

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 29 January 2013

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 AND
UHURU MUIGAI KENYATTA**

Public

Decision Requesting Observations on the "Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute"

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

The Office of the Prosecutor
Fatou Bensouda, Prosecutor
Adesola Adeboyejo, Trial Lawyer

Counsel for Francis Kirimi Muthaura
Karim Khan, Essa Faal, Kennedy
Ogetto, Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta
Steven Kay and Gillian Higgins

Legal Representatives of the Victims
Fergal Gaynor

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”), issues this decision requesting written observations concerning the “Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute (the “Request” or the “Prosecutor’s Request”).²

I. PROCEDURAL HISTORY

1. On 26 November 2009, the Prosecutor filed a request for authorization to commence an investigation into the situation in the Republic of Kenya.³ On 31 March 2010, the Chamber authorized by majority, the commencement of an investigation into the situation in the Republic of Kenya in relation to crimes against humanity within the jurisdiction of the Court committed between 1 June 2005 and 26 November 2009.⁴

2. 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 to appear before the Court.⁵ 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 2011.⁶

3. On 23 January 2012, the Chamber issued its “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, in which, *inter alia*, it confirmed the charges presented against Mr. Muthaura and Mr. Kenyatta to the

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

² ICC-01/09-02/11-607-Conf and its annexes.

³ ICC-01/09-3 and its annexes.

⁴ 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.

⁵ 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.

⁶ ICC-01/09-02/11-T-1-ENG, p. 14, lines 11 to 15.

extent specified in the decision,⁷ and committed the two accused persons to trial on the charges as confirmed.⁸

4. On 28 December 2012, Trial Chamber V which is seized of the case at the trial stage issued the “Decision on the content of the updated document containing the charges”. In this decision Trial chamber V, *inter alia*, rejected a factual allegation put forward by the Prosecutor in her updated document containing the charges on the ground that the Pre-Trial Chamber’s conclusion “should [...] be viewed as a rejection of that particular allegation [...] and thus, the Prosecution should not include the allegation that gunshots were the cause of some of the alleged killings in Naivasha” (the “28 December 2012 Decision”).⁹

5. On 22 January 2013, the Prosecutor filed the Request seeking permission to “re-insert [said] factual allegation [...] previously denied [by the Chamber] as lacking adequate support”.¹⁰

II. APPLICABLE LAW

6. The Single Judge notes articles 21(1)(a),(3), 61(9), 67(1) of the Rome Statute (the “Statute”), rules 93 and 128 of the Rules of Procedure and Evidence (the “Rules”) and regulations 23 *bis* and 24 of the Regulations of the Court (the “Regulations”).

III. DETERMINATION BY THE CHAMBER

7. At the outset, the Single Judge wishes to point out that the Prosecutor has presented her request as “Confidential” without stating “the factual and legal basis for the chosen classification”, as required by regulation 23 *bis* (1) of the Regulations. The Single Judge also notes that the 28 December 2012 Decision is public.¹¹ Moreover, in another public filing addressed to Trial Chamber V, the Prosecutor

⁷ Pre-Trial Chamber II, ICC-01/09-02/11-382-Conf.

⁸ Pre-Trial Chamber II, ICC-01/09-02/11-382-Conf., para. 429.

⁹ Trial Chamber V, ICC-01/09-02/11-584, paras 74-75.

¹⁰ ICC-01/09-02/11-607-Conf., paras 1, 4.

¹¹ ICC-01/09-02/11-584, para. 75.

revealed her intention to apply to the Pre-Trial Chamber to include in the charges the factual allegation referred to in paragraph 4 above.¹² Therefore, the Single Judge sees no reason for the Prosecutor's Request to remain confidential. The Request should accordingly be re-classified as public, subject to any necessary redactions to be directly applied by the Prosecutor.

8. Turning to the subject-matter of this decision, the Single Judge notes article 61(9) of the Statute which reads, "[a]fter the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges". Further, rule 128(2) of the Rules states that "[b]efore deciding whether to authorize the amendment, the Pre-Trial Chamber may request the accused and the Prosecutor to submit written observations on certain issues of fact or law". Thus, before deciding on whether or not to grant such permission or to authorize the amendment sought, the Single Judge considers it appropriate to request the accused persons to submit written observations on the Prosecutor's Request.

9. With respect to the Prosecutor's Request, in paragraph 6 it is mentioned that "[s]ince the Confirmation Hearing, the Prosecution obtained evidence from several witnesses [...] that the Network supplied and used guns in murders of perceived ODM supporters in Naivasha". In this regard, the Single Judge recalls that in a recent judgment, the Appeals Chamber made clear that "the [Prosecutor's] investigation should largely be completed at the stage of the confirmation of charges hearing".¹³ Referring to an earlier judgment, the Appeals Chamber also made clear that although the continuation of the investigation subsequent to the confirmation hearing is permitted, "'ideally', it would be *desirable* for the investigation to be

¹² ICC-01/09-02/11-591.

¹³ Appeals Chamber, "Judgment on the appeal of the Prosecutor against the decision of Pre-trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'", ICC-01/04-01/10-514, para. 44.

complete by the time of the confirmation hearing” (emphasis added).¹⁴ This suggests that the principle approach is that the Prosecutor should be ready with the investigation during said phase and any delay in doing so is exceptional and should be justified. Accordingly, the Single Judge requests the Prosecutor to submit written observations clarifying the reasons for not conducting the investigation in due course in compliance with the Appeals Chamber’s jurisprudence.

10. Further, the Single Judge observes that the Chamber received only redacted excerpts of interview transcripts of four witnesses. In the view of the Single Judge, this is not sufficient for the purpose of deciding on the Prosecutor’s Request, and accordingly, the Prosecutor is requested to file confidential *ex parte*, the full un-redacted copies of said transcripts.

11. Finally, the Single Judge recalls rule 93 of the Rules which states that “[a] Chamber may seek the views of victims or their legal representatives participating pursuant to rules 89 to 91 on any issue, *inter alia*, in relation to issues referred to in rules [...] 128 [...]”. In this respect, the Single Judge considers that the Request to add to one of the charges the sentence “victims were also killed by gunshots”, could affect the victims concerned. Therefore, the Single Judge finds that victims should be given the opportunity to present their views to the Chamber on the Prosecutor’s Request.

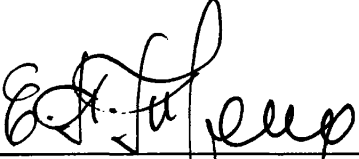
12. Since the Prosecutor’s Request is classified as confidential, it has not been notified to the Victims’ Legal Representative. Therefore, the Prosecutor should consider either to file said Request as a public document or to file a public redacted version of the Request (without the Annexes appended thereto).

¹⁴ Appeals Chamber, “Judgment on the appeal of the Prosecutor against the decision of Pre-trial Chamber I of 16 December 2011 entitled ‘Decision on the confirmation of charges’”, ICC-01/04-01/10-514, para. 44, n. 89; see also “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to rule 81 (2) and (4) of the Rules of Procedure and Evidence’”, ICC-01/04-01/06-568, para. 54.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY REQUESTS

- a) the Prosecutor to file either a public or a public redacted version of the Request, to be notified to the Victims' Legal Representative, no later than Thursday 31 January 2013, at 16 h00;
- b) the Prosecutor to file confidential *ex parte*, the full un-redacted copies of the interview transcripts of the four witnesses referred to in her Request, no later than, Thursday 31 January 2013, at 16 h00;
- c) the Prosecutor to submit written observations in accordance with paragraph 9 of the present decision, no later than, Thursday 7 February 2013, at 16 h00;
- d) the Defence of the accused persons and the Victims' Legal Representative to submit written observations on the Prosecutor's Request, no later than, Thursday 7 February 2013, at 16 h00;
- e) the Defence to file observations, if any, in response to the Prosecutor's written observations and the Victims' Legal Representative's observations, no later than Tuesday 12 February 2013, at 16 h00.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Tuesday, 29 January 2013

At The Hague, The Netherlands