



Original: English

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

Date: 28 March 2011

PRE-TRIAL CHAMBER II

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

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA,
UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI**

Public

**Prosecution's Response to the "Decision Requesting the Prosecutor to submit
Observations on the Possible Reclassification of Certain Documents"**

Source: 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

Luis Moreno Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor
Adesola Adeboyejo, Trial Lawyer

Counsel for the Defence

Evans Monari
John Philpot
Gershom Otachi Bw' Omanwa

Legal Representatives of Victims

Legal Representatives of 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

Ms Silvana Arbia

Deputy Registrar

Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

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"), with 23 annexes.¹ The Prosecutor's Application and 19 out of the 23 annexes were classified "confidential ex parte, Prosecutor only". A public redacted version of the Prosecutor's Application was simultaneously filed with 4 annexes classified as "public".²
2. Further to the decision of the Single Judge of Pre Trial Chamber II ("PTC II" or "the Chamber") of 21 March 2011, the Prosecution proposes specific requests regarding reclassification of the Prosecutor's Application ("confidential ex parte, Prosecutor only"). The Prosecution also submits its observations on the Chamber's request for proposed redactions.
3. For reasons set forth below, at this stage the Prosecution opposes the request that it redact evidentiary materials for the purposes of disclosure to the suspects at their initial appearance. In its view, the Chamber's proposal is pre-mature and inconsistent with the timelines and contemplated process under the Rome Statute. Additionally, in light of the announced intention of the Republic of Kenya to challenge admissibility, presumably on the ground that it is conducting a domestic investigation, disclosure at this time could jeopardize this Court's ongoing proceedings and potentially interfere with national processes.

Procedural History

4. As noted above, on 15 December 2010 the Prosecution submitted the Prosecutor's Application, "Confidential Ex Parte". On the same day, the Prosecution simultaneously submitted a "Public" redacted version of the Application.³

¹ ICC-01/09-31-Conf-Exp and its Annexes.

² ICC-01/09-31-Conf-Exp, Annexes 11, 12, 13 and 15.

³ ICC-01/09-31-Red

5. On 16 February 2011, the Pre-Trial Chamber requested the Prosecutor to submit witnesses' statements on which he relied in the Prosecutor's Application.⁴ The Prosecution provided them and other materials on 18 February 2011 together with exhibits attached to the statements.⁵
6. On 8 March 2011, a majority of the Chamber issued summonses to the suspects to appear before the Court on 7 April 2011.⁶ On 18 March 2011, the Chamber issued a decision setting a new date of 8 April 2011 for the initial appearance of the suspects.⁷
7. On 21 March 2011, the Single Judge directed the Prosecution to make submissions on the possible reclassification of the currently-classified "Confidential Ex Parte" Prosecutor's Application and its Annexes and to provide proposals on redactions to the Annexes and other materials that were submitted to the Chamber on 18 February ("the Order").⁸

Submissions

Reclassification of the Annexes

8. The Prosecution does not oppose reclassification of five (5) annexes to the Redacted Application – Annexes 2, 9, 16, 17, 18 – as "public". The Prosecution also proposes reclassification of the following nine (9) annexes – Annexes 1, 3, 7, 8, 14, 19, 20, 21 – as "confidential" since they contain evidence not yet in the public domain. Even where those materials are in the public domain, knowledge of their use by the OTP could prejudice the future work of organizations using the materials.
9. The Prosecution proposes that Annexes 4, 6, 10, 22, and 23 retain the classification of "confidential *ex parte*". The materials contained in those annexes bear on witness protection and contain information that can easily be traced back to the providers who

⁴ ICC-01/09-45-Conf-Exp.

⁵ Annexes 1 to 385 attached to ICC-01/09-48-Conf-Exp.

⁶ 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.

⁷ ICC-01/09-02/11-8.

⁸ ICC-01/09-02/11-10.

are not currently in any protection program. So far no protective measures have been implemented to mitigate the risk associated with disclosing their identities or identifying features. For the same reasons, the Prosecution proposes that Annexes 1-385 of ICC-01/09-48-Conf-Exp retain their current classification of “confidential *ex parte*”.

Reclassification of the Prosecution’s Application

10. Applying the same principles of witness protection to the Application itself, the Prosecution does not oppose the reclassification as “public” of sections C (titled “Standard of Proof”) and H (titled “Background to Investigation/Legal Framework”) of the Confidential Ex Parte Prosecutor’s Application. However, in order to allow for the protection of ongoing investigation and of victims and witnesses, Section G (titled “Summary of the Evidence and Other Information Establishing Reasonable Grounds to Believe that Muthaura, Kenyatta and Ali Committed Crimes Within the Jurisdiction of the Court Pursuant to Article 58(2)(d)”) should remain redacted.
11. The Prosecution’s proposals for the reclassification are annexed to this document, in chart form.⁹

Request to Redact evidentiary materials to enable disclosure to the Defence

12. The Prosecution respectfully submits that the Chamber’s request that the Prosecution expeditiously submit proposed redaction of the documents “*in light of the forthcoming suspects’ initial appearance*” is premature and falls outside the ambit of the disclosure regime provided for in the legal instruments of the Court.
13. The initial appearance of a suspect does not trigger imminent disclosure obligations under the Statute or Rules. Rather, Rule 121(3) of the Rules of Procedure and Evidence only requires that the Prosecution disclose materials to the defence 30 days before the confirmation hearing. An examination of the practice of the Chambers supports the Prosecution’s reading of Rule 121. They also schedule confirmation hearings at least

⁹ See Annex A to this Application.

three months after the initial appearance of the suspect.¹⁰ Therefore, the disclosure regime adopted in prior cases before the Court has required that the Prosecution disclose materials well after the date of first appearance.

14. Furthermore, at this stage of the proceedings, Prosecution has yet to determine materials and documents that will be used for the confirmation hearing as it is still in the process of collecting and examining its evidence. The Prosecution recalls that the provision of evidence such as the witness statements at the consideration of the Prosecutor's Application should normally be provided for the first time at the confirmation proceedings, which are adversarial proceedings and which provide the defence with an opportunity to comment on the evidence before any conclusions are drawn from it by the Chamber.¹¹ This evidence, the submission of which was responsive to the Request by the Chamber, constitutes a part of the evidence and information relied on by the Prosecution and is not necessarily intended for redactions and disclosure at this stage.

15. Collectively, the Prosecution provided approximately 3,000 pages of material to the Chamber. Proposing redactions to that volume of material will be burdensome and time-consuming, and cannot possibly be completed within the Chamber's one-week deadline. Nor will it be necessary to disclose material to the Defence if the Prosecution does not intend to use it as incriminating evidence at the confirmation hearing and the material is not potentially exculpatory or material to the preparation of the defence.

16. Providing proposals on redactions of these materials at this time also imposes an unnecessary burden on the Chamber to review proposed redactions to materials that the

¹⁰ In the *Lubanga* case, redactions were provided on 29 May 2006 – one month before the confirmation hearing. In the *Katanga* case, redactions were provided on 14 January 2008 – one month and a half before the confirmation hearing; in the *Bemba* Case redactions were provided on 3 September 2008 – two months before the confirmation hearing; in the *Abu Garda* case, redactions were provided on 28 August 2009 - one month and a half before the confirmation hearing.

¹¹ 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.

Prosecution may not use at the later proceeding; that have no potential exculpatory value, and that are not material to the preparation of the defence.

17. Finally, the Prosecution notes that the Republic of Kenya has indicated an intention to contest admissibility. This would be the first State challenge to admissibility in this Court. It is impossible to predict how long resolution of that issue will take, or to say with certainty that there will be a confirmation proceeding in the near future.

Extension of Time

18. Pursuant to Regulation 35(1) of the Regulations of the Court, *"applications to extend {...} any time limit {...} ordered by the Chamber shall be made in writing {...} to the Chamber seized of the matter setting out the grounds on which variation is sought"*. As set out above, the Prosecution submits that the requested submission of redactions is premature. Alternatively, however, the Prosecution cannot identify and propose redactions with precision on the thousands of pages of materials within the one week time frame provided. The need to ensure that the identities of the witnesses and victims, as well as persons at risk on account of the Prosecution's activities are protected necessitates a careful exercise. For that reason, the Prosecution requests that the Chamber authorize the submission of proposed redactions five weeks before the start of the confirmation hearing.

Conclusion

19. As regards the re-classification, the Prosecution proposes:

- a) The following annexes may be re-classified as public – Annexes 2, 9, 16, 17, 18.
- b) The following annexes may be re-classified as confidential - Annexes 1, 3, 5, 7, 8, 14, 19, 20, 21.
- c) The following should retain the classification of "Confidential *ex parte*, Prosecutor Only " - Annexes 4, 6, 10 ,22, 23 , Annexes 1-385 of ICC-01/09-48-Conf-Exp.

- d) The lifting of redactions on the Prosecutor's Application for sections C (titled "Standard of Proof") and H (titled "Background to Investigation/Legal Framework) of the Prosecutor's Application.
- e) The continued redaction of Section G (titled "Summary of the Evidence and Other Information Establishing Reasonable Grounds to Believe that Muthaura, Kenyatta and Ali Committed Crimes Within the Jurisdiction of the Court Pursuant to Article 58(2) (d)").

20. As regards the redactions to the other materials, the Prosecution requests that the time within which to propose redactions be extended to five weeks before the confirmation hearing.



Luis Moreno-Ocampo
Prosecutor

Dated this 28th day of March 2011

At The Hague, The Netherlands