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

Date: **23 June 2011**

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

SITUATION IN KENYA

THE PROSECUTOR

v.

**FRANCIS KIRIMI MUTHAURA
UHURU MUIGAI KENYATTA &
MOHAMMED HUSSEIN ALI**

**Public Document
with Confidential Annex**

**DEFENCE REQUEST FOR DISCLOSURE OF UNREDACTED ARTICLE 58
APPLICATION AND ALL STATEMENTS, DECLARATIONS, TESTIMONIES
AND UTTERANCES OF AMBASSADOR FRANCIS K. MUTHAURA IN THE
POSSESSION OF THE PROSECUTION**

Source: Counsel for Francis Kirimi Muthaura

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
Ms. Fatou Bensouda
Ms. Adesola Adebeyejo

Counsel for the Defence

Counsel for Francis Kirimi Muthaura:
Karim A. A. Khan QC, Essa M. Faal,
Kennedy Ogetto & Shyamala Alagendra
Counsel for Uhuru Muigai Kenyatta:
Steven Kay QC & Gillian Higgins
Counsel for Mohammed Hussein Ali:
Evans Monari and Gershom Otachi

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

REGISTRY

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Ms. Silvana Arbia

Counsel Support Section

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Ms. Maria Luisa-Jacombe

Detention Section

**Victims Participation and Reparations
Section Other**

I. Background

1. On 15 December 2010, the Office of the Prosecutor (“OTP” or “Prosecution”) submitted the “Prosecutor’s Application Pursuant to Article 58 as to Ambassador Francis Kirimi Muthaura (“Ambassador Muthaura”), Uhuru Muigai Kenyatta and Mohammed Hussein Ali (“Article 58 Application”).¹
2. On 8 March 2011, Pre-Trial Chamber II (“Chamber”), by majority issued three summonses to appear in the present case.²
3. On 8 April 2011, Ambassador Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali voluntarily appeared before the Court at the initial appearance hearing held by the Chamber.³
4. On 6 April 2011, the Single Judge, Her Honour, Judge Ekaterina Trendafilova issued her “Decision Setting the Regime for Evidence Disclosure and Other Related Matters” setting out, *inter alia*, the system of disclosure to be followed by the parties in this case.⁴
5. On 20 April 2011, the Single Judge issued her “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”, whereby the Single Judge rejected the Prosecution’s request and established a calendar for disclosure of evidence between the parties.⁵

¹ ICC-01/09-31-Conf-Exp and its annexes.

² ICC-01/09-02/11-01.

³ ICC-01/09-02/11-T-1-ENG.

⁴ ICC-01/09-02/11-48.

⁵ ICC-01/09-02/11-64.

6. On 3 June 2011, the Prosecution disclosed its first batch of disclosure materials that it intends to rely on for the purpose of the confirmation hearing.⁶
7. On 20 June 2011, Lead Counsel for Ambassador Muthaura communicated via E-mail with the Prosecution requesting disclosure of the unredacted version of the Article 58 Application without delay in order to ensure both timely and adequate preparation of the Defence for the upcoming confirmation hearing and to make sense of the Prosecution's first batch of disclosure materials.⁷
8. On 21 June 2011, the Prosecution responded to Lead Counsel's E-mail rejecting his request without advancing any legal basis for doing so. In its E-mail response, the Prosecution avoided mentioning the Article 58 Application as requested by the Defence and instead stated that it would provide *only* the Document Containing the Charges (the "DCC") in accordance with the timeline established by the Single Judge, "*when it is due*".⁸
9. Given the importance of the issue and the Prosecution's stated intention to disclose *only* the DCC, the Defence for Ambassador Muthaura ("Defence") hereby files this request.

II. Defence Request for Disclosure of an Unredacted or Less Redacted Version of the Article 58 Application and all statements, declarations, testimonies and utterances of Ambassador Muthaura currently in the possession and control of the Prosecution

10. In accordance with Articles 67 (1) and (2) of the Rome Statute ("Statute") and Rule 77 of the Rules of Procedure and Evidence ("Rules"), the Defence

⁶ ICC-01/09-02/11-100.

⁷ E-mail sent by Karim A.A. Khan to Ms. Adesola Adebeyejo on 20 June 2011 at 21:32:30 hrs, see Confidential Annex. The Defence classifies the Annex as confidential due to its containing personal information such as E-mail addresses and telephone numbers.

⁸ E-mail response sent by the Prosecution to Karim A. A. Khan on 21 June 2011 at 16:10:48 hrs, see Confidential Annex.

requests disclosure of an unredacted or a lesser redacted version of the Article 58 Application in the case of *Muthaura et al.* and all statements, declarations, testimonies and/or other utterances of Ambassador Muthaura currently in the possession or control of the OTP without delay.

11. The Article 58 Application presently available to the Defence is the same one that is currently on the Court's website. All the relevant and pertinent facts supporting the charges are redacted and it fails to provide the Defence with any semblance of adequate information on the nature and content of the charges and allegations that the Defence is required to answer to.

III. Factual Basis for the Request

12. The Defence appends as a Confidential Annex to this filing its E-mail request as well as the E-mail response of the Prosecution. The Defence's E-mail request was sent in the spirit of promoting cooperation with the Prosecution to enhance a disclosure process, which is essentially *inter partes* and to save the Chamber's time. It is as surprising, as it is regrettable, that the Prosecution has considered it fit in responding to the Defence's E-mail request in the manner that it has, failing to provide any legally justifiable basis for its refusal to provide the Defence with a useful version of the Article 58 Application. As such, the Defence is compelled to submit this request to the Chamber.
13. The Defence is currently reviewing and analyzing thousands of pages of disclosed material without any reference to the relevance of the documents to the Prosecution's case. Disclosure of the Article 58 Application at this stage would enhance the Defence's understanding of the Prosecution case and assist its preparation accordingly. Among other things, it would enhance the Defence's ability to identify the relevance of each disclosed item to the broader context of the Prosecution's case set out in the Article 58 Application.

Similarly, disclosure of the requested statements, declarations, testimonies and utterances currently in the possession of the Prosecution would assist the Defence in understanding the context of the Prosecution's disclosure and the case as a whole. It is for this reason, among others, that the Defence has identified the need for the requested material to be disclosed in order to facilitate its timely and adequate preparation for the upcoming confirmation hearing.

IV. Legal Basis for the Request

14. Rule 77 of the Rules requires the Prosecution to permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor which are material to the preparation for the defence. *In Lubanga*, the Appeals Chamber found that:

*"In Rule 77 of the Rules of Procedure and Evidence, the term "material to the preparation of the defence" should be understood as referring to all objects that are necessary for the preparation of the defence."*⁹

In that same judgment, the Appeals Chamber also found that the Impugned Decision

*"[...] should not be read as to put pressure on the accused to testify or to raise defences at an early stage as a condition of obtaining prosecution disclosure."*¹⁰

⁹ ICC-01/04-01/06-1433, p. 3, para. 2.

¹⁰ *Ibid.*, p. 3, para. 1.

15. As the Appeals Chamber has recognized, the defence is under no obligation to provide an explanation in order to obtain disclosure of materials relevant to its preparation. Suffice it to say that absent disclosure of the requested material at this stage, the defence will not be in a position to use the fruit of the disclosed material unless it can clearly determine the relevance of those materials to the Prosecution's foundational document, the Article 58 Application which undoubtedly is the genesis of this case.
16. Similarly, Article 67(1) and (2) of the Statute support the request. Article 67(1) provides, *inter alia*, that the accused shall be entitled to be informed promptly of the nature, cause and content of the charge; to have adequate time and facilities for the preparation of his or her defence and to be tried without undue delay. A plain reading of the sub-provisions listed under Article 67(1) directs that the Prosecution, as the primary moving party, takes steps to ensure adequate defence preparation and consequently promote expeditious proceedings.
17. Article 67(2) demands disclosure of exculpatory material to the defence as soon as practicable. In *Katanga and Ngudjolo*, the Appeals Chamber recognized the significance of Article 67(2) disclosure. It stated among other things that:

*"The drafting history supports the notion that the Prosecutor's disclosure obligations to the accused are linked to the Prosecutor's role in conducting the investigation, and stem from the Prosecutor's obligation to investigate incriminating and exonerating circumstances equally under article 54(1)(a) of the Statute."*¹¹

¹¹ ICC-01/04-01/07-2288 at para. 75 citing at footnote 125.

18. The Prosecution's duty to disclose exculpatory information exists independently of the defence to the extent that the Prosecution has a positive duty to identify information which could be useful to the defence based on its understanding of the case.¹² Since the Prosecution has spent far more time investigating and putting the case together in its Article 58 Application, it is only fair and reasonable that it be ordered to disclose the requested material and identify portions of the requested material which may be exculpatory to the defence. In these circumstances, the request will enhance the Defence's investigation and overall preparation for the upcoming confirmation hearing.

V. The jurisprudence and practice of the Prosecution and the Court as a whole support the Defence Request

19. The Defence recalls that it has been the consistent practice of the Prosecution to provide its Article 58 Applications to the defence in other cases, either on its own motion applying limited redactions where applicable or upon orders of Chambers.¹³ In the *Bemba* case, the Prosecution disclosed its Article 58 Application to the defence *suo motu* after applying for limited redactions to be imposed by the Chamber.¹⁴ In the *Abu Garda* case on the other hand, the Prosecution disclosed its Article 58 Application upon the order of the Chamber.¹⁵

¹² ICC-01/04-01/06-1433 at para. 36.

¹³ See e.g., ICC-02/05-02/09-12 reclassified as public pursuant to Pre-Trial Chamber I's Decision ICC-02/09-155 of 9 September 2009. See also, ICC-01/05-01/08-128 which was reclassified as public by Decision ICC-01/05-01/08-528.

¹⁴ See also; ICC-01/05-01/08-128 which was reclassified as public by Decision ICC-01/05-01/08-528.

¹⁵ See for instance; ICC-02/05-02/09-12 reclassified as public pursuant to Pre-Trial Chamber I's Decision ICC-02/09-155 of 9 September 2009.

VI. The Prosecution's E-mail response wrongly characterizes the purpose of the DCC and the Article 58 Application in the ICC legal process

20. The Prosecution appears to confuse the purpose and functions of the Article 58 Application and the DCC. The Article 58 Application provides the basis for the summons issued in this case and sets out not only the charges for which the suspects were summoned but significantly, it provides the underlying basis for the charges. As such, its allegations are broader in scope and inform the wider context in which the Prosecution's initial case is constructed. Against this background, disclosure of the Application would significantly assist the Defence's preparation as it would enhance its understanding of the case it has to meet and would inform the Defence of the relationship between the disclosed material and the Article 58 Application.

21. The Defence deliberately did not request disclosure of the DCC in its E-mail request to the Prosecution, since the timing of the disclosure of that document is regulated by the Single Judge's calendar on disclosure. Given that the Prosecution appears to confuse the roles of the DCC and the Article 58 Application, the Defence is compelled to point out that the DCC is limited in scope and is informed by the core evidence that the Prosecution intends to rely on at the confirmation hearing. This limited nature of the DCC is underscored further by the fact that it should be read in conjunction with the Prosecution's list of evidence. And given the overall limited scope of the confirmation hearing, it is only fair and reasonable that the Defence be provided with the requested material which provides a wider context within which the Prosecution's case is constructed. Access to the requested material would in these circumstances contribute to the expeditious and effective conduct of the proceedings at the upcoming confirmation hearing.

VII. Conclusion

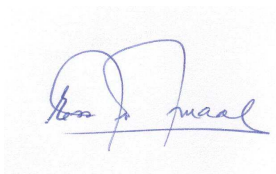
22. For the reasons outlined above, the Defence respectfully requests that the Single Judge order the Prosecution to disclose to the Defence its Article 58 Application in unredacted or lesser redacted form and all statements, declarations, testimonies and utterances of Ambassador Muthaura in the possession and control of the Prosecution without delay.

Respectfully submitted,

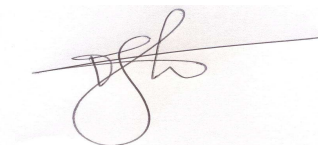


Karim A. A. Khan QC

Lead Counsel for Ambassador Francis K. Muthaura



Mr. Essa M. Faal
Defence Counsel



Mr. Kennedy Ogetto
Defence Counsel



p.p.

Ms. Shyamala Alagendra
Defence Counsel

Dated this 23rd Day of June 2011

At Nairobi, Kenya