

**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, 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

URGENT

**Decision on the "Prosecution's Request to Exclude Certain Documents Submitted
by the Defence"**

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 Khan, Essa Faal, Kennedy
Ogetto, Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta
Steven Kay and Gillian Higgins

Counsel for Mohamed Hussein Ali
Evans Monari, John Philpot and
Gershom Otachi Bw'omanwa

Legal Representatives of the Victims
Morris Azuma Anyah

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

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 decision on the “Prosecution’s Request to Exclude Certain Documents Submitted by the Defence” (the “Request”).²

1. On 8 March 2011, the Chamber, by majority, decided to summon Francis Kirimi Muthaura (“Mr. Muthaura”), Uhuru Muigai Kenyatta (“Mr. Kenyatta”), and Mohammed Hussein Ali (“Mr. Ali”) (collectively, the “Suspects”) to appear before it.³ 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 2011.⁴

2. On 7 April 2011, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters” (the “Decision Setting the Regime for Disclosure”).⁵

3. 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”),⁶ whereby the Single Judge, *inter alia*, ordered the 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 ICC-01/09-02/11-343.

³ 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.

⁴ ICC-01/09-02/11-T-1-ENG.

⁵ Pre-Trial Chamber II, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, ICC-01/09-02/11-48.

⁶ Pre-Trial Chamber II, ICC-01/09-02/11-64.

confirmation hearing, if any, and to file the list of such evidence, no later than Monday, 5 September 2011".⁷

4. On 21 September 2011, the Prosecutor filed the Request, wherein he requests the Chamber:

[T]o exclude from the confirmation hearing the items [...] (i) which were not referenced in the [in-depth analysis charts]; (ii) which contain, 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) which were disclosed in an incomplete manner.⁸

5. On 21 September 2011, the confirmation of charges hearing commenced. During the hearing, the Defence of Mr. Muthaura orally responded to the Request,⁹ while the Chamber also granted the Defence teams until 22 September 2011 at 12.00 hours to respond in writing to the Request.¹⁰

6. On 22 September 2011, the Defence of Mr. Kenyatta filed the "Response by the Defence on Behalf of Uhuru Kenyatta to the 'Prosecution's Request to Exclude Certain Documents Submitted by the Defence (21 September 2011)'",¹¹ seeking that the Request be rejected.¹²

7. Also on 22 September 2011, the Defence of Mr. Ali filed the "Defence Response to 'Prosecution's Request to Exclude Certain Documents Submitted by the Defence', ICC-01/09-02/11-343",¹³ submitting that "[t]he Prosecution's request should be denied by the Chamber and the hearing should proceed without any unnecessary delay".¹⁴

⁷ 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 Between the Parties", ICC-01/09-02/11-64, p. 13.

⁸ ICC-01/09-02/11-343, para. 20.

⁹ ICC-01/09-02/11-T-4-ENG, p. 22, line 8 to p. 23, line 9.

¹⁰ ICC-01/09-02/11-T-4-ENG, p. 23, lines 11-16.

¹¹ ICC-01/09-02/11-345 and confidential annexes A-C.

¹² ICC-01/09-02/11-345, para. 25.

¹³ ICC-01/09-02/11-346 and confidential annex.

¹⁴ ICC-01/09-02/11-346, para. 18.

8. Finally, on 22 September 2011, the Defence of Mr. Muthaura filed the "Defence Response to Prosecution Request to Exclude Witness Statement KEN-D12-0001-0276",¹⁵ wherein it requests "that the Prosecution application with regards to the document complained about be rejected, and:

- (a) It be allowed to re-file the entire statement; or in the alternative
- (b) To admit the statement complained about in the manner in which it was filed."¹⁶

9. The Single Judge notes articles 61(3) and 69(4) of the Rome Statute (the "Statute"), rules 63 and 121 of the Rules of Procedure and Evidence (the "Rules") and regulation 39(1) of the Regulations of the Court (the "Regulations").

10. In the following sections, the Single Judge shall address in turn the three limbs of the Request as presented by the Prosecutor.

I. Evidence which is not referenced in the in-depth analysis charts

11. The Prosecutor lists 50 items of evidence disclosed by the Defence of Mr. Ali and 94 items of evidence disclosed by the Defence of Mr. Kenyatta for which he alleges that they were not included in the Defence of Mr. Ali's and the Defence of Mr. Kenyatta's respective in-depth analysis charts.¹⁷ The Prosecutor asserts that this constitutes a violation of the Decision Setting the Regime for Disclosure, and requests on this basis that the Defence of Mr. Ali and the Defence of Mr. Kenyatta be prevented from relying at the confirmation of charges hearing on this evidence.¹⁸

12. The Defence of Mr. Kenyatta avers that the in-depth analysis chart is not a requirement of the Statute, the Rules of any of the other official texts of the Court but was ordered by the Single Judge on the consideration that it would be of assistance in the instant case.¹⁹ It adds that because the Defence is "attempting to 'prove a negative', not all the Defence evidence fits neatly within the four corners of the [in-

¹⁵ ICC-01/09-02/11-347.

¹⁶ ICC-01/09-02/11-347, para. 8.

¹⁷ ICC-01/09-02/11-343, paras 10-11.

¹⁸ ICC-01/09-02/11-343, para. 12.

¹⁹ ICC-01/09-02/11-345, para. 13.

depth analysis chart]”.²⁰ Finally, it notes that “no sanction for non-entry of a piece of evidence into the [in-depth analysis chart] framework was ever established by the Single Judge”.²¹

13. The Defence of Mr. Ali presented similar submissions, asserting that “[t]he chart is used as a streamline for understanding evidence, not to serve as evidence itself”.²² It attached to its response an “updated version” of its in-depth analysis chart.²³

14. For the purpose of the analysis of this particular request of the Prosecutor, the Single Judge recalls the Decision Setting the Regime for Disclosure, wherein it was decided that “when submitting any evidence to the Registry, the parties shall provide [...] [a]n analysis of each piece of evidence reflecting its relevance”.²⁴ In this regard the Single Judge clarifies that the submission of in-depth analysis charts was ordered with the aim of assisting the parties and the Chamber in the review of disclosed evidence.²⁵ However, the non-reference of *certain* items of disclosed evidence in the in-depth analysis chart in the view of the Single Judge does not amount to such a violation of disclosure obligations which could justify the exclusion of the non-referenced. Therefore, the Request must, in this part, be rejected.

II. Evidence which contains, in whole or in part, a language other than one of the working languages of the Court, and for which no translation is provided

15. In relation to the second limb of the Request, the Prosecutor alleges that the Defence of Mr. Kenyatta and the Defence of Mr. Ali disclosed video materials “containing language that is neither English nor French, apparently without

²⁰ ICC-01/09-02/11-345, para. 15.

²¹ ICC-01/09-02/11-345, para. 15.

²² ICC-01/09-02/11-346, para. 13.

²³ ICC-01/09-02/11-346-Conf-Anx.

²⁴ Pre-Trial Chamber II, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, ICC-01/09-02/11-48, p. 11.

²⁵ Pre-Trial Chamber II, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, ICC-01/09-02/11-48, paras 22-24.

providing translations".²⁶ Alleging violation of regulation 39(1) of the Regulations, he requests that these video materials be excluded from the confirmation of charges hearing.²⁷

16. The Defence of Mr. Kenyatta submits that "it has exercised due diligence with respect to attempting to obtain translations, and that for this reason, the Court should not exclude any such evidence".²⁸ It alleged that it failed to provide translation due to the inability of the Translation Unit of the Court to provide timely assistance.²⁹ Further, the Defence states:

[A] significant number of the videos referred to by the Prosecutor (a) contain a mixture of Swahili and English, (b) have been included to illustrate only that Uhuru Kenyatta was present at a given place, (c) can still be relied upon by the Defence as visual aids to illustrate certain aspects of a given event, or (d) already have accompanying defence-prepared draft translations.³⁰

17. The Defence of Mr. Ali responded that it "will endeavour to complete the necessary translations and convey them to the Prosecution and respective parties as soon as is practicable".³¹

18. At first, the Single Judge notes that for two videos disclosed by the Defence of Mr. Kenyatta (KEN-D13-0001-0287 and KEN-D12-0005-0642), transcripts and translations thereof, have in fact been provided by the Defence,³² contrary to the assertions of the Prosecutor. With respect to these videos, the Request must therefore be rejected.

19. In relation to the remaining items of evidence subject to the Request, which are partly or in whole in a language other than English or French, the Single Judge notes regulation 39(1) of the Regulations, which provides that all documents and materials filed with the Registry shall be in English or in French, unless otherwise provided in

²⁶ ICC-01/09-02/11-343, para. 14.

²⁷ ICC-01/09-02/11-343, paras 15-17.

²⁸ ICC-01/09-02/11-345, para. 18.

²⁹ ICC-01/09-02/11-345, para. 18.

³⁰ ICC-01/09-02/11-345, para. 20.

³¹ ICC-01/09-02/11-346, para. 16.

³² See ICC-01/09-02/11-345, para. 20.

the Statute, the Rules, the Regulations, or authorized by the Chamber or the Presidency. The Single Judge considers that for disclosure to proceed satisfactorily and for the time limits for disclosure to be effective also in cases where the evidence is not in a working language of the Court, translations of evidence must be provided within the time limits for disclosure.

20. However, the Single Judge notes that all the evidence subject to the Prosecutor's Request consists of video material. As such, as stated by the Defence of Mr. Kenyatta, it may be of assistance as visual aid.³³ In addition, the Single Judge considers that it is not inconsistent with the regime of disclosure, and not prejudicial to the Prosecutor, to allow the Defence of Mr. Kenyatta and Defence of Mr. Ali to rely on those portions of the video evidence, which are either in English or in French.

21. In consequence of the above, the Single Judge considers that the Prosecutor's Request must not result in a complete exclusion of the evidence in question, but instead in an order limiting the ability of the Defence of Mr. Kenyatta and the Defence of Mr. Ali to rely on the videos at the confirmation of charges hearing, in accordance with the previous paragraph.

III. Evidence which was disclosed "in an incomplete manner"

22. The Prosecutor submits that four documents disclosed by the Defence of Mr. Muthaura and the Defence of Mr. Kenyatta are incomplete.³⁴ More specifically, according to the Prosecutor, two documents (KEN-D12-0001-0276, KEN-D13-0002-0198) miss one page each, while two witness statements (KEN-D13-0005-0647, KEN-D13-0005-0729) contain references to annexes which were not disclosed.³⁵

23. The Defence of Mr. Muthaura responded that the missing page should not affect the admissibility of the rest of the document which had been duly filed.³⁶ It added that "[t]he exclusion of the entire evidence which is relevant and probative [...] is an

³³ ICC-01/09-02/11-345, para. 20.

³⁴ ICC-01/09-02/11-343, para. 18.

³⁵ ICC-01/09-02/11-343, para. 18.

³⁶ ICC-01/09-02/11-T-4-ENG, p. 22, line 8 to p. 23, line 9; ICC-01/09-02/11-347, para. 5.

extraordinary remedy that a court should exercise with great caution”³⁷ and that “[t]he Chamber has a discretion in the interest of justice to allow the defence to correct this clerical error”.³⁸ Thus, the Defence requests that it be allowed to re-submit the evidence in question, or alternatively to be allowed to rely on the evidence as submitted.³⁹

24. The Defence of Mr. Kenyatta asserts that “the non-inclusion of the information referred to by the Prosecution does not affect the Prosecution’s ability to analyse the content of the document in any significant manner. Further, the Defence does not seek to rely on any non-included information.”⁴⁰

25. The Single Judge reiterates that at the confirmation of charges hearing, the Defence teams are allowed to rely solely on the evidence that has been properly disclosed and which has been included in the list of evidence in compliance with rule 121(6) of the Rules. It is for this reason that the Single Judge considers that the request of the Defence of Mr. Muthaura for leave to re-submit an item of evidence which was not disclosed in its entirety on 5 September 2011 must be rejected.

26. Turning now to the Prosecutor’s Request itself, the Single Judge notes that it does not concern evidence which has not been disclosed at all, but which has been disclosed with some parts apparently missing. In the opinion of the Single Judge, it would be disproportionate and unfair towards the disclosing party to consider that an entire item of evidence is rendered inadmissible whenever a part of it is found to be missing. Conversely, the Single Judge considers that such items of evidence are admissible as disclosed, and adds only for the sake of clarity that the parties may not rely on parts of such evidence which have not been disclosed. In consequence of these considerations, the Single Judge concludes that the Request, in its third limb, must be rejected.

³⁷ ICC-01/09-02/11-347, para. 6.

³⁸ ICC-01/09-02/11-347, para. 7.

³⁹ ICC-01/09-02/11-347, para. 8.

⁴⁰ ICC-01/09-02/11-345, para. 21.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

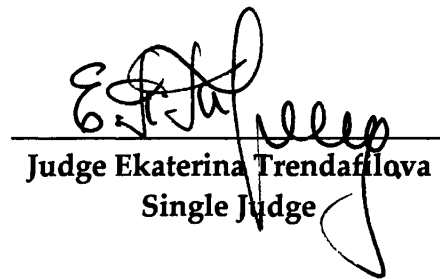
a) decides that the Defence of Mr. Kenyatta shall only be allowed to rely at the confirmation of charges hearing on the visual images and on those parts which are in English or in French with respect to the following evidence:

- KEN-D13-0001-0123;
- KEN-D13-0001-0247;
- KEN-D13-0001-0266;
- KEN-D13-0001-0267;
- KEN-D13-0002-0006;
- KEN-D13-0002-0007;
- KEN-D13-0002-0017;
- KEN-D13-0002-0019;
- KEN-D13-0002-0024;
- KEN-D13-0002-0032;
- KEN-D13-0002-0077;
- KEN-D13-0002-0099;
- KEN-D13-0002-0137;
- KEN-D13-0002-0142;
- KEN-D13-0002-0173;
- KEN-D13-0002-0232;
- KEN-D13-0005-0177;
- KEN-D13-0005-0178;
- KEN-D13-0005-0456; and
- KEN-D13-0005-0510;

b) decides that the Defence of Mr. Ali shall only be allowed to rely at the confirmation of charges hearing, with respect to evidence item KEN-D14-0002-0322, on the visual images and on those parts which are in English or in French;

- c) **rejects** the remainder of the Request;
- d) **rejects** the request of the Defence of Mr. Muthaura to re-submit evidence item KEN-D12-0001-0276.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Thursday, 22 September 2011

At The Hague, The Netherlands