



Original: English

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

Date: 15 April 2011

PRE-TRIAL CHAMBER II

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

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 Response to "Defence Request for Variation of Decision on Summons
or in the Alternative Request for Leave to Appeal" (ICC-01/09-02/11-52)**

Source: The 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 Francis Kirimi Muthaura
Karim A. Khan and Kennedy Ogetto

Counsel for Uhuru Muigai Kenyatta
Steven Kay and Gillian Higgins

Counsel for Mohammed Hussein Ali
Evans Monari and Gershom Otachi

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar
Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. On 4 April 2011, the Single Judge of Pre-Trial Chamber II (“Single Judge”) issued the “Decision on Variation of Summons Conditions” (“Decision”).¹ Among other things, it requires that the Defence consult with the VWU for its advice on potential security issues before it contacts potential Defence witnesses, and it bars the Defence from contacting potential witnesses unless they consented to be contacted.
2. On 11 April 2011, the Defence of the three suspects in this case (“Defence”) filed the “Defence Request for Variation of Decision on Summons or in the Alternative Request for Leave to Appeal” (“Defence Request”).²
3. The Prosecution objects to the Defence request for reconsideration and variation of the Decision.³ The arguments advanced by the Defence do not demonstrate that the Decision is “manifestly unsound” or that its consequences are “manifestly unsatisfactory”.⁴ The terms of the Decision are carefully crafted to ensure that equal levels of protection are provided for all potential or actual witnesses, as well as for other persons at risk on account of the activities of the Court.
4. The Prosecution also objects to the Defence’s alternative application for leave to appeal.⁵ The three issues raised by the Defence are not appealable issues arising out of the Decision. Even if they were, they do not meet the requirements for leave to appeal under Article 82(1)(d).

¹ ICC-01/09-02/11-38.

² ICC-01/09-02/11-52.

³ Defence Request, paras.9-32.

⁴ ICC-01/04-01/06-2705, para. 18.

⁵ Defence Request, paras.33-44.

Defence request for reconsideration and variation

5. Although the Rome Statute framework does not expressly authorize a Chamber to reconsider its decisions,⁶ Trial Chamber I has recently held that “irregular decisions can be varied if they are manifestly unsound and their consequences are manifestly unsatisfactory”.⁷ However, the same Chamber emphasized that “there are strong reasons for recognizing the limits of this approach - most particularly given the need to achieve certainty in the proceedings”.⁸
6. Accepting that there are narrowly-drawn circumstances in which reconsideration may be appropriate, the Prosecution submits that this Defence request falls short and should be rejected. Nothing in the Decision is “manifestly unsound” and its consequences are not “manifestly unsatisfactory”. To the contrary, the Decision and the role allocated therein to the VWU is fully supported by the Statute⁹ and the Rules,¹⁰ as well as the jurisprudence of the Appeals Chamber with respect to the protection of persons at risk on account of the activities of the Court.¹¹

The requirements of consultation with the VWU and of prior consent of the witness

7. As found by the Appeals Chamber, ensuring that all witnesses are appropriately protected is, pursuant to Article 68, “a matter of the highest priority” and a responsibility of the Court as a whole.¹² The VWU was assigned a critical role to protect both Prosecution and Defence witnesses¹³ by providing “protective measures and security arrangements, counselling and other appropriate

⁶ ICC-01/04-01/06-2705, para.12.

⁷ ICC-01/04-01/06-2705, para. 18.

⁸ *Ibid.*

⁹ Article 68(1).

¹⁰ See in particular Rules 17(2)(a)(i) and 18(b) referred to in the Decision, para.16.

¹¹ The Prosecution notes that, alongside its objections against the system of mandatory consultation imposed by the Decision, the Defence claims in one line that the Decision also imposes a disclosure obligation upon the defence which is not contained within the Rules (Defence Request, para.9(v)). However, since the Defence does not explain the reasons for this assertion or otherwise provide any arguments supporting it, there is basically nothing that the Prosecution can respond to in this document.

¹² ICC-01/04-01/07-776 OA7, para. 101.

¹³ ICC-01/04-01/07-776 OA7, paras 78-92.

assistance [...]”, to ensure that all witnesses, regardless which party calls them, are treated equally.¹⁴

8. The Prosecution and the VWU are parties to a joint protocol for protection (“Protocol”)¹⁵ that gives to the VWU a significant role in assessing the security risks as to prosecution witnesses. The Registrar has further committed to apply the relevant standards included in the Protocol *mutatis mutandis* to the protection of actual or potential defence witnesses.
9. With this as the backdrop, the impugned Decision provides that the Defence, prior to its contact with a potential defence witness, first must consult with the VWU for its advice on risks that the contact may entail and possible protective measures that should be implemented to prevent or reduce foreseeable risks. It also provides that the Defence may not then contact potential witnesses unless they have first agreed to be contacted.
10. Contrary to the contention of the Defence, the Decision does not require the Defence to obtain the consent prior to consultation with the VWU. In fact, it establishes exactly the converse order, it requires a risk assessment (which is why the Defence must consult with the VWU) prior to contact with the potential witness.¹⁶
11. The Defence complains that this procedure “could overburden the VWU”,¹⁷ that it would delay Defence investigations,¹⁸ and that it “would be completely unfeasible”.¹⁹ However, the regime works with respect to Prosecution witnesses, and it is also applied in other cases for Defence witnesses.²⁰ There is thus no reason to assume that it will be “completely unfeasible” with respect to defence witnesses in this case. The regime is also consistent with the Statute, which

¹⁴ ICC-01/04-01/07-776 OA7, para.92. See also Article 43(6).

¹⁵ Prosecution-Registry Joint Protocol on the Mandate, Standards and Procedure for Protection, The Hague, 21 March 2011.

¹⁶ Decision, para.15.

¹⁷ Defence Request, para.13.

¹⁸ Ibid.

¹⁹ Defence Request, para.14.

²⁰ See for instance, ICC-01/04-01/07-1734.

envisages that the Court will have to make efforts in order to protect persons who are at risk on account of the activities of the Court. Article 64(2) provides that the Chamber must ensure that proceedings are fair and expeditious “and [are] conducted with [...] due regard for the protection of victims and witnesses”.

12. The Defence’s argument that the procedures established in the Decision could result in denying “the mischief sought to be prevented”²¹, since it could lead to VWU communicating to the Defence the fact that a given witness is protected or should otherwise not be contacted by the Defence, fails to appreciate the professional character of the VWU. It must be assumed that the VWU, when providing advice and support to the Defence, will ensure that any information shared with the Defence will not put persons at risk or undermine existing protective measures.

The alleged detrimental effects to the defence investigation

13. The Prosecution also disagrees that the obligation to obtain the advice from the VWU prior to contacting potential Defence witnesses is disproportionate and will significantly impede and delay defence investigations.²² To the contrary, the requirement is proportionate and necessary to ensure the protection of actual or potential Defence witnesses. The Defence also complains that the procedures to achieve this purpose are a “waste [of] defence resources”.²³ But the procedures in fact are required under the Statute’s protective scheme and the existing case-law, referred above. Moreover, the Defence arguments regarding the implications of the process prescribed by the Decision on the ability by the Defence to conduct its investigations are unsupported and speculative.²⁴ Even if the Defence’s assumptions were accurate, a moderate delay is justified by the need to ensure the protection of persons interacting with the Defence.

²¹ Defence Request, paras.9(iv) and 15.

²² Defence Request, para.21.

²³ Defence Request, para.25.

²⁴ See in particular, Defence Request, paras.24 and 26.

14. Further, contrary to the contention of the Defence, the Decision does not suggest that counsel for the Defence cannot be expected to act in accordance with the Code of Professional Conduct.²⁵ The gist of the Decision is not that counsel cannot be trusted, but that the VWU has “specific expertise in protection matters”²⁶ and shares that expertise with all parties and participants in a neutral manner.²⁷ The Defence lacks the technical expertise of the VWU to conduct security risk assessments and to identify and provide appropriate protective measures with respect to actual or potential witnesses. As a result, a “good faith determination [by the Defence] that contact with a particular person will not result in any security risk or harm to the person in question”²⁸, or a Defence assessment as to “whether the advice of the VWU is necessary to ensure the psychological well-being and safety of the person”²⁹ are insufficient to meet the Court-wide standards of protection.

The alleged procedural disadvantage vis-à-vis the Prosecution

15. The Defence claims that the modalities are imposed only on the Defence and thus disadvantages it vis-a-vis the Prosecution. The Decision is silent as to the Prosecution only because the Prosecution is already subject to measures to ensure that all persons interacting with it are fully protected. The Prosecution has specific statutory powers and a duty of protection under Articles 54(3)(f) and 68(1) of the Statute. As noted above, the Prosecution has also entered into a Protocol with the VWU that obligates it to consult and share information with the VWU on protection matters. As the Decision itself acknowledges, the Prosecution’s consultative relationship with the VWU is similar to that required of the Defence.³⁰ Moreover, because the Prosecution is a party to all the cases in this Court and thus deals regularly with protection issues in all cases – unlike any

²⁵ Defence Request, paras.18-19.

²⁶ ICC-01/04-01/07-776 OA7, para.101.

²⁷ ICC-01/04-01/07-776 OA7, paras78-92.

²⁸ Defence Request, para.23.

²⁹ Defence Request, para.27(i).

³⁰ Decision, para.16.

individual defence counsel representing a single Suspect or Accused person -- it has established a permanent unit within the Office that has particular expertise in risk assessment and sensitive protection matters. In that regard, its institutional capacity is factually distinguishable from the capacity of the Defence in this case.

Defence alternative application for leave to appeal

16. The Defence alternative application for leave to appeal should be rejected. The issues raised by the Defence are not appealable issues arising out of the Decision. Even if they were, they do not meet the requirements for leave to appeal under Article 82(1)(d).

The first issue does not arise from the Decision

17. The first issue raised by the Defence is “whether the Single Judge erred in retaining a condition restricting the rights of the Defence to contact potential witnesses while acknowledging that the suspects have a fundamental right to properly prepare their defence”.³¹

18. This issue does not arise from the Decision, but instead is based on a misinterpretation of it. The Decision does not restrict the rights of the defence to contact potential witnesses, it only requires that the Defence first consult and avail itself of VWU advice and assistance regarding security.³² In fact, it acknowledges that “the Defence may approach, in principle, any person willing to give his or her account of the events in relation to this case”.³³ The Decision itself makes clear that the requirement to seek prior advice on security issues pertaining to potential witnesses by the VWU is not to be considered as an “authorisation” of any kind, but as advice and assistance rendered by the VWU

³¹ Defence Request, paras.33(i) and 36.

³² Decision, para.16.

³³ Decision, para.15.

pursuant to its mandate as set out in rules 17 and, in particular, 18(b) of the Rules.³⁴

The second issue is not properly identified and thus cannot amount to an appealable issue

19. The second issue raised by the Defence is “whether the modalities set out in paragraph 15 of the Impugned Decision are necessary and proportionate”.³⁵

20. This is not an appealable issue. The Appeals Chamber has held that “only an issue may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement of a conflicting opinion.”³⁶

21. The second issue is an “abstract and hypothetical” articulation of the Defence’s disagreement with the Decision.³⁷ The Defence finds the conditions imposed by the Decision unnecessary und disproportionate and presents arguments on the merits to that effect.³⁸ However, it fails to identify a concrete subject, “resolution of which is essential for the determination of matters arising in the” case.³⁹

The third issue does not arise from the Decision

22. The third issue raised by the Defence is “whether the imposition of these modalities on the Defence and not on the Prosecution or any other participants in the case, violates equality of arms”.⁴⁰

23. This issue does also not arise from the Decision. As demonstrated above, the Prosecution is subject to a similar, but even more regulated, process with respect to prosecution witnesses. This Decision, however, deals only with the manner in

³⁴ Decision, para.16.

³⁵ Defence Request, para.33(ii).

³⁶ ICC-01/04-01/06-168 OA3, paras. 9-10.

³⁷ ICC-01/05-01/08-532, para. 17.

³⁸ Defence Request, para.37.

³⁹ ICC-01/04-01/06-168 OA3, paras. 9-10. See also, ICC-01/04-01/06-1433 OA11 (Dissenting Opinion of Judge Song), para. 4, specifying that “[a] decision “involves” an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

⁴⁰ Defence Request, paras.33(iii) and 38.

which the Defence must interact with the VWU. It acknowledges that the Prosecution is also required to obtain prior advice on security issues, but it does not purport to address the modalities of that interaction.⁴¹ The assertion that the Decision creates a one-sided limitation affecting the defence is thus plainly wrong; accordingly, no arguable issue of “equality of arms” can arise out of the Decision.

The issues do not significantly affect the fairness of the proceedings

24. The issues as articulated in the Defence Request do not affect the fairness of the proceedings. The arguments to that effect are unsupported and speculative. The mere allegation that compliance with the Decision could delay the defence investigations, lead to a “waste [of] defence resources” or “result in witnesses becoming unavailable”⁴² are not accompanied by any other information or arguments showing that these dangers are, indeed, possible consequences of the Decision. While the Prosecution recognizes that in order for leave to appeal to be granted a party need not present concrete evidence that something will happen, it also considers that general and unsubstantiated allegations do not suffice to meet the test under Article 82(1)(d). In addition, the Prosecution submits that the fact that the Defence has to take security issues into account, and thus may need to plan an investigation in advance and to consult with the VWU prior to contacting potential witnesses, does not implicate fairness.⁴³ Moreover, as demonstrated above, the allegation that the Decision violates the right of the suspect under Article 67(1)(e) to obtain the attendance and examination of witnesses under the same conditions as witnesses called by the Prosecution,⁴⁴ is factually incorrect.⁴⁵

⁴¹ Decision, para.16.

⁴² Defence Request, para.25; see also paras.23 and 30

⁴³ Defence Request, para.24.

⁴⁴ Defence Request, para.29.

⁴⁵ See para. 15 above.

The issues do not significantly affect the expeditiousness of the proceedings

25. The Prosecution concedes that compliance by the Defence might have a limited effect on the expeditiousness of some of its investigations.⁴⁶ However, the Defence has not demonstrated that consultation with the VWU and advice by the VWU has the potential to delay the confirmation schedule. In fact, the Decision requires that the VWU respond to a Defence request “as early as possible, and no later than two weeks as of the day the Defence communicated its intention to contact a particular potential witness to the VWU”.⁴⁷ It also provides that in case the intervention of the Single Judge is required, “the VWU is instructed to submit immediately a report to the Single Judge”.⁴⁸ Moreover, the Defence in other cases have been subject to similar requirements with no apparent adverse effect on the expeditiousness of those proceedings.⁴⁹

Immediate resolution of the issues by the Appeals Chamber would not materially advance the proceedings

26. The Defence exaggerates the nature of the “logistical challenge” that the Decision imposes on the Defence and therefore the manner in which this affects the conduct of its case.⁵⁰ The Decision merely requires the Defence to consult with the VWU prior to contacting potential witnesses and consider the advice provided by the VWU.⁵¹ As stated by the Single Judge, the prior advice by the VWU is not ‘authorisation’ of any kind, it is instead an assistance rendered by the VWU pursuant to its mandate under Rules 17 and 18(b).⁵² Although, as stated above, implementation of the Decision may require the Defence to plan an investigation in advance, this cannot possibly affect the entire Defence case.

⁴⁶ Defence Request, paras.40-41.

⁴⁷ Decision, para.15.

⁴⁸ Decision, para.15.

⁴⁹ See for instance, ICC-01/04-01/07-1734.

⁵⁰ Defence Request, para.42.

⁵¹ Decision, paras.15-16.

⁵² Decision, para.16.

27. In this context, the Defence also argues that the “lack of directives concerning the conduct of the Prosecution vis-à-vis potential Defence witnesses [...] creates uncertainty as to whether such persons can be approached by the Prosecution, and if so, the applicable modalities”.⁵³ This matter squarely falls outside the scope of the Decision, which is to regulate the Defence relationship with the VWU. It also is beyond the scope of the Issues as articulated by the Defence, so immediate resolution of those Issues will not address the concern about how the Prosecution might approach potential Defence witnesses. Hence, this argument is irrelevant to the question whether immediate resolution by the Appeals Chamber of any of the issues raised by the Defence would materially advance the proceedings.

Conclusion

28. For the reasons set out above, the Prosecution requests that the Pre-Trial Chamber reject the Defence request for reconsideration and variation of Decision on Summons and the alternative application for leave to appeal in their entirety.



Luis Moreno-Ocampo
Prosecutor

Dated this 15th day of April, 2011
At The Hague, The Netherlands

⁵³ Defence Request, para.43.