Cour
Pénale
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International
Criminal
Court

Original: English

No.: **ICC-01/09-02/11**
Date: **1 September 2011**

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
With Confidential Annex A

Prosecution's Response to the "Defence Request for a Status Conference Concerning the Prosecution's Disclosure of 19th August 2011 and the Document Containing the Charges and Article 101 of the Rome Statute"

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 19 August 2011, the Prosecution submitted its Document Containing the Charges (DCC), List of Evidence (LoE) and comprehensive In-depth Analysis Chart (IDAC) of evidence included in the LoE.[1]

2. On 29 August 2011, the Defence Team of Francis Kirimi Muthaura ("Muthaura") submitted its "Corrigendum to the Preliminary Motion Alleging Defects in the Document Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be ordered to re-file an Amended DCC & LoE" wherein it alleged certain defects in the form of the DCC and LoE filed by the Prosecution (the "First Defence Motion").[2]

3. On 29 August 2011, the Prosecution submitted its response to the First Defence Motion (the "Prosecution's Response").[3]

4. On 29 August 2011, the Defence Team of Uhuru Muigai Kenyatta ("Kenyatta") and Mohammed Hussein Ali ("Ali") submitted the "Defence Request for a Status Conference Concerning the Prosecution's Disclosure of 19th August 2011 and the Document Containing the Charges and Article 101 of the Rome Statute" which largely incorporated submissions from the First Defence Motion and requested a status conference to address disclosure of evidence (the "Second Defence Motion").[4]

5. The Prosecution submits that its DCC, LoE and IDAC meet all necessary criteria under the Statute, Rules and decisions of this Chamber, provide adequate notice to the Defence, and do not overstep the boundaries of the Chamber's decision authorizing the issuance of the summons. The Prosecution also submits that Article

[1] ICC-01/09-02/11-257 and its Annexes.
[2] ICC-01/09-02/11-268-Corr and Annex.
[3] ICC-01/09-02/11-269.
[4] ICC-01/09-02/11-270 and Annex.

101 of the Statute does not apply to this case. Nor is there merit to the complaint about late disclosure or the claim about substantial new allegations in the disclosure and the DCC. Finally, the Prosecution is of the view that no meaningful purpose is served by the holding of a status conference pursuant to Rule 121(2)(b) of the Rules as requested by the Defence.

II. SUBMISSIONS

6. The Second Defence Motion largely adopts arguments that were first advanced in the First Defence Motion and have already been addressed in the Prosecution's Response.[5] For purposes of this response therefore, the Prosecution incorporates by reference its submissions in paragraphs 5 to 40 of the Prosecution's Response.

7. The Prosecution will now deal *in seriatim* with each of the new issues raised in the Second Defence Motion.

Non-Applicability of Article 101 of the Rome Statute

8. Article 101 is one of the articles in Part 9 of the Statute dealing with matters concerning "international cooperation and judicial assistance". It provides as follows in paragraph 1 for the "rule of speciality":

> "A person <u>surrendered to the Court under this Statute</u> shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered." (Emphasis added)

9. The Prosecution submits that based on the wording of Article 101, it is clear that it does not apply in cases where a person *voluntarily appears* before the Court pursuant

[5] ICC-01/09-02/11-270, para. 9, adopting paragraphs 15 to 38 of the First Defence Motion.

to a summons to appear. This is the only logical conclusion for a variety of reasons. First, the phrase "surrendered to the Court under this Statute" makes it abundantly clear that the "surrender" must be one under the Statute. In this regard, Article 102 of the Statute provides: "For the purposes of this Statute: (a) 'surrender' means the delivering up of a person by a State to the Court, pursuant to this Statute".

10. Secondly, it is clear from the Statute that the term "surrender" relates to a process involving State cooperation and detention. For a person to have been "surrendered to the Court under [the] Statute", the intervention of a State is required for the execution of a surrender request.[6] No such request has been made or effected in this case.

11. The rule of specialty, moreover, is a principle in treaty law and customary international law that governs relations between the entity requesting the surrender and the entity granting it; it is designed to protect the right of the requested nation against a breach of faith by the requesting nation or, in the case of this institution, the requesting Court. Since the Court has not made a request for surrender and no nation accordingly has granted the request, specialty does not apply.[7]

12. Based on the foregoing, the Prosecution submits that Article 101 of the Statute does not apply to the current case. The conclusion remains the same despite the attempt in the Second Defence Motion to unilaterally change the circumstances of Kenyatta and Ali's initial appearance from one of voluntary appearance to one of "*voluntary surrender*".[8] There is no support for this position. However they may attempt to characterize it, the fact remains that the suspects were not surrendered by a State and

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[6] See for example, Articles 59 and 89 of the Statute.
[7] Vladimir Tochilovsky, Jurisprudence of the international criminal courts and the European Court of Human Rights: Procedure and Evidence, (2008), p. 670: "The voluntary surrender of an accused has a particular relevance since, even under extradition law, it is not self-evident that the Rule of specialty would apply if the extradite consents to his extradition by accepting a simplified procedure".
[8] ICC-01/09-02/11-270, para. 11.

no assurances of specialty were made to a surrendering government or to the suspects themselves. The fact that the suspects initially appeared in response to summonses to appear issued by the Chamber, rather than warrants of arrest, shows that there was no surrender involved.

Whether there are Substantial New Allegations in the Disclosure and DCC

13. The Prosecution strongly takes exception to the misleading manner in which the Defence Teams of Kenyatta and Ali have presented their arguments in this section of the Second Defence Motion. The Defence incorrectly asserts that the "substance and detail of the core evidence against Uhuru Kenyatta and Mohammed Ali" was disclosed to them for the first time on 19 August 2011.[9] Further, they assert that the "*entire* Prosecution case now rests on the evidence of four witnesses, all of which were only disclosed to the Defence on 19th August 2011".[10]

14. The Prosecution is baffled as to how the Defence arrived at these conclusions. First, while the Defence would like the Chamber to believe that it has not had time to review the disclosed evidence,[11] it nevertheless is clear from their argument that the Defence in fact has been able to thoroughly review *all* disclosed evidence. Secondly, the Defence failure to complain about 530 items – spanning all categories of evidence and consisting of approximately 7,950 pages – disclosed before 19 August 2011 is an indirect admission that it has had sufficient time to review these materials. This means that the Defence has had the opportunity to review a large chunk of the evidence to be relied on by the Prosecution at the confirmation hearing.

[9] ICC-01/09-02/11-270, para. 15.
[10] ICC-01/09-02/11-270, para. 19.
[11] ICC-01/09-02/11-270, paras. 15 and 9 (incorporating ICC-01/09-02/11-268, paras. 27, 31 and 35).

15. The Defence also asserts that the substantive core of the 351 documents on the Prosecution's list of evidence was disclosed for the first time on 19 August 2011.[12] They however also point out that only 85 of these documents were disclosed on 19 August 2011 – meaning that 266 of the documents on the Prosecution's list of evidence had already been disclosed prior to 19 August 2011.[13]

16. The Defence also state that the final IDAC which was submitted in five parts consists of approximately 6,644 pages. The Defence however neglects to point out that the total is an accumulation of individual charts that have been submitted over the course of the disclosure process pursuant to the Chamber order to submit one comprehensive IDAC at the end of the disclosure process.[14] Furthermore, the total number of IDAC pages that relate exclusively to the Kenyatta and Ali cases are 4,303 and 3,346 pages respectively, *including* information disclosed prior to 19 August 2011 in ten packages of incriminating evidence.

17. The Defence alleges that the Prosecution referenced 403 and 225 documents respectively relevant to Kenyatta and Ali in the DCC.[15] The Prosecution submits that these figures are false and asserts that to the best of its knowledge it did not reference any document outside the *280 documents* listed as incriminating evidence in the LoE as submitted on 19 August 2011.

18. The Defence further alleges that the DCC contains a "plethora of major allegations that have been notified to the Defence for the first time".[16] It listed 33 and 3 items respectively of purportedly new allegations in the Kenyatta and Ali cases. The Prosecution herein refers the Chamber to Annex A which details in tabular form the

[12] ICC-01/09-02/11-270, para. 15(i).
[13] ICC-01/09-02/11-270, para. 15(iii).
[14] ICC-01/09-02/11-167-Corr.
[15] ICC-01/09-02/11-270, para. 15(v) and (vi).
[16] ICC-01/09-02/11-270, para. 16.

so-called new allegations against information already in the possession of the Defence from the confidential redacted Article 58 Application,[17] the decision on the Prosecution's Article 58 Application[18] and disclosed evidence. Annex A highlights the serious and gross inaccuracies in the Second Defence Motion and illustrates that the majority of the so-called new allegations are in fact not new.

III. RELIEF

19. In conclusion, the Prosecution requests that the Chamber dismiss the Second Defence Motion and deny the relief sought therein.

Luis Moreno-Ocampo
Prosecutor

Dated this 1st day of September 2011
At The Hague, The Netherlands

[17] ICC-01/09-02/11-197 and Confidential Annex.
[18] ICC-01/09-02/11-1.