

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 13 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 Schedule for the Confirmation of Charges Hearing

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

Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”)¹ of the International Criminal Court (the “Court”), hereby renders the decision on the schedule for the confirmation of charges hearing (the “Hearing”).

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 2011³ during which, *inter alia*, the Chamber set the date for the commencement of the Hearing for 21 September 2011.⁴

2. On 6 April 2011, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters” (the “6 April 2011 Decision”).⁵

3. On 30 August 2011, the Single Judge issued the “Decision Requesting Observations on the Schedule for the Confirmation of Charges Hearing” (the “Decision Requesting Observations”).⁶

4. On 2 September 2011, the Chamber was notified of the observations on the schedule submitted by the legal representative of victims,⁷ the Defence for Mr.

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 Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali”, ICC-01/09-02/11-01.

³ Pre-Trial Chamber II, “Decision Setting a New Date for the Initial Appearance”, ICC-01/09-02/11-8.

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

⁵ Pre-Trial Chamber II, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, ICC-01/09-02/11-48 with annexes.

⁶ Pre-Trial Chamber II, “Decision Requesting Observations on the Schedule for the Confirmation of Charges Hearing”, ICC-01/09-02/11-272.

⁷ ICC-01/09-02/11-277.

Kenyatta,⁸ the Prosecutor⁹, the Defence for Mr. Ali,¹⁰ and the Defence for Mr. Muthaura¹¹.

5. The Single Judge notes articles 19, 21(1)(a), (2) and (3), 61 and 67(1) of the Rome Statute (the "Statute"), rules 58, 59, 74(10), 121, 122, 124 and 140(2)(d) of the Rules of Procedure and Evidence (the "Rules"), regulations 20 and 21 of the Regulations of the Court (the "Regulations"), and regulations 52 and 64(1) of the Regulations of the Registry.

A. The Time Schedule for the Hearing

6. The Single Judge recalls the principle of fairness which encompasses the notion of equality of arms and, *inter alia*, requires that the parties be placed on an equal footing and that the Defence always has the final word as prescribed under rules 122(8) and 140(2)(d) of the Rules.

7. The Single Judge has taken into account the parties' observations to the extent possible. However, the parties should bear in mind the second sentence of rule 122(1) of the Rules which states that:

[...] The Presiding Judge shall determine how the hearing is to be conducted and, in particular, may establish the order and the conditions under which he or she intends the evidence contained in the record of the proceedings to be presented.

8. The Single Judge hereby provides the parties and participants with the time schedule for the Hearing as appended to this decision. The schedule has been decided on the basis of the observations received, but also taking into consideration the following factors: (i) the confirmation of charges hearing pursuant to article 61 of the Statute is not a mini-trial and there is a need to organize a concise and streamlined Hearing given its specific nature, limited scope and purpose; (ii) the

⁸ ICC-01/09-02/11-278.

⁹ ICC-01/09-02/11-279.

¹⁰ ICC-01/09-02/11-282.

¹¹ ICC-01/09-02/11-284. A corrigendum was notified to the Chamber on 5 September 2011, ICC-01/09-02/11-284-Corr.

suspects are not in custody as they have been summoned to the Court. Accordingly, they remain active in their professional and personal lives. Consequently, they have a legitimate expectation to spend only limited amount of time away from their routine daily life and commitments; (iii) the Chamber has recently concluded the confirmation of charges hearing in the companion case of the *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* and must proceed at the same time with its duties related to that case; (iv) Judge Cuno Tarfusser is also a member of Pre-Trial Chamber I and equally involved in the work pending before that chamber, in particular the work related to the case of the *Prosecutor v. Callixte Mbarushimana*.

9. In the same context, the Single Judge notes that the Defence for Mr. Muthaura requests the Chamber to “sit only for a maximum of four (4) hours per day during court sessions”,¹² for reasons explained in the confidential *ex parte* annex to the observations.¹³ The Single Judge acknowledges that Mr. Muthaura’s concerns are relevant for the determination of the schedule of the Hearing and have been taken attentively into account to the extent possible, in view of the constraints imposed by the availability of a courtroom. As a result, the schedule for the Hearing envisages no hearing days with sessions lasting more than a maximum of 4.5 hours, and a number of days with a lesser amount of scheduled session time. The Single Judge is convinced that as such, the schedule of the Hearing accommodates to the extent possible the concerns of Mr. Muthaura.

10. The time schedule indicates the maximum net time allotted to the parties and participants in the present case. A brief explanation as to the topic of each session is indicated in the schedule. This also extends to the manner in which the questioning of witnesses will take place. However, it remains the responsibility of the parties and participants to organize their presentations according to the time allotted to them.

¹² ICC-01/09-02/11-284-Corr, para. 12.

¹³ ICC-01/09-02/11-284-Conf-Exp-AnxA.

11. The Defence for Mr. Kenyatta and the Defence for Mr. Ali have requested in advance time to be allotted to question all witnesses called by the other respective Defence teams.¹⁴ At this stage, the Single Judge considers this request as premature as it will depend wholly on whether the witness, called by one suspect, in his/her testimony will touch upon certain issues which concern or implicate the other suspect(s). Additional time has therefore not been allotted in general to each Defence team for the examination of each witness called by the other respective Defence teams. That said, the Single Judge does not exclude the possibility for each Defence team to request in the Hearing that it be granted the opportunity to put questions to a witness called by another Defence team, should the need arise.

12. Moreover, the Single Judge emphasizes that the final schedule for the Hearing is subject to change if developments in the proceedings necessitate it. Furthermore, parties and participants should be aware that some time will be needed for resolving technical matters, such as shifting from public to closed/private sessions and calling witnesses. The Single Judge also underlines that for the sake of efficiency, in case a party does not fully use the time allotted to it in the schedule, the Chamber will automatically move to the next presentation even if it is scheduled for the following day. Thus, the Single Judge expects the parties to be prepared at any time and to be flexible as well.

13. The Defence for Mr. Kenyatta and the Defence for Mr. Ali indicate in their observations that they intend to challenge both jurisdiction and admissibility.¹⁵ The Defence for Mr. Muthaura declares its intention to challenge the jurisdiction in respect of the case against Mr. Muthaura.¹⁶

14. The Single Judge notes that, pursuant to rule 122(2) of the Rules, rule 58 of the Rules applies if a question or challenge concerning jurisdiction or admissibility arises

¹⁴ The Defence for Mr. Muthaura has indicated that it is unable to give an estimate for the time it requires as it is not aware of the identities of the witnesses called by Mr. Kenyatta and Mr. Ali, ICC-01/09-02/11-284-Corr, fn 15.

¹⁵ ICC-01/09-02/11-278, para. 8; ICC-01/09-02/11-282, para. 3.

¹⁶ ICC-01/09-02/11-284-Corr, para. 6.

at the confirmation of charges hearing. In this regard, the Single Judge recalls rule 58(1) of the Rules according to which “a request or application made under article 19 [of the Statute] shall be in writing and contain the basis for it”.

15. Further, the Single Judge notes that rule 58(2) of the Rules provides that in the case of a challenge to jurisdiction or admissibility, the Chamber “shall decide on the procedure to be followed”. This Chamber has held previously, albeit in a slightly different context, that “[g]iven the language used in rule 58 of the Rules, [it] is bestowed with the necessary discretion to organize the proceedings in a manner that best suits the circumstances of each particular case”.¹⁷ The Appeals Chamber also confirmed this interpretation.¹⁸

16. In view of the above, the Single Judge considers it imperative that these applications, if any, are received *before* the start of the Hearing, by no later than Monday, 19 September 2011 at 16h00 hrs.

17. In this regard, the Single Judge considers that, in case said challenges are brought by the Defence teams of the Suspects in accordance with the previous paragraph of this decision, it is not necessary that they are addressed orally at the courtroom sessions of the Hearing.

18. Finally, the Single Judge recalls the limited purpose of the Hearing and reminds all parties and participants to avoid repetitive arguments and to confine themselves to what is strictly necessary so that the Chamber, which has carefully read all the material available, discharge its functions pursuant to article 61(7) of the Statute.

¹⁷ Pre-Trial Chamber II, “Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute”, ICC-01/09-02/11-40, para. 8.

¹⁸ Appeals Chamber, “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’”, ICC-01/09-02/11-274, paras 87 and 108.

B. The Order of Presentation of Evidence at the Hearing

19. As the Single Judge indicated in the 6 April 2011 Decision and the Decision Requesting Observations, she expects that the Prosecutor and the Defence organize their arguments and presentation of evidence following the Draft Model Chart appended to the 6 April 2011 Decision starting with the contextual elements of crimes against humanity, the specific constituent elements of the crimes charged and finally the individual criminal responsibility of each suspect.

C. Technical Issues

20. The Single Judge stresses that when presenting evidence the parties shall provide the EVD number plus the last 4 digits of the document ID number or, at a minimum, their page and paragraph numbers. In addition, the parties are expected to indicate the level of classification of the items of evidence before they are presented.

21. In the event the parties wish to use audio or video material, the Single Judge expects that they will liaise ahead of time with the services of the Registry so that the proceedings can unfold smoothly. For interpretation purposes, the party presenting the audio or video material, shall provide the court officer with the transcripts of the material presented or, if not available, provide the court officer with the recordings at least one full working day before the Hearing so that he or she can transmit these recordings to the interpretation and translation services within the Registry.

22. The parties are further requested to provide the court officer at the end of each Hearing day with a list of the evidence that they intend to present during the Hearing the following day and the order in which they intend to present it so that interpreters and court staff are assisted in their work.

23. The Single Judge also points out that when referring to witnesses, parties and participants shall, in principle, use the pseudonym or witness code. That said, in case a witness has agreed that he or she be addressed by name in court, the witness may be referred to by the parties and participants by name.

24. The Single Judge also notes that in days, where there are more than two sessions required or scheduled, each session should not last more than one hour and a half pursuant to regulation 64(1) of the Regulations of the Registry.

25. Finally, the Chamber expects that services of the Registry are available *before* the Hearing so as to assist the Chamber, parties and participants in setting up their technical equipment.

D. Presence in the Courtroom

26. The Single Judge wishes to make clear that only the parties, participants, and the relevant members of the Registry, are permitted to be present in the courtroom during the Hearing, namely the Prosecutor and his team, the Suspects and their Defence teams, the common legal representative of victims and his assistant/team, if any, the Registrar, the Victims and Witnesses Unit (the "VWU"), and members of the Division of Court Services.

27. A correlated issue is a question that has been raised by the VWU in the companion case of the *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* concerning the potential desirability of a witness to be accompanied by his/her legal adviser. Indeed, the Court's statutory provisions envisage a possibility for a witness to receive independent legal advice. However, it is for the Chamber to organize the manner upon which the Hearing will be conducted. Accordingly, the Single Judge deems it appropriate to order the Registrar to arrange the necessary facilities and be ready to provide, outside the courtroom, independent legal advice from a qualified lawyer to any witness in the present case who may request legal advice pursuant to rule 74(10) of the Rules.

E. Video Recording and Photographs at the Hearing

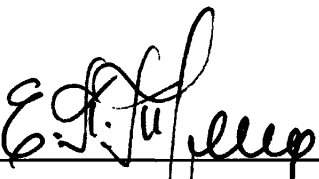
28. The Single Judge recalls that proceedings before this Court are public, unless otherwise provided in the statutory documents of the Court or ordered by the Chamber. The Single Judge notes, in particular, that pursuant to regulation 21(1) of

the Regulations, the publicity of hearings may extend beyond the courtroom. Accordingly, the Single Judge deems it appropriate to authorize the video recording and taking of photographs in the courtroom at the commencement of the Hearing, for no longer than one minute and a half.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) **establishes** the schedule of the Hearing to begin on 21 September 2011 as set out in the annex to the present decision;
- b) **decides** that any challenges by the Defence teams to jurisdiction and/or admissibility shall be brought in writing by no later than **Monday, 19 September 2011 at 16h00**;
- c) **orders** the parties and participants to comply duly with the modalities set out in section C of the present decision;
- d) **orders** the Registrar to arrange for the necessary facilities and a qualified lawyer to be available to provide independent legal advice to any witness in the present case who may request legal advice pursuant to rule 74(10) of the Rules;
- e) **authorizes** the Registrar to inform external applicants that, at the commencement of the Hearing, to be held on Wednesday, 21 September 2011, at 14h30 and after all parties and participants have taken their seats, video recording and the taking of photographs will be permitted for no longer than one minute and a half.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Tuesday, 13 September 2011

At The Hague, The Netherlands