹
10. The definition of an 'issue' under Article 82(1)(d) of the Statute is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. An appealable issue must emanate from the ruling of the decision concerned and does not merely represent an abstract question or a hypothetical concern.¹⁰

III. SUBMISSIONS

11. The Defence respectfully requests the PTC to reject the Prosecution's Application for Leave on the following grounds:
 - (a) The Issue identified constitutes a misrepresentation of the decision of the Pre-Trial Chamber and other decisions of the ICC;
 - (b) The Issue of the Prosecutor's right to a fair trial is ill-defined and bolstered by hypothetical considerations;

1 April 2011, ICC-01/09-02/11-27, at para 6; see also, Decision on Prosecutor's Application for Leave to Appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrant of Arrest under Article 58, 19 August 2005, ICC-02/04-01/05-20, at para. 19; this approach was followed equally by Pre-Trial Chamber I, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, 24 May 2007, ICC-01/04- 01/06-915 at para. 20; see further, Trial Chamber II, Decision on the Prosecutor's Application for Leave to Appeal the Decision on Redactions Rendered on 10 February 2009, 6 March 2009, ICC-01/04-01/07-946-tENG, at para. 11.

⁹ Article 82(1)(d) of the Rome Statute.

¹⁰ 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-01/05-01/08-75, at para. 11.

- (c) The Issue identified by the Prosecution does not affect the fair and expeditious conduct of the proceedings and an immediate decision of the Appeals Chamber will not advance the proceedings.
- (a) The Issue Identified Constitutes a Misrepresentation of the Decision of the Pre-Trial Chamber and other Decisions of the ICC**
12. The Defence submits that the issue identified by the Prosecution, namely whether or not this Decision “affects the Prosecution’s fair trial right” is abstract and emanates from a misrepresentation of the decision, supported by incorrect assertions concerning the jurisprudence of the ICC in an attempt to argue that the Issue involves a number of novel aspects.
13. The Prosecution submits that the Single Judge ignored its concerns and 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”.¹¹ In so doing, the Prosecution argues that the PTC’s decision affects its right to a fair trial.
14. The Defence submits that the Prosecution’s characterisation of the Decision misrepresents both the context and reasoning of the PTC. The Prosecution fails to take into account the justification provided by the PTC in paragraphs 7-10 of the Decision. In particular, the Pre-Trial Judge laid out the statutory provisions of Article 17 and 19 and concluded that “under the Court's statutory framework, lodging an admissibility challenge only results in the suspension of the Prosecutor's investigation

¹¹ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution’s Application for leave to Appeal the “Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of the Republic of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure (ICC-01/09-02/11), 26 April 2011, ICC-01/09-02/11-69 at para. 2.

related to the case.”¹² The Single Judge concluded further after consideration of both the Statute and the Rules of Procedure and Evidence that neither “provide for suspension of prosecution, or any impediment to disclosure, following a challenge to the admissibility of a case.” In the opinion of the Single Judge, “had such procedural effect of an admissibility challenge been envisaged, it would have been stated *expressis verbis* in the Statute or the Rules.”¹³

15. Based upon a careful reading of the Decision, it is incorrect for the Prosecution to allege that the Single Judge relied solely on the ground that there is no specific provision dealing with “suspension of prosecution, or any impediment to disclosure, following a challenge to admissibility of a case.” The PTC presented considered reasons as to why a delay or suspension of disclosure obligations is not permitted following a challenge to the admissibility of a case. The Defence submits that these reasons were based upon an accurate and clear interpretation of both the Statute and the Rules of Procedure and Evidence.¹⁴ A correct reading of these provisions does not confer any power on the Chamber to suspend any part of the proceedings.¹⁵
16. In seeking to bolster the Issue identified, the Prosecution has made incorrect assertions concerning the jurisprudence of the ICC, namely that:

¹² Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of the Republic of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties, 20 April 2011, ICC-01/09-02/11-64, at para. 8.

¹³ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of the Republic of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties, 20 April 2011, ICC-01/09-02/11-64, at para. 9.

¹⁴ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of the Republic of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties, 20 April 2011, ICC-01/09-02/11-64 at paras. 7 – 10.

¹⁵ Rule 121 governing the procedure prior to confirmation does not refer to any procedure for suspension of proceedings.

- (i) "It is the first time that a Chamber considered that steps in the process leading to the confirmation proceeding must go forward even while an admissibility challenge is pending."
- (ii) "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."¹⁶

17. In relation to (i) above, the Defence submits that in the case of Lubanga, the Defence appealed against a decision on admissibility prior to the confirmation hearing.¹⁷ Although this appeal was subsequently withdrawn, it is noteworthy that while it was pending, significant steps in the process leading to the confirmation proceedings, including the implementation of the Prosecution's disclosure obligations, took place. Neither the proceedings nor the Prosecution's obligations concerning disclosure were suspended. In Bemba, the Appeals Chamber rejected the Defence request for suspensive effect of the proceedings due to their appeal on a challenge on admissibility.¹⁸ In reaching its decision, the Appeals Chamber determined that requests for suspensive effect must be made in accordance with the statutory provisions and that the mere fact that the admissibility of the case was being contested did not warrant the suspension of the proceedings.¹⁹

¹⁶ Pre-Trial Chamber II, *Prosecutor v Muthaura et al.*, Prosecution's Application for leave to Appeal the "Decision on the 'Prosecution's application requesting disclosure after a final resolution of the Government of the Republic of Kenya's admissibility challenge' and Establishing a Calendar for Disclosure (ICC-01/09-02/11)", 26 April 2011, ICC-01/09-02/11-69.

¹⁷ *Requête d'appel du conseil de permanence de la décision du 10 février 2006 de la Chambre préliminaire I, relative à la requête du Procureur aux fins de délivrance d'un mandat d'arrêt en vertu de l'Article 58 du statut*, 24 March 2006, ICC-01/04-01/06-57.

¹⁸ *See Prosecutor v. Jean Pierre Bemba Gombo*, Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the "Decision on the Admissibility and Abuse of Process Challenges" ICC-01/05-01/08-817. (The Chamber held that a suspensive effect was not necessary in the circumstances of the case, para. 11).

¹⁹ Appeals Chamber, *Prosecutor v Bemba*, Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the "Decision on the Admissibility and Abuse of Process Challenges", 9 July 2010, ICC-01/05-01/08-817, at para. 5.

18. In relation to (ii) above, there have been other instances before the ICC in which a Chamber has determined that it cannot act absent express statutory provision. For example, PTC I in Lubanga and PTC II in Kony et al., have held that because the deadline for requests for leave to appeal under Article 82(1(d) of the Statute is set out in Rule 155 of the Rules, Regulation 35 of the Regulations of the Court which permits a Chamber to vary deadlines established by the **Regulations or by a Judge** does not apply and therefore the Chamber has no authority to vary the deadline set out in Rule 155 of the Rules.²⁰
19. Furthermore, in its Application for Leave, the Prosecution asserted generally that: “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.”²¹ The Defence submits that the Prosecution is attempting to use the Appeals Chamber Judgement in Lubanga concerning abuse of process,²² to support its argument that proceedings can be stayed notwithstanding the absence of a statutory provision to that effect. This interpretation of the Lubanga judgement however, fails to recognise that the Appeals Chamber founded the abuse of process doctrine in Article 21(3) of the Rome Statute which provides that the Statute and Rules of Procedure and Evidence must be applied in a manner which is consistent with internationally recognised human rights

²⁰ Pre-Trial Chamber I, Prosecutor v Lubanga, Oral Decision Transcript of 25.08.2006 - Decision on the specific request of the Defence for suspension of time-limits for three pending filings and Pre-Trial Chamber II, Prosecutor v. Kony, Decision on the Prosecutor’s Motion for Clarification and Urgent Request for Variation of the Time-Limit Enshrined in Rule 155, 18 July 2005, ICC-02/04-01/05-18.

²¹ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution’s Application for leave to Appeal the “Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of the Republic of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure (ICC-01/09-02/11), 26 April 2011, ICC-01/09-02/11-69 at para. 6.

²² Appeals Chamber, Prosecutor v Lubanga, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772,

law. The Appeals Chamber found within existing human rights law, authority for the proposition that proceedings should not continue in circumstances in which the Court cannot ensure a fair trial.²³ In the present case, the Prosecution has failed to identify *any* authority that would require the Chamber to suspend disclosure proceedings in circumstances where the admissibility of a case has been challenged.

(b) The Prosecutor's Right to a Fair Trial and Hypothetical Concerns

20. In the Application for Leave, the Prosecution does not address or set out the proper scope of its right to a fair trial. It is noteworthy that the extent of this right has been limited in Bemba by the PTC, to the Prosecution being able to fulfil its obligations under Article 54 of the Statute.²⁴ The Appeals Chamber has confirmed that in implementing such obligations, the Prosecution must at all times "fully respect the rights of persons arising under this Statute"²⁵ which includes ensuring that it is in a position to fulfil its disclosure obligations to the defence.²⁶ Therefore, the Prosecution's right to a fair trial is only respected if the Prosecution is

²³ Appeals Chamber, Prosecutor v Lubanga, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, at paras. 36 to 38.

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-01/05-01/08-75, at para. 14. Article 54 of the Rome Statute provides that the Prosecutor **shall**: investigate incriminating and exonerating circumstances equally (Article 54(1)(a)); ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court and in doing so, respect the interests and personal circumstances of victims and witnesses (Article 54(1)(b)); fully respect the rights of persons arising under this Statute (Article 54(1)(c)); The Prosecutor **may** conduct investigations on the territory of a State (Article 54(2)); The Prosecutor **may**: Collect and examine evidence; Request the presence of a question persons being investigated, victims and witnesses; seek the cooperation of any State or intergovernmental organization...Enter into agreements or arrangements...to facilitate the cooperation of a State...Agree not to disclose ...information the Prosecutor obtains on the condition of confidentiality ...and take necessary measures ...to ensure the confidentiality of information, the protection of any person or the preservation of evidence (Article 54(3)).

²⁵ Article 54(1)(c) of the Rome Statute.

²⁶ 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. 42.

able to fulfil its disclosure obligations, a clear concern of the PTC in the present case.

21. The Prosecution's submissions in support of its contention that the PTC's decision affects its right to a fair trial are premised upon hypothetical concerns. In particular, the Prosecution refers to the potential impact of protective measures on witnesses and victims in circumstances where the PTC refuses to permit a suspension of disclosure obligations pending the outcome of the admissibility challenge. The Prosecution refers also to the possibility of the case being remitted back to Kenya and to the potential impact of the security situation and the fact that the Suspects are not detained. These factors are speculative, hypothetical, unsupported by evidence or can be readily addressed by a proper application of the Rome Statute.²⁷ Such factors cannot be used to bolster an issue that does not in any event, arise from a proper reading of the decision of the PTC.

(c) The Issue Identified by the Prosecution does not Affect the Fair and Expeditious Conduct of the Proceedings and an Immediate Decision of the Appeals Chamber will not Advance the Proceedings

22. The Prosecutor argues that the *decision* affects the fairness of the proceedings in multiple ways. However, this approach immediately falls foul of the requirement of Article 82(1)(d) which refers to the *issue* identified by the Prosecutor, not the *decision* in its entirety.
23. The Defence submits that given the *Issue* identified by the Prosecution constitutes most accurately a misinterpretation of the PTC's decision, supported by hypothetical considerations, no appealable issue arises. In the circumstances, it is unnecessary to consider further whether the issue

²⁷ For example, in relation to the potential impact of Prosecution disclosure obligations on witnesses and victims, a clear procedure has been set out in the Statute and Rules of Procedure and Evidence to address this situation which allows the Prosecution to apply for non-disclosure in individual cases: See Rules 81(2) and (4) of the Rules of Procedure and Evidence.

affects the fair and expeditious conduct of the proceedings and whether an immediate decision of the Appeals Chamber will advance those proceedings.

24. In the alternative, if the PTC determines that the Prosecution has identified an *issue* within the meaning of Article 82(1)(d), the Defence submits that the Prosecutor has failed to establish that it affects either the fairness or the expeditious conduct of the proceedings, particularly in light of the following considerations:

- (i) The provisions of Article 19(8) of the Statute which enable the Prosecutor to seek authority from the PTC to perform investigative activities that are deemed necessary;
- (ii) The provisions which enable the Prosecutor to seek witness protection measures and/or redactions to documentation prior to disclosure;²⁸
- (iii) The proper scope of the Prosecutor's fair trial right as defined in Article 54 of the Statute;
- (iv) The date set for the confirmation hearing of 21 September 2011;
- (v) The right of the Suspects to be informed promptly and in detail of the nature, cause and content of the charge;
- (vi) The right of the Suspects to have adequate time and facilities for the preparation of the defence;

²⁸ Article 68 of the Rome Statute and Rules 81 and 87 of the Rules of Procedure and Evidence.

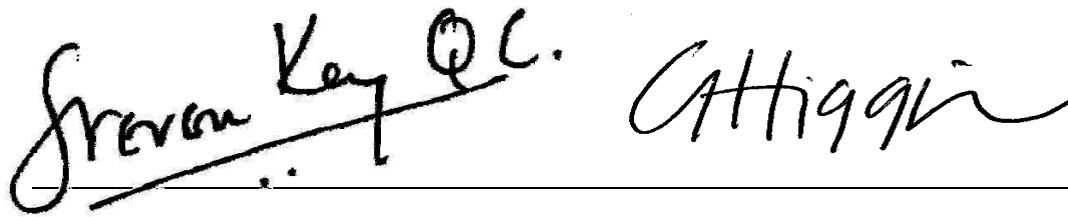
- (vii) The fact that the admissibility challenge has no discernable impact on either witness protection issues or the Prosecution's requests for the redaction of certain documents prior to disclosure;
- (viii) The fact that the admissibility challenge has no discernable impact on determinations to be made by the Prosecutor concerning issues of security in Kenya and how these may affect the protective measures he seeks;
- (ix) The hypothetical nature of submissions made by the Prosecutor as set out in paragraphs 20 and 21 above; and
- (x) The fact that a potential waste of resources concerning protective measures in the event the case is found to be inadmissible is irrelevant to the Prosecution's fair trial rights.²⁹

25. As submitted above, there is no issue raised by the Prosecution that requires an immediate resolution by the Appeals Chamber.

IV. RELIEF REQUESTED

26. The Defence respectfully requests the PTC to dismiss the Prosecution's Application for Leave.

²⁹ Appeals Chamber, *Prosecutor v Bemba*, Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the "Decision on the Admissibility and Abuse of Process Challenges", 9 July 2010, ICC-01/05-01/08-817 at para. 11.



Handwritten signatures of Steven Kay QC and Gillian Higgins. The signature of Steven Kay QC is on the left, and the signature of Gillian Higgins is on the right. A horizontal line is drawn below the signatures.

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



Handwritten signatures of Evans Monari and Gershon Otachi. The signature of Evans Monari is on the left, and the signature of Gershon Otachi is on the right. A horizontal line is drawn below the signatures.

Evans Monari and Gershon Otachi
On behalf of Mohammed Hussein Ali

Dated this, Monday 2 May 2011
At The Hague, Netherlands