

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 20 July 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 Document

**Decision Requesting the Parties to Submit Information for the Preparation of the
Confirmation of Charges Hearing**

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 and Kennedy Ogetto

Counsel for Uhuru Muigai Kenyatta
Steven Kay and Gillian Higgins

Counsel for Mohammed Hussein Ali
Evans Monari 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") of the International Criminal Court (the "Court"),¹ renders this decision requesting the parties to submit information with a view to ensuring the proper preparation of the confirmation of charges hearing.

1. On 8 March 2011, the Chamber, by majority, decided to summon Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali to appear before the Court.² Pursuant to this decision, the suspects voluntarily appeared before the Court at the initial appearance hearing held on 8 April 2011, during which, *inter alia*, the Chamber scheduled the commencement of the confirmation of charges hearing for Wednesday, 21 September 2011.³

2. 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", whereby the Single Judge, *inter alia*, established a calendar for the conduct of the disclosure proceedings (the "Calendar for Disclosure").⁴ The Single Judge established three deadlines, depending on the time when each piece of evidence had been collected by the Prosecutor, either for the disclosure to the Defence of the evidence for which no redaction was needed or for the request to the Chamber to authorize properly justified proposals for redactions. The Single Judge also ordered the Prosecutor to disclose to the Defence the evidence for which redactions were to be requested no later than five days after the Chamber's decision regarding such redactions.

3. On 2 May 2011, the Prosecutor filed the "Prosecution's Application for Extension of Time Limit for Disclosure",⁵ wherein, *inter alia*, he informed the Chamber that, at

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 Summons 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-T-1-ENG, from page 13, line 25 to page 14, line 18.

⁴ ICC-01/09-02/11-64.

⁵ ICC-01/09-02/11-82.

that moment of time, 88% of his evidence had been collected before 15 December 2010 – therefore falling under the first group of evidence – while the 0.002% had been collected between 15 December 2010 and 31 March 2011 – thus falling under the second category; 12% of the Prosecutor’s evidence had instead been collected since 31 March 2011. Consequently, and in accordance with the Calendar for Disclosure, the Prosecutor was requested, by 24 June 2011, to disclose or to apply for redactions to what at the time of his submission dated 2 May 2011 constituted almost the entirety of the evidence on which he intended to rely for the purposes of the confirmation of charges hearing.

4. On 3 June and 24 June 2011, the Prosecutor disclosed to the Defence all the evidence on which he intends to rely for the purposes of the confirmation hearing that was collected before 31 March 2011 and for which, in his view, no redaction was necessary.⁶

5. On 3 June 2011, in compliance with the Calendar for Disclosure, the Prosecutor submitted his first application for redactions with respect to the evidence collected before 15 December 2010,⁷ while on 24 June 2011 he submitted his second application to the same effect with respect to the evidence collected between 15 December 2010 and 31 March 2011.⁸

6. On 8 and 19 July 2011 the Single Judge issued, respectively, the first and the second decision on the Prosecutor’s requests for redactions, whereby she, *inter alia*, ruled on almost all requests for redactions advanced by the Prosecutor within the first two deadlines established in the Calendar for Disclosure.⁹

⁶ ICC-01/09-02/11-100 and annexes attached thereto and ICC-01/09-02/11-135 and annexes attached thereto.

⁷ ICC-01/09-02/11-101-Conf-Exp and annexes attached thereto. A public redacted version of the application has also been filed by the Prosecutor, see ICC-01/09-02/11-101-Red.

⁸ ICC-01/09-02/11-136 and annexes attached thereto. A public redacted version of the application has also been filed by the Prosecutor, see ICC-01/09-02/11-136-Red.

⁹ Pre-Trial Chamber II, “First Decision on the Prosecutor’s Requests for Redactions and Related Requests”, ICC-01/09-02/11-165-Conf-Red; Pre-Trial Chamber II, “Second Decision on the Prosecutor’s Requests for Redactions”, ICC-01/09-02/11-178-Conf-Exp.

7. The Single Judge notes articles 61, 68 and 69(4) of the Rome Statute (the “Statute”) and rules 63, 76, 79, 81, 100, 121 and 122(1) of the Rules of Procedure and Evidence (the “Rules”).

8. At the outset, the Single Judge recalls the limited purpose and scope of the confirmation of charges hearing and, accordingly, the necessity that the parties, for the purposes of this hearing, select their best pieces of evidence in order to convince the Chamber that the charges brought against the suspects shall be confirmed or, conversely, that they shall not. In this respect, the Single Judge notes the provision of article 61(5) of the Statute that expressly states that, for the purposes of the confirmation of charges hearing, “the Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at trial”. Hence, according to this provision, although oral testimony is permitted, the evidentiary debate at the confirmation of charges hearing can be based on witnesses’ written statements. In the same vein, article 68(5) of the Statute and rule 81(6) of the Rules permit that, for the purposes of the confirmation of charges hearing, both the Prosecutor and the Defence submit only a summary of evidence with a view to preventing disclosure of information that might put at risk witnesses or members of their families.

9. Therefore, considering the nature and purpose of the confirmation of charges hearing as well as the limited evidentiary debate to take place therein, the Single Judge anticipates that when the parties intend to rely on witnesses for the purposes of the confirmation hearing, they would normally do so through the use of their statements or transcripts of their recorded interviews. Consequently, the Single Judge expects the parties to rely on live witnesses only as far as their oral testimony at the hearing cannot be properly substituted by documentary evidence or witnesses’ written statements. Furthermore, the Single Judge draws the parties’ attention to the fact that resorting to *viva voce* witnesses only to the extent necessary would permit the confirmation of charges hearing to be conducted in a more expeditious manner.

10. Notwithstanding the above, the parties may still decide to call witnesses to testify orally at the confirmation of charges hearing. In this regard, the Single Judge wishes to inform the parties that, for the proper preparation of the confirmation of charges hearing, the Prosecutor and the Defence teams must timely indicate whether they intend to call live witnesses at the hearing. Indeed, the Single Judge has been made aware by the Victims and Witnesses Unit that a period of 6 weeks before the commencement of the confirmation hearing is essential in order for the necessary arrangements regarding the witnesses' testimony to be made. Accordingly, and considering that the confirmation hearing is scheduled to commence on 21 September 2011, the Single Judge deems it necessary that the parties inform the Chamber, no later than Friday, 5 August 2011, as to whether they intend to call *viva voce* witnesses to testify at the confirmation of charges hearing.

11. The Single Judge wishes to inform the parties that, should they fail to communicate their intention to call witnesses by the deadline hereby established, it will not be possible to finalize the necessary arrangements before the confirmation of charges hearing. As a result, *viva voce* testimony of witnesses for whom no information to that effect will be submitted within the established deadline will not be permitted.

12. The Single Judge further notes the provisions of article 69(4) of the Statute and rule 63(2) of the Rules, both entrusting the Chamber with the authority to make determinations as to the relevance or admissibility of evidence. In this respect, the Single Judge deems it necessary that, in their submissions, the parties also provide information as to the proposed subject matter and scope of the prospective questioning of each witness. This will allow the Chamber to exercise its powers with a view to ensuring the proper organization of the proceedings, including to making any necessary determinations as to the relevance and admissibility of the evidence to be obtained through the proposed oral testimony of witnesses.

13. The Single Judge considers that both the Prosecutor and the Defence teams will be able to comply with the present order given that all the relevant information for an informed decision to be made will be in their possession well in advance of the deadline hereby established. In particular, the Single Judge expects that the Prosecutor, being the triggering force of the proceedings, has carefully reviewed his evidence since the time he approached the Chamber with his application under article 58(7) of the Statute and, accordingly, that he has been having sufficient time for a determination as to the need to call live witnesses to be promptly made. With respect to the Defence teams, the Single Judge notes that they have already been provided – or will be provided in the immediate future – with almost the entirety of the Prosecutor’s evidence. In light of this and considering that the Defence teams have been conducting their own investigation, the Single Judge believes that they are in a position to indicate by the established deadline whether they intend to call live witnesses at the confirmation of charges hearing and to provide the Chamber with the relevant accompanying information.

14. Finally, the Single Judge recalls the Chamber’s initiative within the framework of rule 100 of the Rules enquiring whether conducting the confirmation of charges hearing in the Republic of Kenya could be considered as an option.¹⁰ The Single Judge takes note of the relevant observations submitted, pursuant to a request of the Chamber¹¹, by the parties and by the Office of Public Counsel for Victims (the “OPCV”) on behalf of the victims who had applied for participation in the present case.¹² All parties as well as the OPCV raise concerns with respect to the security situation in the Republic of Kenya should the confirmation of charges hearing take place there. Bearing in mind that the decision whether or not *in situ* hearings may

¹⁰ Pre-Trial Chamber II, “Decision Requesting Observations on the Place of the Proceedings for the Purposes of the Confirmation of Charges Hearing”, ICC-01/09-02/11-102.

¹¹ *Ibid.*

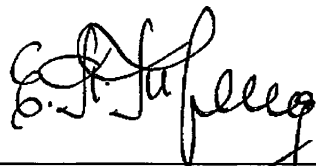
¹² ICC-01/09-02/11-119 – observations submitted on behalf of Mohammed Hussein Ali; ICC-01/09-02/11-120 – observations submitted on behalf of Francis Kirimi Muthaura; ICC-01/09-02/11-121 – observations submitted on behalf of Uhuru Muigai Kenyatta; ICC-01/09-02/11-122 – observations submitted by the Prosecutor; ICC-01/09-02/11-123 – observations submitted by the OPCV on behalf of the applicant victims.

take place lies ultimately with the plenary of Judges according to rule 100 of the Rules, the Single Judge, however, wishes to inform the parties and the applicant victims that the Chamber, for its part, acknowledging their concerns as expressed in the respective submissions, will not consider further the option of conducting the confirmation of charges hearing in the Republic of Kenya. The Chamber has therefore ensured that this concern is submitted to the competent entities entrusted to render a decision upon this question according to rule 100 of the Rules. In any event, absent any decision to the contrary, the confirmation of charges hearing in the present case will take place at the seat of the Court in The Hague.

FOR THESE REASONS, THE SINGLE JUDGE

ORDERS the Prosecutor and the Defence teams to indicate by **Friday, 5 August 2011** whether they intend to call live witnesses at the confirmation of charges hearing and, if so, to submit information detailing the subject matter and the scope of the proposed testimony of each witness.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Wednesday, 20 July 2011

At The Hague, The Netherlands