

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 22 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

With confidential annex *ex parte*, Prosecutor

Decision on the Confidential Redacted Version of the Article 58 Application

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
Gershon 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 hereby renders the decision on the confidential redacted version of the “Prosecutor’s Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali” (the “Article 58 Application”).² The present decision is classified as public although it refers to a limited extent to the content of filings, which have been submitted and are currently treated as confidential *ex parte*, Prosecutor. The Single Judge considers that the references made in the present decision are required by the principle of publicity and judicial reasoning. Moreover, those references are not inconsistent with the nature of the documents referred to and have been kept to a minimum.

1. On 15 December 2010, the Prosecutor submitted the Article 58 Application.
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.³ Pursuant to this decision, the suspects voluntarily appeared before the Court at the initial appearance hearing held on 8 April 2011, during which, *inter alia*, the Chamber scheduled the commencement of the confirmation of charges hearing for Wednesday, 21 September 2011.⁴
3. On 23 June 2011, 29 June 2011 and 1 July 2011 the Chamber received three related applications from Mr. Muthaura, Mr. Kenyatta and Mr. Ali, respectively, requesting, *inter alia*, that the Prosecutor be ordered “to disclose to the Defence its Article 58 Application in unredacted or lesser redacted form”.⁵

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

² Originally filed under registration number ICC-01/09-31-Conf-Exp; copied into the record of the case under registration number ICC-01/09-02/11-35-Conf-Exp; public redacted version available under registration number ICC-01/09-31-Red2.

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-01/09-02/11-1.

⁴ CC-01/09-02/11-T-1-ENG.

⁵ ICC-01/09-02/11-132, para. 22; ICC-01/09-02/11-140, para. 8; ICC-01/09-02/11-144, para. 8.

4. On 4 July 2011, the Single Judge issued the “Decision on the Defence Requests for Disclosure of the Unredacted Article 58 Application and all Statements, Declarations, Testimonies and Utterances of the Suspects” (the “4 July 2011 Decision”), whereby the Prosecutor was ordered “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”.⁶

5. On 7 July 2011, the “Prosecution’s Submissions on the ‘Decision on the Defence Requests for the Disclosure of the Unredacted Article 58 Application and all Statements, Declarations, Testimonies and Utterances of the Suspects’ (ICC-01/09-02/11-151)” was filed, in which the Prosecutor proposes a confidential redacted version of the Article 58 Application.⁷ According to the submission of the Prosecutor, the proposed redactions are “necessary to protect ongoing investigations as well as the safety, physical and psychological well-being of victims and witnesses”.⁸

6. The Single Judge notes articles 21(1)(a) and (3), 57(3)(c), 58, 67 and 68(1) of the Rome Statute (the “Statute”), rule 81 of the Rules of Procedure and Evidence (the “Rules”) and regulation 23*bis* of the Regulations of the Court.

7. At the outset, the Single Judge reiterates that the principle of publicity of proceedings and the right of the Defence to be informed promptly and in detail of the nature, cause and content of the charges as enshrined in article 67(1)(a) of the Statute warrant a review of the level of classification of the Article 58 Application.⁹ However, the Single Judge is equally mindful of the Court’s continuous obligation to take appropriate measures with a view to providing for the protection of victims and witnesses within the meaning of articles 57(3)(c) and 68(1) of the Statute. In the view of the Single Judge, the interests of victims and witnesses may, by virtue of these statutory provisions, inform the decision of the Single Judge as to the proper level of

⁶ Pre-Trial Chamber II, ICC-01/09-02/11-151, p. 10.

⁷ ICC-01/09-02/11-162-Conf-Exp, para. 21.

⁸ ICC-01/09-02/11-162-Conf-Exp, para. 1.

⁹ Pre-Trial Chamber II, “Order to the Prosecutor to File a Proposed New Redacted Version of the Article 58 Application”, ICC-01/09-01/11-157, paras 7-13.

classification of filings in the record of the case as public, confidential or confidential *ex parte*. By the same token, they may justify redactions to parts of documents filed in the record of the case.

8. With respect to the Prosecutor's submission that redactions may be applied in the interest of ongoing investigations, the Single Judge notes article 57(3)(c) of the Statute which empowers the Chamber to provide, *inter alia*, for the preservation of evidence, where necessary. The Single Judge agrees with the Prosecutor that measures under this article may include classification of filings in the record of the case as confidential or confidential *ex parte*, or, as the case may be, redactions to the filings. This view has already been taken by this Chamber in a previous case.¹⁰

9. In light of the fact that several decisions related to redactions to evidence under rule 81 of the Rules have so far been issued in the present case,¹¹ the Single Judge wishes to clarify that rule 81 deals with restrictions on disclosure of evidence and is therefore not directly applicable to the question of determination of the proper level of classification of filings in the record of the case, or to the question of redactions to such filings. Nevertheless, the Single Judge opines that the two matters are related and that essentially the same guiding principles are applicable.

10. Accordingly, restriction of access to documents in the record of the case by way of a stricter level of classification or by way of redactions to filings in the record of the case is justifiable when there is an objectively identifiable risk to the relevant protected interest. Moreover, the measure must be necessary to reduce that risk as well as proportionate to the rights of the opposing party, most commonly the Defence. In this context, the right to publicity of proceedings and the right to be

¹⁰ Pre-Trial Chamber II, "Decision on Re-classification and Unsealing of Certain Documents and Decisions", ICC-01/05-01/08-528, para. 11.

¹¹ Pre-Trial Chamber II, "First Decision on the Prosecutor's Requests for Redactions and Related Requests", ICC-01/09-02/11-165-Conf-Exp and Annexes 1 and 2 (a confidential redacted version of the decision has also been filed, see "Redacted First Decision on the Prosecutor's Requests for Redactions and Related Requests", ICC-01/09-02/11-165-Conf-Red); Pre-Trial Chamber II, "Second Decision on the Prosecutor's Requests for Redactions", ICC-01/09-02/11-178-Conf-Exp and Annex.

informed promptly and in detail of the nature, cause and content of the charge, enshrined in article 67(1) of the Statute, are of particular relevance.

11. Bearing in mind these general principles, the Single Judge turns to the proposed confidential redacted version of the Article 58 Application. The Prosecutor effectively proposes to reduce the extent of redactions, *vis-à-vis* the Defence, in the current public redacted version, wherein section G (paragraphs 51 to 192) is entirely obscured.¹²

12. The Prosecutor submits that “the current public redacted version satisfies the principle of publicity of proceedings *vis-à-vis* the public and that maintenance of redactions is necessary to protect confidential information (...) which cannot be disclosed to the public at this time”.¹³ The Single Judge, in light of the nature of the information currently redacted in the Article 58 Application and considering that the present decision is taken primarily to enable the suspects to understand, before the filing of the Document Containing the Charges (the “DCC”), the nature of the case against them, considers that a new redacted version must be issued as confidential and that *vis-à-vis* the public, the current extent of redactions shall be maintained.

13. With respect to the extent of redactions to be maintained in the confidential redacted version of the Article 58 Application, the Prosecutor submits that references to information stemming from evidence already disclosed to the Defence and from public sources can be revealed to the Defence, as can the Prosecutor’s legal arguments and information for which the Prosecutor has assessed that it is not likely to prejudice the protection of victims and witnesses.¹⁴ At the same time, the Prosecutor proposes the continued redaction of certain information that is likely to identify victims and witnesses as well as of other sensitive information not previously disclosed to the Defence.¹⁵

¹² See ICC-01/09-31-Red2.

¹³ ICC-01/09-02/11-162-Conf-Exp, para. 8.

¹⁴ ICC-01/09-02/11-162-Conf-Exp, para. 17.

¹⁵ ICC-01/09-02/11-162-Conf-Exp, para. 16.

14. Upon review of the proposals, considering also the nature and extent of redactions to disclosed evidence as authorized,¹⁶ the Single Judge considers that the majority of the proposed redactions are justified and must be maintained. The redactions of this type concern references to information that could identify witnesses whose identity is not to be revealed to the Defence pursuant to decision of the Chamber.¹⁷ Furthermore, they include references to evidence which has not been disclosed by the Prosecutor for the purposes of the confirmation of charges hearing, but which could identify certain individuals and put them at risk by way of creating a perception of their co-operation with the Court.

15. Nevertheless, the Single Judge considers that in a number of instances, the proposed redactions are unjustified due to the fact that they either concern information that is already available to the Defence or because revealing the information to the Defence would not create a risk for victims or witnesses.

16. In particular, this is the case with certain documents already accessible to the Defence in the record of the case, namely Annexes 3,¹⁸ 5,¹⁹ 9,²⁰ 17²¹ and 18²² to the Article 58 Application. Redactions of references to these annexes would in the assessment of the Single Judge serve no meaningful purpose. The situation is essentially the same with respect to references to evidence which has been disclosed without redactions and is therefore already in possession of the Defence. Furthermore, the Single Judge considers that references to certain publicly available press articles, despite the fact that the articles are not to be relied upon by the

¹⁶ See Pre-Trial Chamber II, "First Decision on the Prosecutor's Requests for Redactions and Related Requests", ICC-01/09-02/11-165-Conf-Exp and Annexes 1 and 2 (a confidential redacted version of the decision has also been filed, see "Redacted First Decision on the Prosecutor's Requests for Redactions and Related Requests", ICC-01/09-02/11-165-Conf-Red); Pre-Trial Chamber II, "Second Decision on the Prosecutor's Requests for Redactions", ICC-01/09-02/11-178-Conf-Exp and Annex.

¹⁷ Pre-Trial Chamber II, "First Decision on the Prosecutor's Requests for Redactions and Related Requests", ICC-01/09-02/11-165-Conf-Exp, para. 45 and Annex 1.

¹⁸ See ICC-01/09-02/11-35-Conf-Anx3.

¹⁹ See ICC-01/09-02/11-35-Conf-Anx5.

²⁰ See ICC-01/09-02/11-35-Anx9.

²¹ See ICC-01/09-02/11-35-Anx17.

²² See ICC-01/09-02/11-35-Anx18.

Prosecutor at the confirmation of charges hearing and have thus not been disclosed, will not create any risk to victims or witnesses.

17. The Single Judge also notes that in the proposed confidential redacted version of the Article 58 Application, references to the statement of Mohammed Hussein Ali before the Commission of Inquiry into Post Election Violence are consistently redacted. However, the Single Judge considers that the references to the statement of Mohammed Hussein Ali, if revealed to the Defence, cannot create any risk for victims or witnesses.

18. The Single Judge wishes to clarify that while the preceding paragraphs contain the reasoning underpinning the non-approval of some of the proposed redactions, the precise list of redactions rejected is provided in an annex to this decision, filed confidential *ex parte*, Prosecutor.

19. With respect to the second type of redactions proposed, namely redactions in the interest of ongoing investigation, the Prosecutor proposes redaction of “any information or evidence pertaining to the criminal episodes of Kibera and Kisumu”.²³ Additionally, redactions of identifying information of other alleged perpetrators are proposed, in order to preserve their evidence.²⁴

20. With respect to the proposed redaction of all information related to the events in Kisumu and Kibera, the Single Judge considers that since these events fall outside the scope of the present case, the redactions do not have an impact on the right of the Defence to adequately prepare for the confirmation of charges hearing, while protecting the Prosecutor’s further investigation of these events. Furthermore, the Single Judge accepts that the redactions of identifying information of persons who could possess evidence relevant to the Prosecutor are necessary to protect ongoing investigations. Accordingly, the Single Judge accepts the proposals for redactions in the interest of ongoing investigations.

²³ ICC-01/09-02/11-162-Conf-Exp, para. 19.

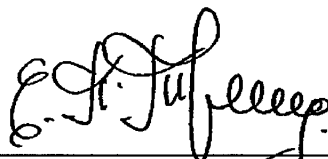
²⁴ ICC-01/09-02/11-162-Conf-Exp, para. 19.

21. Finally, the Single Judge wishes to clarify that while a lesser redacted form of the Article 58 Application is primarily aimed at assisting the Defence in preparation for the confirmation of charges hearing, an article 58 application is not a charging document. The contours of the case are at present shaped by the "Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali",²⁵ while the charges against the suspects are to be set in the DCC to be filed by the Prosecutor by 19 August 2011.²⁶

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

~~partially approves~~ the redactions proposed by the Prosecutor and **orders** the Prosecutor to file in the record of the case, by no later than **Tuesday, 26 July 2011**, a confidential redacted version of the Article 58 Application, containing redactions as proposed, with the exception of proposed redactions listed in the annex to this decision.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Friday, 22 July 2011

At The Hague, The Netherlands

²⁵ Pre-Trial Chamber II, ICC-01/09-02/11-1.

²⁶ 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.