

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 3 June 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,
with Public Annexes A, B, C, D and G
and Confidential Annexes E, F and H**

**Prosecution's First Communication of the Disclosure of Incriminating Evidence and
Rule 77 Materials to the Defence**

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 A. A. Khan QC and
Kennedy Ogeto

Counsel for Uhuru Muigai Kenyatta

Steven Kay QC and Gillian Higgins

Counsel for Mohammed Hussein Ali

Gregory Kehoe, Evans Monari, John
Philpot and Gershom Otachi Bw'omanwa

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, Registrar

Didier Preira, Deputy-Registrar

Victims and Witnesses Unit

Defence Support Section

Detention Section

**Victims Participation and Reparations
Section**

Other

1. The Prosecution is disclosing within the deadline established by the Second Disclosure Decision unredacted material that can be submitted without jeopardizing the safety and well-being of witnesses, victims, and other persons at risk.

Background

2. On 7 April 2011, Judge Trendafilova, acting as the Single Judge for Pre-Trial Chamber II (“the Single Judge”), established the regime for evidence disclosure and related matters for this case (“the First Decision”).¹
3. On 20 April 2011, the Single Judge issued the “Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties” (“the Second Decision”).² In the Second Decision, the Single Judge ordered the Prosecution to disclose to the Defence any evidence on which it intends to rely for the purposes of the confirmation of charges hearing, that has been collected prior to 15 December 2010 and for which no redaction is needed, no later than Friday, 3 June 2011.³ In respect of incriminating evidence collected between 15 December 2010 and 31 March 2011, the Single Judge imposed a deadline of Friday, 24 June 2011.⁴
4. The Single Judge also ordered the Prosecution to permit the Defence to inspect any books, documents, photographs and other tangible objects in its possession or control which either he intends to use at the confirmation of charges hearing or were obtained from or belonged to the suspects within the meaning of Rule 77 of the Rules

¹ ICC-01/09-02/11-48.

² ICC-01/09-02/11-64.

³ ICC-01/09-02/11-64, para. 17.

⁴ ICC-01/09-02/11-64, para. 18.

of Procedure and Evidence and that have been collected prior to 15 December 2010, no later than Friday, 3 June 2011.⁵ Further, the Single Judge ordered the Prosecution to permit the Defence to inspect, pursuant to Rule 77, any books, documents, photographs and other tangible objects in his possession or control which are material to the preparation of the defence as soon as practicable.⁶

5. The Prosecution herewith submits its first communication of disclosure to the Defence of incriminating evidence collected prior to 15 December 2010 and for which no redaction is needed.⁷ Although the evidence was disclosed for its prevailing incriminating value, the Prosecution has informed the Defence that the disclosed documents may also contain information of a potentially exculpatory nature or such that may be material to the preparation of the defence.
6. By this submission, the Prosecution also communicates its disclosure to the Defence of Rule 77 materials for which no redactions are needed and which were collected prior to 15 December 2010 and are intended for use as evidence for the purposes of the confirmation hearing and/or are material to the preparation of the defence. The Prosecution notes that it has no materials which were obtained from or belonged to the suspects.
7. In compliance with the First Decision, this disclosure is accompanied by: (i) lists of evidence that identify recipients for each evidentiary item and reflect the access and level of confidentiality of each item (Public Annexes A, C and G and Confidential Annexes E and H),⁸ and (ii) the analysis of each piece of evidence reflecting its

⁵ ICC-01/09-02/11-64, para. 20.

⁶ ICC-01/09-02/11-64, para. 21.

⁷ As a show of good faith, the Prosecution has additionally disclosed some materials collected between 15 December 2010 and 31 March 2011.

⁸ Annex A is the List of Evidence for Pre-Trial INCRIM Package 1, 3 June 2011. Annex C is the List of Evidence for Pre-Trial INCRIM Package 2, 3 June 2011. Confidential Annex E is the List of Evidence for

relevance (Public Annexes B and D and Confidential Annex F).⁹ In compliance with the decision, the Prosecution is providing the material to the Registry. Additionally, in compliance with its autonomous duties established by Article 61(3) of the Rome Statute and Rules 121(2)(c) and (3) of the Rules, the Prosecution has provided a copy of the evidence to each of the Defence teams.

8. Pursuant to Regulation 23 *bis* of the Regulations of the Court, the Prosecution requests that Annexes E, F and H be treated as confidential because they contain information of a sensitive nature not currently available to the public and/or were obtained from confidential sources. The Prosecution also requests that the disclosed materials listed in Annexes E and H be treated as confidential for the same reasons.
9. The Prosecution is mindful of its obligation under Article 68(1) of the Rome Statute to ensure the protection of victims and witnesses. The Prosecution had therefore assessed, prior to disclosure, that the evidence in this submission could be disclosed to the Defence without jeopardizing the safety and well-being of witnesses, victims, and other persons at risk.
10. Finally, the Prosecution notes that it has received a request from the Defence Counsel for Mr. Kenyatta as well as from Counsel from the Office of the Public Counsel for the Defence (OPCD) on behalf of the Defence teams for the disclosure of evidence in pdf format. The Prosecution submits that in complying with the First Decision it will continue to disclose all relevant materials in accordance with the e-Court protocol.¹⁰

Pre-Trial INCRIM Package 3, 3 June 2011. Annex G is the List of Evidence for Pre-Trial Rule 77 Package 1, 3 June 2011. Confidential Annex H is the List of Evidence for Pre-Trial Rule 77 Package 2, 3 June 2011.

⁹ Annex B is the in-depth analysis chart for Pre-Trial INCRIM Package 1, 3 June 2011. Annex D is the in-depth analysis chart for the Pre-Trial INCRIM Package 2, 3 June 2011. Confidential Annex F is the in-depth analysis chart for Pre-Trial INCRIM Package 3, 3 June 2011.

¹⁰ ICC-01/09-02/11-48, para. 18.



Luis Moreno-Ocampo
Prosecutor

Dated this 3rd day of June 2011
At The Hague, The Netherlands