

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11

Date: 5 May 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

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

Public

Decision on the Defence "Application for Order to the Prosecutor Regarding Extra-Judicial Comments to the Press"

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

The Office of the Prosecutor
Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor

Counsel for Francis Kirimi Muthaura
Karim A. Khan and Kennedy Ogetto

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
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")¹ of the International Criminal Court (the "Court"), renders this decision with respect to the "Application for Order to the Prosecutor Regarding Extra-Judicial Comments to the Press" (the "Application"), submitted by the Defence for Francis Kirimi Muthaura.²

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.³ The initial appearance took place on 8 April 2011.⁴

2. On 30 March 2011, the Defence for Francis Kirimi Muthaura ("Mr. Muthaura") filed before the Chamber the Application, "seeking the intervention of the Pre-Trial Chamber to safeguard his fair trial rights, the integrity of the judicial process that has commenced and in order to prevent irremediable prejudice to the Defence".⁵ The Application is based on comments made by the Prosecutor during a press conference which took place on 14 March 2011.⁶ A copy of the transcript of the said press conference, which refers to the Prosecutor's statement that Mr. Muthaura has control over the police in Kenya, is annexed to the Application.⁷

3. In the Application, the Defence argues that "the inappropriate and one sided press comments by the Prosecutor and his repeatedly presenting theory as fact, has the potential to infect the investigations process and significantly disadvantage the Defence",⁸ and requests that the Chamber:

- a. Order the Prosecutor of the ICC to refrain from making any further public comments touching on the merits of the present case;

Additionally or in the alternative,

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

² ICC-01/09-02/11-20.

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

⁴ ICC-01/09-02/11-T-1-ENG.

⁵ ICC-01/09-02/11-20, para. 1.

⁶ *Ibid.*, paras 8-9.

⁷ ICC-01/09-02/11-20-AnxA, pp. 2-3.

⁸ ICC-01/09-02/11-20, para. 25.

- b. In the event that any press comment is deemed absolutely necessary in order to discharge his responsibilities under the Rome Statute, to require the Prosecutor to make clear that his assertions are mere allegations by the Prosecution, the veracity of which are to be determined by the ICC; and
- c. Put the Prosecutor on notice that any further contravention of the orders of the Pre-Trial Chamber in this regard may attract consideration of judicial sanction.⁹

4. On 20 April 2011, the Prosecutor submitted the "Prosecution's Response to the 'Application for Order to the Prosecutor Regarding Extra-Judicial Comments to the Press'" (the "Response"),¹⁰ in which it is argued that "[t]here [was] nothing objectionable in the Prosecutor's comment. It did not address the merits of the case or infringe on [Mr. Muthaura's] fair trial rights or the integrity of the judicial process".¹¹ According to the Response, the Prosecutor "expressed proper and legitimate concerns about the possibility that Mr Muthaura could exercise authority over the witness protection program."¹² The Prosecutor requested the Chamber to dismiss the Application in its entirety.¹³

5. The Single Judge notes article 68(1) of the Rome Statute (the "Statute").

6. At the outset, the Single Judge recognizes that the Application raises issues which are of legitimate concern to the Defence. Notwithstanding the absence of a specific statutory provision regulating the relationship between the parties and the press, it must be stated, as a matter of principle, that the safeguarding of the proper administration of justice and the integrity of the judicial proceedings requires the parties, participants and any person involved in the proceedings, to refrain from making public statements or engage in any other activity which could have an impact on the evidence or the merits of the case or could be perceived as showing a predetermination of the cause pending before the Court. In this light, the Single Judge recalls what this Chamber has recently stated:

⁹ ICC-01/09-02/11-20, para. 26.

¹⁰ ICC-01/09-02/11-65.

¹¹ ICC-01/09-02/11-65, para. 5.

¹² *Ibid.*, para. 5.

¹³ *Ibid.*, para. 26.

While it is not the Chamber's role to comment and advise the Prosecutor on his interaction with the press and media, the Chamber nevertheless is concerned if his actions have the potential to affect the administration of justice and the integrity of the present proceedings before the Chamber.¹⁴

7. The Single Judge also recalls and endorses the principles affirmed in this respect by Trial Chamber I in the *Lubanga* case, although the factual circumstances before the Trial Chamber differ significantly from those on which the Application is based. In its "Decision on the press interview with Ms Le Fraper du Hellen", the Trial Chamber stated:

It is not the role of the Chamber to comment on the arrangements that are, or should be, in place as regards the relationship between the Court (*i.e.* its various organs and counsel appearing in its cases) and the media. The Chamber's concern is instead focussed on the course of the present trial, and the need to ensure that the interests of justice are upheld [...].¹⁵

8. More specifically, Trial Chamber I held:

39. [...] It is important that in media statements there is a clear and accurate description as to whether issues that are reported have been decided or are still unresolved. Most importantly, and as a matter of professional ethics a party to proceedings is expected not to misrepresent the evidence, to misdescribe the functions of the parties or the Chamber, or to suggest or imply without proper foundation that anyone in the case, including the accused, has misbehaved.

40. [...] In our judgment, respecting the Chamber, the judicial process and the other participants involves speaking publicly about the proceedings in a fair and accurate way, and avoiding any comment about issues that are for the Chamber to determine.¹⁶

9. The Single Judge considers that the foregoing considerations constitute the appropriate principal framework under which the facts giving rise to the present Application shall be analyzed.

10. Upon careful review of the transcript of the Prosecutor's press conference of 14 March 2011, the Single Judge is of the view that the topics addressed by the Prosecutor in his answers to the press were not related to the crimes for which Mr.

¹⁴ Pre-Trial Chamber II, "Decision on the 'Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor's Application under Article 58(7)'", ICC-01/09-42, para. 22.

¹⁵ Trial Chamber I, "Decision on the press interview with Ms Le Fraper du Hellen", ICC-01/04-01/06-2433, para. 36.

¹⁶ *Ibid.*, paras 39-40.

Muthaura has been summoned or those which the Prosecutor may bring before the Chamber as charges. Rather, the Prosecutor commented on the position held by Mr. Muthaura at the time of the press conference *vis-à-vis* the Kenyan police, while making clear reference to the “protection [of witnesses]” and the related “conditions of the judges”.¹⁷ The latter can logically be understood as the condition imposed by the Chamber on Mr. Muthaura “to refrain from corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, or tampering with or interfering with the Prosecution’s collection of evidence”.¹⁸

11. At first, the Single Judge recalls that, under article 68(1) of the Statute, the Prosecutor is vested with the duty to protect witnesses during his investigations and prosecutions. Secondly, the Single Judge considers that the Prosecutor’s answers to the press have properly reflected his role in the present criminal proceedings and cannot be understood as prejudging the questions which are yet to be determined by the Chamber. The Single Judge is thus of the view that the Prosecutor’s comments to the press addressed issues of his concern and within his responsibilities and were therefore not inappropriate. Accordingly, it is not necessary to address the validity of the Prosecutor’s concern for the protection of witnesses in the case or to take into consideration the information provided by the Prosecutor that Mr. Muthaura has since stepped down from the position in question.¹⁹ It may also be added that no prejudicial nature can be attributed to the newspaper articles summarizing the Prosecutor’s comments during the press conference, which are annexed to the Application.²⁰

12. In light of the foregoing, the Single Judge concludes that the statements made by the Prosecutor during the press conference of 14 March 2011 did not violate the

¹⁷ ICC-01/09-02/11-20-AnxA, p. 3.

¹⁸ 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, p. 24.

¹⁹ ICC-01/09-02/11-65, para. 3.

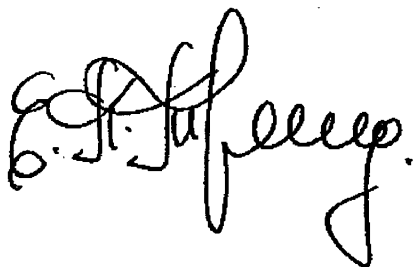
²⁰ ICC-01/09-02/11-20-AnxB and AnxC.

principles set out in paragraphs 6 to 8 above. Consequently, the Application must be rejected in its entirety.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

rejects the Application.

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

A handwritten signature in black ink, appearing to read 'E. Trendafilova', written in a cursive style.

Judge Ekaterina Trendafilova
Single Judge

Dated this Thursday, 5 May 2011

At The Hague, The Netherlands