

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 20 February 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 on the Defence's Request for an Extension of Time Limit

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

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 on the “Defence Request for an Extension of the Time Limit Specified in the ‘Request to File a Confidential Redacted Version of Annex A to the Prosecutor’s Observations’” (the “Defence’s Request or the “Request”).²

I. PROCEDURAL HISTORY

1. 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 Francis Kirimi Muthaura (“Mr. Muthaura”) and Uhuru Muigai Kenyatta (“Mr. Kenyatta”) to the extent specified in the decision,³ and committed the two accused persons to trial on the charges as confirmed.⁴

2. 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”.⁵

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

² ICC-01/09-02/11-650.

³ Pre-Trial Chamber II, ICC-01/09-02/11-382-Conf.

⁴ Pre-Trial Chamber II, ICC-01/09-02/11-382-Conf., para. 429.

⁵ Trial Chamber V, ICC-01/09-02/11-584, paras 74-75.

3. On 22 January 2013, the Prosecutor filed the "Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute (the "Prosecutor's Request")⁶ seeking permission to "re-insert [said] factual allegation [...] previously denied [by the Chamber] as lacking adequate support".⁷

4. On 29 January 2013, the Single Judge issued the "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'", in which she requested, *inter alia*, that the Prosecutor, the Defence of the accused and the Victims' Legal Representative "submit written observations [...], no later than, Thursday 7 February 2013, at 16 h00".⁸ The Single Judge also requested the Defence of the accused "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".⁹

5. On 7 February 2013, the Victim's Legal Representative filed its written observations on the Prosecutor's Request.¹⁰

6. On 7 February 2013, the Chamber received the "Prosecution observations on the conduct of its investigations" (the "Prosecutor's Observations"), together

⁶ ICC-01/09-02/11-607-Conf and its annexes.

⁷ ICC-01/09-02/11-607-Conf., paras 1, 4.

⁸ Pre-Trial Chamber II, ICC-01/09-02/11-614, p. 7.

⁹ Pre-Trial Chamber II, ICC-01/09-02/11-614, p. 7.

¹⁰ "Victims' Observations pursuant to '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*'", ICC-01/09-02/11-630.

with Annex A appended to it.¹¹ Said annex was marked “confidential, *ex parte*, Prosecution and VWU only”.

7. On 7 February 2013, the Defence of the accused also submitted its observations on the Prosecutor’s Request,¹² and on 12 February 2013, it responded to the Prosecutor’s Observations.¹³

8. On 13 February 2013, the Single Judge requested the Prosecutor to file a confidential redacted version of Annex A of the Prosecutor’s Observations, to be notified to the Defence of the accused, no later than Friday 15 February 2013.¹⁴ In the same decision, the Single Judge also requested the Defence to file its final observations after having received said annex, no later than Wednesday 20 February 2013.¹⁵

9. On 20 February 2013, the Chamber was notified of the Defence’s Request, which was initially filed on 19 February 2013. In its Request, the Defence of Mr. Kenyatta seeks an extension of the time limit to “submit [the] final observations no later than 16.00 on Friday 22 February”.¹⁶

II. APPLICABLE LAW

10. The Single Judge notes that pursuant to regulation 35(2) of the Regulations of the Court, “[t]he Chamber may extend or reduce a time limit if good cause is

¹¹ ICC-01/09-02/11-633; ICC-01/09-02/11-633-Conf-Exp-AnxA.

¹² ICC-01/09-02/11-634.

¹³ ICC-01/09-02/11-642.

¹⁴ Pre-Trial Chamber II, “Request to file a Confidential Redacted Version of Annex A to the Prosecutor’s Observations (ICC-01/09-02/11-633-Conf-Exp-AnxA)”, ICC-01/09-02/11-644, p. 6

¹⁵ Pre-Trial Chamber II, “Request to file a Confidential Redacted Version of Annex A to the Prosecutor’s Observations (ICC-01/09-02/11-633-Conf-Exp-AnxA)”, ICC-01/09-02/11-644, p. 6

¹⁶ ICC-01/09-02/11-650, paras 1, 12, 16.

shown and, where appropriate, after having given the participants an opportunity to be heard”.

III. DETERMINATION BY THE SINGLE JUDGE

11. In its Request, the Defence of Mr. Kenyatta avers that the extension of time limit is justified, because it has to comply with an order issued by the Presiding Judge of Trial Chamber V in a recent status conference.¹⁷ According to the Defence, it is “endeavouring [sic] to provide Trial Chamber V with an informative and clear illustration of the extent to which the Prosecution’s regime of disclosure and redactions has affected its ability to prepare adequately for trial”.¹⁸ This task mandates the Defence to provide a “clear and useful statistics and analysis” in relation to “all data relating to the disclosure of witness identities, witness statements and other documentary materials”, the Defence added.¹⁹ With respect to the delay in the preparation of said statistical analysis, the Defence argues that the reason is beyond its control, given that it resulted from “technical disclosure issues”.²⁰ For the Defence, resolving these disclosure issues was decisive for the sake of providing the Trial Chamber with a “complete picture of the volume of material disclosed by the Prosecution” in support of its submission.²¹

12. The Single Judge wishes to point out that as a matter of principle, any Defence team is free to participate in as many cases before the Court or any other

¹⁷ ICC-01/09-02/11-650, para. 13.

¹⁸ ICC-01/09-02/11-650, para. 13.

¹⁹ ICC-01/09-02/11-650, para. 13.

²⁰ ICC-01/09-02/11-650, para. 14.

²¹ ICC-01/09-02/11-650, para. 14.

tribunal as they wish, bearing in mind the different responsibilities expected to emerge as a result of the various commitments. In this context, although the Defence's justification results from the involvement in one and the same case, the Single Judge still expects a better organization and management on the part of the Defence. This aims at expediting the overall conduct of the proceedings, which involves the fundamental right of the accused to be tried without undue delay. In view of the Defence's submission, which in the particular circumstances of this case shows good cause, the Single Judge exceptionally grants the Request.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

grants the Defence's Request.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Wednesday, 20 February 2013

At The Hague, The Netherlands