**Cour Pénale Internationale**

**International Criminal Court**

Original: **English**

No.: **ICC-01/09-02/11**
Date: **12 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**

**Corrigendum to Decision on the Defences' Requests for a Compliance Order in regard to Decision "ICC-01/09-02/11-48"**

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

**Counsel for Uhuru Muigai Kenyatta**
Steven Kay and Gillian Higgins

**Counsel for Mohammed Hussein Ali**
Evans Monari 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
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") of the International Criminal Court (the "Court"),[1] issues this decision on the Defences' requests for a Compliance Order in regard to Decision "ICC-01/09-02/11-48".[2]

1. On 8 March 2011, the Chamber, by majority, decided to summon Francis Kirimi Muthaura ("Mr Muthaura), Uhuru Muigai Kenyatta ("Mr Kenyatta") and Mohammed Hussein Ali ("Mr Ali") to appear before the Court.[3] Pursuant to this decision, the suspects voluntarily appeared before the Court at the initial appearance hearing held on 8 April 2011,[4] during which, *inter alia,* the Chamber scheduled the commencement of the confirmation of charges hearing for Wednesday, 21 September 2011.

2. On 6 April 2011, the Single Judge issued the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", in which she explained, *inter alia,* the required analysis of evidence exchanged between the parties (the "6 April 2011 Disclosure Decision").[5]

3. On 29 June 2011, the Defence for Mr. Ali filed the "Defence Request for a Compliance Order in regard to Decision 'ICC-01/09-02/11-48'" ( "Mr. Ali's Request"), in which it requested the Chamber to issue:

> a. An Order directing the Prosecutor to fully comply with decision ICC-01/09-02/11-48 by latest 15 July 2011;
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> b. A warning of sanctions for misconduct directed at the Prosecutor in case of future non compliance with decision ICC-01/09-02/11-48.[6]

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[1] Pre-Trial Chamber II, "Decision Designating a Single Judge", ICC-01/09-02/11-9.
[2] ICC-01/09-02/11-141; ICC-01/09-02/11-143; ICC-01/09-02/11-156.
[3] Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", ICC-01/09-01/11-01.
[4] ICC-01/09-02/11-T-1-ENG.
[5] ICC-01/09-02/11-48, paras 22-24.
[6] ICC-01/09-02/11-141, para. 18.

4. On 1 July 2011, the Defence for Mr. Muthaura filed an application to join the "Defence Request for a Compliance Order in regard to Decision 'ICC-01/09-02/11-48'" (Mr. "Muthaura's Request"), in which it also requested the Chamber:

> 9. [T]o order the Prosecutor to fully comply with the Decision of the Single Judge of ICC-01/09-02/11-48 and to resubmit the concerned material forthwith to the Defence.
>
> 10. [...][to order the Prosecutor] to identify and set out clearly how and why each piece of evidence disclosed is relevant to each of the three [suspects in the present case][...].[7]

5. On 5 July 2011, the Defence for Mr. Kenyatta also filed an application, joining the other two Defence requests for compliance with the 6 April 2011 Disclosure Decision (Mr. "Kenyatta's Request").[8]

6. On 6 July 2011, upon request of the Single Judge,[9] the Prosecutor filed his observations on the suspects' requests, in which he argued, *inter alia*, that he "has complied fully with the Second Decision on Disclosure and the sample model chart".[10]

7. The Chamber notes articles 21(1)(a), 21(3), 61(3)(b), and 67(1)(a),(b) of the Rome Statute (the "Statute") and rule 121 (2) and (3) of the Rules of Procedure and Evidence.

8. The Single Judge observes that, although each Defence team individually advances three separate requests, the issue *sub judice* is whether the Prosecutor has complied with his disclosure obligations, in accordance with the purposes and the spirit of the 6 April 2011 Disclosure Decision.

9. In the 6 April 2011 Disclosure Decision, the Single Judge quoted the relevant part of the disclosure decision in the case of the *Prosecutor v. Jean-Pierre Bemba Gombo*,[11]

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[7] ICC-01/09-02/11-143, paras 9-10.
[8] ICC-01/09-02/11-156.
[9] Pre-Trial Chamber II, "Order to the Prosecutor to Submit Observations on the Defences' Requests 'for a Compliance Order in regard to Decision 'ICC-01/09-02/11-48'", ICC-01/09-02/11-148.
[10] ICC-01/09-02/11-160, p. 6.
[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 66-70.

which set out the intended methodological approach for the required analysis; this was further clarified in a subsequent decision issued in that same case on 10 November 2008.[12]

10. Thus, the Single Judge wishes to reiterate the relevant portions of these decisions and explain further to the parties the nature of analysis required, in the event that the language used in the previous decisions appeared to be unclear to them.

11. In the 6 April 2011 Disclosure Decision, the Single Judge stated that the Defence needs to be provided 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 [...].[13]

12. The quoted paragraph was previously clarified by Pre-Trial Chamber III in its decision issued on 10 November 2008 Decision, whereby the Chamber stated that the required methodology ensures that:

> [T]he analysis is presented in a manner which 'shows the relevance of the evidence presented in relation to the constituent elements of the crimes with which the person is charged. This enables 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 [...] there are one or more corresponding pieces of evidence (...), which the Chamber must assess in light of the criteria set under article 61(7) of the Statute".[14]

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[12] Pre-Trial Chamber III, "Decision on the Submission of an Updated, Consolidated Version of the In-depth Analysis Chart of Incriminatory Evidence", ICC-01/05-01/08-232, para. 6.
[13] ICC-01/09-02/11-48, para. 22.
[14] Pre-Trial Chamber III, "Decision on the Submission of an Updated, Consolidated Version of the In-depth Analysis Chart of Incriminatory Evidence", ICC-01/05-01/08-232, para. 6.

13. In this regard, the Single Judge wishes to point out that expressing that "the evidence exchanged between the parties [...] must be the subject of sufficiently detailed legal analysis relating the alleged facts with the constituent elements corresponding to each crime charged", was never meant to impose an obligation on the Prosecutor other than to properly present the evidence supporting his case, by way of relating each piece of evidence to each legal elements of the alleged crimes and the alleged mode of participation in such crimes. For this purpose, the Chamber expects that the Prosecutor, first, conduct legal analysis of the facts and, thereafter, presents each piece of evidence according to its relevance to the constituent elements of the crimes as well as the modes of liability of the suspects.

14. This approach is justified on the basis of: (i) the role of the Prosecutor as the triggering force to create the cases before the Court; (ii) the explicit language of article 69(3) and (4) of the Statute and rules 63(2) and 64(1) and (3) of the Rules, which makes clear that only *relevant* evidence should be presented by the parties and considered by the Chamber; (iii) the rights of the Defence to be in a position to adequately prepare its case for the confirmation of charges hearing; and (iv) the principle of expeditiousness, which necessitates the Chamber to organize the conduct of the proceedings accordingly and obliges the parties to adhere thereto.

15. Thus, in view of such rationale, the Prosecutor is obliged to disclose to the Defence the pieces of evidence selected to support his case in the manner described in the decisions quoted in paragraphs 11 and 12 above and clarified further in paragraph 13 of the present decision. This ensures that what is presented by the Prosecutor is focused and relevant to the particular counts, or charges, as the case may be, brought against the suspects. As the Single Judge stated previously, such an approach "streamline[s] the process of evidence disclosure" and ensures, on the one hand, that "the Defence is prepared under satisfactory conditions", and, on the other hand, that the Chamber is in position to "organise the presentation of evidence

according to the crimes charged with one party responding to the other on each count consecutively".[15]

16. However, this does not entail that the Prosecutor is required to engage into a critical analysis of the evidence he intends to rely on for the purposes of the confirmation hearing. Conversely, once the Defence has been provided with the evidence disclosed by the Prosecutor together with the charts wherein each piece of evidence is linked to each constituent element of the alleged crimes, it falls within its own responsibility to critically analyze such evidence and challenge, as the case may be, *inter alia*, its relevance, admissibility, reliability, trustworthiness, genuineness and probative value, as entitled to do pursuant to article 61(6)(b) of the Statute. Accordingly, the Prosecutor cannot be expected to replace the Defence in performing its duties, in terms of making the Defence own analysis in light of the disclosed evidence as organized and presented in the prepared charts.

17. Therefore, the interpretation advanced by the Defence, requesting the Prosecutor to disclose "how" and "why" a piece of evidence disclosed is or is not "relevant" to his case, goes beyond what the 6 April 2011 Disclosure Decision requires, since it was never the Single Judge's intention to place the Prosecutor in a prejudicial position by way of imposing on his office a duty that is not supported by the Court's statutory provisions.

18. Consistent with this logic is the approach adopted by the Chamber in its recent "Decision on the 'Prosecution's Application for leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters (ICC-01/09-01/11-44)'".[16] In that decision the Single Judge made clear that the analysis required by the Prosecutor for the purposes of the chart is only requested with respect to the incriminating evidence and that by no means he is mandated to provide an analysis of evidence of exculpatory nature, which tends to show the innocence of the suspects

[15] Pre-Trial Chamber II, "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", ICC-01/09-02/11-48, para. 24.
[16] Pre-Trial Chamber II, ICC-01/09-02/11-77.

against whom summonses to appear have been issued.[17] As soon as exculpatory evidence is disclosed to the Defence by the Prosecutor, it is the task of the Defence to make the appropriate analysis of said evidence as inherent part of Defence responsibilities to properly build up its case. For such a reason, the Prosecutor has not been requested to prepare any in-depth analysis chart of the exculpatory evidence disclosed pursuant to article 67(2) of the Statute.

19. In light of the order contained in the 6 April 2011 Disclosure Decision, the Single Judge has examined the different packages of evidence and annexes appended thereto, which were disclosed to the Defence and communicated to the Chamber. The Single Judge found that the Prosecutor duly set out in chart form each constituent element of the crimes, as well the modes of liability. Furthermore, as requested by the Single Judge, the Prosecutor listed the items of information he considered relevant pursuant to article 61(7) of the Statute under each element of the crimes and modes of liability. In light of such an examination, the Single Judge considers that the Prosecutor has complied with the 6 April 2011 Disclosure Decision.

20. Finally, the Single Judge takes note of the concerns expressed by the Defence team in that each piece of evidence concerning the alleged criminal responsibility of each suspect should have been presented independently. The Single Judge is of the view that the chart as presented by the Prosecutor is sufficiently organized to put the Defence in a position to proceed with the preparation of its case throughout the disclosure proceedings. In this respect, the Single Judge recalls that, according to rule 121(3) of the Rules, the disclosure proceedings will be finalized at the latest 30 days before the commencement of the confirmation of charges hearing, when the Prosecutor will submit the Document Containing the Charges and the list of the evidence – out of all the pieces of evidence previously disclosed to the Defence – upon which he intends to rely for the purposes of the confirmation of charges hearing.

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[17] ICC-01/09-02/11-77, para. 17.

21. In light of such procedural developments ultimately leading to the confirmation of charges hearing as reflected in the statutory documents of the Court, the Single Judge considers that, for the purposes of the analysis charts submitted throughout the disclosure proceedings, the way the Prosecutor presented his evidence with respect to the alleged criminal responsibility of the suspects satisfactorily permits the Defence to progressively building up its case. However, the Prosecutor is requested, at the end of the disclosure proceedings, to present the evidence upon which he intends to rely for the purposes of the confirmation hearing – namely the evidence included in his list of evidence pursuant to rule 121(3) of the Rules – in an in-depth analysis chart wherein each piece of evidence relevant to the alleged criminal responsibility of each suspect will be presented separately.

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

**a) rejects** Mr. Ali's Request;

**b) rejects** Mr. Muthaura's Request;

**c) rejects** Mr. Kenyatta's Request;

**d) Orders** the Prosecutor to submit, no later than Friday, 19 August 2011, a comprehensive in-depth analysis chart of the evidence included in the list of the evidence upon which he intends to rely for the purposes of the confirmation of charges hearing, wherein each piece of evidence is linked to each constituent element of the crimes charged, and, wherein each piece of evidence concerning the alleged criminal responsibility is presented with respect to each suspect separately.

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

**Judge Ekaterina Trendafilova**
**Single Judge**

Dated this Tuesday, 12 July 2011

At The Hague, The Netherlands