

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 2 May 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single 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

**Decision on the "Prosecution's Application for leave to Appeal the 'Decision
Setting the Regime for Evidence Disclosure and Other Related Matters'
(ICC-01/09-02/11-48)"**

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

The Office of the Prosecutor

Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor

Counsel for Francis Kirimi Muthaura

Karim A. Khan and Kennedy Ogetto

Counsel for Uhuru Muigai Kenyatta

Steven Kay and Gillian Higgins

Counsel for Mohammed Hussein Ali

Evans Monari, John Philpot, and
Gershom Otachi Bw'omanwa

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar
Silvana Arbia, Registrar
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Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”)¹ of the International Criminal Court (the “Court”), hereby renders the decision on the “Prosecution’s Application for leave to Appeal the ‘Decision Setting the Regime for Evidence Disclosure and Other Related Matters’ (ICC-02/09-01/11-48)”² (the “Application”).

I. Procedural History

1. On 8 March 2011, the Chamber, by majority, decided to summon Francis Kirimi Muthaura (“Francis Muthaura”), Uhuru Muigai Kenyatta (“Uhuru Kenyatta”) and Mohammed Hussein Ali (“Mohammed Ali”) to appear before the Court.³

2. On 6 April 2011, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters” (the “Disclosure Decision”).⁴

3. On 8 April 2011, the initial appearance of the suspects was held⁵ in which the Chamber scheduled the first day of the confirmation of charges hearing to be 21 September 2011.⁶

4. On 13 April 2011, the Prosecutor lodged his application requesting leave to appeal the Disclosure Decision on three issues.

¹ Pre-Trial Chamber II, “Decision Designating a Single Judge”, ICC-01/09-02/11-9.

² ICC-01/09-02/11-55.

³ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11-01.

⁴ Pre-Trial Chamber II, ICC-01/09-02/11-48.

⁵ ICC-01/09-02/11-T-1-ENG; the date for the initial appearance had been re-scheduled from 7 to 8 April 2011, see Pre-Trial Chamber II, “Decision Setting a New Date for the Initial Appearance”, ICC-01/09-02/11-8.

⁶ ICC-01/09-02/11-T-1-ENG, p. 14, lines 11-13.

5. On 18 April 2011, counsel for all three suspects submitted a joint “Defence Response to the ‘Prosecution’s Application for leave to Appeal the ‘Decision Setting the Regime for Evidence Disclosure and Other Related Matters’”,⁷ requesting that the Prosecutor’s Application be dismissed.

II. The Law and Its Interpretation

6. The Single Judge notes article 82(1)(d) of the Rome Statute (the “Statute”), rule 155 of the Rules of Procedure and Evidence (the “Rules”) and regulation 65 of the Regulations of the Court (the “Regulations”).

7. The Single Judge, mindful of the exceptional character of the remedy of the interlocutory appeal, recalls that for leave to be granted, the following specific requirements must be met:

- (a) the decision involves 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.

8. According to the established jurisprudence of this Court,⁸ an “issue” 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 issue is constituted by a subject, the resolution of which is essential for the determination of matters arising in the judicial cause under examination. Concerning the other requirements set out in (a) and (b) above, the Single Judge recalls that they are

⁷ ICC-01/09-02/11-62.

⁸ See, Pre-Trial Chamber II, “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 Mohammed Hussein Ali’”, ICC-01/09-02/11-27, para. 7 with further exemplary references to the Court’s established jurisprudence in footnote 6.

cumulative. Failure in demonstrating that one of the requirements in (a) and (b) is fulfilled makes it unnecessary for the Single Judge to address the remaining requirements under article 82(1)(d) of the Statute.

III. Preliminary Issues

9. The Prosecutor's Application was filed within the five-day period in accordance with rule 155(1) of the Rules. The response by the Defence thereto was filed equally within the prescribed time-period of three days pursuant to regulation 65(3) of the Regulations.

10. The Prosecutor requests that his Application be dealt with by the full Chamber.⁹ However, as the Chamber designated a Single Judge to carry out the functions of the Chamber, subject to article 57(2)(a) of the Statute, and as this decision does not fall within the ambit of that provision, the Single Judge shall address the Prosecutor's Application on behalf of the Chamber.

IV. The Issues

1. The First Issue

11. The Prosecutor requests leave to appeal the Disclosure Decision on the following issue: "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".¹⁰

⁹ ICC-01/09-02/11-55, para. 10.

¹⁰ ICC-01/09-02/11-55, para. 8.

The Disclosure Decision

12. In the Disclosure Decision, the Single Judge ordered the Prosecutor, when submitting any evidence to the Registry, to provide, *inter alia*, “an analysis of each piece of evidence reflecting its relevance” as described in part III of the Disclosure Decision.¹¹ Part III of the Disclosure Decision reads, in relevant part:

The Single Judge recalls Pre-Trial Chamber's III earlier findings in the 31 July 2008 Decision in which it stressed the significance of providing the Defence with:

[A]ll necessary tools to understand the reasons why the Prosecutor relies on any particular piece of evidence and that, consequently, the evidence exchanged between the parties and communicated to the Chamber must be the subject of a sufficiently detailed legal analysis relating the alleged facts with the constituent elements corresponding to each crime charged[...] This analysis consist of presenting each piece of evidence according to its relevance in relation to the constituent elements of the crimes presented by the Prosecutor in his application under article 58 of the Statute and taken into account by the Chamber in its [decision on the said application]. Each piece of evidence must be analyzed - page by page or, where required, paragraph by paragraph - by relating each piece of information contained in that page or paragraph with one or more of the constituent elements of one or more of the crimes with which the person is charged, including the contextual elements of those crimes, as well as the constituent elements of the mode of participation in the offence with which person is charged. [...]

In the context of the present decision, the Single Judge favours the same approach adopted in the 31 July 2008 Decision, which was further clarified in a subsequent decision issued by the same Chamber on 10 November 2008 (the “10 November 2008 Decision”). In the latter decision, the Chamber requested the Prosecutor to present a consolidated version of his in-depth analysis chart of incriminating evidence, following the structure of a draft model chart annexed to the 10 November 2008 Decision. The same request to follow the exact approach was addressed to the Defence if it “intend[ed] to present evidence under article 61(6) of the Statute and in accordance with rules 78, 79 and 121(6) of the Rules or rely on evidence disclosed by the Prosecutor [...]”. For the purposes of the present proceedings, the Single Judge expects that the parties follow the sample draft model chart attached as Annex 2 to the present decision (footnotes omitted).¹²

Arguments by the Prosecutor

13. The Prosecutor avers that the Disclosure Decision on this issue affects the fairness of the proceedings *vis-à-vis* the Prosecutor. To this end, he contends that the “highly burdensome duty”¹³ imposed on him is not written in the Statute, the Rules or the

¹¹ Pre-Trial Chamber II, Disclosure Decision, paragraph (e)(3.) of the operative part.

¹² Pre-Trial Chamber II, Disclosure Decision, paras 22 and 23.

¹³ ICC-01/09-02/11-55, para. 20.

Regulations.¹⁴ He continues to argue that that there is no “empirical proof that in-depth analysis (...) is particularly helpful to the [D]efence” or that its absence in previous pre-trial cases, such as the *Lubanga* or *Katanga* cases, adversely affected the Defence rights.¹⁵ He further maintains that the duty to analyze the evidence for the Defence as detailed as required by the Disclosure Decision “intrudes on the independence” of the Prosecutor’s office “in determining the use of [his] resources” and “effectively demands allocation of resources to the performance of tasks that are not required by the Statute or Rules”.¹⁶ Whilst the Prosecutor accepts to bear the burden of proof to establish substantial grounds to believe, he contests additionally to “bear the burden to affirmatively guide the Defence to understand and fashion a responsive case”.¹⁷ The Prosecutor further maintains that the Disclosure Decision on this issue affects expeditiousness. He purports that since this requirement “imposes a massive burden”¹⁸ on him, he “will not be able to produce the full analysis prior to the confirmation hearing” which, by necessary implication, will require a postponement of the hearing date set for 21 September 2011.¹⁹ The Prosecutor also highlights again that “diverting [his Office’s] resources to this new and extra-statutory task will delay its performance of other core statutory obligations”.²⁰ Lastly, in the view of the Prosecutor, an immediate decision by the Appeals Chamber would materially advance the proceedings as it would provide legal certainty and guidance on this issue, which has been treated differently hitherto by the Court’s Pre-Trial Chambers.²¹

¹⁴ ICC-01/09-02/11-55, paras 4, 19 and 20.

¹⁵ ICC-01/09-02/11-55, para. 19.

¹⁶ ICC-01/09-02/11-55, paras 6 and 21.

¹⁷ ICC-01/09-02/11-55, para. 22.

¹⁸ ICC-01/09-02/11-55, para. 23.

¹⁹ ICC-01/09-02/11-55, para. 25.

²⁰ ICC-01/09-02/11-55, paras 6 and 25.

²¹ ICC-01/09-02/11-55, paras 4, 9 and 36-38.

Arguments by the Defence

14. The Defence argues that the First Issue does not arise from the Disclosure Decision.²² It maintains that providing information concerning the relevance of non-incriminating material is a fundamental aspect of the Prosecutor's mandate under article 54(1)(a) of the Statute,²³ according to which he has to investigate incriminating and exonerating circumstances equally, and independently from the Defence²⁴. It is further argued that the Defence would 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".²⁵ The Defence also contends that, as the Prosecutor has spent more time than the Defence in investigating the case, he is "best placed to identify how each item fits within the factual matrix of the case".²⁶ Moreover, the Defence argues that the issue does not affect the fairness and expeditiousness of the proceedings as the Disclosure Decision does not create any extra-statutory duties for the Prosecutor but promotes the balance between the parties by ensuring that the Defence is not overwhelmed by the disclosure of potentially irrelevant material.²⁷ Moreover, the Defence contends that the Disclosure Decision applies equally to the Defence,²⁸ and that administrative workload occasioned by a decision cannot be advanced by the Prosecutor as affecting the fairness and expeditiousness of proceedings.²⁹ Finally, the Defence maintains that a decision by the Appeals Chamber would not materially advance the proceedings and, in case suspensive effect was granted, severely hinder Defence preparation.³⁰

²² ICC-01/09-02/11-62, paras 3, 5 and 13.

²³ ICC-01/09-02/11-62, para. 13.

²⁴ ICC-01/09-02/11-62, para. 11.

²⁵ ICC-01/09-02/11-62, para. 10.

²⁶ ICC-01/09-02/11-62, para. 11.

²⁷ ICC-01/09-02/11-62, para. 24.

²⁸ ICC-01/09-02/11-62, para. 26.

²⁹ ICC-01/09-02/11-62, para. 27.

³⁰ ICC-01/09-02/11-62, paras 37-40.

Conclusion by the Single Judge

15. At the outset, the Single Judge observes that the Prosecutor does not appear to oppose the preparation of an in-depth-analysis chart of incriminating evidence³¹ but only the preparation of a chart analyzing the exculpatory evidence. The Single Judge will therefore focus her assessment of the issue with regard to exculpatory evidence only.

16. In part III of the Disclosure Decision, the Single Judge made reference to a previous decision of Pre-Trial Chamber III in the *Bemba* case dated 31 July 2008³² in which Pre-Trial Chamber III (i) ordered the Prosecutor to prepare an analysis of all evidence disclosed and (ii) indicated how such analysis should be conducted. As noted in paragraph 23 of the Disclosure Decision, the Single Judge expressed her preference to follow the same approach in the present case as well. However, the Single Judge also made reference to two decisions in the *Bemba* case, addressed to the Prosecutor and the Defence respectively, which further clarified the scope of the requisite in-depth analysis by both parties.³³ With regard to the Prosecutor, the pertinent decision in the *Bemba* case made abundantly clear that he “submit an updated, consolidated version of the in-depth analysis chart of *incriminating evidence*” following a model chart prepared by the Chamber (emphasis added).³⁴ This language was also relied upon in paragraph 23 of the Disclosure Decision. Moreover, the operative part of the Disclosure Decision makes reference to these explanations in part III and does not alter the approach previously taken by Pre-Trial Chamber III.

³¹ See ICC-01/09-01/11-50, paras 16 and 23.

³² Pre-Trial Chamber III, “Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties”, ICC-01/05-01/08-55.

³³ Pre-Trial Chamber III, “Decision on the Submission of an Updated, Consolidated Version of the In-Depth Analysis Chart of Incriminatory Evidence”, ICC-01/05-01/08-232 and annex; Pre-Trial Chamber III, “Decision on the Disclosure of Evidence by the Defence”, ICC-01/05-01/08-311.

³⁴ Pre-Trial Chamber III, “Decision on the Submission of an Updated, Consolidated Version of the In-Depth Analysis Chart of Incriminatory Evidence”, ICC-01/05-01/08-232, para. 8.

17. In light of such explicit reference to the decisions in the *Bemba* case, and mindful that the Prosecutor prepared an in-depth analysis chart in the *Bemba* case encompassing only incriminating evidence, the Single Judge deems the Prosecutor's interpretation of the Disclosure Decision to be simply incorrect by arguing that an in-depth analysis chart must also comprise the analysis of all exculpatory evidence. Since the Single Judge did not order the in-depth analysis chart to include a detailed analysis of exculpatory evidence (but that of all incriminating evidence), the Single Judge considers that the argument presented by the Prosecutor is based on a misconception, and thus does not constitute a subject that requires a decision for its resolution. It follows that the Prosecutor failed to demonstrate the existence of an "issue" within the meaning of article 82(1)(d) of the Statute, and therefore, there is no need to entertain the remaining requirements of the said provision. Consequently, the First Issue presented in the Application must fail. This conclusion also makes it unnecessary to address the Defences' arguments.

2. The Second Issue

18. The Prosecutor requests leave to appeal the Disclosure Decision on the following issue: "In light of the confined nature of the confirmation hearing, whether the Prosecutor is obliged to disclose to the Defence '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'".³⁵

The Disclosure Decision

19. In the Disclosure Decision, the Single Judge set out the regime for evidence disclosure between the parties, which includes the disclosure of:

- (a) all evidence in the Prosecutor's possession or control (pursuant to article 67(2) of the Statute) which he believes shows or tends to show the innocence of the suspects, or to mitigate their alleged guilt, or may affect the credibility of the Prosecutor's evidence; [...][and] (c) all rule 77 material in possession or control of

³⁵ ICC-01/09-02/11-55, para. 8.

the Prosecutor (incriminatory, exculpatory, or mixed in nature), which is material to the preparation of the Defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or was obtained from or belonged to the person; [...].³⁶

Arguments by the Prosecutor

20. The Prosecutor avers that the Disclosure Decision on this issue affects the fairness of the proceedings *vis-à-vis* the Prosecutor as it departs from the “bulk rule” adopted in the *Lubanga* and *Katanga* cases and requires the disclosure of all article 67(2) or rule 77 material prior to the confirmation hearing.³⁷ He further argues that this “additional duty will unfairly hamper the [Prosecutor’s] ability to prepare and present [his] case”.³⁸ The Prosecutor maintains that the Disclosure Decision on this issue also affects expeditiousness. To this end, he argues that the “onerous requirement of disclosure” of all article 67(2) and rule 77 material “renders it unavoidable that the [Prosecutor] will need to delay and postpone the confirmation proceeding”.³⁹ In the view of the Prosecutor, an immediate decision by the Appeals Chamber would materially advance the proceedings as it would provide legal certainty and guidance on this issue, which has been treated differently hitherto by the Court’s Pre-Trial Chambers.⁴⁰

Arguments by the Defence

21. The Defence argues that the Second Issue does not arise from the Disclosure Decision.⁴¹ It is argued that the Prosecutor misconstrued the “bulk rule” which, in the view of the Defence, is merely a test whether the rights of the Defence to a fair confirmation hearing are respected “in light of the non-disclosure of materials which

³⁶ Pre-Trial Chamber II, Disclosure Decision, para. 7.

³⁷ ICC-01/09-02/11-55, para. 26.

³⁸ ICC-01/09-02/11-55, para. 27.

³⁹ ICC-01/09-02/11-55, para. 28.

⁴⁰ ICC-01/09-02/11-55, paras 4, 9 and 36-38.

⁴¹ ICC-01/09-02/11-62, paras 3 and 5. The Defence alleges in paragraph 18 of its submission that the issue does not arise from the Disclosure Decision “as it has already been resolved by prior appellate decision”. In the preceding paragraph reference was made to an Appeals Chamber judgment in which the Appeals Chamber found that non-disclosure of information is the exception to the overriding principle that full disclosure be made.

need to be withheld for legitimate protective reasons".⁴² By setting out its own interpretation of the "bulk rule", the Defence seemingly acknowledges that not all exculpatory evidence may be disclosed prior to the confirmation of charges hearing due to various reasons, including the taking of protective measures.⁴³ However, the Defence maintains that it does not allow the Prosecutor to withhold exculpatory evidence in his possession during the pre-confirmation phase which is not subject to protective measures.⁴⁴ Moreover, the Defence argues that the issue does not affect the fairness and expeditiousness of the proceedings as the "bulk rule" requires the Prosecutor to review all material with a view to determining whether information may be withheld as a result of protective measures⁴⁵ and did not permit the Prosecutor to "sit on a portion of the evidence" within his control without analyzing, seeking protective measures or, ultimately disclosing it.⁴⁶ The Defence also raises the argument that the Disclosure Decision "does not increase or affect the [Prosecutor's] existing duties or workload" as he is obliged to disclose all exculpatory evidence, which is not subject to protective measures, as soon as practicable.⁴⁷ Finally, the Defence maintains that a decision by the Appeals Chamber would not materially advance the proceedings and, in case suspensive effect was granted, severely hinder Defence preparation.⁴⁸

Conclusion by the Single Judge

22. The Single Judge holds that the Second Issue as presented by the Prosecutor is an appealable issue that arises from the Disclosure Decision. However, for the reasons set out below, the Single Judge is of the view that the Second Issue neither affects the fairness nor the expeditiousness of the proceedings.

⁴² ICC-01/09-02/11-62, para. 23.

⁴³ ICC-01/09-02/11-62, paras 16 and 20.

⁴⁴ ICC-01/09-02/11-62, para. 23.

⁴⁵ ICC-01/09-02/11-62, para. 29.

⁴⁶ ICC-01/09-02/11-62, para. 28.

⁴⁷ ICC-01/09-02/11-62, para. 30.

⁴⁸ ICC-01/09-02/11-62, paras 37-40.

23. The Prosecutor maintains that the Disclosure Decision departed from the “bulk rule” which, as such, affects the fairness of the proceedings *vis-à-vis* the Prosecutor. This line of argumentation means that the Single Judge was somehow duty-bound to respect the “bulk rule” in the context of disclosure of exculpatory evidence. The Single Judge underlines that the “bulk rule” as a term and concept is nowhere enshrined in the Court’s statutory documents. The argument would have merit if the Single Judge was bound by previous decisions of other Chambers pursuant to article 21(2) of the Statute. To this end, the Single Judge recalls that the usage of the verb ‘may’ in article 21(2) of the Statute provides the Chamber with the discretion as to whether to follow previous precedents. Consequently, the provision as drafted rejects the *stare decisis* doctrine. Following the Prosecutor’s line of argumentation would have meant that, in essence, article 21(2) of the Statute itself automatically affects the fairness of the proceedings on the grounds that precedents were not followed; this is an erroneous interpretation of the article 21(2) of the Statute.

24. Furthermore, the “bulk rule” is a notion appearing only in some pre-trial proceedings.⁴⁹ Even if, for the sake of argument, one was to accept the existence of a “bulk rule”,⁵⁰ the Single Judge observes that this jurisprudence is seemingly not applied consistently in the pre-trial proceedings⁵¹, including the proceedings before Pre-Trial Chambers II and III.⁵² In fact, Pre-Trial Chambers II/(III) apply consistently

⁴⁹ Pre-Trial Chamber I, „Decision on the final system of disclosure and the establishment of a timetable”, ICC-01/04-01/06-102; Pre-Trial Chamber I, “Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation Hearing”, ICC-01/04-01/07-621.

⁵⁰ The jurisprudence seems to be unclear, see Pre-Trial Chamber I, „Decision on the final system of disclosure and the establishment of a timetable”, ICC-01/04-01/06-102, paras 124 and 125; Pre-Trial Chamber I, “Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation Hearing”, ICC-01/04-01/07-621, para. 8.

⁵¹ See e.g., Pre-Trial Chamber I, “Second Decision on issues relating to Disclosure”, ICC-02/05-02/09-35; Pre-Trial Chamber I, “Decision on issues relating to disclosure”, ICC-02/05-03/09-43; Pre-Trial Chamber I, “Decision on issues relating to disclosure”, ICC-01/04-01/10-87.

⁵² Pre-Trial Chamber III, “Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties”, ICC-01/05-01/08-55; Pre-Trial Chamber II, “Decision Setting the

the disclosure regime following the principles established in the Disclosure Decision, which lack any reference to the “bulk rule”.

25. The Prosecutor also avers that full disclosure of exculpatory evidence in his possession or control at the pre-confirmation stage to the Defence would “unfairly hamper” his ability to prepare and present the case. The Single Judge observes that the Prosecutor, after having been authorized to commence with the investigation into the situation in the Republic of Kenya in March 2010,⁵³ has been investigating both incriminating and exonerating circumstances and collecting respective evidence ever since. It is assumed that he progressively analyzed and reviewed his material collected in order to be fully prepared to fulfil his duties under article 67(2) of the Statute and rule 77 of the Rules. Thus, with regard to the “time- and resource-consuming” argument in relation to disclosure, the Single Judge considers that the Prosecutor is expected to organize his office in such a professional manner that he can comply with his duties under the Statute timely and properly. It can hardly be argued that expectations as to the proper organization of the Prosecutor’s office could in any way affect the fairness of the proceedings with regard to the Prosecutor. Thus, absent any further argument, the Single Judge is not persuaded why and how full disclosure of exculpatory evidence in the Prosecutor’s possession or control would “unfairly hamper” his ability to prepare himself for the upcoming confirmation of charges hearing. By the same token, the Prosecutor has not convincingly put forward any argument why the disclosure of exculpatory evidence already in his possession or control may be considered an “onerous requirement”, warranting the drastic measure of postponing the confirmation of charges hearing. Therefore, the Single Judge deems the Prosecutor’s argument, that the Disclosure

Regime for Evidence Disclosure and Other Related Matters”, ICC-01/09-01/11-44; Pre-Trial Chamber II, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, ICC-01/09-02/11-48.

⁵³ Pre-Trial Chamber II, “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, ICC-01/09-19.

Decision on the Second Issues also affects expeditiousness of proceedings, equally untenable.

26. In conclusion, the Single Judge does not find that the Second Issues affects the fair and expeditious conduct of the proceedings. It is therefore not necessary to determine whether an immediate resolution by the Appeals Chamber would materially advance the proceedings.

3. The Third Issue

27. The Prosecutor requests leave to appeal the Disclosure Decision on the following issue: "Whether the Chamber may require the Prosecution to provide to the Chamber all the material made available to the Defence (under Article 67(2) and Rule 77) that is not intended to be introduced into evidence at the confirmation hearing".⁵⁴

The Disclosure Decision

28. In the Disclosure Decision, the Single Judge ordered the Registrar to communicate all evidence disclosed between the parties to the Chamber. The Disclosure Decision reads, in relevant part:

[...] [T]he Single Judge considers that ensuring an effective disclosure process, which ultimately aims at reaching a proper decision as to whether or not to send the cases to trial, requires that all evidence disclosed between the parties, shall be communicated to the Chamber, regardless of whether the parties intend to rely on or present the said evidence at the confirmation hearing. This reading is compatible with a literal as well as a contextual interpretation of the Statute and the Rules thereto and in particular, the last sentence of rule 121(2) (c) of the Rules, which requires that "all evidence disclosed [...] be communicated to the Pre-Trial Chamber". This means that the Chamber shall have access to the following disclosed evidence: (a) all evidence in the Prosecutor's possession or control (pursuant to article 67(2) of the Statute) which he believes shows or tends to show the innocence of the suspects, or to mitigate their alleged guilt, or may affect the credibility of the Prosecutor's evidence; [...] [and] (c) all rule 77 material in possession or control of the Prosecutor (incriminatory, exculpatory, or mixed in nature), which is material to the preparation of the Defence or are intended for use

⁵⁴ ICC-01/09-02/11-55, para. 8.

by the Prosecutor as evidence for the purposes of the confirmation hearing or was obtained from or belonged to the person; [...].

[...]

Finally, all evidence disclosed by both parties for the purposes of the confirmation hearing and contained in the record of the case shall be presented to the Chamber as decided by the Presiding Judge in accordance with rule 122(1) of the Rules.⁵⁵

Arguments by the Prosecutor

29. The Prosecutor avers that the Disclosure Decision on this issue affects the fairness of the proceedings *vis-à-vis* both parties. The Prosecutor contends that “the Presiding Judge does not need evidence that neither party seeks to introduce in order to organize the presentation of evidence at the confirmation hearing”.⁵⁶ He argues that by requiring all evidence to be communicated to the Chamber, it is assuming control over the presentation of both parties’ cases.⁵⁷ He maintains that the Chamber intrudes into both the Prosecutor’s and Defence role while it is the parties which “decide what evidence to offer at the confirmation hearing”.⁵⁸ Raising the interests of the Defence, the Prosecutor purports that it would lose control over any article 67(2) and rule 77 material as it deprives it from deciding which disclosed material should be placed before the Chamber.⁵⁹ The Prosecutor further views the fairness of the proceedings affected on the grounds that the Disclosure Decision in fact limits disclosure as the Chamber purportedly required the Prosecutor “to filter [his] disclosed evidence in order to avoid registration of vast amounts of materials”.⁶⁰ The Prosecutor maintains that the Disclosure Decision on this issue also affects expeditiousness. To this end, he purports that the Disclosure Decision expands the amount of evidence that the Chamber on its own accord can decide to consider, thus slowing down the proceedings.⁶¹ He additionally argues that a Pre-Trial Chamber record containing vast amounts of material, and which is transferred to the Trial

⁵⁵ Pre-Trial Chamber II, Disclosure Decision, paras 7 and 12.

⁵⁶ ICC-01/09-02/11-55, para. 30.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ ICC-01/09-02/11-55, para. 32.

⁶¹ ICC-01/09-02/11-55, para. 33.

Chamber after the confirmation of charges, is less efficient.⁶² In the view of the Prosecutor, an immediate decision by the Appeals Chamber would materially advance the proceedings as it would provide legal certainty and guidance on this issue which has been treated differently hitherto by the Court's Pre-Trial Chambers.⁶³

Arguments by the Defence

30. The Defence contests that the issue affects the fairness of the proceedings by referring, *inter alia*, to the Prosecutor's previous line of argumentation in the *Mbarushimana* case.⁶⁴ In addition, it argues that the Prosecutor failed to adduce any concrete arguments how this issue could significantly affect the expeditiousness of the proceedings.⁶⁵ Finally, the Defence maintains that a decision by the Appeals Chamber would not materially advance the proceedings and, in case suspensive effect was granted, severely hinder Defence preparation.⁶⁶ Additionally, as the Third Issue, in the view of the Defence is based on speculation, an appellate resolution would only be required at a later stage in the event such concerns crystallized.⁶⁷

Conclusion of the Single Judge

31. The Single Judge holds that the Third Issue as presented by the Prosecutor is an appealable issue that arises from the Disclosure Decision. However, for the reasons set out below, the Single Judge is of the opinion the Third Issue neither affects the fairness nor the expeditiousness of the proceedings.

32. The Single Judge observes at the outset that the same question, and to a certain degree the same line of argumentation, has been already the subject of a request by the Prosecutor for leave to appeal in the *Bemba* case which was rejected by the then

⁶² ICC-01/09-02/11-55, para. 37.

⁶³ ICC-01/09-02/11-55, paras 4, 9 and 36-38.

⁶⁴ ICC-01/09-02/11-62, para. 31.

⁶⁵ ICC-01/09-92/11-62, para. 34.

⁶⁶ ICC-01/09-02/11-62, paras 37-40.

⁶⁷ ICC-01/09-02/11-62, para. 41.

Single Judge acting on behalf of Pre-Trial Chamber III. Reminding the parties that it is prejudicial to the expeditiousness of proceedings to advance arguments which have been previously rejected, the Single Judge rehearses the previous holding, in relevant part, again:

48. As to the first line of argumentation, the Prosecutor alleges that by notifying the evidence disclosed under article 67(2) of the Statute and rule 77 of the Rules, he will lose control over the presentation of his case. The Single Judge wishes to clarify that material falling under the second category of inspection material under rule 77 of the Rules is to be communicated to the Chamber in any event, as it relates to material that the Prosecutor intends to use as evidence for the purposes of the confirmation hearing. Therefore, the only material falling under the two other categories of inspection material under rule 77 of the Rules is relevant for this question.

49. 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 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.

[...]

54. In any event, a specific methodology in the system of disclosure which applies equally to both parties in the proceedings, does not affect the fairness of proceedings *per se*.

55. In light of the above, the Single Judge concludes that since communication of material falling under article 67(2) of the Statute and rule 77 of the Rules to the Chamber has been established for both parties no substantial disadvantage can be ascertained with regard to the Prosecutor.⁶⁸

33. With regard to the Prosecutor's further argument that the Defence may be deprived from deciding which disclosed material should be placed before the Chamber, the Single Judge clarifies that no such interference can be deduced from the Disclosure Decision. What has been held in relation to the Prosecutor, stipulated above, applies *mutatis mutandis* equally to the Defence. In fact, it is recalled that at the confirmation of charges hearing the Defence has the right to remain silent⁶⁹ and to decide not to present any evidence or challenge the evidence presented by the

⁶⁸ Pre-Trial Chamber III, „Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure", ICC-01/05-01/08-75.

⁶⁹ Article 67(1)(g) of the Statute.

Prosecutor⁷⁰. Lastly, the Single Judge notes that the Defence has not complained about the communication of all evidence to the Chamber.

34. The Single Judge also wishes to provide some clarifications on the Prosecutor's erroneous arguments that the Chamber intrudes into the role of the Prosecutor and the Defence, and assumes control over the presentation of both parties' cases. By raising these arguments, the Prosecutor disregards the Chamber's statutory mandate, in particular its filtering function, and its responsibility to *contribute* to the establishment of the truth, which crystallizes ultimately in the final decision on the accused's innocence or guilt. Such contribution by the Pre-Trial Chamber is made in the framework of the confirmation of charges stage when determining whether or not there are substantial grounds to believe that the suspect has committed the crime(s) charged. Fulfilling its mandate to *contribute* to the establishment of the truth as mentioned above, the Chamber may resort to article 69(3), second sentence, of the Statute,⁷¹ which authorizes the Chamber "to request the submission of all evidence that it considers necessary" for its specific determination at the end of the pre-trial stage, in addition to other evidence which has been presented by the parties. Hence, article 69(3), second sentence, of the Statute implies that such evidence must not have been presented previously by either party, but is known to the Chamber, and could, after it is submitted by dint of article 69(3) of the Statute, be discussed, contested and analyzed by both the Prosecutor and the Defence during the confirmation of charges hearing. Thus, it is entirely for the Chamber to base its determination, or parts thereof, on such evidence namely, after the Chamber has requested its submission at the confirmation of charges hearing and after the parties have made their observations, if any, at the hearing. Against the backdrop of these fundamental principles, the Single Judge considers the Prosecutor's arguments related to the Third

⁷⁰ Article 61(6) of the Statute reads: „At the hearing, the person *may*: (a) object to the charges; (b) challenge the evidence presented by the Prosecutor; and (c) present evidence" (emphasis added).

⁷¹ See also Pre-Trial Chamber III, "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties", ICC-01/05-01/08-55, paras 8-11.

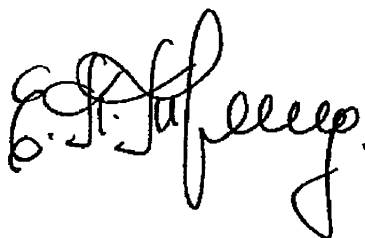
Issue, including the simplistic reference to the possible slow-down of proceedings as wholly hypothetical and in disregard of such principles.

35. The Single Judge therefore is not convinced that the Third Issue significantly affects the fair and expeditious conduct of the proceedings. It is therefore unnecessary to entertain whether an immediate resolution of the Appeals Chamber would materially advance the proceedings.

FOR THESE REASONS THE SINGLE JUDGE HEREBY

rejects the Prosecutor's Application.

Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova
Single Judge

Dated this Monday, 2 May 2011

At The Hague, The Netherlands