

**Cour  
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Internationale**



**International  
Criminal  
Court**

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

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. WILLIAM SAMOEI RUTO, HENRY  
KIPRONO KOSGEY AND JOSHUA ARAP SANG**

**Public Document**

**Decision on the "Prosecution's Application for leave to Appeal the 'Decision  
Setting the Regime for Evidence Disclosure and Other Related Matters'  
(ICC-01/09-01/11-44)"**

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 William Samoei Ruto**

Joseph Kipchumba Kigen-Katwa, David  
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**Counsel for Henry Kiprono Kosgey**

George Odinga Oraro

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Joseph Kipchumba Kigen-Katwa

**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**

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**Registrar & Deputy Registrar**

Silvana Arbia, Registrar  
Didier Preira, Deputy-Registrar

**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”)<sup>1</sup> 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-01/09-01/11-44)”<sup>2</sup> (the “Application”).

## **I. Procedural History**

1. On 8 March 2011, the Chamber, by majority, issued three summonses to appear in the present case and set the date for the initial appearance of William Samoei Ruto (“William Ruto”), Henry Kiprono Kosgey (“Henry Kosgey”) and Joshua Arap Sang (“Joshua Sang”) for 7 April 2011.<sup>3</sup>
2. On 6 April 2011, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters” (the “Disclosure Decision”).<sup>4</sup>
3. On 7 April 2011, the initial appearance of the suspects was held<sup>5</sup> in which the Chamber scheduled the first day of the confirmation of charges hearing to be 1 September 2011.<sup>6</sup>
4. On 13 April 2011, the Prosecutor lodged the Application requesting leave to appeal the Disclosure Decision on three issues.

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<sup>1</sup> Pre-Trial Chamber II, “Decision Designating a Single Judge”, ICC-01/09-01/11-6.

<sup>2</sup> ICC-01/09-01/11-50.

<sup>3</sup> Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang”, ICC-01/09-01/11-1.

<sup>4</sup> Pre-Trial Chamber II, ICC-01/09-01/11-44.

<sup>5</sup> ICC-01/09-01/11-T-1-ENG.

<sup>6</sup> *Ibid.*, p. 17, lines 19-21.

5. On 15 April 2011, counsel for Henry Kosgey filed the “Response on behalf of Henry Kiprono Kosgey to the Prosecution’s Application for leave to Appeal the ‘Decision setting the regime for evidence disclosure and other related matters’ (ICC-01/09-01/11-44)” requesting that the Prosecutor’s Application be dismissed.<sup>7</sup> On the same day, counsel for William Ruto and Joshua Sang submitted the “Defence Response to the ‘Prosecution’s Application for leave to Appeal the ‘Decision Setting the Regime for Evidence Disclosure and Other Related Matters’ (ICC-91/09-01/11-44)” also requesting that the Prosecutor’s Application be dismissed<sup>8</sup>.

## 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,<sup>9</sup> an “issue” is an identifiable subject or topic requiring a decision for its resolution, not merely a

<sup>7</sup> ICC-01/09-01/11-57.

<sup>8</sup> ICC-01/09-01/11-58.

<sup>9</sup> 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.

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 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 responses by the Defence thereto were 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.<sup>10</sup> 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.

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<sup>10</sup> ICC-01/09-01/11-50, para. 10.

## 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".<sup>11</sup>

#### *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.<sup>12</sup> 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

<sup>11</sup> ICC-01/09-01/11-50, para. 8.

<sup>12</sup> Pre-Trial Chamber II, Disclosure Decision, paragraph (e)(3.) of the operative part.

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).<sup>13</sup>

### *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"<sup>14</sup> imposed on him is not written in the Statute, the Rules or the Regulations.<sup>15</sup> He continues to argue 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.<sup>16</sup> 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".<sup>17</sup> 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".<sup>18</sup> The Prosecutor further maintains that the Disclosure Decision on this issue affects expeditiousness. He purports that since this requirement "imposes a massive burden"<sup>19</sup> on him, he "will not be able to produce the full analysis prior to the confirmation hearing" which, by necessary implication, will require a

<sup>13</sup> Pre-Trial Chamber II, Disclosure Decision, paras 21 and 22.

<sup>14</sup> ICC-01/09-01/11-50, para. 20.

<sup>15</sup> ICC-01/09-01/11-50, paras 4, 19 and 20.

<sup>16</sup> ICC-01/09-01/11-50, para. 19.

<sup>17</sup> ICC-01/09-01/11-50, paras 6 and 21.

<sup>18</sup> ICC-01/09-01/11-50, para. 22.

<sup>19</sup> ICC-01/09-01/11-50, para. 23.

postponement of the hearing date set for 1 September 2011.<sup>20</sup> 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”.<sup>21</sup> 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.<sup>22</sup>

### *Arguments by the Defence*

14. The Defence for Henry Kosgey argues that the First Issue does not affect the fairness and expeditiousness of the proceedings.<sup>23</sup> It contends that the Prosecutor’s obligation to explain the relevance of material disclosed is a fundamental component of his mandate under article 54(1) of the Statute.<sup>24</sup> In the view of the Defence of Henry Kosgey, 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.<sup>25</sup> Moreover, it is argued that the Disclosure Decision applies equally to the Defence,<sup>26</sup> and that administrative workload occasioned by a decision cannot be advanced by the Prosecutor as affecting the fairness and expeditiousness of proceedings.<sup>27</sup> Finally, the Defence for Henry Kosgey argues that a decision by the Appeals Chamber would not materially advance the proceedings as an interlocutory appeal would delay the proceedings and, in case suspensive effect was granted, severely hinder Defence preparation.<sup>28</sup>

<sup>20</sup> ICC-01/09-01/11-50, paras 23 and 25.

<sup>21</sup> ICC-01/09-01/11-50, paras 6 and 25.

<sup>22</sup> ICC-01/09-01/11-50, paras 4, 9 and 36-38.

<sup>23</sup> ICC-01/09-01/11-57, para. 7.

<sup>24</sup> ICC-01/09-01/11-57, para. 9.

<sup>25</sup> *Ibid.*

<sup>26</sup> ICC-01/09-01/11-57, para. 10.

<sup>27</sup> ICC-01/09-01/11-57, para. 11.

<sup>28</sup> ICC-01/09-01/11-57, paras 22-24.



15. The Defence for William Ruto and Joshua Sang advances the same arguments as the Defence for Henry Kosgey set out above. Moreover, it purports that the First Issue does not arise from the Disclosure Decision.<sup>29</sup> It is argued that the Prosecutor has a duty to investigate, pursuant to article 54(1) of the Statute, both incriminating and exculpatory circumstances equally, which correspond with the duty to disclose such material.<sup>30</sup> However, the Defence would not benefit from the “fruits of the Prosecutor’s investigation unless it can clearly identify why such materials should be considered to be material to the preparation of the Defence”.<sup>31</sup> The Defence for William Ruto and Joshua Sang further argues 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”.<sup>32</sup> It also alleges that “without any guidance as to the relevance, [the Defence] may be unable to conduct [its] pre-confirmation preparation in an expeditious manner”.<sup>33</sup>

#### *Conclusion by the Single Judge*

16. 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 evidence<sup>34</sup> 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.

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<sup>29</sup> ICC-01/09-01/11-58, paras 5 and 13.

<sup>30</sup> ICC-01/09-01/11-58, paras 8 and 9.

<sup>31</sup> ICC-01/09-01/11-58, para. 10.

<sup>32</sup> ICC-01/09-01/11-58, para. 11.

<sup>33</sup> ICC-01/09-01/1158, para. 32.

<sup>34</sup> See ICC-01/09-01/11-50, paras 16 and 23.

17. 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 2008<sup>35</sup> 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 22 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.<sup>36</sup> 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).<sup>37</sup> This language was also relied upon in paragraph 22 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.

18. 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

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<sup>35</sup> 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.

<sup>36</sup> 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.

<sup>37</sup> 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.

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

19. 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’”.<sup>38</sup>

### *The Disclosure Decision*

20. 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 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; [...].<sup>39</sup>

### *Arguments by the Prosecutor*

21. 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

<sup>38</sup> ICC-01/09-01/11-50, para. 8.

<sup>39</sup> Pre-Trial Chamber II, Disclosure Decision, para. 6.

in the *Lubanga* and *Katanga* cases and requires the disclosure of all article 67(2) or rule 77 material prior to the confirmation hearing.<sup>40</sup> He further argues that this “additional duty will unfairly hamper the [Prosecutor’s] ability to prepare and present [his] case”.<sup>41</sup> 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”.<sup>42</sup> 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.<sup>43</sup>

#### *Arguments by the Defence*

22. The Defence for Henry Kosgey argues that the Second Issue does not arise from the Disclosure Decision as the Prosecutor misconstrued the Disclosure Decision and the “bulk rule”.<sup>44</sup> It maintains that the Disclosure Decision recognized that the duty to disclose is subject to the right to requests protective measures.<sup>45</sup> Hence, in the view of the Defence for Henry Kosgey, the Disclosure Decision did not require the Prosecutor to disclose all material.<sup>46</sup> The “bulk rule”, in the view of the Defence for Henry Kosgey, 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 need to be withheld for legitimate protective reasons”.<sup>47</sup> *A contrario*, the Defence argues, it does not allow the Prosecutor to withhold exculpatory evidence in his possession during the pre-confirmation phase. Thus, it is maintained that the Second

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<sup>40</sup> ICC-01/09-01/11-50, para. 26.

<sup>41</sup> ICC-01/09-01/11-50, para. 27.

<sup>42</sup> ICC-01/09-01/11-50, para. 28.

<sup>43</sup> ICC-01/09-01/11-50, paras 4, 9 and 36-38.

<sup>44</sup> ICC-01/09-01/11-57, para. 28.

<sup>45</sup> ICC-01/09-01/11-57, para. 30.

<sup>46</sup> ICC-01/09-01/11-57, para. 30.

<sup>47</sup> ICC-01/09-01/11-57, para. 32.

Issue “does not [...] reveal criteria for disclosure which markedly depart from the practice applied, to date, by all Pre-Trial Chambers of the [Court]”.<sup>48</sup> Moreover, the Defence for Henry Kosgey contends that the Second Issue does not affect the fairness and expeditiousness of the proceedings,<sup>49</sup> as the “bulk rule” did not permit the Prosecutor to “leave to one side a portion of the evidence within his control” without analyzing, seeking protective measures or, ultimately disclosing it, but requires him to review all material with a view to determining whether information may be withheld as a result of protective measures.<sup>50</sup> After having set out its own interpretation of the “bulk rule”, the Defence concludes that the Disclosure Decision “should not materially 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.<sup>51</sup> Finally, the Defence for Henry Kosgey maintains that a decision by the Appeals Chamber would not materially advance the proceedings as an interlocutory appeal would delay the proceedings and, in case suspensive effect was granted, severely hinder Defence preparation.<sup>52</sup>

23. The Defence for William Ruto and Joshua Sang equally alleges that the Second Issue does not arise from the Disclosure Decision.<sup>53</sup> It sets out its own understanding of the “bulk rule”<sup>54</sup> and advances the same arguments as the Defence for Henry Kosgey set out above. Additionally, it purports that the Prosecutor’s seeking to defer disclosure amounts to “an attempt to deny the suspects an opportunity to challenge

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<sup>48</sup> ICC-01/09-01/11-57, para. 33.

<sup>49</sup> ICC-01/09-01/11-57, para. 7.

<sup>50</sup> ICC-01/09-01/11-57, para. 12.

<sup>51</sup> ICC-01/09-01/11-57, para. 15.

<sup>52</sup> ICC-01/09-01/11-57, paras 22-24.

<sup>53</sup> ICC-01/09-01/11-58, paras 5 and 23. The Defence alleges in paragraph 23 of its submission that the issue does not arise from the Disclosure Decision “as it was already resolved by prior appellate litigation”. 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.

<sup>54</sup> ICC-01/09-01/11-58, para. 25.

the integrity of the Prosecution witnesses (character and honesty) and the credibility of their evidence".<sup>55</sup>

### *Conclusion of the Single Judge*

24. 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.

25. 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.

26. Furthermore, the "bulk rule" is a notion appearing only in some pre-trial proceedings.<sup>56</sup> Even if, for the sake of argument, one was to accept the existence of a

<sup>55</sup> ICC-01/09-01/11-58, paras 14 and 18.

<sup>56</sup> 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

“bulk rule”,<sup>57</sup> the Single Judge observes that this jurisprudence is seemingly not applied consistently in the pre-trial proceedings<sup>58</sup>, including the proceedings before Pre-Trial Chambers II and III.<sup>59</sup> In fact, Pre-Trial Chambers II/(III) apply consistently the disclosure regime following the principles established in the Disclosure Decision, which lack any reference to the “bulk rule”.

27. 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,<sup>60</sup> 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

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Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation Hearing”, ICC-01/04-01/07-621.

<sup>57</sup> 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.

<sup>58</sup> 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.

<sup>59</sup> 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 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.

<sup>60</sup> 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.

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

28. 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

29. 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".<sup>61</sup>

#### *The Disclosure Decision*

30. 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:

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<sup>61</sup> ICC-01/09-01/11-50, para. 8.



[...] [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 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.<sup>62</sup>

### *Arguments by the Prosecutor*

31. 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".<sup>63</sup> He argues that by requiring all evidence to be communicated to the Chamber, it is assuming control over the presentation of both parties' cases.<sup>64</sup> 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".<sup>65</sup> 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.<sup>66</sup> The Prosecutor further views the fairness of the proceedings affected on the grounds that the Disclosure Decision in fact limits

<sup>62</sup> Pre-Trial Chamber II, Disclosure Decision, paras 6 and 11.

<sup>63</sup> ICC-01/09-01/11-50, para. 30.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

disclosure as the Chamber purportedly required the Prosecutor “to filter [his] disclosed evidence in order to avoid registration of vast amounts of materials”.<sup>67</sup> 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.<sup>68</sup> He additionally argues that a Pre-Trial Chamber record containing vast amounts of material, and which is transferred to the Trial Chamber after the confirmation of charges, is less efficient.<sup>69</sup> 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.<sup>70</sup>

#### *Arguments by the Defence*

32. The Defence for Henry Kosgey contends that the Third Issue does not affect the fairness and expeditiousness of the proceedings. To this end, it makes reference to, *inter alia*, the Prosecutor’s previous line of argumentation in the *Mbarushimana* case.<sup>71</sup> The Defence further argues that the Prosecutor failed to provide any compelling arguments how this issue significantly affects the expeditiousness of proceedings.<sup>72</sup> Finally, the Defence for Henry Kosgey 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.<sup>73</sup> As the Third Issue is based on speculation, an appellate resolution would only be required at a later stage in the event such concerns crystallized and would not materially advance the proceedings now.<sup>74</sup>

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<sup>67</sup> ICC-01/09-01/11-50, para. 32.

<sup>68</sup> ICC-01/09-01/11-50, para. 33.

<sup>69</sup> ICC-01/09-01/11-50, para. 37.

<sup>70</sup> ICC-01/09-01/11-50, paras 4, 9 and 36-38.

<sup>71</sup> ICC-01/09-01/11-57, para. 16.

<sup>72</sup> ICC-01/09-01/11-57, para. 18.

<sup>73</sup> ICC-01/09-01/11-57, paras 22-24.

<sup>74</sup> ICC-01/09-01/11-57, para. 26.

33. The Defence for William Ruto and Joshua Sang advances the same arguments as the Defence for Henry Kosgey.<sup>75</sup>

#### *Conclusion of the Single Judge*

34. 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.

35. 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 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.

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<sup>75</sup> ICC-01/09-01/11-58, paras 36-40.

[...]

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.<sup>76</sup>

36. 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 silent<sup>77</sup> and to decide not to present any evidence or challenge the evidence presented by the Prosecutor<sup>78</sup>. Lastly, the Single Judge notes that the Defence has not complained about the communication of all evidence to the Chamber.

37. 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

<sup>76</sup> 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.

<sup>77</sup> Article 67(1)(g) of the Statute.

<sup>78</sup> 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).

as mentioned above, the Chamber may resort to article 69(3), second sentence, of the Statute,<sup>79</sup> 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 Issue, including the simplistic reference to the possible slow-down of proceedings as wholly hypothetical and in disregard of such principles.

38. 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.

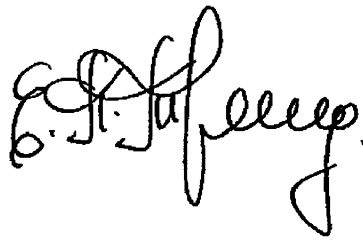
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<sup>79</sup> See also Pre-Trial Chamber III, “Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties”, ICC-01/05-01/08-55, paras 8-11.

**FOR THESE REASONS THE SINGLE JUDGE HEREBY**

**rejects the Prosecutor's Application.**

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



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**Ekaterina Trendafilova**  
**Single Judge**

Dated this Monday, 2 May 2011

At The Hague, The Netherlands