

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 4 April 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 MOHAMMED HUSSEIN ALI**

Public

Decision on Variation of Summons Conditions

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 A. Khan

Counsel for Uhuru Muigai Kenyatta

Steven Kay and Gillian Higgins

Counsel for Mohammed 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

Maria Luisa Martinod Jacome

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 Variation of Summons Conditions”.

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”).² In the same decision, the Chamber imposed certain conditions restricting liberty (other than detention) on the three suspects, including the condition

(i) 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 Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali have been summoned.

(...)

2. On 23 March 2011, counsel for the Defence lodged the “Defence Submissions on the variation of Summons Conditions for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali” (the “Defence Submission”),³ arguing that the broad wording of condition (i), as formulated by the Chamber, disproportionately interferes with the ability of the suspects to prepare for future court proceedings and their right to a fair trial, as it “prevents them from contacting directly or indirectly *defence* witnesses or people they believe to be *defence* witnesses”.⁴ Hence, counsel for the Defence requested that the Chamber replace the word “witness” in the said condition with the words “prosecution witness”, thereby affirming the right of the suspects to meet potential Defence witnesses.⁵

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

² 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-01/09-02/11-01.

³ ICC-01/09-02/11-13.

⁴ ICC-01/09-02/11-13, paras 3 and 10.

⁵ ICC-01/09-02/11-13, para. 12.

3. On 28 March 2011, following a decision of the Single Judge,⁶ the Prosecutor submitted the “Prosecution’s Response to the Defence Submissions on the Variation of Summons Conditions for Francis Krimu Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali” (the “Prosecutor’s Response”),⁷ arguing that the suspects lacked legal standing to submit this request.⁸ Additionally, he argues that the conditions imposed by the Chamber do not impugn the rights of the suspects to conduct their investigations or to speak with witnesses in preparation of their defence. Questioning the applicability of article 67(1)(d) of the Rome Statute (the “Statute”) at this stage, he contends that the suspects are assisted by qualified and responsible counsel who may assist and investigate on their behalf without threatening, interfering or tampering with the evidence.⁹ The Prosecutor, therefore, does not see any need for the Chamber to vary the conditions it has imposed on the suspects and requests the Chamber to dismiss the Defence Submission.

4. On 1 April 2011, counsel for the Defence requested the Chamber’s leave to reply to the Prosecutor’s Response, indicating its intention to raise the issue that the summonses, as drafted, are capable of interfering with the suspects’ right to family and freedom of association.¹⁰

I. The Law and its Interpretation

5. The Single Judge notes articles 21(2) and (3), 43(6), 57(3)(c), 58(7), 67, 68(1) and 69(3) of the Statute, rules 17 to 19 and 121(1) of the Rules of Procedure and Evidence (the “Rules”) and regulations 24(5) and 41 of the Regulations of the Court (the “Regulations”). She further takes cognizance of articles 28 and 29 of the Code of Professional Conduct for counsel (the “Code of Professional Conduct”).¹¹

⁶ Pre-Trial Chamber II, “Decision Pursuant to Regulation 24(1) of the Regulations of the Court”, ICC-01/09-02/11-15.

⁷ ICC-01/09-02/11-19. A corrigendum to the Prosecutor’s response was filed the following day, ICC-01/09-02/11-19-Corr.

⁸ ICC-01/09-02/11-19-Corr, paras 1 and 4.

⁹ ICC-01/09-02/11-19-Corr, paras 5 and 6.

¹⁰ ICC-01/09-02/11-31.

¹¹ Adopted at the 3rd plenary meeting on 2 December 2005, by consensus, ICC-ASP/4/Res.1.

6. The Single Judge recalls article 67(1) of the Statute, which reads, in relevant part:

In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(...)

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(...)

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(...)

7. The Single Judge also notes rule 121(1) of the Rules, which stipulates:

A person subject to a warrant of arrest or a summons to appear under article 58 shall appear before the Pre-Trial Chamber, in the presence of the Prosecutor, promptly upon arriving at the Court. Subject to the provisions of articles 60 and 61, the person shall enjoy the rights set forth in article 67. At this first appearance, the Pre-Trial Chamber shall set the date on which it intends to hold a hearing to confirm the charges. It shall ensure that this date, and any postponements under sub-rule 7, are made public.

8. The Single Judge further pays regard to article 43(6) of the Statute, which provides:

The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence

9. The Single Judge wishes to set out first the principles which govern her decision on the Defence Submission before setting out the modalities to be observed by the suspects when complying with the condition concerned.

10. At the outset, the Single Judge recalls that under the Statute, and as enunciated in previous rulings of other Chambers, witnesses are not attributable to either party but are witnesses of the Court.¹² Rather, the witness is a mere bearer of information who provides his or her account of events, which could be incriminating or exonerating, or both, in nature. Thus, the Single Judge emphasizes that a witness is not “owned” by either party but may be called by either the Prosecutor, and/or the Defence or the Chamber *proprio motu* pursuant to its powers under article 69(3) of the Statute, so that the witness provide his or her account of certain events.

11. Further, the Single Judge is aware of the competing interests which need to be balanced in deciding this present request. The Single Judge, on the one hand, is attentive to the fundamental right of the suspects to prepare their defence, which includes approaching witnesses who may provide their account of facts which may serve the defence for the purposes of the relevant proceedings. The Prosecutor’s argument that the suspects do not benefit from the rights under article 67 of the Statute prior to their initial appearance before the Court is flawed and appears to emanate from a misinterpretation of previous rulings of the Chamber relating to the finding that article 58 proceedings are *ex parte* in nature.¹³ To this end, the Single Judge notes that the Chamber had limited the *ex parte* nature of article 58 proceedings until the moment the Chamber would issue summonses to appear. With the 8 March 2011 Decision proceedings have past the article 58 stage,¹⁴ and the persons summoned to appear before the Court have attained procedural standing before the Chamber. Accordingly, as of this moment, the suspects are subjected to

¹² Pre-Trial Chamber I, “Decision on the Practices of Witness Familiarisation and Witness Proofing”, ICC-01/04-01/06-679, para. 26; Trial Chamber I, “Decision Regarding the Practices used to prepare and Familiarise Witnesses for Giving Testimony”, ICC-01/04-01/06-1049, para. 34.

¹³ Pre-Trial Chamber II, “Decision on Application for Leave to Submit *Amicus Curiae* Observations”, ICC-01/09-35, para. 10; Pre-Trial Chamber II, “Decision on the Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor’s Application under Article 58(7)”, ICC-01/09-42, paras 16 *et seq*; Pre-Trial Chamber II, “Decision on Application for Leave to Participate under Articles 58, 42(5), (7)-(8)(a) of the Rome Statute and Rule 34(1)(d) and (2) of the Rules of Procedure and Evidence”, ICC-01/09-47, para. 5.

¹⁴ See also Pre-Trial Chamber II, “Decision on a Request for Leave to Appeal”, ICC-01/09-43, para. 9.

the rights and obligations envisaged by law. The Single Judge is also mindful of the wording of rule 121(1) of the Rules providing that a suspect subject to a summons to appear shall enjoy the rights set forth in article 67 of the Statute, which could be read literally to be applicable only as of the moment of his or her initial appearance before the Pre-Trial Chamber. The Single Judge, however, convinced of the principled consideration as stated above, recalls article 21(3) of the Statute which instructs that the interpretation and application of the law must be consistent with internationally recognized human rights. In light of this, the Single Judge has regard to the existing jurisprudence of, in particular, the European Court of Human Rights to article 6 of the Convention on Protection of Human Rights and Fundamental Freedoms,¹⁵ and thus she concludes that the rights guaranteed under article 67 of the Statute, including access to court, apply as soon as the Chamber has issued the summonses to appear in accordance with article 58(7) of the Statute.

12. On the other hand, the Single Judge is equally cognizant of the obligation to protect witnesses and not to expose them to any threat or risk. This duty is incumbent on all concerned throughout the proceedings, including the Prosecutor, as set forth in articles 54(1)(b) and 68(1) of the Statute; counsel to the Defence, as required under articles 28 and 29 of the Code of Professional Conduct; and the Chamber, as provided in articles 57(3)(c) and 68(1) of the Statute. The same holds true for the suspects themselves, as mirrored in the condition imposed on them in the 8 March 2011 Decision.

13. In light of the above, the Single Judge concludes that a solution should accommodate both legitimate interests, which will not compromise (i) the fundamental right of the suspects to properly prepare their defence, and (ii) the

¹⁵ As to the applicability of article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention"), see European Court of Human Rights, *Case of Eckle v. Germany*, Judgment, 15 July 1982, Application no. 8130/78, para. 73; *Case of Foti and others v. Italy*, Judgment, 10 December 1982, Application no. 7604/76, 7719/76, 7781/77, 7913/77, para. 52; *Case of Salduz v. Turkey*, Judgment, 27 November 2008, Application no. 3639/02, para. 50; *Case of Kravtas v. Lithuania*, Judgment, 18 January 2011, Application no. 1217/06, paras 35-36.

safety and security of witnesses. To this end, the Single Judge draws the attention to article 43(6) of the Statute which provides for the establishment of a specialized Victims and Witnesses Unit (the "VWU") within the Court's Registry, supporting, assisting and advising the Court as a whole on witness and victims' protection issues. This assistance is extended to the Defence as well, as confirmed, *inter alia*, by rules 17(2) and 18(b) of the Rules. When providing its services, the VWU is instructed, according to rule 18(b) of the Rules, to cooperate with all parties impartially and in accordance with the rulings and decisions of the Chambers.

14. In the following, the Single Judge will set out the modalities to be observed by the suspects when complying with the condition concerned. In so doing, she is guided by the tenet not to put the Defence in a disadvantaged position vis-à-vis the Prosecutor but also to subject the Defence to modalities which are strictly necessary and proportionate.

II. Modalities to be observed when complying with the condition concerned

15. The Defence benefits from all "minimum guarantees" as stipulated in article 67 of the Statute. This implies that the Defence may approach, in principle, any person willing to give his or her account of the events in relation to this case. This consent by the potential witness approached must be given voluntarily and knowingly and any party is prohibited from trying to influence his or her decision as to whether or not to agree to be contacted by the Defence. However, before such contact takes place, the Defence is ordered to communicate the name and necessary contact details 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, if necessary. In case security arrangements need to be set up, the VWU shall be responsible for making the necessary arrangements, in consultation with the Defence. Such advice to the Defence shall be rendered 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. In principle, such communication takes

place between the Defence and the VWU only, unless the VWU, based on its assessment, is of the view that such contact could lead to a security risk for the person concerned, thus requiring the Single Judge's intervention. In this case, the VWU is instructed to submit immediately a report to the Single Judge, which will, in turn, address this issue in a separate decision.

16. The Single Judge 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 an advice and assistance rendered by the VWU pursuant to its mandate as set out in rules 17 and, in particular, 18(b) of the Rules, which is, in principle, also undertaken by the Prosecutor. The necessity to establish such a system is owed to the fact that potential witnesses may be vulnerable and in circumstances to which the Defence may not be privy and the fact that the suspects must comply with the condition concerned imposed on them. This does also not represent an unnecessary or disproportionate violation of the right to family or freedom of association as indicated by the Defence in its request to reply to the Prosecutor's Response.

17. Lastly, the Single Judge recalls counsels' obligations arising out of articles 28 and 29 of the Code of Professional Conduct and orders that any difficulties in the implementation of this decision shall be brought immediately to her attention.

18. The Single Judge notes the issues raised by counsel of the Defence on 1 April 2011 which they intend to address in a further reply to the Prosecutor's Response with the leave of the Chamber pursuant to regulation 24(5) of the Regulations. In light of the foregoing, the Single Judge does not deem it necessary to receive further submissions on an issue which has been adequately set out in the two submissions of the parties to these proceedings.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) **decides** to retain condition (i) as set out in the 8 March 2011 Decision while **ordering** the Defence and the VWU to comply with the modalities to be observed and as set out in part II of this decision;
- b) **orders** that any difficulties in the implementation of this decision shall be brought immediately to the attention of the Single Judge;
- c) **rejects** the request of the Defence dated 1 April 2011 to reply to the Prosecutor's Response.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Monday, 4 April 2011

At The Hague, The Netherlands