

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: ICC-01/09
Date: **23 February 2011**

PRE-TRIAL CHAMBER II

Before: Judge Ekaterian Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

Registrar: Ms Silvana Arbia

SITUATION IN KENYA

Confidential *ex parte*, Prosecutor Only

Prosecutor's Submission of Further Information and Materials

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

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Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. On 15 December 2010, the Prosecution submitted the "Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henri Kiprono Kosgey and Joshua Arap Sang" and the "Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali" requesting the Pre-Trial Chamber to issue summonses to appear for the persons concerned (collectively, the "Applications"), together with a number of annexes attached thereto.¹

2. On 16 February 2011, the Pre-Trial Chamber requested "the Prosecutor to submit all witnesses' statements on which he relies for the purposes of his Applications under Article 58 of the Statute" ("Request").² The Pre-Trial Chamber found that "Article 58(2) of the Statute, while allowing the Prosecutor to present *in the application* only 'a summary of the evidence' which, in his view, establishes reasonable grounds to believe that the person(s) committed the alleged crimes, [it] does not entitle him to provide the Chamber with excerpts of witnesses' statements of his choice, thus depriving the Chamber of the 'evidence' as provided in article 58(1) of the Statute and the possibility to properly asses this evidence".³

3. The Appeals Chamber has ruled that "article 58 of the Statute [...] foresees that the Pre-Trial Chamber takes its decision on the application for a warrant of arrest on the basis of the information and evidence provided by the Prosecutor".⁴ Applying this standard, Pre-Trial Chamber I has consistently found that "it falls within the discretion of the Prosecution to decide which materials to present to the Chamber in support of the Prosecution Application for a warrant of arrest [...]".⁵ Accordingly, Pre-Trial Chamber I emphasized in those cases that "the Chamber's invitation to

¹ ICC-01/09-30-Conf-Exp and ICC-01/09-31-Conf-Exp.

² ICC-01/09-45-Conf-Exp.

³ Request, para. 5.

⁴ ICC-01/04-169 OA3, para. 45.

⁵ ICC-02/05-01/09-3, para. 24; see also ICC-01/04-01/06-2-IEN, p. 2; ICC-01/04-01/07-I-tENG, p. 2; ICC-01/04-01/07-32 and Annexes.

submit further materials did not impose any procedural obligation on the Prosecution".⁶

4. Prudential reasons justify the exercise of selectivity in the provision of excerpts, not the least of which is the risk that information that would tend to identify witnesses may inadvertently be exposed before protective measures are in place. Security is an ongoing challenge for the Court as a whole, and all organs must take measures to prevent the possibility of accidental disclosures of information that could jeopardize the safety to persons. Additionally, evidence such as witness statements would normally be provided for the first time at the confirmation proceedings, which are adversarial providing the defence with an opportunity to comment on the evidence before any conclusions are drawn from it by the Chamber.⁷ Nevertheless, the Prosecution voluntarily provides the Pre-Trial Chamber with all witness statements as specified in paragraph 6 of the Request.⁸ This evidence, the submission of which is responsive to the Request, constitutes a part of the evidence and information relied on by the Prosecution as summarized or presented by way of extracts in the Applications.

5. The Prosecution further requests that before any statements included in the attached Annexes are disclosed to the defence, the Prosecution be given an opportunity to seek appropriate redactions.⁹

⁶ ICC-01/04-01/06-1-US-Exp, para. 9 and ICC—01/04-02/06-20-Conf-Exp, para. 9.

⁷ The Prosecution notes that the Pre-Trial Chamber has repeatedly ruled that Article 58 proceedings are conducted on an ex-parte basis (see for instance ICC-01/09-43, para. 4; see also ICC-01/09-35). The Prosecution also notes that the standard of proof under Article 58(1)(a) is lower than under Article 61(7) (see for instance ICC-02/05-01/09-73 OA, para. 30). While for the confirmation hearing the Prosecution may rely on "documentary or summary evidence", it would be illogical to require the Prosecution to provide the Chamber with all witness statements to meet a lower standard of proof for the purposes of a warrant of arrest or summons to appear under Article 58.

⁸ Annex 1 contains a description of the materials herein submitted pursuant to the Request. See Annexes 2 to 385 for the materials submitted.

⁹ ICC-01/05-01/08-323 OA, paras. 32-33.



Luis Moreno-Ocampo, Prosecutor

Dated this 23th day of February 2011

At The Hague, The Netherlands