

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 6 April 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

**SITUATION IN THE REPUBLIC OF KENYA
IN THE CASE OF THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA,
UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI**

Public

Decision Setting the Regime for Evidence Disclosure and Other Related Matters

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

The Office of the Prosecutor

Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor

Counsel for Francis Kirimi Muthaura

Karim A. Khan and Kennedy Ogeto

Counsel for Uhuru Muigai Kenyatta

Steven Kay and Gillian Higgins

Counsel for Mohammed Hussein Ali

Evans Monari, John Philpot and
Gershom Otachi Bw'omanwa

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar

Silvana Arbia, Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”)¹ of the International Criminal Court (the “Court”) issues this decision setting a regime for the disclosure of evidence between the parties and other related matters for the purpose of organization, efficiency and expeditiousness of the upcoming proceedings until the confirmation of the charges hearing.

1. On 8 March 2011, the Chamber, by majority, decided to summon Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali to appear before the Court on 7 April 2011.²

2. On 18 March 2011, the Chamber decided that the initial appearance hearing shall be convened on Friday, 8 April 2011 at 14.30 hours.³

3. The Single Judge notes articles 21 (1)(a), (2)-(3), 54(3)(e), 61 (3),(7), 67(1)(a)-(b), (2), 69(3), 72 and 93(8) of the Rome Statute (the “Statute”), rules 15, 63(1), 76-83, 121(2-10) and 122 of the Rules of Procedure and Evidence (the “Rules”), regulation 26 of the Regulations of the Court and regulations 15-19, 21, 24, 28 and 53(3) of the Regulations of the Registry (“RoR”).

I. Principles governing disclosure and the time-frame thereto

4. The Single Judge reminds the Prosecutor and the Defence that in order to reach the stage of holding a hearing on whether to confirm the charges, the Court’s statutory documents envisage several procedural steps that must be undertaken by the Chamber as well as by the parties throughout the proceedings leading to that hearing. Central to this is the creation of a system that regulates the disclosure of evidence between the parties and its communication to the Chamber.

5. In this regard, the Single Judge recalls the decision of 31 July 2008 issued by Pre-Trial Chamber III in the case of the *Prosecutor v. Jean-Pierre Bemba Gombo*, in which it

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

² Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11-01.

³ Pre-Trial Chamber II, “Decision Setting a New Date for the Initial Appearance”, ICC-01/09-02/11-8.

developed the principles underlying evidence disclosure between the parties for the purposes of the confirmation hearing (the “31 July 2008 Decision”).⁴ The Single Judge has no reason to depart from the principles as laid down in the 31 July 2008 Decision, and accordingly, will apply them in the present decision.

6. As stated in the 31 July 2008 Decision, disclosure of evidence as envisaged by the language of rule 121(2)(c) of the Rules is an *inter partes* process that takes place between the Prosecutor and the Defence. It is facilitated or implemented through the channel of the Registry. The Chamber receives “all evidence disclosed for the purposes of the confirmation hearing” by way of communication in order to carry out its main duty, which is “to ensure that disclosure takes place under satisfactory conditions” in accordance with article 61(3) of the Statute together with rule 121(2)(b) of the Rules.

7. In this context, the 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; (b) all names of witnesses and copies of their prior statements on which the Prosecutor intends to rely at the confirmation hearing, regardless of whether the Prosecutor intends to call them to testify (rule 76); (c) all rule 77 material

⁴ 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.

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; (d) all rule 78 material in possession or control of the Defence, which is intended for use as evidence for the purposes of the confirmation hearing; and (e) all evidence the Defence may present as per rule 79, on which the suspect intends to rely, to establish an alibi or a ground for excluding criminal responsibility.

8. The Single Judge reminds the Prosecutor and the Defence that the Court's statutory documents impose different time-limits on both parties, by which to file the material and evidence *stricto sensu* in the record of the case. In this respect, according to rule 121(3) of the Rules, the Prosecutor shall provide a document containing a detailed description of the charges together with a list of evidence, for the purposes of the confirmation hearing, no later than 30 days before the date of its commencement. If he intends to amend the charges or the list of evidence, rule 121(4) of the Rules requires that the Defence be notified no later than 15 days prior to the date of the hearing of the amended charges or/and list of evidence.

9. Moreover, should the Prosecutor intend to present new evidence at the hearing, rule 121(5) of the Rules dictates that he shall also provide a list of that evidence no later than 15 days before the date of the hearing. In this respect, the Single Judge wishes to point out that for the purpose of this rule "new evidence" refers to any information, material or evidence which came into the Prosecutor's control or possession after the deadline provided for in rule 121(3) of the Rules. Accordingly, evidence presented to the Chamber (including new evidence) after the time limits, as specified by the provision referred to above shall not be considered.

10. As to the Defence, pursuant to rule 121(6) of the Rules, if the persons intend to present evidence, they shall provide a list of evidence no later than 15 days before the start of the confirmation hearing.

11. In this regard, it is the view of the Single Judge that the deadlines established by rule 121 of the Rules are only indicative of the minimum time limits that a party can avail itself to comply with its disclosure obligations. This conclusion finds support in the express wording of “no later than”, reflected in rule 121(3)-(6) and (9) of the Rules. Thus, the early initiation of the process of disclosure better guarantees the expeditiousness of the proceedings, guided by the overarching principle of fairness. For these reasons, the Single Judge encourages the parties to fulfill their disclosure obligations as soon as practicable and not only on the date when the deadline as provided by the statutory documents expires.

12. 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.

13. With respect to the different requests related to protective measures for witnesses including redactions, the Single Judge wishes to make clear that any such request must be submitted as soon as practicable, but no later than the date which shall be specified in a calendar to be issued in due course. This prevents unnecessary delays for the start of the confirmation hearing and ensures that the Defence is put on sufficient notice for its preparation.

II. Role of the Registry and registration procedure

14. The Single Judge reiterates that the process of evidence disclosure is facilitated by the Registry, which is not a party to the proceedings but rather “a communication channel” between the parties and the Chamber.⁵ The Single Judge will apply the modalities of disclosure of evidence and communication of that evidence to the Chamber as laid down in the 31 July 2008 Decision.

⁵ 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, para. 34.

15. The Registry has different responsibilities related to this process as referred to in rule 121(10) of the Rules and regulations 15-19, 24-28 and 53(3) of the RoR. Among these responsibilities is to maintain a full and accurate record of the proceedings containing the evidence disclosed, and subject to restrictions regarding confidentiality or national security information, the Registry facilitates having access to the record by the parties and the Chamber. Thus, the Registry must register and transmit all evidence disclosed between the parties and communicated to the Chamber expeditiously.

16. In relation to the registration procedure, the Single Judge wishes to explain that upon receipt of the relevant evidence, the Registry will register each piece of evidence to be disclosed and communicated to the Chamber. Each piece of evidence submitted shall be assigned with an independent "EVD number". Evidence shall be submitted by the parties in its original form and a corresponding electronic copy. In case of tangible objects, evidence shall be submitted in the form of an electronic photograph.

17. Unless a party raises an objection against the authenticity of a piece of evidence,⁶ the Registry shall not conduct an authentication process confirming that the electronic copy is an exact replica of the original piece of evidence.

18. In case a piece of evidence or part of it needs to be replaced in the record of the case upon an objection, the document shall be provided in accordance with the e-Court protocol (see Annex 1).

19. When submitting evidence under rule 76 of the Rules, the Prosecutor is reminded to provide a translation which will be reflected accordingly in the record of the case. That translation of the document shall be provided in accordance with the e-Court protocol (see Annex 1).

⁶ *Ibid.*, para. 59.

20. The parties are reminded to include in their submission of evidence the following documentation: (i) a list of evidence enlisting all pieces of evidence enclosed with their respective document ID as defined in the e-Court protocol (see Annex 1) and (ii) a list of recipients including the level of confidentiality applicable to each item.

21. In view of the principle of publicity of proceedings, the evidence submitted shall in principle be registered as public unless there is a reason to classify it otherwise.

III. Required analysis of the evidence exchanged between the parties

22. 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. The same analysis technique shall apply *mutatis mutandis* to photographs, maps, videodiscs, tangible objects and any other support disclosed by the Prosecutor [...]this analysis should be presented in the form of a summary table which shows the relevance of the evidence presented in relation to the constituent elements of the crimes with which the person is charged. It should enable the Chamber to verify that for each constituent element of any crime with which the person is charged, including their contextual elements, as well as for each constituent element of the mode of participation in the offence with which he or she is charged, there are one or more corresponding pieces of evidence, either incriminating or

exculpatory, which the Chamber must assess in light of the criteria set under article 61(7) of the Statute.⁷

23. In the context of the present decision, the Single Judge favours the same approach adopted in the 31 July 2008 Decision,⁸ which was further clarified in a subsequent decision issued by the same Chamber on 10 November 2008 (the “10 November 2008 Decision”). In the latter decision, the Chamber requested the Prosecutor to present a consolidated version of his in-depth analysis chart of incriminating evidence, following the structure of a draft model chart annexed to the 10 November 2008 Decision.⁹ 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 [...]”.¹⁰ 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.

24. The approach advanced in the referenced decisions and reiterated in the present one aims at streamlining the process of evidence disclosure, thus ensuring that the Defence is prepared under satisfactory conditions, and that the Presiding Judge is in a position to “organise the presentation of evidence by the parties according to the crimes charged with one party responding to the other on each count consecutively”.¹¹ This prevents any unnecessary delays that might negatively impact upon the commencement of the confirmation hearing on the date envisaged by the Chamber.

⁷ 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 66-70.

⁸ *Ibid.*, paras. 66-73.

⁹ Pre-Trial Chamber III, “Decision on the Submission of an updated, Consolidated Version of the In-depth Analysis Chart of incriminatory Evidence Disclosure of evidence by the Defence”, ICC-01/05-01/08-232, paras 5-8; ICC-01/05-01/08-232-Anx, pp. 8-9.

¹⁰ *Ibid.*, para. 9; see also Pre-Trial Chamber III, “Decision on the Disclosure of evidence by the Defence”, ICC-01/05-01/08-311, paras 9-10.

¹¹ 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 72-73.

IV. Documents affected by articles 54(3)(e), 72 and 93(8) of the Statute

25. The Single Judge recalls the obligation of the Prosecutor to disclose as soon as practicable to the Defence all exculpatory evidence in his possession or control in accordance with article 67(2) of the Statute or otherwise material for the preparation of the Defence in accordance with rule 77 of the Rules. In this respect, it is the Prosecutor's duty, in case he has received materials to be disclosed to the Defence pursuant to article 67(2) of the Statute or rule 77 of the Rules and protected under articles 54(3)(e), 72 and 93(8) of the Statute, to ensure that disclosure can take place without undue delay. To that end, the Prosecutor should conduct the necessary consultations with any information provider to reach an agreement on a waiver of that condition. In any event, the Prosecutor must bring those documents or any problem that might arise with the information provider to the attention of the Chamber as soon as practicable.¹²

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) decides** that the disclosure process between the parties shall be facilitated through the Registry;
- b) orders** the parties submitting any evidence to submit the original of the evidence as well as its electronic copy or, in case of tangible objects, its electronic photograph to the Registry;
- c) orders** the parties to submit any evidence with the appropriate metadata in accordance with the e-Court protocol as set out in Annex 1 to this decision;

¹² Appeals Chamber, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials conveyed by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference of 10 June 2008", ICC-01/04-01/06-1428, paras 2 and 3.

d) orders the parties to submit the evidence in due time and within official filing hours of the Registry;

e) decides that, when submitting any evidence to the Registry, the parties shall provide the following accompanying documentation:

1. A list of evidence listing all pieces of evidence enclosed with their respective document ID;
2. A list of identified recipients for each evidentiary item also reflecting the access and level of confidentiality for each item;
3. An analysis of each piece of evidence reflecting its relevance as described in part III of this decision (see Annex 2);

f) orders the parties to comply with the registration procedure of any evidence as described in part II of this decision;

g) orders the Registrar to register electronic copies of any evidence in the record of the case and to store its original in the Registry vault;

h) orders the Registrar to provide unrestricted access to the Chamber of all evidence disclosed between the parties;

i) orders the Registrar to report any related practical or security concern to the Single Judge as soon as possible;

j) orders the parties to provide the factual and legal basis for any proposal to classify (as non-public) the evidence submitted;

k) decides that any delays in the process of disclosure, which result from procedures concerning articles 54(3)(e), 72 and 93(8) of the Statute, shall be brought to the attention of the Chamber as soon as practicable;

l) orders the Prosecutor at the latest by 15 April 2011 at 16,00 hours to submit a report to the Single Judge indicating the number of documents of exculpatory nature pursuant to article 67(2) of the Statute or otherwise material for the preparation of the Defence in accordance with rule 77 of the Rules that he has received in the present

case, which are protected under articles 54(3)(e), 72 and 93(8) of the Statute and the possibility, if any, for waiving the restrictions imposed by the information provider.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Wednesday, 6 April 2011

At The Hague, The Netherlands