

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 1 April 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

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

Public Document

Decision on Reclassification of Certain Documents

Decision 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

Karim A. A. Khan
Kennedy Ogeto
Steven Kay
Gillian Higgins
Evans Monari
John Philpot
Gershom Otachi Bw'omanwa

Legal Representatives of the Victims

Legal Representatives of the 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 & Deputy Registrar

Silvana Arbia, Registrar
Didier Preira, Deputy-Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the "Chamber") of the International Criminal Court (the "Court"),¹ issues this decision reclassifying certain documents.

1. On 31 March 2010, the Chamber issued its decision in which it granted, by majority, the Prosecutor's request to commence an investigation into the situation in the Republic of Kenya for crimes against humanity, to the extent specified in the operative part of the said decision.²
2. On 15 December 2010, the Prosecutor submitted the "Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali" (the "Prosecutor's Application") together with 23 annexes attached thereto.³
3. On 8 March 2011, the Chamber issued its decision on the Prosecutor's Application, wherein the Chamber, by majority, decided to summon Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (collectively "the suspects") to appear before it.⁴
4. On 28 March 2011, pursuant to a decision issued on 21 March 2011 by the Single Judge,⁵ the Prosecutor submitted his observations on the possible reclassification of certain documents, filed by him and currently classified as "confidential *ex parte*, Prosecutor only" (the "Prosecutor's Observations").⁶
5. The Single Judge notes articles 57(3)(c), 60, 67, 68(1) of the Rome Statute (the "Statute"), rules 15 and 81 of the Rules of Procedure and Evidence, regulations 8(c)

¹ Pre-Trial Chamber II, "Decision Designating a Single Judge", ICC-01/09-02/11-9.

² Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr.

³ ICC-01/09-31-Conf-Exp and its Annexes.

⁴ Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", ICC-01/09-02/11-01.

⁵ Pre-Trial Chamber II, "Decision Requesting the Prosecutor to Submit Observations on the Possible Reclassification of Certain Documents", ICC-01/09-02/11-10.

⁶ ICC-01/09-02/11-18 and annex A attached thereto.

and 23bis of the Regulations of the Court (the “Regulations”) and regulations 14, 20 and 22 of the Regulations of the Registry.

6. The Single Judge recalls her duty to ensure that proceedings are conducted in a fair and expeditious manner, with full respect for the rights of the suspects, and due regard for the principle of publicity, as enshrined in article 67(1) of the Statute and as previously enunciated by this Chamber⁷. Furthermore, the Single Judge is contemporaneously entrusted with the responsibility to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses in accordance with articles 57(3)(c) and 68(1) of the Statute.⁸

7. The Single Judge further notes regulation 23bis of the Regulations of the Court which provides that the Chamber may reclassify a document upon request by any participant or on its own motion where the basis for the classification no longer exists.

8. The Single Judge also wishes to clarify that the present decision on reclassification is issued in light of the forthcoming initial appearance hearing scheduled to occur on 8 April 2011. The purpose of this hearing, pursuant to article 60 of the Statute, is for the Chamber to satisfy itself that the suspects have been informed, firstly of the crimes they are alleged to have committed, and secondly of their rights under the Statute. Therefore, the Single Judge’s current assessment of the factual and legal basis for the classification of certain documents, is conducted taking due account of the limited purpose and scope of the initial appearance hearing. Notwithstanding the findings in the present decision regarding the classification of documents, the Single Judge, following the initial appearance hearing and during forthcoming disclosure proceedings, may later re-assess whether the factual and legal bases for classification continue to exist. Indeed, the Single Judge remains alert to the need to balance

⁷ Pre-Trial Chamber II, “Decision on Re-classification and Unsealing of Certain Documents and Decisions”, ICC-01/05-01/08-528, paras 9, 21.

⁸ Pre-Trial Chamber II, “Decision on Re-classification and Unsealing of Certain Documents and Decisions”, ICC-01/05-01/08-528, paras 10, 15.

interests in order to ascertain the continued necessity and proportionality of any classifications⁹.

9. The Single Judge notes that a number of documents attached to the Prosecutor's Application, namely annexes 2, 9, 16, 17 and 18, are either publicly available or refer to information which has subsequently become public knowledge. When asked to submit observations on the possible reclassification of this set of documents, the Prosecutor stated that he would not oppose their reclassification as "public".¹⁰ Thus, these documents shall be reclassified as "public", since the basis for their current classification no longer exists. The same holds true for a decision of the Chamber and several filings which are to be re-classified accordingly.

10. The Prosecutor also proposed the reclassification of other annexes to his Application as "confidential", namely annexes 1, 3, 5, 7, 8, 14, 19, 20, 21, since either they contain evidence not yet in the public domain or "knowledge of their use by the OTP could prejudice the future work of organizations using the materials".¹¹ The Single Judge is of the view that there is sufficient basis for keeping these documents confidential *vis-à-vis* the public. However, the Single Judge considers that there is no reason to prevent the suspects from having access to the concerned annexes of the Prosecutor's Application. Thus, they shall be reclassified as "confidential", as proposed by the Prosecutor.

11. Lastly, the Prosecutor stated that annexes 4, 6, 10, 22, and 23 to his Application shall retain the classification of "confidential *ex parte*, Prosecutor only", as they contain information which, "can easily be traced back to the providers who are not currently in any protection program" and potentially "bear on witness protection".¹²

⁹ Pre-Trial Chamber II, "Decision on Re-classification and Unsealing of Certain Documents and Decisions", ICC-01/05-01/08-528. The Single Judge at paragraph 22 states that "[...] in reviewing the level of confidentiality of documents containing the identity of ICC Staff members and deciding to re-classify such documents as "public" or "public redacted", the Single Judge balanced the possible threat posed to the ICC staff members and the principle of publicity".

¹⁰ Prosecutor's Observations, para. 8.

¹¹ *Ibid.*

¹² *Ibid.*, para. 9.

The Single Judge concurs with the Prosecutor that, at this stage of the proceedings, and absent of any information as to the implementation of protective measures for the persons concerned, the continued classification of these annexes as “confidential *ex parte*, Prosecutor only”, appears to be a necessary measure in order to minimise the risk associated with making these persons identifiable. Furthermore, in light of the limited purpose of the initial appearance hearing, the Single Judge finds that maintaining the current classification of the concerned documents appears to be a proportionate measure in order to avoid placing these persons at risk. For the same reasons, the Single Judge is of the view that annexes 1-385 to ICC-01/09-48-Conf-Exp shall retain their current classification of “confidential *ex parte*, Prosecutor only”, as proposed by the Prosecutor.

12. With respect to the reclassification of the Prosecutor’s Application, the Single Judge takes note of the Prosecution’s Observations, wherein he requested that only the redaction to Section G of the Application be retained, “in order to allow for the protection of ongoing investigation and of victims and witnesses”. The Single Judge agrees with the Prosecutor that the disclosure of the concerned information may prejudice his further or ongoing investigations and/or put victims and witnesses at risk and that the applied redaction is, at this stage of the proceedings, adequate to minimise this risk. Bearing in mind the limited purpose and scope of the initial appearance hearing, the Single Judge also believes that such redaction is restricted to what is necessary to overcome such risk and is, at this stage of the proceedings, the least intrusive alternative measure that can be taken to achieve this goal.

FOR THESE REASONS, THE SINGLE JUDGE

DECIDES

that the following documents be reclassified as “**public**”:

- (i) ICC-01/09-25-US, entitled “Notification to Pre-Trial Chamber II and Request for Extension of Page Limit”;

- (ii) **ICC-01/09-27-US**, entitled "Decision on the Prosecutor's Request for Extension of Page Limit";
- (iii) **ICC-01/09-31-Conf-Exp-Anx2**, entitled "Photographs of Suspects";
- (iv) **ICC-01/09-31-Conf-Exp-Anx9**, entitled "Map showing location of Kisumu, Nakuru, Naivasha and Nairobi";
- (v) **ICC-01/09-31-Conf-Exp-Anx16**, entitled "Hospitals and Health/Medical Centres: Kibera, Nairobi Province";
- (vi) **ICC-01/09-31-Conf-Exp-Anx17**, entitled "Hospitals and Health/Medical Centres: Naivasha, Nakuru District;
- (vii) **ICC-01/09-31-Conf-Exp-Anx18**, entitled "Hospitals and Health/Medical Centres: Nakuru District, Rift Valley Province;
- (viii) **ICC-01/09-48-Conf-Exp**, entitled "Prosecutor's Submission of Further Information and Materials";

DECIDES

that the following documents be reclassified as "**confidential**":

- (i) **ICC-01/09-31-Conf-Exp-Anx1**;
- (ii) **ICC-01/09-31-Conf-Exp-Anx3**;
- (iii) **ICC-01/09-31-Conf-Exp-Anx5**;
- (iv) **ICC-01/09-31-Conf-Exp-Anx7**;
- (v) **ICC-01/09-31-Conf-Exp-Anx8**;
- (vi) **[ICC-01/09-31-Conf-Exp-Anx14**;
- (vii) **ICC-01/09-31-Conf-Exp-Anx19**;
- (viii) **ICC-01/09-31-Conf-Exp-Anx20**;
- (ix) **ICC-01/09-31-Conf-Exp-Anx21**;

ORDERS

The Prosecutor to file in the record of the Case, no later than Monday, 4 April 2011 at 16.00 hrs, a new public redacted version of the "Prosecutor's Application Pursuant


to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali”, wherein only the redaction to Section G is retained.

ORDERS

the Registrar to copy the following documents that are currently in the record of the Situation in the Republic of Kenya into the corresponding record of the Case with the same level of classification, unless otherwise ordered by the Single Judge or by the Chamber:

- (i) **ICC-01/09-25-US**, entitled “Notification to Pre-Trial Chamber II and Request for Extension of Page Limit”;
- (ii) **ICC-01/09-27-US**, entitled “Decision on the Prosecutor’s Request for Extension of Page Limit”;
- (iii) **ICC-01/09-31-Conf-Exp**, entitled “Prosecutor’s Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali” and Annexes 1-23;
- (iv) **ICC-01/09-45-Conf-Exp**, entitled “Decision Requesting the Prosecutor to Submit the Statement of the Witnesses on which he Relies for the Purposes of his Applications under Article 58 of the Rome Statute”;
- (v) **ICC-01/09-48-Conf-Exp**, entitled “Prosecutor’s Submission of Further Information and Materials” and the annexes attached thereto.

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


 Judge Ekaterina Trendafilova
 Single Judge

Dated this Friday, 1 April 2011
 At The Hague, The Netherlands