

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 13 June 2011

**PRE-TRIAL CHAMBER II**

Before: Judge Ekaterina Trendafilova, Presiding Judge  
Judge Hans-Peter Kaul  
Judge Cuno Tarfusser

**SITUATION IN THE REPUBLIC OF KENYA**

**IN THE CASE OF THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA; UHURU  
MUGAI KENYATTA AND MOHAMMED HUSSEIN ALI**

**PUBLIC**

Observations on behalf of Mohammed Hussein Ali in response to the " the Decision  
Requesting for Observations on the Place of the Proceedings for the Purposes of the  
Confirmation of Charges Hearing."

Source: Defence of General Mohammed Hussein Ali

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. A. Khan and Kennedy Ogeto

**Counsel for Uhuru Muigai Kenyatta**

Steven Kay and Gillian Higgins

**Counsel for Mohammed Hussein Ali**

Evans Monari, Gregory Kehoe and  
Gershom Otachi Bw'omanwa

**Legal Representatives of the Victims**

**Legal Representatives of the Applicant**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

Paolina Massidda

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

**Registrar**

Ms Silvana Arbia, Registrar  
Didier Preira, Deputy Registrar

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

Fiona McKay

## PROCEDURAL HISTORY

1. On 31 March 2010, the Pre-Trial Chamber (PTC) issued its decision authorising the Prosecutor to commence an investigation into the situation in the Republic of Kenya.<sup>1</sup>
2. On 8 March 2011, the PTC decided to summon Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali to appear before the Court on 7 April 2011.<sup>2</sup>
3. On 18 March 2011, the PTC issued a decision setting a new date for the initial appearance hearing for 8 April 2011.<sup>3</sup>
4. On 8 April 2011, during the initial appearance hearing, the PTC set 21 September 2011, as the date for the commencement of the confirmation of charges hearing.
5. On 3 June 2011, the PTC issued a decision requesting observations by the parties regarding the location for the confirmation hearings and directed the attention of the parties to articles 3(1), (3) and 4(2) of the Rome Statute (the “Statute”), rule 100 of the Rules of Procedure and Evidence (the “Rules”) and regulations 80 and 81 of the Regulations of the Court.
6. The PTC also noted that although article 3(1) of the Statute states that the “seat of the Court shall be established at The Hague in the Netherlands”, paragraph 3 of the same provision makes clear at the Court “may sit elsewhere, whenever it considers it desirable, as provided in this Statute”. Moreover, according to rule 100(1) of the Rules, the Court “may decide to sit in a State other than the host State, in a particular case, where [it] considers that it would be in the interests of justice”.
7. While in the process of assessing the desirability and feasibility of conducting the confirmation hearing in the Republic of Kenya, the PTC requested

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<sup>1</sup> Pre-Trial Chamber II, “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, ICC-01/09-19-Corr.

<sup>2</sup> Pre-Trial Chamber II, “Decision on the Prosecution’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali”, ICC-01/09-02/11-1.

<sup>3</sup> Pre-Trial Chamber II, “Decision Setting a New Date for the Initial Appearance”, ICC-01/09-02/11-8. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali

observations on the foregoing from the parties and the victims who have applied for participation.

### SUBMISSIONS

8. On behalf of General Mohammed Hussein Ali, the Defence prefers that the confirmation of charges hearing be conducted before the PTC in The Hague for the following reasons:
  - a. Consistent with the right to a speedy trial guaranteed under Article 61(1) of the Statute, the PTC has observed that this right includes a confirmation hearing within a reasonable time. In keeping with that provision, the PTC scheduled a confirmation hearing date in September 2011.
  - b. Approximately three (3) months remain before the scheduled hearings to be preceded by a fixed disclosure timetable.
  - c. Given the desirability to bring this matter to a prompt conclusion, it is questionable from a practical perspective whether the necessary infrastructural and logistical measures can be put in place quickly and whether the Government Of Kenya (GoK) can facilitate the maintenance of the court schedule to safeguard the speedy and fair trial rights of General Ali, which will be compromised by possible delays and other factors.
  - d. The Ali Defence notes that the GoK has appealed the PTC decision on admissibility of the case. In the circumstances the Defence is unaware of the GoK's position and its ability to assist. Without a proper understanding of the government's likely position on this matter, and in order not to expose these proceedings to delay the Defence of General Ali prefers that the confirmation hearings be conducted at the Hague.
9. In light of the significance of this matter and the likelihood that there may be different views held by other parties, before any decision is rendered changing the hearing venue, General Ali respectfully requests a status conference to discuss *inter alia* the impact the relocation of the confirmation hearings will have

on his right to a speedy and fair trial as well as the practicalities involved in coordinating such hearings in Kenya.

REQUESTED RELIEF

10. The Defence of General Ali respectfully requests ;

- a) That the scheduled confirmation hearing be held at the ICC in The Hague in the interests of justice, and
- b) That the Pre-Trial Chamber schedule a status conference in the immediate future to discuss the matter further in the presence of all parties.

Respectfully submitted,



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Evans Monari and Gershom Otachi Bw'omanwa  
On behalf of Mohammed Hussein Ali

DATED AT Nairobi this 13<sup>th</sup> day of June 2011.