

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 20 April 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 Document

**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**

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, 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

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 renders this decision on the “Prosecution’s application requesting disclosure after a final resolution of the Government of Kenya’s admissibility challenge” (the “Request”)² and hereby establishes the calendar for disclosure of evidence between the parties.

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 “Prosecutor’s Application”).³

2. On 8 March 2011, the Chamber issued its decision on the Prosecutor’s Application, whereby the Chamber, by majority, decided to summon Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (collectively, the “suspects”) to appear before it.⁴ Pursuant to this decision, the suspects voluntarily appeared before the Court at the initial appearance hearing held on 8 April 2011.⁵

3. On 31 March 2011, the Chamber received the “Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute”, whereby the Government of the Republic of Kenya requested the Chamber to determine that the case against the suspects is inadmissible (the “Admissibility Challenge”).⁶

4. On 4 April 2011, the Chamber issued the “Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute”, in which it, *inter alia*, requested that the Prosecutor and the Defence submit written observations on the Admissibility Challenge no later

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

² ICC-01/09-02/11-56.

³ ICC-01/09-31-Conf-Exp and its Annexes.

⁴ 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.

⁵ ICC-01/09-02/11-T-1-ENG.

⁶ ICC-01/09-02/11-26.

than Thursday, 28 April 2011.⁷ The same deadline has also been established for the observations, if any, to be submitted by the Office of Public Counsel for Victims on behalf of the victims who have communicated with the Court in relation to the present case.⁸

5. On 14 April 2011, the Prosecutor filed the Request, whereby he requested the Chamber to “order disclosure as soon as a final decision on the admissibility challenge is rendered”, asserting that this is required by the “full respect for the complementarity principle and the interest of fairness”.⁹

6. During the initial appearance hearing, the Chamber, *inter alia*, set the date for the commencement of the confirmation of charges hearing for 21 September 2011 and convened a status conference with a view to discussing matters relevant for the purposes of establishing an adequate calendar of the disclosure proceedings.¹⁰ The status conference was held on 18 April 2011 in the presence of the Prosecutor, the Defence teams of the suspects and the Registrar.¹¹

I. The Request

7. With respect to the Request, the Single Judge notes article 19(7) and (8) of the Rome Statute (the “Statute”).

8. At the outset, the Single Judge notes that challenges to the admissibility of a case are governed by article 19 of the Statute. In particular, article 19(7) of the Statute states that “[i]f a challenge is made by a State [...], the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.” In this respect, the Single Judge wishes to point out that article 19(7) of the Statute only makes reference to the term “investigation”, in contrast to, for example, article 16 of the Statute, which refers to both “investigation” and “prosecution”. In

⁷ Pre-Trial Chamber II, “Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute”, ICC-01/09-02/11-40.

⁸ *Ibid.*

⁹ ICC-01/09-02/11-56, para. 12.

¹⁰ ICC-01/09-02/11-T-1-ENG.

¹¹ ICC-01/09-02/11-T-2-ENG.

addition, an “investigation” should be distinguished from “judicial proceedings”: an investigation “is not a judicial proceeding but an inquiry conducted by the Prosecutor into the commission of a crime with a view to bringing to justice those deemed responsible”.¹² Thus, the Single Judge concludes from the foregoing that, under the Court’s statutory framework, lodging an admissibility challenge only results in the suspension of the Prosecutor’s investigation related to the case.¹³ Even then, article 19(8) of the Statute still enables the Prosecutor to seek authority from the Court to perform certain investigative activities that are deemed necessary.

9. On the other hand, neither the Statute nor the Rules of Procedure and Evidence (the “Rules”) provide for suspension of prosecution, or any impediment to disclosure, following a challenge to the admissibility of a case. In the opinion of the Single Judge, had such procedural effect of an admissibility challenge been envisaged, it would have been stated *expressis verbis* in the Statute or the Rules.

10. In light of the above, the Single Judge considers that the Prosecutor’s Request does not have a legal basis in the applicable law. As such, it must be rejected without further consideration.

II. Calendar for disclosure between the parties

11. Having found that the disclosure proceedings are not to be suspended pending the Admissibility Challenge, the Single Judge will now address the calendar for disclosure between the parties.

12. The Single Judge notes articles 51(5), 61 and 67 of the Statute and rules 15, 63(1), 76-83 and 121 of the Rules. The Single Judge further recalls the principles as to the

¹² Appeals Chamber, “Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007”, ICC-01/04-556, para. 45.

¹³ Other consequences are attached to an admissibility challenge with regard to the cooperation of States (see in this regard Part IX of the Statute and more specifically articles 89(2), 90 and 95 of the Statute).

disclosure of evidence and its communication to the Chamber as established in the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”.¹⁴

13. The Single Judge recalls that the Court’s statutory documents impose different time-limits on both parties to disclose the evidence to each other and to file it in the record of the case. These deadlines are reflected in rule 121(3)-(6) of the Rules. However, the Single Judge already clarified that “the deadlines established by rule 121 of the Rules are only indicative of the minimum time-limits that a party can avail itself to comply with its disclosure obligations”.¹⁵

14. In particular, rule 121(3) of the Rules mandates that the Prosecutor shall provide a document containing a detailed description of the charges together with a list of evidence, for the purposes of the confirmation hearing, *no later than 30 days* before the date of the commencement of such hearing. Therefore, the disclosure from the Prosecutor to the Defence shall be completed 30 days before the date of the hearing at the latest. However, under article 51(5) of the Statute, the provision of rule 121(3) of the Rules is to be read against the backdrop of, and subject to statutory provisions that guarantee the rights of the Defence and, in particular, the right of the suspects to have adequate time for a meaningful preparation of their defence pursuant to article 67(1)(b) of the Statute. In this respect, the Single Judge recalls article 61(3)(b) of the Statute which provides that the person shall be informed *within a reasonable time before the confirmation hearing* of the evidence on which the Prosecutor intends to rely at the hearing. In the same vein, rule 76 of the Rules establishes that the Prosecutor shall provide the Defence with the names of witnesses whom he intends to call to testify as well as the copies of any prior statements made by them *sufficiently in advance to enable the adequate preparation of the defence*.

15. Rule 121(2) of the Rules provides that the Chamber (and the Single Judge designated to exercise its functions) shall take the necessary decisions regarding

¹⁴ Pre-Trial Chamber II, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, ICC-01/09-02/11-48.

¹⁵ *Ibid.*, para. 11.

disclosure between the parties. Taking due account of the statutory documents of the Court and with a view to guaranteeing the fairness and expeditiousness of the disclosure proceedings, the Single Judge is of the view that specific deadlines need to be established.

16. The evidence on which the Prosecutor intends to rely on for the purposes of the confirmation hearing is to be divided into three groups depending on the time when the piece of evidence has been collected by the Prosecutor. The deadlines established for each group is either for the disclosure to the Defence of evidence for which, in the Prosecutor's view, no redaction is needed or for the request to the Chamber to authorize proposed redactions properly justified following the guidance given by the Appeals Chamber in this respect.¹⁶ The Single Judge establishes these deadlines, bearing in mind the information provided by the Prosecutor with respect to the overall amount of evidence to be disclosed to the Defence and, in particular, the indicated amount of documents for which the Prosecutor intends to request that redactions be authorized by the Chamber pursuant to rule 81(2) or (4) of the Rules.¹⁷

17. The first deadline is with respect to the evidence collected by the Prosecutor before 15 December 2010, *i.e.* the date of the Prosecutor's Application under article 58(7) of the Statute. As regards this category, the Single Judge recalls that, according to the statutory documents of the Court, the Prosecutor is the triggering force of the proceedings, in the sense that the determination as to whether, and when, an application for a warrant of arrest or a summons to appear is to be filed before the

¹⁶ See Appeals Chamber, "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to rule 81(2) and (4) of the Rules of Procedure and Evidence'", ICC-01/04-01/06-568; Appeals Chamber, "Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'", ICC-01/04-01/06-773; Appeals Chamber, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements'" ICC-01/04-01/07-475; Appeals Chamber, "Judgment on the appeal of Mr Mathieu Ngudjolo against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9'", ICC-01/04-01/07-521; Appeals Chamber, "Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements'", ICC-01/04-01/07-476.

¹⁷ ICC-01/09-02/11-T-2-ENG.

Chamber falls squarely within his prerogatives. The Single Judge thus expects that, before approaching the Chamber with his application for summonses to appear for the suspects, the Prosecutor has carefully reviewed the evidence in his possession at that time, both incriminating and exculpatory. Furthermore, this material has been in his domain for sufficient time for him to be able to disclose to the Defence or to request redactions, if need be, within a short period of time. The Prosecutor is thus ordered to disclose to the Defence any evidence collected prior to 15 December 2010 on which he intends to rely for the purposes of the confirmation hearing and for which no redaction is needed no later than Friday, 3 June 2011. Within the same deadline, the Prosecutor shall submit to the Chamber properly justified proposals for redactions with respect to the evidence collected prior to 15 December 2010.

18. The second deadline is with respect to the evidence collected between 15 December 2010 and 31 March 2011, *i.e.* between the date of the Prosecutor's Application and the date of the Admissibility Challenge filed by the Government of Kenya. In this regard, the Single Judge recalls that, according to article 19(7) of the Statute, if a challenge to the admissibility of a case or to the jurisdiction of the Court is made by a State referred to in article 19(2)(b) or (c) of the Statute, "the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17". The evidence collected by the Prosecutor after the application under article 58(7) of the Statute and prior to the suspension of his investigation pursuant to article 19(7) of the Statute shall be disclosed to the Defence by no later than Friday, 24 June 2011, if no redaction is needed in the Prosecutor's view. If the Prosecutor intends to request that the Chamber authorize redactions with respect to this evidence, he shall do so by submitting properly justified proposals for redactions by no later than Friday, 24 June 2011.

19. The third and last deadline is with respect to the evidence collected after the filing of the Admissibility Challenge. In this regard, the Single Judge notes that, according to article 19(8)(a) and (b) of the Statute, read in conjunction with article 18(6) of the Statute, pending a ruling on the Admissibility Challenge, the Prosecutor may seek

authorization from the Chamber to: (i) pursue investigative steps for the purpose of preserving evidence in case of a unique opportunity to obtain important evidence or in the presence of a significant risk that such evidence may not be subsequently available; and/or (ii) take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge. The evidence collected pursuant to the authorization under article 19(8)(a) and/or (b) of the Statute, should the Chamber grant any request to that effect, is to be disclosed to the Defence, if no redaction is needed, by Friday, 29 July 2011. In case the Prosecutor is of the view that redactions on these pieces of evidence are needed, a request to that effect shall be submitted to the Chamber no later than Friday, 29 July 2011.

20. The Single Judge is of the view that the same deadlines established with respect to the different groups of evidence identified in the above paragraphs on the basis of the time when they have been collected by the Prosecutor are also to be set for the purposes of the inspection by the Defence to be permitted by the Prosecutor, pursuant to rule 77 of the Rules, of any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor which are intended to be used as evidence for the purposes of the confirmation hearing or were obtained from or belonged to the suspects.

21. With respect to the evidence of a potential exculpatory nature under article 67(2) of the Statute as well as the material for the preparation of the defence subject to inspection within the meaning of rule 77 of the Rules, the Single Judge notes that, even though the Statute or the Rules do not provide for any explicit deadline, the Prosecutor nevertheless is instructed by law to disclose to the Defence any piece of evidence falling within the scope of article 67(2) of the Statute or rule 77 of the Rules as soon as practicable. In this regard, the Single Judge assumes that the Prosecutor, being cognizant of his duties as provided in the statutory documents of the Court and with the awareness of the rights of the Defence teams to have adequate time for a meaningful preparation of their case, will comply with the obligations vested on

him to disclose any such evidence as soon as practicable, *i.e.* immediately after having identified any such evidence, and on a continuous basis.

22. Finally, turning to the matter of the disclosure by the Defence, the Single Judge recalls that, according to rule 121(6) of the Rules, if the suspects intend to present evidence at the confirmation hearing, they shall provide a list of such evidence no later than 15 days before the commencement of the hearing. Furthermore, rule 78 of the Rules mandates that the Defence shall permit the Prosecutor to inspect any books, documents, photographs and other tangible objects in the possession or control of the defence that are intended for use as evidence for the purposes of the confirmation hearing. According to rule 79 of the Rules, the Defence teams shall notify the Prosecutor of their intention, if any, to raise the existence of an alibi or to raise a ground for excluding criminal responsibility, and to present the evidence on which they intend to rely for either purpose, sufficiently in advance to enable the Prosecutor to prepare adequately and to respond. As regards the evidence on which the Defence teams may intend to rely on for the purposes of the confirmation hearing, the Single Judge deems it necessary to set the date of Friday, 12 August 2011 as the deadline by which the Defence shall submit to the Chamber properly and sufficiently justified proposals for redactions under rule 81 of the Rules, if any, following the guidance given by the Appeals Chamber in this respect.¹⁸

FOR THESE REASONS, THE SINGLE JUDGE

(a) Rejects the Prosecutor's Request;

(b) Orders the Prosecutor:

(i) to disclose to the Defence any evidence on which he intends to rely for the purposes of the confirmation of charges hearing that has been collected prior to 15

¹⁸ See above footnote 16.

December 2010 and for which no redaction is needed no later than **Friday, 3 June 2011**;

(ii) to submit properly justified proposals for redactions, if any, with respect to the evidence that has been collected prior to 15 December 2010, no later than **Friday, 3 June 2011**;

(iii) to disclose to the Defence any evidence for which redactions will be requested no later than five (5) days after the Chamber's decision regarding such redactions;

(iv) to permit the Defence to inspect, at a location and time agreed upon with him, any books, documents, photographs and other tangible objects in his possession or control which either 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 and that have been collected prior to 15 December 2010, no later than **Friday, 3 June 2011**;

(v) to disclose to the Defence any evidence on which he intends to rely for the purposes of the confirmation of charges hearing that has been collected between 15 December 2010 and 31 March 2011 for which no redaction is needed no later than **Friday, 24 June 2011**;

(vi) to submit properly justified proposals for redactions, if any, with respect to the evidence that has been collected between 15 December 2010 and 31 March 2011, no later than **Friday, 24 June 2011**;

(vii) to disclose to the Defence any evidence for which redactions will be requested no later than five (5) days after the Chamber's decision regarding such redactions;

(viii) to permit the Defence to inspect, at a location and time agreed upon with him, any books, documents, photographs and other tangible objects in his possession or control which either 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 and that have been collected between 15 December 2010 and 31 March 2011, no later than **Friday, 24 June 2011**;

(ix) to disclose to the Defence any evidence on which he intends to rely for the purposes of the confirmation of charges hearing that has been collected after 31 March 2011 for which no redaction is needed, no later than **Friday, 29 July 2011**;

(x) to submit properly justified proposals for redactions, if any, with respect to the evidence that has been collected after 31 March 2011, no later than **Friday, 29 July 2011**;

(xi) to disclose to the Defence any evidence for which redactions will be requested no later than five (5) days after the Chamber's decision regarding such redactions;

(xii) to permit the Defence to inspect, at a location and time agreed upon with him, any books, documents, photographs and other tangible objects in his possession or control that either 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 and that have been collected after 31 March 2011, no later than **Friday, 29 July 2011**;

(xiii) to disclose to the Defence all evidence in his possession or control under article 67(2) of the Statute as soon as practicable and on a continuous basis;

(xiv) to permit the Defence to inspect, at a location and time agreed upon with him, any books, documents, photographs and other tangible objects in his possession or control which is material to the preparation of the defence within the meaning of rule 77 of the Rules, as soon as possible;

(xv) no later than 5 days after inspection has taken place and upon a request to that effect is made by the Defence, if any, to submit to the Registry electronic copies or electronic photographs in case of tangible objects of such evidence subject to

inspection, in order to be registered as evidence in the record of the case and to submit the original form of the respective piece of evidence to be stored in the Registry vault;

(xvi) to file in the record of the case as soon as possible and no later than **Friday, 19 August 2011** the Document Containing the Charges and the List of Evidence as required by rule 121(3) of the Rules;

(c) Orders the Defence teams:

(i) to disclose to the Prosecutor the evidence they intend to present at the confirmation hearing, if any, and to file the list of such evidence, no later than **Monday, 5 September 2011;**

(ii) to submit properly justified proposals for redactions under rule 81 of the Rules, if any, no later than **Friday, 12 August 2011;**

(iii) to permit the Prosecutor, at a location and time agreed upon by them, any documents, photographs or tangible objects in the possession or control of the Defence, which are intended for use by the Defence as evidence for the purposes of the confirmation of charges hearing within the meaning of rule 78 of the Rules as soon as possible and no later than **Friday, 29 August 2011;**

(iv) no later than 5 days after inspection has taken place and upon a request to that effect is made by the Prosecutor, if any, to submit to the Registry electronic copies or electronic photographs in case of tangible objects of such evidence subject to inspection, in order to be registered as evidence in the record of the case and to submit the original form of the respective piece of evidence to be stored in the Registry vault;

(v) to notify the Prosecutor of their intention, if any, to raise the existence of an alibi or to raise a ground for excluding criminal responsibility, and to present the evidence on which they intend to rely for either purpose, within the meaning of rule 79 of the Rules, sufficiently in advance to enable the Prosecutor to prepare adequately and to respond;

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


Judge Ekaterina Trendafilova
Single Judge

Dated this Wednesday, 20 April 2011

At The Hague, The Netherlands