



Original: English

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

Date: 20 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 Response to the "Application for Order to the Prosecutor Regarding
Extra-Judicial Comments to the Press"**

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

Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor
Adesola Adeboyejo, Trial Lawyer

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, Evans Monari, Gershom Otachi and John Philpott

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

Introduction

1. On 16 March 2011 the Prosecutor sent a letter to the Government of Kenya expressing his concerns about the security of witnesses inside Kenya and whether the current official positions of and functions of Mr. Muthaura and Mr. Kenyatta, would give them privileged access to and influence over the state security apparatus in a way that could interfere with witnesses or with the collection of evidence.
2. The letter reiterated the concerns that Prosecutor had publicly expressed at a press conference on 14 March 2011. He stated that *“The issue is Mr. Muthaura has a role as a superior of the police and so before we disclose the testimonies in Kenya itself, we should be sure that Mr. Muthaura is not on top of the police in Kenya because if not we cannot go to Kenya to take testimonies or to proceed. So that is a big problem. It should be clear that Mr. Muthaura if he remains in power, he has no power on the police side.”*¹
3. On 28 March 2011 the Government of Kenya answered the letter and informed the Prosecution that Mr. Muthaura relinquished attendance and participation in all meetings of the Cabinet or its Committees dealing with ICC subject matters in December 2010, and had relinquished the Chairmanship and membership of all National Security Advisory Committee meetings on 28 March 2011.² It attached Mr. Muthaura’s letter, in which he agreed to relinquish his chairmanship and membership on the National Security Advisory Committee to avoid any doubt on matters of conflict of interest relating to ICC investigations in Kenya. ³ Mr Muthaura asserted that this, together with previous communications, should satisfy the Prosecution’s concerns.⁴
4. Francis Kirimi Muthaura (the “Applicant”) now requests Pre-Trial Chamber II to order the Prosecutor: (i) to refrain from making further public comments on the merits of the pending case; and/or (ii) where public comment is required by the

¹ ICC-01/09/-02/11-20-AnxA.

² See Confidential Ex-parte Annex A.

³ See Confidential Ex-parte Annex B

⁴ See Confidential Ex-parte Annex C.

Rome Statute, to make clear that his statements are allegations that will be adjudicated by the Court. The Applicant also requests the Chamber to put the Prosecutor on notice that contravention of the orders of the Pre-Trial Chamber regarding public comments may be sanctioned by the Court (the “Application”).

5. The Application should be dismissed. There is nothing objectionable in the Prosecutor’s comment. It did not address the merits of the case or infringe on the Applicant’s fair trial rights or the integrity of the judicial process. The Applicant’s assertion that “the Prosecutor repeatedly trespassed into areas which are central to the charges”⁵ is unfounded. The Prosecutor expressed proper and legitimate concerns about the possibility that Mr Muthaura could exercise authority over the witness protection program. The resignation of Mr Muthaura, to avoid “any doubt of conflict of interest” confirmed that the Prosecutor’s concerns were legitimate. In other words, the Prosecutor’s comment and the subsequent letter achieved a wholly proper and uncontroversial result -- the suspect’s withdrawal from his position as chairman of the National Security Advisory Committee.
6. The Application thus has no factual or legal merit. It is instead an excuse to seek to silence the Prosecutor. However, the Prosecutor’s duty to inform the public about its policies and activities is recognized in international law and has been recognized by the “Integrated Strategy for External Relations, Public Information and Outreach” adopted by the Court.⁶ This is part of the Prosecutor’s independent role and must be respected, so long as the Prosecutor does not obstruct the administration of justice and respects the due process rights of persons brought before the Court and the role of ICC judges.

⁵ “Application for Order to the Prosecutor Regarding Extra-Judicial Comments to the Press” (“Application”), ICC-01/09-02/11-20, 30 March 2011, para. 8.

⁶ Available at http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Outreach/Integrated+strategy/Integrated+Strategy+for+External+Relations_+Public+Information+and+Outreach.htm (last accessed on 20 April 2011). The Office of the Prosecutor has also established internal guidelines regarding public statements to the media and other entities. The comment does not violate those guidelines.

Submissions

7. On 08 March 2011 the majority of the Pre-Trial Chamber issued two decisions granting the Prosecution's request for the issuance of summonses to six suspects to appear and to answer charges of crimes against humanity in connection with post-election violence in Kenya. Among other things, the majority found that "there are reasonable grounds to believe that [Applicant], by virtue of his position, exercised direct authority over the Kenyan Police Forces" during the period of the post-election violence.⁷ The decisions received wide public attention.⁸
8. On 14 March 2011 the Prosecutor made a public statement at the seat of the Court. He noted that the majority "accepted that there is evidence showing the Police shoot to kill" in Kisumu⁹ and described the Applicant's "role as a superior to the Police".¹⁰ In that context, the Prosecutor stated that the Applicant must relinquish a position of authority over the police before the Prosecution can investigate in Kenya or rely on Kenyan authorities to protect prosecution witnesses. This is a straightforward and uncontroversial position: a person charged with a crime should not be in a position to influence the investigation of the crime or the protection of witnesses. Stating this is not a comment on guilt or innocence, it addresses only the need to protect the integrity of the investigation and, more specifically, the well-being of witnesses.

⁷ ICC-01/09-02/11-01, para. 42.

⁸ E.g. Bernard Namunane, "Ocampo Six ordered to appear at Hague", Daily Nation, 8 March 2011, available at <http://www.nation.co.ke/News/ICC+judges+decide+fate+of+Ocampo+Six/-/1056/1121398/-/11fsux3z/-/index.html> (last accessed 19 April 2010); Scott Baldauf, "ICC summons six Kenyan suspects over post-election violence", Christian Science Monitor Africa Monitor, 9 March 2011, available at <http://www.csmonitor.com/World/Africa/Africa-Monitor/2011/0309/ICC-summons-six-Kenyan-suspects-over-post-election-violence> (last accessed 19 April 2011); Jerry Okungu, "The Ocampo Six are finally in the net", New Vision, 10 March 2011, available at <http://www.newvision.co.ug/D/8/20/748721> (last accessed 19 April 2011); Nzau Musau, "ICC Judges Reject Some Allegations Against the Ocampo Six", Nairobi Star, 10 March 2011, available at <http://allafrica.com/stories/201103110187.html> (last accessed 19 April 2011).

⁹ ICC-01/09-02/11-20-AnxA, p. 3.

¹⁰ ICC-01/09-02/11-20-AnxA, p. 1.

9. Subsequent to this press conference, on 16 March 2011 the Prosecutor sent a letter to the Government of Kenya expressing his concerns about the security of witnesses inside Kenya and whether the current official positions of and functions of Mr. Muthaura and Mr. Kenyatta would give them privileged access to and influence over the state security apparatus in a way that could interfere with witnesses or with the collection of evidence.
10. On 28 March of 2011, the Government of Kenya informed the Prosecutor that the Applicant agreed to relinquish his chairmanship and membership of the National Security Advisory Committee, to avoid any doubt on matters of conflict of interest relating to ICC investigations in Kenya.¹¹
11. The Government of Kenya also informed that Mr. Uhuru Kenyatta, another suspect in the case, relinquished his position on the Witness Protection Advisory Board. Mr. Kenyatta's 18 March 2011 letter states that he took these decisions to avoid any suggestion of a conflict of interest.¹² On 23 March 2011 he additionally decided to excuse himself from attending any Meeting of the Cabinet Sub Committee on Security and Foreign Relation, as well as any other meetings that touch on the issue of the ICC.¹³
12. The fact that the Applicant and the other suspect gave up their positions corroborates that the Prosecution's statement and concerns were well-founded.
13. Nonetheless, the Applicant urges that the prosecutor's comment violated ethical rules and that the Chamber should order the Prosecutor to "refrain from unnecessary, inappropriate and/or extra judicial comments on a case before the court".¹⁴ This request is wholly unjustified.

¹¹ See Confidential Ex-parte Annex C.

¹² See Confidential Ex-parte Annex D.

¹³ See Confidential Ex-parte Annex E.

¹⁴ Application, para. 2.

14. No provision in the Statute or Rules authorizes the Court generally to regulate the Prosecutor's speech. The Prosecutor thus has the right to speak publicly so long as he does not prejudice the Defence or violate legitimate orders of the Chamber.¹⁵
15. Nor did the Prosecutor's comment violate any internationally accepted standard applicable to this Court. First, the standards cited by the Applicant are not applicable.¹⁶ Even if they did apply, however, nothing in the Prosecutor's statement violated their proscriptions. He did not speak about "the merits of [the] case[] or the guilt or innocence of [the] accused" or make "any statements regarding the character, credibility, reputation, or record of an accused"¹⁷ – the prohibitions in the specific standards on which the Applicant relies. Nor was the Prosecutor's remark at the press conference disrespectful to the Chamber or capable of affecting the judicial process; in particular, he did not prejudge the case or intrude into judicial functions.
16. Additionally, there was no improper purpose underlying the Prosecutor's statement. It was made in connection with the Prosecutor's witness protection mandate. In furtherance of his mandate and powers under Articles 54(3)(f) and 68(1) of the Rome Statute, the Prosecutor's comment was intended to assure witnesses and the public that the Prosecution will not conduct unduly expose its witnesses within Kenya. It clearly did not imply anything about the Applicant's role *at the time of the post election violence*.
17. The public also has a right to information regarding the Court and the Prosecution's performance of its responsibilities under the Rome Statute, including its duty of witness protection. In that regard, it serves the public interest for the Prosecution to clarify how it deals with difficulties in investigating cases in an insecure environment, without commenting on issues such as witness credibility or the guilt or innocence of suspects.

¹⁵ E.g. ICC-02/05-01/09-112 ; ICC-01/04-01/10-51, para. 17

¹⁶ Application, paras. 19-24

¹⁷ See Application, paras. 19, 23.

18. Pursuant to Article 54(3)(a) and (b), the Prosecution also has the responsibility to collect and examine evidence and request the presence of and question persons being investigated, victims and witnesses. In order to properly discharge these functions, the Prosecution requires the general cooperation of members of the public, particularly victims and potential witnesses. To obtain that public cooperation, the Prosecution must be able to take appropriate measures to ensure their protection. Public statements made by the Prosecutor to reassure the general public and inform them of measures being taken to ensure the safety of potential witnesses can only further the goals of the Court and advance the ability of the judiciary of the ICC to discern the truth and discharge their mandate. Indeed, restricting the Prosecution's ability to do so would amount to an unjustifiable restriction on the powers of the Prosecutor and adversely affect his ability to adequately carry out his mandate.¹⁸

19. Against the backdrop of the Prosecutor's responsibilities, the claim that the Prosecutor's statement violated Defence rights is spurious.

20. The Applicant decries "inappropriate and one sided press comments by the Prosecutor and his repeatedly presenting theory as fact, [which] has the potential to infect the investigations process and significantly disadvantage the Defence".¹⁹ As previously stated, the concerns of the Prosecutor were well founded and, in fact, the Applicant recognized the existence of at least an appearance of conflict of interest. Additionally, the description of the Applicant's role is neither new nor inaccurate, the vehement denial by the Applicant notwithstanding. Indeed, one reporter prefaced a question with the statement, "we understand that [the

¹⁸ In interpreting Articles 54(3)(f) and 68(1) of the Statute, the Appeals Chamber has decided that those provisions are intended to ensure "that the Prosecutor takes general measures that ordinarily might be expected to arise on a day-to-day basis during the course of an investigation or prosecution with the aim of preventing harm from occurring to victims and witnesses." *Prosecutor v. Katanga*, Judgment on the appeal of the Prosecutor against the "Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules" of Pre-Trial Chamber I, ICC-01/04-01/07-776 OA7, 26 November 2008, para. 98.

¹⁹ ICC-01/09-02/11-20, para. 25.

Applicant] is the Chairman of the National Security Council”.²⁰ And, as noted above, the Applicant and another suspect in the case resigned their positions in the Kenyan government’s security apparatus, corroborating the Prosecution’s concerns. Following their 28 March resignations, it was widely reported in the Kenyan press that the Applicant was the chairman of the National Security Advisory Committee, a Cabinet Secretary, Permanent Secretary in the Office of the President, and Head of Public Service.²¹ As one newspaper article specifically stated, “[c]onsequently, Muthaura has power, authority and control over all investigative, prosecutorial and judicial processes in Kenya and would be able to obtain any information pertaining to the ICC process and witnesses whenever and wherever he desires.”²²

²⁰ ICC-01/09-02/11-20-AnxA, p. 2.

²¹ E.g. Miguna Miguna, “Resignations by Uhuru, Muthaura Empty Ploy”, The Nairobi Star, 05 April 2011, available at <http://www.the-star.co.ke/opinions/miguna-miguna/19813-muthauras-and-uhurus-icc-related-resignations-are-empty-plies> (last accessed 18 April 2011), indicating that Muthaura, as chair the National Security Advisory Committee, oversaw, among others, the head of the police; Emeka-Mayaka and Peter Leftie, “Why Muthaura is an ICC Suspect”, Daily Nation, 18 December 2010., available at <http://allafrica.com/stories/201012200236.html> (last accessed 19 April 2011), indicating in effect that, as head of the National Security Advisory Committee, Muthaura supervises the police; Isaac Ongiri, “Muthaura, Uhuru Leave Key Security Positions”, Nairobi Star, 1 April 2011, available at <http://allafrica.com/stories/201104040204.html> (last accessed 19 April 2011).

²² The news article reported, “Francis Kirimi Muthaura and Uhuru Muigai Kenyatta – two of Moreno Ocampo’s most powerful Kenyan indictees – have announced that they have resigned from ICC-related functions within government. Muthaura has reportedly written a letter to the Minister for Internal Security, George Saitoti, that he would no longer chair the National Security Advisory Committee whose members include the Chief of General Staff; the head of intelligence; head of police; army, army, air force and navy commanders; among others. The National Security Advisory Committee is an extraordinarily powerful body. Its chairman is at the very pinnacle of the security apparatus in Kenya. This is the Committee that makes all important decisions affecting national security, including but not limited to security operations. [...] Muthaura heads the committee by virtue of his position, firstly, as the President’s Permanent Secretary; secondly, as Secretary to the Cabinet; and thirdly, as Head of the Civil Service. [...] Moreover, by dint of the three significant offices he continues to occupy – his purported resignation being limited to the security advisory committee - he remains the de facto head of the police, intelligence, military, provincial administration and other state security agencies. Within the presidency, it’s Muthaura who has been signing appointment letters of all civil servants, including that of the Police Commissioner, the head of intelligence service, the Chief Justice and all judicial officers. In Kenya, therefore, the police, intelligence – even the military and judiciary – operationally fall under the Head of Civil Service. Consequently, Muthaura has power, authority and control over all investigative, prosecutorial and judicial processes in Kenya and would be able to obtain any information pertaining to the ICC process and witnesses whenever and wherever he desires.” Miguna Miguna, “Resignations by Uhuru, Muthaura Empty Ploy”, The Nairobi Star, 05 April 2011, available at <http://www.the-star.co.ke/opinions/miguna-miguna/19813->

21. Because Applicant disputes that he had any role overseeing the police or witness protection – notwithstanding his agreement to relinquish his positions to avoid the appearance of conflict of interest -- he argues that the Prosecutor's remark undermines the statutory rights of the Defence because it might influence potential prosecution or defence witnesses to accept as true something that they know not to be true. This is wrong for multiple reasons.
22. First, the Applicant misconstrues the Prosecutor's comment. In paragraph 9 of the Application, the Applicant states that, "The transcript of the Prosecutor's press conference annexed to this Application discloses that the Prosecutor has asserted as a fact that 'Mr. Muthaura has a role as a superior of the Police.'"²³ The Prosecution reproduces below, the full paragraph from which this quote is taken:

*"The issue is Mr. Muthaura has a role as a superior of the police and so before we disclose the testimonies in Kenya itself, we should be sure that Mr. Muthaura is not on top of the police in Kenya because if not we cannot go to Kenya to take testimonies or to proceed. So that is a big problem. It should be clear that Mr. Muthaura if he remains in power, he has no power on the police side."*²⁴

Thus, the factual assertion did not accuse the Applicant of being in charge of the police *per se*, it simply made clear that the ICC investigators and prosecutors will not take steps in Kenya until it is clear that the Applicant is not in a position to control the police.

23. Second, the comment relates to the Applicant's role *at the time of the press conference* and was based on public information widely reported throughout the

[muthauras-and-uhurus-icc-related-resignations-are-empty-ploys](#) (last accessed 18 April 2011) (emphasis added).

²³ ICC-01/09-02/11-20, para. 9.

²⁴ ICC-01/09-02/11-20-AnxA.

Kenyan media.²⁵ It does not draw a link to the status or role of the Applicant at the time of the charged crimes.

24. Third, notwithstanding the Defence mistake that “the Prosecutor repeatedly trespassed into areas which are central to the charges”,²⁶ the complained-of comment cannot possibly have “infect[ed] peoples['] understandings of reality which may in turn feed into the account they later give to a party”.²⁷ As noted previously, it is unrealistic to suppose that percipient witnesses (who have actual knowledge and are in a position to testify that the Applicant had no supervisory authority over the police) will “doubt themselves and be reluctant to come forward” or “subconsciously” change their knowledge or understanding of the facts.²⁸ Even if that were to happen, however, it is impossible to believe that their self-doubts or reluctance could result from the Prosecutor’s statement and not from the widespread press reports in Kenya about the Applicant, both before and after the 14 March press conference.²⁹

25. Finally, the Defence complains that the newspaper headlines following the press conference reflected what those papers “considered was the underlying message behind the Prosecutor’s comments”.³⁰ The Prosecution cannot be responsible for the contents of articles printed by media outlets. The duty of the Prosecution does

²⁵ See Application Annex F and Annex G. For example, a commentator notes the following in Annex G: “Take Mr. Muthaura, for example. Who is better placed than him to frustrate the ICC? He knows exactly what the government is doing to facilitate the ICC – including the location of witnesses, the collection of evidence, and the work of ICC officials in Kenya.”

²⁶ Application, para. 8.

²⁷ Application, para. 11.

²⁸ Application, para. 12.

²⁹ E.g. Miguna Miguna, “Resignations by Uhuru, Muthaura Empty Ploy”, The Nairobi Star, 05 April 2011, available at <http://www.the-star.co.ke/opinions/miguna-miguna/19813-muthauras-and-uhurus-icc-related-resignations-are-empty-plays> (last accessed 18 April 2011), indicating that Muthaura, as chair the National Security Advisory Committee, oversaw, among others, the head of the police; Emeka-Mayaka and Peter Leftie, “Why Muthaura is an ICC Suspect”, Daily Nation, 18 December 2010., available at <http://allafrica.com/stories/201012200236.html> (last accessed 19 April 2011), indicating in effect that, as head of the National Security Advisory Committee, Muthaura supervises the police; Isaac Ongiri, “Muthaura, Uhuru Leave Key Security Positions”, Nairobi Star, 1 April 2011, available at <http://allafrica.com/stories/201104040204.html> (last accessed 19 April 2011).

³⁰ Application, para. 15.

not extend to ensuring that reporters around the world correctly quote the Prosecutor's public statement. Therefore, if headlines or media accounts of the Prosecutor's remarks are inaccurate, the fault lies with the media, not the Prosecution.

Conclusion

26. The Prosecution therefore requests that the Chamber dismiss the Application in its entirety.



Luis Moreno-Ocampo, Prosecutor

Dated this 20th Day of April 2011

At The Hague, the Netherlands