

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/09-02/11  
Date: 14 September 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**

**Decision on the Request for Access to Confidential *Inter Partes* Material**

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, Essa Faal, Kennedy  
Ogetto, Shyamala Alagendra

**Counsel for Uhuru Muigai Kenyatta**  
Steven Kay and Gillian Higgins

**Counsel for Mohammed Hussein Ali**  
Evans Monari, John Philpot and  
Gershom Otachi Bw'omanwa

**Legal Representatives of the Victims**  
Morris Azuma Anyah

**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**

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**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”)<sup>1</sup> hereby issues this decision on the “Request for Access to Confidential *Inter Partes* Material” (the “Request”).<sup>2</sup>

1. On 8 March 2011, the Chamber, by majority, decided to summon Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (collectively “the Suspects”) to appear before the Court.<sup>3</sup> Pursuant to this decision, the Suspects voluntarily appeared before the Court at the initial appearance hearing held on 8 April 2011,<sup>4</sup> during which, *inter alia*, the Chamber scheduled the commencement of the confirmation of charges hearing for Wednesday, 21 September 2011.<sup>5</sup>

2. On 26 August 2011, the Single Judge issued the “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings” (the “Decision on Victims’ Participation”), in which she decided to admit 233 victims as participants in the confirmation of charges hearing and in the related proceedings and appointed Mr. Morris Anyah as the common legal representative of all the victims admitted in the present case.<sup>6</sup>

3. On 9 September 2011, the Chamber received the Request, in which the common legal representative seeks “access to all *inter partes* confidential material filed in the record of the case”.<sup>7</sup>

4. On 12 September 2011, the Single Judge issued the “Decision Requesting Observations”, in which the Prosecutor and the Defence teams of the Suspects were

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

<sup>2</sup> ICC-01/09-02/11-310.

<sup>3</sup> 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.

<sup>4</sup> ICC-01/09-02/11-T-1-ENG.

<sup>5</sup> ICC-01/09-02/11-T-1-ENG, page 14, lines 11 to 15.

<sup>6</sup> Pre-Trial Chamber II, “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”, ICC-01/09-02/11-267, pp. 45-46, letters (c) and (e) of the operative part.

<sup>7</sup> ICC-01/09-02/11-310, para. 17.

requested to submit observations as to whether or not they object to provide the victims' legal representative with access to their respective lists of evidence.<sup>8</sup>

5. On 13 September 2011, the Prosecutor and the Defence teams of the Suspects filed their observations, in which they request that the Single Judge reject the Request.<sup>9</sup>

6. The Single Judge notes article 68(3) of the Rome Statute (the "Statute").

7. The common legal representative of victims grounds his Request on three main arguments. First, he seeks access to confidential material disclosed by the Prosecutor "on the basis that it has already been redacted in order to withhold the most sensitive material from the defendants".<sup>10</sup> Second, it is claimed that access to confidential material disclosed by the parties is necessary "to ensure that victims' recognized interests are properly represented before the Chamber".<sup>11</sup> In this sense, it is the view of the legal representative that "[a]llowing [...] [him] to make an opening and closing statement, but depriving him of access to the material on which the confirmation hearing is based, would be tantamount to participation by the victims in form, but not substance".<sup>12</sup> Finally, it is contended that the disclosure of all confidential material to the victims' legal representative favours judicial economy.<sup>13</sup> To the contrary "[r]equiring the parties to make submissions for and/or against disclosure based upon the importance of a document to victims' interests relative to any potential sensitivity of the material would be time-consuming and require individual determination".<sup>14</sup>

8. At the outset, the Single Judge recalls the Decision on Victims' Participation, wherein the principle approach towards victims' procedural rights within the context of the confirmation of charges hearing and related proceedings has been established. First, the Single Judge held that a number of provisions of the applicable law *expressis*

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<sup>8</sup> Pre-Trial Chamber II, "Decision Requesting Observations", ICC-01/09-02/11-318.

<sup>9</sup> ICC-01/09-02/11-319-Corr; ICC-01/09-02/11-320; ICC-01/09-02/11-322 and ICC-01/09-02/11-323.

<sup>10</sup> ICC-01/09-02/11-310, para. 5.

<sup>11</sup> ICC-01/09-02/11-310, para. 9.

<sup>12</sup> ICC-01/09-02/11-310, para. 9.

<sup>13</sup> ICC-01/09-02/11-310, para. 16.

<sup>14</sup> ICC-01/09-02/11-310, para. 16.

*verbis* confer upon victims certain rights that they could exercise *ex lege*, through their legal representative.<sup>15</sup> Beside them, other rights may be granted to the victims, either *proprio motu* by the Chamber or “upon specific and motivated request submitted by the legal representative”, and provided that the personal interests of the victims are affected by the specific issue(s) under consideration.<sup>16</sup>

9. With respect to the latter category, the Single Judge specified that determining whether or not it is appropriate to grant any specific rights to the victims is an exercise that cannot be conducted in *abstracto*, but, conversely, shall be performed on a case-by-case basis, upon specific and motivated request by the legal representative and “in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”, as stipulated by article 68(3) of the Statute.<sup>17</sup>

10. With specific regard to the rights of the victims to access decisions, filings and evidence that are classified as confidential, the Single Judge has held in the Decision on Victims’ Participation that “the Chamber retains the option to decide on a case-by-case basis, either *proprio motu* or upon receipt of a specific and motivated request”<sup>18</sup> whether to grant the victims’ legal representative access to such material.

11. The Single Judge wishes to stress that, in the event of requests to access material withheld to the victims pursuant to rule 121(10) of the Rules of Procedure and Evidence, as in the present case, the approach established in the Decision on Victims’ Participation is designed to avoid situations in which the victims’ legal representative aims at collecting, indiscriminately, all material on which the parties intend to rely for the purposes of the confirmation of charges hearing, irrespective of its pertinence to

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<sup>15</sup> Pre-Trial Chamber II, “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”, ICC-01/09-02/11-267, paras 98, 103-114.

<sup>16</sup> Pre-Trial Chamber II, “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”, ICC-01/09-02/11-267, para. 99.

<sup>17</sup> Pre-Trial Chamber II, “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”, ICC-01/09-02/11-267, para. 99.

<sup>18</sup> Pre-Trial Chamber II, “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”, ICC-01/09-02/11-267, para. 109.

any issue at stake and regardless of findings as to whether victims' interests are affected by that issue.

12. The Single Judge shares the views expressed by the Defence, in particular on behalf of Mr. Kenyatta and Mr. Ali,<sup>19</sup> according to which the Request is essentially departing from the approach towards victims' rights under article 68(3) of the Statute as well as from the Decision on Victims' Participation.<sup>20</sup> The Single Judge also agrees with the submission of the Prosecutor that "[a]ccess to confidential material should not be granted except on a case-by-case basis, and only when the victims can demonstrate that the material relates to issues specific to their interests and the Chamber determines that the interests of the victims outweigh the need to retain the confidentiality of the information".<sup>21</sup>

13. In the view of the Single Judge, the Request runs contrary to the principle according to which any request pursuant to article 68(3) of the Statute shall demonstrate how the personal interests of victims are affected by the specific issue(s) at stake. Absent any specific issue identified by the victims' legal representative in the present circumstances and having failed to show any impact thereof on the victims' personal interests, the Single Judge considers that the Request remains in the abstract and must be rejected.

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<sup>19</sup> ICC-01/09-02/11-319-Corr, para. 11; ICC-01/09-02/11-320, para. 9.

<sup>20</sup> Pre-Trial Chamber II, "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings", ICC-01/09-02/11-267, paras 98-99.

<sup>21</sup> ICC-01/09-02/11-322, para. 17.

**FOR THESE REASONS, THE SINGLE JUDGE HEREBY**

**rejects** the Request.

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



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**Judge Ekaterina Trendafilova**  
**Single Judge**

Dated this Wednesday, 14 September 2011

At The Hague, The Netherlands