

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: ICC-01/09-02/11
Date: 5 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

Confidential

**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"**

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

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

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Victims and Witnesses Unit

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**Victims Participation and Reparations
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Other

1. The Defence for Uhuru Kenyatta (“Defence”) has requested that Trial Chamber V (“Chamber”) 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.¹ In the Prosecution’s view, nothing in Annex D goes beyond discussions already held publicly in the confirmation hearing, so classification as public is appropriate. If, however, the Annex can be read to discuss Defence strategy that should not be made public, the Prosecution does not oppose the request.
2. The Prosecution disagrees, however, with the Defence allegation that it acted inappropriately in filing Annex D publicly.² First, the presumption before this Court is that proceedings are public.³ If a party seeks to classify a document as confidential then the request and justification should be made clear.⁴ Contrary to the Defence assertions,⁵ the Defence never asked the Prosecution to treat its observations as confidential.⁶ There was no reason, accordingly, for the Prosecution to have assumed that preference, particularly bearing in mind that: (i) documents explaining the parties’ positions taken during *inter partes* discussions have previously been filed publicly in this case without objection from the Defence;⁷ and (ii) the parties in the case of *The Prosecutor v Ruto and Sang* filed their observations on their updated document containing the charges in public form three days before the joint filing in this case was submitted.⁸

¹ ICC-01/09-02/11-471-Conf.

² ICC-01/09-02/11-471-Conf, para.6.

³ Article 67 enshrines the right of the accused to a public hearing.

⁴ Regulation 23 *bis* (1) requires that a party filing a document state the factual and legal basis for the chosen classification of that document.

⁵ ICC-01/09-02/11-471-Conf, para. 6.

⁶ Email from Defence to the Prosecution dated 23 August 2012.

⁷ See *e.g.*, ICC-01/09-02/11-440-Anx1.

⁸ ICC-01/09-01/11-448, 21 August 2012.

3. Second, contrary to the Defence assertion that Annex D contained detailed submissions on evidential issues,⁹ the content of Annex D largely relates to the consistency between the findings of Pre-Trial Chamber II in its Confirmation Decision and the Prosecution's allegations. The Prosecution submits that the discussion of evidentiary issues is limited and does not extend beyond matters already addressed publicly during the confirmation hearing.



Fatou Bensouda, Prosecutor

Dated this 5th day of September 2012

At the Hague, The Netherlands

⁹ ICC-01/09-02/11-471-Conf, para.7.