

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 15 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 Requests for Leave to Resubmit or Add Evidence and
Related Requests**

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, Kennedy
Ogetto, Shyamala Alagendra

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 Defence requests to for leave to resubmit or add evidence to be presented at the confirmation of charges hearing and on related requests.

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.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 7 April 2011, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters” (the “Decision Setting the Regime for Disclosure”).⁴

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 Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure” (the “Calendar for Disclosure”),⁵ whereby the Single Judge, *inter alia*, ordered the Defence teams “to disclose to the Prosecutor the evidence they intend to present at the

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, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, ICC-01/09-02/11-48.

⁵ Pre-Trial Chamber II, ICC-01/09-02/11-64.

confirmation hearing, if any, and to file the list of such evidence, no later than Monday, 5 September 2011".⁶

4. On 5 September 2011, the Defence teams requested⁷ and were granted extensions to the time limit for completion of their disclosure of evidence and filing of the list of evidence until 5 September 2011 at 23.59.⁸

5. On the same day, the Defence teams disclosed their evidence and filed their respective lists of evidence.⁹

6. On 7 September 2011, the Defence of Mr. Muthaura filed the "Application by the Defence for Ambassador Muthaura for Leave to add five items of evidence and Re-filing of its Amended List of Evidence and Chart on Presentation of Evidence" (the "Muthaura First Request"),¹⁰ wherein it requests the following:

a) Leave of the Chamber to upload witness statement- KEN-D12-0016-0001 together with annexes to the statement- Ken-D12-0016-0007 and KEN-D12-0016-0010 (all of which have been disclosed to the Prosecution) into E-court and file same into the record of the case;

b) Leave to file and add into the case record, audio recording KEN-D12-0017-0001 previously disclosed to the Prosecution, but not uploaded into RINGTAIL;

c) Leave to add a new item of evidence appended as Annex 3 to this submission to its LoE and chart on presentation of evidence and to file same into the record of the case and;

d) That the Chamber receives its amended LoE and in-depth analysis chart appended hereto as Annexes 4 and 5 respectively as properly filed.¹¹

⁶ 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.

⁷ ICC-01/09-02/11-294, ICC-01/09-02/11-296, ICC-01/09-02/11-297, ICC-01/09-02/11-298.

⁸ Pre-Trial Chamber II, "Extension of Time Limit for Disclosure under Rule 121(6) of the Rules of Procedure and Evidence", ICC-01/09-02/11-299, p. 7.

⁹ ICC-01/09-02/11-293 and confidential annexes A and B; ICC-01/09-02/11-300 and confidential annex A; ICC-01/09-02/11-301 and confidential annexes A and B.

¹⁰ ICC-01/09-02/11-305, confidential annexes 1-2, 4-5 and annex 3, confidential *ex parte*.

¹¹ ICC-01/09-02/11-305, para. 22.

7. Also on 7 September 2011, the Defence of Mr. Ali submitted its “Urgent Request to Append Two Missing Pages in from the Rule 78 Disclosure Package” (the “Ali First Request”),¹² wherein it requests leave to add for the purposes of the hearing two pages of evidence which were missing in its original disclosure.¹³

8. On 9 September 2011, the Defence of Mr. Kenyatta submitted the “Urgent Request to Resubmit 24 TIF Images to Rule 78 Disclosure Package”,¹⁴ requesting “that the Single Judge allow it to provide the following TIG images to the Registry and the OTP: KEN-D13-0005-0816.tif to KEN-D13-0005-0839.tif inclusive”.¹⁵

9. On 12 September 2011, the Prosecutor filed the “Prosecution’s Response to the Defence Requests to Add Evidence” (the “Response”),¹⁶ wherein he “submits that the Defence requests should be denied and that the items of evidence that were not disclosed within the set time limit (including items that were disclosed but that are illegible or partially illegible) should not be considered by the Chamber”.¹⁷ In addition, he requests “that the Defence teams re-submit documents that were disclosed with missing ERNs or with partial ERNs”.¹⁸

10. On 14 September 2011, the Defence of Mr. Ali submitted the “Defence Request Pursuant to Regulation 35(2) to Submit Additional Evidence” (the “Ali Second Request”),¹⁹ requesting:

- a) Leave to add new items of evidence appended as Annexes A-D to this submission to its LoE and chart on presentation of evidence and to file the same into the record of the case and;
- b) That the Chamber receives the Defence’s amended LoE appended hereto as Annex E as properly filed.²⁰

¹² ICC-01/09-02/11-306.

¹³ ICC-01/09-02/11-306, paras. 5-6.

¹⁴ ICC-01/09-02/11-309-Conf-Exp.

¹⁵ ICC-01/09-02/11-309-Conf-Exp, para. 9.

¹⁶ ICC-01/09-02/11-312.

¹⁷ ICC-01/09-02/11-312, para. 35.

¹⁸ ICC-01/09-02/11-312, para. 36.

¹⁹ ICC-01/09-02/11-324-Conf, with confidential annexes A-E.

²⁰ ICC-01/09-02/11-324-Conf, para. 15.

11. Also on 15 September 2011, the Defence of Mr. Muthaura submitted the “Application by the Defence for Ambassador Muthaura for Leave to add 15 items of evidence to Its Amended List of Evidence”,²¹ wherein it requests:

a) That the Chamber appoint an independent counsel to investigate matters arising from the allegations in the video interview and supporting documentation appended as Confidential Annexes B and C to this application and to report his/her findings to the Chamber; and

b) Leave of the Chamber to add the items of evidence contained in Confidential Annexes B And C to its Amended List of Evidence in order to enable the Defence to be able to rely on the same at the upcoming confirmation hearing.²²

12. The Single Judge notes articles 61(3), 68(1), 69(4), 70 of the Rome Statute (the “Statute”) and rules 121 and 165(1) of the Rules of Procedure and Evidence (the “Rules”).

13. In the following sections of this decision, the Single Judge shall address in turn the various requests received.

I. Muthaura First Request

14. The Single Judge notes that the Defence of Mr. Muthaura first requests leave to upload into E-court a witness statement and two annexes (KEN-D12-0016-0001, KEN-D12-0016-0007, KEN-D12-0016-0010), stating:

Before the expiration of the time-limit [...], the Defence encountered technical difficulties which prevented it from uploading [these items] into RINGTAIL and immediately alerted the Prosecution to these difficulties. To mitigate this problem, the Defence provided the Prosecution with the full witness statement and annexes to the statement by e-mail before the expiration of the time-limit. In the e-mail, the Defence informed the Prosecution of the technical difficulties encountered that have necessitated disclosure of the said statement by e-mail and further undertook to consult the Court’s technical team in the morning of the 6th September 2011 to assist it in uploading the said statement into RINGTAIL.”²³

²¹ ICC-01/09-02/11-325 with confidential annexes A to C12.

²² ICC-01/09-02/11-325, para. 20.

²³ ICC-01/09-02/11-305, para. 10.

15. Second, the Defence of Mr. Muthaura seeks leave to upload into E-court an audio recording (KEN-D12-0017-0001), submitting the following:

Despite its best efforts, the team in Kenya was unable to convert the audio file from its original '.m4a' format into the '.wma' format required for use in Ringtail. The Defence alerted the Prosecution to this problem and efforts were made [...] to transmit this attachment via the secure ICC e-mail addresses of Prosecution team members. These attempts were unsuccessful. [...] The file was burnt onto a CD and personally served on the Prosecution at approximately 1.15am on 6th September 2011 and receipt confirmed.²⁴

16. Third, the Defence of Mr. Muthaura seeks leave to add evidence in the form of photographs and a supplementary witness statement, obtained from the witness on 6 September 2011.²⁵ It asserts that "the production of this piece of evidence depended solely on the prompting of the witness without any investigative activity on the part of the Defence Team", and that this constitutes exceptional circumstance under regulation 35(2) of the Regulations to "warrant the exercise of the Chamber's discretion in favour of granting the request".²⁶

17. The Prosecutor objects to above requests, submitting that the Defence of Mr. Muthaura has not shown good cause or provide a justification for its failure to disclose the concerned materials within the required time limit.²⁷ He adds, in relation to the first two components of the Muthaura Request, that the Defence was, considering the time when the evidence in question was obtained, clearly in a position to disclose the material in time or to request an extension within the set time limit.²⁸ Specifically with respect to items KEN-D12-0016-0001, KEN-D12-0016-0007 and KEN-D12-0016-0010, the Prosecutor states that they were not "disclosed" by email on 5 September 2011, as the Defence suggests, but on 6 September 2011.²⁹

²⁴ ICC-01/09-02/11-305, para. 10.

²⁵ ICC-01/09-02/11-305, para. 14.

²⁶ ICC-01/09-02/11-305, para. 15.

²⁷ ICC-01/09-02/11-312, paras 16, 19 and 23.

²⁸ ICC-01/09-02/11-312, paras 16 and 19.

²⁹ ICC-01/09-02/11-312, para. 15.

18. At the outset, the Single Judge recalls that the purpose of the time limit for disclosure for the Defence teams to disclose to the Prosecutor the evidence which they intend to present at the confirmation of charges hearing, as set in the Calendar for Disclosure and in light of rule 121(6) of the Rules,³⁰ is primarily to protect the interest of the Prosecutor to adequately prepare and to be able to respond. As a matter of rule, therefore, procedural fairness *vis-à-vis* the Prosecutor does not permit that Defence requests for late addition of evidence be granted.

19. However, the Single Judge notes that with respect to the items identified above at paragraphs 14 and 15, disclosure in compliance with the Decision Setting the Regime for Disclosure was attempted by the Defence of Mr. Muthaura, and was not successful due to technical reason. Immediately upon becoming aware of the technical issues, the Defence informed and informally provided the evidence to the Prosecutor.

20. In these circumstances, the Single Judge considers that since the Defence has not acted in bad faith and since appreciable prejudice has not arisen to the Prosecutor, barring the Defence from relying on these items at the confirmation of charges hearing is not appropriate in the particular circumstances. Consequently, the Muthaura First Request should be granted as concerns documents KEN-D12-0016-0001, KEN-D12-0016-0007, KEN-D12-0016-0010 and KEN-D12-0017-0001.

21. Conversely, the Single Judge considers that such exceptional circumstances have not been established with respect to the items identified above at paragraph 16. The supplementary witness statement and the associated photographs were not disclosed within the applicable time limit nor was their disclosure attempted. Thus, granting the Defence request is not possible without a clear disregard for the time limit for disclosure and without causing prejudice to the Prosecutor. In the opinion of the Single Judge, the submission that the evidence came into possession of the

³⁰ 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, para. 22.

Defence solely on the prompting of the originator and the submission that the evidence is “relevant and probative”³¹ can have no bearing on the decision. Thus, the Single Judge concludes that the request to add these items of evidence must be rejected.

22. Finally, the Defence of Mr. Muthaura requests that the Single Judge authorize the filing of its amended list of evidence and its in-depth analysis chart, “to reflect items of evidence which have been uploaded into E-court and disclosed to the Prosecution and Registry on 5 September 2011, but which do not appear in the LoE and chart on the presentation of evidence filed on 5 September 2011”.³² The Defence provides a list of items of evidence which are affected by this problem.³³

23. In relation to the proposed amended list of evidence, the Single Judge reiterates that the purpose of imposition of a time limit for the filing of lists of evidence by Defence teams prior to the confirmation of charges hearing is primarily to enable the Prosecutor to adequately prepare and to be able to respond.³⁴ In the present case, the Defence of Mr. Muthaura filed its list of evidence in compliance with the extended time limit on 5 September 2011,³⁵ thereby indicating to the Prosecutor and the Chamber the evidence that it intends to present at the confirmation of charges hearing.

24. The divergence between the evidence disclosed by the Defence to the Prosecutor and the evidence included in the list of evidence must, in the opinion of the Single Judge, generally be considered as a choice on the part of the Defence. Still, even if the divergence occurred as a result of an unintended omission, the Single Judge considers that it would be incompatible with the purpose of the list of evidence to be presented within the deadline provided by law, to permit the Defence of Mr.

³¹ ICC-01/09-02/11-305, para. 15.

³² ICC-01/09-02/11-305, para. 18.

³³ ICC-01/09-02/11-305, para. 18.

³⁴ 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, para. 22.

³⁵ ICC-01/09-02/11-301-Conf-AnxA.

Muthaura to amend its list of evidence at this time in the present proceedings. Therefore, the Single Judge considers that the Muthaura First Request must be rejected in this part.

25. With respect to the Defence of Mr. Muthaura's proposed amended in-depth analysis chart, the Single Judge notes that in the Decision Setting the Regime for Disclosure, the parties were ordered to provide an in-depth analysis chart when submitting any evidence to the Registry for disclosure.³⁶ The purpose of the in-depth analysis chart is to assist the Chamber and the parties in the analysis of the disclosed evidence,³⁷ and it does not have the kind of procedural effect which is attached to the list of evidence. In particular, the Single Judge wishes to underline that inclusion in the in-depth analysis chart of references to evidence which has not been disclosed or which has not been included in the list of evidence does not allow the party to rely on this evidence at the confirmation of charges hearing. Consequently, there is no prejudice to the Prosecutor associated with the reception of the amended in-depth analysis chart as properly filed and the Muthaura First Request can be granted in this respect.

II. Ali First Request

26. The Defence of Mr. Ali submits that during the handover to the Registry of the originals of its evidence, it was discovered that two documents disclosed by the Defence (KEN-D14-0005-0054 and KEN-D14-0005-0106) were missing one page each.³⁸ It requests the Single Judge to "allow the late addition of these two pages" for presentation at the confirmation of charges hearing, while adding that the Defence is able to disclose the additional pages "at the earliest convenience to the Registry and the Prosecution".³⁹

³⁶ Pre-Trial Chamber II, "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", ICC-01/09-02/11-48, p. 11.

³⁷ Pre-Trial Chamber II, "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", ICC-01/09-02/11-48, para. 24.

³⁸ ICC-01/09-02/11-306, paras. 3-5.

³⁹ ICC-01/09-02/11-306, para. 6.

27. The Prosecutor states in his Response that the Ali First Request should be rejected “[g]iven that no good cause or justifications have been identified in respect of the late disclosure or request, and the failure to attempt to ameliorate the prejudice by providing copies to the Prosecution even before the Defence application was resolved”.⁴⁰

28. The Single Judge notes that the Defence of Mr. Ali does not provide any justification for its request beyond stating that it is based on the Defence’s realization that two pages of evidence intended for disclosure were missing. Therefore, the Single Judge concludes that the Ali First Request must be rejected.

III. Kenyatta Request

29. The Defence of Mr. Kenyatta submits that following its disclosure of evidence on 5 September 2011, it was alerted by the Registry to the fact that “24 of the disclosed TIF images had experienced copy errors”.⁴¹ According to the Defence, the problem occurred as a result of the transfer of the files between an external hard disk and the agent server at some point on 5 September 2011.⁴² The Defence requests leave to provide the Registry and the Prosecutor with correct versions of the said TIF images (KEN-D13-0005-0816.tif to KEN-D13-0005-0839.tif inclusive).

30. The Prosecutor responded by stating that “[t]he Defence had ample opportunities to acquaint itself with the E-court process. Given that no good cause or justifications have been identified in respect of the late disclosure or request, the Prosecution submits that it be denied.”⁴³

31. Considering that the request by the Defence of Mr. Kenyatta is based on technical difficulties which the Defence encountered when attempting to disclose the 24 images in compliance with the Decision Setting the Regime for Disclosure, and

⁴⁰ ICC-01/09-02/11-312, para. 25.

⁴¹ ICC-01/09-02/11-309-Conf-Exp, para. 4.

⁴² ICC-01/09-02/11-309-Conf-Exp, para. 6.

⁴³ ICC-01/09-02/11-312, para. 28.

considering that the Defence has acted in good faith, the Single Judge opines that the Kenyatta Request can be granted.

32. The Single Judge also notes that the Kenyatta Request has been filed as confidential *ex parte*, only available to the Prosecutor and the Defence of Mr. Kenyatta. However, having reviewed the content of the filing, the Single Judge considers that it can be reclassified as “public”.

IV. Ali Second Request

33. The Ali Second Request concerns four items of evidence, annexed to the filing, which the Defence of Mr. Ali requests to be added for the purpose of the confirmation of charges hearing. The Defence states that these items were not in its possession before the expiration of the time limit,⁴⁴ and that “it would be in the interests of justice to allow it to add the pieces of evidence proposed herein and that the same would allow the Chamber to have a chance to scrutinize the best available evidence to determine issues in this case”.⁴⁵ In addition, the Defence claims that granting its request would not prejudice the Prosecutor, as there will be no need of conducting new investigations.⁴⁶

34. In light of the general considerations expressed above at paragraph 18 and in the absence of exceptional circumstances of the kind referred to at paragraph 19, the Single Judge considers that the Ali Second Request must be rejected.

V. Muthaura Second Request

35. The Defence of Mr. Muthaura submits that its request concerns “a recorded video interview and supporting documents of a witness who alleges that certain individuals (believed to be witnesses that the Prosecution intend to rely upon as ‘core witnesses’ in the forthcoming confirmation of charges hearing) may have

⁴⁴ ICC-01/09-02/11-324-Conf, paras 8 and 11.

⁴⁵ ICC-01/09-02/11-324-Conf, para. 12.

⁴⁶ ICC-01/09-02/11-324-Conf, paras 8 and 11.

committed offences against the administration of justice”.⁴⁷ It asserts that “the evidence presented [...] as part of this application is credible and surpasses the threshold required to warrant the Chamber’s intervention under Article 70 of the Statute”.⁴⁸ On this basis, the Defence requests the appointment of “an independent ad-hoc counsel to investigate this matter”, asserting also:

The Prosecution have been served with the evidence subject to this filing. If the individuals named are indeed anonymous Prosecution witnesses, and if the Prosecution intend to still rely upon these individuals as witnesses in the face of the evidence provided by the Defence, there will clearly be a conflict that would militate against the OTP having conduct of the requested investigation.⁴⁹

36. The Defence of Mr. Muthaura equally requests leave to add the items of evidence to its list of evidence, submitting that this will enable it “to properly challenge the reliability of core prosecution evidence”.⁵⁰

37. With respect to the first limb of the Muthaura Second Request, the Single Judge notes rule 165(1) of the Rules, pursuant to which it is the Prosecutor who may, on his or her own initiative, initiate and conduct investigations with respect to the offences defined in article 70 of the Statute on the basis of information communicated by a Chamber or any reliable source. Under this provision of the Rules, it is clear that the role of the Chamber is limited just to communicating to the Prosecutor, along other reliable sources, information relevant for the exercise of his powers.

38. The Single Judge notes further that the Muthaura Second Request is premised on the assertion that the Prosecutor will be unable to properly exercise its powers and obligations following the receipt from the Defence of Mr. Muthaura of information which purportedly establishes that offences against the administration of justice under article 70 of the Statute have been committed. The Single Judge does not accept this assertion by the Defence, as it is based solely on the fact (presumed by the Defence) that the alleged offenders are witnesses of the Prosecutor, and not on any

⁴⁷ ICC-01/09-02/11-325, para. 7.

⁴⁸ ICC-01/09-02/11-325, para. 7.

⁴⁹ ICC-01/09-02/11-325, para. 14.

⁵⁰ ICC-01/09-02/11-325, para. 15.

concrete and specific information establishing a lack of impartiality on the part of the Prosecutor. Considering also that all the information in question is in possession of the Prosecutor, at the latest following its communication to his office by the Defence of Mr. Muthaura, the Single Judge notes that no intervention on the part of the Chamber is needed, and that therefore the request to appoint an independent counsel to investigate the matter must be rejected.

39. Turning now to the requested addition of the video interview and supporting documents to the evidence on which the Defence of Mr. Muthaura may rely at the confirmation of charges hearing, the Single Judge reiterates that any evidence should have been disclosed for this purpose and included in the list of evidence by the applicable time limit. Accordingly, this particular request, and in consequence the Muthaura Second Request as a whole, must be rejected.

VI. The Prosecutor's request to exclude certain Defence evidence

40. The Single Judge notes that in his Response, the Prosecutor lists a series of complaints related to the disclosure of evidence by the Defence, without specifying clearly the relief requested in relation to each particular complaint.⁵¹ However, in the conclusion of the response, the Prosecutor submits "that the items of evidence that were not disclosed within the set time limit (including items that were disclosed but that are illegible) should not be considered by the Chamber".⁵² The Single Judge considers that this submission makes it possible to address some of the individual complaints raised by the Prosecutor while those unrelated to a specified request for relief shall be disregarded.

41. The Prosecutor alleges that items of evidence bearing ERN KEN-D12-0002-0127, KEN-D12-0003-0031, KEN-D12-0001-0041, KEN-D13-0001-0253, KEN-D13-0002-0060, KEN-D13-0003-0005, KEN-D13-0005-0172, KEN-D13-0005-0569, KEN-D13-0005-0609, KEN-D13-0005-0679 and KEN-D14-0002-0323 are in whole or in part illegible and

⁵¹ ICC-01/09-02/11-312, para. 32.

⁵² ICC-01/09-02/11-312, para. 35.

should therefore be excluded.⁵³ The Single Judge, upon review of the said items, considers that the documents are not of poor quality due to the Defence failure to comply with its disclosure obligations, but rather because the documents came into the possession of the Defence as such. In consequence, the Single Judge concludes that no exclusion of this evidence is warranted.

42. Further, the Prosecutor submits that items bearing ERN KEN-D12-0016-0001, KEN-D13-0002-0143 and KEN-D14-0002-0322 (in part) should be excluded as they were not disclosed.⁵⁴ The Single Judge notes that one of these items (KEN-D12-0016-0001) was subject to the Muthaura First Request, and its resubmission is authorized in the present decision. As concerns the remaining items, the Single Judge notes that these items contain no image in E-court, although listed therein. Therefore, they must be considered as not disclosed, and the Prosecutor's request must be granted in this part.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

a) authorizes the Defence of Mr. Muthaura to submit to the Registry for registration in E-court the following items of evidence:

- KEN-D12-0016-0001;
- KEN-D12-0016-0007;
- KEN-D12-0016-0010; and
- KEN-D12-0017-0001;


b) decides that the amended in-depth analysis chart of the Defence of Mr. Muthaura (ICC-01/09-02/11-305-Conf-Anx5) shall be considered as duly filed;

⁵³ ICC-01/09-02/11-312, paras 32 and 35.

⁵⁴ ICC-01/09-02/11-312, paras 32 and 35.

- c) **authorizes** the Defence of Mr. Kenyatta to submit to the Registry for registration in E-court the TIF images of the following pages of evidence: KEN-D13-0005-0816 to KEN-D13-0005-0839 inclusive;
- d) **rejects** the remainder of the Muthaura First Request;
- e) **rejects** the Ali First Request;
- f) **rejects** the Ali Second Request;
- g) **rejects** the Muthaura Second Request;
- h) **decides** that the Defence of Mr. Kenyatta shall not be allowed to rely at the confirmation of charges hearing on evidence item KEN-D13-0002-0143;
- i) **decides** that the Defence of Mr. Ali shall not be allowed to rely at the confirmation of charges hearing on evidence item KEN-D14-0002-0322 at 0323;
- j) **orders** the Registrar to reclassify document ICC-01/09-02/11-309-Conf-Exp as "public".

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Thursday, 15 September 2011

At The Hague, The Netherlands