

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 21 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

Prosecution's Request to Exclude Certain Documents Submitted by the Defence

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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Summary

1. The Defence teams were requested to disclose by 5 September 2011 the evidence they intended to rely on at the confirmation hearing.
2. The Prosecution has conducted a preliminary analysis of the material submitted (over 900 documents containing over 4400 pages), and has noticed that (i) many of the material was disclosed but not referenced in the In-dept Analysis Chart ("IDAC"); (ii) some of the material is not in a working language of the Court (and a translation was not provided); and (iii) some of the material is incomplete.
3. The Prosecution hereby requests the Chamber for an order precluding the Defence teams from relying on these materials at the confirmation hearing.

Background

4. On 6 April 2011, the Single Judge issued the first decision on disclosure, specifically ordering that: "when submitting any evidence to the Registry, the parties shall provide: [...] 3. An analysis of each piece of evidence reflecting its relevance as described in part III of this decision".¹ She also ordered that the e-Court Protocol (attached to the decision) be followed.²
5. On 20 April 2011, the Single Judge ordered the Defence teams to disclose to the Prosecution any evidence they intend to present at the confirmation hearing and the list of evidence, no later than 5 September 2011.³

¹ ICC-01/09-02/11-48, paras. 23 and 24 and page 11. The procedural history in respect of the disclosure obligations of the Defence teams was set out in filing ICC-01/09-02/11-312, paras. 5 to 9.

² ICC-01/09-02/11-48, paras. 16, 18, 19, 20; page 10, item (c).

³ ICC-01/09-02/11-64, page 13.

6. On 5 September 2011, the Defence teams filed their IDACs.⁴ The same day, the Defence of Mr. Uhuru Muigai Kenyatta (“Mr. Kenyatta”) filed a new List of Evidence,⁵ but not a new IDAC.

7. On 8 September 2011, the Defence of Francis Kirimi Muthaura (“Mr. Muthaura”) filed a new IDAC.⁶ The Single Judge considered the chart to be “duly filed”.⁷

8. On 14 September 2011, the Defence of Mr. Mohammed Hussein Ali (“Mr. Ali”) filed three new Lists of Evidence, but no new IDAC.⁸

Submissions

The Chamber should exclude items disclosed by the Defence teams but not referred to in their respective IDACs

9. As mentioned above, the Single Judge ordered the parties to provide “an analysis of each piece of evidence reflecting its relevance”.⁹ She clarified that she expected the parties to follow the sample draft model chart attached as Annex 2 to her decision.¹⁰

10. The Defence of Mr. Ali disclosed an important number of documents that were not included in the IDAC, namely:

KEN-D14-0001-0001; KEN-D14-0001-0022; KEN-D14-0001-0231; KEN-D14-0001-0294; KEN-D14-0001-0309; KEN-D14-0002-0001; KEN-D14-0002-0004; KEN-D14-0002-0008; KEN-D14-0002-0033; KEN-D14-0002-0073; KEN-D14-0002-0086; KEN-D14-0002-0105; KEN-D14-0002-0107; KEN-D14-0002-0109; KEN-D14-0002-0111; KEN-D14-0002-0194; KEN-D14-0002-0196; KEN-D14-0002-0208; KEN-D14-0002-0224; KEN-D14-0002-0240;

⁴ The Defence of Mr. Ali: ICC-01/09-02/11-293-Conf-AnxB ; The Defence of Mr. Kenyatta: ICC-01/09-02/11-295-Conf-AnxA ; and the Defence of Mr. Muthaura: ICC-01/09-02/11-301-Conf-AnxB.

⁵ ICC-01/09-02/11-300-Conf-AnxA.

⁶ ICC-01/09-02/11-305-Conf-Anx5.

⁷ ICC-01/09-02/11-330, page 15 (b).

⁸ ICC-01/09-02/11-324-Conf-AnxE; ICC-01/09-02/11-327-Conf-AnxA and ICC-01/09-02/11-327-Conf-AnxA-Corr.

⁹ ICC-01/09-02/11-48, page 11.

¹⁰ ICC-01/09-02/11-48, para. 23.

KEN-D14-0002-0257; KEN-D14-0002-0276; KEN-D14-0002-0280; KEN-D14-0002-0284;
 KEN-D14-0002-0294; KEN-D14-0002-0295; KEN-D14-0002-0300; KEN-D14-0002-0301;
 KEN-D14-0002-0320; KEN-D14-0002-0322; KEN-D14-0005-0001; KEN-D14-0005-0028;
 KEN-D14-0005-0043; KEN-D14-0005-0044; KEN-D14-0005-0049; KEN-D14-0005-0054;
 KEN-D14-0005-0061; KEN-D14-0005-0095; KEN-D14-0005-0106; KEN-D14-0005-0113;
 KEN-D14-0005-0121; KEN-D14-0005-0126; KEN-D14-0005-0131; KEN-D14-0005-0144;
 KEN-D14-0005-0180; KEN-D14-0005-0189; KEN-D14-0005-0254; KEN-D14-0005-0268;
 KEN-D14-0005-0271; KEN-D14-0005-0282.

11. Likewise, the Defence of Mr. Kenyatta disclosed a significant amount of documents that were not included in the IDAC, namely:

KEN-D13-0001-0081; KEN-D13-0001-0107; KEN-D13-0001-0117; KEN-D13-0001-0118;
 KEN-D13-0001-0138; KEN-D13-0001-0146; KEN-D13-0001-0148; KEN-D13-0001-0149;
 KEN-D13-0001-0151; KEN-D13-0001-0348; KEN-D13-0001-0349; KEN-D13-0001-0353;
 KEN-D13-0001-0354; KEN-D13-0001-0355; KEN-D13-0001-0356; KEN-D13-0001-0357;
 KEN-D13-0001-0358; KEN-D13-0001-0359; KEN-D13-0002-0006; KEN-D13-0002-0007;
 KEN-D13-0002-0008; KEN-D13-0002-0017; KEN-D13-0002-0019; KEN-D13-0002-0020;
 KEN-D13-0002-0021; KEN-D13-0002-0024; KEN-D13-0002-0025; KEN-D13-0002-0026;
 KEN-D13-0002-0028; KEN-D13-0002-0031; KEN-D13-0002-0034; KEN-D13-0002-0035;
 KEN-D13-0002-0069; KEN-D13-0002-0070; KEN-D13-0002-0072; KEN-D13-0002-0074;
 KEN-D13-0002-0076; KEN-D13-0002-0077; KEN-D13-0002-0078; KEN-D13-0002-0080;
 KEN-D13-0002-0082; KEN-D13-0002-0083; KEN-D13-0002-0084; KEN-D13-0002-0085;
 KEN-D13-0002-0086; KEN-D13-0002-0088; KEN-D13-0002-0091; KEN-D13-0002-0092;
 KEN-D13-0002-0093; KEN-D13-0002-0095; KEN-D13-0002-0097; KEN-D13-0002-0098;
 KEN-D13-0002-0099; KEN-D13-0002-0100; KEN-D13-0002-0101; KEN-D13-0002-0103;
 KEN-D13-0002-0105; KEN-D13-0002-0106; KEN-D13-0002-0112; KEN-D13-0002-0119;
 KEN-D13-0002-0121; KEN-D13-0002-0123; KEN-D13-0002-0124; KEN-D13-0002-0126;
 KEN-D13-0002-0127; KEN-D13-0002-0130; KEN-D13-0002-0131; KEN-D13-0002-0133;
 KEN-D13-0002-0135; KEN-D13-0002-0138; KEN-D13-0002-0140; KEN-D13-0002-0144;
 KEN-D13-0002-0148; KEN-D13-0002-0149; KEN-D13-0002-0154; KEN-D13-0002-0238;
 KEN-D13-0003-0005; KEN-D13-0003-0024; KEN-D13-0003-0026; KEN-D13-0003-0030;
 KEN-D13-0003-0040; KEN-D13-0003-0132; KEN-D13-0003-0145; KEN-D13-0003-0147;
 KEN-D13-0003-0150; KEN-D13-0003-0154; KEN-D13-0003-0156; KEN-D13-0003-0157;
 KEN-D13-0004-0001-trENG; KEN-D13-0004-0007-trENG; KEN-D13-0004-0013-trENG;
 KEN-D13-0004-0015-trENG; KEN-D13-0004-0130; KEN-D13-0004-0131;

12. Since both Defence teams failed to comply with the Single Judge's order within the set disclosure deadline, the Prosecution requests that the Defence of Mr. Ali and the

Defence of Mr. Kenyatta be prevented from relying at the confirmation hearing on these materials.

The Chamber should exclude items disclosed which are, in whole or in part, in a language other than one of the working languages of the Court, but for which no translation is provided

13. Regulation 39(1) of the Regulations of the Court requires that “All documents and materials filed with the Registry shall be in English or French unless otherwise provided in the Statute, Rules, these Regulations or authorized by the Chamber or the Presidency. If the original document or material is not in one of these languages, a participant shall attach a translation thereof.”

14. The Defence of Mr. Kenyatta and of Mr. Ali disclosed video materials containing language that is neither English nor French, apparently¹¹ without providing translations. Based on a preliminary review of the materials disclosed, the Prosecution’s request concerns the following items:

- KEN-D13-0001-0123 : partly in a foreign language
- KEN-D13-0001-0247: mainly in a foreign language
- KEN-D13-0001-0266: entirely in a foreign language
- KEN-D13-0001-0267: entirely in a foreign language
- KEN-D13-0001-0287: entirely in a foreign language
- KEN-D13-0002-0006: partly in a foreign language
- KEN-D13-0002-0007: partly in a foreign language
- KEN-D13-0002-0017: entirely in a foreign language
- KEN-D13-0002-0019: entirely in a foreign language
- KEN-D13-0002-0024: mainly in a foreign language
- KEN-D13-0002-0032: partly in a foreign language
- KEN-D13-0002-0077: mainly in a foreign language
- KEN-D13-0002-0099: partly in a foreign language
- KEN-D13-0002-0137: entirely in a foreign language
- KEN-D13-0002-0142: entirely in a foreign language

¹¹ The Prosecution has searched the material and has not found any translation. The Defence has not provided any information as to the availability of such translations.

- KEN-D13-0002-0173: entirely in a foreign language
- KEN-D13-0002-0232: entirely in a foreign language
- KEN-D13-0005-0177: entirely in a foreign language
- KEN-D13-0005-0178: entirely in a foreign language
- KEN-D13-0005-0456: entirely in a foreign language
- KEN-D13-0005-0510: mainly in a foreign language
- KEN-D13-0005-0642: mainly in a foreign language
- KEN-D14-0002-0322 : partly in a foreign language

15. As required by the Single Judge,¹² the Defence submitted these materials to the Registry. Filing into the record of the case documents and materials which are not in a working language of the court with no accompanying translation violates Regulation 39(1).

16. Several Chambers have confirmed this principle.¹³ Moreover, the Single Judge of this Chamber ruled that “where the evidence is not in a working language of the Court, translations of evidence must be provided within the time limits for disclosure”. Consequently, the Single Judge ruled that any material disclosed without translation should be discarded, including in cases where only portions of the material were not in a working language of the Court.¹⁴

17. In line with the Single Judge’s decision, the Prosecution requests the Chamber to exclude items which contain, in whole or in part, a language other than one of the working languages of the Court, and for which no translation is provided. This includes the items listed above and any other items that the Prosecution may have

¹² ICC-01/09-02/11-48, page 10.

¹³ ICC-01/04-01/07-717, paras. 129 and 130; ICC-01/04-01/06-676 at pp. 3-4; ICC-01/04-01/07-1336 at paras. 10 to 13.

¹⁴ ICC-01/09-02/11-300-Conf, pages 15 and 16. See for example KEN-D11-0003-0004, which contains six audio files, of which 0007 and 0010 were only partially in English. Because the audio files were not in a working language of the Court, the Single Judge ruled that the Defence was not allowed to rely on KEN-D11-0003-0004.

overlooked in its initial review but that on further review will also prove to be wholly or partially in a language other than a working language of the Court.

The Chamber should exclude items disclosed by the Defence teams but which are incomplete

18. Upon review, the Prosecution has noted that some of the documents disclosed are still incomplete. It concerns the following items:

- KEN-D12-0001-0276: this document contains the Statement of a Defence witness. The document goes from page 8 (KEN-D12-0001-0283) to page 10 (KEN-D12-0001-0284). Page 9, which should contain paragraphs 38 to 42, is missing.
- KEN-D13-0002-0198: this document is entitled “Standard pg1&3 (...)”, and contains two pages, however the second page seems to be merely the typed content text of the first page. Since the title refers to pages 1 and 3, and since the text indicates that the article is continued on page 3, it is assumed the third page is missing.
- KEN-D13-0005-0647: this document contains the statement of a Defence witness. In para. 30 (KEN-D12-0005-0653), the witness refers to an Annex 6, which the witness deems relevant¹⁵ but which has not been disclosed.
- KEN-D13-0005-0729: this document contains the statement of a Defence witness. In para. 14 (KEN-D13-0005-0732), the witness refers to three Annexes, none of which have been disclosed.

19. Since these documents were not properly (i.e. in their entirety) disclosed, the Prosecution has not been in a position to fully analyze their content. The Prosecution

¹⁵ KEN-D12-0005-0653, para. 30.

therefore submits that the material should be excluded, in line with the decision of the Single Judge.¹⁶

Conclusion

20. Based on the foregoing, the Prosecution requests the Chamber to exclude from the confirmation hearing the items cited above (i) which were not referenced in the IDACs; (ii) which contain, in whole or in part, a language other than one of the working languages of the Court, but for which no translation is provided; or (iii) which were disclosed in an incomplete manner.



Luis Moreno-Ocampo, Prosecutor

Dated this 21st day of September 2011

At The Hague, The Netherlands

¹⁶ ICC-01/09-02/11-330 para. 42.