

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

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TRIAL CHAMBER V(B)

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. UHURU MUIGAI KENYATTA***

Public redacted version of

**Decision on the 'Defence request for Reclassification of ICC-01/09-02/11-823-
Conf-Exp and Related *Ex Parte* Documents', 5 November 2013, ICC-01/09-02/11-
852-Conf**

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Benjamin Gumpert

Counsel for Uhuru Muigai Kenyatta

Mr Steven Kay
Ms Gillian Higgins

Legal Representatives of Victims

Mr Fergal Gaynor

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Mr Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(B) ('Chamber') of the International Criminal Court ('Court') in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, pursuant to Article 64(6) of the Rome Statute ('Statute') and Regulations 23 *bis*, 34 and 35 of the Regulations of the Court ('Regulations'), renders the following Decision on the 'Defence request for Reclassification of ICC-01/09-02/11-823-Conf-Exp and Related *Ex Parte* Documents'.

I. Procedural background and submissions

1. On 25 July 2013, the Office of the Prosecutor ('Prosecution') notified the Chamber that it intended to submit applications for in-court protective measures for its first 10 witnesses and further informed the Chamber that 'the issue of self-incrimination may arise' with respect to its witnesses interviewed pursuant to Article 55(2) of the Statute and Rule 112 of the Rules of Procedure and Evidence ('Rules').¹ On 12 September 2013, the Prosecution notified the Chamber of the order of its first ten witnesses.²
2. On 11 October 2013, the Prosecution filed the confidential *ex parte*, Prosecution and VWU only, 'Prosecution request for protective measures and protections against self-incrimination for its first ten witnesses' ('Protective Measures Request').³ The Prosecution concurrently submitted a confidential redacted as well as a public redacted version of the Protective Measures Request.⁴ In particular, the Prosecution requests: (a) in-court protective measures for eight of the first ten witnesses then scheduled to appear⁵ (namely, Witnesses 2, 11, 217, 232, 429, 430, 493 and 505);⁶ and

¹ Prosecution submissions on the conduct of the proceedings, ICC-01/09-02/11-778, paras 9, 10.

² ICC-01/09-02/11-803; ICC-01/09-02/11-803-Conf-AnxA.

³ ICC-01/09-02/11-823-Conf-Exp.

⁴ Confidential redacted version of the Prosecution request for protective measures and protections against self-incrimination for its first ten witnesses, 11 October 2013, ICC-01/09-02/11-823-Conf-Red; Public redacted version of the Prosecution request for protective measures and protections against self-incrimination for its first ten witnesses, 11 October 2013, ICC-01/09-02/11-823-Red2.

⁵ On 28 October 2013, the Prosecution filed a 'Prosecution's amended order of witnesses following the Chamber's decision of 23 October 2013', ICC-01/09-02/11-839, 28 October 2013, amending its previous witness list communicated in ICC-01/09-02/11-803; ICC-01/09-02/11-803-Conf-AnxA.

(b) assurances against self-incrimination under Rule 74 of the Rules for six of the first ten witnesses then scheduled to appear (Witnesses 11, 217, 429, 430, 493, and 505).⁷

3. In the Protective Measures Request, the Prosecution submits that it filed the Protective Measures Request as confidential and *ex parte* 'because it contains witnesses' identifying information'.⁸ The Prosecution states that regarding the witnesses [REDACTED].⁹ According to the Prosecution [REDACTED].¹⁰ Specific to Witness 11, the Prosecution notes that his two [REDACTED].¹¹
4. On 18 October 2013, the defence team for Mr Kenyatta ('Defence') requested the Chamber to reclassify the Protective Measures Request and all *ex parte* filings cited therein as confidential ('Reclassification Request').¹² The Defence submits that the Prosecution has not properly justified the *ex parte* classification of the Protective Measures Request. It avers that the justification provided is meaningless as the Defence already knows the identities of all Prosecution witnesses at this stage of the proceedings.¹³ Further, the Defence posits that due to the high amount of redactions and reliance upon *ex parte* sources in the Protective Measures Request, the Defence is

⁶ Specifically, the Prosecution requests the Chamber to authorize (i) image and voice distortion; (ii) continued use of witness pseudonyms; and (iii) limited *in camera* sessions. Protective Measures Request, ICC-01/09-02/11-823-Red2, paras 1, 6, 35.

⁷ The request entails limited *in camera* sessions as well as image and voice distortion. Protective Measures Request, ICC-01/09-02/11-823-Red2, paras 2, 31, 36. Additionally, in view of 'unique circumstances of this case where the Accused is the Head of State,' the Prosecution requests the Chamber to require Mr Kenyatta 'to sign an undertaking not to reveal these witnesses' identities or potentially self-incriminating evidence to any States, government agencies or officials, and to abide by the Chamber's confidentiality orders.' Protective Measures Request, ICC-01/09-02/11-823-Red2, para. 32.

⁸ Protective Measures Request, ICC-01/09-02/11-823-Red2, para. 3.

⁹ Protective Measures Request, ICC-01/09-02/11-823-Conf-Red, para. 12.

¹⁰ Protective Measures Request, ICC-01/09-02/11-823-Conf-Red, para. 13.

¹¹ Protective Measures Request, ICC-01/09-02/11-823-Conf-Red, para. 14, citing to ICC-01/09-02/11-796-Conf-AnxA, para. 87.

¹² Defence Request for Reclassification of ICC-01/09-02/11-823-Conf-Exp and Related *Ex Parte* Documents, ICC-01/09-02/11-829-Conf, 18 October 2013.

¹³ Reclassification Request, ICC-01/09-02/11-829-Conf, para. 7.

unable to provide substantive submissions on the merits of the necessity and proportionality of the measures sought by the Prosecution.¹⁴

5. The Defence also requests the Chamber to order disclosure of 'all evidence' in the Prosecution's possession relating to its assertion that [REDACTED] and in particular, all evidence relating to [REDACTED].¹⁵ In addition, the Defence requests that the time limit for the filing of its response to the Protective Measures Request be calculated from the date of full disclosure of the *ex parte* documents cited in the Protective Measures Request.¹⁶
6. In response, on 23 October 2013, the Prosecution opposed the reclassification of the Protective Measures Request to 'confidential'. It posits that most of the redactions were applied to protect Prosecution witnesses [REDACTED].¹⁷ The Prosecution adds that their lifting would 'jeopardise [REDACTED]'.¹⁸
7. The Prosecution agrees however that more information on the reasons justifying the need for protective measures can be provided¹⁹ and submitted on 23 October 2013 a lesser redacted version of the Protective Measures Request.²⁰
8. Regarding the Defence's request to reclassify all *ex parte* filings cited in the Protective Measures Request, the Prosecution responds that such reclassification is unnecessary as the lesser redacted version of the Protective Measures Request 'reveals information specific to each of the witnesses' and thus provides the Defence with sufficient

¹⁴ Reclassification Request, ICC-01/09-02/11-829-Conf, paras 2, 8.

¹⁵ Reclassification Request, ICC-01/09-02/11-829-Conf, paras 3, 11, 13, *citing* Protective Measures Request, ICC-01/09-02/11-823-Conf-Red, para. 13.

¹⁶ Reclassification Request, ICC-01/09-02/11-829-Conf, para. 14.

¹⁷ Prosecution response to Defence Request for Reclassification of ICC-01/09-02/11-823-Conf-Exp and Related *Ex Parte* Documents', ICC-01/09-02/11-833-Conf, 23 October 2013 ('Response'), para. 2.

¹⁸ Response, ICC-01/09-02/11-833-Conf, para. 2.

¹⁹ Response, ICC-01/09-02/11-833-Conf, para. 3.

²⁰ Confidential redacted version of the Prosecution request for protective measures and protections against self-incrimination for its first ten witnesses, ICC-01/09-02/11-823-Conf-Red3.

information to respond.²¹ It also notes that the Defence already has access to two of the requested filings.²² Further, the Prosecution informs that it has already disclosed to the Defence all information in its possession related to [REDACTED].²³

II. Analysis by the Chamber

1. Justification for *ex parte* classification

9. The Chamber notes that the Prosecution's initial justification for the designation of its Protective Measures Request as 'confidential *ex parte*' was rather incomplete in that it merely indicated that it contains 'witnesses' identifying information'.²⁴ However, in its Response the Prosecution submits that the *ex parte* designation was chosen in order to protect the witnesses' as well as their families' security since disclosure of the redacted information 'would jeopardise [REDACTED]'.²⁵ Although this additional reasoning was belatedly provided, the Chamber considers that it formally satisfies the requirements of Regulation 23 *bis*(2) of the Regulations.

2. Request for reclassification

10. As to the Defence's argument that the level of redactions and reliance on *ex parte* sources in the redacted version of the Protective Measures Request does not provide sufficient information to assess its merits and thus renders it impossible to respond in a meaningful manner,²⁶ the Chamber considers as follows. The Chamber notes that in the lesser redacted version of the Protective Measures Request submitted by the Prosecution on 23 October 2013, a large portion of previously redacted information is now disclosed to the Defence. The Chamber does not see a need to order the

²¹ Response, ICC-01/09-02/11-833-Conf, para. 4.

²² Response, ICC-01/09-02/11-833-Conf, para. 4.

²³ Response, ICC-01/09-02/11-833-Conf, para 5.

²⁴ Protective Measures Request, ICC-01/09-02/11-823-Red2, para. 3.

²⁵ Response, ICC-01/09-02/11-833-Conf, para. 2.

²⁶ Reclassification Request, ICC-01/09-02/11-829-Conf, paras 2, 6, 8.

Prosecution to provide complete disclosure to the Defence of any further information which currently remains redacted. The Chamber notes that the remaining redactions relate primarily to information such as [REDACTED], as well as certain personal details. The Chamber considers that disclosure of such information is not necessary in order to enable the Defence to meaningfully respond to the Protective Measures Request. The Chamber accepts in this regard the Prosecution's explanation that the remaining redactions have been applied primarily to provide adequate protection for the witnesses and their families. The Chamber notes however the rather extensive redactions in the first redacted version of the Protective Measures Request. In order to prevent unnecessary litigation on redactions, the Chamber urges the parties to limit redactions in their filings to what is strictly necessary.

11. Regarding the *ex parte* documentation cited in the Protective Measures Request, the Chamber notes that the Defence merely lists in an initial footnote the *ex parte* documents it requests to be reclassified as 'confidential' and subsequently seems to refer to all *ex parte* sources which the Prosecution relies upon in paragraphs 14 to 26 of the Protective Measures Request,²⁷ without any further explanation as to how each of these documents could be material for the Defence's observations. In addition, the Chamber reiterates its observation that the lesser redacted version of the Protective Measures Request contains a large portion of previously redacted information now disclosed to the Defence. In light of the foregoing, the Chamber is not convinced that the Defence is unable to make meaningful submissions in response to the Protective Measures Request.

3. Disclosure of evidence on [REDACTED]

²⁷ Reclassification Request, ICC-01/09-02/11-829-Conf, para. 1, footnote 1; para. 8, footnotes 7-14.

12. The Defence also requests the Chamber to order disclosure of all evidence in the Prosecution's possession relating to [REDACTED].²⁸ The Chamber takes note of the Prosecution's submission that it has already disclosed to the Defence all relevant information in its possession regarding the [REDACTED].²⁹ The Chamber finds that the information currently available to the Defence is sufficient for it to make submissions to the Chamber on what weight, if any, should be attributed to the Prosecution's reliance on the [REDACTED]. In light of the foregoing, the Chamber considers that the Defence's request on this matter is moot.

4. Time limit for Defence response

13. With regard to the Defence request that the time limit for the filing of its response be calculated from the date of full disclosure of the documents cited in the Protective Measures Request,³⁰ the Chamber notes that information sufficient to enable the Defence to respond to the Protective Measures Request was fully available to the Defence at the latest on 23 October 2013 when the lesser redacted version was submitted. However, the Chamber is also mindful of the fact that the Defence had received the original redacted version of the Protective Measures Request as early as 11 October 2013, enabling it at least to commence with the general preparation of a response. In the circumstances, the Chamber considers that good cause has been shown for extending the deadline. The Chamber considers it appropriate to alter the original time limit for the Defence response, as stipulated by Regulation 34(b) of the

²⁸ Reclassification Request, ICC-01/09-02/11-829-Conf, paras 3, 11, 13, *referring to* Protective Measures Request, ICC-01/09-02/11-823-Conf-Red, paras 13-14.

²⁹ Response, ICC-01/09-02/11-833-Conf, para. 5. The Chamber also notes the Prosecution's clarifying remark that the [REDACTED]. Response, ICC-01/09-02/11-833-Conf, para. 5, footnote 6.

³⁰ Reclassification Request, ICC-01/09-02/11-829-Conf, para. 14.

Regulations. Any response to the Protective Measures Request should be filed within 5 days from the date of the present decision.³¹

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ORDERS the Defence to file a response to the Protective Measures Request, if any, within 5 days from the date of the present decision; and

DENIES the remainder of the Reclassification Request.

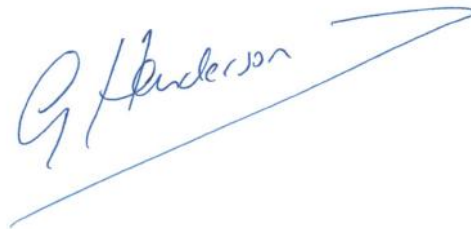
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Robert Fremr



Judge Geoffrey Henderson

Dated this 3 February 2017

At The Hague, The Netherlands

³¹ The Chamber notes the Email communication from a legal officer of the Chamber to the parties and participants on 1 November 2013 at 17:10h notifying them that an extension of the time limit for a response is forthcoming.