Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/09-02/11**
Date: **8 October 2012**

PRE-TRIAL CHAMBER II

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

SITUATION IN THE REPUBLIC OF KENYA

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

Confidential ex parte Trial Chamber V, Prosecutor and Victims and Witnesses Unit

Decision on the Referral of a Preliminary Issue to Pre-Trial Chamber II

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

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
Maria Luisa Martinod-Jacome

Detention Section

Victims Participation and Reparations Section

Other
Trial Chamber V

PRE-TRIAL CHAMBER II (the "Chamber") of the International Criminal Court (the "Court") renders this decision following Trial Chamber V's "Decision referring a preliminary issue to the Pre-Trial Chamber" dated 25 September 2012 (the "Trial Chamber Decision").[1]

I. PROCEDURAL HISTORY

1. On 23 January 2012, the Chamber 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*, by majority confirmed the charges against four of the six suspects to the extent specified in each decision (the "Confirmation of Charges Decisions").[2]

2. 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 of the Confirmation of Charges Decisions together with the record of the proceedings.[3]

3. 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*"[4] as well as the "Decision referring the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* to Trial Chamber V" (the "Presidency's Decisions").[5]

4. On 24 September 2012, by way of her "Prosecution notification regarding intent to take investigative steps following apparent attempts to interfere with protected prosecution witnesses" (the "First Prosecution Notification"),[6] the Prosecutor informed Trial Chamber V (the "Trial Chamber") that she had been receiving information suggesting that individuals acting on behalf of one of the

[1] ICC-01/09-493-Conf-Exp and Conf-Exp-AnxA.
[2] ICC-01/09-01/11-373; ICC-01/09-02/11-382-Red.
[3] ICC-01/09-02/11-406; ICC-01/09-01/11-399. Judge Kaul appended a declaration to the decisions.
[4] ICC-01/09-01/11-406.
[5] ICC-01/09-02/11-414.
[6] ICC-01/09-02/11-493- Conf-Exp-AnxA.

accused were seeking to interfere with Prosecution witnesses and their families, *inter alia*, in violation of the conditions imposed upon the issuance of the summonses to appear. Accordingly, the Prosecutor was planning to arrange for the recording of communications which might take place between one witness and the accused in the subsequent days. Whilst arguing that this recording would occur with the knowledge and the consent of the relevant witness, and would therefore be lawful, the Prosecutor nevertheless wished to provide the Trial Chamber "with an opportunity to seek additional clarification or interpose objections to the intended process".[7]

5. On 25 September 2012, by way of an urgent decision, the Trial Chamber referred the First Prosecution Notification to the Chamber "for its determination as appropriate" pursuant to article 64(4) of the Statute[8] (the "Referral"). In its view, this referral would be more consistent with its own "effective and fair functioning", notably in light of the likelihood that the Trial Chamber "may, in the future course of these proceedings, be called upon to determine the admissibility of evidence obtained as a result of the prosecution's investigation" and with a view to preventing questions of "prejudgement of the admissibility issue" from arising.[9]

6. On 27 September 2012, the Prosecutor submitted her "Prosecution update pursuant to Decision ICC-01/09-02/11-493-Conf-Exp" (the "Second Prosecution Notification"),[10] whereby she informed the Chamber that the investigative steps envisaged in the First Prosecution Notification had not been taken and assured the Chamber that it would be informed on any "material developments".

II. APPLICABLE LAW

7. 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").

[7] ICC-01/09-02/11-493- Conf-Exp-AnxA, paragraph 4.
[8] ICC-01/09-02/11-493-Conf-Exp.
[9] ICC-01/09-02/11-493- Conf-Exp, paragraph 5.
[10] ICC-01/09-02/11-494-Conf-Exp.

III. DETERMINATION BY THE CHAMBER

8. 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".

9. As in its recent "Decision on the 'Application for a ruling on the legality of the arrest of Mr Dennis Ole Itumbi'",[11] the Chamber wishes to reiterate that, by virtue of the Presidency's Decisions, Trial Chamber V has been constituted,[12] and accordingly, it is responsible for the conduct of "subsequent proceedings" related to both cases in the Kenya situation.

10. Both the Statute and the Rules make it clear that, following the constitution of a Trial Chamber and the assignment of a case to it, the responsibility of conducting the proceedings of that case shifts from the Pre-Trial to the Trial Chamber. To this end, the Trial Chamber is vested with the discretionary power to exercise any function of the Pre-Trial Chamber, provided only – as explicitly set forth in article 61(11) of the Statute - that they are "relevant and capable of application" in the trial phase. Accordingly, as a matter of principle, it is for the Trial Chamber to address and decide all issues which are relevant to the organization and conduct of the trial proceedings and/or may influence its determinations thereto. It is also the Trial Chamber's duty to rule on issues which may influence its determination on the guilt or innocence of the accused and the outcome of the trial. Instances where, after the constitution of a Trial Chamber, the Pre-Trial Chamber is called anew to make determinations relating to the case are to be regarded as deviations from the ordinary course and sequence of the proceedings as enshrined in the statutory texts.

[11] ICC-01/09-106.
[12] ICC-01/09-01/11-406; ICC-01/09-02/11-414.

11. In this context, and more specifically, the Chamber considers that article 64(4) of the Statute provides an exception to the aforementioned structure and sequence, and has therefore to be narrowly construed. The Statute does not vest an unfettered discretionary power in the Trial Chamber to refer issues to a Pre-Trial Chamber for its resolution. Article 64(4) imposes the requirement that such referral be necessary for – and hence instrumental to – the effective and fair functioning of the Trial Chamber. Thus, the Statute entails that no referral is legitimate or desirable whenever it might result in creating additional, unnecessary steps in the proceedings which are complex and lengthy by their own nature. The instrumentality to the effectiveness and fairness of the proceedings as a whole is the guiding criterion in deciding whether a referral should or should not be made. As Trial Chamber I already cautioned in interpreting the provision in question, "it may be counter-productive to attempt to delegate the kind of complicated decisions that arise during this preparatory stage to a judge or to judges of another Division who have not been involved in the complex and often interrelated issues that will have arisen following the confirmation of charges"; the pre-trial judge or judges would have "to place the issue referred to them in the overall context of the Trial Chamber's work to date, and that process would be exacting and time-consuming".[13]

12. The exceptional nature of the referral to the Pre-Trial Chamber of issues relating to a case pending before a Trial Chamber is also evident in light of the additional requirement that such referral exclusively pertain to issues which qualify as "preliminary".

13. Under the present circumstances, and notably in light of the Prosecutor's Second Notification, the Chamber does not deem it necessary or appropriate to engage in an in-depth analysis of all of the features an issue must possess for it to qualify as preliminary. Suffice it to say, however, that no issue relating to a Trial Chamber's own design for the organization and conduct of the trial proceedings, or having an impact on the merits or on the outcome of a case, can qualify as "preliminary" within the meaning and for the purposes of article 64(4) of the Statute.

[13] ICC-01/04-01/06-1349, paragraph 14(b).

14. In this regard, the Chamber more specifically notes that issues such as those outlined and foreshadowed in the Prosecutor's First and Second Notification are related to the Trial Chamber's core responsibility, namely its determination on the merits of the case, as they are of an evidentiary nature, pertaining to the relevance and admissibility of evidence. As such they cannot therefore be regarded as "preliminary" for the purposes of the aforementioned provision. Further, a referral allowing two separate Chambers to address and adjudicate on issues relating to the relevance and admissibility of evidence to be used for the purposes of the determination of the guilt or innocence of the accused would most likely lead to further highly undesirable or problematic consequences. For example, it could trigger additional challenges in the context of the trial proceedings, whereby one or both parties would question the determination taken by the Pre-Trial Chamber on the referred issue, whenever such determination appears contrary to their interest in the case. Certainly, these challenges would not serve the efficiency of the proceedings.

15. Finally, the Chamber wishes to highlight that neither in her First, nor in her Second Notification does the Prosecutor seek the Trial or the Pre-Trial Chamber respectively to rule on any particular request. As made apparent by their very title, both submissions are merely aimed at conveying to the Chamber(s) information received in respect of the evidence of the case and in sharing details concerning a number of envisaged investigative steps. Whilst the Prosecutor's solicitude in this respect may be regarded as commendable, such submission can hardly be considered as raising an "issue", let alone a preliminary one, within the meaning of article 64(4) of the Statute.

FOR THESE REASONS, THE CHAMBER, HEREBY

DECIDES that it cannot exercise functions in regard of the First Prosecution Notification.

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

Judge Ekaterina Trendafilova
Presiding Judge

Kaul 8/10/12

Judge Hans-Peter Kaul
Judge

Judge Cuno Tarfusser
Judge

Dated this Monday, 8 October 2012

At The Hague, The Netherlands