

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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Date: 11 December 2012

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

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

Confidential

**Defence Request to the Judges of the Chamber to consider acting pursuant to Rule
33(1) of the Rules**

Sources: Counsel for Ambassador Francis Kirimi Muthaura

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

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**Victims Participation and Reparations
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Other

I. INTRODUCTION

1. The Defence of Francis Kirimi Muthaura ("Defence") hereby respectfully requests¹ the honourable Judges of the Trial Chamber ("Chamber") to consider whether it would be in the interests of justice, and the right of Ambassador Muthaura to be tried without undue delay, for the members of the Chamber to act pursuant to Rule 33(1) of the Rules of Procedure and Evidence to seek to excuse themselves prior to the start of trial from either the case of the *Prosecutor v. William Samoei Ruto and Joseph Arap Sang* ("Kenya I") or the present case – the *Prosecutor v. Francis Kirimi Muthaura & Uhuru Muigai Kenyatta* ("Kenya II").

II. PROCEDURAL HISTORY

2. On 8 March 2011, Pre-Trial Chamber II of the Court ("Pre-Trial Chamber"), by two majority decisions, issued summonses to appear to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (collectively "*Kenya I* Suspects"),² and Francis Kirimi Muthaura, Uhhuru Kenyatta and Mohammed Hussein Ali (collectively "*Kenya II* Suspects").³
3. Pursuant to the First Summonses Decision, the *Kenya I* Suspects voluntarily appeared before the Court at the initial appearance held on 7 April 2011, at which the Pre-Trial Chamber set the date for the start of the confirmation of charges hearing for the *Kenya I* case for 1 September 2011.⁴
4. Similarly, pursuant to the Second Summonses Decision, the *Kenya II* Suspects voluntarily appeared before the Court at the initial appearance held on 8 April

¹ In order to comply with the spirit of Rule 33(2) of the Rules, which dictates that any request submitted by a Judge pursuant to Rule 33(1) shall be treated as confidential by the Presidency, this request is submitted confidentially in order to keep from public view any action or deliberations the honorable Judges may see fit to undertake in this respect.

² Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-01/11-1 ("First Summonses Decision").

³ Decision on the Prosecutor's Application for Summons to Appear for Francis Kirimi Muthaura, Uhiirii Muigai Kenyatta and Mohammed Hussein Ah, ICC-01/09-02/11-01 ("Second Summonses Decision").

⁴ ICC-01/09-01/11-T-I-ENG ET.

2011, at which the Pre-Trial Chamber set the date for the start of the confirmation of charges hearing in the *Kenya II* case for 21 September 2011.⁵

5. The *Kenya I* confirmation of charges hearing was held between 1 and 8 September 2011. On 23 January 2012, the Pre-Trial Chamber issued its Decision on the Confirmation of Charges, in which it confirmed for trial, by majority, the charges preferred by the Prosecutor against Mr. Ruto and Mr. Sang. The Pre-Trial Chamber declined to confirm any charges against Mr. Kosgey.⁶
6. The *Kenya II* confirmation of charges hearing was held between 21 September and 5 October 2011. On 23 January 2012, the Pre-Trial Chamber issued its Decision on the Confirmation of Charges, in which it confirmed for trial, by majority, certain charges preferred by the Prosecutor against Ambassador Muthaura and Mr. Kenyatta, and declined to confirm any charges against Mr. Ali.⁷
7. On 29 March 2012, the Presidency constituted Trial Chamber V⁸ and referred to it both the *Kenya I*⁹ and *Kenya II* cases.¹⁰
8. On 9 July 2012, the Chamber issued scheduling orders in both the *Kenya I*¹¹ and *Kenya II*¹² cases, setting the commencement of trial in these cases for 10 April and 11 April 2013, respectively.

⁵ ICC-01/09-02/11-T-1-ENG, pp. 7,12-14.

⁶ Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373.

⁷ Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red.

⁸ Decision constituting Trial Chamber V and referring to it the case of The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11-406.

⁹ *Ibid.*

¹⁰ Decision referring the case of The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta to Trial Chamber V, ICC-01/09-02/11-414.

¹¹ Decision on the schedule leading up to trial, ICC-01/09-01/11-440.

¹² Decision on the schedule leading up to trial, ICC-01/09-02/11-451.

III. APPLICABLE LAW

9. Article 41(1) of the Rome Statute establishes that the "Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence."
10. Rule 33 of the Rules sets out the procedure by which a Judge may request to be excused from a particular function:
 1. A judge [...] seeking to be excused from his or her functions shall make a request in writing to the Presidency, setting out the grounds upon which he or she should be excused.
 2. The Presidency shall treat the request as confidential and shall not make public the reasons for its decision without the consent of the person concerned.
11. Outside of Rule 35 of the Rules, which concerns the duty of a Judge to seek excusal from a function if the Judge has reason to believe that a ground for disqualification exists in relation to him or her, it is wholly up to the discretion of a Judge of the Court as to whether he or she should seek to be excused from a particular function.
12. In accordance with Rule 33(1), a Judge who has made a decision to seek excusal from a function or functions need only set out in a written request to the Presidency "the grounds upon which he or she should be excused". The Presidency has previously established that such a request should be "well founded".¹³

¹³ See Decision on the request to be excused from the exercise of judicial functions in Trial Chamber IV pursuant to article 41 of the Rome Statute, 6 March 2012, ICC-02/05-03/09-308-Anx2; Decision on the request to be excused from the exercise of judicial functions in Trial Chamber III, pursuant to article 41 of the Rome Statute, 15 July 2010, ICC-01/05-01/08-837-Anx2; Decision on the request to be excused from the exercise of judicial functions in Trial Chamber II, pursuant to article 41 of the Rome Statute, 30 September 2009, ICC-01/04-01/07-1503-Anx2; Decision on the request to be excused from the exercise of judicial functions in Pre-Trial Chamber III, 22 April 2008, ICC-01/05-9-Anx2.

13. At least three judges of a Trial Chamber have requested to be excused from their functions on a Trial Chamber due to workload stemming from other cases and / or situations.¹⁴ All of these requests were deemed 'well founded' by the Presidency and granted.¹⁵
14. Additionally, Judge Fulford, when writing on behalf of both himself and Judge Odio Benito to the Presidency requesting to be excused from their functions on Trial Chamber III prior to the start of trial proceeding in the *Bemba* case due to their on-going duties presiding over trial in the *Lubanga* case, noted his unequivocal view [] that it would be inimical to the interests of justice in both cases if I and Judge Odio Benito attempted to preside over two substantial concurrent trials.
- There are other judges at the Court who are better placed in terms of their commitments to undertake the Bemba trial, and accordingly we ask that we are relieved of our continuing obligations in the Bemba case, now that the trial is about to start.¹⁶
15. In finding the request from Judge Fulford and Judge Odio Benito to be well founded, the "the Presidency took particular note of the possible lengthy overlap between the two trials [...] and the availability of other judges to sit in the Bemba case."¹⁷

¹⁴ Request to be excused from Trial Chamber III, 28 June 2010, ICC-01/05-01/08-837-Anx1; Request to be excused from functions in Trial Chamber II, 5 August 2009, ICC-01/04-01/07-1503-Anx1.

¹⁵ Decision on the request to be excused from the exercise of judicial functions in Trial Chamber III, pursuant to article 41 of the Rome Statute, 15 July 2010, ICC-01/05-01/08-837-Anx2; Decision on the request to be excused from the exercise of judicial functions in Trial Chamber II, pursuant to article 41 of the Rome Statute, 30 September 2009, ICC-01/04-01/07-1503-Anx2;

¹⁶ Request to be excused from Trial Chamber III, 28 June 2010, ICC-01/05-01/08-837-Anx1.

¹⁷ Decision on the request to be excused from the exercise of judicial functions in Trial Chamber III, pursuant to article 41 of the Rome Statute, 15 July 2010, ICC-01/05-01/08-837-Anx2.

IV. SUBMISSIONS OF THE DEFENCE ON THE GROUNDS FOR ACTING UNDER RULE 33(1)

16. The Defence respectfully requests that the honourable Judges of the Chamber consider whether it would be “inimical to the interests of justice” for the Judges to “attempt[] to preside over [these] two substantial concurrent trials”.¹⁸ While both the *Kenya I* and *Kenya II* cases involve events that took place within the context of the 2007 national elections and post-election violence in Kenya, the Prosecution’s theory of the case, the specific locations where the crimes are alleged to have occurred, the core actors allegedly involved, and the witnesses that will be called by the Prosecution and the defence teams in each case are and will be completely different.
17. In addition to the two cases being completely free-standing in all material respects, and as alluded above, the Defence respectfully submits that the trials in the *Kenya I* and *Kenya II* cases will be ‘substantial’ undertakings on par with – if not greater in magnitude than – the trials undertaken in the *Lubanga* and *Bemba* cases for which their Honours Judges Fulford and Odio Benito determined it would be “inimical to the interests of justice” for them to preside over concurrently, even though the overlap was limited to the remainder of the presentation of the Defence case in *Lubanga*.
18. The specific facts in question in both cases will very likely involve calling numerous fact witnesses from three different parties in each case¹⁹ and

¹⁸ The Defence notes that the honourable Presiding Judge also sits on Trial Chamber III in *Bemba*, where the presentation of the Defence case is ongoing, and that Her Honour Judge Van den Wyngaert is a member of Trial Chamber II presiding over the *Katanga & Ngudjolo Chui* case, where the course of trial proceedings against Mr. Katanga is unclear at present following the Chamber’s “Décision relative à la mise en oeuvre de la norme 55 du Règlement de la Cour et prononçant la disjonction des charges portées contre les accusés” (Judge Van den Wyngaert dissenting in part), 21 November 2012, ICC-01/04-01/07-3319, and litigation arising therefrom (see ICC-01/04-01/07-3321).

¹⁹ With respect to the *Kenya II* case, the Prosecution has stated that it expects to call between 25 to 35 *viva voce* witnesses (ICC-01/09-02/11-T-18-ENG ET, p. 9, lines 12-13). At the confirmation of charges hearing the Muthaura and Kenyatta Defence teams each called two *viva voce* witnesses and submitted into evidence statements from a total of over 60 additional witnesses.

potentially by the Legal Representatives of Victims, the testimony of several expert witnesses, as well as the submission of significant documentary evidence into the record. Further, at least in the *Kenya II* case, and as demonstrated by the parties submissions on the Updated Document Containing the Charges²⁰ and the Document Containing the Modified Charges Section,²¹ facts related to both crime base and mode of liability allegations are fully contested by the parties.

19. As trial in both cases is set to commence at the same time – 10 and 11 April 2013, respectively – it is a mathematical fact that the honorable Judges of the Chamber will have to split both their courtroom time and their resources outside the courtroom between the *Kenya 1* and *Kenya 2* cases. Accordingly, the Judges will have to share their attention between two complex and substantial cases, and trial proceedings in each case will necessarily be considerably longer than they would if the Judges preside over only one substantial trial before the Court.
20. Because of this reality, the Defence further respectfully submits that the fundamental Article 67(1)(c) right of Ambassador Muthaura, and indeed the other accused in both the *Kenya I* and *Kenya II* cases, “[t]o be tried without undue delay”, is put at risk if there is a “lengthy overlap between the two trials” and presuming there are other judges with fewer commitments available to hear either case. The trial process, even if heard by a chamber of Judges who are presiding over no other trials, is likely to extend well into 2014, if not beyond, before closing statements are submitted, let alone the issuing of a judgment on guilt or innocence, by which time Ambassador Muthaura would, God willing, be around 70 years of age.

²⁰ ICC-01/09-02/11-468 (and annexes) and ICC-01/09-02/11-481-Conf (and annexes).

²¹ ICC-01/09-02/11-563 and annex.

21. Additionally, the Defence respectfully submits that it would likewise be in the interests of victims should trial proceedings in each case conclude within a shorter period, though the rights of an accused are of course paramount in such deliberations.
22. Finally, the Defence note that, as of yet, no case before the Court has commenced trial while one or more of the Judges sitting on a Trial Chamber was or were engaged in another trial, let alone another 'substantial' trial.

RELIEF REQUESTED

For the reasons set out above, the Defence respectfully requests the honourable Judges of the Trial Chamber to consider whether it would be in the interests of justice and the right of Ambassador Muthaura to a trial without undue delay, for the Judges of the Chamber to act pursuant to Rule 33(1) of the Rules and seek to excuse themselves from their functions with respect to either the *Kenya I* case or the *Kenya II* case prior to the commencement of trial in these cases.

Respectfully Submitted,



Karim A. A. Khan QC
Counsel for Ambassador Francis K. Muthaura

Dated this 11th Day of December 2012
At The Hague, the Netherlands