

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 12 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

**Decision on the Defence Request for Amendment of the List of *Viva Voce*
Witnesses**

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 and Kennedy
Ogetto

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 request of the Defence of Uhuru Muigai Kenyatta (“Mr. Kenyatta”) for amendment of the list of *viva voce* witnesses.

1. On 8 March 2011, the Chamber, by majority, decided to summon Francis Kirimi Muthaura, Mr. Kenyatta and Mohammed Hussein Ali (collectively, the “Suspects”) to appear before it.² 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 2011.³

2. On 20 July 2011, the Single Judge issued the “Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing”, ordering 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.⁴

3. On 5 August 2011, the Defence of Mr. Kenyatta indicated its intention to call five *viva voce* witnesses.⁵

4. On 10 August 2011, the Single Judge issued the “Order 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”),⁶ whereby she ordered the Defence teams to: (i) reduce the number of the witnesses they intended to call to testify at the confirmation of charges hearing to a maximum of two witnesses for each suspect; and (ii) submit an amended list of *viva voce*

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

² 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.

³ ICC-01/09-02/11-T-1-ENG.

⁴ Pre-Trial Chamber II, ICC-01/09-02/11-181, p. 8.

⁵ ICC-01/09-02/11-216 and annexes, confidential *ex parte*.

⁶ Pre-Trial Chamber II, ICC-01/09-02/11-226.

witnesses, indicating their names and the scope and subject-matter of their proposed questioning.⁷

5. On 15 August 2011, the Defence of Mr. Kenyatta submitted its amended list of *viva voce* witnesses in compliance with the 10 August 2011 Order.⁸

6. On 2 September 2011, the Defence of Mr. Kenyatta submitted the “Application by the Defence for Uhuru Kenyatta under Articles 61(3) and 67(1)(a) for an Adjournment of the Confirmation Hearing Scheduled for 21 September 2011 and Request for Alteration to their Selected Viva Voce Witnesses” (the “Request”),⁹ wherein it, *inter alia*, requests leave to add a third *viva voce* witness at the confirmation of charges hearing or, alternatively, permission to replace one of the *viva voce* witnesses.¹⁰ The Defence of Mr. Kenyatta recalls that it was required by an order of the Single Judge to submit a list of its *viva voce* witnesses on 15 August 2011.¹¹ However, “[a]s a result of the disclosure of 19 August, which reveals a change in the nature of the Prosecution’s case, the Defence is forced to seek leave to change the selection of its *viva voce* witnesses”.¹²

7. Also on 5 September 2011, the Prosecutor filed the “Prosecution’s Consolidated Response to the Defence Applications for Adjournment of the Confirmation Hearing and Other Related Requests”,¹³ wherein he, *inter alia*, stated that he “does not object to the Defence request to revise its selection of *viva voce* witnesses as long as this is done by 5 September 2011”.¹⁴

⁷ Pre-Trial Chamber II, “Order 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”, ICC-01/09-02/11-226, p. 13.

⁸ ICC-01/09-02/11-238-Conf-Exp.

⁹ ICC-01/09-02/11-281 and annexes 1, 1A, 1B, 1C, 1D and 2, confidential *ex parte*. On 5 September 2011, annexes 1, 1A, 1B, 1C and 1D were reclassified as “confidential *ex parte*, Prosecutor and Defence of Uhuru Muigai Kenyatta only”, while annex 2 was reclassified as “confidential”.

¹⁰ ICC-01/09-02/11-281-Conf-Anx2.

¹¹ ICC-01/09-02/11-281, para. 25.

¹² ICC-01/09-02/11-281, para. 26.

¹³ ICC-01/09-02/11-288.

¹⁴ ICC-01/09-02/11-288, para. 20.

8. The Single Judge notes articles 61(6), 67, and 69 Rome Statute (the “Statute”), and rule 121(6) of the Rules of Procedure and Evidence.

9. The Single Judge notes that insofar as the request of the Defence of Mr. Kenyatta to amend the list of *viva voce* witnesses aims at addition of a third witness to the list, it must be considered as a request for reconsideration of the 10 August 2011 Order,¹⁵ and is as such not allowed.¹⁶

10. However, as for the alternative request to replace one of the previously selected *viva voce* witnesses with another, the Single Judge notes the Prosecutor’s agreement in this respect and the fact that the name of the prospective new witness and certain related information have been made available to the Prosecutor following the reclassification of annex 2 to the Request as “confidential” on 5 September 2011.¹⁷ In the absence of any prejudice to the Prosecutor, the Single Judge considers that the alternative request of the Defence of Mr. Kenyatta can be granted.

11. Finally, the Single Judge considers that in order for the Chamber to exercise its powers under article 69(4) of the Statute and in order to enable the Prosecutor to adequately prepare for the confirmation of charges hearing, it is necessary to require the Defence of Mr. Kenyatta to submit in a confidential filing information detailing the subject matter and the scope of the proposed testimony of each *viva voce* witness.

¹⁵ Pre-Trial Chamber II, ICC-01/09-02/11-226.

¹⁶ See, in this case, Pre-Trial Chamber II, “Decision on the ‘Defence Application for Allocation of Time to Present Viva Voce Witnesses at the Confirmation Hearing’, ICC-01/09-02/11-240, para. 8. 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 a/0071/06 aux fins d’accéder au document confidentiel déposé par le Conseil de direction du Fonds d’affection 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.

¹⁷ Pre-Trial Chamber II, “Decision on the ‘Request by Defence of Uhuru Kenyatta for the Pre-Trial Chamber to vary the status of Ex Parte Confidential Annexes 1 and 2 of the Application by the Defence for Uhuru Kenyatta under Articles 61(3) and 67(1)(a) for Adjournment of the Confirmation Hearing Scheduled for 21 September 2011 and Request for Alteration to their Selected Viva Voce Witnesses to Confidential Inter Partes’”, ICC-01/09-02/11-291.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) **authorizes** the Defence of Mr. Kenyatta to replace one of its *viva voce* witnesses with the proposed alternative witness;
- b) **orders** the Defence of Mr. Kenyatta to submit, by Wednesday, 14 September 2011, information detailing the subject matter and the scope of the proposed testimony of each *viva voce* witness.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Monday, 12 September 2011

At The Hague, The Netherlands