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PRE-TRIAL CHAMBER II

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

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

**Prosecution's Consolidated Observations to the Defences' Requests "for a
Compliance Order in regard to decision 'ICC-01/09-02/11-48'"**

Source: Office of the Prosecutor

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

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I. Introduction

1. On 29 June 2011 the Defence of Mohammed Ali filed a request for an order directing the Prosecutor to comply with decision ICC-01/09-02/11-48 (“Ali Request”)¹ arguing that the Prosecution has deliberately failed to comply with parts of the Decision Setting the regime for Evidence Disclosure and Other Related Materials (“Second Disclosure Decision”)² to the detriment of the Defence. In the Ali Request, the Defence also seeks from the Pre-Trial Chamber (“Chamber”) the issuance of a warning of sanctions should the Prosecutor fail to comply fully with the Second Disclosure Decision³. On 1 July 2011, the Defence team for Francis Kirimi Muthaura applied to join the Ali Request.⁴ On 1 July 2011, the Single Judge requested in its “Order to the Prosecution to Submit its Observations on the Defences’ Requests “for a Compliance Order in regard to decision ‘ICC-01/09-02/11-48”, that the Prosecution respond the Defences’ Requests by 6 July 2011.⁵ On 5 July 2011, the Kenyatta Defence also filed an application to join the Ali Request.⁶ The Prosecution hereby submits its consolidated observations to all three petitions from the Defence (together referred to as the “Defences’ Requests”) opposing them in their entirety.

II. Procedural History

¹ ICC-01/09-02/11-141.

² ICC-01/09-02/11-48.

³ ICC-01/09-02/11-141, p. 8.

⁴ See Application on Behalf of Ambassador Francis Muthaura to Join the Defence Request for a Compliance Order in Regard to Decision ‘ICC-01/09-02/11-48’ (“Muthaura Application”), ICC-01/09-02/11-143, filed on 30 June 2011.

⁵ ICC-01/09-02/11-148, p.4.

⁶ See Application on Behalf of Uhuru Muigai Kenyatta to Join the Defence Request for a Compliance Order in Regard to Decision ‘ICC-01/09-02/11-48’, ICC-01/09-02/11-156, filed on 5 July 2011.

2. On 6 April 2011, the Single Judge issued the Second Decision on Disclosure in which she requested that the Prosecutor present an in-depth analysis chart of incriminating evidence, in accordance with the sample draft model chart attached as Annex 2 to its decision.⁷ In electing such an approach the Single Judge aims at “streamlining the process of evidence disclosure” to ensure that the Defence can adequately prepare its case and to allow the Judge to organize the presentation of evidence of the parties.⁸ According to the Single Judge, a chart presentation would prevent unnecessary delays of the current proceedings.⁹
3. On 3 June 2011, the Prosecution disclosed to the Defence its first three packages of incriminating evidence and filed, according to the model chart contained in Annex 2 of the Second Decision on Disclosure, the analysis charts for each package in Public Annexes B and D and Confidential Annex F submitted with the Prosecution’s First Communication of the Disclosure of Incriminating Evidence and Rule 77 Materials to the Defence.¹⁰
4. On 24 June 2011, the Prosecution disclosed a fourth package of incriminating evidence and appended, as Public Annex B to its Prosecution’s First Communication of the Disclosure of Potentially Exculpatory Evidence and Second Communication of the Disclosure of Incriminating Evidence and Rule 77

⁷ ICC-01/09-02/11-48-Anx2.

⁸ ICC-01/09-02/11-48, para 24.

⁹ ICC-01/09-02/11-48, para 24.

¹⁰ ICC-01/09-02/11-100, Annex B (ICC-01/09-02/11-100-AnxB) is the in-depth analysis chart for Pre-Trial INCRIM Package 1; Annex D (ICC-01/09-02/11-100-AnxD) is the in-depth analysis chart for the Pre-Trial INCRIM Package 2; Confidential Annex F (ICC-01/09-02/11-100-Conf-AnxF) is the in-depth analysis chart for Pre-Trial INCRIM Package 3; all disclosed on 3 June 2011.

Materials to the Defence, an analysis of each piece of evidence reflecting its relevance in light of the crimes charged in this case.¹¹

5. On 29 June 2011, the Defence team for Mohammed Hussein Ali filed the Ali Request prompting the Chamber to issue an order directing the Prosecutor to comply with decision ICC-01/09-02/11-48 arguing that “the Prosecutor has not complied with his obligation to provide the Defence with a sufficiently detailed analysis of the evidence disclosed” thereby prejudicing the rights of the Defence.¹² The Defence contends that the “Prosecutor has not provided detailed analysis to show the relevance of the evidence disclosed.”¹³ This failure amounts to a deliberate refusal to comply with a judicial order compromising the integrity of the proceedings and warranting, if necessary, the imposition of sanctions against the Prosecution pursuant to Article 71 of the Statute.¹⁴
6. On 1 July 2011, the Defence team for Francis Kirimi Muthaura submitted an application to join the Ali Request with particular reference to paragraphs 9 to 14 of the Ali Request¹⁵ and arguing 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”. The Muthaura Defence further argues that the Prosecution be ordered to identify and set out clearly how and why each piece of evidence disclosed is relevant to each of the three [suspects]”.¹⁶

¹¹ ICC-01/09-02/11-135 and ICC-01/09-02/11-135-AnxB.

¹² ICC-01/09-02/11-141, paras 2, 13 and 18.

¹³ ICC-01/09-02/11-141, para. 14.

¹⁴ ICC-01/09-02/11-141, para. 17.

¹⁵ ICC-01/09-02/11-143, para. 6.

¹⁶ ICC-01/09-02/11-143, paras 9-10.

7. On 1 July 2011, the Single Judge ordered the Prosecution to submit its observations on the Defences' requests by 6 July 2011.¹⁷
8. On 5 July 2011, the Kenyatta Defence also filed an application to join the Ali Request similar in content and presentation to the Muthaura Application.¹⁸

III. Prosecution's Observations

9. The Prosecution opposes these requests. The Prosecution has complied fully with the Second Decision on Disclosure and the sample model chart in the above referenced disclosure filings and appended annexes.¹⁹ As stated above, the Chamber, in its Second Decision on Disclosure, requested the Prosecution to link the evidence (by referring to the document ID number and the relevant paragraph or section of the document) to the element of the crimes or modes of liability in an in-depth analysis chart.²⁰ In fact, the Prosecution went beyond its obligations by providing additional information in the chart, such as by including excerpts of the relevant evidence and indicating the source of the materials.
10. In addition, the Prosecution submits that the Muthaura and Kenyatta Requests for the Prosecution to specify in the in-depth analysis charts how a given piece of evidence relates to any and/or each of the three suspects is unfounded. In the Second Disclosure Decision, the Single Judge ordered that the evidence in the in-depth analysis chart be linked to the crimes, but not in respect to each suspect individually.²¹ Furthermore, such a distinction is unwarranted, especially at this

¹⁷ ICC-01/09-02/11-148, p.4.

¹⁸ ICC-01/09-02/11-156.

¹⁹ See ICC-01/09-02/11-100-AnxB, ICC-01/09-02/11-100-AnxD, ICC-01/09-02/11-100-Conf-AnxF and ICC-01/09-02/11-135-AnxB.

²⁰ ICC-01/09-02/11-48, paras 22 to 24.

²¹ See ICC-01/09-02/11-48, paras 22 to 24 and ICC-01/09-02/11-48-Anx2.

stage of the proceedings, in light of the Pre-Trial Chamber's findings regarding the suspects' roles in the commission of the crimes in "Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali".²² In the latter decision the Chamber found reasonable grounds to believe that Kenyatta and Muthaura acted as indirect co-perpetrators under article 25(3)(a) for the crimes and that Ali is criminally responsible under article 25(3)(d) for having contributed to the commission of the crimes against humanity as alleged by the Prosecutor.²³ Since the suspects' roles toward the commission of the crimes are interlinked through the respective modes of liability, dividing the constituent elements of the crime and the mode of liability for each of the three suspects would be unduly burdensome on the Prosecution thereby causing unnecessary delays in the current proceedings, while of very limited use to the Defence for the preparation of the Confirmation Hearing.

III. Relief sought

11. For the above reasons, the Prosecution respectfully asks that the Chamber reject the three Defence team's requests.



Luis Moreno-Ocampo
Prosecutor

Dated this 6th day of July 2011
At The Hague, The Netherlands

²² ICC-01/09-02/11-1.

²³ ICC-01/09-02/11-1, paras 45 and 51.