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

Date: 29 June 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

Defence Request for a Compliance Order in regard to Decision "ICC-01/09-02/11-48"

Source: Defence of General Mohammed Hussein Ali

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

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Ms. Fatou Bensouda, Deputy Prosecutor

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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
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Detention Section

Victims Participation and Reparations

Other

Introduction

1. The Defence of Mohammed Hussein Ali requests the Chamber to issue an Order directing the Prosecutor to comply fully with "Decision Setting the Regime for Evidence Disclosure and Other Related Matters"¹ issued on 6 April 2011 (hereinafter "Second Disclosure Decision").
2. The Defence submits that the Prosecutor has deliberately failed to comply with parts of the Second Disclosure Decision to the detriment of the Defence. Specifically, the Prosecutor has not complied with his obligation to provide the Defence with a sufficiently detailed analysis of the evidence disclosed.
3. The Defence also seeks issuance of a warning of sanctions should the Prosecutor fail to comply fully with the Second Disclosure Decision.
4. The Defence reserves its right to seek further remedies in regard to this non-compliance.

Procedural history

5. On 6 April 2011, the Single Judge issued the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters"² in which she set the modalities for disclosure between the parties. In that decision, the Single Judge favoured the approach that was taken in the 31 July 2010 decision³ in regard to provision of a detailed legal analysis of the evidence disclosed by the Prosecutor.⁴
6. On 13 April 2011, the Prosecutor filed the "Prosecution's Application for leave to Appeal the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters" (ICC - 01/09 - 02/11 - 48)"⁵ wherein the Prosecutor sought leave to appeal the modalities set forth in the Second Disclosure Decision. The

¹ ICC-01/09-02/11-48

² *Id.*

³ Pre-Trial Chamber III, "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties", ICC-01/05-01/08-55, paras 66-70.

⁴ *Id.* paras 22 and 23.

⁵ ICC-01/09-02/11-55

Prosecutor argued that the decision, "...creates extra-statutory duties for the Prosecution that go beyond the proper scope of pre-confirmation disclosure set out in the Statute and Rules."⁶

7. On 2 May 2011, the Single Judge rejected the Prosecutor's Application for Leave to Appeal.⁷
8. On 3 June 2011 and 24 June 2011, the Prosecutor filed "Prosecutor's First Communication of the Disclosure of Incriminating and Rule 77 Materials to the Defence"⁸ and "Prosecutor's First Communication of the Disclosure of Potentially Exculpatory Evidence and Second Communication of the Disclosure of Incriminating Evidence and Rule 77 Materials to the Defence"⁹ respectively.

Submissions

9. The Defence recalls the Orders of this Chamber contained in the Second Decision on Disclosure wherein the Single Judge adopted the approach taken in the 31 July 2010 Decision and requiring that the Defence be provided with:

"All necessary tools to understand the reasons why the Prosecutor relies on any particular piece of evidence and that, consequently, the evidence exchanged between the parties and communicated to the Chamber must be the subject of a sufficiently detailed legal analysis relating the alleged facts with the constituent elements corresponding to each crime charged [...] This analysis consist of presenting each piece of evidence according to its relevance in relation to the constituent elements of the crimes presented by the Prosecutor in his application under article 58 of the Statute and taken into account by the Chamber in its [decision on the said application]. Each piece of evidence must be analyzed - page by page or, where required,

⁶ *Id.* Para. 4

⁷ Pre Trial Chamber II, "Decision on the 'Prosecution's Application for leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters' (ICC-01/09-02/11-48)" ICC-01/09-02/11-77

⁸ ICC-01/09-02/11-100

⁹ ICC-01/09-02/11-135

paragraph by paragraph - by relating each piece of information contained in that page or paragraph with one or more of the constituent elements of one or more of the crimes with which the person is charged, including the contextual elements of those crimes, as well as the constituent elements of the mode of participation in the offence with which person is charged. The same analysis technique shall apply *mutatis mutandis* to photographs, maps, videodiscs, tangible objects and any other support disclosed by the Prosecutor [...] this analysis should be presented in the form of a summary table which shows the relevance of the evidence presented in relation to the constituent elements of the crimes with which the person is charged. It should enable the Chamber to verify that for each constituent element of any crime with which the person is charged, including their contextual elements, as well as for each constituent element of the mode of participation in the offence with which he or she is charged, there are one or more corresponding pieces of evidence, either incriminating or exculpatory, which the Chamber must assess in light of the criteria set under article 61(7) of the Statute.”¹⁰

10. The rationale of this requirement, as explained by the Single Judge, is to ensure that the Defence is “... prepared under satisfactory conditions, and that the Presiding Judge is in a position to “organise the presentation of evidence by the parties according to the crimes charged with one party responding to the other on each count consecutively”.¹¹

11. The Appeals Chamber has categorically stated that parties before a Chamber are obliged to obey its Orders regardless of any conflict of such Orders with the perceived duties of a party. The Appeals Chamber stated:

¹⁰ ICC-01/09-02/11-48 Para 22 (footnotes omitted)

¹¹ *Id.* Para 24 (footnotes omitted)

Orders of the Chambers are binding and should be treated as such by all parties and participants unless and until they are suspended, reversed or amended by the Appeals Chamber or their legal effects are otherwise modified by an appropriate decision of a relevant Chamber.

Even if there is a conflict between the orders of a Chamber and the Prosecutor's perception of his duties, the Prosecutor is obliged to comply with the orders of the Chamber.¹²

12. It is noteworthy that the Prosecutor sought a variance of this Order by stating in its Application for Leave to appeal that the Decision "...creates extra-statutory duties for the Prosecution that go beyond the proper scope of pre-confirmation disclosure set out in the Statute and Rules."¹³ Despite this request for leave to appeal being rejected, the Prosecutor seems to be acting on his perceived duties regardless of the Orders of the Single Judge. Even if the request for appeal was allowed, the obligation on a party to comply with an order that party seeks to appeal on does not cease till a Chamber pronounces so. As succinctly stated by the Appeals Chamber above, "...the filing of a request by a party does not, in itself, suspend the effect of an order; only a judicial decision may alter the legal effects of a judicial order."¹⁴

13. The essence of the Orders issued by this Chamber in regard to disclosure, the Defence understands, is to enable General Ali to prepare adequately for his defence having understood clearly what the allegations against him are. Disclosure that does not meet the necessary parameters as set out in the Second Decision on Disclosure therefore fails to ensure that the rights of the Defence are respected.

14. In the disclosures from the Prosecutor on 3 June 2011 and 24 June 2011, the Prosecutor has not provided any detailed analysis to show the relevance of the

¹² Appeals Chamber "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU" ICC-01/04-01/06-2582, Paras 1 and 2

¹³ ICC-01/09-02/11-55, para 4.

¹⁴ Para 49, *supra* note 12.

evidence disclosed. In the 3 June 2011 disclosures, the Prosecutor indicates that "...the analysis of each piece of evidence reflecting its relevance..."¹⁵ is contained in Public Annexes B, D and Confidential Annex F of the "Prosecutor's First Communication of the Disclosure of Incriminating and Rule 77 Materials to the Defence."¹⁶ However, the said annexes contain just quotes from the pieces of evidence without any analysis of their relevance provided. The same is true for "Prosecutor's First Communication of the Disclosure of Potentially Exculpatory Evidence and Second Communication of the Disclosure of Incriminating Evidence and Rule 77 Materials to the Defence."¹⁷ The annexes alluded to be containing the analysis of each piece of evidence reflecting its relevance contain mere quotations from those pieces of evidence without any explanation of their relevance.¹⁸

15. The above disclosures have made it impossible for General Ali to understand the relevance of the disclosed evidence and to be in a position to sufficiently prepare for his Defence.

16. The Defence submits that the Prosecutor has deliberately failed to comply with the Orders of the Chamber which failure amounts to a refusal. Such a refusal, the Defence argues, amounts to a compromise on the integrity of these proceedings if steps are not taken to ensure compliance.

17. The Defence notes the provisions of Article 71 of the Statute and Rule 171 of the Rules of Procedure and Evidence and states that it will, if it becomes necessary, request the Chamber to impose sanctions on the Prosecutor for refusal to comply with its orders.

Relief Sought

18. For the foregoing reasons, the Defence requests the Chamber to issue:

- a) An Order directing the Prosecutor to fully comply with decision ICC-01/09-02/11-48 by latest 15 July 2011;

¹⁵ Para 7, *infra*.

¹⁶ ICC-01/09-02/11-100

¹⁷ ICC-01/09-02/11-135

¹⁸ See ICC-01/09-02/11-135-AnxB

- b) A warning of sanctions for misconduct directed at the Prosecutor in case of future non compliance with decision ICC-01/09-02/11-48.

Respectfully submitted,



Evans Monari and Gershom Otachi Bw'omanwa
On behalf of Mohammed Hussein Ali

Dated this 29th day of June, 2011,
At Nairobi, Kenya.