

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 30 August 2012

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
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***

Confidential

**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"**

Source: Defence for Uhuru Muigai Kenyatta

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms. Fatou Bensouda, Prosecutor

Counsel for the Defence

Counsel for Francis Kirimi Muthaura

Karim A. A. Khan QC, Essa Faal,
Kennedy Ogetto & Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta

Steven Kay QC and Gillian Higgins

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia, Registrar

Deputy Registrar

Mr. Didier Daniel Pereira, Deputy
Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section Other

I. INTRODUCTION

1. The Defence for Uhuru Muigai Kenyatta ("the Defence") requests that Trial Chamber V ("the Chamber") permanently reclassify the "Prosecution's Submission of the Updated Document Containing the Charges pursuant to Order ICC-01/09-02/11-450, Annex D" from public to confidential.

II. PROCEDURAL HISTORY

2. On 5 July 2012, the Chamber ordered the Prosecution to send an updated Document Containing the Charges ("Updated DCC") to the Defence by 6 August 2012 for the purpose of the Parties to liaise *inter se* to ensure that the Updated DCC accurately reflected the Decision on the Confirmation of Charges hearing.¹ The Chamber ordered that "[a]ny points of disagreement that could not be resolved during *inter partes* consultations are to be raised in the form of a jointly submitted prosecution-defence annex to the updated DCC."²
3. On 21 August 2012, the Prosecution and Defence filed a joint submission requesting an extension of time to file the Updated DCC.³ The Chamber granted the request, allowing the Prosecution until 24 August 2012 to file the Updated DCC.⁴
4. On 24 August 2012, the Prosecution filed its "Submission of the Updated Document Containing the Charges pursuant to Order ICC-01/09-02/11-

¹ ICC-01/09-02/11-450 at para 9.

² ICC-01/09-02/11-450 at para 11.

³ ICC-01/09-02/11-466.

⁴ ICC-01/09-02/11-467.

450”⁵ with two confidential annexes and three public annexes. The Prosecution filed Annex D, the *inter se* comment chart on the Updated DCC, as a public redacted document.⁶

5. After notification of the Prosecution’s filing, the Defence sent an urgent email to Court Management Court Records’ email address, requesting that Annex D temporarily be reclassified as confidential while the Defence drafted a formal request for the attention of the Chamber.⁷ In the absence of a response and observing that Annex D was still on the public website, the Defence sent an urgent email to the Chamber on 25 August.⁸

III. SUBMISSIONS

6. The Defence submits that the Prosecution’s classification of the filing as public is inappropriate in respect of an *inter se* communication without the prior notification and approval of all parties involved in the process.
7. The Defence’s observations in relation to the Updated DCC contain detailed submissions on evidential issues. Given the heightened media attention on the Kenya cases, the Defence submits that a public filing of the observation chart could contaminate and/or influence potential witness testimony.

⁵ ICC-01/09-02/11-468.

⁶ ICC-01/09-02/11-468-AnxD.

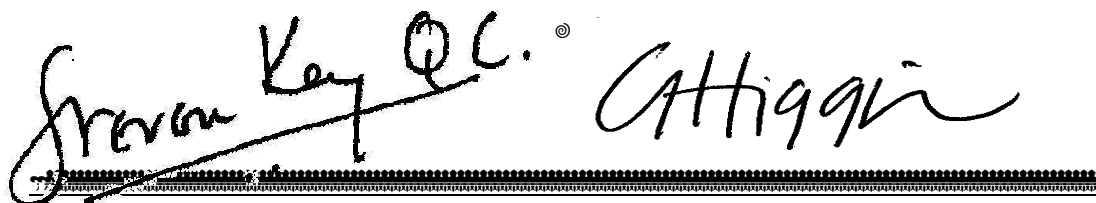
⁷ The Defence’s Case Manager sent an email marked ‘URGENT’ on to Court Management-Court Records <judoc@icc-cpi.int> on 24 August 2012 22:54:23 GMT+03:00.

⁸ The Defence’s Case Manager sent an email marked ‘URGENT’ to Trial Chamber V Communications TrialChamberVComms@icc-cpi.int on 25 August 2012 at 14:38:29 GMT+03:00.

IV. RELIEF

8. The Defence respectfully requests the Chamber to permanently reclassify as confidential the "Prosecution's Submission of the Updated Document Containing the Charges pursuant to Order ICC-01/09-02/11-450, Annex D".

Respectfully submitted,

The image shows two handwritten signatures in black ink. The first signature, on the left, is 'Steven Kay QC.' followed by a small registered trademark symbol (®). The second signature, on the right, is 'G Higgins'. Both signatures are written in a cursive, flowing style. Below the signatures is a horizontal line with a repeating pattern of small squares.

Steven Kay QC and Gillian Higgins

On behalf of Uhuru Muigai Kenyatta

Dated this 30 August 2012

London, England