

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 15 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**

**Decision on the “Defence Application for Allocation of Time to Present *Viva Voce*  
Witnesses at the Confirmation Hearing”**

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. Khan, Kennedy Ogetto and  
Essa Faal

**Legal Representatives of the Victims**

**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**

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**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”),<sup>1</sup> hereby renders this decision on the “Defence Application for Allocation of Time to Present *Viva Voce* Witnesses at the Confirmation Hearing” (the “Application”).<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup>

2. On 20 July 2011, the Single Judge ordered the parties to indicate whether they intended to call live witnesses at the confirmation of charges hearing and, if so, to submit information detailing the subject-matter and the scope of the proposed testimony of each witness.<sup>5</sup>

3. On 5 August 2011, the Prosecutor indicated his intention not to call any live witness at the confirmation of charges hearing.<sup>6</sup> On the same date, the suspects’ Defence teams submitted their respective lists of *viva voce* witnesses.<sup>7</sup> In particular, the Defence for Mr. Muthaura indicated its intention to call a maximum of 9

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<sup>1</sup> Pre-Trial Chamber II, “Decision Designating a Single Judge”, ICC-01/09-02/11-9.

<sup>2</sup> ICC-01/09-02/11-237.

<sup>3</sup> 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.

<sup>4</sup> ICC-01/09-02/11-T-1-ENG.

<sup>5</sup> Pre-Trial Chamber II, “Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing”, ICC-01/09-02/11-181, para. 8.

<sup>6</sup> ICC-01/09-02/11-218.

<sup>7</sup> ICC-01/09-02/11-215 and ICC-01/09-02/11-215-Conf-Exp-Anx; ICC-01/09-02/11-216 and ICC-01/09-02/11-216-Conf-Exp-AnxA; ICC-01/09-02/11-219 and ICC-01/09-02/11-219-Conf-Exp-Anx.

witnesses;<sup>8</sup> the Defence for Mr. Kenyatta a maximum of 4 witnesses;<sup>9</sup> and the Defence of Mr. Ali a maximum of 10 witnesses.<sup>10</sup>

4. On 10 August 2011, the Single Judge issued the “Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of *Viva Voce* Witnesses” (the “10 August 2011 Order”), wherein she ordered the Suspects’ Defence teams to “reduce the number of the witnesses they intend to call to testify at the confirmation of charges hearing to a maximum of two witnesses for each suspect” and to submit an amended list of *viva voce* witnesses by 15 August 2011.<sup>11</sup>

5. On 12 August 2011, the Defence of Mr. Muthaura (the “Defence”) submitted the Application, wherein it requested the Single Judge to “allocate 10 hours to the Defence for the calling of *viva voce* witnesses at the confirmation of charges hearing *in lieu* of a maximum cap of two witnesses for the Defence”.<sup>12</sup> It avers that such an order setting and strictly enforcing a reasonable and appropriate time allocation for *viva voce* testimony ensures respect for the principles of judicial economy and expeditiousness of the proceedings while at the same time preserving the limited scope of the confirmation hearing.<sup>13</sup>

6. The Single Judge notes article 21(1)(a), (2) and (3) of the Rome Statute (the “Statute”) and regulation 35 of the Regulations of the Court (the “Regulations”).

7. Having reviewed the arguments put forward by the Defence and the relief requested, the Single Judge considers that the Application is in effect a request for reconsideration of the 10 August 2011 Order. Indeed, the Single Judge is requested to depart, with respect to Mr. Muthaura, from the previous ruling limiting the presentation of live witnesses at the confirmation of charges hearing to two

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<sup>8</sup> ICC-01/09-02/11-215-Conf-Exp, para. 3; and ICC-01/09-02/11-223.

<sup>9</sup> ICC-01/09-02/11-216-Conf-Exp-AnxA.

<sup>10</sup> ICC-01/09-02/11-219-Conf-Exp-Anx.

<sup>11</sup> Pre-Trial Chamber II, ICC-01/09-02/11-226, p. 13.

<sup>12</sup> ICC-01/09-02/11-237, para. 22.

<sup>13</sup> ICC-01/09-02/11-237, para. 14.

witnesses per suspect, and instead to accord the Defence the discretion to determine the number of witnesses to be called, within the proposed ten-hour time limit.<sup>14</sup>

8. In this respect, the Single Judge recalls that, as consistently established in the jurisprudence of the Pre-Trial Chambers of the Court, the Statute and the Rules of Procedure and Evidence do not provide for a motion for reconsideration as a procedural remedy against any decision taken by the Chamber or the Single Judge.<sup>15</sup> Consequently, the Application must be rejected.

9. At the same time, however, the Single Judge notes that the arguments put forward by the Defence in its Application touch upon the allocation of time to parties and participants at the confirmation of charges hearing. The Single Judge wishes to clarify that a decision on the precise schedule for the confirmation of charges hearing shall be taken in due course.

10. Finally, the Single Judge notes that, while the present decision may reasonably affect the Defence's submission of its amended list of evidence, it will not have been notified to the Defence before the expiration of the 15 August 2011 deadline established in the 10 August 2011 Order. In these circumstances, noting regulation 35 of the Regulations, which empowers the Chamber to vary a time limit where good cause is shown, the Single Judge considers that it is appropriate to *proprio motu* extend the said time limit by 24 hours, in order to enable the Defence to make a fully informed submission.

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<sup>14</sup> See ICC-01/09-02/11-237, paras 2, 14, 20 and 22.

<sup>15</sup> See, in this case, Pre-Trial Chamber II, "Decision on the 'Prosecution's Application for Extension of Time Limit for Disclosure'", ICC-01/09-02/11-85, para. 10. See also Pre-Trial Chamber II, "Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II To Redact Factual Description of Crimes from the Warrant of Arrests, Motion for Reconsideration, and Motion for Clarification", ICC-02/04-01/05-60; Pre-Trial Chamber I, "Decision on the Prosecution Motion for Redaction", ICC-01/04-01/06-123; Pre-Trial Chamber I, "Decision on the Prosecution Motion for Reconsideration and, in the alternative, Leave to Appeal", ICC-01/04-01/06-166; Pre-Trial Chamber I, "Decision on the 'Demande des représentants légaux de VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, VPRS6 et a/0071/06 aux fins d'accéder au document confidentiel déposé par le Conseil de direction du Fonds d'affectation spéciale au profit des victimes le 7 février 2008'", ICC-01/04-457; Pre-Trial Chamber I, "Decision on the Defence for Mathieu Ngudjolo Chui's Request concerning translation of documents", ICC-01/04-01/07-477.

**FOR THESE REASONS, THE SINGLE JUDGE HEREBY**

**rejects** the Application;

**orders** the Defence of Mr. Muthaura to submit its amended list of *viva voce* witnesses by no later than **Tuesday, 16 August 2011**.

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

  
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Judge Ekaterina Trendafilova  
Single Judge

Dated this Monday, 15 August 2011

At The Hague, The Netherlands