



Original: English

No. ICC-01/09-02/11
Date: 13 September 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

SITUATION IN KENYA

THE PROSECUTOR

v.

**FRANCIS KIRIMI MUTHAURA
UHURU MUIGAI KENYATTA &
MOHAMMED HUSSEIN ALI**

Public Document

**Defence Observations on Legal Representative's "Request for Access to
Confidential *Inter Partes* Material"**

Source: Counsel for Ambassador Francis Kirimi Muthaura

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

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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

Amicus Curiae

REGISTRY

Registrar

Silvana Arbia

Counsel Support Section

Deputy Registrar

Didier Prieria

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. BACKGROUND

1. On 26 August 2011, the Single Judge issued the “Decision on Victim’s Participation at the Confirmation of Charges Hearing and in the Related Proceedings” in which she admitted 233 victims as participants in the confirmation of charges hearing and in the related proceedings and appointed a common legal representative for all the victims admitted in this case.¹
2. On 9 September 2011, the Victim’s Legal Representative filed a “Request for Access to Confidential *Inter Partes* Material” wherein access to all *inter partes* confidential material filed in the record of the case was requested.²
3. On 12 September 2011, the Single Judge issued an Urgent “Decision Requesting Observations” inviting the Defence teams to submit any observations relating to the filing by the legal representative of the victims no later than 13 September 2011.³
4. The Defence for Ambassador Francis Kirimi Muthaura (“the Defence”) hereby submits its observations on the matter.

II. DEFENCE OBSERVATIONS

5. The jurisprudence of the Court is that legal representatives have a right to all public filings, public decisions and access to public evidence filed by the parties and that this right “does not extend to those filed on a confidential basis”⁴ and that the Chamber however retains the option to decide, on a case by case basis, when confronted with a request, whether to grant access to the said confidential records of the case.⁵

¹ ICC-01/09-02/11-267, pp 45-46 letters (c) and (e) of the operative part

² ICC-01/09-02/11-310, para. 17

³ ICC-01/09-02/11-318, p. 5

⁴ ICC-01/05-01/08-320 para 103

⁵ ICC-02/05-02/09-136 paras 13-15; ICC-01/09-02/11-267, para. 109

6. For the reasons discussed below, the Defence objects to the request by the Victims' Legal Representative to have access to its confidential material filed in the record of the case and submits that the same should remain confidential with access limited only to the parties in the case.
7. The Defence respectfully invite the Single Judge to be mindful of the fact that the Defence has been exceptionally open in terms of the nature of the materials that it has disclosed to assist the Chamber in its determination of whether or not the charges in this case should be confirmed. These materials include confidential and sensitive information in the nature of telephone records identifying the persons called, emails which contain the email addresses of witnesses and third parties, and confidential minutes, reports and correspondences of the National Security Advisory Committee of the Republic of Kenya (NSAC).
8. In relation to the NSAC documents, the Defence, with the agreement of the client, determined that disclosure to the Chamber and the OTP of the complete NSAC minutes, reports and correspondences, without any redactions, would avoid speculation that unhelpful matters had been redacted by the Defence. A consequence of the NSAC minutes being disclosed is that documents otherwise classified as "secret" have been put before the court and parties. They should not be distributed beyond what is strictly necessary.
9. The NSAC minutes are complete and include sensitive discussions concerning national security, such as Al-Qaeeda and other terrorist threats to the Republic of Kenya. Whilst the Defence has permission to use these documents prudently, it is submitted that disclosure to the legal representative of the victims, or the large number of victims in this case, is unjustified, and could mitigate against such disclosure of sensitive information in future instances.
10. For these reasons, the Defence opposes the Request. As the Defence has indicated in its Observations on the Schedule of the Confirmation of Charges

Hearing,⁶ some Defence witnesses have no objections to their names as opposed to the totality of the content of their statements being mentioned in public and the Defence will furnish the Legal Representative with those names at the commencement of the hearing. The important safeguard is the prosecution and the chamber have all Defence evidence and can ask any questions necessary. This approach is reasonable and proportionate given the limited scope of the confirmation hearing.

CONCLUSION

11. In light of the foregoing, the Defence respectfully requests the Single Judge to reject the request by the Legal Representative for access to the confidential materials filed by the Defence into the record of the case.



Karim A. A. Khan QC

Lead Counsel for Ambassador Francis K. Muthaura

Dated this 13th Day of September 2011

At The Hague, Netherlands

⁶ ICC-01/09-02/11-284, para. 16