



Original: **English**

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

Date: **30 March 2011**

PRE-TRIAL CHAMBER I

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

SITUATION IN KENYA

THE PROSECUTOR

v.

**FRANCIS KIRIMI MUTHAURA
UHURU MUIGAI KENYATTA &
MOHAMMED HUSSEIN ALI**

Public Document

with Public Annexures A,B,C,D,E and F and Confidential Annexure A1

**APPLICATION FOR ORDER TO THE PROSECUTOR REGARDING EXTRA-
JUDICIAL COMMENTS TO THE PRESS**

Source: Counsel for Francis Kirimi Muthaura (the “Applicant”)

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

Counsel for the Defence

Mr. Karim A. A. Khan

Mr. Kennedy Ogetto

Mr. Steven Kay QC

Ms. Gillian Higgins

Mr. Evans Monari

Mr. Gershom Otachi

Mr. John Philpott

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

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Defence for Ambassador Francis Kirimi Muthaura (hereinafter “Ambassador Muthaura”) files this application seeking the intervention of the Pre-Trial Chamber to safeguard his fair trial rights, the integrity of the judicial process that has commenced and in order to prevent irremediable prejudice to the Defence.
2. Various Chambers of the ICC have had occasion to address the issue of the statements made to the press by the Prosecutor in several cases that are before the court.¹ The record reveals, in the respectful submission of the Defence, that the Prosecutor has shown scant regard to the various judicial injunctions and admonitions that have been rendered by the court in response to extra-judicial statements made by him in some cases before the Court.
3. For reasons detailed in this Application, the Defence requests that the Pre-Trial Chamber: (i) safeguard the integrity of the present judicial proceedings and uphold the fair trial rights of the Defence, by requiring the Prosecutor to refrain from unnecessary, inappropriate and/or extra judicial comments on a case before the court; (ii) put the Prosecutor on notice that if he continues his casual and, it must be said, rather inappropriate approach of extra judicial comments, the Defence retains its right to make any application challenging the credibility, probative value and utility of Prosecution witnesses who purportedly provide accounts on issues which are the subject of the Prosecutor’s comments in the press.
4. In other words, the Defence submit that the Prosecutor’s comments have the potential to tarnish the integrity of his own investigations. More damaging still, the Prosecutor’s comments have the potential to cause significant prejudice to the Defence as they have the potential to pollute the witness pool in Kenya and expose them to a one sided narrative from the Prosecutor. In consequence, this may significantly undermine the statutory rights of the Defence as well as hamper

¹ See, for example, ICC-01/04-01/10-51 para 17; ICC-01/04-01/06-2433.

the ability of the judiciary of the ICC to discern the truth and discharge their own mandate at the Pre-Trial or Trial stage.

II. LEGAL SUBMISSIONS

5. The Court has repeatedly cautioned against inappropriate press reports generated by the parties. For example:

“Judge Fulford [addressing the Prosecution]: ...a very considerable time ago...I gave a very firm indication that the Judges did not expect to see satellite litigation in the press with the issues which we are considering being the subject of some kind of debate, with commentators on one or both sides seeking to litigate the issues in the trial in a different forum. It was expressed to us then that this is an inappropriate activity, particularly for the Prosecutor to undertake, and you may like to remind this individual of our views on that subject”²

6. In a subsequent decision, also in *Lubanga*, the Trial Chamber explained:

“None of the provisions of the Rome Statute address the relationship between the parties and the press, and public statements outside the courtroom are in this sense unregulated.”³ This was, however, subject to one important caveat:

“It is not the role of the Chamber to comment on the arrangements that are, or should be, in place as regards the relationship between the Court (i.e. its various organs and counsel appearing in its cases) and the media. The Chamber’s concern is instead focused on the course of the present trial, and the need to ensure that the interests of justice are upheld: by Article 64(2) of the Rome Statute (“Statute”) “[t]he Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full regard for the rights of the accused and due regard for the protection of victims and witnesses. The presumption is that the trial will be held in public: Article 64(7) of the Statute; and by Article 64(6)(f) of the Statute the Chamber may rule on any relevant matters.”⁴

7. The Prosecution in *Lubanga* accepted that it should *not* comment on issues such as the credibility of witness or the evidence or other matters that are under

² ICC-01/04-01/06-T-264-CONF-ENG-ET, pages 5, lines 11-21; see, eg, ICC-01/04-01/06-T-126-CONF-ENG CT, page 46, line 22 to page 48, line 11. (Referred to in ICC-01/04-01/06-2433, para 15.)

³ ICC-01/04-01/06-2433, para 34.

⁴ ICC-01/04-01/06-2433, para 36.

consideration by the Chamber.⁵ It acknowledged that it must respect the other participants and the process.⁶ The Chamber held that respecting the Chamber and the other participants involves speaking publicly about the proceedings in a fair and accurate way, and avoiding comment about issues that are for the Chamber to determine.

8. In his press conference on 14 March 2011,⁷ the Prosecutor repeatedly trespassed into areas which are central to the charges that the Prosecutor must now prove to the required standard at a confirmation hearing. For example, the Prosecutor maintained in his Article 58 application and in his press conference that Ambassador Muthaura has control over the police in Kenya. This is contested by the Defence in strong and unequivocal terms. The veracity of the Prosecutor's assertions will be determined by the Court in due course. What is unhelpful and indeed wholly inappropriate is for the Prosecutor to peddle his *theory* in the press as uncontroverted *facts*.
9. The transcript of the Prosecutor's press conference annexed to this Application discloses that the Prosecutor has asserted as a fact that "Mr. Muthaura has a role as a superior of the Police".⁸ Similarly, he repeated what the Defence maintains is a fiction, later in his interview by asserting, as uncontested truth, that 'We focus on Mr. Muthaura because of his clear role ['in the protection system and the police system']...'."
10. The question of whether Ambassador Muthaura had clear control over the police is an obvious and clear fact in dispute and one that must be left to the judges to determine. It is therefore totally inappropriate for the Prosecutor to make such sweeping statements in the Kenyan press so as to entrench these views, and

⁵ ICC-01/04-01/06-2433, para 40.

⁶ ICC-01/04-01/06-2389, para 15 (cited in ICC-01/04-01/06-2433, para 40.)

⁷ See Annexure A. The Defence has transcribed a tape available. It seems that the press conference itself may have been longer than the portion for which a recording is available.

⁸ Annexure A, page 1. The last page of this transcript has been included as a separate confidential annexure ("A1") as it contains the name and attestation of the person who prepared the transcript.

thereby polluting the witness pool,⁹ especially at a time when his investigations are still ongoing and he has not provided any disclosure.¹⁰

11. It has been held that remarks in press interviews may breach restrictions if they tend to prejudice the public's understanding of the trial.¹¹ This is not confined to the Prosecutor tarnishing his own evidence. He does that at his own peril. What he has no right to do, is to infect the witness pool that is in Kenya or elsewhere with his own factual matrix and his own pre-conceptions. The Defence conduct investigations in a proper and disciplined manner. It is obvious that one-sided comments by the Prosecutor, with all the media attention that he attracts by dint of his Office, has the potential to infect peoples understandings of reality which may in turn feed into the account they later give to a party.
12. The more putative witnesses hear the Prosecutor's narrative, presented as uncontroverted truth, the greater the risk that witnesses who have a different recollection may doubt themselves and be reluctant to come forward for the Defence. It is also possible that such a flow of one sided information may, even subconsciously, cause the understanding of such witnesses to change and

⁹ By "polluting the witness pool" the Defence means to say that the recollections, inferences and evidence of putative OTP witnesses will be unnecessarily imperilled as it may not be clear if their evidence is based upon their recollections and views as to what existed at the time relevant to the charges, or whether their account is influenced by what they have read or heard due to the Prosecutor's oft repeated assertions, of which his comments at the press conference are but an example.

¹⁰ The Defence notes that the initial hearing is scheduled for 8 April 2011 and request that the OTP prepare the first disclosure batch to serve that day, so as to enable the Defence to begin preparing for confirmation. It is submitted that no prejudice will be caused to the Prosecutor by this timely action; rather, the Defence maintain that such disclosure would be consistent with the spirit of the Rome Statute. Article 67(1)(b) guarantees the Defence adequate time and facilities for the preparation of the defence. The 30 day deadline prior to the confirmation hearing provided for in Rule 121(3) of the Rules of Procedure is the final deadline by which the Prosecution must complete any outstanding disclosure; it is *not* the starting point for the disclosure process. On this important point it is worth quoting the learned Single Judge's Decision on issues relating to disclosure in the *Banda & Jerbo* case (ICC-02/05-03/09-49, para. 9):

"[The timelines set out in Rule 121] have to be read however, against the background not only of the need to ensure the expeditiousness of proceedings, but especially of the fundamental right of the suspect 'to be informed promptly and in detail of the nature, cause and content of the charge in a language which [he] fully understands and speaks' (article 67(1)(a)). This right appears critical for such crucial evidence as that provided by prosecution witnesses, in respect of which rule 76(1) of the Rules mandates that the defence be provided with their names and copies of their statements 'sufficiently in advance to enable the adequate preparation of the defence'. Along the same lines, rule 76(2) of the Rules requires the Prosecutor to 'subsequently advise the defence of the names of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses'. Furthermore, the Chamber take due account of the paramount principle that any and all material, including material covered by article 67(2) of the Statute, shall be disclosed as soon as practicable."

¹¹ ICC-01/04-01/06-2433, para 41.

improperly influence the account they may later give of what obtained during the period relevant to the charges.

13. In spite of the negative impact the Prosecutor's comments are having against the fair trial rights of the Defence, the Defence is duly refraining from rebutting the Prosecutor's inappropriate assertions in the press. The Defence is alive to the fact that to do so would be to do that which Judge Fulford admonished against.¹² It would be to conduct satellite litigation in the press instead of only before the Court. This will not only be disrespectful to the Bench (to hear arguments or be informed of filings that have yet to be lodged by the parties, through the aegis of the media), it also runs counter to the principle of litigating matters before the Court, rather than other fora. Significantly, litigation via the media, where parties seek to grab the headlines and influence the public (even under the pretence of "outreach") is litigation without the safeguards and insulation that judicial proceedings before the International Criminal Court provide. This is particularly important in countries that have emerged from conflict or have suffered polarization and violence in the recent past. The conduct of Ambassador Muthaura since he was publicly named as a target of the Prosecutor in the latter's live press conference just before Christmas 2010 has been exemplary. Ambassador Muthaura has not spoken to the merits of his case and has undertaken to respect all orders of the Court. He has complied with whatever conditions the Pre-Trial Chamber has imposed and undertakes to continue to do so.
14. It is only fair that the Prosecutor be required to conduct himself to the same high standard. He simply must not be allowed to use his high office to somehow influence the information that emerges from his investigations. This is so especially given that he has a statutory obligation to investigate incriminatory and exonerating evidence equally.¹³
15. The front page of two leading Kenyan newspapers that are annexed to the present application¹⁴ clearly presents what these two newspapers considered was the

¹² See para 5 above.

¹³ Rome Statute, Art. 54.

¹⁴ Annexure B and Annexure C.

underlying message behind the Prosecutor's comments. The Defence notes that the Prosecutor did not request that Ambassador Muthaura vacate his post in the civil service in his Article 58 application. Accordingly, it is hoped that the consistent headlines that the Press Conference generated are not part of a deliberate policy of the Prosecutor to brief the press off the record as part of wider agenda, or to seek to do in the press that which he should have done in court.

16. The Court should strive to promote consistency in its jurisprudence and ensure that like cases are treated alike. The present application deals with an issue that will not go away and that requires considered thought. Whilst consistency of jurisprudence is not an end in itself, and cannot trump the duty of a judge to discharge his/her duty under the Statute, it may be fair to state that, at the very least, due regard must be given to the views of fellow Trial Chamber judges in relation to issues that they consider may be inappropriate. Trial Chamber I held that:

"Although on this occasion the Chamber does not intend to take any action beyond expressing the strongest disapproval of the content of the interview, if objectionable public statements of this kind are repeated the Chamber will not hesitate to take appropriate action against the party responsible."¹⁵

17. This very Pre-Trial Chamber has had cause to note that:

"While it is not the Chamber's role to comment and advise the Prosecutor on his interaction with the press and media, the Chamber nevertheless is concerned if his actions have the potential to affect the administration of justice and the integrity of the present proceedings before the Chamber. In this respect, the Chamber expresses its deprecation regarding the Prosecutor's course of action in the present case, as it has unduly exposed the Applicant to prejudicial publicity before a determination of the Chamber pursuant to Article 58 of the Statute has even been made."¹⁶

18. Whilst, unusually perhaps, there is no formalized Code of conduct for Prosecutors that has been adopted by the OTP, recourse may be had to

¹⁵ ICC-01/04-01/06-2433, para 53.

¹⁶ ICC-01/09-42, para 22.

international standards when reviewing the standard of conduct expected by a Prosecutor of the ICC and the interests being protected.

19. A draft was prepared by the Secretariat of the International Association of Prosecutors and the Coalition of the International Criminal Court entitled “The code of professional conduct for prosecutors of the ICC”.¹⁷ Article 17 is entitled “Publicity and the Media” and provides:

“Prosecutors shall:

1. Avoid making public comments outside the courtroom, including, inter alia, speaking to the media about the merits of particular cases or the guilt or innocence of certain accused before judgement of the court, and making any statements regarding the character, credibility, reputation, or record of an accused;
2. Make it clear, particularly when undertaking official speaking engagements, that he or she is representing the OTP and not the Court as a whole.”

20. The Standards of Professional Conduct for Prosecution Counsel set out in Prosecutors Regulation Number 2 of 1999 by the Prosecutor of the ICTY¹⁸ also provides guidance as to acceptable standards of conduct. Those Standards begin with the following observation:

“the Universal Declaration of Human Rights enshrines the principles of equality before the law, the presumption of innocence and right to fair trial and public hearing by an independent and impartial tribunal;”

21. The Standards go on to state that:

“prosecutors, who in these Tribunals represent the international community, play a crucial role in the administration of justice and the determination of individual responsibility for crimes, and standards and rules concerning the performance of their important responsibilities should promote principles of fairness and professionalism;”

¹⁷ Annexure D.

¹⁸ Promulgated by H.E. Louise Arbour, Prosecutor of the ICTY and ICTR on 14 September 1999. See Annexure E.

22. The Standards also point out the difference between the authority of the Prosecution and the role of defence counsel in representing individual accused. They provide:

“the duties and responsibilities of the Prosecutor differ from, and are broader than, those of defence counsel – the Office of the Prosecutor is one of the three constituent organs of each of the International Tribunals, their members can be regarded as permanent officers of the court, and many safeguards are built into the Statutes of the respective tribunals, their Rules of Procedure and Evidence and Evidence of the United Nations system to ensure high standards of conduct and ethics on the part of the Prosecutor and prosecution counsel;”

23. Hence, in conformity with the role of the Prosecution and its obligations, the Standards of Professional Conduct make clear that in the conduct of all proceedings before the Tribunal prosecution counsel must

“2(a) serve and protect the public interest, including the interest of the international community, victims and witnesses, and to respect the fundamental rights of suspects and accused;

“2(c) to be, and to appear to be, consistent, objective, and independent;

“2(h) to assist the Tribunal to arrive at the truth and to do justice for the international community, victims and the accused;

“2(k) to avoid, outside the courtroom, making public comments or speaking to the media about the merits of particular cases or the guilt or innocence of specific accused while judgement in such matters is pending before a Chamber of the Tribunal;”

24. In a similar vein, the Guidelines on the Role of Prosecutors¹⁹ (known as the Havana Declaration) enjoin that:

“Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human

¹⁹ Guidelines on the Role of Prosecutors, Adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. See Annexure F.

dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system”.²⁰

25. For the reasons provided in paragraph 14 above, the Defence submit that the inappropriate and one sided press comments by the Prosecutor and his repeatedly presenting theory as fact, has the potential to infect the investigations process and significantly disadvantage the Defence. The avenue available to the Defence to counter such risk, namely reply to such misconceptions and misrepresentations through the media, will not contribute to “the smooth functioning of the criminal justice system.” The Prosecutor has not had any regard, or at least any proper regard, to the principles enshrined in the Havana Declaration or in the other codes or standards referred to in the paragraphs above. Nor even to the several enjoinders from various Chambers of the ICC. Accordingly, the Defence seeks recourse to the Pre-Trial Chamber to safeguard the integrity of the judicial process of the ICC and the rights of the Defence.

III. RELIEF SOUGHT

26. For the reasons detailed in this Application, the Defence pray that the Pre-Trial Chamber:

- a. Order the Prosecutor of the ICC to refrain from making any further public comments touching on the merits of the present case;

Additionally or in the alternative,

- b. In the event that any press comment is deemed absolutely necessary in order to discharge his responsibilities under the Rome Statute, to require the Prosecutor to make clear that his assertions are mere allegations by the Prosecution, the veracity of which are to be determined by the ICC; and
- c. Put the Prosecutor on notice that any further contravention of the orders of the Pre-Trial Chamber in this regard may attract consideration of judicial sanction.

²⁰ Ibid, para 12.

Respectfully Submitted,



Mr. Karim A. A. Khan

Lead Counsel for Ambassador Francis K. Muthaura

Dated this 30th Day of March 2011

At Phnom Penh, Cambodia

Index of Annexures

A	Transcript of the Prosecutor's press conference of 14 March 2011
A1 (confidential)	Last page of transcript of Prosecutor's press conference of 14 March 2011, containing the name and attestation of the person who prepared the transcript
B	"Three-week Ultimatum!", <i>The Standard</i> , 15 March 2011, p. 1
C	"ICC wants Muthaura to leave key security team", <i>Daily Nation</i> , 15 March 2011, p. 1,6
D	International Association of Prosecutors & Coalition for the International Criminal Court, Draft "Code of Professional Conduct for Prosecutors of the International Criminal Court"
E	Office of the Prosecutor of the ICTY, Prosecutor's Regulation No. 2 (1999), Standards of Professional Conduct for Prosecution Counsel
F	Guidelines on the Role of Prosecutors, Adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990