



Original: English

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

Date: 5 September 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

Extremely Urgent

Defence Application for a Limited Extension of Time to file its List of Evidence

Source: Defence for 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

Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Counsel for Francis Kirimi Muthaura:

Karim A.A. Khan QC, Essa. M. Faal,
Kennedy Ogeto and Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta:

Steven Kay QC and Gillian Higgins

Counsel for Mohammed Hussein Ali:

Evans Monari, Gregory Kehoe, John
Philpot and Gershom O. 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**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia, Registrar

Deputy Registrar

Mr. Didier Daniel Preira, Deputy
Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations

Other

Introduction

1. Pursuant to Regulation 35(2) of the Regulations of the Court ("Regulations"), the Defence for Ambassador Muthaura hereby requests a limited extension of 3 hours from 4 p.m. to 7 p.m. in order to file its List of Evidence ("LoE") and serve same on the Prosecution and the Registry. For the reasons set out below, the Defence submits that good cause exists to warrant the exercise of discretion in favour of the requested limited extension of 3 hours.

Background

2. At the status conference held on 8 April 2011, the Chamber scheduled the confirmation hearing in this case to commence on 21 September 2011.¹
3. Pursuant to Rule 121(6) of the Rules, where the person intends to present evidence, the Defence shall provide a list of that evidence to the Chamber no later than 15 days before the date of the hearing, in this case, by no later than 5 September, 2011 at 4 p.m.²
4. On 19 August 2011, the Prosecution filed its Document Containing the Charges ("DCC") and List of Evidence ("LoE") and disclosed to the Defence fresh witness statements which contained extensively new allegations for the first time. The newly disclosed allegations appear to change the substance and direction of the Prosecution's case.³
5. The new allegations disclosed by the Prosecution necessitated the undertaking of fresh investigations by the Defence into those allegations. In anticipation of the potential difficulties associated with the Prosecution's late disclosure, the Defence also filed a request for an adjournment of the confirmation hearing or

¹ ICC-01/09-02/11-T-1-ENG WT, p. 14, lines 11 to 15.

² See times for disclosure established by the Single Judge in ICC-01/09-02/11-48+Anxs and ICC-01/09-02/11-64.

³ ICC-01/09-02/11-257. *See also* ; ICC-01/09-02/11-259-Conf+ConfAnxs

in the alternative requested an extension of time to file an amended list of evidence.⁴ This application has not been determined by the Chamber. Accordingly in the present circumstances, the Defence finds it prudent and reasonable to file the present request.

Good Cause Exists to justify the requested limited extension

6. The Defence is trying its utmost within the constraints of the Prosecution's late disclosure of extensively new allegations to fulfil its professional obligations and to comply in good faith with the disclosure time-line established by the Single Judge in this case. The late disclosure of new allegations by the Prosecution has warranted fresh investigations by the Defence in accordance with its right under Article 67(1) of the Statute in order to effectively present its case at the upcoming confirmation hearing. These investigations remain incomplete. However the Defence has acquired important new information which is essential to its case and which it considers prudent to put before the Chamber in order to assist it in its determination. The most recent of these statements was obtained this morning. The practical difficulty associated with the Prosecution's late disclosure is the primary reason for the limited requested extension of 3 hours.

7. In addition, the Defence is undertaking its investigations in Kenya, the *locus in quo*. The Defence has encountered technical difficulty in transmitting and uploading materials into the Court's RINGTAIL system which has been interrupted by frequent power failure in Kenya. Similarly, intermittent internet access in Kenya has further hampered the Defence's ability to comply with the original order of the Single Judge to file its list of evidence by 4 p.m. An additional problem encountered is the splitting of large evidence files from Kenya into smaller units for transmission to the case manager in The Hague for uploading into the Court's evidence system, given the limited capacity of the

⁴ ICC-01/09-02/11-285

ICC secured e-mail systems, which is the official recognised court facility for electronically transporting evidence and sensitive materials.

8. Given the importance of the issue to the meaningful exercise of the rights of the Ambassador under Article 67(1), the Defence submits that the requested limited extension is justified, proportionate and indeed necessary in the circumstances of the present case. No prejudice would occasion the Prosecution and the other defence teams on account of the requested limited extension. The Prosecution is the triggering force in this case and the materials to be submitted are in response to its allegations. Similarly, the other defence teams would not be prejudiced because the exercise of Ambassador's Muthaura's statutory rights does not impede or limit the exercise of their rights in the present circumstances of this case.
9. For all these reasons, the Defence respectfully requests that the Chamber grants the requested limited extension of 3 hours in order to allow it to file its list of evidence and serve the same on the Prosecution and the Registry by 7 p.m.

Respectfully submitted,



Mr. Karim A. A. Khan QC

Lead Counsel for Ambassador Francis K. Muthaura

Dated this 5th day of September 2011

At Nairobi, Kenya