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

Date: 15 April 2011

PRE-TRIAL CHAMBER II

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

Response to Prosecution's Request for Conditions of Enforcement

Source: Defence

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

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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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**Victims Participation and Reparations
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Other

PROCEDURAL BACKGROUND

1. On 15 December 2010, the Prosecutor submitted the “Prosecutor’s Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Mugai Kenyatta and Mohammed Hussein Ali” (the “Application for Summonses”).¹
2. On 8 March 2011, the Pre-Trial Chamber issued its “Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali” (the “Summons Decision”).²
3. In the Summons Decision, the majority of Pre-Trial Chamber II found that there were reasonable grounds to believe that the suspects had committed a crime falling under the Rome Statute, and that the issuance of a summons was sufficient to secure their appearance at the initial appearance.
4. The Pre-Trial Chamber also ordered, without prejudice to future orders that the suspects were:
 - a. to have no contact directly or indirectly with any person who is or is believed to be a victim or a witness of the crimes for which the suspects have been summoned;
 - b. to refrain from corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, or tampering with or interfering with the Prosecution’s collection of evidence; and

¹ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecutor’s Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 15 December 2010, ICC-01/09-31.

² Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision on the Prosecutor’s Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11-01.

- c. to refrain from committing crime(s) set forth in the Statute; and
 - d. to attend all required hearings at the International Criminal Court.
5. On 6 April 2011, the Prosecutor filed "Prosecution's Conditions on Enforcement" (the "Application") in which, pursuant to Rule 119, he requested the Pre-Trial Chamber to:
- (i) Renew the conditional release provisions imposed by virtue of the Decision of 8 March 2011; and
 - (ii) Impose the following additional conditions:
 - (a) that the suspects provide specified information to the Chamber ostensibly to allow for the "enforcement" of the original conditions imposed. The Prosecutor has requested that the suspects be required to:
 - i. provide the Chamber with all residential and home addresses, email addresses, and telephone numbers, inside and outside Kenya. The suspects to verify the accuracy of this information in signed statements made under oath and filed with the Registry the first day of every month. Any change in the information provided shall be reported to the Registry within 48 hours of the change;
 - ii. provide the Chamber with official records for all telephone numbers from the date the summonses were issued until further order of the Chamber; and
 - iii. provide the Chamber with their email account addresses that are directly or indirectly used;

- (b) An order requiring the suspects to provide complete information about their finances, including assets and liabilities and the identities of all to whom money or property is owed;
 - (c) An order requiring the suspects to post bond in a sum to be determined by the Chamber, for the purpose of guaranteeing their appearances at the International Criminal Court;
 - (d) An order requiring the suspects to appear in person at the seat of the Court at least once every six month period and certify before the Pre-Trial Chamber, under oath, that he has complied in full with all the conditions imposed; and
 - (e) An order restraining the suspects from making public statements or comments about the case, the charges, the investigation, or the evidence.³
6. On 8 April 2011 pursuant to Article 60 of the Rome Statute, the suspects voluntarily submitted to the jurisdiction of the ICC and, in answer to the summons issued, attended the initial hearing scheduled by Pre-Trial Chamber II.
7. On 11 April, the Defence filed “Application for Variation of Decision on Summons or in the Alternative Request for Leave to Appeal” (the “Application for Variation”).⁴ In the Application for Variation, the Defence seek a variation of the Decision by the Pre Trial Chamber in respect of their ability to contact defence witnesses.
8. The Defence oppose the Prosecution’s Application on the following grounds:

³ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution’s Request for Conditions Enforcement, 6 April 2011, ICC-01/09-02/11-47.

⁴ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Defence Request for Variation of Decision on Summons or in the Alternative Request for Leave to Appeal, 11 April 2011, ICC-01/09-02/11-52.

- (a) The Pre-Trial Chamber has already, save for the variation of one condition requested by the Defence,⁵ imposed adequate conditions upon the suspects to ensure their attendance and proper conduct during the proceedings;
- (b) The Prosecutor has failed to submit any evidence or any valid argument to justify the imposition of the new conditions now sought. Indeed, he has failed to establish - and has not even argued - that there has been a material change in circumstances since the Pre-Trial Chamber imposed the conditions detailed in its decision of 8 March 2011. The Defence respectfully submit that a showing of such a change of circumstances is necessary before any new, additional conditions are imposed at the Prosecutor's request. When considering the sufficiency of the conditions originally imposed by the Pre-Trial Chamber, it is pertinent to note that the Prosecutor did not seek leave to appeal the conditions imposed on 8 March 2011. The Defence submit the conditions originally imposed remain sufficient and require no further embellishment or addition⁶;
- (c) In his Article 58 application,⁷ the Prosecutor requested broadly similar conditions to those now being sought. That application was judicially considered and, on 8 March 2011, the Pre-Trial Chamber imposed such conditions as it considered necessary and justified.;
- (d) The Prosecutor has not argued that any of the suspects are flight risks. Accordingly, the Prosecutor has failed to establish any justification as to why the Suspects be required to post bond;

⁵ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Defence Request for Variation of Decision on Summons or in the Alternative Request for Leave to Appeal, 11 April 2011, ICC-01/09-02/11-52.

⁶ Save with regards to the proviso detailed paragraph 7 above and the pending Defence Application for Variation dated 11 April 2011.

⁷ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 15 December 2010, ICC-01/09-31.

- (e) Properly considered, there has been no change of circumstance since 8 March 2011. What the Prosecutor is attempting to do is reopen the issue of appropriate conditions under the guise of “enforcement” of the original conditions. At the same time, the Prosecutor has failed to establish the need for such enforcement measures nor has he identified any breach by any of the suspects, to warrant the imposition of additional conditions;
- (f) The Prosecution is wrongfully seeking information from the suspects in breach of their right to remain silent provided for by Article 67(1)(g) of the Rome Statute;
- (g) The Prosecution is attempting to prevent the suspects from speaking freely about the proceedings.

II. SUBMISSIONS

(a) Conditions currently imposed sufficient

9. The Defence respectfully submit that the original conditions imposed by the Pre-Trial Chamber in its decision of 8 March 2011 are adequate and sufficient to ensure both the suspects attendance when requested by the Pre-Trial Chamber and to ensure the proper conduct of proceedings at all stages. The Prosecutor has failed to submit any evidence capable of showing that any conditions have been breached or that additional conditions are required.

(b) No Change in Circumstances

10. Article 60(3) which permits the Pre-Trial Chamber to periodically review the conditions of release, stipulates it may modify its ruling if satisfied that changed circumstances so require. The burden of demonstrating a change in circumstances is upon the Prosecutor and in this case no such change has been

submitted or proven.⁸ This application is a blatant attempt to reopen the original issue ruled upon by the Pre-Trial Chamber in its Decision under Article 58 of the issuance of the summons, but is now described erroneously by the Prosecutor as an “enforcement” of conditions. No grounds for submitting the need and justification for enforcement conditions have in fact been submitted.

11. The Prosecution links Rule 119(2) and (4), as the ground for its application but omits the part of the text within Rule 119(4) that requires the Trial Chamber to be convinced of the failure of a person to comply with one or more of the conditions imposed.⁹ No such failures have been adduced in evidence in support of the present application before the Chamber.

(c) Similarity of Request to that Previously Sought in the Application under Article 58

12. The information requested in the instant application is similar to that found in the Prosecutor’s Application for Summonses under Article 58. This is apparent from paragraph 208 of the Article 58 Application which refers to a request for addresses, telephone information; and to post a bond or provide real or personal security or surety.¹⁰ As the Prosecutor failed to seek leave to appeal that part of the Pre-Trial Chamber’s Decision, he is bound by the Chamber’s Decision. In effect he is now seeking to reopen the issue once again, after the time limits of seeking leave to appeal have expired and without providing any substantive justification.

⁸ Prosecutor v. Bemba., Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence", 19 November 2010, ICC-01/05-01/08-1019 at para 51.

⁹ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution’s Request for Conditions Enforcement, 6 April 2011, ICC-01/09-02/11-47 at para. 6.

¹⁰ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecutor’s Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 15 December 2010, ICC-01/09-31.

(d) Provision of Information

13. The conditions by which the Chamber may restrict liberty are set out in Rule 119(1). While these conditions are not exhaustive, they are clearly conditions of restriction of conduct. They are not intended to be a means, without just cause, for the supply of personal information by the suspect or accused to the Court or Prosecution.
14. The Prosecutor is seeking personal information consisting of financial information, addresses, phone records, emails (direct and indirect) which exceed the normal conditions of release. Without any grounds for such disclosure, the Application seeking this information is disproportionate to the circumstances of the instant case before the Pre-Trial Chamber.
15. The request for the provision of financial information has not been justified within the Application. At no stages in these proceedings has the Prosecutor submitted that any of the suspects are flight risks. No evidence to justify such a submission has been put forward. Indeed, in his Application for Summonses under Article 58, the Prosecutor conceded as much.¹¹ Furthermore, the Pre-Trial Chamber concurred in its Decision under Article 58 with the Prosecutor's assessment that none of the suspects were flight risks.¹² In the circumstances, the provision of the information requested is not justified nor is it proportionate to the circumstances before the Pre-Trial Chamber.

(e) Request to Post Bond

16. In terms of the propriety of requesting the defendants to post bail, the European Court of Human Rights has confirmed that the purpose of requesting a person to submit bail is to mitigate/eliminate the risk that they may flee from the

¹¹ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 15 December 2010, ICC-01/09-31 at para. 207.

¹² Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision on the Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11-01 at para. 55.

jurisdiction.¹³ It has no application in relation to issues concerning witness intimidation or obstruction of justice.¹⁴ It should thus only be employed in the context of a person who would otherwise need to be detained.¹⁵

(f) Restriction of Freedom of Speech

17. The Prosecution is seeking to silence the suspects from speaking in public about the case, charges, the investigation and the evidence. It is submitted that such a restriction constitutes an oppressive interference with their right to freedom of speech and expression.
18. It is not challenged that the suspects must not by speech or conduct unlawfully interfere, corrupt or threaten victim, witnesses or other persons. This restriction of conduct and behaviour has already been dealt with, however, in the conditions imposed by the Pre-Trial Chamber on 8 March 2011. No further action or additional restriction is necessary. All suspects know that breach of the conditions may result in the Pre-Trial Chamber revisiting the summons. Indeed, as much was indicated by the Presiding judge at the initial hearing of 8 April 2011.¹⁶
19. The Prosecutor regularly comments and issues media releases internationally and within Kenya concerning the nature of the proceedings against the suspects. For example, there have been numerous reports within the media regarding the Prosecutor's assertion that the six individuals are "the most responsible" for the 2007 post election violence.¹⁷ Furthermore, institutions that are supporters of the Court¹⁸ also disseminate internationally and within Kenya press releases and reports of the proceedings and the nature of the allegations against the suspects. Within Kenya, the media broadcasts reports and publishes

¹³ Smirnova v. Russia, ECHR Judgement of 24 July 2003.

¹⁴ S Trechsel *Human Rights in Criminal Proceedings* (Oxford University Press, 2005) at page 532.

¹⁵ S Trechsel *Human Rights in Criminal Proceedings* (Oxford University Press, 2005) at page 532.

¹⁶ ICC-01/09-02/11, T1-ENG at p 6, line 16-17.

¹⁷ See Annex 1, Examples of statements made that the six suspects are the "most responsible" for the 2007 post election violence.

¹⁸ Coalition for International Justice

articles concerning these proceedings and related issues. Politicians, lawyers and Kenyan citizens are reported commenting upon and giving their opinions on the proceedings before the ICC. The internet, blogs and websites contain further substantial comment. Some of these reports are plainly manipulative and do not justify the headlines, that often appear designed to mislead and denigrate the reputation of the Suspects, as has happened with the recent campaign speeches of Mr Kenyatta.¹⁹

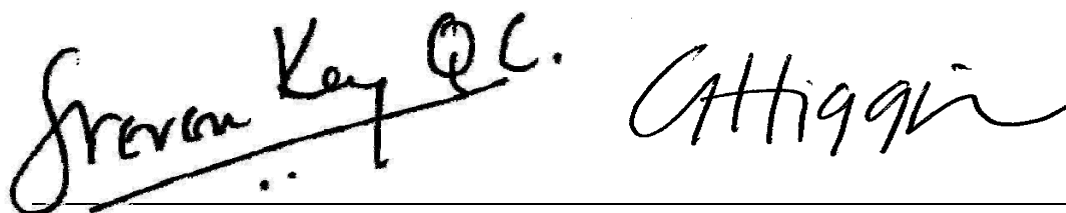
20. In the circumstances, the Defence submit that it would be both wrong and unfair for the Prosecutor to obtain a “gagging” order against the suspects whilst the Prosecutor can continue to speak about them. Individuals must have a right to put their case forward within their society as long as it is within the law, thereby allowing them to respond to controversies that surround them. That said, it is also the right of individual suspects to choose for themselves whether to respond publicly to various accusations and misconceptions, or to remain silent and address all matters solely before the Court. The margin of discretion given to individual suspects to decide to speak out and correct misunderstandings, or not, is particularly important at a time when the Prosecutor has repeatedly spoken about the merits of the case and has held multiple press conferences, one example of which is currently subject of a Defence application.²⁰

III. CONCLUSION

21. In the circumstances and for the reasons detailed in the paragraphs above, the Defence submit that no change of circumstance has been shown, nor any need established, for the additional conditions sought in the Prosecutor’s Application. Accordingly, the Defence respectfully submit that the Pre-Trial Chamber dismiss the Prosecution’s Application.

¹⁹ See for example; Daily Nation “Uhuru and Ruto warned over hate speech at rallies” 2 April 2011.

²⁰ Application for Order to the Prosecutor regarding extra-judicial comments to the press, ICC-01/09-02/11, 31 March 2011.



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On behalf of Uhuru Muigai Kenyatta



Karim A. A. Khan QC
On behalf of Francis Kirimi Muthaura



Evans Monari and Gershom Otachi
On behalf of Mohammed Hussein Ali

Dated this Friday 15th April 2011

The Hague, Netherlands