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PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul Title
Judge Cuno Tarfusser Title

SITUATION IN REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI
KENYATTA AND MOHAMMED HUSSEIN ALI

Public Document

**Defence Response to “Prosecution’s Response to the “Decision Requesting the
Prosecutor to Submit Observations on the Possible Reclassification of Certain
Documents” dated 28 March 2011**

Source: Defence

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

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I. INTRODUCTION

1. On 15 December 2010, the Prosecutor submitted the “Prosecutor’s Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Mugai Kenyatta and Mohammed Hussein Ali”.¹ This Application appended 23 annexes, 4 of which are classified as “public”,² while the other 19 are currently classified as “confidential ex parte, Prosecutor only”. On the same date, the Prosecutor filed a public redacted version of the Application with the 4 annexes classified as “public”.

2. On 21 March 2011, the Single Judge of Pre Trial Chamber II (the “Pre-Trial Chamber”) filed the “Decision requesting the Prosecutor to Submit Observations on the Possible Reclassification of Certain Documents”.³ Judge Trendafilova ordered the Prosecutor to submit by no later than 28 March 2011, observations on the possible reclassification either as “public” or as “confidential” those Annexes submitted by the Prosecution in support of its Article 58 application in addition to observations on the reclassification of sections thereof.⁴ The Prosecutor was also requested to submit observations on the possible reclassification of the witness statements that were provided to the Chamber on 23 February 2011 with a view to disclosure to the suspects. The Single Judge referred specifically to the need to receive submissions from the Prosecutor given the “forthcoming hearing of the suspects’ initial appearance before the Chamber”.⁵

3. On 28 March 2011, the Prosecution filed the requested observations as “Prosecution’s Response to the “Decision Requesting the Prosecutor to Submit

¹Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecutor’s Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 15 December 2010, ICC-01/09-31.

² Annexes 11,12,13 and 15.

³ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision Requesting the Prosecutor to Submit Observations on the Possible Reclassification of Certain Documents, 21 March 2011, ICC-01/09-02/11-10.

⁴The Prosecutor was asked to submit observations on the reclassification of Sections C, H and G.

⁵*Ibid* at para.6.

Observations on the Possible Reclassification of Certain Documents.””⁶ The Prosecutor proposed specific requests regarding reclassification of the Prosecutor’s application and opposed the Single Judge’s request to redact evidentiary materials for the purposes of disclosure to the suspects at their initial appearance. The initial appearance is scheduled to take place on 8 April 2011. The Defence submits that under Regulation 24(1) of the Regulations of the Court, the Defence may file a response to any document that has been filed by any participant in the case pursuant to an order of the Chamber.⁷ While the Defence is cognisant of Regulation 24(5),⁸ it is submitted that leave is not necessary in the instant case as the substance of the Prosecution’s filing is properly characterised as observations filed in response to an order of the Pre-Trial Chamber, as opposed to a response to a filing by a party within the meaning of Regulation 24(5).

4. The Prosecution resists the request of the Chamber to redact evidentiary material for the purposes of disclosure to the suspects at their initial appearance on the basis that:
 - (i) The Chamber’s proposal is pre-mature and inconsistent with the timelines contemplated under the Rome Statute; and
 - (ii) Given the intention of the Republic of Kenya to challenge admissibility, disclosure at this time could jeopardize the Court’s ongoing proceedings and potentially interfere with national processes.⁹
5. The Defence submits that the Chamber’s proposal to ensure prompt disclosure to the three suspects as from the first appearance is not premature and is entirely consistent with the spirit and meaning of the relevant provisions within

⁶Pre-Trial Chamber II, *Prosecutor v Muthaura et al.*, Prosecution’s Response to the “Decision Requesting the Prosecutor to submit Observations on the Possible Reclassification of Certain Documents”, 28 March 2011, ICC-01/09-02/11-18.

⁷ Regulation 24(1) of the Regulations of the Court: The Prosecutor and the defence may file a response to any document filed by any participant in the case in accordance with the Statute, Rules, these Regulations and any order of the Chamber.

⁸ Regulation 24(5) of the Regulations of the Court: Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations.

⁹ *Ibid.*, at para. 3.

the Rome Statute and the Rules of Procedure and Evidence. The track record for late disclosure by the Prosecution necessitating the frequent postponement of confirmation hearings requires the Pre-Trial Chamber to set strict deadlines to ensure the protection of the fair trial rights of the suspects, under Article 67 of the Rome Statute from the initial appearance. Furthermore, the Prosecution fails to substantiate any reason as to why disclosure at this time could jeopardize the Court's ongoing proceedings and potentially interfere with national processes. The Defence submit that the Prosecution's request that the time within which to propose redactions be extended to five weeks before the confirmation hearing should be rejected.

II. LOCUS STANDI

6. On 11 February 2011, the Pre-Trial Chamber issued its "Decision on a Request for Leave to Appeal" in the case of William Ruto.¹⁰ In this instance, the applicant sought leave to submit observations concerning the application for a summons. In rejecting the request, the Pre-Trial Chamber determined that:

"[it]...does not consider a person, against whom a summons to appear has been requested as having *locus standi*, nor does it recognize him as a "party" to the proceedings, within the meaning of article 82(1)(d) of the Statute, *until it has taken a decision on the Prosecutor's applications.*"¹¹

7. The Defence submit that the Pre-Trial Chamber's decision recognises that an individual has *locus standi* to address the Court as soon as the Chamber has rendered a decision on the summons. This decision making process was completed on 15 March 2011 with the issuance of His Honour Judge Kaul's dissent.¹²

¹⁰Pre-Trial Chamber II, Prosecutor v Ruto et al., Decision on a Request for Leave to Appeal, 11 February 2011, ICC-01/09-43.

¹¹ Ibid., at para. 9.

¹²Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11-01; Pre-Trial Chamber II, Prosecutor v Muthaura et al., Dissenting Opinion by Judge Hans-Peter Kaul to the Pre-Trial Chamber II's "Decision on the

III. SUBMISSIONS

(a) Rule 121(3), Rights of the Suspects and the Disclosure Regime

8. The Defence submit that the Prosecution has misinterpreted the meaning and spirit of Rule 121(3) of the Rules of Procedure and Evidence. The Prosecution argues that the rule “only requires that the Prosecution disclose materials to the defence 30 days before the confirmation hearing”.¹³ However, the precise wording of Rule 121(3) states as follows:

“The Prosecutor shall provide to the Pre-Trial Chamber and the person, **no later than 30 days** before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing.”

9. Rule 121(3) merely sets out the deadline for provision of the charging document and a list of the evidence to be relied upon, as opposed to a framework for the timely disclosure of evidence having regard to the fundamental rights of suspects under Article 67 of the Rome Statute.
10. The obligation upon the Pre-Trial Chamber to ensure that disclosure commences at, or soon after, the initial appearance of the suspects is inextricably linked to its duty to inform the suspects of their rights under Article 67 and to ensure the protection thereof.¹⁴
11. Article 67(1)(a)-(c) provides that the individual has a right to a public and fair hearing conducted impartially which guarantees the following rights in full equality:

Prosecutor’s Application for Summonses to Appear for Francis Kiriimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali”, 15 March 2011, ICC-01/09-02/11-3.

¹³ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution’s Response to the “Decision Requesting the Prosecutor to submit Observations on the Possible Reclassification of Certain Documents”, 28 March 2011, ICC-01/09-02/11-18, at para 13.

¹⁴ Article 60(1) of the Rome Statute.

- (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
- (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence; and
- (c) To be tried without undue delay.¹⁵

12. Article 67(2) expressly addresses the issue of disclosure within the context of the rights of an accused:

“2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.”

13. In *Lubanga*, Judge Steiner held that “the final system of disclosure must satisfy the minimum guarantees provided for in Article 67 of the Statute, among them (i) the right of the Defence to know as soon and as fully as possible the evidence the Prosecution intends to rely on at the confirmation hearing and about potentially exculpatory and other materials that may assist the Defence in preparing for the confirmation hearing, and (ii) adequate time and facilities to prepare the defence.”¹⁶ The Pre-Trial Chamber clarified that as “soon as the Prosecution has identified an item of potentially exculpatory material within the scope of article 67(2) of the Statute, the Prosecution shall: (i) disclose it to the Defence” and “as soon as the Prosecution decides to rely on a given witness at the confirmation hearing, the Prosecution shall: (i) transmit pursuant to rule 76

¹⁵ Article 67 of the Rome Statute.

¹⁶Pre-Trial Chamber I, Prosecutor v. Lubanga, Annex I: Discussion of the Decision on the final system of disclosure to Decision on the final system of disclosure and the establishment of a timetable, 15 May 2006, ICC-01/04-01/06-102, para. 5.

of the Rules, to the Defence the name of that witness and copies of his or her statement.”¹⁷

14. A similar interpretation of the Prosecution’s disclosure obligations was provided by Pre-Trial Chamber II in *Bemba* where the Pre-Trial Chamber held that the provisions on disclosure must be interpreted in a manner which is compatible with, *inter alia*, the right of the person prosecuted to be informed promptly and in detail of the nature, cause and content of the charges and with his right to have adequate time and facilities for the preparation of the defence.¹⁸ In addition, the Pre-Trial Chamber confirmed that on the basis of Rule 121(1), the Chamber has the duty to ensure at the pre-trial stage that the disclosure system provides no less than the minimum guarantees set out in Articles 67(l)(a) and 67(l)(b) of the Statute and to ensure fairness in the disclosure system and respect for equality of arms between the parties.¹⁹ The Chamber stressed that the most important factor in safeguarding the rights of the defence is not for the Prosecutor to disclose the greatest volume of evidence, but to disclose the evidence which is of true relevance to the case, whether that evidence be incriminating or exculpatory. In fact, disclosure of a considerable volume of evidence for which it is difficult or impossible to comprehend the usefulness for the case, merely puts the Defence in a position where it cannot genuinely exercise its rights, and serves to hold back the proceedings.²⁰
15. The requirement that disclosure takes place within a reasonable time before the confirmation hearing, and sufficiently in advance to enable the adequate preparation of the defence is set out in both the Rome Statute and the Rules of Procedure and Evidence.

¹⁷Pre-Trial Chamber I, Prosecutor v. Lubanga, Decision on the final system of disclosure and the establishment of a timetable, 15 May 2006, ICC-01/04-01/06-102, pp. 8 and 9.

¹⁸Pre-Trial Chamber I, Prosecutor v. Bemba Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008, ICC-01/05-01/08-55, para. 20.

¹⁹Pre-Trial Chamber I, Prosecutor v. Bemba, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, ICC-01/05-01/08-55, 31 July 2008, para. 21.

²⁰Pre-Trial Chamber I, Prosecutor v. Bemba, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, ICC-01/05-01/08-55, 31 July 2008, para. 67.

16. **Article 61(3)** of the Rome Statute requires that **within a reasonable time before the hearing**, the person shall be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial, and to be informed of the evidence on which the Prosecutor intends to rely at the hearing.
17. Under **Article 67(2)**, the Prosecutor has the duty to disclose all materials within his possession or control that he believes (i) show or tend to show the innocence of the accused; (ii) mitigate the guilt of the accused; and (iii) may affect the credibility of the Prosecution's evidence.²¹ The Article provides that such disclosure must be made **"as soon as practicable"**. In *Bemba*, Pre-Trial Chamber II confirmed that Article 67(2) requires the Prosecution to disclose to the Defence all exculpatory evidence, which is of utmost importance for the preparation of the Defence, as soon as practicable and that the Prosecution permits the Defence to inspect all evidence under Rule 77 as soon as possible.²²
18. **Rule 76(1)** requires the Prosecution to provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. The Rule requires that this must be done **"sufficiently in advance to enable the adequate preparation of the defence."**²³ Further, **Rule 76(2)** states that "the Prosecutor shall subsequently advise the defence of the names of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses". Rule 76 illustrates the obligation upon the Prosecution to disclose such information as soon as it is available.
19. In a recent decision in *Mbarushimana*, the Pre-Trial Chamber expressly referred to the "paramount principle that any and all material, including material

²¹Pre-Trial Chamber I Prosecutor v. Katanga and Ngudjolo, 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, 20 June 2008, para. 1.

²²Pre-Trial Chamber II, Prosecutor v. Bemba, Decision Regarding the Disclosure of Materials Pursuant to Article 67(2) of the Rome Statute and Rule 77 of the Rules of Procedure and Evidence, ICC-01/05-01/08-241, paras 9 and 14.

²³Rule 76(1) of the Rules of Procedure and Evidence.

covered by Article 67(2) of the Statute, shall be disclosed as soon as practicable.”²⁴ The Defence must have access to the identities and the unredacted versions of the statements the Prosecutor will seek to rely on at confirmation as soon as practicable in order to uphold the fundamental fair trial rights of the suspects, which include the need to investigate, test, consider and contest the evidence called at confirmation.

20. In respect of other disclosure obligations, the Pre-Trial Chamber in *Mbarushimana* has ruled that the Defence is entitled to disclosure of information and documents relevant to an admissibility challenge, whether or not admissibility is a live issue pending before the Court.²⁵ The right to make a challenge to the admissibility of a case or the jurisdiction of the Court are expressly provided for in the Statute and thereby necessitate defence access to relevant documents.²⁶ In a further decision in *Mbarushimana*, the Pre-Trial Chamber emphasized that “when complying with his disclosure obligations, the Prosecutor shall give priority to materials relating to jurisdiction and admissibility.”²⁷ Such priority requires disclosure without delay.
21. In order to uphold the rights of a suspect under Article 67, the Pre Trial Chamber must ensure that disclosure is both timely, and not subject to any unnecessary or unjustifiable redaction, having regard to the Chamber’s

²⁴Pre-Trial Chamber I, Prosecutor v. Mbarushimana, Decision on Issues Relating to Disclosure, ICC-01/04-01/10-87, 30 March 2011, para 20.

²⁵Pre-Trial Chamber I, Prosecutor v Mbarushimana, Decision on the Defence Request for Disclosure, ICC-01/04-01/10, 27 January 2011, para.13: The Pre Trial Chamber held that to make “such disclosure dependent on a prior finding by the Chamber that there is a live admissibility issue pending or on a prior challenge to admissibility by the Defence would unduly restrict and delay the Defence’s exercise of a right to effectively make such a challenge.” In Prosecutor v Kony et al, Pre-Trial Chamber II had ordered disclosure of certain documents to the defence for the purpose of making observations on the admissibility of the case, relying on the fairness of the proceedings in this connection: Prosecutor v Kony et al, “Decision on Defence Counsel’s “Request for conditional stay of proceedings”, 31 October 2008, ICC-02/04-01/05-328. Trial Chamber III in Bemba has held that the prosecution has obligations with respect to the disclosure of certain documents to the defence for the purposes of challenging the admissibility of the case, basing its conclusion on Rule 77 of the Rules: Prosecutor v Jean-Pierre Bemba Gombo, “Decision on the defence application for additional disclosure relating to a challenge on admissibility”, 2 December 2009, ICC-01/05-01/08-632, para.18.

²⁶Pre-Trial Chamber I, Prosecutor v Mbarushimana, Decision on the Defence Request for Disclosure, ICC-01/04-01/10, 27 January 2011, para.13.

²⁷Pre-Trial Chamber I, Prosecutor v Mbarushimana, Decision on Issues Relating to Disclosure, ICC-01/04-01/10-87, 30 March 2011.

obligation to respect the rights of the suspects, safeguard the principle of publicity and to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.²⁸ Judge Trendafilova, acting as the Single Judge, expressly referred to these duties when requesting the Prosecutor to review whether or not redactions were required before providing the suspects with documents from the Annexes and those witness statements served on the Pre-Trial Chamber on 23 February 2011.²⁹

22. The Pre-Trial Chamber in *Mbarushimana*, with Judge Tarfusser presiding, has recently adopted a pro-active approach to ensuring timely Prosecution disclosure by imposing prompt deadlines, justified “by the need to ensure the expeditiousness of proceedings, and by the fundamental right of the suspect “to be informed promptly and in detail of the nature, cause and content of the charge in a language which [he] fully understands and speaks” (article 67(1) of the Statute).”³⁰ The adoption of a stringent approach is even more imperative in the instant case given that these are complex multi-handed proceedings that will undoubtedly give rise to a plethora of issues, some of which may necessitate the disclosure of potentially exculpatory evidence and/or material which is relevant to defence preparations by the different teams.

(b) The Prosecution’s Inability to Disclose in a Timely Manner

23. The Prosecution’s practice of late disclosure has resulted in considerable delay and postponement of the confirmation proceedings in *Lubanga*,³¹ *Katanga and Ngudjolo*,³² *Bemba*³³ and *Abu Garda*.³⁴

²⁸ Articles 67, 68 and 57(3)(c) of the Rome Statute.

²⁹Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision Requesting the Prosecutor to Submit Observations on the Possible Reclassification of Certain Documents, 21 March 2011, ICC-01/09-02/11-10, para. 5.

³⁰Pre-Trial Chamber I, Prosecutor v Mbarushimana, Decision on Issues Relating to Disclosure, ICC-01/04-01/10-87, 30 March 2011, para.20.

³¹ In *Lubanga*, a first postponement of the confirmation hearing date was caused by the Office of the Prosecutor’s inability to implement protective measures in a timely manner: Decision on the postponement of the confirmation hearing and the adjustment of the timetable set in the Decision on the final system of disclosure, 24 May 2006, ICC-01/04-01/06-126; The date of confirmation was postponed on a second occasion due to the fact that the Prosecution had not provided the Defence

24. Furthermore, the Prosecution misstated the dates of these confirmation hearings in footnote 10 of its Response and failed to address the fact that postponement of the confirmation dates was caused by the Prosecutor's inability to implement disclosure and/or protective measures and/or compulsory translations in a timely manner.³⁵
25. The Defence submits that the language of the disclosure provisions cited in paragraphs 16-18 herein ("within a reasonable time"; "sufficiently in advance"; and "as soon as practicable") requires the Pre-Trial Chamber to implement a pro-active disclosure framework from the date of the initial appearance. The disclosure provisions provide the Pre-Trial Chamber with the discretion to formulate a workable regime. In the circumstances, the Defence submits that to allow the Prosecution to rely on the default position of the 30 day deadline in Rule 121(3) would be to abrogate the fair trial rights of the suspects. The practice and impact upon the proceedings of delayed Prosecution disclosure to date reinforces the Defence submissions.
26. Further, the Pre-Trial Chamber's role in setting a date for the confirmation hearing at the initial appearance should not be carried out *in abstracto*. The Defence submit that the initial appearance is an opportunity for the Pre-Trial

with timely disclosure: Decision on the date of confirmation hearing, 5 October 2006; ICC-01/04-01/06-521. The confirmation hearing took place from 9 November 2006 – 28 November 2006.

³² In Katanga and Ngudjolo, the Prosecution failed to comply with its obligations concerning the filing of electronic copies of the evidence contained in the charging document and list of evidence with the data required by the e-court protocol: Decision on the Defence Request for Postponement of the Confirmation Hearing, 25 April 2008; ICC-01/04-01/07-446. The confirmation hearing took place from 27 June 2008 – 16 July 2008.

³³ In Bemba, the Pre-Trial Chamber postponed the initial date for the confirmation hearing because part of the evidence on which the Prosecutor intended to rely at the confirmation hearing was not yet accessible to the defence: Decision on the Postponement of the Confirmation Hearing; 17 October 2008; ICC-01/05-01/08-170-tENG. The confirmation hearing took place from 12 January 2009 to 15 January 2009.

³⁴ In Abu Garda, the confirmation proceedings had to be postponed as an extension of time was required by the Prosecution to file an Arabic translation of the list of evidence and revised summaries of transcripts: Decision on the Confirmation of Charges; 8 February 2010; ICC-02/05-02/09-243-Red; referring to Decision on the Prosecutor's requests for extension of time limit"; ICC-02/05-02/09-98; 11 November 2009. The confirmation hearing took place between 19 October and 30 October 2009.

³⁵Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution's Response to the "Decision Requesting the Prosecutor to submit Observations on the Possible Reclassification of Certain Documents", 28 March 2011, ICC-01/09-02/11-18, fn. 10.

Chamber to determine the initial disclosure deadlines for service of evidence in accordance with the Statute and Rules of Procedure and Evidence.

(c) Jeopardy to Proceedings

27. The Prosecutor submits that in “light of the announced intention of the Republic of Kenya to challenge admissibility...disclosure at this time could jeopardize this Court’s ongoing proceedings and potentially interfere with national processes.”³⁶ The State of Kenya filed an admissibility challenge on 31 March 2011.³⁷
28. The Prosecutor has failed to explain how the provision of timely disclosure to the suspects within the remit of the Statute and Rules of Procedure and Evidence could jeopardize proceedings before the International Criminal Court. The Defence submit that it is in fact the Prosecution’s intended reliance upon Rule 121(3) that risks interference with the requirement of expeditious proceedings, not an application by the State of Kenya, which it is entitled to make under Article 19 of the Rome Statute.

(d) No Determination of Material for Confirmation

29. The Prosecution argues that it has “yet to determine materials and documents that will be used for the confirmation hearing as it is still in the process of collecting and examining its evidence”.³⁸ The Defence submits that the Prosecution cannot be allowed to evade its disclosure obligations by prevaricating in respect of the decision as to which particular evidence it will rely on for the purposes of confirmation.

³⁶Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution’s Response to the “Decision Requesting the Prosecutor to submit Observations on the Possible Reclassification of Certain Documents”, 28 March 2011, ICC-01/09-02/11, para 3.

³⁷Pre-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.

³⁸Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution’s Response to the “Decision Requesting the Prosecutor to submit Observations on the Possible Reclassification of Certain Documents”, 28 March 2011, ICC-01/09-02/11, para 14.

30. Contrary to the Prosecution's submission, the confirmation hearing is not an opportunity for the Defence to "comment on the evidence before any conclusions are drawn from it by the Chamber".³⁹ This proposition entirely misstates the purpose and intention of the confirmation process, which crucially, allows the Defence to both challenge and present evidence.
31. Notwithstanding the fact that the Prosecution continues to collect and examine evidence, documents and information within the possession or control of the Prosecutor fall to be disclosed to the Defence without delay under the following provisions:
- (i) Under Article 61(3), the Prosecution is under an obligation to serve its charging document and to inform the Defence of the evidence on which the Prosecutor intends to rely at the hearing within a reasonable time before the confirmation hearing;
 - (ii) The Prosecution must disclose all material without delay covered by Article 67(2) as set out in paragraph 17 herein;
 - (iii) Under Rule 76(1), the Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses, sufficiently in advance to enable adequate preparation. The Defence submits that such witness statements must be disclosed regardless of whether the Prosecution intends to call them to testify.⁴⁰ Even if the Prosecutor determines that it will rely only on "summary evidence" of a witness statement, the Defence submits that it must be provided with the underlying witness statement in order to be in a position to properly investigate and challenge the evidence presented;
 - (iv) The Prosecution must disclose as a priority, information, documents and material relating to the issues of admissibility and jurisdiction;

³⁹Pre-Trial Chamber II, *Prosecutor v Muthaura et al.*, Prosecution's Response to the "Decision Requesting the Prosecutor to submit Observations on the Possible Reclassification of Certain Documents", 28 March 2011, ICC-01/09-02/11, para 14.

⁴⁰Pre-Trial Chamber I, *Prosecutor v Mbarushimana*, Decision on Issues Relating to Disclosure, 30 March 2011, ICC-01/04-01/10-87.

- (v) Under Rule 77, the Prosecution must allow the Defence to inspect, starting as soon as practicable, at a location, time and manner agreed by the parties, any books, documents, photographs and other tangible objects in its possession or control, which are material to the preparation of the defence and relate to jurisdiction and admissibility;⁴¹ and
- (vi) Under Rule 77, the Prosecution must allow the Defence to inspect, starting as soon as practicable, at a location, time and manner agreed by the parties, any books, documents, photographs and other tangible objects in its possession or control, which are material to the preparation of the defence, or intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing, or were obtained from or belonged to the person.⁴²

IV. RELIEF REQUESTED

32. The Defence request the Pre-Trial Chamber to:

- (i) Reject the Prosecution's request to provide proposed redactions 5 weeks before the date set for the confirmation hearing;
- (ii) Order the Prosecution in accordance with paragraph 31(i)-(vi) to ensure that the Prosecutor discloses to the Defence, forthwith:
 - (a) Material which the Office of the Prosecution submitted to the Pre-Trial Chamber in its application for summons;
 - (b) The charging document under Article 61(3);
 - (c) Evidence in the Prosecutor's possession or control which is relevant to jurisdiction and admissibility;
 - (d) Exculpatory evidence as defined in Article 67(2);
 - (e) The names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses, summaries prepared by the Prosecution and exhibit

⁴¹Pre-Trial Chamber I, Prosecutor v Mbarushimana, Decision on Issues Relating to Disclosure, 30 March 2011, ICC-01/04-01/10-87.

⁴²*Ibid.*

material which the Prosecution intends to rely upon at the confirmation phase under Rule 76(1);

- (f) Material relevant to defence preparations under Rule 77 which should be construed broadly to encompass any information which assists the Defence to understand the incriminating and exculpatory aspects of the case; and information/evidence concerning the context and credibility of the evidence relied upon by the Prosecution;⁴³
- (iii) Set a strict timetable in respect of any requests for redactions by the Prosecution under Rule 81 of the Rules and any applications for protective measures. Any measures taken in relation to the protection of victims and witnesses must not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

⁴³Judgement on the appeal of Mr Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008 (Judge Pikis and Judge Song dissenting), ICC-01/04-01/06-1433, paragraphs 76-82.

Steven Kay QC.

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On behalf of Mohammed Hussein Ali

Dated this Friday, 1 April 2011

At Nairobi, Kenya