

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/09-02/11  
Date: 03 December 2012

**THE PRESIDENCY**

**Before:** Judge Sang-Hyun Song, President  
Judge Sanji Mmasenono Monageng, First Vice-President  
Judge Cuno Tarfusser, Second Vice-President

**SITUATION IN THE REPUBLIC OF KENYA**

**IN THE CASE OF  
*THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA  
AND  
UHURU MUIGAI KENYATTA***

**Public**

**Defence Application for a change of place where the Court shall sit for Trial**

**Sources:** Counsel for Ambassador Francis Kirimi Muthaura

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

**The Office of the Prosecutor**

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**Legal Representatives of the Victims**

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**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(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**

Ms. Silvana Arbia

**Counsel Support Section**

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. INTRODUCTION

1. The Defence of Francis Kirimi Muthaura (“Defence”) hereby respectfully applies to the Presidency pursuant to Articles 3(3) and 62 of the Rome Statute and Rule 100 of the Rules of Procedure and Evidence (“Rules”) to change the place where the Court shall sit for trial to the Republic of Kenya (“Kenya”) or to the United Republic of Tanzania (“Tanzania”) and requests the Presidency to undertake the consultations mandated by Rule 100(3) of the Rules in this respect.

## II. PROCEDURAL HISTORY

2. On 8 March 2011, Pre-Trial Chamber II of the Court (“Pre-Trial Chamber”), by majority decision, issued summonses to appear (“Summonses Decision”) to Ambassador Francis Kirimi Muthaura, Hon. Uhuru Kenyatta and Mr. Mohammed Hussein Ali (collectively “Suspects”).<sup>1</sup>
3. Pursuant to the Summonses Decision the Suspects voluntarily appeared before the Court at the initial appearance held on 8 April 2011, at which the Pre-Trial Chamber set the date for the start of the confirmation of charges hearing for 21 September 2011.<sup>2</sup>
4. On 3 June 2011, the Pre-Trial Chamber informed the Suspects that it was “in the process of assessing the desirability and feasibility of conducting the confirmation of charges hearing on the territory of the Republic of Kenya” and therefore requested observations from the Prosecutor and Defence on the possibility of holding the confirmation hearing in Kenya.<sup>3</sup>

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<sup>1</sup> Decision on the Prosecutor's Application for Summons to Appear for Francis Kirimi Muthaura, Uhuruu Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11-01, p. 23.

<sup>2</sup> ICC-01/09-02/11-T-1-ENG, pp. 7,12-14.

<sup>3</sup> Decision Requesting Observations on the Place of the Proceedings for the Purposes of the Confirmation of Charges Hearing, ICC-01/09-01/11-106, p. 6.

5. On 13 June 2011, the Defence submitted its observations,<sup>4</sup> namely that it would be in the interests of Ambassador Muthaura, victims, witnesses, Kenyan society and the Court itself to hold the confirmation hearing in Kenya, that the Kenyan government should be consulted so that the Court was confident that adequate arrangements to ensure a safe and orderly conduct of proceedings could be put in place, and proposed Tanzania as an alternative venue in the region should proceedings in Kenya be deemed not reasonably feasible.
6. The confirmation of charges hearing was subsequently held at the seat of the Court in The Hague, the Netherlands between 21 September and 5 October 2011. On 23 January 2012, the Pre-Trial Chamber issued its Decision on the Confirmation of Charges, in which it confirmed for trial, by majority, certain charges preferred by the Prosecutor against Ambassador Muthaura and Mr. Kenyatta, and declined to confirm any charges against Mr. Ali.<sup>5</sup>
7. On 29 March 2012, the Presidency referred the case against Ambassador Muthaura and Mr. Kenyatta to Trial Chamber V.<sup>6</sup>
8. On 14 May 2012, the Trial Chamber (“Chamber”) issued the Order scheduling a status conference, which included an agenda for the status conference, and instructed the parties to make written submissions on the listed issues by 28 May 2012.<sup>7</sup>

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<sup>4</sup> OBSERVATIONS OF THE DEFENCE TEAM OF AMBASSADOR FRANCIS K. MUTHAURA ON THE PLACE OF THE PROCEEDINGS FOR THE PURPOSE OF THE CONFIRMATION OF CHARGES HEARING, ICC-01/09-02/11-120.

<sup>5</sup> Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red.

<sup>6</sup> Decision referring the case of The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta to Trial Chamber V, ICC-01/09-02/11-414.

<sup>7</sup> ICC-01/09-02/11-422.

9. On 28 May 2012, the Defence submitted its written submissions on the status conference agenda.<sup>8</sup> As part of its submissions the Defence requested that the issue of venue for the trial be added to the status conference agenda and that the Trial Chamber invite the governments of Kenya and Tanzania to “address it on the feasibility and willingness of hosting the ICC so that the present ICC trial can take place in Kenya or else in Arusha, Tanzania.”<sup>9</sup>
10. The Defence of Mr. Kenyatta similarly requested that “the trial to be held in Kenya for reasons of judicial economy and to ensure that the judicial process takes place within the territory affected.”<sup>10</sup>
11. On 7 November 2012, the Chamber issued the “Decision on the defence request to change the place of the proceedings”,<sup>11</sup> holding that, in accordance with Rule 100 of the Rules, “any party wishing to change the place of trial has to submit a formal application to the Presidency which must then seek the views of the relevant Chamber” and “consult the State where the Court may sit”.<sup>12</sup> The Chamber accordingly rejected the respective requests of the Muthaura Defence and Kenyatta Defence, without prejudice to the right of the Muthaura Defence and / or Kenyatta Defence to file an application with the Presidency pursuant to Rule 100 of the Rules.<sup>13</sup>

### III. APPLICABLE LAW

12. Article 3 of the Rome Statute establishes that the seat of the Court is The Hague, the Netherlands, but that the “Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute”. With respect to trial proceedings in

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<sup>8</sup> Defence Submissions on the status conference agenda items contained in the Trial Chamber’s “Order scheduling a status conference” of 14 May 2012, ICC-01/09-02/11-427.

<sup>9</sup> *Ibid.*, para. 41.

<sup>10</sup> Defence for Uhuru Muigai Kenyatta Submissions on Status Conference Agenda, 28 May 2012, ICC-01/09-02/11-429, para. 24.

<sup>11</sup> ICC-01/09-02/11-522.

<sup>12</sup> *Ibid.*, para. 5.

<sup>13</sup> *Ibid.*, p. 5.

particular, Article 62 of the Statute states: “Unless otherwise decided, the place of the trial shall be the seat of the Court.”

13. Rule 100 of the Rules sets out the procedure by which the Court may decide, and a party may request, that proceedings take place outside the Netherlands:
  1. In a particular case, where the Court considers that it would be in the interests of justice, it may decide to sit in a State other than the host State.
  2. An application or recommendation changing the place where the Court sits may be filed at any time after the initiation of an investigation, either by the Prosecutor, the defence or by a majority of the judges of the Court. Such an application or recommendation shall be addressed to the Presidency. It shall be made in writing and specify in which State the Court would sit. The Presidency shall satisfy itself of the views of the relevant Chamber.
  3. The Presidency shall consult the State where the Court intends to sit. If that State agrees that the Court can sit in that State, then the decision to sit in a State other than the host State shall be taken by the judges, in plenary session, by a two-thirds majority.

#### **IV. APPLICATION PURSUANT TO RULE 100 OF THE RULES**

14. Pursuant to Rule 100(2) of the Rules, the Defence hereby respectfully applies to the Presidency to change the place where the Court shall sit for trial to Kenya or to Tanzania and requests the Presidency to undertake the consultations mandated by Rule 100(3) of the Rules in this respect.
15. The Defence adopts its previous submissions on this matter,<sup>14</sup> which it includes here for ease of review by the Presidency. As the Presidency will be aware, any trial process significantly disrupts the life of an accused person and such a process, with the stresses attendant to it, can have a detrimental effect on the health of an accused. It is principally for this reason – a desire to reduce

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<sup>14</sup> ICC-01/09-02/11-120 and ICC-01/09-02/11-427, paras. 40-41.

disruption and the strain of a criminal trial – that Ambassador Muthaura continues to prefer that his trial before the ICC takes place in Kenya or else in Tanzania.<sup>15</sup> Conducting the trial in Kenya or close by in Tanzania will therefore be convenient for Ambassador Muthaura, members of his family and friends who undoubtedly would like to be around him during such a period in order to lend him their support.<sup>16</sup>

16. The Defence also notes that generally, it is in the interest of justice, the witnesses who shall testify and the victims in the case to hold trials in the territory of the state where the alleged crimes occurred.<sup>17</sup> It would therefore be more convenient for the witnesses, victims and members of Kenyan society in general to witness or participate in the proceedings if they are held in Kenya.<sup>18</sup> This will give Kenyans ownership of the process and contribute immeasurably in the fight against impunity in Kenya.<sup>19</sup>
17. Holding the proceedings in Kenya will also enhance the Court's legal processes not only in this, but in future cases. The Trial Chamber will have the unique opportunity to obtain a sustained first-hand view of the *locus in quo* that will enable it to better understand the context as well as the particular circumstances in which the alleged crimes occurred. As such, factual and evidentiary assessments and findings to be made by the Chamber will significantly benefit from these direct observations and local understandings of the events under investigation.<sup>20</sup>
18. Of course, the trial can only take place in Kenya if the proper planning is undertaken and adequate safeguards in place to ensure the orderly conduct of

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<sup>15</sup> ICC-01/09-02/11-427, para. 40.

<sup>16</sup> ICC-01/09-02/11-120, para. 7.

<sup>17</sup> ICC-01/09-02/11-120, para. 6.

<sup>18</sup> ICC-01/09-02/11-120, para. 7.

<sup>19</sup> ICC-01/09-02/11-120, para. 8.

<sup>20</sup> ICC-01/09-02/11-120, para. 9.

proceedings and the security of Court staff, parties, participants and witnesses.<sup>21</sup> In this regard, and in order to facilitate the consultations called for pursuant to Rule 100(3), the Defence additionally informs the Presidency that the Defence shall transmit a copy of this application to the Attorney General of Kenya for his attention.

19. Concurrent to the Court's consideration of Kenya as venue for trial proceedings, the Defence likewise applies to the Presidency to change the place for trial to Tanzania in the event the Court determines Kenya is not a reasonably suitable location, and to undertake the necessary consultations with the Government of Tanzania pursuant to Rule 100(3). In particular, the Defence submits that Arusha, Tanzania is a suitable place for the Court to sit for trial for the following reasons:<sup>22</sup>
- a. Arusha, because of its proximity to Kenya (only four hours drive from Nairobi) offers convenience to all Kenyans as they would be able to travel quite easily to Arusha for the purpose of participating in and/or observing the proceedings. In this regard, Ambassador Muthaura would also have the benefit of having members of his family and friends available to support him during the proceedings without incurring too much expense.
  - b. Arusha, as the seat of the International Criminal Tribunal for Rwanda ("ICTR") is tried and tested as a venue for hosting international courts for nearly two decades and has developed world class facilities for hosting international trials which include, *inter alia*: facilities to ensure the delivery of witness testimony, witness protection services as well as the protection of court personnel including Judges and the preservation of court records and evidence. It is understood that the ICTR is currently winding down its

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<sup>21</sup> ICC-01/09-02/11-120, paras. 10-11.

<sup>22</sup> ICC-01/09-02/11-120, para. 14.



operations. As such some of its facilities may be made available to the ICC for the purpose of conducting the trial.

- c. Additionally, Tanzania in general and Arusha in particular has the experience of hosting high profile cases arising from the region. As such, they have the experience of dealing with media and civil society groups that have interests in trials being conducted in Arusha. It is reasonable to conclude that the Government of Tanzania would not have any significant difficulty in hosting in Arusha trial proceedings in this case.
- d. Arusha is also quite accessible from Europe. It has daily flights from many countries in Europe, including the Netherlands. As such, it should not be difficult for Court staff to be able to travel there as and when required.
- e. Further, in view of the fact that the ICTR is winding down, many former staff members of the Tribunal are leaving. This makes accommodation more readily available for all those whose presence is officially required in Arusha for the purpose of trial proceedings in this case.

### **Relief Requested**

For the reasons set out above, the Defence respectfully applies to the Presidency pursuant Rule 100(2) to change the place where the Court shall sit for trial to Kenya or to Tanzania and requests the Presidency to undertake the consultations required by Rule 100(3) of the Rules with the governments of Kenya and Tanzania.

Respectfully Submitted,



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Karim A. A. Khan QC  
Counsel for Ambassador Francis K. Muthaura

Dated this 3rd Day of December 2012  
At Nairobi, Kenya