

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 4 April 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

**SITUATION IN THE REPUBLIC OF KENYA
IN THE CASE OF THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA,
UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI**

**Public
Urgent**

**Decision on the Conduct of the Proceedings Following the Application of the
Government of Kenya Pursuant to Article 19 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 A. Khan and Kennedy Ogeto

Counsel for Uhuru Muigai Kenyatta

Steven Kay and Gillian Higgins

Counsel for Mohammed Hussein Ali

Evans Monari, John Philpot and
Gershon Otachi Bw'omanwa

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Paolina Massida

**The Office of Public Counsel for the
Defence**

States Representatives

Geoffrey Nice
Rodney Dixon

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar

Silvan Arbia, Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Fiona McKay

Other

PRE-TRIAL CHAMBER II (the “Chamber”) of the International Criminal Court (the “Court”) renders this decision on the conduct of the proceedings following the application of the Government of Kenya pursuant to article 19 of the Rome Statute (the “Statute”).

1. On 8 March 2011, the Chamber, by majority, decided to summon Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali to appear before the Court on 7 April 2011.¹

2. On 18 March 2011, the Chamber decided that the initial appearance hearing shall be convened on Friday, 8 April 2011 at 14.30 hours.²

3. On 31 March 2011, the Chamber received the “Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute” (the “Kenyan Application” or the “Application”), in which the Kenyan Government requested that the Chamber: (1) determines that the case, against the three persons for whom summonses to appear have been issued, is inadmissible (“First Request”); (2) convenes a status conference to be attended by the Kenyan Government as well as the parties “to address the Pre-Trial Chamber on the procedure to be adopted before any orders or directions are made by [...] as to the procedure to be followed” (“Second Request”); and (3) that the Kenyan Government “be afforded a separate time allocation to have an opportunity to address briefly the Pre-Trial Chamber on one or both of the hearings’ days of 7/8 April 2011, as the Court may decide in circumstances where the parties can be present” (“Third Request”).³

4. The Chamber notes articles 17, 19(2) (b), (3), 21(1)(a), (3) and 60(1) of the Statute, rules 58(2),(3) and 59(1)(b), (2), (3) of the Rules of Procedure and Evidence (the “Rules”), and regulations 80 and 81 of the Regulations of the Court (the “Regulations”).

¹ 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.

² Pre-Trial Chamber II, “Decision Setting a New Date for the Initial Appearance”, ICC-01/09-02/11-8.

³ ICC-01/09-02/11-26, paras 80-82.

5. The Chamber examined the three requests put forth by the Kenyan Government and considers that in order to be in a position to rule on the merits of the First Request related to the inadmissibility of the case, it must initially address the Second and the Third Requests, which mainly relate to the organization of the proceedings concerning the article 19 challenge.

6. According to rule 58(2) and (3) of the Rules:

2. When a chamber “receives a request or application raising a challenge [...] concerning [...] the admissibility of a case in accordance with article 19, paragraph 2[...], it shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. It may hold a hearing. It may join the challenge [...] to a confirmation or trial proceeding as long as this does not cause delay, and in this circumstance shall hear the and decide on the challenge [...] first.

3. The Court shall transmit a request or application received under sub-rule 2 to the Prosecutor and to the person referred to in article 19, paragraph 2, who [...] has appeared voluntarily or pursuant to summons, and shall allow them to submit written observations to the [...] application within a period of time determined by the Chamber.

7. Moreover pursuant to rule 59 of the Rules:

1. “[t]he Registrar shall inform the following of any [...] challenge of [...] admissibility which has arisen pursuant to article 19, paragraphs 1, 2 and 3:

[...] (b) The victims who have already communicated with the Court in relation to that case or their legal representatives.

2. The Registrar shall provide those referred to in sub-rule 1, in a manner consistent with the duty of the Court regarding the confidentiality of information, the protection of any person and the preservation of evidence, with a summary of the grounds on which the jurisdiction of the Court or the admissibility of the case has been challenged.

3. Those receiving the information, as provided for in sub-rule 1, may make representation in writing to the competent Chamber within such time limit as it considers appropriate.

8. Given the language used in rule 58 of the Rules, the Chamber is bestowed with the necessary discretion to organize the proceedings related to an admissibility challenge in manner that best suits the circumstances of each particular case. This is clear from the reference to the phrase “shall decide on the procedure to be followed” and the discretion provided by using the verb “may take appropriate measures” and “may hold a hearing”.

9. In the Kenyan Application, the Government requested that the Chamber convene a status conference to organize the proceedings related to the challenge under article 19(2) of the Statute and expressed desire to participate in the proceedings concerning the initial appearance hearing.

10. In response, the Chamber, being keen to expedite the proceedings and avoid any unnecessary delay, deems it sufficient to confine the engagement of the parties in the article 19 proceedings to providing written observations as dictated by rules 58(3) and 59(3) of the Rules. Accordingly, the Chamber considers that the Government's Second Request should be rejected.

11. As to the Government's Third Request regarding its participation in "one or both of the hearings' days of 7/8 April 2011", the Chamber wishes to recall its recent "Decision on the Motion by Legal Representative of Victim Applicants to Participate in Initial Appearance Proceedings", in which it made clear that the initial appearance hearing has a limited purpose and scope reflected in article 60(1) of the Statute and rule 121(1) of the Rules.⁴ Thus, considering issues related to article 19 proceedings during the initial appearance hearing would certainly go beyond the scope of this hearing as defined by the Statute and Rules thereto. Moreover, the fact that the Government of Kenya is a party to the article 19 proceedings does not mean *per se* that it is a party to the criminal proceedings against the suspects, which would allow its participation during the initial appearance hearing. It follows that the Government's Third Request should also be rejected.

12. Concerning more generally the procedure to be followed, the Chamber shall, in accordance with rule 58(3) of the Rules allow the Prosecutor and the suspects to submit written observations on the Application within a time period determined by the Chamber. In addition, the Chamber is of the view that the victims who have communicated with the Court namely, those who submitted applications to

⁴ Pre-Trial Chamber II, ICC-01/09-01/11-14, para. 6

participate in the proceedings in the present case, shall be allowed, in accordance with article 19(3) of the Statute and rule 59(3) of the Rules, to submit written observations on the Application within a time period determined by the Chamber. In order to ensure the proper and expeditious conduct of the article 19 proceedings and taking into consideration that no victim has been recognized yet in the present case, the Chamber is of the view that it is in the interest of justice to appoint the Office of Public Counsel for Victims (the “OPCV”) to represent all those victims who have submitted applications to participate in the proceedings in the present case.

13. Although the Chamber has already stated in its “First Decision on Victims’ Participation in the Case” that victims who have no legal representation shall be assisted by the OPCV for the purpose of participation in the proceedings,⁵ this does not deny the fact that the article 19 procedure is of a specific and limited nature and governed by *lex specialis* provisions, such as rule 59 of the Rules, which provides the Chamber with the discretion to organize the proceedings in a way that best guarantees its expeditiousness. Thus, it is the Chamber’s view that for the purpose of the article 19 proceedings, the OPCV may still serve the common interest of victims who have communicated with the Court even if in the meantime they are represented by their legal representatives. The Victims Participation and Reparations Section is instructed to that effect to provide all victims applications related to this case to the OPCV and to provide it with any necessary assistance to contact the victim applicants expeditiously.

⁵ Pre-Trial Chamber II, ICC-01/09-02/11-23, para. 23.

FOR THESE REASONS, THE CHAMBER, HEREBY

a) decides to reject the Second and Third Requests;

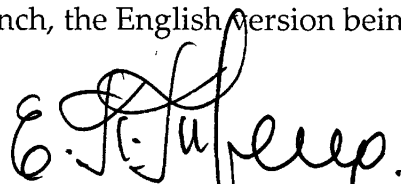
b) requests the Prosecutor and the Defence to submit written observations on the Kenyan Application, no later than **Thursday 28 April 2011, at 16.00 hours**;

c) invites the victims who have submitted applications to participate in the Court's proceedings with regard to the present case to make written observations on the Kenyan Application and submit them to the Chamber, no later than **Thursday 28 April 2011, at 16.00 hours**;

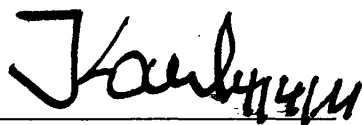
d) decides that the Office of Public Counsel for Victims shall represent those victims referred to in letter (c) above, and only for the purposes of article 19 proceedings.

Judge Hans-Peter Kaul appends a declaration.

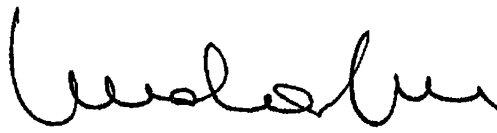
Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova
Presiding Judge



Judge Hans-Peter Kaul
Judge



Judge Cuno Tarfusser
Judge

Dated this Monday, 4 April 2011

At The Hague, The Netherlands

Declaration by Judge Hans-Peter Kaul

I wish to clarify that my concurrence with this decision of the Chamber is limited to the purposes of the present decision and is without prejudice to my Dissenting Opinion of 15 March 2011⁶, entitled "Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's 'Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali'", in which I have found that the "[International Criminal Court] lacks jurisdiction *ratione materiae* in the situation in the Republic of Kenya, including in the present case".



Judge Hans-Peter Kaul

Dated this Monday, 4 April 2011

At The Hague, The Netherlands

⁶ Pre-Trial Chamber II, "Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", ICC-01/09-02/11-3.