

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 12 May 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

**SITUATION IN THE REPUBLIC OF KENYA
*IN THE CASE OF THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA,
UHURU MUIGAI KENYATTA AND MOHAMED HUSSEIN ALI***

Public

**Decision on the "Defence Request for Variation of Decision on Summons or in
the Alternative Request for Leave to Appeal"**

Decision 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

Counsel for Francis Kirimi Muthaura
Karim Khan and Kennedy Ogetto

Counsel for Uhuru Muigai Kenyatta
Steven Kay and Gillian Higgins

Counsel for Mohamed Hussein Ali
Evans Monari, John Philpot and
Gershom Otachi Bw'omanwa

Legal Representatives of the Victims

Legal Representatives of the 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 & Deputy Registrar
Silvana Arbia, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”)¹ of the International Criminal Court (the “Court”) hereby renders the decision on the “Defence Request for Variation of Decision on Summons or in the Alternative Request for Leave to Appeal” (the “Application”).²

1. On 8 March 2011, the Chamber, by majority, issued its “Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali” (the “8 March 2011 Decision”).³ In the same decision, the Chamber imposed certain conditions restricting liberty (other than detention) on the three suspects, including the condition “to have no contact directly or indirectly with any person who is or is believed to be a victim or a witness of the crimes for which [they] have been summoned.”⁴

2. On 4 April 2011, the Single Judge issued the “Decision on Variation of Summons Conditions” (the “4 April 2011 Decision”),⁵ setting out the modalities to be observed by the suspects when complying with the condition concerned. Specifically, the Single Judge ordered the Defence “to communicate the name and necessary contact details [of any potential witness] to the [Victims and Witnesses Unit] which, in turn, will advise the Defence on whether this contact may put the person at risk and/or which security arrangements the Defence should obey, if necessary.”⁶

3. On 11 April 2011, the Defence for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali submitted jointly the Application,⁷ requesting the Single Judge to reconsider the 4 April 2011 Decision and vary the modalities when complying with said condition according to its own proposal (the “First

¹ Pre-Trial Chamber II, “Decision Designating a Single Judge”, ICC-01/09-02/11-9.

² ICC-01/09-02/11-52.

³ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali”, ICC-01/09-02/11-1.

⁴ *Ibid.*, p. 24.

⁵ Pre-Trial Chamber II, “Decision on Variation of Summons Conditions”, ICC-01/09-02/11-38.

⁶ *Ibid.*, para. 15.

⁷ ICC-01/09-02/11-52.

Request”),⁸ or grant leave to appeal the 4 April 2011 Decision (the “Second Request”).⁹

4. On 15 April 2011, the Prosecutor lodged a response to the Application requesting that the Application be rejected in its entirety.¹⁰

5. On 20 April 2011, the Defence for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali submitted jointly a request for leave to reply¹¹ to parts of the Prosecutor’s submissions in his response dated 15 April 2011.

6. On 28 April 2011, the Prosecutor filed a submission to the Defence’s request for leave to reply and argued that the Single Judge deny the Defence leave to reply.¹²

7. In the following sections, the Single Judge shall first address the preliminary matter of the Defence request for leave to reply, before proceeding, in turn, to the analysis of the First and Second Requests advanced by the Defence.

I. The Defence request for leave to reply

8. The Defence requests leave to reply to certain parts of the Prosecutor’s response dated 15 April 2011 pursuant to regulation 24(5) of the Regulations of the Court (the “Regulations”). Regulation 24(5) of the Regulations provides discretion to the Single Judge in deciding this matter. As the observations to be made relate primarily to the interpretation of the jurisprudence of other Chambers of the Court, the Single Judge is of the opinion that it is not necessary to receive further submissions. Therefore, the Defence request for leave to reply must be rejected.

9. The Single Judge also observes that the Prosecutor has filed a submission in relation to the question whether leave to reply should be granted. Bearing in mind the restrictive regime established by regulations 24(4) and (5) of the Regulations, the

⁸ *Ibid.*, para. 45.

⁹ *Ibid.*, para. 46.

¹⁰ ICC-01/09-02/11-59, para. 28.

¹¹ ICC-01/09-02/11-63.

¹² ICC-01/09-02/11-73, para. 6.

Single Judge shall not take the Prosecutor's submission dated 28 April 2011 into consideration.

II. The First Request

10. With regard to the First Request, the Defence essentially argues that it is unclear how it can ascertain whether potential witnesses consent to meet with the Defence, if the Defence teams are unable to have any contact with potential witnesses prior to their consultation with the Victims and Witnesses Unit (the "VWU").¹³ The Defence submits that having to obtain prior VWU advice would "overburden the VWU"¹⁴ and "significantly impede and delay [D]efence investigations".¹⁵ In that respect, the Defence avers that the modalities are unnecessary and disproportionate.¹⁶ Moreover, the Defence contends that the imposition of these modalities on the Defence and not on the Prosecutor "disadvantages the Defence *vis-à-vis* the [Prosecutor] in terms of [...] ability to conduct effective and expeditious investigations", thus violating article 67(1)(e) of the Statute.¹⁷ The Defence also maintains that the practical implementation of the modalities would inevitably disclose the very issues to be concealed from the Defence.¹⁸ Therefore, while the Defence, in general, acknowledges the need to protect the safety and well-being of witnesses,¹⁹ it proposes to vary the modalities to provide as follows:

I. The Defence may make preliminary contacts with all potential witnesses, for the purpose of ascertaining whether the person in question consents to be interviewed by the Defence;

II. Based on the particular circumstances of the person, the Defence must make a good faith assessment as to whether the advice of the VWU is necessary to ensure the psychological well-being and safety of the person whom the Defence intends to interview;

III. To that end, when making a preliminary contact with the potential witness for the purpose of ascertaining whether the person consents to be interviewed by the

¹³ ICC-01/09-02/11-52, paras 9 and 12.

¹⁴ *Ibid.*, para. 13.

¹⁵ *Ibid.*, paras 9 and 13; see also paras 40 and 41.

¹⁶ *Ibid.*, paras 18-26.

¹⁷ *Ibid.*, paras 9, 29-32.

¹⁸ *Ibid.*, paras 9 and 15.

¹⁹ *Ibid.*, paras 18 and 20.

Defence, the Defence shall inquire with the person whether there are any personal well-being or safety issues, which have been referred to the VWU in the past, or which should be referred to the VWU at that juncture;

IV. If the Defence has made a good faith assessment that the advice of the VWU is not necessary with respect to a particular person, and that the person has not brought any issue to the attention of the Defence, then the Defence may proceed to interview that person, without first seeking the advice of the VWU;

V. The Defence is obliged continuously to evaluate the security and safety of the person throughout the course of the interview and to stop the interview and seek the advice of the VWU where necessary, should new information concerning the well-being and safety of the person come to the attention of the Defence;

VI. These modalities shall apply *mutatis mutandis* to other parties and participants in the case.²⁰

11. The Prosecutor argues that the First Request should be rejected as the 4 April 2011 Decision is neither “manifestly unsound” nor its consequences “manifestly unsatisfactory” in order to justify reconsideration by the Single Judge.²¹ He recalls the role and professional character of the VWU²² and maintains that the regime established by the Single Judge is applied in other cases and is consistent with the Statute.²³ Moreover, the Prosecutor avers that the modalities are necessary and proportionate to ensure the protection of witnesses, and considers the Defence argument regarding potential negative impediments to the Defence investigations as “unsupported and speculative”.²⁴ Lastly, the Prosecutor recalls his statutory responsibilities in relation to protection issues.²⁵

12. With regard to the First Request, the Single Judge notes articles 43(6), 54(1)(b), 57(3)(c), 67 and 68(1) of the Rome Statute (the “Statute”), and rules 17 to 19 of the Rules of Procedure and Evidence (the “Rules”). She further takes cognizance of

²⁰ *Ibid.*, para. 45.

²¹ ICC-01/09-02/11-59, para. 6.

²² *Ibid.*, paras 7 and 12.

²³ *Ibid.*, para. 11.

²⁴ *Ibid.*, para. 13.

²⁵ *Ibid.*, para. 15.

articles 28 and 29 of the Code of Professional Conduct for counsel (the “Code of Professional Conduct”).²⁶

13. The Single Judge deems it appropriate to enter into the analysis of the First Request by underscoring the fundamental concepts which guided the 4 April 2011 Decision and to which the Single Judge continues to subscribe fully, convinced that it is imperative to organize the proceedings in a way that the values equally central to the proceedings are evenly respected.

14. First, the Single Judge emphasizes the importance of the protection of the safety, physical and psychological well-being, dignity and privacy of victims, witnesses and other persons at risk during all activities of the Court and the corresponding responsibilities of the Chamber,²⁷ but also of the Prosecutor,²⁸ counsel to the Defence,²⁹ and the suspects themselves.³⁰

15. Second, the Single Judge is attentive to another value, *i.e.* the rights of the suspects as provided for in the statutory documents as well as in internationally recognized human rights. This includes in particular the right of the suspects to prepare their defence, which includes the right to obtain the testimony of witnesses.³¹ However, the Single Judge is equally attentive of the suspects’ fundamental right to personal liberty.³²

²⁶ Adopted at the 3rd plenary meeting on 2 December 2005, by consensus, ICC-ASP/4/Res.1.

²⁷ Article 57(3)(c) and 68(1) of the Statute.

²⁸ Article 54(1)(b) and 68(1) of the Statute.

²⁹ Articles 28 and 29 of the Code of Professional Conduct.

³⁰ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali”, ICC-01/09-02/11-1, p. 24.

³¹ Article 67 of the Statute; see also Pre-Trial Chamber II, “Decision on Variation of Summons Conditions”, ICC-01/09-02/11-38, para. 11.

³² It is recalled that in the 8 March 2011 Decision, the Chamber stated: “Should [the suspects] fail to appear on the date specified in the summonses or to comply with the conditions to be imposed, the Chamber reserves the right to replace the summonses to appear with warrants of arrest under article 58 of the Statute and rule 119(4) of the Rules of Procedure and Evidence.” See Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali”, ICC-01/09-02/11-1, para. 55.

16. Equally cognizant of and concerned for the values as outlined above, the Single Judge considers it to be her responsibility to establish a system which concurrently achieves the following objectives: (i) the Defence communication with witnesses does not expose the witnesses to any risk; (ii) the suspects can meaningfully prepare their defence; and (iii) the danger is avoided that the Defence inadvertently performs actions which could be seen as a threat *vis-à-vis* potential witnesses, compelling the Chamber to replace the summonses to appear with warrants of arrest.³³

17. Turning now to the arguments of the Defence in support of reconsideration of the 4 April Decision, the Single Judge is not convinced that any such reconsideration is warranted. Most significantly, no new facts have been presented which would justify a modification of the modalities to be observed by the Defence when complying with summons conditions. Nevertheless, the Single Judge considers it appropriate, in light of the nature of the arguments raised by the Defence, to provide some further clarifications and directions, with a view to ensuring proper understanding of the 4 April 2011 Decision by all its addressees.

18. In the 4 April 2011 Decision, the Single Judge ordered the Defence to communicate the name and necessary contact details of potential witnesses, before contacting them, to the VWU which, in turn, will advise the Defence on whether this contact may put the person at risk and/or which security arrangements the Defence should obey.³⁴ The Single Judge hereby reiterates that such communication to the VWU shall take place as soon as the Defence has approached the potential witness and become aware of their identity, and in any case before the interview of the person in question. Further, in case the Defence wishes to visit a particular location in order to find potential witnesses, the Defence will have to communicate to the VWU in advance detailed information thereto. The Single Judge stresses that this

³³ Cf. Pre-Trial Chamber II, "Decision on Variation of Summons Conditions", ICC-01/09-02/11-38, paras 11-14.

³⁴ *Ibid.*, para. 15.

applies to all potential witnesses, as the VWU is best placed to ascertain the existence of risk and/or to provide assistance and advice to the Defence.

19. Given the mandate of the VWU³⁵, the Single Judge believes that it follows the security issues regarding witnesses, victims and other persons at risk in the situations and cases before the Court and, accordingly, keeps a database thereof. Thus, a communication to the VWU of the names and other available information related to potential witnesses allows for a quick check whether there are security issues regarding the said persons known to the VWU. Based on the outcome, the VWU shall either inform the Defence to proceed with its investigation, when the potential witness does not appear to be vulnerable, or, in case there are known security issues, will bring the matter before the Chamber for consideration.

20. As regards the concern related to expeditiousness the Single Judge refers to the nature of contemporary communication means, such as electronic mail, and thus is satisfied that the requirement of prior VWU assistance will not delay Defence investigations. It is however still imperative that the VWU render its advice as early as possible but not later than two weeks after the day of the Defence communication. The Single Judge has no doubts that the VWU will be able to organize its work in such professional manner that prompt information, assistance and advice can be provided to the Defence in the shortest possible time, preferably the very day of the Defence communication or, should exigencies so oblige, within the two week time-limit.

21. Further, in the view of the Single Judge, the Defence's fears to "overburden the VWU" are, absent any facts to the contrary, hypothetical and cannot have a bearing on the question at hand. There is nothing in the 4 April 2011 Decision which would demand that the VWU enter into a time-, and resource-intensive risk assessment in relation to each and every potential witness, irrespective of their personal circumstances. Rather, as explained above, the VWU is instructed to devise a

³⁵ See article 43(6) of the Statute and rules 17 to 19 of the Rules.

pragmatic and workable solution, which will enable it to provide its services timely and efficiently, preferably on the day of the Defence communication.

22. As far as the advice and assistance to the Defence is concerned, the VWU is encouraged to develop standard guidelines to be communicated to the Defence together with the results of the check performed, which will assist the Defence in its contacts with potential witnesses. It should not, however, disclose any identifying information of the person concerned, the information as to whether the person has been approached by the Prosecutor, or the status of the person as a protected witness.

23. As regards the argument that the Defence is subjected to modalities which do not apply to the Prosecutor, the Single Judge recalls that the fundamental principle of equality of rights cannot be applied mechanically, and highlights that the Prosecutor and the Defence differ markedly in their respective status as well as rights and obligations under the Statute. The Prosecutor is, next to being a party in criminal proceedings, an organ of the Court and has significant duties as well as powers, related to the protection of victims and witnesses, which the Defence does not have. In light of this, and in view of the above consideration that the modalities established do not impair the Defence in the preparation of its case, the Single Judge is satisfied that the principle of equality of arms is preserved.

24. In conclusion, the Single Judge considers that the established modalities of Defence contact with witnesses equally ensure on the one hand the protection of witnesses, victims and other persons at risk and on the other hand the respect for the rights of the suspects, in particular the right to prepare their defence and the right to liberty. Therefore the First Request must be rejected.

III. The Second Request

25. In case the First Request should be rejected, the Defence alternatively submits the Second Request and seeks leave to appeal the 4 April 2011 Decision pursuant to article 82(1)(d) of the Statute in relation to the following three issues:

- (i) 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;
- (ii) Whether the modalities set out in paragraph 15 of the Impugned Decision are necessary and proportionate; and
- (iii) Whether the imposition of these modalities on the Defence and not the Prosecution or any other participants in the case, violates equality of arms.³⁶

26. The Defence avers that all three issues arise from the 4 April 2011 Decision³⁷ and that, for the reasons advanced in relation to the First Request, affect the fair³⁸ and expeditious³⁹ conduct of the proceedings. The Defence contends that the 4 April 2011 Decision imposes “significant logistical challenges for the Defence”⁴⁰ and “creates uncertainty” concerning the conduct of the Prosecutor *vis-à-vis* potential Defence witnesses,⁴¹ all of which warrants an immediate decision of the Appeals Chamber.⁴²

27. With regard to the Second Request, the Prosecutor submits that all issues do not arise from the 4 April 2011 Decision and, thus, are not “issues” within the meaning of article 82(1)(d) of the Statute.⁴³ Furthermore, he contends that the issues neither affect the fairness of the proceedings, as the arguments advanced are unsupported and speculative,⁴⁴ nor expeditiousness of the proceedings⁴⁵. Lastly, the Prosecutor considers the “logistical challenge” argument by the Defence as exaggerated⁴⁶ and

³⁶ ICC-01/09-02/11-52, para. 46.

³⁷ *Ibid.*, paras 36-38.

³⁸ *Ibid.*, para. 39.

³⁹ *Ibid.*, paras 40 and 41.

⁴⁰ *Ibid.*, para. 42.

⁴¹ *Ibid.*, para. 43.

⁴² *Ibid.*, para. 44.

⁴³ ICC-01/09-02/11-59, paras 17-23.

⁴⁴ *Ibid.*, para. 24.

⁴⁵ *Ibid.*, para. 25.

⁴⁶ *Ibid.*, para. 26.

argues that an immediate resolution of the issues by the Appeals Chamber would not materially advance the proceedings.

28. The Single Judge notes article 82(1)(d) of the Statute.

29. Mindful of the existing jurisprudence related to article 82(1)(d) of the Statute,⁴⁷ the Single Judge recalls that, for leave to be granted, the Defence must establish that the proposed issue emanates from the 4 April 2011 Decision, that it “significantly affect[s] the fair and expeditious conduct of the proceedings or the outcome of the trial”, and that an immediate resolution by the Appeals Chamber may materially advance the proceedings.

30. Having examined the submission of the Defence in detail, the Single Judge observes that although formally framed as separate, the three issues are proposed under a single line of argument and indeed affect a single subject matter, *i.e.* the correctness of the modalities to be observed when complying with summons conditions, established in the 4 April 2011 Decision. Therefore, the Single Judge deems it appropriate to undertake a single, common analysis of the entire Second Request.

31. The Single Judge accepts that the correctness of the established modalities is an appealable issue within the meaning of article 82(1)(d) of the Statute. However, the Single Judge notes that the Defence advances, with respect to the requirement that the issues significantly affect the fair and expeditious conduct of the proceedings, the same line of argumentation as in relation to the First Request. In this respect, the Single Judge refers to the previous section where it has been clarified that the established modalities will not have a negative effect on the Defence’s right to fair and expeditious preparation for the confirmation hearing. Consequently, the Single Judge concludes that the issues proposed for appeal do not affect the fair and expeditious conduct of the proceedings, and that the Second Request must be

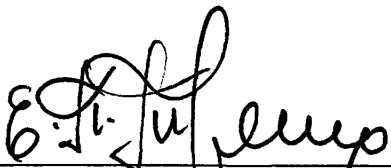
⁴⁷ See for the latest references in Pre-Trial Chamber II, “Decision on the ‘Prosecution’s Application for leave to Appeal the ‘Decision Setting the Regime for Evidence Disclosure and Other Related Matters’ (ICC-01/09-02/11-48)”, ICC-01/09-02/11-77, paras 7-8.

rejected. It may be clarified that failing to establish this requirement under article 82(1)(d) of the Statute, it is not necessary to proceed to a determination whether an immediate resolution by the Appeals Chamber would materially advance the proceedings.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) **rejects** the First Request;
- b) **rejects** the Second Request;
- c) **rejects** the Defence request for leave to reply;
- d) **orders** all Defence teams to comply with the modalities set out in the 4 April 2011 Decision and further clarified in the present decision;
- e) **instructs** the VWU to assist the Defence timely and properly, preferably on the very same day of the Defence communication, and to provide the Defence with standard guidelines in relation to the security and well-being of potential witnesses;
- f) **orders** that any difficulties in the implementation of this decision shall be brought immediately to the attention of the Single Judge.

Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova
Single Judge

Dated this Thursday, 12 May 2011

At The Hague, The Netherlands