

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11

Original Date: 25 September 2012

Date of public version: 3 February 2017

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***

Public redacted version of

**Decision referring a preliminary issue to the Pre-Trial Chamber, 25 September
2012, ICC-01/09-02/11-493-Conf**

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

The Office of the Prosecutor
Ms Fatou Bensouda

Counsel for Francis Kirimi Muthaura

Counsel for Uhuru Muigai Kenyatta

Legal Representatives of Victims

Legal Representatives of 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

Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other

Pre-Trial Chamber II

1. Trial Chamber V (“Chamber”) of the International Criminal Court in the case of *The Prosecutor v. Francis Kiriimi Muthaura and Uhuru Muigai Kenyatta*, having regard to Article 64(4) of the Rome Statute (“Statute”) renders the following Decision referring a preliminary issue to the Pre-Trial Chamber.
2. On 24 September 2012, the Office of the Prosecutor (“prosecution”) filed the “Prosecution notification regarding intent to take investigative steps following apparent attempts to interfere with protected prosecution witnesses” (“Notification”).¹ The Notification provides information to the Chamber regarding an investigation by the prosecution into alleged attempts by Mr Kenyatta to influence protected prosecution witnesses to change or withdraw their testimony. It further notifies the Chamber that in the course of its investigation, there is a possibility that [REDACTED]. The Notification seeks to “give the Chamber an opportunity to seek additional clarification or interpose objections to the intended process”. The Notification is attached to this Decision as Annex A.
3. Article 64(4) of the Statute provides the Chamber with discretionary power to refer “preliminary issues” to the Pre-Trial Chamber or, if necessary, a single judge of the Pre-Trial Chamber where it is necessary for its “effective and fair functioning”.
4. In the Chamber’s view, the issue raised in the Notification constitutes a preliminary issue as it concerns an investigation by the prosecution, which may affect not only the present proceedings but also potential future and separate proceedings under Article 70 of the Statute. These kinds of investigative matters are primarily overseen by the Pre-Trial Chamber pursuant to Articles 56 and 57 of the Statute. Whilst a Trial Chamber is also empowered, pursuant to Article 64(6) of the Statute, to exercise these oversight functions, in the particular circumstances of the present case the

¹ ICC-01/09-02/11-492-Conf-Exp (notified at 15h10 on 24 September 2012)

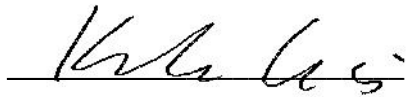
Chamber considers that referral to the Pre-Trial Chamber would be more consistent with the “effective and fair functioning” of this Chamber.

5. Specifically, given the likelihood that the 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, the Chamber is concerned that any step it may take with regard to the substance of the Notification may raise questions of prejudgment of the admissibility issue.
6. Accordingly, in order to preserve its ability to rule on the admissibility of any evidence that may be so obtained, the Chamber considers it necessary for its effective and fair functioning to refer this issue to Pre-Trial Chamber II, to which the situation in the Republic of Kenya is assigned, pursuant to Article 64(4) of the Statute.

FOR THE FOREGOING REASONS, THE CHAMBER

DECIDES to refer the Notification to Pre-Trial Chamber II for its determination as appropriate.

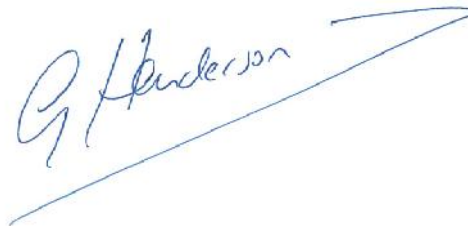
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Robert Fremr



Judge Geoffrey Henderson

Dated this 3 February 2017