

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **5 August 2011**

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul, Judge
Judge Cuno Tarfusser, 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

with CONFIDENTIAL EX PARTE, DEFENCE ONLY ANNEX

**Defence Submissions on “Decision Requesting the Parties to Submit Information
for the Confirmation of Charges Hearing” (ICC-01/09-02/11-181)**

Source: Defence of General Mohammed Hussein Ali

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

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Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Counsel for Francis Kirimi Muthaura:

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Counsel for Uhuru Muigai Kenyatta:

Steven Kay QC and Gillian Higgins

Counsel for Mohammed Hussein Ali:

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

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**

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Victims and Witnesses Unit

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Other

Introduction

1. On 20 July 2011, the Single Judge ordered the parties to indicate whether they intended 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 (hereinafter the “20 July 2011 Decision”)
2. Mindful of the need for a careful balance between General Ali’s rights to have adequate resources for his Defence and his right to an expeditious trial, the Defence submits a list of 8 proposed witnesses together with the subject matter and scope of their proposed testimonies for consideration.
3. In addition to the proposed *viva voce* witnesses, General Ali reserves his right to give live testimony during the confirmation of charges hearing.
4. Moreover, the Defence submits that the proposed *viva voce* witnesses are only provisional as it has not completed its investigations and also pending the filing of the Document Containing Charges. Further, the Defence reserves its right to call additional witnesses or substitute the proposed *viva voce* witnesses depending on any further evidence disclosed by the Prosecutor which is not in possession of the Defence at the moment.

Submissions

5. The Defence submits the proposed live witnesses bearing in mind that article 67(1)(e) gives a right to the suspect/accused “to examine and 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.”
6. The Defence is alive to the fact that this right to call *viva voce* witnesses has been recognized by the Court. In its Decision of 15 May 2006, Pre-Trial Chamber 1 confirmed firstly, that Article 67 applied to a defendant in the pre-

confirmation phase, and secondly, that the rights set out in Article 67 should be viewed as the minimum yardstick, which the Chamber may be required to exceed in order to secure the right to a fair hearing.¹

7. The Appeals Chamber has also confirmed that the principles of a fair trial apply to the preliminary stages of the proceedings, including the investigations phase.²
8. The Defence, therefore, in asserting this right under the Statute has chosen a strategy that involves the presentation of *viva voce* witnesses whom it believes are necessary to challenge the Prosecution's case. The Defence will demonstrate in more detail (in the confidential *ex parte* Annex) that it is necessary to call the proposed witnesses in arguing its case. The Defence justifies the proposed witnesses both on the legal submissions herein and also on the more detailed *ex parte* Annex detailing the subject matter and scope of the proposed live witnesses' testimony, as requested by the Single Judge.
9. While appreciating the Single Judge's expectation on 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,"³ the Defence submits that the particular circumstances of the case against General Ali and in particular the scope of his alleged role in the commission of the alleged crimes as presented by the Prosecutor necessitate the calling of the proposed witnesses in addition to submission of documentary evidence and written statements.
10. The Defence submits that the strategy it chooses to counter the Prosecution case is independent of whatever strategy the Prosecution pursues in

¹ Pre-Trial Chamber I, Prosecutor v. Lubanga, Decision on the final system of disclosure and the establishment of a timetable, ICC-01/04-01/06-102, 15 May 2006, para. 97.

² Appeals Chamber, Situation in DRC, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para 11.

³ Para 9, 20 July 2011 Decision

presenting its case. Whether or not the Prosecution will present *viva voce* witnesses at the confirmation, the Defence has adopted a strategy that best fits its case. Furthermore, the Defence believes the proposed live witnesses to be called at the confirmation hearing will best present its counter-position, in addition to other evidence to be relied upon. Each proposed witness has been carefully chosen to cover the suggested subject matter and scope while keeping in mind the limited scope of the confirmation of charges hearing.

11. The Defence further notes that the ICTY Appeals Chamber has underscored that each defence team has the right to pursue its individual strategy, in a manner which is independent of the strategic choices of other defence teams in the same case.⁴ The Defence submits that it has chosen a strategy that best answers every accusation leveled against General Ali as demonstrated in Annex A to this filing, which clearly lays down the scope of the proposed testimony for the proposed witnesses.

12. Moreover, the Defence asserts that the proposed live testimonies will ensure that General Ali is granted a fair trial during the confirmation hearing. While the Defence agrees with the Single Judge that “the principle of expeditiousness is one of the core components of the fairness of the proceedings and one of the main rights enjoyed by the suspects themselves”⁵, the Defence, however, respectfully submits that in the event of a conflict between the need to have an expeditious trial and the Defence’s right to call witnesses and to have adequate time and facilities to prepare for its Defence, the latter should take precedence. In this regard, the Defence notes the provisions of numerous international human rights instruments, in particular Article 6(1) of the European Convention on Human Rights, Article 8(1) of the

⁴ See *Prosecutor v. Prlic et al*, ‘Decision on Slobodan Praljak’s Appeal Against the Trial Chamber’s Decision of 16 May 2008 on Translation of Documents’, 4 September 2008 IT-04-74-AR73.9 at paras 16 and 20. See also *Prosecutor v. Prlic et al*, Decision On Defendants Appeal Against ‘D cision Portant Attribution du Temps   la D fense pour la Pr sentation des Moyens   D charge’ at para 34 where the Appeals Chamber also held that each “Accused should be allowed time to respond to the common elements of the Prosecution case as they relate to his particular case”

⁵ Pre Trial Chamber II, *Prosecutor v. William Ruto et al*, Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of Viva Voce Witnesses, ICC-01/09-01/11-221, para. 12

American Convention on Human Rights and Article 7(l)(d) of the African Charter on Human and Peoples' Rights. As observed by Judge Trechsel, "A cursory glance at the Convention, immediately shows an apparent contradiction between Article 6 para 1, which guarantees the right to trial 'within a reasonable time' and Article 6 para 3(b) which grants 'adequate time' for the preparation of the defence. The general guarantee calls for speed, the specific one protects against speed. [...] Of course there is no contradiction between article 6 paras 1 and 3. The priority lies clearly with the *lex specialis* of Article 6 para 3(b)."⁶

Confidentiality

13. The Annex to this filing has been submitted as Confidential *ex parte*, Defence only, as it contains indicative information to the Chamber which is provisional and therefore cannot be disclosed to the Prosecution.

Conclusion

14. For the reasons advanced herein and the information provided in the annex to this filing, the Defence requests to be allowed to call all the proposed live witnesses.

Respectfully submitted,



Evans Monari and Gershom Otachi Bw'omanwa
On behalf of Mohammed Hussein Ali

Dated this 5th day of August, 2011

At Nairobi, Kenya

⁶ S Trechsel Human Rights in Criminal Proceedings (Oxford University Press 2006) at page 216.