

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 21 March 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 Document

**Decision Requesting the Prosecutor to Submit Observations on the Possible
Reclassification of Certain Documents**

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 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
Didier Preira, Deputy-Registrar

Defence Support Section

Victims and Witnesses Unit

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 in light of the forthcoming hearing of initial appearance of Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (collectively, the "suspects") before the Chamber, issues this decision requesting the Prosecutor to submit observations on the possible reclassification of certain documents emanating from him.

1. On 15 December 2010, the Prosecutor submitted the "Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali" (the "Prosecutor's Application") together with 23 annexes attached thereto.²
2. On 18 February 2011, pursuant to a request of the Chamber,³ the Prosecutor provided the Chamber with the witnesses' statements on which he relied for the purposes of his Application under article 58 of the Statute together with additional related material.⁴
3. On 8 March 2011, the Chamber issued its decision on the Prosecutor's Application, whereby the Chamber, by majority, summoned the suspects to appear before the Court on 7 April 2011.⁵
4. The Single Judge notes articles 54(3)(f), 57(3)(c), 67, 68(1) of the Rome Statute (the "Statute"), rules 15, 81 and 87 of the Rules of Procedure and Evidence, regulation 23*bis* of the Regulations of the Court and regulation 14 of the Regulations of the Registry.

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

² ICC-01/09-31-Conf-Exp and its Annexes. Out of the 23 annexes attached to the Prosecutor's Application, 4 are classified as "public" (Annexes 11, 12, 13 and 15), while the other 19 are currently classified as "confidential *ex parte*, Prosecutor only".

³ Pre-Trial Chamber II, "Decision Requesting the Prosecutor to Submit the Statements of the Witnesses on which he Relies for the Purposes of his Applications under Article 58 of the Statute", ICC-01/09-45-Conf-Exp.

⁴ Annexes 1 to 385 attached to ICC-01/09-48-Conf-Exp.

⁵ 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. The Single Judge recalls that the Chamber (and the Single Judge designated to exercise its functions) has the duty to ensure the fair and expeditious conduct of the proceedings in full respect of the rights of the suspects in accordance with article 67 of the Statute as well as to safeguard the principle of publicity of these proceedings as prescribed in article 67(1) of the Statute. In the same vein, in accordance with article 68(1) of the Statute, the Single Judge has the obligation and the responsibility to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. The same duty is vested with the Single Judge pursuant to article 57(3)(c) of the Statute. The Single Judge is of the view that protection of victims, witnesses and other persons at risk on account of the activities of the Court may render redactions necessary prior to the reclassification of certain documents that are currently classified as “confidential *ex parte*, Prosecutor only”.

6. Mindful of these principles and in light of the forthcoming hearing of the suspects’ initial appearance before the Chamber, the Single Judge deems it appropriate to receive from the Prosecutor observations on the possible reclassification either as “confidential” or as “public” of the Prosecutor’s Application and of the 16 annexes attached thereto that are currently classified as “confidential *ex parte*, Prosecutor only”. Should the Prosecutor be of the view that the documents concerned are to be provided to the suspects only in a redacted form, he shall submit properly substantiated proposals as to the redactions to be made thereto together with his observations on the reclassification of the documents concerned. The Prosecutor is also requested to submit observations on the possible reclassification of the witnesses’ statements provided to the Chamber on 23 February 2011 and to submit his proposals for redactions, if any, to be made thereto before making them available to the suspects.

7. In this respect, the Single Judge recalls the Prosecutor’s own responsibility, as enshrined in articles 54(3)(f) and 68(1) of the Statute, to provide for protection of victims, witnesses and, more generally, of those persons place at risk due to the

Prosecutor's activities. For the purposes of his observations, the Prosecutor shall thus take due consideration of this statutory duty bestowed on him.

FOR THESE REASONS, THE SINGLE JUDGE

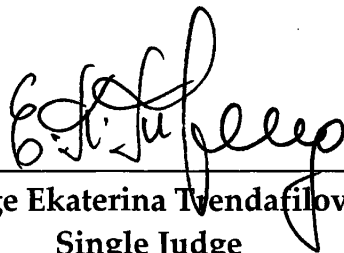
ORDERS

the Prosecutor to submit, no later than Monday, 28 March 2011 at 16.00hrs observations on the possible reclassification either as "public" or as "confidential" of the following documents together with proposals on the redactions, if any, to be made thereto:

- (i) **ICC-01/09-31-Conf-Exp**, entitled "Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali";
- (ii) **ICC-01/09-31-Conf-Exp-Anx1**;
- (iii) **ICC-01/09-31-Conf-Exp-Anx2**;
- (iv) **ICC-01/09-31-Conf-Exp-Anx3**;
- (v) **ICC-01/09-31-Conf-Exp-Anx4**;
- (vi) **ICC-01/09-31-Conf-Exp-Anx5**;
- (vii) **ICC-01/09-31-Conf-Exp-Anx6**;
- (viii) **ICC-01/09-31-Conf-Exp-Anx7**;
- (ix) **ICC-01/09-31-Conf-Exp-Anx8**;
- (x) **ICC-01/09-31-Conf-Exp-Anx9**;
- (xi) **ICC-01/09-31-Conf-Exp-Anx10**;
- (xii) **ICC-01/09-31-Conf-Exp-Anx14**;
- (xiii) **ICC-01/09-31-Conf-Exp-Anx16**;
- (xiv) **ICC-01/09-31-Conf-Exp-Anx17**;
- (xv) **ICC-01/09-31-Conf-Exp-Anx18**;
- (xvi) **ICC-01/09-31-Conf-Exp-Anx19**;
- (xvii) **ICC-01/09-31-Conf-Exp-Anx20**;
- (xviii) **ICC-01/09-31-Conf-Exp-Anx21**;

- (xix) ICC-01/09-31-Conf-Exp-Anx22;
- (xx) ICC-01/09-31-Conf-Exp-Anx23;
- (xxi) ICC-01/09-48-Conf-Exp, Annexes 1 to 385.

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



Judge Ekaterina Tsvendafilova
Single Judge

Dated this Monday, 21 March 2011

At The Hague, The Netherlands