

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/09 OA 2

Date of the original: 11 July 2012

Date of the redacted version: 6 September 2012

THE APPEALS CHAMBER

Before:

**Judge Sang-Hyun Song, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka**

SITUATION IN THE REPUBLIC OF KENYA

Public Redacted Version

**Decision on the Request for Disqualification of the Prosecutor in the
Investigation against Mr David Nyekorach-Matsanga**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr Fabricio Guariglia

Counsel for Mr Nyekorach-Matsanga
Mr Charles A. Taku
Ms Beth S. Lyons

REGISTRY

Registrar
Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

Having before it the “Confidential Application with Confidential Annexes of Dr. David Nyekorach- Matsanga for the Disqualification of the Prosecutor pursuant to article 42 (8) of the Statute” dated 28 May 2012 (ICC-01/09-89-Conf-Exp-Anx1 (OA 2), pp. 2-16),

After deliberation,

Renders unanimously the following

DECISION

1. The request to disqualify the Prosecutor is dismissed.
2. The “Confidential, *Ex Parte*, Application of Dr. David Nyekorach- Matsanga for Leave to Reply, pursuant to Regulations of the Court, Regulation 24(5), to the Prosecution’s Confidential Comments, Dated 12 June 2012” is dismissed *in limine*.
3. Mr David Nyekorach-Matsanga and the Prosecutor shall file by 16h00 on 20 July 2012 proposed redacted versions of, respectively:
 - a. the “Confidential Application with Confidential Annexes of Dr. David Nyekorach- Matsanga for the Disqualification of the Prosecutor pursuant to article 42 (8) of the Statute” (excluding the annexes thereto, which shall remain confidential and *ex parte*); and the “Confidential, *Ex Parte*, Application of Dr. David Nyekorach- Matsanga for Leave to Reply, pursuant to Regulations of the Court, Regulation 24(5), to the Prosecution’s Confidential Comments, Dated 12 June 2012”; and
 - b. the “Prosecution’s comments on the ‘Confidential Application with Confidential Annexes of Dr. David Nyekorach- Matsanga for the Disqualification of the Prosecutor pursuant to article 42(8) of the Statute’”; and the “Prosecution’s response to ‘Application of Dr. David Nyekorach-Matsanga for leave to reply, pursuant to Regulations of the Court, Regulation 24(5), to the Prosecution’s confidential comments, dated 12 June 2012’”.

4. The Prosecutor and Mr Nyekorach-Matsanga may submit, by 16h00 on 31 July 2012, any observations as to why the redacted versions proposed by the other party, or parts thereof, should not be made public.
5. The proposed redacted versions referred to above and any observations thereon shall be filed as confidential, *ex parte*, available to the Prosecutor and Mr Nyekorach-Matsanga only.

REASONS

I. PROCEDURAL HISTORY

1. On 1 June 2012, the Registry transmitted to the Appeals Chamber, on a confidential and *ex parte* basis, the “Confidential Application with Confidential Annexes of Dr. David Nyekorach- Matsanga for the Disqualification of the Prosecutor pursuant to article 42 (8) of the Statute”,¹ submitted by Mr David Nyekorach-Matsanga (hereinafter: “Mr Nyekorach-Matsanga”), which was dated 28 May 2012 and registered on 1 June 2012.² On 5 June 2012, the Appeals Chamber ordered the Registrar to assign this document a document number under regulation 26 of the Regulations of the Registry in the situation in the Republic of Kenya.³ Thereafter, the Registry transferred this document to the record of the situation in the Republic of Kenya and assigned it a document number.⁴ This document comprises, under one document number, an application for disqualification of the Prosecutor⁵ (hereinafter: “Request for Disqualification”) and several annexes thereto.⁶

2. On 5 June 2012, the Appeals Chamber ordered the Prosecutor to present any comments on the Request for Disqualification by 16h00 on Tuesday, 12 June 2012.⁷

¹ ICC-STA42-01/12-1-Conf-Exp-Anx1.

² “Registry’s transmission of a submission received on 30 May 2012”, 1 June 2012, ICC-STA42-01/12-1-Conf-Exp (hereinafter: “Registry’s Transmission”).

³ “Decision on the Presiding Judge of the Appeals Chamber for the proceedings with respect to the ‘Confidential Application with Confidential Annexes of Dr. David Nyekorach- Matsanga for the Disqualification of the Prosecutor pursuant to article 42 (8) of the Statute’ and order on re-numbering of documents”, ICC-01/09-87-Conf-Exp (OA 2)).

⁴ ICC-01/09-89-Conf-Exp-Anx1 (OA 2).

⁵ ICC-01/09-89-Conf-Exp-Anx1 (OA 2), pp. 2-16.

⁶ ICC-01/09-89-Conf-Exp-Anx1 (OA 2), pp. 17-355.

⁷ “Order on the submission of comments by the Prosecutor on the ‘Confidential Application with Confidential Annexes of Dr. David Nyekorach- Matsanga for the Disqualification of the Prosecutor pursuant to article 42 (8) of the Statute’”, ICC-01/09-88-Conf-Exp (OA 2) (hereinafter: “Appeals Chamber’s Order of 5 June 2012”).

On 12 June 2012, the Prosecutor submitted the “Prosecution’s comments on the ‘Confidential Application with Confidential Annexes of Dr. David Nyekorach-Matsanga for the Disqualification of the Prosecutor pursuant to article 42(8) of the Statute’”⁸ (hereinafter: “Comments on the Request for Disqualification”).

3. On 25 June 2012, the Appeals Chamber received Mr Nyekorach-Matsanga’s “Confidential, *Ex Parte*, Application of Dr. David Nyekorach- Matsanga for Leave to Reply, pursuant to Regulations of the Court, Regulation 24(5), to the Prosecution’s Confidential Comments, Dated 12 June 2012”⁹ (hereinafter: “Request for Leave to Reply”) which was dated 21 June 2012.

4. On 26 June 2012, the Prosecutor submitted the “Prosecution’s response to ‘Application of Dr. David Nyekorach-Matsanga for leave to reply, pursuant to Regulations of the Court, Regulation 24(5), to the Prosecution’s confidential comments, dated 12 June 2012’”¹⁰ (hereinafter: “Response to the Request for Leave to Reply”).

II. PRELIMINARY ISSUES

A. Compliance of the Request for Disqualification with the Regulations of the Court

5. The Appeals Chamber recalls that regulation 36 (2) (b) of the Regulations of the Court provides that “[a]ny appendix containing references, authorities, copies from the record, exhibits and other relevant, non-argumentative material” “shall not be counted in calculating [...] page limits”, but that “[a]n appendix shall not contain submissions”. The Appeals Chamber notes that, in his Request for Disqualification, Mr Nyekorach-Matsanga “adopts the reasons” contained in one of the annexes to the Request for Disqualification.¹¹ The Appeals Chamber considers that this amounts to an attempt to circumvent the requirements of regulations 36 and 37 of the Regulations of the Court. To the extent that the annexes to the Request for Disqualification may be construed to contain submissions or argumentative material, the Appeals Chamber considers it appropriate to disregard such submissions or arguments contained therein.

⁸ ICC-01/09-90-Conf-Exp (OA 2).

⁹ ICC-01/09-92-Conf-Exp (OA 2).

¹⁰ ICC-01/09-93-Conf-Exp (OA 2).

¹¹ Request for Disqualification, para. 17.

Furthermore, the Appeals Chamber notes that, in the Request for Disqualification, Mr Nyekorach-Matsanga, when referring to its voluminous annexes, often does not clearly specify which part of the cited annex supports the relevant argument being advanced. The Appeals Chamber disapproves of this practice, which does not assist in assessing the submissions expeditiously.

B. Confidentiality of the Proceedings

6. Mr Nyekorach-Matsanga submitted the Request for Disqualification and its annexes as confidential on the bases that it pertains to a confidential investigation against him and that the annexes contain correspondence on confidential matters as well as potential witnesses.¹² Despite its confidential status, Mr Nyekorach-Matsanga listed the Office of Public Counsel for victims, the Office of Public Counsel for the defence and the Victims Participation and Reparations Section among those to be notified of the Request for Disqualification.¹³

7. “Considering that the [...] document may contain sensitive and confidential information”, the Registrar transmitted the Request for Disqualification to the Appeals Chamber on a confidential and *ex parte* basis, available only to the Registry, the Office of the Prosecutor and counsel for Mr Nyekorach-Matsanga.¹⁴ The Appeals Chamber ordered the Registrar to maintain this confidential and *ex parte* status.¹⁵

8. Pursuant to the Appeals Chamber’s Order of 5 June 2012, the Prosecutor submitted that the Request for Disqualification, including its annexes, and his Comments on the Request for Disqualification should be kept confidential and *ex parte* as the Request for Disqualification contains information purporting to reveal the identity of a protected witness, makes defamatory allegations against third persons and reveals the identities of staff of the Office of the Prosecutor.¹⁶ However, the Prosecutor did not assert that the investigation against Mr Nyekorach-Matsanga is itself confidential.

¹² Request for Disqualification, para. 1.

¹³ Request for Disqualification, p. 2.

¹⁴ Registry’s Transmission, p. 3.

¹⁵ “Decision on the Presiding Judge of the Appeals Chamber for the proceedings with respect to the ‘Confidential Application with Confidential Annexes of Dr. David Nyekorach- Matsanga for the Disqualification of the Prosecutor pursuant to article 42 (8) of the Statute’ and order on re-numbering of documents”, 5 June 2012, ICC-01/09-87-Conf-Exp (OA 2), p. 3.

¹⁶ Comments on the Request for Disqualification, para. 12.

9. The Appeals Chamber notes that, notwithstanding its confidential nature, the Request for Disqualification was quoted in media sources as early as 29 May 2012.¹⁷ Given that proceedings before the Appeals Chamber are, in principle, public unless confidentiality is required by the specific circumstances, that the existence of an investigation against Mr Nyekorach-Matsanga and of the Request for Disqualification are already matters of public knowledge, and that the Prosecutor does not argue that the existence of an investigation against Mr Nyekorach-Matsanga or the request to disqualify the Prosecutor are in themselves confidential, the Appeals Chamber is presently not convinced that these facts should remain confidential.

10. At the same time, the Appeals Chamber notes that the Request for Disqualification and the Comments on the Request for Disqualification pertain to certain matters which are confidential and which should not be further publicised. In particular, the Appeals Chamber notes that the Request for Disqualification pertains to an investigation against Mr Nyekorach-Matsanga which relates to allegations that he has revealed the identity of an individual he believes to be a protected witness.¹⁸ The Appeals Chamber also notes that the Request for Disqualification concerns what the Prosecutor describes as “defamatory allegations” against third parties, which could cause them irreparable harm if publicised.¹⁹ The Appeals Chamber does not pronounce itself upon the allegations of either Mr Nyekorach-Matsanga or the Prosecutor. However, the Appeals Chamber considers that these are matters, along with the identities of staff of the Office of the Prosecutor, which should not be publicised.

11. In light of the above, the Appeals Chamber considers that the annexes to the Request for Disqualification shall remain confidential and *ex parte*. To determine whether public redacted versions of the submissions in these proceedings as well as of the present decision can be filed, the Appeals Chamber orders Mr Nyekorach-Matsanga and the Prosecutor to file proposed redacted versions of their respective submissions, on which the Prosecutor and Mr Nyekorach-Matsanga may submit observations. The proposed redacted versions and observations thereon shall be filed

¹⁷ [REDACTED]

¹⁸ Comments on the Request for Disqualification, para. 4.

¹⁹ Comments on the Request for Disqualification, para. 12.

confidentially and *ex parte* and shall be treated as such unless and until there is a further order by the Appeals Chamber.

C. Non-existence of any complaint before the Appeals Chamber

12. In his Request for Disqualification, Mr Nyekorach-Matsanga claims that he has previously submitted a complaint to the Appeals Chamber against the Prosecutor.²⁰ The Appeals Chamber wishes to emphasise that it has not been seized of any such complaint. The Appeals Chamber is aware that Mr Nyekorach-Matsanga has previously attempted to convey information to the judges of the Appeals Chamber outside of the context of any Court proceedings and without following the proper procedures for the filing of documents. The Appeals Chamber understands that, on such occasions, Mr Nyekorach-Matsanga was informed by the Registry that the Appeals Chamber will not consider submissions sent directly to the Appeals Chamber and that all communications in relation to judicial proceedings must be in compliance with the applicable procedures, *i.e.*, properly filed with and registered by the Registry. The Request for Disqualification is the only submission by Mr Nyekorach-Matsanga which is before the Appeals Chamber.

III. DETERMINATION BY THE APPEALS CHAMBER

13. The present request to disqualify the Prosecutor pertains to investigations initiated by the Prosecutor against Mr Nyekorach-Matsanga for offences against the administration of justice under article 70 of the Statute.²¹ While the Prosecutor has not provided information to the Appeals Chamber on the scope of this investigation, it is clear that it relates at least to allegations that Mr Nyekorach-Matsanga knowingly sought to reveal the identity of an individual he believed to be a protected witness.²²

14. Mr Nyekorach-Matsanga requests to disqualify the Prosecutor from conducting these investigations on the basis of article 42 of the Statute which provides, in relevant part, that:

7. Neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground [...]

²⁰ Request for Disqualification, para. 23.

²¹ See Comments on the Request for Disqualification, para. 5.

²² Comments on the Request for Disqualification, para. 4.

8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber:

(a) The person being investigated or prosecuted may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this article;

(b) The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter.

15. Mr Nyekorach-Matsanga's underlying claim for doubting the Prosecutor's impartiality is that the then-Prosecutor, Mr Luis Moreno-Ocampo (hereinafter: "Mr Moreno-Ocampo") has a personal interest in the outcome of this investigation in that Mr Nyekorach-Matsanga has made public complaints against Mr Moreno-Ocampo, which are related to the subject-matter of the investigation.²³ These complaints alleged that the Prosecutor had not properly carried out his investigations in the situation in the Republic of Kenya and had committed perjury by withholding material evidence.²⁴ Mr Nyekorach-Matsanga now contends that the investigation constitutes a "retaliatory action"²⁵ and that, in investigating him, the Prosecutor "intended to a) silence [him], [...] one of the Prosecutor's critics on the African continent; b) stifle and render nugatory his complaint to the Appeals Chamber and c) pre-empt the investigations of a complaint he filed against the Prosecutor's intermediaries".²⁶ In order to properly decide on the Request for Disqualification, Mr Nyekorach-Matsanga requests the Appeals Chamber to order the Prosecutor to file or disclose additional information, to thoroughly review such information and to order oral arguments on the Request for Disqualification.²⁷

16. The Prosecutor responds that Mr Nyekorach-Matsanga's "claims are frivolous and fail as a matter of law".²⁸ He argues that Mr Nyekorach-Matsanga's complaints "cannot be a basis to disqualify the Prosecutor" as "[i]f that were the case, any person under investigation could disarm the Prosecutor simply by complaining about his conduct".²⁹

²³ Request for Disqualification, paras 18, 37.

²⁴ Request for Disqualification, paras 5, 17, 18, 20-23.

²⁵ Request for Disqualification, para. 37.

²⁶ Request for Disqualification, para. 44.

²⁷ Request for Disqualification, paras 45-49.

²⁸ Comments on the Request for Disqualification, para. 3.

²⁹ Comments on the Request for Disqualification, para. 10.

A. Standing of Mr Nyekorach-Matsanga to request disqualification of the Prosecutor

17. While not raised by Mr Nyekorach-Matsanga or the Prosecutor, the Appeals Chamber considers it appropriate to address whether Mr Nyekorach-Matsanga has standing to request the disqualification of the Prosecutor. Article 42 (8) (a) of the Statute does not specify whether it pertains to persons being investigated or prosecuted for the crimes listed in article 5 of the Statute or whether it also applies to persons being investigated or prosecuted for offences against the administration of justice pursuant to article 70 of the Statute. The Appeals Chamber notes that, on its face, there is nothing to suggest that article 42 (8) (a) of the Statute does not apply to investigations of offences under article 70 of the Statute. Rule 163 of the Rules of Procedure and Evidence provides that, subject to certain exceptions which do not apply to the present matter, the Statute and the Rules of Procedure and Evidence “shall apply *mutatis mutandis* to the Court’s investigation, prosecution and punishment of offences defined in article 70 [of the Statute]”. Accordingly, the Appeals Chamber finds that a person being investigated on suspicion of having committed offences under article 70 of the Statute may request the disqualification of the Prosecutor from that particular investigation (*i.e.*, the investigation of that person under article 70 of the Statute). As Mr Nyekorach-Matsanga is being investigated under article 70 of the Statute,³⁰ he may request the disqualification of the Prosecutor from that investigation.

B. The Request for Disqualification

18. The Request for Disqualification seeks the disqualification of the Prosecutor from investigating Mr Nyekorach-Matsanga.³¹ At the time that the Request for Disqualification was registered on 1 June 2012, the Prosecutor of the Court was Mr Moreno-Ocampo, and the Request for Disqualification is based on Mr Moreno-Ocampo’s alleged direct and personal interest in investigating Mr Nyekorach-Matsanga.³²

³⁰ Comments on the Request for Disqualification, para. 5.

³¹ Request for Disqualification, para. 2.


³² See Request for Disqualification, in particular paras 18, 37.

19. Mr Moreno-Ocampo's term of office began on 16 June 2003³³ and, pursuant to article 42 (4) of the Statute, lasted for nine years. His term of office ended on 15 June 2012. With Mr Moreno-Ocampo having left office, the request to disqualify him has been rendered moot and must be dismissed as such.

20. Given that the Request for Disqualification is dismissed as moot, the Appeals Chamber finds it unnecessary to consider the other remedies requested by Mr Nyekorach-Matsanga, all of which were aimed at facilitating the Appeals Chamber's consideration of the merits of the Request for Disqualification.³⁴

21. Furthermore, the Appeals Chamber dismisses *in limine* the Request for Leave to Reply. Considering that the Request for Disqualification is moot, the Appeals Chamber sees no reason why it should grant leave to reply and thus to present further arguments to Mr Nyekorach-Matsanga. In addition, the Appeals Chamber notes and disapproves of the fact that Mr Nyekorach-Matsanga made substantive submissions in the Request for Leave to Reply instead of requesting leave by explaining why leave to reply should be granted to him and awaiting the Appeals Chamber's decision on the request before making substantive submissions.³⁵

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


Judge Sang-Hyun Song
Presiding Judge

Dated this 6th day of September 2012

At The Hague, The Netherlands

³³ ICC Press Release, "The Solemn Undertaking of the Prosecutor", 13 June 2003, ICC-OTP-20030613-14, accessed at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2003/the%20solemn%20undertaking%20of%20the%20prosecutor>.

³⁴ See Request for Disqualification, paras 45-48.

³⁵ See *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'", 13 February 2007, ICC-01/04-01/06-824 (OA 7), para. 68.