

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 20 April 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 MOHAMED HUSSEIN ALI**

Public

Decision on the "Prosecution's Request for Conditions of Enforcement"

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 Francis Kirimi Muthaura
Karim Khan and Kennedy Ogetto

Counsel for Uhuru Muigai Kenyatta
Steven Kay and Gillian Higgins

Counsel for Mohamed Hussein Ali
Evans Monari, John Philpot and
Gershon Otachi Bw'omanwa

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

Other

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”)¹ of the International Criminal Court (the “Court”) renders this decision on the “Prosecution’s Request for Conditions of Enforcement” (the “Request”).²

1. On 8 March 2011, the Chamber, by majority, decided to summon Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali (collectively, the “suspects”) to appear before the Court, and imposed on them certain conditions (the “8 March 2011 Decision”).³ In particular, the Chamber ordered the suspects:

- (i) to have no contact directly or indirectly with any person who is or is believed to be a victim or a witness of the crimes for which Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali have been summoned;
- (ii) to refrain from corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, or tampering with or interfering with the Prosecution's collection of evidence;
- (iii) to refrain from committing crime(s) set forth in the Statute; and
- (iv) to attend all required hearings at the International Criminal Court.⁴

2. On 6 April 2010, the Prosecutor filed before the Chamber his Request, in which he required the Chamber to impose additional conditions in order to “guarantee that [the suspects] continue to appear voluntarily and that they not obstruct or endanger the investigation or the Court’s proceedings”.⁵ Specifically, the Prosecutor requested that the Chamber, pursuant to rule 119 of the Rules of Evidence and Procedure (the “Rules”), order the suspects:

- (i) To provide the Chamber with all residential and home addresses, email addresses, and telephone numbers;
- (ii) To provide complete financial information about their finances;
- (iii) [...] to post bond in a sum to be determined by the Chamber;
- (iv) [...] to appear in person at the seat of the Court at least once every six month period and certify before the Chamber, under oath, that [they have] complied in full with all the conditions imposed by the Chamber;

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

² ICC-01/09-02/11-47.

³ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali”, ICC-02/09-01/11-01.

⁴ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali”, ICC-02/09-01/11-01, p.23-24.

⁵ ICC-01/09-02/11-47, paras 3-4.

- (v) [to refrain] from making any public statements or comments about the case, the charges, the investigation, or the evidence.⁶

3. On 8 April 2011, the Single Judge ordered the Defence teams, should they wish to respond to the Request, to file their responses by no later than Friday, 15 April 2011 at 16.00 hours.⁷

4. On 15 April 2011, the Defence filed its "Response to Prosecution's Request for Conditions of Enforcement",⁸ together with one annex.⁹ Essentially, the Defence contended that the Prosecutor "failed to submit any evidence capable of showing that any conditions have been breached or that additional conditions are required".¹⁰ The Defence further alleged that the Request is a "blatant attempt to reopen the original issue ruled upon by the Pre-Trial Chamber in its Decision under article 58".¹¹

5. The Single Judge notes article 58(7) of the Statute and rule 119(2) of the Rules.

6. At the outset, the Single Judge recalls that according to article 58(7) of the Statute, "[i]f the Pre-Trial Chamber is satisfied that [...] a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention), [...] for the person to appear".

7. Consistent with rule 119(2) of the Rules, "[a]t the request of the person concerned or the Prosecutor or on its own initiative, the Pre-Trial Chamber may at any time decide to amend the conditions set pursuant to sub-rule 1".

8. The Single Judge recalls that, on the basis of the information submitted by the Prosecutor in the "Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali (the "article 58 Application")",¹² the Majority of this Chamber was satisfied, in its 8 March 2011

⁶ ICC-01/09-02/11-47, para. 8.

⁷ Pre-Trial Chamber II, "Order under Regulation 24(1) of the Regulations of the Court", ICC-01/09-02/11-50.

⁸ ICC-01/09-02/11-60.

⁹ ICC-01/09-02/11-60-Anx1.

¹⁰ ICC-01/09-02/11-60, para 9.

¹¹ ICC-01/09-02/11-60, para 10.

¹² ICC-01/09-31-Conf-Exp.

Decision, that the issuance of summonses to appear for the suspects, together with the conditions imposed on them in the operative part of the said decision, were sufficient to ensure their appearance before the Court.¹³

9. In his Request, the Prosecutor is now seeking additional conditions to ensure that the suspects “*continue to appear voluntarily and that they not obstruct or endanger the investigation or the Court’s proceedings*”.¹⁴ The Single Judge notes that two of the additional conditions proposed, namely conditions (i) and (iii), had already been requested by the Prosecutor in his article 58 Application, and they were denied by the Chamber in the 8 March 2011 Decision.

10. In this regard, the Single Judge is of the view that, although rule 119(2) of the Rules lacks the substantive requirements on the basis of which the Chamber may amend the conditions imposed on the suspects, the Prosecutor’s Request should be supported by proper grounds, showing the change of circumstances that would justify the adoption of any additional measure, in particular when one or more of these measures had already been rejected under the circumstances in force at the time of the previous ruling of the Chamber, on 8 March 2011.

11. In the particular circumstances of the present case, since the Chamber has already ruled in the 8 March 2011 Decision on the necessity to impose certain obligations on the suspects, the wording used by the Prosecutor and quoted in paragraph 10 above, would presumably imply that between 8 March 2011 and 6 April 2011, the date of his Request, the Prosecutor has collected information or evidence showing the risk that, should the conditions imposed remain the same, the suspects would not continue to appear voluntarily and would be likely to obstruct or endanger the investigation or the Court’s proceedings.

12. On the contrary, the Single Judge observes that the Prosecutor has failed to identify in his Request any change of circumstances occurred in the abovementioned

¹³ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali”, ICC-01/09-02/11-01, para. 55.

¹⁴ ICC-01/09-02/11-47, para. 3, emphasis added.

period of time that would lead him to seek before the Chamber an amendment of the conditions imposed on 8 March 2011.

13. In light of the foregoing considerations, the Single Judge concludes that the additional conditions sought by the Prosecutor under rule 119(2) of the Rules lack any justification and his Request must therefore be rejected.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

rejects the Request.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Wednesday, 20 April 2011

At The Hague, The Netherlands