

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/09-02/11**
Date: **11 November 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

URGENT

Public

**Urgent Defence Request to Remove Specific Parts of the Prosecutor's Final
Observations on the Confirmation of Charges Hearing Brief, ICC-01/09-02/11-361**

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 and Gershom Otachi

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

Victims and Witnesses Unit

Counsel Support Section

Detention Section

Introduction

1. On 08 April 2011, Pre-Trial Chamber II issued an oral decision setting the start date of the Confirmation of Charges Hearing [the “Hearing”] in the case of *The Prosecutor v. Muthaura et al* at 21 September 2011.¹
2. On 05 October 2011, the Single Judges issued an oral decision allowing the Prosecutor to submit written observations on the Hearing before 28 October 2011 at 1600 Central European Time. The Single Judge allowed the Defence until 21 November 2011 at 1600 Central European Time to file its observations.²
3. On 28 October 2011, the Prosecutor timely filed the “Prosecution’s Written Submissions Following the Hearing on the Confirmation of Charges”³ [the “Prosecutor’s Observations”].

The Core Legal Texts of the ICC

4. The Defence Team for General Ali [the “Defence”] notes Article 50(2) and (3) of the Rome Statute [the “RS”]; Rules 41(1)(b) and 41(2) of the Rules of Procedure and Evidence [the “RPE”]; and the Regulations of the Court [the “RoC”] 39(1) and 23(3).
5. Article 50(2) of the RS establishes that the two working languages of the Court are English and French. Under Article 50(3), the Court may authorise the use of another language as long as the requesting party or State adequately justifies its use. Similarly, Rule 41(1)(b) of the RPE requires the Presidency to authorise the use of an official language of the Court when “the Prosecutor *and* the defence so request.” Furthermore, Rule 41(2) of the RPE also allows the Presidency to authorise the use of an official language “if it considers that it would facilitate the efficiency of the proceedings.”

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

² ICC-01/09-02/11-T-15-CONF-ENG, p. 88, lines 14-19.

³ ICC-01/09-02/11-361.

6. Regulation 39(1) of the RoC states:

All documents and materials filed with the Registry shall be in English or French, unless otherwise provided in the Statute, Rules, these Regulations or authorised by the Chamber or the Presidency. If the original document or material is not in one of these languages, a participant shall attach a translation thereof.

7. Regulation 23(3) of the RoC states:

Subject to any order of the Chamber, a participant shall file, with each document, *copies of any authorities relied upon or, if appropriate, internet links*. Participants are not required to file copies of decisions or orders of the Court. Authorities shall be provided in an authorised version together with a translation *in at least one of the working languages of the Court if the original is not in one of those languages*.

Submissions

8. In paragraph 35 of the Prosecutor's Observations, he refers to a "legal authority" from a special unit of the Argentinean Office of the Attorney General.⁴ In footnote 51, the Prosecutor attempts to comply with Regulation 23(3) of the RoC by supplying a website for the document. This hyperlink connects to the Spanish version of the document.
9. To this date, an appendix or corrigendum to the Prosecutor's Observations has not been uploaded onto the Trim database. Because of this, the Defence is unable to analyse the legal arguments put forth in the document cited to in footnote 51 of the Prosecutor's Observations and comment on the document's legal value.⁵ By his failure to follow the Regulations of the Court and not file a copy in a working language or use an English-version website, the Prosecutor has materially prejudiced the Defence's ability to respond to the argument put forth by this "legal authority."

⁴ ICC-01/09-02/11-361, para. 35.

⁵ The Defence does not object to footnotes 9, 10, 25 and 157. These documents are easily found in one of the working languages or in the ICC library.

10. Finally, the Defence has not been notified of any decision allowing the Prosecutor to file documents or authorities in any language other than in one of the working languages of the Court.

Defence Request

11. Because the Prosecutor has failed to follow proper procedure when filing the Prosecutor's Observations and has materially prejudiced the Defence's ability to respond to the legal arguments put forth by this "legal authority," the Defence respectfully requests that the Prosecutor be order to re-file the Prosecutor's Observations, removing the last two sentences in paragraph 35, footnote 51 and any references made to the document listed in footnote 51 from the entire document. In the alternative, the Defence respectfully requests that the Chamber disregard the parts of the arguments which rely upon this document.

Respectfully Submitted,



Evans Monari and Gershon Otachi
On behalf of Mohammed Hussein Ali

Dated this 11th day of November 2011

At Nairobi, Kenya