

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 12 September 2011

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,
UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI**

Public

**Decision on the Reclassification of Certain Items of Evidence and Certain
Documents in the Record of the Case**

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 Khan, Essa Faal and Kennedy
Ogetto

Counsel for Uhuru Muigai Kenyatta
Steven Kay and Gillian Higgins

Counsel for Mohamed Hussein Ali
Evans Monari, John Philpot and
Gershom Otachi Bw'omanwa

Legal Representatives of the Victims
Morris Azuma Anyah

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”) of the International Criminal Court (the “Court”),¹ hereby renders this decision on the reclassification of certain evidence and certain documents in the record of the case.

1. 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 (“Mr. Ali”) (collectively, the “Suspects”) to appear before it.² 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 2011.³

2. On 2 September 2011, the “Application by the Defence for Uhuru Kenyatta under Articles 61(3) and 67(1)(a) for an Adjournment of the Confirmation Hearing Scheduled for 21 September 2011 and Request for Alteration to their Selected Viva Voce Witnesses” was submitted, together with 6 annexes, filed “confidential *ex parte*” (the “Application for Adjournment”).⁴

3. On the same day, the Defence of Mr. Kenyatta filed the “Request by Defence of Uhuru Kenyatta for the Pre-Trial Chamber to vary the status of Ex Parte Confidential Annexes 1 and 2 of the ‘Application by the Defence for Uhuru Kenyatta under Articles 61(3) and 67(1)(a) for Adjournment of the Confirmation Hearing Scheduled for 21 September 2011 and Request for Alteration to their Selected Viva Voce Witnesses’ to Confidential Inter Partes”,⁵ seeking that the annexes be reclassified as

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

² 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.

³ ICC-01/09-02/11-T-1-ENG.

⁴ ICC-01/09-02/11-281 and confidential *ex parte* annexes 1, 1A, 1B, 1C, 1D, 2.

⁵ ICC-01/09-02/11-283.

“confidential”, “[g]iven the nature and scope of the information contained therein and its direct relevance to all parties to the proceedings”.⁶

4. On 5 September 2011, the Single Judge issued the “Decision on the Request by Defence of Uhuru Kenyatta for the Pre-Trial Chamber to vary the status of Ex Parte Confidential Annexes 1 and 2 of the Application by the Defence for Uhuru Kenyatta under Articles 61(3) and 67(l)(a) for Adjournment of the Confirmation Hearing Scheduled for 21 September 2011 and Request for Alteration to their Selected Viva Voce Witnesses to Confidential Inter Partes”,⁷ whereby annexes 1, 1A, 1B, 1C, 1D were reclassified as “confidential *ex parte*, Prosecutor and Defence for Mr. Kenyatta”, while annex 2 was reclassified as “confidential”.⁸

5. On the same day, the Single Judge issued the “Order to the Prosecutor and the Victims and Witnesses Unit to Submit Observations”,⁹ wherein the Prosecutor and the Victims and Witnesses Unit (the “VWU”) were ordered to submit observations on Annex 1 to the Application for Adjournment.¹⁰

6. Also on 5 September 2011, the Defence of Mr. Kenyatta disclosed the evidence on which it intends to rely at the confirmation of charges hearing, and filed the “Defence First Communication of Pre-Trial Evidence, Pursuant to Rule 78 of the Rules of Procedure and Evidence to the Prosecution”¹¹ and the “Defence Communication of its List of Evidence in Compliance with the Decision of Time Limit for Disclosure under Rule 121(6) of the Rules of Procedure and Evidence”.¹²

⁶ ICC-01/09-02/11-283, para. 9.

⁷ Pre-Trial Chamber II, ICC-01/09-02/11-291.

⁸ Pre-Trial Chamber II, “Decision on the Request by Defence of Uhuru Kenyatta for the Pre-Trial Chamber to vary the status of Ex Parte Confidential Annexes 1 and 2 of the Application by the Defence for Uhuru Kenyatta under Articles 61(3) and 67(l)(a) for Adjournment of the Confirmation Hearing Scheduled for 21 September 2011 and Request for Alteration to their Selected Viva Voce Witnesses to Confidential”, ICC-01/09-02/11-291, p. 4.

⁹ Pre-Trial Chamber II, ICC-01/09-02/11-292-Conf-Exp.

¹⁰ Pre-Trial Chamber II, “Order to the Prosecutor and the Victims and Witnesses Unit to Submit Observations”, ICC-01/09-02/11-292-Conf-Exp, p. 4.

¹¹ ICC-01/09-02/11-295 and annexes A-C, confidential *ex parte*.

¹² ICC-01/09-02/11-300 and annex A, confidential *ex parte*.

7. Still on 5 September 2011, the Defence of Mr. Kenyatta submitted the “Urgent Defence Request of on Behalf of Uhuru Kenyatta for Directions Concerning Disclosure to the Co-Defence Teams of Materials to be Relied Upon at the Confirmation Hearing which are the Subject of a Court Order to the Registry not to Disclose to Mr. Muthaura and Mr. Ali, and Request for Additional Time to Amend the Relevant Metadata”,¹³ wherein it “seeks direction as to when it may be permitted to serve the documents contained in Annex 1 on the Co-Defence teams in addition to several other witness statements that pertain to the same issue”¹⁴

8. On 7 September 2011, the VWU submitted the “Victims and Witnesses Unit’s observations of the confidential *ex parte* annex 1 to the ‘Application by the Defence for Uhuru Kenyatta under Articles 61(3) and 67(1)(a) for an Adjournment of the Confirmation Hearing Scheduled for 21 September 2011 and Request for Alteration to their Selected Viva Voce Witness’ (ICC-01/09-02/11-281)”.¹⁵

9. On the same day, the Prosecutor filed the “Prosecution’s observations on the confidential *ex parte* annex 1 to the ‘Application by the Defence for Uhuru Kenyatta under Articles 61(3) and 67(1)(a) for an Adjournment of the Confirmation Hearing Scheduled for 21 September 2011 and Request for Alteration to their Selected Viva Voce Witness’ (ICC-01/09-02/11-281)”.¹⁶

10. The Single Judge notes article 68(1) of the Rome Statute, regulation 23*bis*(3) of the Regulations of the Court and article 8 of the Code of Professional Conduct for counsel.

11. This decision is taken with respect to: (i) certain evidence disclosed by the Defence of Mr. Kenyatta, and (ii) certain documents filed in the record of the case by the Defence of Mr. Kenyatta.

¹³ ICC-01/09-02/11-294.

¹⁴ ICC-01/09-02/11-294, para. 7.

¹⁵ ICC-01/09-02/11-303-Conf-Exp.

¹⁶ ICC-01/09-02/11-304-Conf-Exp.

12. Upon review of the material subject to this decision, and upon consideration of the submissions of the Defence of Mr. Kenyatta, the Prosecutor and the VWU, the Single Judge considers that it is appropriate in the present circumstances to reclassify the said material as “confidential”.

13. Finally, the Single Judge reminds the Defence counsel of their obligation, pursuant to article 8 of the Code of Professional Conduct for counsel, to “respect and actively exercise all care to ensure respect for [...] confidentiality of information in accordance with the Statute, the Rules of Procedure and Evidence and the Regulations of the Court”.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

a) orders the Registrar to reclassify the following items of evidence as “confidential”:

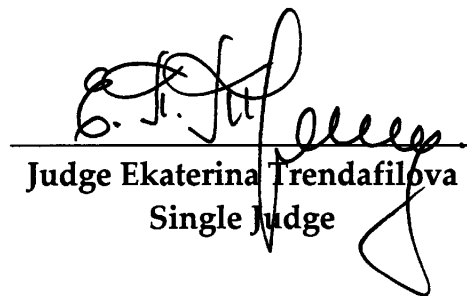
- KEN.D13.0002.0056;
- KEN.D13.0005.0225;
- KEN.D13.0005.0226;
- KEN.D13.0005.0227;
- KEN.D13.0005.0228;
- KEN.D13.0005.0229;
- KEN.D13.0005.0230;
- KEN.D13.0005.0231;
- KEN.D13.0005.0232;
- KEN.D13.0005.0233;
- KEN.D13.0005.0234;
- KEN.D13.0005.0235;
- KEN.D13.0005.0238;
- KEN.D13.0005.0246;
- KEN.D13.0005.0296;

- KEN.D13.0005.0297;
- KEN.D13.0005.0298;
- KEN.D13.0005.0299;
- KEN.D13.0005.0300;
- KEN.D13.0005.0301;
- KEN.D13.0005.0377;
- KEN.D13.0005.0389;
- KEN.D13.0005.0397;
- KEN.D13.0005.0400;
- KEN.D13.0005.0402;
- KEN.D13.0005.0406; and
- KEN.D13.0005.0408;

b) orders the Registrar to reclassify the following documents as “confidential”:

- ICC-01/09-02/11-281-Conf-Exp-Anx1;
- ICC-01/09-02/11-281-Conf-Exp-Anx1A;
- ICC-01/09-02/11-281-Conf-Exp-Anx1B;
- ICC-01/09-02/11-281-Conf-Exp-Anx1C;
- ICC-01/09-02/11-281-Conf-Exp-Anx1D;
- ICC-01/09-02/11-295-Conf-Exp-AnxA;
- ICC-01/09-02/11-295-Conf-Exp-AnxB;
- ICC-01/09-02/11-295-Conf-Exp-AnxC; and
- ICC-01/09-02/11-300-Conf-Exp-AnxA.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Monday, 12 September 2011

At The Hague, The Netherlands