

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 12 September 2012

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

**Decision on the "Request for Reclassification in Respect of the 'Prosecution's
Submission of the Updated Document Containing the Charges pursuant to
Order ICC-01/09-02/11-450, Annex D'"**

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
Mr Karim Khan, Mr Essa Faal,
Mr Kennedy Ogetto, Ms Shyamala
Alagenda

Counsel for Uhuru Muigai Kenyatta
Mr Steven Kay
Ms Gillian Higgins

Legal Representatives of Victims
Mr Morris Anyah

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**

Others

Trial Chamber V (“Chamber”) of the International Criminal Court in the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* renders the following Decision on the “Request for Reclassification in Respect of the ‘Prosecution’s Submission of the Updated Document Containing the Charges pursuant to Order ICC-01/09-02/11-450, Annex D’”.

I. Background and Submissions

1. On 30 August 2012 the defence for Uhuru Muigai Kenyatta (“defence”) filed its “Request for Reclassification in Respect of the ‘Prosecution’s Submission of the Updated Document Containing the Charges pursuant to Order ICC-01/09-02/11-450, Annex D’” (“Request”).¹ In the Request, the defence requests the Chamber to permanently reclassify Annex D to the “Prosecution’s Submission of the Updated Document Containing the Charges pursuant to Order ICC-01/09-02/11-450” (“Annex D”)² as a confidential document.
2. Annex D comprises a chart identifying the issues in dispute between the parties in relation to the prosecution’s proposed updated document containing the charges. It includes the parties’ submissions on each of these issues. Annex D was filed as a public redacted document on 24 August 2012 with the relevant redactions masking the names of individuals whose identities were also redacted in the Pre-Trial Chamber’s Confirmation Decision. On 27 August 2012, in response to an urgent email request of the defence, the Chamber ordered the Registry to temporarily remove Annex D from the Court’s website and disable public access to it pending a decision by the Chamber on its reclassification.³

¹ ICC-01/09-02/11-471-Conf.

² ICC-01/09-02/11-468-AnxD.

³ Email from Trial Chamber V Communications to Case Manager for Mr Kenyatta, 27 August 2012 at 10:26.

3. In support of the Request to permanently reclassify Annex D as confidential, the defence submits that “the Prosecution’s classification of the filing as public is inappropriate in respect of an *inter se* communication without prior notification and approval of all parties involved in the process.”⁴ Further, the defence states that Annex D contains detailed submissions on evidential issues and submits that, “[g]iven the heightened media attention on the Kenya cases ... a public filing of the observation chart could contaminate and/or influence potential witness testimony.”⁵
4. On 5 September 2012 the Office of the Prosecutor (“prosecution”) filed a response to the Request.⁶ The prosecution states that it does not oppose the Request “if the Annex can be read to discuss Defence strategy that should not be made public”.⁷ On the other hand, the prosecution disagrees with the defence’s assertion that it acted inappropriately in filing Annex D as a public document. Referencing Article 67 of the Rome Statute (“Statute”) and Regulation 23 *bis*(1) of the Regulations of the Court (“Regulations”), the prosecution argues that there is a presumption in favour of documents being filed as public.⁸ The prosecution also notes that the defence never requested the prosecution to treat its comments as confidential and that similar documents have previously been filed publicly in this case, and in the related Kenya I case, without objection from any of the defence teams.⁹ Finally the prosecution submits that the discussion of evidential issues in Annex D is limited in scope and does not go beyond discussions already held publicly in the confirmation hearing.¹⁰

⁴ ICC-01/09-02/11-471-Conf, paragraph 6.

⁵ ICC-01/09-02/11-471-Conf, paragraph 7.

⁶ Response to Defence Request for Reclassification in Respect of the “Prosecution’s Submission of the Updated Document Containing the Charges pursuant to Order ICC-01/09-02/11-450, Annex D”, ICC-01/09-02/11-477-Conf.

⁷ ICC-01/09-02/11-477-Conf, paragraph 1.

⁸ ICC-01/09-02/11-477-Conf, paragraph 2.

⁹ ICC-01/09-02/11-477-Conf, paragraph 2.

¹⁰ ICC-01/09-02/11-477-Conf, paragraph 3.

II. Analysis

5. Under Regulation 23 *bis*(3) of the Regulations, the Chamber has the power to reclassify a document “upon request by any other participant or on its own motion”. Although Regulation 23 *bis*(3) does not specify what information must be provided by a participant in support of a request for reclassification, guidance may be sought from Regulation 23 *bis*(1). This provision governs initial classification requests and states that a participant filing a document as confidential shall “state the factual and legal basis for the chosen classification”. The Chamber considers it appropriate to apply this standard equally to requests for reclassification pursuant to Regulation 23 *bis*(3).

6. In the present case, the Chamber is not convinced that the defence has sufficiently articulated the “factual and legal basis” for its Request. In particular, the Request does not identify the defence’s concerns about the public dissemination of the material in Annex D with any specificity, nor is it based on any particular provision of the Statute, Rules of Procedure of Evidence (“Rules”) or Regulations. As noted above, the defence arguments in support of reclassification are simply that it is “inappropriate” to file *inter se* communication as public without prior notification and approval, and that the public filing of a document containing parties’ submissions on evidentiary issues “could contaminate and/or influence potential witness testimony”.

7. With respect to the first argument, the Chamber is of the view that there is no such general rule in proceedings before the Court. Unlike purely internal communications or other work product,¹¹ communications between opposing parties to the proceedings do not, in themselves, benefit from any special

¹¹ See *e.g.* Rule 81 of the Rules which exempt “reports, memoranda or other internal documents prepared by a party” from disclosure. ICC-01/09-02/11-477-Conf, paragraph 2.

protections under the Statute, Rules or Regulations nor do they give rise to any expectation of confidentiality absent a specific agreement between the parties to that effect.

8. With respect to the second argument, the Chamber considers any potential contamination or influencing of witness testimony to be a most serious matter. However, the defence has not provided the Chamber with any indication of how the information contained in Annex D may be used for such purposes. The defence has not described how the information in Annex D goes beyond information that has already been made public during the confirmation hearing or in the Confirmation Decision. Furthermore, the Chamber notes that the names of certain individuals have already been redacted in Annex D and that this serves as an important prevention mechanism against witness interference. Accordingly, the Chamber does not consider it necessary to reclassify the entire document in the present circumstances. Should the defence have any particular concerns about specific assertions or information contained in Annex D being misused, the appropriate course would be to submit a reasoned request for additional redactions of Annex D. In this way, the protection of witnesses and integrity of the proceedings can be safeguarded whilst at the same time respecting the basic principle of public proceedings.
9. The Chamber notes that the Request and the prosecution's response thereto were filed as confidential documents. Having considered this matter, the Chamber is of the view that there is no basis for this classification as the documents do not appear to disclose any confidential or sensitive material. Accordingly, pursuant to Regulation 23 *bis*(3) of the Regulations, the Chamber determines that these documents should be reclassified as public documents, subject to any limited redactions the parties may request.

FOR THE FOREGOING REASONS, THE CHAMBER

REJECTS the Request to permanently reclassify Annex D as confidential;

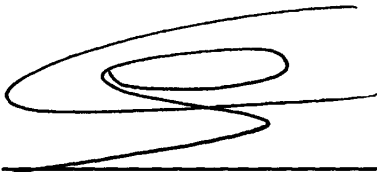
INSTRUCTS the defence to file, within 7 days of notification of this Decision, a reasoned request for additional redactions to Annex D, failing which the Chamber will order the Registry to reinstate public access to the document; and

INSTRUCTS the parties to file, within 7 days of notification of this Decision, any requests for redactions to ICC-01/09-02/11-471-Conf and ICC-01/09-02/11-477-Conf.

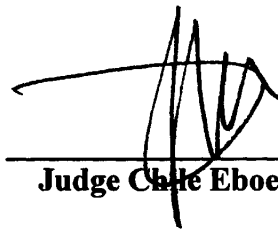
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki



Judge Christine Van den Wyngaert



Judge Chale Eboe-Osuji

Dated this 12 September 2012