

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 22 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 with Confidential Annex A

**Defence Response to “Prosecution’s Request to Exclude Certain Documents
Submitted by the Defence”, ICC-01/09-02/11-343**

Source: Defence for 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

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

Counsel for the Defence

Counsel for Francis Kirimi Muthaura:
Karim A.A. Khan QC and Kennedy
Ogetto
Counsel for Uhuru Muigai Kenyatta:
Steven Kay QC and Gillian Higgins
Counsel for Mohammed Hussein Ali:
Evans Monari, Gershon Otachi, Gregory
Kehoe and John Philpot

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 Pereira, Deputy
Registrar

Victims and Witnesses Unit

Counsel Support Section

Detention Section

**Victims Participation and Reparations
Section**

Other

Procedural History

1. On 31 March 2010, Pre-Trial Chamber II (the “Chamber”) authorised the commencement of an investigation into the situation in the Republic of Kenya.¹
2. On 15 December 2010, the Office of the Prosecutor filed its ‘Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali’ (‘Article 58 Application’), wherein it outlined the nature of its case against the above named accused.²
3. On 8 March 2011, the honourable Chamber issued its ‘Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali.’³ The three voluntarily appeared before the Chamber on 8 April 2011.
4. On 12 July 2011, the Single Judge issued a Corrigendum to the “Decision on the Defences’ Requests for a Compliance Order in regard to Decision ‘ICC-01/09-02/11-48’” (the “Decision”), in which the Single Judge ordered the Prosecution to submit, by no later than Friday, 19 August 2011, a comprehensive in-depth analysis chart of the evidence included in the list of the evidence upon which the Prosecution intends to rely for the purposes of the confirmation of charges hearing, wherein each piece of evidence is linked to each constituent element of the crimes charged, and, wherein each piece of evidence concerning the alleged criminal responsibility is presented with respect to each suspect separately.⁴

¹ ICC-01/09-19.

² ICC-01/09-02/11-197-Conf-AnxA.

³ ICC-01/09-02/11-01.

⁴ ICC-01/09-02/11-167-Corr, p. 9.

5. On 19 August 2011, the Prosecution submitted its Document Containing the Charges, List of Evidence and In-Depth Analysis Chart (IDAC) of evidence included with the List of Evidence.⁵
6. On 05 September 2011, the Defence, pursuant to an order from the Single Judge,⁶ submitted its disclosure to the Prosecution, which included its List of Evidence, *viva voce* witnesses and IDAC.⁷
7. On 21 September 2011, the Prosecution filed its 'Request to Exclude Certain Documents Submitted by the Defence' (Hereafter, 'Prosecution Request') wherein it, *inter alia*, requested the Chamber to exclude from the confirmation hearing specified items of evidence submitted by the Ali Defence (Hereafter, 'Defence') on the basis the exhibits in question were not (i) not referenced in the In-Depth Analysis Chart (Hereafter, 'IDAC'); (ii) contained, in whole or in part, a language other than one of the working languages of the court, but for which no translation is provided; or (iii) disclosed in an incomplete manner.⁸
8. On 21 September, the Confirmation of Charges hearing in the case of *Prosecutor v. Muthaura et al* commenced, wherein the Single Judge informed the respective Defence teams that should they wish to respond to the issues raised in the Prosecution's request, that they should do so in writing by no later than 12.00pm, 22 September 2011.⁹ The Defence hereby responds to the Prosecution request.

Submissions

9. The Defence respectfully submits that the Prosecution request to exclude Defence evidence should be dismissed in its entirety. Simply put, this request by the

⁵ ICC-01/09-02/11-257.

⁶ ICC-01/09-02/11-48.

⁷ ICC-01/09-02/11-293.

⁸ ICC-01/09-02/11-343, paras 10, 12, 14, 20.

⁹ ICC-01/09-02/11-T-4-ENG ET WT 21-09-2011 PV PT, page 23, lines 11-16.

Prosecutor, made literally at the eleventh hour, is by the measure of Pre-Trial Chamber jurisprudence, unacceptably late and should be plainly disregarded.

10. The Defence notes the 16 August Decision of the *Mbarushimana* Pre-Trial Chamber, which in recalling a ruling of the Appeals Chamber in *Katanga and Ngudjolo*, stated that:

A party to a proceeding who claims to have an enforceable right *must exercise due diligence in asserting such a right*. This is as it should be in order for the Trial Chamber to take account of the interests of the other parties to and participants in the proceedings and of the statutory injunction for fairness and expeditiousness. The Appeals Chamber agrees with the Trial Chamber's conclusion that *parties must submit motions that have repercussions on the conduct of the trial in "a timely manner... A timely manner means that parties must act within a reasonable time."*¹⁰ (Emphasis added)

11. In *Mbarushimana*, the Defence filed requests for exclusion of Prosecution evidence **9 days** before the commencement of the Confirmation of charges hearing. In that instance, the Chamber deemed that the Defence **failed to exercise due diligence** in asserting its right to receive witnesses' statements in a language which the suspect fully understands and speaks. The Chamber therefore refused to exclude the requested evidence as it would '**substantially disadvantage the Prosecutor in that he would be unable to replace the excluded evidence with other evidence**, or otherwise remedy the grievance of the Defence.'¹¹ (Emphasis added)
12. Furthermore, the Prosecution's request to exclude would significantly disadvantage the Defence and deny its rights under Article 61(6). Furthermore, it would greatly diminish the Chamber's ability to determine the truth of the case.

¹⁰ ICC-01/04-01/10-378, paras. 18-19

¹¹ *Ibid*, para. 19.

Finally, such a request is antithetical to the Prosecution's duty to seek the truth and "fully respect the rights of the persons arising under this statute".¹²

13. As the Prosecution has carefully listed several paragraphs from the Single Judge's decision on the disclosure of evidence, the Prosecution neglected to include the Single Judge's final statement that:

The approach advanced in the referenced decisions and reiterated in the present one aims at streamlining the process of evidence disclosure, thus **ensuring that the Defence is prepared under satisfactory conditions, and that the Presiding Judge is in a position to "organise the presentation of evidence by the parties according to the crimes charged with one party responding to the other on each count consecutively."**¹³ (emphasis added).

This chart is used as a streamline for understanding evidence, not to serve as evidence itself.

14. As for the Prosecution's knowledge of the Defence's evidence, the Prosecution was clearly aware of the state of the disclosure when it meticulously detailed at least 44 alleged errors in the disclosure tendered by all three suspects.¹⁴ If there was an issue involving the disclosure of the Defence's IDAC, the Prosecution should have filed it promptly and it did not.
15. Additionally, The Prosecution did not file its request until after the beginning of business on 21 September 2011. Logic dictates that since the Prosecutions examination was so late, its reliance on the IDAC was minimal and thus cannot claim prejudice.
16. The Defence notes that similar issues of the absence of translation of evidence into one of the working languages of the court were present in the *Mbarushimana*

¹² See Article 54(1)(a) and (c) of the Rome Statute.

¹³ ICC-01/09-02/11-48, para. 24.

¹⁴ ICC-01/09-02/11-312, pages 11-12.

Decision discussed above. In that instance, the Chamber determined that the appropriate remedy was to adjourn the hearing to allow for adequate translation. However, in that case there were still nine days to the beginning of the hearing. In the instant case, the parties do not have the luxury of time. The Confirmation of Charges hearing has already begun and must proceed without delay. Indeed, the Single Judge has repeatedly emphasised the importance that the hearing proceed 'expeditiously.' The Defence will endeavour to complete the necessary translations and convey them to the Prosecution and respective parties as soon as is practicable. It is respectfully submitted that the schedule of the Confirmation of Charges hearings need not be affected by this oversight which the Defence readily acknowledges and is undertaking to remedy with the utmost haste.

17. Appended to this response as Confidential Annex A is an updated version of the Defence's IDAC. Because of the confidential information disclosed this annex, the Defence requests that this annex be classified as confidential.

Relief Requested

18. The Prosecution's exclusion request – brought at the eleventh hour – and on the day the confirmation hearing began – demonstrates its complete **failure to exercise due diligence** and an **utter failure to act within a reasonable time** in asserting its request. Likewise, such a request denies the Defence its rights under Article 61(6), the Chamber of its duty under Article 69(3) and is contrary to the Prosecution's responsibility under Article 54(1). Nevertheless, the Defence will immediately perform the necessary translations and convey them to the Prosecutor and respective parties. The Prosecution's request should be denied by the Chamber and the hearing should proceed without any unnecessary delay.

Respectfully Submitted,

Two handwritten signatures in black ink. The first signature on the left is 'Evans Monari' and the second signature on the right is 'Gershom Otachi'.

Evans Monari and Gershom Otachi
On behalf of Mohammed Hussein Ali

Dated this 22nd day of September 2011

At The Hague, The Netherlands