

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/09-02/11
Date: 1 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 Document

**Decision on the Defence Applications for Leave to Appeal the Single Judge's
Order to Reduce the Number 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 A. Khan and Kennedy Ogetto and
Essa Faal

Counsel for Uhuru Muigai Kenyatta
Steven Kay and Gillian Higgins

Counsel for Mohammed 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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Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other
Appeals Chamber

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 applications for leave to appeal 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 “Order”)² respectively submitted by the Defence teams (collectively, the “Applications”).

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) to appear before the Court.³ 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 2011.⁴
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.⁵
3. On 5 August 2011, in compliance with the said decision of the Single Judge, the Prosecutor indicated his intention not to call any live witness at the confirmation of charges hearing.⁶ On the same date, the Defence teams of the three suspects

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

² Pre-Trial Chamber II, “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”, ICC-01/09-02/11-226.

³ 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.

⁴ ICC-01/09-02/11-T-1-ENG, page 14, lines 11 to 15.

⁵ 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.

⁶ ICC-01/09-02/11-218.

submitted their respective lists of *viva voce* witnesses, specifying, as requested, the subject-matter and the scope of the proposed testimony of each of those witnesses.⁷ In particular, the Defence for Mr. Muthaura indicated its intention to call a maximum of 9 witnesses;⁸ the Defence for Mr. Kenyatta a maximum of 4 witnesses;⁹ and the Defence of Mr. Ali a maximum of 10 witnesses.¹⁰

4. On 10 August 2011, the Single Judge issued the Order, 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, by Monday, 15 August 2011, an amended list of *viva voce* witnesses, indicating their names and the scope and subject-matter of their proposed questioning.¹¹

5. On 15 August 2011, the Defence of Mr. Ali filed an application for leave to appeal the Order, on the issue that “the Defence be restricted to calling a maximum of two *viva voce* witnesses for the forthcoming Confirmation of Charges hearing on 21 September 2011, and specifically whether the Single Judge erred in restricting the number of *viva voce* witnesses”.¹²

6. On the same date, the Defence of Mr. Kenyatta filed its application for leave to appeal the Order, on the issue that “the Single Judge erred in exercising her discretion to implement her duty to ‘organise the proceedings’ by limiting each Defence team to calling only two *viva voce* witnesses at the confirmation hearing”.¹³

⁷ ICC-01/09-02/11-215 and confidential *ex parte* annex attached thereto; ICC-01/09-02/11-216 and confidential *ex parte* annex attached thereto; ICC-01/09-02/11-219 and confidential *ex parte* annex attached thereto.

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

⁹ ICC-01/09-02/11-216-Conf-Exp-AnxA.

¹⁰ ICC-01/09-02/11-219-Conf-Exp-Anx.

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

¹² ICC-01/09-02/11-239, para. 10.

¹³ ICC-01/09-02/11-242, para. 10.

7. On 16 August 2011, the Defence of Mr. Muthaura filed a request to join the application for leave to appeal submitted by Mr. Kenyatta, wherein it endorsed the issue identified in both the other Defence teams' respective applications, as well the arguments advanced therein.¹⁴

8. On 19 August 2011, the Prosecutor filed a consolidated response to the Applications, requesting that they be rejected.¹⁵

II. The Applicable Law

9. The Single Judge notes articles 21(1)(a), (2), (3) and 82(1)(d) of the Rome Statute (the "Statute").

10. The Single Judge, mindful of the exceptional character of the remedy of the interlocutory appeal, recalls that for leave to be granted, the following specific requirements must be met:

- (a) the decision involves an "issue" that would significantly affect (i) *both* the fair and expeditious conduct of the proceedings (ii) or the outcome of the trial; and
- (b) in the opinion of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

11. According to the established jurisprudence of this Court,¹⁶ an "issue" is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. An issue is constituted by a subject, the resolution of which is essential for the determination of

¹⁴ ICC-01/09-02/11-245.

¹⁵ ICC-01/09-02/11-256.

¹⁶ See, Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal", ICC-01/04-168; see also Pre-Trial Chamber II, "Decision on the 'Prosecution's Application for Leave to Appeal the 'Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali'", ICC-01/09-02/11-27, para. 7, with further exemplary references to the Court's established jurisprudence in footnote 6; and, more recently, Pre-Trial Chamber II, "Decision on the 'Prosecution's Application for Leave to Appeal the 'Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11-185)'", ICC-01/09-02/11-253, paras 15-19.

matters arising in the judicial cause under examination. Concerning the other requirements set out in (a) and (b) above, the Single Judge recalls that they are cumulative. Failure in demonstrating that one of the requirements in (a) and (b) is fulfilled makes it unnecessary for the Single Judge to address the remaining requirements under article 82(1)(d) of the Statute.

12. Lastly, the Single Judge takes note of the jurisprudence of Pre-Trial Chambers which held that it is incumbent upon any applicant seeking leave to appeal “to demonstrate [...] that the issue at stake affects, first and foremost, the fairness and expeditiousness of the proceedings currently before the Chamber or the outcome of the related trial, as well as the impact (in terms of material advancement) of an immediate resolution of the issue on such proceedings”.¹⁷

III. Arguments of the parties

Submissions of the Defence teams

13. At the outset, the Single Judge notes that the issues on which the Defence teams respectively seek leave to appeal are essentially the same as well as the same are the arguments advanced in order to demonstrate that the said issue meets the criteria pursuant to article 82(1)(d) of the Statute. In light of this, the Single Judge will hereunder summarise the main arguments put forward by the Defence teams and thereafter provide a joint analysis and conclusions thereof.

14. The Defence teams allege that the Order affects the fairness of the proceedings within the meaning and for the purposes of article 82(1)(d) of the Statute, since it impinges on its ability to mount an effective defence against the charges.¹⁸ In this

¹⁷ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58”, ICC-02/04-01/05-20, para. 21; see also Pre-Trial Chamber I, “Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6”, ICC-01/04-135-tENG, para. 44 and Pre-Trial Chamber II, “Decision on a Request for Leave to Appeal”, ICC-01/09-43, para. 17.

¹⁸ ICC-01/09-02/11-239, para. 11; ICC-01/09-02/11-242, para. 12. See also, ICC-01/09-02/11-245, para. 7.

respect, the Defence asserts that “the admission of *viva voce* testimony will play a significant, persuasive role in challenging the evidence of the Prosecutor” and convince the Chamber that the required standard of proof has not been met in the present case.¹⁹ In fact, the Defence contention is that “[t]he calling of selected *viva voce* evidence at the confirmation stage affords the Defence the crucial opportunity of presenting coherent evidence of a higher probative value than written statements”.²⁰

15. In the same vein, the Defence of Mr. Kenyatta maintains that the limitation of two *viva voce* witnesses per team significantly affects the expeditious conduct of the proceedings, since “allowing the Defence to call the number of live witnesses originally proposed, may in the long-term result in the elimination of the need for a lengthy and expensive trial”.²¹ Likewise, the Defence of Mr. Ali submits that “were it permitted to call the requested number of *viva voce* witnesses, any possible charges against Mr. Ali would not be confirmed” and, accordingly, “any subsequent proceedings with one less accused would proceed more expeditiously”.²²

16. As for the impact on the outcome of trial within the meaning of article 82(1)(d) of the Statute, the Defence contends that the Order causes its inability to counter the Prosecutor’s evidence using “persuasive” live testimony, thus turning the confirmation of charges hearing into a “*pro forma* proceeding” and a “rubber-stamping of the charges”.²³

17. Finally, the Defence teams submit that an immediate resolution of the issue may materially advance the proceedings essentially because, should they be allowed to call their proposed *viva voce* witnesses, the charges against the suspects would not be confirmed.²⁴

¹⁹ ICC-01/09-02/11-239, para. 14; ICC-01/09-02/11-242, para. 16.

²⁰ [ICC-01/09-02/11-242, para. 13.

²¹ ICC-01/09-02/11-242, para. 18.

²² ICC-01/09-02/11-239, para. 15.

²³ ICC-01/09-02/11-239, para. 16; ICC-01/09-02/11-242, para. 21.

²⁴ ICC-01/09-02/11-239, para. 17; ICC-01/09-02/11-242, para. 22.

Response of the Prosecutor

18. The Prosecutor submits that the Applications fail to demonstrate that the issue for which leave to appeal the Order is sought meets the criteria pursuant to article 82(1)(d) of the Statute and, accordingly, must be rejected. In particular, he maintains that the Defence arguments are abstract and hypothetical, thereby failing to demonstrate how, in this particular case, the Order issued by the Single Judge affects the fairness and expeditiousness of the proceedings.²⁵

19. Moreover, the Prosecutor asserts that the assumption that the charges will not be confirmed if the Defence were allowed to present more than two *viva voce* witnesses is misplaced since: (i) “[w]hile the [Order] limits the number of *viva voce* witnesses, it expressly allows the Defence to rely on additional documentary evidence and written witnesses’ statements”;²⁶ and (ii) “[t]here is no hierarchy within the types of evidence that may be offered at the confirmation hearing, and no basis for the underlying theory that *viva voce* testimony must necessarily be given greater weight than documentary evidence”.²⁷ In light of this, the Prosecutor concludes averting that “[a]ny speculation by the Defence about the outcome of the hearing is irrelevant”.²⁸

20. Finally, the Prosecutor notes that the argument advanced with respect to the confirmation of charges hearing being turned into a “*pro forma* proceeding” and a “rubber-stamping of the charges” is speculative and unsupported and that “the Defence does not explain what it means by ‘*pro forma* proceedings’ and a ‘rubber-stamping’ of the charges”.²⁹

²⁵ ICC-01/09-02/11-256, paras 10 and 13.

²⁶ ICC-01/09-02/11-256, para. 11.

²⁷ ICC-01/09-02/11-256, par.a 13.

²⁸ ICC-01/09-02/11-256, para. 13.

²⁹ ICC-01/09-02/11-256, para. 16.

IV. Analysis and conclusion of the Single Judge

21. At the outset the Single Judge expresses her concern for the way the issue has been framed by the Defence teams. As already recalled above, according to the established jurisprudence of the Court, an "issue" within the meaning of article 82(1)(d) of the Statute is, at first, "an identifiable subject or topic". The issue presented can hardly meet the said requirement, since the Defence teams seem to be seeking a generic review of the Order in its entirety, asserting that the Single Judge erred in limiting the number of *viva voce* witnesses, as opposed to a resolution by the Appeals Chamber of an identifiable subject or topic. However, the Single Judge is of the view that the arguments put forward by the Defence sufficiently indicate the scope of the sought leave to appeal and, in particular, that the issue on which the said leave to appeal is requested is whether the reduction of the number of *viva voce* witnesses affects the Defence ability to properly present its case for the purposes of the confirmation of charges hearing. In this sense, the issue would constitute an identifiable topic indeed arising out of the Order within the meaning of the definition provided by the Appeals Chamber and recalled in paragraph 11 above.

22. In any case, and regardless of the way the issue on which the instant leave to appeal is sought has been presented by the Defence teams, the Single Judge is of the view that the arguments advanced in order to demonstrate that the issue meets the criteria set out in article 82(1)(d) of the Statute are not persuasive for the reasons set out below.

23. For the sake of clarity and with a view to properly identifying the matter *sub judice*, the Single Judge wishes to reiterate that the Applications are fundamentally based upon one ground, namely that, because of the Order, the Defence has been deprived of the opportunity to present "persuasive" and "potent" evidence to counter the evidence submitted by the Prosecutor. In the Defence view, in light of the fact that oral witnesses' statements would be accorded a higher probative value than those submitted in writing, the charges against the suspects would not be confirmed, should the proposed live witnesses be all permitted to testify at the

confirmation of charges hearing. In light of the this argument, the Defence asserts, as recalled above, that the issue on which leave to appeal is sought in turn: (i) affects the fairness of the proceedings; (ii) affects the expeditiousness of the proceedings; (iii) has an impact on the outcome of the Trial; and (iv) is such that its resolution may materially advance the proceedings.

24. The Single Judge considers that the said argument, upon which the Applications are entirely based, is flawed as the Defence teams misrepresent, in several respects, the scope and the subject-matter of the Order.

25. At first, it is to be noted that the Order, in no way, limits the quantity of the evidence which may be relied upon by the Defence teams for the purposes of the confirmation of charges hearing. Conversely, it only limits the number of *viva voce* witnesses. Indeed, as clearly stated in the Order, the reduction of the live witnesses is “without prejudice to the rights of the suspects’ Defence teams to rely, for the purposes of the confirmation of charges hearing, upon all written witnesses’ statements that are of significance for their respective case”.³⁰

26. Furthermore, the Single Judge wishes to clarify that, contrary to the Defence assertion, the fact that witnesses’ statements are elicited through oral questioning does not *per se* entail that they be attached a higher probative value than that they would be given if provided in writing. Nowhere is any such hierarchy established, either in the applicable law or in the jurisprudence of the Pre-Trial Chambers of the Court.³¹ In this respect, the Single Judge already held that “witnesses’ testimonies [...] introduced in writing into the record of the case [...] are not *a priori* accorded a lesser probative value” than those obtained through oral questioning at the

³⁰ Pre-Trial Chamber II, “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”, ICC-01/09-02/11-226, para. 27. See also paras 14 and 18.

³¹ It is of significance that the decision on the confirmation of charges issued by Pre-Trial Chamber I in the case of the *Prosecutor v. Bahar Idriss Abu Garda* – which is, to date, the only case in which *viva voce* witnesses have been called to testify at the confirmation of charges hearing – does not distinguish, on the ground of their probative value, between oral and written witnesses’ statements, but places both types of evidence on the same level. (See Pre-Trial Chamber I, “Decision on the Confirmation of Charges”, ICC-02/05-02/09-243-Conf).

confirmation of charges hearing.³² Conversely, the determination of the probative value of each piece of evidence submitted before the Chamber shall be conducted on a case-by-case basis, in light of different criteria, such as its relevance, the source from which it originates, its direct or indirect nature, its credibility, reliability, trustworthiness and genuineness.³³ Accordingly, the Single Judge held in the Order that, given that the suspects may rely on other types of evidence, “the proper employment of the[ir] rights [pursuant to article 61(6) of the Statute] is not preconditioned on the possibility to call an unlimited number of *viva voce* witnesses”.³⁴

27. In view of the fact that, despite the Order, the Defence teams may thus rely on all written witnesses’ statements that they consider of relevance for their respective case, in conjunction with the fact that such statements to be provided in writing will not *a priori* be attached a lower probative value than those provided by *viva voce* witnesses at the confirmation of charges hearing, the Single Judge’s view is that the assumptions upon which the Defence teams rely in support of their Applications are misconceived.

28. In particular, it is of a purely speculative nature the contention that, if the Defence were allowed to call all the proposed live witnesses, the charges against the suspects would not be confirmed. Indeed, the Single Judge is not persuaded why and how, in the present circumstances, only oral questioning of the proposed witnesses would permit the Defence to convince the Chamber that the requisite standard of proof has not been met in the present case, whilst the submission in writing of the statements of the very same witnesses would not allow so.

³² See Pre-Trial Chamber II, “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”, ICC-01/09-01/11-221, para. 14.

³³ Pre-Trial Chamber II, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, ICC-01/05-01/08-424, paras 41, 42, and 47-60.

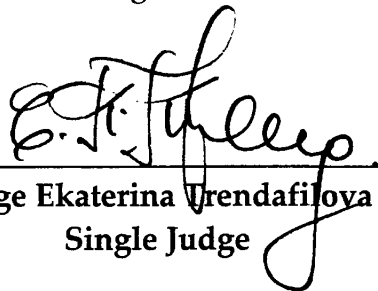
³⁴ Pre-Trial Chamber II, “Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of *Viva Voce* Witnesses”, ICC-01/09-02/11-226, para. 19.

29. Accordingly, and considering that, as noted above, the said argument constitutes the only ground upon which the Defence teams rely in order to demonstrate that all the requirements pursuant to article 82(1)(d) of the Statute have been met for the requested leave to appeal, the Applications must be rejected as the issue presented fails to meet any of these criteria.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Applications.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Thursday, 1 September 2011

At The Hague, The Netherlands