

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 13 July 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**

Confidential

**Decision on the "Prosecutor's Request for leave to Reply to the 'Defence Response
to the Prosecution's Request to Invalidate the Appointment of Counsel to the
Defence team'"**

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 A. Khan and Kennedy Ogetto

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")¹ of the International Criminal Court (the "Court"), issues this decision on the "Prosecutor's Request for Leave to Reply to the 'Defence Response to the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence team'" (the "Request").²

1. On 8 March 2011, the Chamber, by majority, decided to summon Francis Kirimi Muthaura ("Mr. Muthaura"), Uhuru Muigai Kenyatta, and Mohammed Hussein Ali to appear before the Court on 7 April 2011.³

2. On 18 March 2011, the Chamber issued a decision setting 8 April 2011 as the new date for the initial appearance hearing.⁴ The initial appearance took place on the new date.

3. On 28 June 2011, the Single Judge ordered the Prosecutor and the Registrar to submit observations on a possible impediment to Mr. Essa Faal's representation as Counsel for Defence in the proceedings with which the Chamber is currently seized , by no later than 1 July 2011.⁵ She also ordered that, should the Defence for Mr. Muthaura wish to respond, it must do so, by no later than 6 July 2011.⁶

4. On 1 July 2011, the Prosecutor filed his observations together with 9 annexes appended thereto,⁷ and the Defence responded on 6 July 2011 (the "Defence's Response").⁸

5. On 12 July 2011, the Prosecutor requested leave to reply to the Defence's Response.⁹

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

² ICC-01/09-02/11-169-Conf-Exp.

³ 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.

⁴ Pre-Trial Chamber II, "Decision Setting a New Date for the Initial Appearance", ICC-01/09-02/11-8.

⁵ Pre-Trial Chamber II, "Order to the Prosecutor and the Registrar to Submit Observations Regarding a Potential Impediment to Defence Representation", ICC-01/09-02/11-138-Conf.

⁶ Pre-Trial Chamber II, "Order to the Prosecutor and the Registrar to Submit Observations Regarding a Potential Impediment to Defence Representation", ICC-01/09-02/11-138-Conf, p. 4.

⁷ ICC-01/09-02/11-150-Conf and its annexes.

⁸ ICC-01/09-02/11-159-Conf and its annexes.

6. The Chamber notes article 12(1)(b) of the Code of Professional Conduct for counsel (the "Code of Conduct") and regulations 24 (5) and 34(c) of the Regulations of the Court.

7. The Single Judge further notes that in the Request, the Prosecutor argues he is in possession of relevant additional information, which tend to demonstrate that Mr. Essa Faal accessed confidential information concerning the Kenya case that was not available to the Defence of Mr. Muthaura.¹⁰ He further claims that his request is triggered by "Mr. Faal's denial of having been privy to any confidential material form the Kenya case" as outlined in the Defence's Response.¹¹

8. The Single Judge wishes to point out that one of her ultimate responsibilities is ensuring the fair conduct of proceedings, and for the sake of guaranteeing that the matter *sub judice* is judged in a fair manner, she deems it appropriate to grant the Prosecutor's Request. However, the Single Judge alerts the parties that granting this Request does not mean that the Chamber will remain involved in an endless cycle of the parties' submissions. The expeditiousness of proceedings is equally one of the fundamental aspects of its fairness, which the Chamber is mandated to maintain. Therefore, with the receipt of the Prosecutor's reply, the Single Judge shall directly decide on the merits of the subject matter.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

Grants the Prosecutor's Request to the extent that he files his reply, by no later than Thursday 14 July 2011 at 13 hrs.

⁹ ICC-01/09-02/11-169-Conf-Exp.

¹⁰ ICC-01/09-02/11-169-Conf-Exp, p. 3.

¹¹ ICC-01/09-02/11-169-Conf-Exp, p. 3.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Wednesday, 13 July 2011

At The Hague, The Netherlands