



Original: **English**

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

Date: **30 June 2011**

PRE-TRIAL CHAMBER II

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

**Application on Behalf of Ambassador Francis K. Muthaura to Join the Defence
Request for a Compliance Order in regard to Decision 'ICC-01/09-02/11-48'**

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

Counsel for Francis Kirimi Muthaura:

Mr. Karim A. A. Khan QC , Mr. Essa

Faal, Mr. Kennedy Ogetto & Ms.

Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta:

Mr. Steven Kay QC & Ms. Gillian

Higgins

Counsel for Mohammed Hussein Ali:

Mr. Evans Monari, Mr. John Philpot, Mr.

Gregory Kehoe & Mr. Gershom Otachi

Bw'omanwa

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

Other

I. PROCEDURAL HISTORY

1. On 6 April 2011, the Single Judge issued her “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”¹ in which the modalities for disclosure between the parties were spelt out. The Single Judge adopted the approach as set out previously by PTC III in its “Decision on the Evidence Disclosure System and Setting the Timetable for Disclosure between the Parties” of 31 July 2010, which required the provision of a detailed legal analysis of the evidence disclosed by the Prosecutor.²
2. On 2 May 2011, the Single Judge issued her “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)’” wherein the Single Judge rejected³ the Prosecutor’s Application for Leave to Appeal of 13 April 2011⁴ in which it had sought to appeal the modalities set forth in the decision referred to paragraph 1 above.
3. On 3 June 2011, the Prosecution filed the “Prosecutor’s First Communication of the Disclosure of Incriminating and Rule 77 Material to the Defence”.⁵
4. On 24 June 2011, the Prosecution filed the “Prosecutor’s First Communication of the Disclosure of Potentially Exculpatory Evidence and Second Communication of the Disclosure of Incriminating and Rule 77 Material to the Defence”.⁶
5. On 29 June 2011, the Defence Team of General Mohammed Hussein Ali filed its “Request for Compliance Order in regard to Decision “ICC-01/09-02/11-48”.⁷

¹ ICC-01/09-02/11-48

² ICC-01/05-01/08-55 paras 66-70

³ ICC-01/09-02/11-77

⁴ ICC-01/09-02/11-55 “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 ICC-01/09-02/11-100

⁶ ICC-01/09-02/11-135

⁷ ICC-01/09-02/11-141

II. SUBMISSIONS

6. The Defence for Ambassador Francis K. Muthaura file this application to join issue with the filing referred to in paragraph 5 above, with particular reference to paragraphs 9 to 14 of the said filing as applicable to Ambassador Muthaura.
7. The Defence submits that the manner and content of the prosecution disclosure thus far makes it impossible for Ambassador Muthaura and/or his Defence to understand the relevance of the evidence disclosed. Coupled with the fact that the Article 58 Application disclosed to the Defence by the prosecution is heavily redacted, the disclosure in its present state renders any proper preparation of a Defence for Ambassador Muthaura, impossible.
8. The Defence further emphasise the obligation of the Prosecutor to comply with paragraph 22 of the said Decision of the Single Judge and identify the relevance of each piece of evidence to each suspect in this case.

III. RELIEF SOUGHT

9. The Defence respectfully requests the Chamber to order the Prosecutor to fully comply with the Decision of the Single Judge of ICC-01/09-02/11-48 and to resubmit the concerned material forthwith to the Defence.
10. The Defence further requests that the Prosecutor be ordered to identify and set out clearly how and why each piece of evidence disclosed is relevant to each of the three individuals, Ambassador Muthaura, Mr. Kenyatta, and General Ali.

Respectfully Submitted,



Mr. Karim A. A. Khan, QC

Lead Counsel for Ambassador Francis K. Muthaura

Dated this 30th Day of June 2011

At Nairobi, Kenya