

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 13 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
URGENT**

**Request to file a Confidential Redacted Version of Annex A to the Prosecutor's
Observations (ICC-01/09-02/11-633-Conf-Exp-AnxA)**

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
Mr 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 the Prosecutor to file a confidential redacted version of Annex A of document ICC-01/09-02/11-633-Conf-Exp-AnxA.

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.² 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 2009.³

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.⁴ 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 2011.⁵

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 extent specified in the decision,⁶ and committed the two accused persons to trial on the charges as confirmed.⁷

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

² ICC-01/09-3 and its annexes.

³ 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.

⁴ 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.

⁵ ICC-01/09-02/11-T-1-ENG, p. 14, lines 11 to 15.

⁶ Pre-Trial Chamber II, ICC-01/09-02/11-382-Conf.

⁷ Pre-Trial Chamber II, ICC-01/09-02/11-382-Conf., para. 429.

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”.⁸

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

6. 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 and the Defence of the accused “submit written observations [...], no later than, Thursday 7 February 2013, at 16 h00”.¹⁰ The Single Judge also requested the Defence of the accused “to file observations, if any, in response to the Prosecutor’s written observations [...], no later than Tuesday 12 February 2013, at 16 h00”.¹¹

7. On 7 February 2013, the Chamber received the “Prosecution observations on the conduct of its investigations” (the “Prosecutor’s Observations”), together with Annex A appended to it.¹² Said annex is marked “confidential, *ex parte*, Prosecution and VWU only”.

⁸ Trial Chamber V, ICC-01/09-02/11-584, paras 74-75.

⁹ ICC-01/09-02/11-607-Conf., paras 1, 4.

¹⁰ Pre-Trial Chamber II, ICC-01/09-02/11-614, p. 7.

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

¹² ICC-01/09-02/11-633; ICC-01/09-02/11-633-Conf-Exp-AnxA.

8. On 7 February 2013, the Defence of the accused submitted its observations on the Request,¹³ and on 12 February 2013, it responded to the Prosecutor's Observations (the "Joint Response").¹⁴

II. APPLICABLE LAW

9. The Single Judge notes articles 21(1)(a),(3), 61(9), 67(1) of the Rome Statute, rule 128 of the Rules of Procedure and Evidence and regulations 23 *bis*, 24 and 34 of the Regulations of the Court.

III. DETERMINATION BY THE SINGLE JUDGE

10. In the Joint Response, the Defence argued that although the Prosecutor has put forward reasons for filing Annex A appended to her Observations as confidential, *ex parte*, the Defence is "unable to consider and respond to the Prosecution's key submissions"¹⁵, if this level of classification is maintained. According to the Defence, the accused persons "must be allowed to address and challenge the Prosecution's reasons for conducting such a disproportionate amount of its investigations post Confirmation Hearing", and this cannot be done without having access to Annex A appended to the Prosecutor's Observations.¹⁶

11. In this regard, the Single Judge considers that fairness of the proceedings is fundamental, and in order to draw a balance between the competing interests at stake, it is necessary that the Defence receives from the Prosecutor a confidential redacted version of said Annex.

¹³ ICC-01/09-02/11-634.

¹⁴ ICC-01/09-02/11-642.

¹⁵ ICC-01/09-02/11-642, para. 35.

¹⁶ ICC-01/09-02/11-642, para. 35.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY REQUESTS

- a) the Prosecutor to file a confidential redacted version of document: ICC-01/09-02/11-633-Conf-Exp-AnxA, to be notified to the Defence of the accused, no later than Friday 15 February 2013, at 16 h00;
- b) the Defence to file its final observations, no later than Wednesday 20 February 2013, at 16 h00.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Wednesday, 13 February 2013

At The Hague, The Netherlands