

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/09-02/11**
Date: **16 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

**Defence Request for Extension of Time Pursuant to Regulation 35(2) of the
Regulations of the Court**

Sources: Defence Team of Ambassador Francis Kirimi Muthaura

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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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**

States' Representatives

Amicus Curiae

REGISTRY

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Ms. Silvana Arbia

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. On 12 August 2011, the Single Judge granted an extension of time for filing observations to applications for participation in the proceedings, to 16 August 2011.¹
2. The Defence of Ambassador Francis K. Muthaura (“Defence”) sought to comply with the Single Judge’s Order, but due to circumstances beyond its control, it could not file within the time limit.
3. The Defence transmitted its filing and various annexes appended thereto to the Court Management Section (“CMS”) between 4:09 p.m and 4:15 p.m. More specifically, the Defence transmitted its main filing at 4:09 p.m. Annexes 1, 3 and 4 appended to the filing were transmitted at 4:10 p.m and Annex 2 was transmitted at 4: 15 p.m.
4. The Defence regrets this delay in submission of approximately 20 minutes. The Defence submits that exceptional circumstances warranting the exercise of the Single Judge’s discretion in granting an extension of time exist in this case, and respectfully requests that the Single Judge extend the time limit for receipt of the Defence’s Observations and related annexes by 20 minutes. This request is made pursuant to Regulation 35(2) second sentence of the Regulations of the Court (“Regulations”).²

II. Exceptional Circumstances Justifying Extension of Time Limit

(A) The Relatively Minimal Delay in the Defence’s Filing was due to Technical Issues beyond the Defence’s Control

5. In the processing and finalisation of its Observations and related annexes, the Defence encountered certain technical issues which account for the approximately 20 minute delay in submitting the filing and annexes to CMS.

¹ ICC-01/09-02/11-234, para. 18

² The Defence does not file this Request as “Urgent” as, given the context of this filing, no “urgent measures ” need be taken in accordance with Regulation 24(3) of the Regulations of the Registry.

First, as the Single Judge may be aware, for reasons of security, communication of court filings and evidence between Defence teams on the one hand, and the Court on the other, is generally conducted through the official ICC-EPN and ICC e-mail systems, which have limitations in their capacity to transmit emails, including any attachments, larger than approximately 4 megabytes in size. The original scanned version of Annex 2 to the Defence's Observations, which consists of a witness statement that the Defence was only able to obtain on 16 August and six annexes to this statement, amounted to approximately 7 megabytes in size. The Defence therefore proceeded to electronically reduce the size of each individual annex to the statement in order to create a singular annex of appropriate size. This process also entailed the review of each reduced-size annex to ensure the quality of the image remained sufficient.

6. Alongside this technical issue, the Kenya-based Defence team experienced certain communication difficulties with its Case Manager in The Hague, who was assisting in the finalising of the filing and its annexes – for instance as regards the appropriate level of classification of the various annexes. These technical issues, unforeseen at the time of drafting the submission and related annexes, contributed to the delay in submitting the filing to CMS in time.

7. The Defence also note that the volume of the victim participation applications necessitated an extensive response from the Defence, as evidenced by its earlier request for extension of page limit filed on 16 August.³ While it cannot constitute an exceptional circumstance, the process of finalising its submissions, particularly those contained in Annex 1 to its Observations, somewhat exacerbated the above noted technical issues encountered by the Defence.

³ ICC-01/09-02/11-247

(B) The Interest of Justice Warrants the Exercise of Discretion in Favour of Granting the Requested Minimal Extension

8. The requested 20 minute extension of time does not prejudice any of the parties or participants to these proceedings. Given the significance of the issue to be determined and its overall impact on the proceedings, the Defence submits that exercise of discretion in favour of granting the requested minimal extension is in the interest of justice. The Defence recalls that the Single Judge granted a minimal extension of time to the Prosecution in this case and received its late submissions because of the significance of the issue before the Single Judge, notwithstanding the fact that the Prosecution did not provide any explanation for its lateness.⁴

(C) Taken Together these Reasons Constitute Exceptional Circumstances

9. Viewed collectively, the technical issues faced by the Defence, in the context of its extensive submissions, constitute exceptional circumstances warranting exercise of discretion in favour of granting the Defence's request. As noted above, these circumstances were unforeseen and unanticipated at the time of drafting the submission and annexes.

Relief Requested

10. For the above-mentioned reasons, the Defence respectfully requests that the Single Judge exercise discretion and extend the time limit for the proper receipt of the Defence's Observations and its appended Annexes by 20 minutes and treat the same as properly filed before the Chamber.

⁴ ICC-01/09-02/11-185, para. 13

Respectfully Submitted,



Mr. Karim A. A. Khan QC
Lead Counsel

Dated this 16th Day of August 2011

At Nairobi, Kenya