

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 10 May 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 for Extension of Time Limit for
Disclosure"**

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 for Extension of Time Limit for Disclosure” (the “Request”).²

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”.³

2. On 8 March 2011, the Chamber, by majority, decided to summon Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (collectively, the “suspects”) to appear before the Court.⁴

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”).⁵

4. On 7 April 2011, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, whereby, *inter alia*, principles as to the disclosure of evidence between the parties and its communication to the Chamber have been established (the “Disclosure Decision”).⁶

5. During the initial appearance hearing held on 8 April 2011, 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

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

² ICC-01/09-02/11-82.

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-01/09-02/11-26.

⁶ Pre-Trial Chamber II, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, ICC-01/09-02/11-48.

relevant for the purposes of establishing an adequate calendar of the disclosure proceedings.⁷ The status conference took place on 18 April 2011 in the presence of the Prosecutor, the Defence teams of the suspects and the representatives of the Registrar.⁸

6. On 20 April 2011, the Single Judge issued the “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”, whereby the Single Judge, *inter alia*, rejected the Prosecutor’s request to suspend the disclosure proceedings until a final determination of the Admissibility Challenge and established an articulate calendar for the conduct of the disclosure proceedings (the “Calendar for Disclosure”).⁹ According to the Calendar for Disclosure, the evidence on which the Prosecutor intends to rely for the purposes of the confirmation hearing is to be divided into three groups on the basis of the time when each piece of evidence has been collected by the Prosecutor. Three deadlines have been established, depending on the group under which each piece of evidence falls, either for the disclosure to the Defence of the evidence for which no redaction is needed or for the request to the Chamber to authorize properly justified proposals for redactions. The three deadlines established are the following: Friday, 3 June 2011 for the evidence collected before 15 December 2010; Friday, 24 June 2011 for the evidence collected between 15 December 2010 and 31 March 2011; and Friday, 29 July 2011 for the evidence collected after 31 March 2011.

7. On 2 May 2011, the Prosecutor filed his Request. The relief sought thereby is the following:

[T]he [Prosecutor] requests the Chamber to authorize the disclosure of the witnesses statements collected that require redactions after a proper reevaluation of the security in Kenya within the time frame adopted in the First Disclosure Decision.

⁷ ICC-01/09-02/11-T-1-ENG.

⁸ ICC-01/09-02/11-T-2-ENG.

⁹ Pre-Trial Chamber II, ICC-01/09-02/11-64.

The [Prosecutor] will disclose other evidence in accordance with the Second Disclosure Decision. The [Prosecutor] undertakes to submit proposals for redactions in two stages, the first group on 24 June and the second group on 29 July 2011.¹⁰

8. The Single Judge notes articles 51(5), 54, 61, 67 and 68 of the Rome Statute (the “Statute”), rules 76-83 and 121 of the Rules of Procedure and Evidence (the “Rules”) and regulation 35 of the Regulations of the Court (the “Regulations”).

9. The Single Judge is of the view that, by his Request, the Prosecutor is essentially seeking a reconsideration of the Calendar for Disclosure. This is shown by the arguments put forward by the Prosecutor with respect to the prejudice allegedly caused by the Calendar for Disclosure to his fair trial right as well as the relief sought in the Request.

10. In this respect, the Single Judge recalls that, as consistently held by the established jurisprudence of the Pre-Trial Chambers of the Court, the statutory framework set out by the Statute and the Rules do not provide for a motion for reconsideration as a procedural remedy against any decision taken by the Chamber or the Single Judge.¹¹ Nevertheless, the Single Judge shall address the substance of the Prosecutor’s argument in this regard, in order to emphasize the importance and proper understanding of the Calendar for Disclosure.

11. The Prosecutor seeks that the deadline for the submission of proposed redactions be withdrawn and suggests to provide the Single Judge with an *undertaking* as to his commitment to file before the Chamber proposals for redactions in two stages, the

¹⁰ Request, paras. 32 and 33.

¹¹ See e.g. Pre-Trial Chamber II, “Decision on the Prosecutor’s Position on the Decision of Pre-Trial Chamber II To Redact Factual Description of Crimes from the Warrant of Arrests, Motion for Reconsideration, and Motion for Clarification” ICC-02/04-01/05-60; Pre-Trial Chamber I, “Decision on the Prosecution Motion for Redaction”, ICC-01/04-01/06-123; Pre-Trial Chamber I, “Decision on the Prosecution Motion for Reconsideration and, in the alternative, Leave to Appeal”, ICC-01/04-01/06-166; Pre-Trial Chamber I, “Decision on the ‘Demande des représentants légaux de VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, VPRS6 et a/0071/06 aux fins d’accéder au document confidentiel déposé par le Conseil de direction du Fonds d’affectation spéciale au profit des victimes le 7 février 2008’”, ICC-01/04-457; Pre-Trial Chamber I, “Decision on the Defence for Mathieu Ngudjolo Chui’s Request concerning translation of documents” ICC-01/04-01/07-477.

first group on Friday, 3 June 2011 and the second group on Friday, 8 July 2011. In support of this request the Prosecutor essentially argues that the deadlines set in the Calendar for Disclosure are well in advance of the legal deadlines provided by the statutory documents of the Court and are also inconsistent with the “time frame for disclosure adopted by the (...) Disclosure Decision”.¹²

12. At first the Single Judge observes that, contrary to the Prosecutor’s assertion, there is no contradiction or inconsistency between the Disclosure Decision and the Calendar for Disclosure. As clearly indicated therein, the Disclosure Decision only intended to set general principles relating to disclosure according to the legal instruments of the Court. No time frame for the disclosure proceedings has been provided thereby. To the contrary, in the Disclosure Decision it is clearly stated that “[w]ith respect to the different requests related to protective measures for witnesses including redactions, the Single Judge wishes to make clear that any such request must be submitted as soon as practicable, but no later than the date which shall be specified in a calendar to be issued in due course”.¹³ Thereafter, the Single Judge convened a status conference for the specific purpose of receiving relevant information in order to establish an articulate calendar for disclosure.¹⁴ Therefore, the Calendar for Disclosure eventually issued by the Single Judge is not in conflict with the Disclosure Decision, but rather complements it.

13. Furthermore, the Single Judge recalls that the deadlines reflected in rule 121(3)-(6) of the Rules are only indicative of the minimum time limits for the disclosure of the evidence between the parties and its communication to the Chamber.¹⁵ In this respect, in the Calendar for Disclosure, the Single Judge clarified that:

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

¹² Request, paras. 1, 3 and 20.

¹³ Disclosure Decision, para. 13.

¹⁴ ICC-01/09-02/11-T-1-ENG, from page 16, line 5 to page 17, line 25. The status conference took place on 18 April 2011: see ICC-01/01-01/11-T-2-ENG.

¹⁵ See Disclosure Decision, para. 11 and Calendar for Disclosure, para. 13.

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*.¹⁶

14. The Single Judge recalls her responsibility to ensure that the disclosure proceedings takes place under satisfactorily conditions and that the rights of the defence as enshrined in the legal instruments of the Court are fully respected. To this purpose rule 121(2) of the Rules states that the Chamber “shall take the necessary decisions regarding disclosure”. Bearing in mind the principles recalled above as set out in the Calendar for Disclosure, the Single Judge reiterates that, with a view to guaranteeing the fairness and the expeditiousness of the disclosure proceedings, specific deadlines for the submission of justified proposals for redactions are necessary. The Prosecutor’s Request cannot therefore be granted to the extent that it advocates the non-binding nature of the dates indicated by the Prosecutor for his submission of proposals for redactions.

15. The Single Judge however notes that the Prosecutor’s Request also includes reference to regulation 35 of the Regulations, as a legal basis for the relief sought,¹⁷ and, thus, can be read as an application for extension of time limit under that provision. Accordingly, the Single Judge shall consider whether the requirement for extension of the time limit is met, namely whether good cause for such extension is shown.

¹⁶ Calendar for Disclosure, para. 14 (emphasis in the text).

¹⁷ Request, para. 20.

16. In this respect, the Single Judge notes the Prosecutor's submission that 88% of his evidence has been collected before 15 December 2010¹⁸ and, therefore, falls under the first group of evidence for which proposed redactions are to be submitted to the Chamber by Friday, 3 June 2011. More specifically, the Prosecutor asserts that, according to the Calendar for Disclosure, he is required to review by 3 June 2011, 502 documents, constituting 7,230 pages or nearly 77% of the total document to be disclosed in redacted form.¹⁹ A large part of the Prosecutor's evidence for which redactions are necessary is thus to be reassessed, in light of the current security situation in the field, in order for him to comply with the first deadline established in the Calendar for Disclosure for the submission of proposed redactions.²⁰ In this respect, the Single Judge acknowledges and endorses the Prosecutor's submission as to the need for an intensive and careful work to be conducted by him with a view to submitting to the Chamber properly and accurately justified proposals for redactions.²¹ Finally, the Single Judge takes note of the Prosecutor's submission that a number of redactions could turn out to be unnecessary, due to the possibility that lesser intrusive protective measures for witnesses other than redactions would soon be available.²²

17. Notwithstanding the above, the Single Judge recalls that the Calendar for Disclosure was issued more than 6 weeks in advance of the expiration of the first deadline for the submission of proposals for redactions for evidence collected before 15 December 2010. In this respect, the Single Judge expects that the Prosecutor had already conducted a preliminary risk assessment in relation to the witnesses on whom he intends to rely for the purposes of the confirmation hearing and that only a reassessment was yet to be conducted at the time of the issuance of the Calendar for Disclosure. In this sense, the Single Judge still considers 6 weeks to be, in the current circumstances, more than sufficient for the Prosecutor to complete his work with

¹⁸ Request, para. 3.

¹⁹ Request, para. 16.

²⁰ Request, paras. 17 and 18.

²¹ Request, para. 27.

²² Request, paras. 4, 22 and 28-30.

respect to evidence that has been in his domain for a protracted period of time, namely between 14 and 5 months as this evidence was collected since 31 March 2010 until 15 December 2010. Furthermore, in relation to the asserted potential availability of protective measures that fall short of redaction, the Single Judge observes that, in case of changes of circumstances that make redactions previously authorized no longer necessary or proportionate, such redactions can be lifted by the Chamber on its own motion or upon requests of the parties.

18. In light of the above, the Single Judge is of the view that the arguments advanced by the Prosecutor in his Request do not sufficiently show "good cause" within the meaning of regulation 35(2) of the Regulations for the sought extension of time limit. The Request must thus be rejected in its entirety.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Tuesday, 10 May 2011

At The Hague, The Netherlands