

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 13 September 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul, Judge
Judge Cuno Tarfusser, 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 with Public Annex

**Corrigendum to 'Response to The Single Judge's "Decision Requesting
Observations"'**

Source: Defence for General Mohammed Hussein Ali

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

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor

Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Counsel for Francis Kirimi Muthaura:

Karim A.A. Khan QC, Essa Faal and

Kennedy Ogeto

Counsel for Uhuru Muigai Kenyatta:

Steven Kay QC and Gillian Higgins

Counsel for Mohammed Hussein Ali:

Evans Monari, Gershom O. Bw'omanwa,

Greg Kehoe and John Philpot

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

(Participation/Reparation)

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia, Registrar

Deputy Registrar

Mr. Didier Daniel Preira, Deputy
Registrar

Victims and Witnesses Unit

Counsel Support Section

Detention Section

Victims Participation and Reparations

Other

Introduction

1. On 19 August 2011, the Prosecutor filed his Document Containing the Charges (DCC) and List of Evidence (LoE). On 02 September 2011, the Prosecutor, in conformance with rule 121(4) of the Rules of Evidence and Procedure, the Prosecutor filed his amended Document Containing the Charges and List of Evidence.¹
2. On 05 September 2011, the Defence for Mohammed Hussein Ali (the "Defence") disclosed its evidence which it intends to present at the Confirmation of Charges Hearing (the "Hearing") and its List of Evidence.
3. On 09 September 2011, Pre-Trial Chamber II (the "Chamber") received the "Request for Access to Confidential *Inter Partes* Material" (the "request"), in which the common legal representative (the "Representative") seeks "access to all *inter partes* confidential material filed in the record of the case".²
4. On 12 September 2011, the Single Judge requested observations from the Prosecutor and the three suspects "whether or not they object to grant the victims' common legal representative access to their respective list of evidence".³
5. At the outset, the Defence submits that the request neither finds support in the Statute and Rules nor in the Court's jurisprudence.

Submissions

6. The legal provisions under articles 61(3), 67(1) (a) and (b) and 67(2) of the Statute and rules 76 to 83 of the Rules envisage disclosure as between the "parties" (Prosecution and Defence) only. These are the only parties upon which rights and obligations are granted, in the same measure. The Defence submits that this position has found support i the Chambers of this Court on a number of occasions. In the *Lubanga* case, the Chamber held that a contextual

¹ *The Prosecutor v. Muthaura et. al*, ICC-01/09-02/11-257 and ICC-01/09-02/11-257-AnxA, as amended on 2 September 2011. See ICC-01/09-02/11-280 and ICC-01/09-02/11-280-Anx A.

² *The Prosecutor v. Muthaura et. al*, "Request for Access to Confidential *Inter Partes* Material", ICC-01/09-02/11-310, paragraph 17.

³ *The Prosecutor v. Muthaura et. al*, "Decision Requesting Observation", ICC-01/09-02/11-318.

interpretation of the relevant provisions on disclosure “also leads to the conclusion that the disclosure process can only be inter partes and prior to any communication of evidence to the Pre-Trial Chamber through its filing in the record of the case.”⁴

7. In the absence of any clear provisions that form the basis of the request by the representative then the Defence submits that the same should be dismissed *in limine*.
8. The Defence notes that the representative has relied on a decision by the Pre Trial Chamber in the *Katanga and Ngudjolo* case albeit selectively. The representative has omitted important conclusions drawn by the Single Judge in the later part of the decision. Specifically, the Single Judge stated :

Hence, the Single Judge finds that the contextual interpretation of article 68(3) of the Statute and rules 91 and 92 of the Rules in light of the provisions of the Statute and the Rules that regulate the pre-trial stage of a case, leads to the conclusion that those granted the procedural status of victim cannot be part of the disclosure process at the pre-trial stage of a case, and thus they have neither disclosure rights nor disclosure obligations.⁵

9. Even at the trial stage during which victims have more participatory rights, since victims are not parties to the proceedings, they do not have the right to access confidential materials. As concerns disclosure from the OTP, in the Lubanga case, the Chamber held that victims must identify how their personal interests are affected by a specific type of information within the control of the Prosecutor.⁶

⁴ *Prosecutor v. Thomas Lubanga* Decision on the Final System of Disclosure and the Establishment of a Final Timetable, ICC-01/04-01/06-102 at para 63. See also *Prosecutor v. Katanga & Ngudjolo*, “Decision on the Set of Procedural Rights Attached to the Procedural Status of Victim at the Pre-Trial Stage of the Case,” ICC-01/04-01/07-474, 13 May 2008 at para 93

⁵ *Prosecutor v. Katanga & Ngudjolo*, “Decision on the Set of Procedural Rights Attached to the Procedural Status of Victim at the Pre-Trial Stage of the Case,” ICC-01/04-01/07-474, 13 May 2008 at para 114

⁶ *Prosecutor v. Thomas Lubanga* Decision on the legal representative's request for clarification of the Trial Chamber's 18 January 2008 "Decision on victims' participation ICC-01/04-01/06-1368. Para 31-34

10. Even so, the Defence notes that the Trial Chamber in the *Katanga and Ngudjolo* case held that disclosure from the defence to the victims was a matter of professional courtesy and not a legal obligation.⁷
11. Further, the Defence submits that the representative has not advanced any arguments to show how the disclosures sought are relevant to the “personal interests of the victims”. The representative has advanced general arguments without satisfying this test as required by article 68(3).
12. The Defence also notes that the representative has offered not to disclose the evidence to his clients. This is an admission that indeed the “personal interests” of the victims are not affected. The role of the legal representative is to act as a conduit for the views and concerns of his clients. If the legal representative were unable to consult with or receive instructions from his clients in relation to the evidence, then he would essentially be presenting his own legal views concerning the responsibility of the defendant, and would be unable to develop any arguments or views as to how the issues in question affect the personal interests of his clients. In so doing, he would be acting as a second prosecuting authority, and contravening the Appeals Chamber’s direction that the Court must actively ensure that the role of the victims does not usurp or duplicate the role of the Prosecutor.⁸

Conclusion

13. For the foregoing reasons, the Defence urges the Chamber to reject the request by the legal representative of victims.

⁷ Oral decision 23 September 2010 ; T. 47-48 [ICC-01/04-01/07-T-191-Red-ENG WT 23-09-2010]

⁸ *The Prosecutor v. Thomas Lubanga Dyilo*, ‘Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007’; ICC-01/04-01/06-925, 13-06-2007, at para. 28: “[A]n assessment will need to be made in each case as to whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor.”

Respectfully submitted,

Two handwritten signatures in black ink. The first signature on the left is 'Evans Monari' and the second signature on the right is 'Gershom Otachi Bw'omanwa'.

Evans Monari and Gershom Otachi Bw'omanwa
On behalf of Mohammed Hussein Ali

Dated this, 13th day of September 2011

At Nairobi, Kenya