

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 14 April 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**

**Prosecution's application requesting disclosure after a final resolution of the  
Government of the Republic of Kenya's admissibility challenge**

**Source:** Office of the Prosecutor

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

**The Office of the Prosecutor**

**Counsel for the Defence**

**Counsel for Francis Kirimi Muthaura:**

Karim Khan and Kennedy Ogetto

**Counsel for Uhuru Muigai Kenyatta:**

Steven Kay QC and Gillian Higgins

**Counsel for Mohammed Hussein Ali:**

Gregory Kehoe and Evans Monari

**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**

**Other**

**REGISTRY**

---

**Registrar & Deputy Registrar**

Silvana Arbia, Registrar

Didier Preira, Deputy Registrar

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

1. On 31 March 2010 the Government of the Republic of Kenya (“GoK”) filed an admissibility challenge to the pending proceedings, stating that it has changed its laws and is undertaking to investigate and prosecute persons domestically for crimes committed in the context of the post election violence in Kenya. It has, accordingly, proposed to provide status reports to the Chamber in July and September, and to take steps in furtherance of its intended domestic cases. The parties’ responses to the admissibility application are due to be filed on 28 April 2011.
2. On 8 April 2011 the Pre-Trial Chamber decided that it was appropriate to schedule the confirmation hearing to take place on 21 September 2011. The Presiding Judge noted that the filing by a State of a challenge to the admissibility of a case would not “in any way disrupt the proper conduct of the disclosure of what you [the Prosecution] have up until now”.<sup>1</sup> The Chamber also issued a decision determining, inter alia, that for the purposes of the confirmation hearing the Prosecution shall disclose virtually “all evidence in the Prosecutor's possession or control”.<sup>2</sup>
3. The Prosecution agrees with the Presiding Judge that it is important to avoid unnecessary delays and to proceed in an expeditious manner. Further, the Prosecution believes that it is imperative to end the impunity for the crimes committed during the post election violence in Kenya. For over two years, victims have been waiting for judicial proceedings to commence. However, expeditious proceedings should remain fair for all the

---

<sup>1</sup> ICC-01/09-02/11-T-1-ENG ET WT 08-04-2011, page 20

<sup>2</sup> ICC-01/09-02/11-48, para.7 (emphasis added). The Prosecution is also filing an Application for Leave to Appeal the disclosure order. That request does not relate to the issue presented in this filing.

parties, and also should not outweigh the principle of complementarity or the security and safety of the witnesses.

4. This is the first challenge brought by a State to the admissibility of a case before the Court, in the first situation triggered by the Prosecutor's exercise of his *proprio motu* power. The Prosecution submits that the Chamber should not take steps that signal a possible pre-judgment of the application before all the briefing is done and while the State's request to provide further information to the Chamber remains pending. Notwithstanding the Prosecution's disagreement with the GoK submission -- as it will demonstrate in its response to the challenge -- it submits that the GoK is entitled to careful consideration of its arguments before any judicial determination is made.
5. Moreover, the Prosecution notes that even if the Pre Trial Chamber considers *prima facie* that the admissibility challenge has no legal basis, an appeal from an admissibility determination is a matter of right.<sup>3</sup> Thus, it is possible that if the Chamber rejects the challenge, the GoK will appeal the decision.
6. The Prosecution submits that the disclosure of the identities of its witnesses increase their exposure to risk, and should be done only after a final decision on the admissibility challenge is rendered.
7. The security of the witnesses should not be affected without a final determination of the issues of admissibility. There is a significant risk in disclosing information that would identify witnesses before admissibility is

---

<sup>3</sup>Article 82 (1) (a) and Rule 155 (1).

finally resolved. The concerns about the witnesses are based on the public attention that this case has attracted in Kenya and events that signal that supporters of the suspects might attempt to retaliate against perceived witnesses. This conclusion is based on the previous security risk assessments conducted, though the risks are exacerbated after the first appearance:

- As soon the suspects returned to Kenya they were given heroes' welcomes by some of their supporters. Additionally, supporters are campaigning to present the ICC activities as an affront against the Kalenjin and Kikuyu communities to which the suspects belong. Some of the witnesses against the suspects will be viewed by their ethnic communities as traitors, and their cooperation with the Court as total betrayal. Even if the witnesses and their families are protected, their lives will be affected. Some may not be able to return to Kenya at least for a period of time.
- The Daily Nation on 11/4/2011 stated: "Judges at the International Criminal Court last week warned the six post-election violence suspects against making public comments that might inflame tensions". But in apparent defiance of the warning, their political associates say they will not relent in their criticism of the court. For example, Laikipia East MP Mwangi Kiunjuri, one of the key organisers of Monday's "homecoming" rally at Nairobi's Uhuru Park for the six suspects, said the judges' warning "does not apply

to them.”<sup>4</sup> This atmosphere will increase the possibility of adverse reaction against actual or perceived witnesses.

- On 12/04/2011 The Standard reported that Mr. Ruto, speaking in parables, stated that the post-election violence cases were traps. “There are those who have put a trap for us and as you all know a trap catches those that are meant for it and those that are not but we pray those who have set the trap that it catches them also”.<sup>5</sup> These statements can be perceived as threats and stigmatize actual or perceived witnesses.

8. To avoid risk for its witnesses, the Prosecution cannot disclose information unless it takes further steps to protect the witnesses and their families, which is costly and highly disruptive to all concerned and should not be undertaken unless there is certainty that the confirmation proceedings will occur.
9. Alternatively, the Prosecution will have to redact its evidence heavily to protect against the disclosure of any information that could reveal the identity of witnesses. Such heavy redactions, however, will prejudice the interests of the Prosecution (and also will result in a disclosure of information that would be too imprecise to significantly assist the Defence). The heavy redactions could disincline the Chamber to place much weight

---

<sup>4</sup> Annex 1 - Kipchumba Some, “Ocampo Six allies threaten to defy hate speech warning”, Daily Nation, 09 April 2011, available at <http://www.nation.co.ke/News/politics/Ocampo+Six+allies+threaten+to+defy+hate+speech+warning+/-/1064/1141860/-/15um1nlz/-/index.html> (last accessed 12 April 2011).

<sup>5</sup> Annex 2 - Martin Mutua and Moses Njagi, “Anti-Raila Crusade”, The Standard, 12 April 2011, available at <http://www.standardmedia.co.ke/InsidePage.php?id=2000033078&cid=4&ttl=Anti-Raila%20crusade> (last accessed 12 April 2011).

on the evidence. A factor that causes the Chamber to dismiss the probative value of the evidence will affect the Prosecution's role.

10. The Statute expressly bars the Prosecution from taking the investigative steps it expected to take in the period between the initial appearances and the suspects' confirmation proceedings. Since the challenge may not be resolved for several months, it is possible and even likely that the confirmation hearing will occur before the admissibility issue is finally decided. Thus, the Prosecution may be required to prove its case at a confirmation hearing notwithstanding that it has been deprived of the opportunity to further and complete its pre-confirmation investigation. Combined with its inability to offer evidence without heavy redactions, the Prosecution will be deprived of a fair opportunity to present its best case.
11. In short, disclosure should be ordered after the issue of admissibility is decided. This course of action, would respect the right of a sovereign State to a fair consideration of its claims. It would respect the needs of the victims, whose identities should not be compromised in a case that could later be found to be inadmissible. It would respect the right of the Prosecution to complete its pre-confirmation investigations. The Prosecution also notes that the suspects are not in custody, and the delay that would occur from the requested suspension is not attributable to any action on the part of the Prosecution or the suspects themselves.
12. Under these circumstances, full respect for the complementarity principle and the interest of fairness to the parties requires the Chamber to order disclosure as soon as a final decision on the admissibility challenge is rendered.



---

Luis Moreno-Ocampo  
Prosecutor

Dated this 14<sup>th</sup> day of April 2011  
At The Hague, The Netherlands