

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **26 July 2011**

**PRE-TRIAL CHAMBER II**

**Before: Judge Ekaterina Trendafilova, Presiding Judge  
Judge Hans-Peter Kaul  
Judge Cuno Tarfusser**

**SITUATION IN THE REPUBLIC OF KENYA  
IN THE CASE OF THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA,  
UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI**

**Public**

**Prosecution's Submission on the Reclassification of Annexes and  
Submissions, Relating to the Question of Invalidating the Appointment of  
Counsel to the Defence**

**Source: Office of the Prosecutor**

**Document 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**

**Counsel for Francis Kirimi Muthaura:**

Karim A. Khan, Kennedy Ogetto and Essa Faal

**Counsel for Uhuru Muigai Kenyatta:**

Steven Kay QC and Gillian Higgins

**Counsel for Mohammed Hussein Ali:**

Evans Monari and Gershon Otachi Bw'omanwa

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for Victims**

Paolina Massidda

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

**Other**

**REGISTRY**

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**Registrar**

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**Deputy Registrar**

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**Defence Support Section**

**Victims and Witnesses Unit**

Maria Luisa Martinod-Jacome

**Detention Section**

**Victims Participation and Reparations  
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## I. Introduction

1. In response to the Single Judge's "Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence"<sup>1</sup> and more specifically pursuant to her order to consider which submissions and annexes in that litigation may be reclassified as public, the Prosecution hereby submits its decision not to reclassify as public the annexes to filings ICC-01/09-02/11-150-Conf and ICC-01/09-02/11-172-Conf-Exp.<sup>2</sup> The Prosecution will file a public redacted version of its filings.
2. The Prosecution further takes note of the Defence filing in compliance with the Single Judge's order, requesting that its submission and all but one of its annexes<sup>3</sup> should be reclassified as public. The Prosecution urges the Chamber to take cognisance of the annexes submitted to this filing, and exercise its powers pursuant to Article 57(3)c of the Rome Statute to provide for the protection and privacy of the victims and witnesses.

## II Prosecution's Submissions

3. The annexes submitted by the Prosecution for these filings<sup>4</sup> can be divided into three groups: (i) Materials originating from the Registry; (ii) Materials originating from the Defence; and (iii) Materials originating from the Prosecution. Of the fifteen (15) Annexes submitted by the Prosecution, one annex falls into the first

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<sup>1</sup> ICC-01/09-02/11-185.

<sup>2</sup> ICC-01/09-02/11-150-Conf-AnxA to AnxH; and ICC-01/09-02/11-172-Conf-Exp-Anx1 to Anx6.

<sup>3</sup> With the exception of annex H which was to be redacted

<sup>4</sup> ICC-01/09-02/11-150-Conf and ICC-01/09-02/11-172-Conf-Exp

group;<sup>5</sup> two (2) annexes into the second group;<sup>6</sup> and twelve (12) annexes into the third group.<sup>7</sup>

4. With respect to the first two groups, the Prosecution reserves to the Defence and the Registry the ability to comment on the confidentiality level of its materials.
5. In respect of the materials originating from the Prosecution, the annexes contain affidavits,<sup>8</sup> e-mails,<sup>9</sup> a notice of resignation,<sup>10</sup> and a letter from the Deputy Prosecutor.<sup>11</sup> All the materials, other than the letter from the Deputy Prosecutor, were created for internal work purposes of the Office of the Prosecutor only. They contain private correspondence between staff members or internal confidential information or they divulge information on internal processes. Therefore, the Prosecution considers that they should remain confidential. The letter from the Deputy Prosecutor, however, reflects the Prosecution's position on the disputed matter and does not contain any confidential information, and therefore can be reclassified as public.
6. Accordingly, the Prosecution requests that its documents retain their confidentiality status, with the exception of Annex C of ICC-01/09-02/11-150-Conf., which without objection can be reclassified as public.

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<sup>5</sup> ICC-01/09-02/11-150-Conf-AnxB.

<sup>6</sup> ICC-01/09-02/11-150-Conf-AnxD and AnxD1.

<sup>7</sup> ICC-01/09-02/11-150-Conf-AnxA, AnxC, AnxE, AnxF, AnxG and AnxH; ICC-01/09-02/11-172-Conf-Exp-Anx1 to Anx6.

<sup>8</sup> ICC-01/09-02/11-150-Conf-AnxA and ICC-01/09-02/11-172-Conf-Exp-Anx1, Anx2 and Anx6.

<sup>9</sup> ICC-01/09-02/11-150-Conf-AnxA and ICC-01/09-02/11-172-Conf-Exp-Anx1, Anx2 and Anx6.

<sup>10</sup> ICC-01/09-02/11-150-Conf-AnxG.

<sup>11</sup> ICC-01/09-02/11-150-Conf-AnxE, AnxF and AnxH; and ICC-01/09-02/11-172-Conf-Exp-Anx3, Anx4 and Anx5.

7. Noting that the Defence has expressed its willingness to make public all its submissions and annexes,<sup>12</sup> the Prosecution would request that the Chamber not reclassify Defence Annexes A-H and the Defence submission as public.
8. Firstly, the Prosecution notes that making the Defence submissions and annexes public means the second affidavit of Mr Faal<sup>13</sup> which was submitted “confidential ex parte available only to the OTP and Mr Faal” and which makes reference to sensitive material in a separate case before the Court, becomes available to Mr Khan as well as the general public. This negates the confidential nature of the affidavit, impacts on the confidential information relating to that third case which is discussed in the affidavit and is in danger of jeopardising the very essence of that case.
9. For other reasons, the Prosecution also objects to the re-classification of the additional materials.
10. The very essence of the establishment of the Court is to protect the rule of law and end both the perception and the reality of impunity due to power or special status. In this regard, this Court, like other courts, is dependent on public confidence for the legitimacy of the process.
11. As the Prosecution has previously noted,<sup>14</sup> in Kenya the public perceives that its judicial system is corrupt and ineffective. This controversy has caused public concern about the ICC system as well. Putting into the public domain the Defence submissions and annexes, particularly the affidavits of the Defence which purport to describe sensitive internal working relationships within the Office of the Prosecutor, is likely to further erode public confidence in the

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<sup>12</sup> ICC-01/09-02/11-187-Conf

<sup>13</sup> ICC-01/09-02/11-158-Conf-Exp

<sup>14</sup> ICC-01/09-01/11-97-Conf-Exp; paras. 17 & 18

process of the Court. In the Prosecution's view, reclassification of the Defence submission and annexes from confidential to public and the consequent access of such materials in the public domain will diminish the stature of the Court (including, of course, but not limited to, the Office of the Prosecutor) or their confidence in the institution. As a consequence, it could discourage persons from cooperating.<sup>15</sup>

12. Of course, if the descriptions of the internal relationships were in any way relevant to the issue before the Court, the Prosecution would not oppose their disclosure, even though it is concerned about the consequences and however much it may disagree with the characterizations of OTP personnel or the description of the internal process. But these allegations are not relevant to the issue of Mr Faal's entitlement as a recently departed senior prosecutor to join the defence team. They add nothing to the discussion; they are instead simply aggressive and unpleasant. The Court should not sanction parties in the proceedings using the court processes as a mechanism to make public comments that could not be made outside the confines of the courtroom, in an attempt to diminish the other side. Where such comments are not relevant to the controversy and would have been inappropriate if made outside the Courtroom in public statements, parties should not be allowed to make them through filings in the case, using the judicial proceeding as a pretext for lobbing public attacks.
13. The redaction of the Defence submission and annexes to permit public access to the essence of the arguments, including Mr Faal's denials that he has confidential insider information about this case, while withholding the irrelevant allegations of in-fighting and personal animosities and fractured relationships within the

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<sup>15</sup> ICC-01/09-01/11-97-Conf-Exp

OTP, will satisfy the principle of publicity of proceedings and protect the process from titillating journalism.

### **Relief Sought**

14. For the above reasons, the Prosecution respectfully

- 1) informs the Chamber that it seeks to maintain confidentiality of all annexes attached to filings ICC-01/09-02/11-150-Conf and ICC-01/09-02/11-172-Conf-Exp, except ICC-01/09-02/11-150-Conf-Anx;
- 2) requests that the Defence submission and annexes be reclassified as public only within the context of a publicly redacted version.



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Luis Moreno-Ocampo,  
Prosecutor

Dated this 26th day of July 2011

At The Hague, the Netherlands