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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 leave to Appeal 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' (ICC-01/09-02/11)"

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 hereby renders this decision on the “Prosecution’s Application for leave to Appeal 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’ (ICC-01/09-02/11)” (the “Application”).²

I. Procedural History

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” requesting the Chamber to issue summonses to appear for the persons concerned, together with a number of annexes attached thereto.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 Pursuant to this decision, the suspects voluntarily appeared before the Court at the initial appearance hearing held on 8 April 2011.⁵

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”).⁶

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

² ICC-01/09-02/11-69.

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-T-1-ENG.

⁶ ICC-01/09-02/11-26.

4. On 14 April 2011, the Prosecutor filed the “Prosecution’s application requesting disclosure after a final resolution of the Government of Kenya’s admissibility challenge”, whereby he requested the Chamber to “order disclosure as soon as a final decision on the admissibility challenge is rendered”, asserting that this was required by the “full respect for the complementarity principle and the interest of fairness”.⁷

5. 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 such proceedings (the “Decision”).⁸

6. On 27 April 2011, the Prosecutor filed his Application, requesting leave to appeal the Decision on the following issues: “whether the Decision affects the Prosecution fair trial right” (the “Issue”).

7. On 2 May 2011, counsel for Uhuru Kenyatta and Mohammed Hussein Ali filed the “Defence Response to the ‘Prosecution’s Application for leave to Appeal 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’ (ICC-01/09-02/11)”, requesting that the Application be dismissed.⁹ On the same day, counsel for Francis Muthaura filed the “Defence Response to Prosecution’s Application for leave to appeal the “Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the

⁷ ICC-01/09-02/11-56, para. 12.

⁸ Pre-Trial Chamber II, ICC-01/09-02/11-64.

⁹ ICC-01/09-02/11-78.

Government of Kenya's admissibility challenge' and Establishing a Calendar for Disclosure' (ICC-01/09-02/11)", also requesting that the Application be dismissed.¹⁰

II. The Applicable Law

8. The Single Judge notes article 82(1)(d) of the Rome Statute (the "Statute").

9. The Single Judge, mindful of the exceptional character of the remedy of the interlocutory appeal, recalls that for leave to be granted, the following specific requirements must be met:

- (a) the decision involves an "issue" that would significantly affect (i) *both* the fair and expeditious conduct of the proceedings (ii) or the outcome of the trial; and
- (b) in the opinion of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

10. According to the established jurisprudence of this Court,¹¹ an "issue" is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. An issue is constituted by a subject, the resolution of which is essential for the determination of matters arising in the judicial cause under examination. Concerning the other requirements set out in (a) and (b) above, the Single Judge recalls that they are cumulative. Failure in demonstrating that one of the requirements in (a) and (b) is fulfilled makes it unnecessary for the Single Judge to address the remaining requirements under article 82(1)(d) of the Statute.

11. Lastly, the Single Judge takes note of the jurisprudence of Pre-Trial Chambers which held that it is incumbent upon any applicant seeking leave to appeal "to demonstrate (...) that the issue at stake affects, first and foremost, the fairness and

¹⁰ ICC-01/09-02/11-80.

¹¹ See, Pre-Trial Chamber II, "Decision on the 'Prosecution's Application for Leave to Appeal the 'Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali'", ICC-01/09-02/11-27, para. 7, with further exemplary references to the Court's established jurisprudence in footnote 6.

expeditiousness of the proceedings currently before the Chamber or the outcome of the related trial, as well as the impact (in terms of material advancement) of an immediate resolution of the issue on such proceedings".¹²

III. Arguments of the parties

Submissions of the Prosecutor

12. As noted above, the Issue presented by the Prosecutor reads as follows: "whether the Decision affects the Prosecution fair trial right".

13. The Prosecutor alleges that the Decision affects the fairness of the proceedings within the meaning and for the purposes of article 82(1)(d) as it would subject him to an "unreasonable choice of facing detrimental consequences to [his] ability to effectively present [his] case at the confirmation stage or taking costly and difficult protective measures despite the reigning uncertainty on admissibility".¹³ More specifically, the Prosecutor contends that the Decision "leaves [him] in the unfair position where [he] may have to sacrifice the probative force of [his] case in order to avert harm to [his] witnesses and their families".¹⁴ The Prosecutor maintains that, in light of the current security situation in the field, he would not be in a position to disclose sensitive information without having put in place before protective measures for the concerned witnesses.¹⁵ The Prosecutor's assertion is that those protective measures, in the form of redactions of witnesses' identifying information or use of summaries of their statements, would prejudice his case at the confirmation hearing, due to the lesser probative value that it may be attached to these pieces of

¹²Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58", ICC-02/04-01/05-20, para. 21; see also Pre-Trial Chamber I, "Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", ICC-01/04-135-tENG, para. 44 and, recently, Pre-Trial Chamber II, "Decision on a Request for Leave to Appeal", ICC-01/09-43, para. 17.

¹³ Application, para. 14.

¹⁴ Application, para. 17.

¹⁵ Application, para. 15.

evidence.¹⁶ Alternatively, the Prosecutor would need to put in place elaborate and costly protective measures that would turn out to be unnecessary should the Admissibility Challenge succeed.¹⁷ In this respect the Prosecutor states that “[i]t is part of the [Prosecutor]’s responsibility not to undertake that expense without certainty”.¹⁸

14. In the same vein, the Prosecutor maintains that the Issue affects the expeditious conduct of the proceedings since the Decision “that imposes a substantial burden on a party and involves the taking of procedural steps which may be completely futile (...) is supremely wasteful of resources”.¹⁹ According to the Prosecutor, the Decision could also result in delay since in order to meet the required evidentiary standard for the charges against the suspects to be confirmed, he may be required to request a postponement of the confirmation hearing or to restart the process again if the charges are not confirmed due to the inadequate probative value of his evidence caused by the necessary redactions.²⁰ Finally, in the view of the Prosecutor, an immediate decision by the Appeals Chamber would materially advance the proceedings as it could “avoid unnecessary expense of time and resources by the Court and prevent unnecessary risk or disruption to any witness” at the same time guaranteeing that the Prosecutor be able to “present evidence that meets the Chamber’s standards”.²¹

Submissions of the Defence

15. The Defence for Uhuru Kenyatta and Mohammed Hussein Ali argues that “given [that] the *Issue* identified by the [Prosecutor] constitutes most accurately a misinterpretation of the [Decision], supported by hypothetical considerations, no

¹⁶ Application, para. 15.

¹⁷ Application, para. 16.

¹⁸ Application, para. 16.

¹⁹ Application, para. 19.

²⁰ Application, para. 20.

²¹ Application, para. 22.

appealable issue arises”.²² In particular, it maintains that, contrary to the Prosecutor’s assertion, the Decision was properly reasoned and “based upon an accurate and clear interpretation of both the Statute and the Rules of Procedure and Evidence”.²³ By the same token, the Defence for Uhuru Kenyatta and Mohammed Hussein Ali contends that the Application was supported by incorrect assertions concerning the jurisprudence of the Court “in an attempt to argue that the Issue involves a number of novel aspects”.²⁴ The Defence for Uhuru Kenyatta and Mohammed Hussein Ali further asserts that the Prosecutor’s contention are premised upon hypothetical concerns, namely the potential impact of protective measures on witnesses and victims should the disclosure proceedings not be suspended, the possibility of the case being declared inadmissible and the potential impact of the security situation on the Prosecutor’s case.²⁵

16. In any case, according to the Defence for Uhuru Kenyatta and Mohammed Hussein Ali, the Prosecutor failed to establish that the Issue affects either the fairness or the expeditiousness of the proceedings, in light, *inter alia*, of: (i) the possibility for the Prosecutor to request protective measures and/or redaction to his evidence prior to its disclosure; (ii) the right of the Suspects to be informed promptly and in detail of the nature, cause and content of the charge and to have adequate time and facilities for the preparation of their defence; and (iii) the fact that the Admissibility Challenge does not have discernable impact on either protective measures for witnesses, including redactions, or on the security situation in Kenya.²⁶

17. The Defence for Francis Muthaura advances the same or similar arguments as those put forward by the Defence for Uhuru Kenyatta and Mohammed Hussein Ali in particular with respect to the incorrect assertions made by the Prosecutor with regard to the jurisprudence of the Court and to the arguments advanced by the

²² ICC-01/09-02/11-78, para. 23 (emphasis in the text).

²³ ICC-01/09-02/11-78, para. 15.

²⁴ ICC-01/09-02/11-78, para. 12.

²⁵ ICC-01/09-02/11-78, para. 21.

²⁶ ICC-01/09-02/11-78, para. 24.

Prosecutor being speculative in nature.²⁷ Additionally, the Defence for Francis Muthaura purports that “an appeal at this stage would interrupt the disclosure process, and consequently delay the proceedings” as opposed to “materially advance the proceedings” as required by article 82(1)(d) of the Statute.²⁸

IV. Analysis and conclusion of the Single Judge

18. At the outset the Single Judge expresses her concern for the way the Issue has been framed by the Prosecutor. As already recalled above, according to the established jurisprudence of the Court, an “issue” within the meaning of article 82(1)(d) is, at first, “an identifiable subject or topic”. The alleged Issue presented by the Prosecutor can hardly meet such requirement and be defined as an “appealable issue”, since the Prosecutor seems to be seeking a generic review of the Decision in its entirety in light of the principle of fair trial as opposed to a resolution by the Appeals Chamber of an identifiable subject or topic. Nevertheless, the Single Judge is of the view that the arguments put forward by the Prosecutor sufficiently indicate the scope of the sought leave to appeal.

19. In any case, the Single Judge is of the view that the arguments advanced by the Prosecutor to demonstrate that the Issue meets the criteria set out in article 82(1)(d) are not persuasive for the reasons set out below.

20. As noted above, the Application is fundamentally based upon one ground, namely that the Decision would impose on the Prosecutor an “unreasonable choice” between the duty to protect victims and witnesses, on the one hand, and the ability to effectively present his case. In this respect, the Single Judge observes that no such “choice”, whether “unreasonable” or not, has been imposed on the Prosecutor by the Decision. Conversely, what the Prosecutor alleges to be an “unreasonable choice” leaving him in an “unfair position” emerges from the statutory documents of this Court. In particular, the Prosecutor has the obligation to protect victims and

²⁷ ICC-01/09-02/11-80, paras. 12 and 15.

²⁸ ICC-01/09-02/11-80, para. 18.

witnesses²⁹ and, to that effect, he may request that certain information be redacted³⁰ or rely on summary evidence for the purposes of the confirmation hearing.³¹ The matter of the lesser probative value of the redacted items of evidence or summary evidence is not linked *per se* with the Decision and only relates to the Chamber's discretion in the assessment of the evidence as enshrined in article 69(4) of the Statute. Hence, even if one assumes that the Prosecutor's obligation to protect victims and witnesses, by way of requesting redactions or presenting summary evidence, can *in concreto* be in conflict or, at least, in tension with his ability to present his case, this sort of situation in no way can be considered as having been created by the Decision. Conversely, it clearly stems from the applicable law.

21. Indeed, the Decision only rejected, on the basis of the statutory documents of the Court, the Prosecutor's request for suspension of the disclosure proceedings pending a final ruling on the Admissibility Challenge. It does not deprive the Prosecutor of the possibility to request that protective measures for victims and witnesses be put in place, nor does it impose on him any activity implicating waste of time and/or resources not dictated by the statutory documents of the Court, or establish general principles as to the probative value to be attached to the evidence to be relied on for the purposes of the confirmation hearing.

22. The same holds true for the Admissibility Challenge, the lodging of which seems to be used by the Prosecutor as a pretext to request suspension of the disclosure proceedings but not as the cause, in combination with the Decision, of the asserted prejudice alleged in the Application. In particular, the Single Judge notes that the Prosecutor refers, on several occasions, to the current security situation in the field as the reason for which he needs that protective measures for witnesses be taken, in turn, constituting the alleged cause of the prejudice to his case. No reference is made in this respect to the existence of the Admissibility Challenge and no link between

²⁹ Articles 54 and 68(1) of the Statute.

³⁰ Rule 81(4) of the Rules.

³¹ Article 61(5) and 68(5) of the Statute.

the current pending status of the Admissibility Challenge and the security risks in the field is in any way shown or even mentioned in the Application.

23. In this respect, the Single Judge still observes that two possible final outcomes of the proceedings following the Admissibility Challenge are envisaged in the Statute and that neither of the two – whether read in combination with the Decision or not – can be considered as prejudicing the Prosecutor’s fair trial right in the sense he alleges in his Application.

24. The first scenario is that the Chamber decides the case to be admissible. In this case, the confirmation of charges hearing would take place and, as prescribed by the legal texts of the Court, it would be preceded by the disclosure of evidence between the parties. The Prosecutor would then be required to disclose to the Defence his evidence in accordance with the statutory texts of the Court³² and Chamber’s decisions in this respect, taking due account of his obligations to protect victims and witnesses. Thus, the Prosecutor would be left in any case in the alleged “unfair position” and subjected to the “unreasonable choice” which he asserts to be caused by the Decision. Therefore, it is alleged that the only effect that the suspension of the disclosure proceedings might have in this first scenario would be to delay the proceedings leading to the confirmation hearing and, consequently, the confirmation hearing itself – to the detriment of the expeditiousness of proceedings, which is a core component of the paramount principle of fairness.

25. Hence, the Single Judge is not persuaded why and how, in this scenario, the Prosecutor would be prejudiced by the Decision. It would be of a purely speculative nature even the implicit contention that protective measures which, in light of the different security situation in the field, may be necessary at this moment of time might not be necessary after the final resolution of the Admissibility Challenge, and, therefore, that the prejudice allegedly caused by the Decision would be avoided only with the suspension of the disclosure proceedings pending the Admissibility

³²Article 61(3) and rules 76, 77 and 121 of the Rules.

Challenge. In any case, 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, including the Prosecutor.

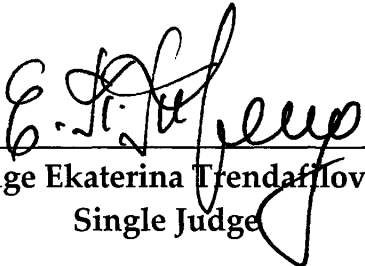
26. The second possible outcome of the Admissibility Challenge is the Chamber's decision that the case is inadmissible. In this scenario, there would be no prejudice to the Prosecutor's case simply because no case against the suspects would go further. The Single Judge acknowledges the Prosecutor's assertion that, in these circumstances, the "costly" protective measures for witnesses that could have been put in place before would turn out to be unnecessary. However, no relevance can be attributed to arguments related to the Prosecutor's resources as the legal basis for the Chamber's determination of the proper conduct of the proceedings, in particular in the present circumstances, in which preservation of Prosecutor's resources could jeopardize the expeditiousness and fairness of the proceedings in the sense specified above.

27. In view of the above, the Single Judge is not persuaded that the Issue affects the fairness of the proceedings for the reason that the Decision has in no way caused, or contributed to cause, the alleged prejudice to the Prosecutor that constitutes the ground upon which he seeks the instant leave to appeal: in this sense the Issue, as presented by the Prosecutor, cannot even be considered as arising out of the Decision. Accordingly, it is unnecessary for the Single Judge to address the remaining requirements under article 82(1)(d) of the Statute as well as the arguments put forward by the Defence teams and the Application must be rejected.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Application.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Wednesday, 11 May 2011

At The Hague, The Netherlands