Commentary

1. Introduction

The 'Decision concerning the Prosecutor’s Proposed Summary Evidence' relates to the use of summary evidence from anonymous witnesses in the pre-trial phase before the International Criminal Court (ICC). The use of such evidence in criminal proceedings has always been and remains highly controversial because the accused has no ability to meaningfully evaluate or challenge the evidence. Although the decision touches on several intriguing issues – such as victim participation and the disclosure of exculpatory evidence – this commentary focuses solely on issues of admissibility, as the other topics are analyzed elsewhere in this edition.

When the decision was rendered, the evidence underlying it had been and remained the subject of extensive proceedings before the Pre-Trial and Appeals Chambers. In the 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81', the Pre-Trial Chamber determined that

“even if heavily redacted, the unredacted parts of certain witness statements, transcripts of witness interviews and investigators’ notes and reports of witness interviews would lead to the identification of the relevant Prosecution witnesses”.

It consequently refused to disclose this evidence to the defence, and requested that the prosecution prepare summaries of it to protect the identity of the witnesses. The current decision followed an *ex parte* hearing on the matter.

The Pre-Trial Chamber took the novel approach of making the issue of witness protection a factor relevant to admissibility. This approach was motivated by “exceptional circumstances” and the limited role of the confirmation hearing. The Chamber simultaneously decided on the distinct issues of disclosure and admissibility and thereby unnecessarily denied the accused’s right to challenge the admissibility of the evidence. Perhaps as a result of this, the decision does not take into account the possible prejudice to the accused in its application of the admissibility criteria. Interestingly, the Pre-Trial Chamber determined that the prosecutor’s request did not adequately protect prosecution witnesses and, on that ground, excluded the admission of evidence related to certain witnesses.

2. Admissibility and witness protection

Unlike common law jurisdictions, but similar to other international criminal courts, judges at the ICC are not bound to strict rules of evidence. This is reflected in Article 69, paragraph 4 of the ICC Statute which provides that

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2 The authors use the term ‘accused’ throughout this commentary to refer to the object of proceedings before the ICC. However, the ICC Statute refers to both “the person” and “the accused”. See, for example, Article 7, sub e, and Articles 12, 17, 20, 31, 33 and 63 of the ICC Statute.


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Admissibility of Evidence

“The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.”

Guidance on the admission of summary evidence is provided for in Article 61, paragraph 5, and Article 68, paragraph 5 of the ICC Statute, which state that the prosecutor may rely on such evidence at the confirmation hearing.

Shortly after the decision under review here was rendered, the Appeals Chamber held that summary evidence could be admitted during the pre-trial proceedings. It warned, however, that admission may not be prejudicial to or inconsistent with the rights of the accused and with a fair and impartial trial. Chambers must determine this on a case-by-case basis, taking into account that the accused may be affected in his ability to challenge the evidence against him.

3. Fair trial

The decision reads that

“according to Article 69 (4) of the Statute, the single judge must balance (i) the probative value that the Chamber could give to the summary evidence proposed by the Prosecution of these four witnesses, against (ii) the grave risks to their security [that are] inherent to the disclosure of their identity to the Defence given the exceptional circumstances present in this case.”

It notably did not, as Article 69, paragraph 4 of the ICC Statute provides, balance ”the probative value of any evidence and any prejudice that such evidence may cause to a fair trial.”

As explicitly provided in Article 61, paragraph 6, sub b of the ICC Statute, the accused has a right to challenge the evidence during the confirmation hearing. Even if this right applies with less force than during the trial proceedings, it is a fundamental right which merits due consideration. Regardless of whether witness protection should feature in decisions on admissibility, it is clear that any correct application of Article 69, paragraph 4 of the ICC Statute should take into account that the accused can, with regard to anonymous evidence, hardly exercise his fundamental right to evaluate and challenge evidence against him.

The Pre-Trial Chamber’s balancing of probative value with witness protection furthermore implies that the more important the witness’ testimony is to the prosecution’s case, the less protection he or she is entitled to. This approach seems directly at odds with the essential duty of the Court to provide adequate protection for all witnesses. Furthermore, if the reasoning is turned around – when probative value is low, more extensive protective measures are allowed – it leads to a perverse result that would appear at odds with the practice of the ad hoc tribunals that any protective measures must be kept at the absolute minimum required to ensure the safety of the witness.

Furthermore, the decision to simultaneously rule on disclosure and admissibility led to the prosecutor being permitted to rely on seventeen anonymous statements without the defence having been heard. Ex parte

8 See also the corresponding Rule 63, paragraph 2 of the ICC Rules of Procedure and Evidence (RPE), which, however, does not add substantive elements.
9 Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision of Pre-Trial Chamber I Entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, Prosecutor v. Dyilo, supra note 4, par. 40-51. The Appeals Chamber’s comments on evidence were made in the abstract, not with regard to the specific evidence at issue here (see ibid., par. 41).
10 Ibid., par. 51.
11 Ibid., par. 50.
12 Decision Concerning the Prosecutor Proposed Summary Evidence, Prosecutor v. Dyilo, supra note 1, p. 5-6.
13 Article 67 of the ICC Statute. See also, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision of Pre-Trial Chamber I Entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, Prosecutor v. Dyilo, supra note 4, par. 50.
14 See Decision Concerning the Prosecutor Proposed Summary Evidence, Prosecutor v. Dyilo, supra note 1, p. 5-6.
15 Article 57, paragraph 3, sub c, Article 64, paragraph 2 and 6, sub e, and Article 68 of the ICC Statute. See also Rule 76, paragraph 4 and Rule 81, paragraph 4 of the ICC RPE.
hearings are the exception to the general rule that both parties will be represented. This is an essential safeguard for a fair trial. Arguments by the defence might have prompted the judge to consider more carefully the requirements of a fair trial and might have led to more statements being denied admission, for example, on the ground that they are found to be insufficiently reliable.

The defence could easily have participated, had a strict distinction between both stages been maintained. It is suggested that if, as happened in the current case, the Chamber after ex parte hearings concludes that some of the redactions and summaries proposed by the prosecution do not sufficiently ensure the safety of the witness, it should order more redactions. When the proposed redactions strike a fair balance between the needs of the witness and the rights of the accused, the Chamber can order the evidence to be disclosed. Of course, the statement may by then have been so heavily redacted that it is left with very limited probative value. This will become a factor during the next stage, when to have the evidence admitted the prosecutor must show that its probative value outweighs the right of the accused to evaluate and challenge the evidence against him.

The Pre-Trial Chamber further considered that documents that were annexed to the summaries deemed inadmissible are also “inadmissible if the Prosecution intends to rely on them at the confirmation hearing only in relation to such proposed summary evidence.” A skilled prosecutor will always be able to link a document to other evidence or issues, which raises the question of what is meant by “only”. Additionally, without access to the underlying witness statement, the defence’s ability to ascertain the context and reliability of these documents will be severely restricted. Again, the decision did not pay due attention to the accused’s right to evaluate and challenge the evidence against him. It can only be hoped that the rights of the accused play a more pronounced role in subsequent decisions.

4. Exclusion of prosecution evidence in favour of the protection of prosecution witnesses

Adequate protection for witnesses is seen as critical to the success of the ICC and this is reflected in the ICC Statute. Similar to the ad hoc tribunals, the need to ensure witness safety is more important during the pre-trial phase than it is during the trial phase. Strikingly, concerns over the witness’ security led the Pre-Trial Chamber to deny the prosecution’s request for the admission of certain evidence, based on the fact that this request would unacceptably endanger prosecution witnesses. The Chamber’s decision to do so draws attention to a rarely explored conflict, namely between the prosecution’s ability to present its case which it does inter alia on behalf of victims, and the interest witnesses (who often are also victims) have in adequate protection.

Although the Pre-Trial Chamber’s concern over witness safety falls squarely within its competence and duties, strong arguments exist for the view that judges must trust that the Prosecution will not compromise the safety of its own witnesses. The prosecution’s case rises or falls with the availability of its witnesses and their willingness to participate in investigations and trials, so it is reasonable to assume that the prosecution would not knowingly place them in jeopardy. Furthermore, through its contacts with investigators, victims, witnesses and governments the prosecution has greater familiarity with both the general situation in the field and the personal circumstances of the witness than the Chamber has. Additionally, the ICC Statute requires the prosecution to ensure witness safety.

Yet, the Pre-Trial Chamber’s willingness to find that a witness requires more protection than the prosecution deems appropriate must be welcomed. The prosecution has an interest not only in the safety of the witness,
but also in their evidence being shared with the defence so that the evidence may be used at trial or will be of greater probative value. In light of this interest, the prosecutor may understate the protective measures needed. A possible illustration may be found in the current decision, which states that the prosecutor conceded that admission of some summaries would reveal the witness’ identity, but apparently did not think it necessary to withdraw its request to tender those summaries into evidence.24 Furthermore, the Pre-Trial Chamber is required to play an active role in issues relating to disclosure prior to the trial and is specifically charged with the ensuring witness safety.25 In addition, the availability of independent advice from the Victims and Witnesses Unit suggests an autonomous assessment is warranted.

5. “Exceptional Circumstances”

The decision notes that it is only in the context of the “exceptional circumstances faced in the present case as a result of the recent deterioration of the security situation in certain parts of the Democratic Republic of the Congo and the impact of such deterioration on the range of available and feasible protective measures” that the Pre-Trial Chamber authorized the Prosecutor to rely on summary evidence from anonymous sources at the confirmation hearing.26 This leads the authors to wonder if, within the context of the ICC, the considerations underlying the decision are “exceptional”. While situations involving violence, disorganized civilian administration and general social upheaval would certainly strike most readers of this commentary as “exceptional”, it is a situation that the ICC is likely to encounter time and again.

However, the circumstances may have been genuinely exceptional. Only a few days before this decision was issued, the United Nations Security Council passed Resolution 1711, which referred to recent violence between rival security forces in Kinshasa.27 The resolution condemned the continuation of hostilities in the Democratic Republic of the Congo (DRC) and deplored the “persistence of violations of human rights and international humanitarian law in the [DRC]”.28 The resolution refers to the “continuing illicit flow of weapons within and into the [DRC]”.29 Seven United Nations peacekeepers had been taken hostage by rebels, while engaged in an attempt to disarm militias, in late May 2006.30

Although the Pre-Trial Chamber did not provide an evaluation of the personal circumstances of the witnesses in the public version of this document, these individuals’ circumstances appear to have influenced the decision. The Pre-Trial Chamber noted that four witnesses faced “grave risks to their security” if their identities were disclosed.31 The use of this language to apply to only four witnesses suggests differences between the witnesses’ personal circumstances. It could be an indication that some remained in the area of hostilities whilst others had relocated.32 It could also indicate that some were more vulnerable – due to age, position or otherwise – than others.33 The reason for the discrepancy in the admissibility determinations regarding these witnesses on the ground of protection is not clear from the public version of the decision, but the differing determinations suggest that, in keeping with practice of the ad hoc tribunals,34 the Pre-Trial

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24 See Decision Concerning the Prosecutor Proposed Summary Evidence, Prosecutor v. Dyilo, supra note 1, p. 6. This is even more surprising given the prosecution’s duty to ensure the safety of the witness, and the fact that the prosecution is not obliged to disclose or tender all its evidence at the pre-trial stage. During this stage, the prosecution only needs to tender sufficient evidence to have the charges confirmed.

23 See H. Brady, Disclosure of Evidence, in R. Lee (ed.), The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, Transnational Publishers, Ardsley 2001, p. 407 (“Rule 121, which underpins article 61, paragraph 3, provides a detailed regime governing disclosure of evidence prior to the confirmation hearing. At its core is the notion that the Pre-Trial Chamber plays a very significant and active role vis-à-vis disclosure before the confirmation hearing” (footnotes omitted)).

24 See Decision Concerning the Prosecutor Proposed Summary Evidence, Prosecutor v. Dyilo, supra note 1, p. 3 and 7-8.

25 See ICC, Decision on Second Defence Motion for Leave to Appeal, Prosecutor v. Dyilo, Case No. ICC-01/04-01/06, P-T. Ch. I, 28 September 2006, in this volume, p. 633, p. 9 (noting that certain prosecution witnesses were “currently living in risk areas within the DRC”).

26 The Pre-Trial Chamber referred to “position” being a possible “identifying feature”. See Decision Concerning the Prosecutor Proposed Summary Evidence, Prosecutor v. Dyilo, supra note 1, p. 4.

27 See, for example, ICTY, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, Prosecutor v. Tadić, Case No. IT-94-I-T, T. Ch. II, 10 August 1995 (Tadić (1995) ICTY JR 123), Klip/ Sluiter, ALC-I-155, par. 53-
Chamber assessed each witness individually with regard to the existence of “exceptional circumstances” warranting the exclusion of certain evidence.35

6. Conclusion
Regrettably, this decision fails to address what lies at the heart of the admissibility of anonymous evidence: the right of the accused to have the opportunity evaluate and challenge the evidence against him. The decision to simultaneously decide on disclosure and admissibility should not be repeated, since it unnecessarily deprives the defence the opportunity to be heard. It is fortunate that the Appeals Chamber, in general terms, adequately elaborated on the subject some weeks after this decision was rendered. Additionally, the prosecutor and defence can, and certainly should, revisit the Pre-Trial Chamber’s admissibility determinations during the trial phase.36

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35 As further indication that the Pre-Trial Chamber was guided by an assessment of personal circumstances, see Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81(2) and (4) of the Statute, Prosecutor v. Dyilo, supra note 16, par. 31 (noting the “particular circumstances surrounding a given witness”).