

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 10 August 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

Urgent

**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**

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, Kennedy Ogetto and
Essa Faal

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

Other

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 hereby renders this order to the Defence teams of Francis Kirimi Muthaura (“Mr. Muthaura”), Uhuru Muigai Kenyatta (“Mr. Kenyatta”) and Mohammed Hussein Ali (“Mr. Ali”) (collectively the “Suspects”) to reduce the number of witnesses they intend to call to testify at the confirmation of charges hearing.

The present order is classified as “public” although it refers to the existence of documents and, as the case may be, to a limited extent to their content, which have been submitted and are currently treated as confidential *ex parte*, Defence. The Single Judge considers that the references made in the present order are required by the principle of publicity and judicial reasoning. Moreover, those references are not inconsistent with the nature of the documents referred to and have been kept to a minimum.

I. Procedural History

1. On 8 March 2011, the Chamber, by majority, decided to summon the Suspects to appear before it.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 set the date for the commencement of the confirmation of charges hearing for 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” (the “Calendar for Disclosure”), whereby she, *inter alia*, ordered the Suspects’ Defence teams to “disclose to the Prosecutor the evidence they intend to present at the

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-T-1-ENG.

confirmation hearing, if any, and to file the list of such evidence, no later than Monday, 5 September 2011".⁴

3. 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 (the "20 July 2011 Decision").⁵

4. On 5 August 2011, in compliance with the 20 July 2011 Decision, the Prosecutor indicated his intention not to call any live witnesses at the confirmation of charges hearing.⁶ On the same date, the Suspects' Defence teams submitted their respective lists of *viva voce* witnesses, specifying, as requested, the subject-matter and the scope of the proposed testimony for each of those witnesses.⁷ In particular, the Defence for Mr. Muthaura indicated its intention to call a maximum of nine witnesses;⁸ the Defence for Mr. Kenyatta a maximum of four witnesses;⁹ and the Defence of Mr. Ali a maximum of ten witnesses.¹⁰

5. In their submissions, the Defence team of Mr. Ali contended that the particular circumstances of the case against him "necessitate the calling of the proposed witnesses in addition to the submission of documentary evidence and written statements",¹¹ in line with the right of the suspect to obtain the attendance and examination of witnesses on his or her behalf. In addition, the Defence for Mr. Ali asserted 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

⁴ Pre-Trial Chamber II, "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", ICC-01/09-02/11-64, operative part, letter (c)(i).

⁵ Pre-Trial Chamber II, "Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing", ICC-01/09-02/11-181, para. 8.

⁶ ICC-01/09-02/11-218.

⁷ ICC-01/09-02/11-215 and ICC-01/09-02/11-215-Conf-Exp-Anx; ICC-01/09-02/11-216 and ICC-01/09-02/11-216-Conf-Exp-AnxA; ICC-01/09-02/11-219 and ICC-01/09-02/11-219-Conf-Exp-Anx.

⁸ ICC-01/09-02/11-215-Conf-Exp, para. 3; and ICC-01/09-02/11-223,

⁹ ICC-01/09-02/11-216-Conf-Exp-AnxA.

¹⁰ ICC-01/09-02/11-219-Conf-Exp-Anx.

¹¹ ICC-01/09-02/11-219, para. 9.

prepare for its defence, the latter should take precedence".¹² The Defence of Mr. Muthaura also averted that calling the proposed witnesses will "strike a fair balance between the organization of the proceedings without limiting the Defence's ability to present its case and respond to the alleged charges".¹³

6. The Defence team of Mr. Kenyatta supported the calling of their proposed witnesses taking into consideration: (i) the right of the suspect to object to the charges, to challenge the evidence presented by the Prosecutor and to present evidence pursuant to article 61(6) of the Rome Statute (the "Statute");¹⁴ (ii) the absence of any provision in the Statute limiting or circumscribing the right of the suspect to challenge evidence and to present evidence, and in particular to rely on live witnesses only as far as their oral testimony cannot be properly substituted by documentary evidence;¹⁵ and (iii) the assertion that the Defence "is in the best position to determine the necessity for live testimony" at the confirmation of charges hearing.¹⁶

7. On 9 August 2011, the Defence team of Mr. Muthaura filed the "Defence Request for Permission to Add an additional Witness to its List of vive voce witnesses at the Confirmation Hearing Pursuant to Regulation 35 of the Regulations of the Court" (the "Request for Extension of Time"),¹⁷ wherein it requested the Chamber to grant an extension of time limit so as to include an additional witness among those proposed for the purposes of live testimony at the confirmation of charges hearing.

II. The Applicable Law

8. The Single Judge notes articles 21(1)(a) and (3), 61(5) and (6), 67(1), 68(5) and 69(4) of the Statute, rules 63(2), 81(6), 121(5) and 122(1) of the Rules of Procedure and

¹² ICC-01/09-02/11-219, para. 12.

¹³ ICC-01/09-02/11-215, para. 6.

¹⁴ ICC-01/09-02/11-216, para. 8.

¹⁵ ICC-01/09-02/11-216, paras 8, 16.

¹⁶ ICC-01/09-02/11-216, para. 19.

¹⁷ ICC-01/09-02/11-223 and ICC-01/09-02/11-223-Conf-Exp-AnxA.

Evidence (the “Rules”), and regulations 23 *bis* and 35(2) of the Regulations of the Court (the “Regulations”).

III. The Order to the Defence to Reduce Its List of *Viva Voce* Witnesses

9. Before addressing the merit relating to the subject matter of the proposed live witnesses for the purposes of the confirmation of charges hearing, the Single Judge will deal with the Request for Extension of Time. At the outset, the Single Judge notes that, in their submission, the Defence of Mr. Muthaura erroneously referred to regulation 37(2) of the Regulations of the Court as the legal basis for their request for extension.¹⁸ The Single Judge, however, will adjudicate the issue in light of the relevant provision, which is regulation 35(2) of the Regulations, dealing with extension of time limits after the lapse of deadlines.

10. The Single Judge takes into consideration the submission of the Defence of Mr. Muthaura, according to which they were only able to identify the evidence of the proposed witness on 6 August 2011, one day after the deadline established for the submission of the list of *viva voce* witnesses.¹⁹ In light of this information and considering the sensitivity and relevance of the core matter of the present order, the Single Judge deems it appropriate to grant the Request for Extension of Time. Consequently, the request to introduce the additional proposed live witness, as outlined in the submissions and in the Annex attached thereto, will be examined alongside the other requests concerning the proposed live witnesses as indicated by the three Defence teams in their initial filings.

11. Turning to the merits, the Single Judge recalls the 20 July 2011 Decision, in which she explained that, on the basis of the limited scope and purpose of the confirmation of charges hearing, her expectations are that the parties, being cognizant of the nature of the present proceedings, select their best pieces of evidence in order to

¹⁸ ICC-01/09-02/11-223, para. 9.

¹⁹ ICC-01/09-02/11-223, para. 5.

support their respective cases.²⁰ The Single Judge reiterates that “the confirmation hearing has a limited scope and by no means can it be seen as an end in itself, but it must be seen as a means to distinguish those cases that should go to trial from those that should not go to trial”. Whilst this mechanism is designed to protect the rights of the Defence against wrongful and wholly unfounded charges, the pre-trial stage also is governed by the principle of judicial economy “in terms of preventing those cases that do not meet the requisite evidentiary standard at the pre-trial stage from proceeding to trial”.²¹

12. As also stated in the 20 July 2011 Decision, a series of provisions make clear that, for the purposes of the confirmation of charges hearing, the parties may rely on documentary evidence and written witnesses’ statements – including statements to be presented in the form of summaries. In this respect, reference is also made to articles 61(5) and 68(5) of the Statute and rule 81(6) of the Rules. In light of the above, in the 20 July 2011 Decision, the Single Judge concluded that:

[C]onsidering 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.²²

13. The Single Judge notes that the suspects indicate their intention to call a number of *viva voce* witnesses, the total amount of which reaches a maximum of twenty-three. However, this number of live witnesses is *per se* manifestly excessive and disproportionate for the purposes of the confirmation of charges hearing. If all the witnesses indicated by the parties were permitted to testify orally, the confirmation

²⁰ Pre-Trial Chamber II, “Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing”, para. 8.

²¹ Pre-Trial Chamber I, “Decision on the Confirmation of Charges”, ICC-02/05-03/09-121-Corr-Red, para. 31.

²² Pre-Trial Chamber II, “Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing”, para. 9.

of charges hearing would, ultimately, constitute a mere anticipation of the trial stage of the case, only distinguishable from the latter for the different standard of proof established by articles 61(7) and 66(3) of the Statute. However, this is not the case at this stage of the proceedings and if the pre-trial stage is to be accorded any meaning within the procedural system as established by the drafters of the Statute, the number of witnesses indicated by the Defence should be significantly reduced.

14. In this respect, the Single Judge wishes to make clear that the issue *sub judice* is not whether the Defence teams should be authorized to rely on the testimonies of the witnesses that they have identified, upon review of the Prosecutor's evidence and upon conducting their own investigation, to be relevant for their respective procedural strategies. Rather, the matter under consideration is whether, and to what extent, such testimonies must be elicited through the *oral* questioning of such witnesses at the confirmation of charges hearing and could not, more appropriately, given the nature and purposes of the confirmation of charges hearing, be presented in the form of written statements.

15. It is also to be clarified that it is not the Single Judge's intent to interfere with the strategy of the Defence. However, the Single Judge recalls her duty to organize the proceedings, taking due account of their nature and scope. Indeed, her duty entails making a delicate balance of competing interests between, on the one hand, the rights of the Suspects to conduct their defence for the purposes of the confirmation of charges hearing, including by way of calling witnesses to testify in open court, and on the other hand, the proper organization of the entire proceedings, with a view to ensuring, *inter alia*, their expeditiousness. This requires the endorsement of an approach towards handling these proceedings in a manner that does not compromise one element in favor of the other. In this regard, the Single Judge is not persuaded by the argument put forward by the Defence of Mr. Ali that all the witnesses indicated should be allowed to orally testify at the confirmation of charges

hearing since the principle of expeditiousness should not prevail over the rights of the defence.²³ Several reasons make such an argument unconvincing.

16. First, the principle of expeditiousness is not different from, let alone incompatible with, the rights of the defence. To the contrary, 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. In this respect, the Single Judge refers to the rights of the Suspects “to be tried without undue delay” as enshrined in article 67(1)(c) of the Statute and recognized as one of the paramount rights according to the well-established international human rights standards.²⁴ Thus, in resolving the matter *sub judice*, the Single Judge does not consider the principle of expeditiousness of the proceedings to be in conflict with the “rights of the defence”, as alleged by Mr. Ali.

17. Secondly, the Single Judge notes that the right to be tried without undue delay is enjoyed by the three Suspects in the present case equally. They cannot thus be mutually and unduly prejudiced by the procedural strategy of one another, resulting in a burden on the hearing on the confirmation of the charges brought against the Suspects concomitantly.

18. Thirdly, the Single Judge notes that the rights of the defence at the confirmation of charges hearing that are of particular relevance for the matter under consideration are provided for by article 61(6) of the Statute. The said provision clarifies that, at the confirmation hearing, the Defence may: (i) object to the charges; (ii) challenge the evidence presented by the Prosecutor; and (iii) present evidence. These rights cannot be denied to the Suspects and the Single Judge has the responsibility to put the Defence in a position to meaningfully exercise them. However, it is nowhere provided that the Defence shall exercise the said right *exclusively* by way of calling live witnesses at the hearing. In other words, nothing in the Court’s statutory

²³ ICC-01/09-02/11-219, para. 12.

²⁴ See article 6(1) of the European Convention on Human Rights, article 8(1) of the American Convention on Human Rights and article 7(1)(d) of the African Charter on Human and Peoples’ Rights.

provisions give precedence to the principle of orality at the pre-trial stage. This view finds support in the Appeals Chamber's recent jurisprudence according to which different evidentiary rules apply between pre-trial and trial phases and "the rules regarding orality in the pre-trial phase are more relaxed than at trial".²⁵ Indeed, according to article 61(5) of the Statute, 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". By contrast, article 69(2) of the Statute stipulates that, at trial, "the testimony of a witness [...] shall be given in person", and "witness statements may only be introduced under Rule 68 of the Rules [...] if the strict conditions of that rule are met".²⁶ Furthermore, live testimony has a significant impact on the organization of the confirmation of charges hearing and, more generally, on the conduct of the proceedings.

19. Thus as already clarified above, the legal instruments of the Court permit that, at the stage of the confirmation of charges hearing, witnesses' testimonies be introduced in writing into the record of the case. Therefore, given the Suspects' opportunity to rely on other types of evidence, the proper employment of the rights of the Suspects to object the charges, challenge the evidence presented by the Prosecutor and present evidence, contrary to the assertion of Mr. Kenyatta's Defence team, is not preconditioned on the possibility to call an unlimited number of *viva voce* witnesses or to rely on as many live witnesses as would correspond to each and every legal elements for both the crimes and the form of the individual responsibility with which the Suspects are charged.

20. The Single Judge considers therefore that, whilst it falls within the realm of the Defence teams to decide their best strategy in order to serve the interests of the

²⁵ Appeals Chamber, "Judgment on the appeals of Mr Jean Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecutor's list of evidence'", ICC-01/05-01/08-1386, para. 80.

²⁶ Appeals Chamber, "Judgment on the appeals of Mr Jean Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecutor's list of evidence'", ICC-01/05-01/08-1386, para. 80.

Suspects, this does not mean that all the evidence to be presented needs to be obtained through *viva voce* witnesses.

21. In light of the above, the Single Judge is of the view that the equal rights of the Suspects in the present case are properly respected if their Defence teams were ordered to reduce the number of *viva voce* witnesses to be called at the confirmation hearing and rely, as may be deemed necessary, on the written statements of other witnesses without a need to call them to testify live before the Chamber.

22. In addition to the arguments presented above, the Single Judge notes the assertions advanced by the Suspects' Defence teams and in particular, the Defence team of Mr. Muthaura, that the proposed live testimony of witnesses at the confirmation of charges hearing will avoid duplication and repetition of evidence.²⁷ In the view of the Single Judge, this does not appear to be the case. The Single Judge has reviewed the scope and the subject-matter of the proposed questioning of each witness and has identified a duplication of the evidence that each Defence team intends to obtain through the oral testimonies of such witnesses. The Single Judge will hereunder provide some examples of such duplication.

23. First of all, from the list of witnesses provided by the Defence of Mr. Muthaura, it appears that witnesses 1 and 2 would be called to testify on the same subject-matter. Similarly, witnesses 3 and 4 would be questioned on the very same issue, which is captured by the evidence to be adduced by witness 8. As far as the witnesses proposed by the Defence of Mr. Kenyatta are concerned, the Single Judge notes that, although witnesses 1 to 3 would testify about distinct events, the subject-matter of their evidence is essentially the same. Finally, the Single Judge observes that the Defence of Mr. Ali itself recognizes that witnesses 3 and 4, and witnesses 7 and 8, respectively, will cover the same area in their testimony.

24. With a view of exercising her inherent power to organize the proceedings in such a manner which properly balance the different competing interests involved and

²⁷ ICC-01/09-02/11-215, para. 4.

upon careful review of the evidence to be adduced by the proposed witnesses as indicated by the Defence teams of the Suspects, the Single Judge considers that reducing the number of such witnesses to a maximum of two for each suspect would still permit that the Defence meaningfully exercise its rights provided for by article 61(6) of the Statute, in light of the considerations expressed above.

25. The Single Judge is cognizant that it does not fall within her responsibility and power to identify those witnesses who should be chosen among those previously inserted in the Suspects' list of witnesses; rather, the choice lies with the Defence.

26. That said, the Single Judge expresses her confidence that qualified and experienced counsels, meeting the requirements to appear before the Court, would be able, upon review of the evidence disclosed and upon conducting their own investigation, to identify the crucial points of the case and to properly exercise their defence in a focused manner, by way of selecting those live witnesses who are of greatest significance in light of their respective strategy. This could be the case, for example, for those witnesses who are expected to testify in relation to a large number of facts related to several elements of the crimes charged and/or to provide information contesting those pieces of the Prosecutor's evidence deemed to be the weakest. In this respect, needless to say, if even one of the cumulative constituent elements of the crimes charged is not established to the required threshold under article 61(7) of the Statute, this would be sufficient for the Chamber to decide not to confirm the charges. The burden of proof lies indeed with the Prosecutor who is statutorily called, pursuant to article 61(5) of the Statute, to support each charge – and therefore each and every constituent element of the crimes and the mode of liability as charged – with sufficient evidence to convince the Chamber to the requisite threshold.

27. As stated earlier, this is, however, without prejudice to the rights of the Suspects' Defence teams to rely, for the purposes of the confirmation of charges hearing, upon all written witnesses' statements that are of significance for their respective case,

subject to the Chamber's determination as to their relevance or admissibility within the meaning of article 69(4) of the Statute and rule 63(2) of the Rules.

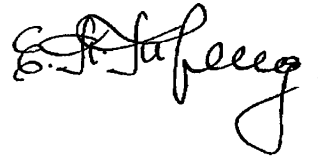
28. In light of the foregoing, the Single Judge deems it essential that the Defence teams submit an amended list of the witnesses they intend to call to testify live at the confirmation of charges hearing, indicating not more than two *viva voce* witnesses for each suspect and detailing their names and the scope and subject-matter of their proposed questioning. Furthermore, the Single Judge wishes to clarify that the present order does not prejudice the right of the Suspects to make an unsworn statement in their defence, pursuant to article 67(1)(h) of the Statute.

FOR THESE REASONS, THE SINGLE JUDGE

a) grants the Request for Extension of Time;

b) orders the Suspects' Defence teams to reduce the number of the witnesses they intend to call to testify at the confirmation of charges hearing to a maximum of two witnesses for each suspect and to submit, by no later than **Monday, 15 August 2011** an amended list of *viva voce* witnesses, indicating their names and the scope and subject-matter of their proposed questioning.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Wednesday, 10 August 2011

At The Hague, The Netherlands