

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09

Date: 25 September 2012

PRE-TRIAL CHAMBER II

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

SITUATION IN THE REPUBLIC OF KENYA

**Public
Urgent**

**Decision on the "Application for a ruling on the legality of the arrest of Mr.
Dennis Ole Itumbi"**

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

The Office of the Prosecutor
Fatou Bensouda, Prosecutor

Counsel for the Defence
Nicholas Kaufman

Legal Representatives of the Victims

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

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER II (the “Chamber”) of the International Criminal Court (the “Court”) renders this decision on the “Application for a ruling on the legality of the arrest of Mr. Dennis Ole Itumbi” (the “Application”).¹

I. PROCEDURAL HISTORY

1. On 31 March 2010, the Chamber, by majority, issued its decision authorising the Prosecutor to commence an investigation into the situation in the Republic of Kenya.²

2. On 23 January 2012, the Chamber, by majority, issued the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” in the cases of *The Prosecutor v. William Samoei Ruto et al.*, and *The Prosecutor v. Francis Kirimi Muthaura et al.*, in which it, *inter alia*, confirmed the charges against four of the six suspects to the extent specified in each decision (the “Confirmation of Charges Decisions”).³

3. On 9 March 2012, the Chamber issued two decisions denying leave to appeal the Confirmation of Charges Decisions, pursuant to article 82(1)(d) of the Rome Statute (the “Statute”) and ordering the transmission to the Presidency the Confirmation of Charges Decisions together with the record of the proceedings.⁴

4. On 29 March 2012, the Presidency issued the “Decision constituting Trial Chamber V and referring to it the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*”⁵ as well as the “Decision referring the case of *The Prosecutor v. Francis Kirimi*

¹ ICC-01/09-105 and its annex.

² Pre-Trial Chamber II, “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, ICC-01/09-19-Corr.

³ Pre-Trial Chamber II, ICC-01/09-01/11-373; ICC-01/09-02/11-382-Red.

⁴ Pre-Trial Chamber II, ICC-01/09-02/11-406; ICC-01/09-01/11-399. Judge Kaul appended a declaration to the decisions.

⁵ Presidency, ICC-01/09-01/11-406; ICC-01/09-01/11-406.

Muthaura and Uhuru Muigai Kenyatta to Trial Chamber V” (the “Presidency’s Decisions”).⁶

5. On 21 September 2012, the applicant’s Defence Counsel filed the Application, whereby he requests that the Chamber rule on the legality of the applicant’s arrest “in the context of an investigation instigated on the initiative of the OTP or, otherwise, in connection with ICC proceedings in general”.⁷

II. APPLICABLE LAW

6. The Chamber notes articles 21(1)(a) and (3), 61(9) and (11) and 64(4) of the Statute and rule 130 of the Rules of Procedure and Evidence (the “Rules).

III. DETERMINATIONS BY THE CHAMBER

7. According to article 61(11) of the Statute “[o]nce the charges have been confirmed [...], the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings”. Further, rule 130 of the Rules stipulates that “[w]hen the Presidency constitutes a Trial Chamber and refers the case to it, the Presidency shall transmit [...] the record of the proceedings to the Trial Chamber”.

8. In this context, the Chamber wishes to underline that by virtue of the Presidency’s Decisions, Trial Chamber V has been constituted,⁸ and accordingly, it is responsible for the conduct of “subsequent proceedings” related to the two cases, subject to the application of articles 61(9) and 64(4) of the Statute. Given that the Application presented and the annex appended thereto raise an issue concerning the alleged intimidation of the Prosecutor’s witnesses in the two cases already before the Trial

⁶ Presidency, ICC-01/09-02/11-414.

⁷ ICC-01/09-105, pp. 1, 14.

⁸ Presidency, ICC-01/09-01/11-406; ICC-01/09-02/11-414.

Chamber,⁹ the Chamber considers that it is no more competent to address the Application *sub judice*.

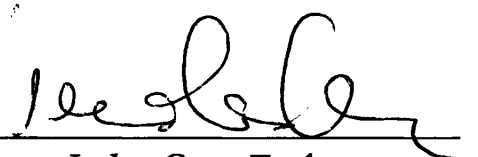
FOR THESE REASONS, THE CHAMBER, HEREBY

Dismisses the Application *in limine*.

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 Tuesday, 25 September 2012

At The Hague, The Netherlands

⁹ ICC-01/09-105 and its annex.