

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 4 July 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 Requests for Disclosure of the Unredacted Article 58  
Application and all Statements, Declarations, Testimonies and Utterances of the  
Suspects**

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 Khan and Kennedy Ogetto

**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**

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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 Defence requests for disclosure of the unredacted article 58 application and all statements, declarations, testimonies and utterances of the suspects.

1. On 15 December 2010, the Prosecutor submitted the “Prosecutor’s Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali” (the “Article 58 Application”).<sup>2</sup>

2. 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.<sup>3</sup>

3. On 1 April 2011, the Single Judge issued the “Decision on Reclassification of Certain Documents”, whereby, *inter alia*, the Prosecutor was ordered to file a new public redacted version of the Article 58 Application, while the Registrar was ordered to copy this document from the record of the Situation in the Republic of Kenya into the record of the case.<sup>4</sup> The current public redacted version is accessible in the record of the Situation in the Republic in Kenya under the registration number ICC-01/09-31-Red2, while the original application has been copied into the record of the case, under registration number ICC-01/09-02/11-35-Conf-Exp.

4. On 6 April 2011, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, whereby, *inter alia*, principles as to

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<sup>1</sup> Pre-Trial Chamber II, “Decision Designating a Single Judge”, ICC-01/09-02/11-9.

<sup>2</sup> ICC-01/09-31-Conf-Exp.

<sup>3</sup> 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-01/09-02/11-1.

<sup>4</sup> Pre-Trial Chamber II, ICC-01/09-02/11-30.

the disclosure of evidence between the parties and its communication to the Chamber have been established.<sup>5</sup>

5. On 20 April 2011, the Single Judge issued the “Decision on the ‘Prosecution's application requesting disclosure after a final resolution of the Government of Kenya's admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties” (the “Calendar for Disclosure”),<sup>6</sup> whereby the Single Judge, *inter alia*, established a series of deadlines for the Prosecutor to disclose to the Defence any evidence which he intends to rely upon for the purposes of the confirmation of charges hearing. Certain deadlines have also been established for the Prosecutor to permit the Defence to inspect any books, documents, photographs and other tangible objects in his possession or control which he intends to use at the confirmation of charges hearing or were obtained from or belonged to the suspects within the meaning of rule 77 of the Rules of Procedure and Evidence (the “Rules”). In addition, the Single Judge ordered the Prosecutor to disclose to the Defence all evidence in his possession or control under article 67(2) of the Rome Statute (the “Statute”) as soon as practicable and on a continuous basis and to permit the Defence, as soon as possible, to inspect any books, documents, photographs and other tangible objects in his possession or control which are material to the preparation of the Defence within the meaning of rule 77 of the Rules.

6. On 23 June 2011, the Defence of Mr. Muthaura submitted the “Defence Request for Disclosure of Unredacted Article 58 Application and all Statements, Declarations, Testimonies and Utterances of Ambassador Francis K. Muthaura in the Possession of the Prosecutor”, wherein it is requested that the Single Judge:

[O]rder the Prosecution to disclose to the Defence its Article 58 Application in unredacted or lesser redacted form and all statements, declarations, testimonies

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<sup>5</sup> Pre-Trial Chamber II, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, ICC-01/09-02/11-48.

<sup>6</sup> Pre-Trial Chamber II, ICC-01/09-02/11-64.

and utterances of Ambassador Muthaura in the possession and control of the Prosecution without delay.<sup>7</sup>

7. In support of this request, the Defence of Mr. Muthaura argues that the current redacted form of the Article 58 Application “fails to provide the Defence with any semblance of adequate information on the nature and content of the charges and allegations”<sup>8</sup> and that “[d]isclosure of the Article 58 Application at this stage would enhance the Defence’s understanding of the Prosecution case and assist its preparation accordingly.”<sup>9</sup>

8. On 29 June 2011, the Single Judge received the “Application on Behalf of Uhuru Muigai Kenyatta to Join the Defence Request for Disclosure of the Unredacted Article 58 Application and all Statements, Declarations, Testimonies and Utterances of Uhuru Muigai Kenyatta in the Possession of the Prosecution”, whereby the Defence of Mr. Kenyatta sought to join the arguments advanced by the Defence of Mr. Muthaura<sup>10</sup> and requested that the Single Judge:

[O]rder the Prosecution to disclose to the Defence its Article 58 Application in unredacted or lesser redacted form and all statements, declarations, testimonies and utterances of Mr. Uhuru Muigai Kenyatta in the possession and control of the Prosecution without delay.<sup>11</sup>

9. Lastly, on 1 July 2011, the Defence of Mr. Ali submitted the “Defence Request for Disclosure of the Unredacted Article 58 Application and all Statements, Declarations, Testimonies and Utterances of Mohammed Hussein Ali in the Possession of the Prosecution”, likewise joining the arguments put forward by the Defence of Mr. Muthaura<sup>12</sup> and requesting that the Single Judge:

[O]rder the Prosecution to disclose to the Defence its Article 58 Application in unredacted or lesser redacted form and all statements, declarations, testimonies

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<sup>7</sup> ICC-01/09-02/11-132, para. 22.

<sup>8</sup> ICC-01/09-02/11-132, para. 11.

<sup>9</sup> ICC-01/09-02/11-132, para. 13.

<sup>10</sup> ICC-01/09-02/11-140, para. 7.

<sup>11</sup> ICC-01/09-02/11-140, para. 8.

<sup>12</sup> ICC-01/09-02/11-144, para. 7.

and utterances of Mohammed Hussein Ali in the possession and control of the Prosecution without delay.<sup>13</sup>

10. At the outset, the Single Judge clarifies that although the Defence teams submitted their applications separately, their requests are identical in substance and even in wording and shall accordingly be examined together. In the following two sections of this decision, the Single Judge shall first address the request to obtain an unredacted or lesser redacted form of the Article 58 Application (the "First Request"), before proceeding to analyze the request of the Defence teams to have disclosed all "statements, declarations, testimonies and utterances" of the respective suspects (the "Second Request").

11. The Single Judge notes articles 21(1)(a) and (3), 54(3)(f), 57(3)(c), 58, 61(3), 67 and 68(1) of the Statute, rules 77 and 121(2) and 3) of the Rules and regulation 23*bis* of the Regulations of the Court (the "Regulations").

### *The First Request*

12. The Single Judge underlines that the principle of publicity of proceedings is an indispensable component of the right to a fair trial, and is enjoyed by the suspects in the case pursuant to article 67(1) of the Statute as well as on the basis of internationally recognized human rights applicable by virtue of article 21(3) of the Statute. Therefore, as a general rule, all documents related to the proceedings before this Court shall be public.

13. Nevertheless, the Statute places upon the Court an obligation to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.<sup>14</sup> The restriction of access by the Defence and/or the public to certain documents or parts of documents in the record of the case is one such mechanism which the Chamber may use to protect the interests of victims and witnesses. Additionally, regulation 23*bis* of the Regulations recognizes the power of the Chamber, on application or on its own motion, to review the classification of

<sup>13</sup> ICC-01/09-02/11-144, para. 8.

<sup>14</sup> Article 68(1) of the Statute; see also article 57(3)(c) of the Statute.

documents in the case. In applying such measures, the Chamber must balance the needs for protection of victims and witnesses on the one hand, and the fair trial rights of the suspects on the other hand.

14. However, the right to publicity of proceedings is not the only relevant interest of the Defence. Additionally, the right to be informed promptly and in detail of the nature, cause and content of the charge, enshrined in article 67(1)(a) of the Statute, must equally be taken into account. While charges are only definitely laid out in the document containing the charges pursuant to article 61(3)(a) of the Statute and rule 121(3) of the Rules (the "DCC"), a considerable period of time may elapse between the start of the process of disclosure of evidence, and the receipt by the Defence of the DCC. During this time, access to the application under article 58 of the Statute may enable the Defence to understand better the charges, and thereby give flesh to article 67(1)(a) of the Statute during this particular stage of proceedings.

15. In the present case, the Single Judge has, prior to the initial appearance of the suspects, ordered the Prosecutor to reduce the extent of redactions to the Article 58 Application.<sup>15</sup> The Single Judge stated:

[The] current assessment of the factual and legal basis for the classification of certain documents, is conducted taking due account of the limited purpose and scope of the initial appearance hearing. Notwithstanding the findings in the present decision regarding the classification of documents, the Single Judge, following the initial appearance hearing and during forthcoming disclosure proceedings, may later re-assess whether the factual and legal bases for classification continue to exist. Indeed, the Single Judge remains alert to the need to balance interests in order to ascertain the continued necessity and proportionality of any classifications.<sup>16</sup>

16. The Single Judge accepts the Defence argument that at the present point in the proceedings, when a substantial amount of evidence has already been disclosed to the Defence but the DCC is yet to be filed, pursuant to the Calendar for Disclosure

<sup>15</sup> Pre-Trial Chamber II, "Decision on Reclassification of Certain Documents", ICC-01/09-02/11-30.

<sup>16</sup> Pre-Trial Chamber II, "Decision on Reclassification of Certain Documents", ICC-01/09-02/11-30, para. 8.

and in accordance with the applicable law, on 19 August 2011,<sup>17</sup> there is a need to review the current level of classification of the Article 58 Application.

17. At the same time, the Single Judge considers that, because of the ongoing disclosure of evidence to the Defence, some information that is currently redacted in the Article 58 Application may already be in possession of the Defence, possibly rendering purposeless the redaction of the same information in the Article 58 Application, at least *vis-à-vis* the Defence.

18. In light of the foregoing, the Single Judge, bearing in mind the obligations of the Prosecutor under article 54(3)(f) of the Statute, considers that it is appropriate to order the Prosecutor to provide information as to what redactions of the Article 58 Application, whether *vis-à-vis* the Defence or the public, are still necessary and proportionate, in order for the Chamber to be able to take an informed decision on the matter. Therefore, the Prosecutor is expected to submit a proposal for a new public, or if deemed necessary confidential, redacted version of the Article 58 Application, and to provide justification for the proposed redactions. Following review of the Prosecutor's proposal, the Single Judge will be able to rule whether any redactions are still justified.

### ***The Second Request***

19. The Single Judge notes that in the original application the Defence of Mr. Muthaura did not advance any arguments in support of the request, nor were such arguments put forward in the subsequent related submissions of the Defence of Mr. Kenyatta or the Defence of Mr. Ali. Nevertheless, it is apparent from the request that it refers to the Prosecutor's compliance with his disclosure obligations, and the Single Judge considers that, in light of the Chamber's obligation to ensure that disclosure takes place under satisfactory conditions, the Second Request shall be considered on its merits.

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<sup>17</sup> Pre-Trial Chamber II, "Decision on the 'Prosecution's application requesting disclosure after a final resolution of the Government of Kenya's admissibility challenge' and Establishing a Calendar for Disclosure Between the Parties", ICC-01/09-02/11-64, p. 13.



20. It has been laid out previously in this case:

[D]isclosure 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.<sup>18</sup>

21. The scope of disclosure is regulated by various provisions of the applicable law, *inter alia* by article 67(2) of the Statute which obliges the Prosecutor to disclose to the Defence such evidence in his possession or control which he or she believes shows or tends to show the innocence of the accused, to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence; and by rule 77 of the Rules, which requires the Prosecutor to permit the Defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are 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 at trial, or were obtained from or belonged to the person.

22. It is unclear from the submissions of the Defence teams in the present instance, whether the general request to have disclosed to them all “statements, declarations testimonies and utterances” of the suspects is based on these or any other provision of the applicable law. What is however clear is that when a provision provides for an obligation of disclosure, any such items which may fall within its scope shall be disclosed to the Defence by virtue of that provision. Consequently, it is not necessary that an order to this effect be issued by the Chamber.

23. It is only in cases that the Prosecutor does not comply with his disclosure obligations that the Chamber is called, pursuant to article 61(3) of the Statute and rule 121(2) of the Rules, to issue such orders as may be necessary for disclosure to

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<sup>18</sup> Pre-Trial Chamber II, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, ICC-01/09-02/11-48, para. 6.

proceed satisfactorily. For this purpose, the Defence has to allege in concrete terms how, and in relation to what evidence, the Prosecutor has violated his disclosure obligations. In the present instance, however, the Single Judge considers that the request advanced by the Defence teams is of such general nature that it cannot amount to an application for a remedial order under article 61(3) of the Statute and rule 121(2) of the Rules.

24. In consequence of the above considerations, the Second Request must be rejected.

**FOR THESE REASONS, THE SINGLE JUDGE HEREBY**

**orders** the Prosecutor to file in the record of the case a proposed new public, or if deemed necessary confidential, redacted version of the Article 58 Application, and to provide justification of redactions proposed, by no later than Thursday, 7 July 2011;

**rejects** the Second Request.

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

  
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Judge Ekaterina Trendafilova  
Single Judge

Dated this Monday, 4 July 2011

At The Hague, The Netherlands