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

Date: **24 October 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
with Public Annexes A and B**

**APPLICATION BY THE DEFENCE OF AMBASADOR FRANCIS K. MUTHAURA
IN RELATION TO PUBLIC STATEMENT OF THE PROSECUTOR**

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, Prosecutor
 Ms. Fatou Bensouda, Deputy Prosecutor
 Ms. Adesola Adeboyejo, Trial Lawyer

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. Gershom Otachi,
 Mr. Gregory Kehoe & Mr. John Philpot

Legal Representatives of the Victims

Mr. Morris Anyah

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

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
 Section**

Other

I. Introduction

1. The Defence of Ambassador Muthaura (“Defence”) hereby files this application seeking the intervention of the Pre-Trial Chamber in order to safeguard the integrity of proceedings, the rights of the suspect and to ensure respect and compliance by all parties to admonitions and injunctions given by the Pre- Trial and Trial Chambers of this Court. The present application is brought pursuant to Article 57 and 67 of the Rome Statute, Rule 134 of the Rules of Procedure and Evidence and Articles 24 and 25 of the Code of Professional Conduct for Counsel.

II. Procedural Background

2. The Confirmation of Charges Hearing in the case of *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohemmed Hussein Ali* took place between 21 September 2011 and 5 October 2011.
3. On 6th October 2011, the day after the conclusion of the Confirmation of Charges Hearing, the Prosecutor, Mr. Luis Moreno Ocampo, was interviewed in The Hague by Kenyan television reporter Mr. Jeff Koinange. The interview was broadcast on the K24 Channel in Kenya.¹
4. The Defence submits that during this interview the Prosecutor made statements which were manifestly false or otherwise wholly inaccurate thus prejudicing the integrity of the Court, its proceedings and prejudicing Ambassador Muthaura.

III. Defence Submissions

5. The Defence submits that the Prosecutor of the International Criminal Court is required to uphold the highest standards of professional conduct.

¹ The full interview is available at: http://www.youtube.com/watch?v=Ke_RlzR3JcI. The Defence has transcribed the interview for the convenience of the PTC in determining the merits of this application, which is annexed to this application as “Annex A”. A declaration of the transcriber is included as “Annex B”.

Article 24 of the Code of Professional Conduct for Counsel, which is equally applicable to the Prosecutor, requires that *“counsel shall take all necessary steps to ensure that his or her actions or those of counsel’s assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute”*.

6. Various Chambers of the ICC have had occasion to address the issue of the statements made to the press by the Prosecutor in several cases that are before the court and has cautioned against making inappropriate statements or misrepresenting evidence and proceedings before the Court.
7. In the *Lubanga* proceedings, Presiding Judge Fulford, addressing the Prosecution, stated: *“a very considerable time ago I gave a very firm indication that the Judges did not expect to see satellite litigation in the press with the issues which we are considering being the subject of some kind of debate, with commentators on one or both sides seeking to litigate the issues in the trial in a different forum. It was expressed to us then that this is an inappropriate activity, particularly for the Prosecutor to undertake, and you may like to remind this individual of our views on that subject.”*²
8. In a subsequent decision, also in *Lubanga*, the Trial Chamber explained: *“None of the provisions of the Rome Statute address the relationship between the parties and the press, and public statements outside the courtroom are in this sense unregulated.”*³ This was, however, subject to one important caveat:

“It is not the role of the Chamber to comment on the arrangements that are, or should be, in place as regards the relationship between the Court (i.e. its various organs and counsel appearing in its cases) and the media. The Chamber’s concern is instead focused on the course of the present trial, and the need to

² ICC-01/04-01/06-T-264-CONF-ENG-ET, page 5, lines 11-21; see, e.g., ICC-01/04-01/06-T-126-CONF-ENG CT, page 46, line 22 to page 48, line 11. (Referred to in ICC-01/04-01/06-2433 at para. 15)

³ ICC-01/04-01/06-2433, para. 34.

*ensure that the interests of justice are upheld: by Article 64(2) of the Rome Statute ('Statute') the Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full regard for the rights of the accused and due regard for the protection of victims and witnesses. The presumption is that the trial will be held in public: Article 64(7) of the Statute; and by Article 64(6)(f) of the Statute the Chamber may rule on any relevant matters"*⁴

9. The Lubanga Trial Chamber further explained that:

*"The requirement of public justice and the reasons underlying that requirement are essentially determinative of this issue. A first principle of the criminal law, largely recognised throughout the world, is that justice is administered in public, for all to see and hear. In order for the trial process to be respected, including the verdict and any sentence, anyone who is interested in the case must be able, to the greatest extent possible, to access a fair and accurate record of the proceedings [...] the public needs to be able to trust the published statements of those involved in the case, as reflecting, in a suitably balanced way, the evidence that has been heard and the decisions that have been made. It is important that in media statements there is a clear and accurate description as to whether issues that are reported have been decided or are still unresolved. Most importantly, and as a matter of professional ethics a party to proceedings is expected not to misrepresent the evidence, to misdescribe the functions of the parties or the Chamber, or to suggest or imply without proper foundation that anyone in the case, including the accused, has misbehaved."*⁵

10. The Single Judge in her "Decision on the Defence 'Application for Order to the Prosecutor Regarding Extra-Judicial Comments to the Press' " endorsed the principles identified by the Lubanga Trial Chamber⁶ and

⁴ ICC-01/04-01/06-2433, para. 36.

⁵ ICC-01/04-01/06-2433, paras 37 and 39.

⁶ ICC-01/09-02/11-83, para. 7.

further held that these considerations “constitute the appropriate principle framework under which the facts giving rise to the present application shall be analysed.”⁷ The learned single judge had recalled that “as a matter of principle, [...] the safeguarding of the proper administration of justice and the integrity of the judicial proceedings requires parties, participants and any person involved in the proceedings, to refrain from making public statements or engage in any other activity which could have an impact on the evidence of the case or could be perceived as showing a predetermination of the cause pending before the court.”⁸

11. The record of the Prosecutor’s interview with Mr. Jeff Koinange reveals that the Prosecutor has shown insufficient regard to the various judicial injunctions and admonitions that have been rendered by the Court in response to extra-judicial statements made by him in some cases before the Court. Whist various remarks and observations by the Prosecutor during the same interview may warrant comment by the Defence – all of which may demonstrate how fraught with danger interactions with the press in relation to discussions of evidence and other *sub judice* matters can be, the Defence considers it necessary and pertinent to confine itself to one aspect of the said interview.

12. At page 8 of the annexed Transcript, the Prosecutor describes the probative evidence he elicited during his cross examination of Mr. Uhuru Kenyatta during the hearing. In the course of providing this information, Mr. Ocampo asserts that Uhuru Kenyatta confirmed that Ambassador Muthaura has “a bigger role” than had apparently been previously contended.⁹ This assertion was and is materially incorrect. Evidence

⁷ ICC-01/09-02/11, 8 May 2011, para 9.

⁸ ICC-01/09-02/11, 8 May 2011, para 6.

⁹ Ocampo: “Yaya. So it is not just a shopping centre and he would say, ‘oh it is just a shopping centre’. It is not just a shopping centre. It is a complex. So we explored that. He agreed with that. We explored with him how Muthaura has a bigger role and we...he confirmed that. In the confidential part we explored some names that we

presented to the Chamber has been misstated and the Defence submit requires correction.

13. A review of the cross-examination itself of Mr. Uhuru Kenyatta discloses that Ambassador Muthaura did not have the kind of authority as contended by the Prosecution in its DCC or the Prosecutor during his questioning. The material parts of the transcript is reproduced below¹⁰:

Q. Thank you. And another question about the possibility to have meetings. You explained to the Court how difficult -- how tight control of course of the State House is, but has someone with the authority like Mr. Muthaura, for instance, can authorise a person to go in the State House?

A. Your Honours, based on my experience as a cabinet minister, the head of public service cannot authorise anybody to enter State House. The person who has the authority is either the president himself or the State House controller, and that is based on my own experience as a cabinet minister and somebody who has also grown up in that building at one stage.

Q. But you seen President Kibaki call the guards to inform who can go and who it cannot?

A. No, it is the State House controller who informs the head of security who is coming and with whom and at what time.

Q. Okay. Is the State House controller reported to Mr. Muthaura?

A. Your Honours, the State House controller reports to the president.

Q. It's not -- have no link possibility with Mr. Muthaura as a Secretary-General of the cabinet?

A. Your Honour, the State House controller reports directly to the president.

14. On any reading, the testimony of Mr. Kenyatta during his testimony in chief, his cross-examination by the Prosecutor and his cross-examination by the Defence Team of Ambassador Muthaura *vis a vis* the role, conduct and responsibilities of Ambassador Muthaura, contradict the Prosecution's factual allegations. Any assertion to the contrary amounts to a material misrepresentation of the evidence by the Prosecutor to the people of Kenya

would like to confirm...he confirmed, he acknowledge so all for us was good. But then when I went to the Mungiki, the lack of explanation was so strong for me that I say, 'okay. This is for me enough. That's for me the way to stop'. So a good lawyer knows how to stop."

¹⁰ ICC-01/09-02/11-T-11-CONF-ENG ET 29-09-2011 47/95 PV PT page 55 lines 9 to 23 and page 56 lines 1 to 5.

and the public generally. The consequences of such misrepresentations on the integrity of the proceedings and the rights of the suspects cannot be understated and is the subject of various rulings by this court.

IV. Relief Requested

15. Given that the Prosecutor has himself mischaracterized the evidence of Mr. Uhuru Kenyatta in so far as it relates to Ambassador Muthaura, and given that Ambassador Muthaura and his Defence Lawyers wish to refrain from satellite litigation in the press in order to correct the misrepresentation as identified above, the Defence respectfully requests the intervention of the Chamber to order the Prosecutor to publicly correct his misstatement.
16. In the alternative, the Defence requests the Chamber to render a public decision confirming that the Prosecutor has misstated the evidence presented at the hearing on the single issue raised above and remind the Prosecutor, again, to be ever vigilant in his interactions with the press and to be scrupulously fair and accurate in his public statements on cases before the court.

Respectfully Submitted,



Mr. Karim A. A. Khan, QC

Lead Counsel for Ambassador Francis K. Muthaura

Dated this 24th Day of October 2011

At Nairobi, Kenya