

**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 “Preliminary Motion Alleging Defects in the Documents Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be ordered to re-file an Amended DCC & LoE” and the “Defence Request for a Status Conference Concerning the Prosecution’s Disclosure of 19<sup>th</sup> August 2011 and the Document Containing the Charges and Article 101 of the Rome Statute”**

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**

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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 “Preliminary Motion Alleging Defects in the Documents Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be ordered to re-file an Amended DCC & LoE” (the “Muthaura Motion”)<sup>2</sup> and the “Defence Request for a Status Conference Concerning the Prosecution’s Disclosure of 19<sup>th</sup> August 2011 and the Document Containing the Charges and Article 101 of the Rome Statute” (the “Kenyatta and Ali Motion”).<sup>3</sup>

## **I. Procedural history**

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”).<sup>4</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>5</sup>
2. On 6 April 2011, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”,<sup>6</sup> setting out the principles for the disclosure of evidence between the parties and its communication to the Chamber for the purposes of the confirmation of charges hearing, and ordering the Prosecutor to present a consolidated version of an in-depth analysis chart.<sup>7</sup>
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

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

<sup>2</sup> ICC-01/09-02/11-268.

<sup>3</sup> ICC-01/09-02/11-270 and Annex.

<sup>4</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>5</sup> ICC-01/09-02/11-T-1-ENG.

<sup>6</sup> Pre-Trial Chamber II, ICC-01/09-02/11-48

<sup>7</sup> Pre-Trial Chamber II, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, ICC-01/09-02/11-48, operative part, letter (e)(3).

Kenya's admissibility challenge' and Establishing a Calendar for Disclosure" (the "Calendar for Disclosure"),<sup>8</sup> whereby she, *inter alia*, ordered the Prosecutor to "file in the record of the case as soon as possible and no later than Friday, 19 August 2011 the Document Containing the Charges (the "DCC") and the List of Evidence as required by rule 121(3) of the Rules".<sup>9</sup>

4. On 19 August 2011, the Prosecutor submitted the "Prosecution's Document Containing the Charges, List of Evidence and Comprehensive In-Depth Analysis Chart of Evidence Included in the List of Evidence Submitted Pursuant to Article 61(3) and Rule 121(3)".<sup>10</sup>

5. On 26 August 2011, the Muthaura Motion was filed. The Defence of Mr. Muthaura asserts that the DCC is "defective in seven material respects" and accordingly requests the Single Judge to order the Prosecutor to file an amended DCC, List of Evidence and an in-depth analysis chart by 29 August 2011.<sup>11</sup> In addition, the Defence team of Mr. Muthaura requests the Single Judge to schedule a status conference before the full Chamber.<sup>12</sup> On 28 August 2011, the Defence team of Mr. Muthaura filed a "Corrigendum to the Preliminary Motion Alleging Defects in the Document Containing the Charges (DCC) and LoE filed by the Prosecution".<sup>13</sup>

6. On 29 August 2011, the Prosecutor filed his response to the Muthaura Motion, wherein he requests that such motion be dismissed.<sup>14</sup>

7. On 29 August 2011, the Kenyatta and Ali Motion was submitted. The Defence teams of Mr. Kenyatta and Mr. Ali adopted paragraphs 15-38 of the Muthaura Motion, requesting the Single Judge (i) to order the OTP to file an amended DCC,

<sup>8</sup> Pre-Trial Chamber II, ICC-01/09-02/11-64.

<sup>9</sup> 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.

<sup>10</sup> ICC\_01/09-02/11-257 and Annexes.

<sup>11</sup> ICC-01/09-02/11-268.

<sup>12</sup> ICC-01/09-02/11-268.

<sup>13</sup> ICC-01/09-02/11-268-Corr and Annex.

<sup>14</sup> ICC-01/09-02/11-269.

List of Evidence and in-depth analysis chart; (ii) to grant the request for a status conference for the week commencing 29th August 2011 before the fully constituted Chamber.<sup>15</sup>

8. On 1 September 2011, the Prosecutor filed his response to the Kenyatta and Ali Motion, wherein he requests that the Motion be dismissed and the relief sought therein be accordingly rejected.<sup>16</sup>

9. On 2 September 2011, the Prosecutor submitted the "Prosecution Amended Document Containing the Charges and List of Evidence Submitted Pursuant to Article 61(3) and Rule 121(3), (4) and (5)" (the "Amended DCC").<sup>17</sup>

## II. Findings of the Single Judge

10. The Single Judge notes articles 58(5), 61(1) and (3), 67(1) and 101 of the Rome Statute (the "Statute") and rules 121(3), (4) and (5) of the Rules of Procedure and Evidence (the "Rules"), and regulation 52 of the Regulations of the Court (the "Regulations").

11. The Single Judge notes the submission of the Defence of Mr. Muthaura, according to which the "DCC is defective in seven material respects namely:

(i) The impermissible charging of rape in Counts 5 and 6 in relation to Naivasha in breach of the Chamber's Decision Issuing Summons and Article 58(6) of the Statute;

(ii) The impermissible charging of other forms of sexual violence in breach of the Chamber's Decision Issuing Summons and Article 58(6) of the Statute;

(iii) The impermissible expansion of the temporal scope of all counts from 24th to 31st January 2008 as was approved by the Chamber to 30th December 2007 to 29th January 2008 without the express approval of the Chamber;

<sup>15</sup> ICC-01/09-02/11-270 and Annex.

<sup>16</sup> ICC-01/09-02/11-276.

<sup>17</sup> ICC-01/09-02/11-280.

(iv) The impermissible expansion of the locations covered in all counts in breach of the Decision Issuing Summons and without the express approval of the Chamber;

(v) The imprecise and vague pleading of alleged preparatory meetings without specifically identifying details such as dates, specific locations, times and the identity of the participants in these preparatory meetings;

(vi) The imprecise pleading of a common plan without particulars as to the identity of the members and participants in the common plan;

(vii) The imprecise pleading of the identity of the victims in a generalised manner as ‘perceived ODM supporters’<sup>18</sup>.

12. The Single Judge considers that the challenges raised by Mr. Muthaura’s Defence team cannot be upheld. In particular, the Single Judge takes the view that it is a prerogative of the Prosecutor to proffer charges against the suspects. In this regard, the Single Judge observes that the DCC is not defective, since if duly read in conjunction with the List of Evidence, it contains all the relevant submissions in sufficient detail to meet the formal requirements established in article 61(3) of the Statute, rule 121(3) of the Rules and regulation 52(b) of the Regulations.

13. In addition, the Single Judge notes that in the Amended DCC, the Prosecutor presented more specific details from disclosed evidence, which are not detrimental to the rights of the Suspects and can facilitate the preparation of the Defence.<sup>19</sup>

14. Furthermore, the Single Judge notes that the Defence teams of Mr. Kenyatta and Mr. Ali state that “pursuant to the rule of speciality in Article 101, the Suspects cannot be ‘proceeded against’ in respect of:

- i. The allegation of rape in Naivasha;
- ii. The expansion of the temporal period from 30 December 2007 to 29 February 2008. The summons decision referred to the period ‘on or about 24 January 2008 until 31 January 2008’;

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<sup>18</sup> ICC-01/09-02/11-268, para. 1.

<sup>19</sup> ICC-01/09-02/11-280.

- iii. The expansion of the locations included in all counts alleged in the DCC: The summons decision was confined to crimes allegedly committed in Nakuru and Naivasha. The DCC refers to in or around locations including Nakuru town Nakuru District, Rift Valley Province) and Naivasha Town (Naivasha District, Rift Valley Province".<sup>20</sup>

15. The Single Judge recalls that pursuant to article 101(1) of the Statute, "a person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered".

16. In this regard, the Single Judge agrees with the Defence teams of Mr. Kenyatta and Mr. Ali that the rationale of article 101 of the Statute is to protect State sovereignty. However, the Single Judge, recalling that the Suspects in the present case voluntarily appeared before the Court following a summons to appear, does not find convincing the submission in the Kenyatta and Ali Motion that "[a]rticle 101 does not make any distinction between a person, who is arrested pursuant to an arrest warrant, and a person, who voluntarily surrenders to the Court pursuant to a summons to appear".<sup>21</sup> To the contrary, the Single Judge observes that the application of the rule of speciality is limited to the scenarios in which the person is arrested and is surrendered as a result of a request submitted by the Court to the State. This distinction between a person who is surrendered and a person who voluntarily appears before the Court can be deduced from the statutory provisions, such as articles 58(5) and 61(1) of the Statute.

17. Turning to the further issues raised by the Defence teams of the Suspects, the Single Judge notes that according to their submissions, "[t]he LoE filed in this case does not meet any of the minimum standards stated above. Crucially, the obligation on the OTP to link each item of evidence to the factual statement/allegation it intends

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<sup>20</sup> ICC-01/09-02/11-270, para. 13.

<sup>21</sup> ICC-01/09-02/11-270, para. 11.

to prove has not been adhered to".<sup>22</sup> However, the Single Judge recalls that the Prosecutor was ordered to submit a comprehensive in-depth analysis chart of the evidence included in the list of the evidence upon which it intends to rely for the purposes of the confirmation hearing.<sup>23</sup> In particular, the Single Judge required the Prosecutor to conduct an in-depth analysis consisting of properly presenting each piece of evidence in relation to the contextual elements of crimes against humanity, the specific constituent elements of the crimes charged and the individual criminal responsibility of each suspect.<sup>24</sup>

18. The Single Judge notes also the contention of the three Defence teams that the in-depth analysis chart submitted by the Prosecutor does not serve its intended purpose, since it lists witness statements referring to the ERN number in the List of Evidence.<sup>25</sup> Thus, the Defence teams propose the "assignment – and use in the DCC and LoE – of witnesses identification number/pseudonyms".<sup>26</sup> However, the Single Judge recalls that the Prosecutor was not so ordered. The Single Judge is of the view that the in-depth analysis chart meets the criteria required by her first decision on disclosure and enables the Defence to prepare for the confirmation hearing.

19. The Single Judge notes the assertion of the Defence teams that "the manner and timing of the OTP's disclosure in this case fails to provide the Defence with adequate notice of the evidentiary basis of the OTP's case in time for the upcoming confirmation hearing".<sup>27</sup> In supporting this statement, the Defence teams refer to the size of the last disclosure batch filed by the Prosecutor on 19 August 2011, which amounts to more than 6,000 pages. In this respect, the Defence teams of the Suspects hold that "[t]he timing of this last tranche of disclosure comprising transcripts of witnesses interviews, summaries and statements to coincide with the deadline of the

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<sup>22</sup> ICC\_01/09-02/11-257, paras 22-23.

<sup>23</sup> Pre-Trial Chamber II, "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", ICC-01/09-02/11-48, para. 23.

<sup>24</sup> Pre-Trial Chamber II, "Decision on the Defences' Requests for a Compliance Order in regard to Decision 'ICC-01/09-02/11-48'", ICC-01/09-02/11-167, para. 13.

<sup>25</sup> ICC-01/09-02/11-268, paras 24-25; ICC-01/09-02/11-270, para. 9.

<sup>26</sup> ICC-01/09-02/11-268, para. 25; ICC-01/09-02/11-270, para. 9.

<sup>27</sup> ICC-01/09-02/11-268, para. 27 ; ICC-01/09-02/11-270, para. 9.



DCC does not allow the orderly and efficient conduct of proceedings and risks rendering the confirmation process meaningless and ineffective”.<sup>28</sup>

20. The Single Judge opines that the Prosecutor’s disclosure has complied both with rule 121(3) of the Rules, according to which the DCC and the list of evidence shall be provided by the Prosecutor to the Pre-Trial Chamber and the person “no later than 30 days before the date of the confirmation hearing” and with the deadlines established in the Calendar for Disclosure.

21. The Single Judge further notes that the Defence teams advance a complaint about the disclosure of a great number of transcripts and propose that the Prosecutor be ordered to prepare witnesses statements, which could facilitate the Defence in the analysis of the evidence.<sup>29</sup> However, the Single Judge observes that nothing in the statutory provisions prevents the Prosecutor from choosing the style of written recording of witness testimony. The request of the Defence therefore cannot be accommodated.

22. Further, the Defence teams assert that the Prosecutor should have assigned pseudonyms to all witnesses at the time of the disclosure, in order to allow the Defence to properly organize and analyze on an ongoing basis the materials disclosed related to such witnesses.<sup>30</sup> The Single Judge is of the view, however, that no prejudice has arisen to the Defence preparation in this respect. The witness numbers have been provided by the Prosecutor in time to allow the preparation and the smooth conduct of the confirmation hearing.

23. Finally, the Single Judge turns to the request of the Defence teams that a status conference be convened in order to discuss the matters raised in their respective motion. Considering that the present decision addresses and disposes of the entirety of the issues raised by the Defence, the Single Judge does not deem it necessary that

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<sup>28</sup> ICC-01/09-02/11-268, para. 27 ; ICC-01/09-02/11-270, para. 9.

<sup>29</sup> ICC-01/09-02/11-268, paras. 29-30; ICC-01/09-02/11-270, para. 9.

<sup>30</sup> ICC-01/09-02/11-268, para. 33 ; ICC-01/09-02/11-270, para. 9.

a status conference be convened for this purpose. Accordingly, the respective requests by the Defence teams shall be rejected.

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

- a) **rejects** the Muthaura Motion;
- b) **rejects** the Kenyatta and Ali Motion.

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



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**Judge Ekaterina Trendafilova**  
**Single Judge**

Dated this Monday, 12 September 2011

At The Hague, The Netherlands