

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 21 October 2014

TRIAL CHAMBER V(B)

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Robert Fremr
Judge Geoffrey Henderson

SITUATION IN THE REPUBLIC OF KENYA

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

Public

Order concerning the public disclosure of confidential information

Order 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

Government of the Republic of Kenya

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

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*, having regard to Articles 64(6)(c) and 71 of the Rome Statute ('Statute'), Rule 171 of the Rules of Procedure and Evidence and Regulations 23 *bis* and 29 of the Regulations of the Court ('Regulations'), renders this 'Order concerning the public disclosure of confidential information'.

I. Procedural history

1. On 5 April 2011, Pre-Trial Chamber II ordered¹ the Registrar to: (i) 'prepare and transmit, in accordance with Article 87(2) of the Statute and Rule 176(2) of the Rules [...] a request for cooperation to the competent authorities of the Republic of Kenya for purposes of identifying, tracing and freezing or seizing the property and assets belonging to or under the control of [...] Uhuru Muigai Kenyatta [...]' ('Pre-Trial Chamber's Order').² The Pre-Trial Chamber's Order was issued under seal, *ex parte*, Prosecution only.

2. On 8 April 2013, in a public filing, the Government of the Republic of Kenya ('Kenyan Government') referred to a request by the Office of the Prosecutor ('Prosecution') for assistance in relation to identifying, tracing, and freezing property and assets of Mr Kenyatta.³

3. On 8 May 2013, the Prosecution filed its response⁴ to the 8 April 2013 submissions of the Kenyan Government, requesting that the Chamber issue a caution to the Kenyan Government for referring to confidential information in a public filing,

¹ Decision Ordering the Registrar to Prepare and Transmit a Request for Cooperation to the Republic of Kenya for the Purpose of Securing the Identification, Tracing and Freezing or Seizure of Property and Assets of Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 5 April 2011, ICC-01/09-02/11-42-Conf. The Pre-Trial Chamber's Order was filed under seal, *ex parte*, Prosecutor only, but was reclassified as under seal, *ex parte*, the Prosecutor and Common Legal Representative of Victims only, on 4 April 2014 pursuant to an order of the Chamber (ICC-01/09-02/11-909-US-Exp-Corr). It was subsequently reclassified as confidential on 7 April 2014 pursuant to a further order of the Chamber (ICC-01/09-02/11-910-Conf).

² Pre-Trial Chamber's Order, ICC-01/09-02/11-42-Conf, page 5.

³ Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, or, in the alternative, Application for Leave to file Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence, ICC-01/09-02/11-713, para. 41.

⁴ Prosecution response to the "Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, or in the alternative, Application for Leave to file Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence" (ICC-01/09-02/11-713), ICC-01/09-02/11-733-Red. The public redacted version was filed on 10 May 2013.

and submitting that ‘the prejudice caused by the disclosure [was] irreversible’ (‘Prosecution’s Request for a Caution’).⁵

4. On 24 May 2013, the Registry transmitted to the Chamber⁶ the ‘Application by the Government of Kenya for leave to Reply to the [Prosecution’s Request for a Caution]’ in which the Kenyan Government apologised for what it referred to as an ‘inadvertent disclosure’ and assured the Chamber that it would ‘proceed with the appropriate and necessary caution’ when referring to such confidential [requests for assistance] in future filings.⁷

5. On 3 July 2013, the Chamber issued a decision⁸ on the Prosecution’s Request for a Caution, declaring, *inter alia*, that ‘[i]n light of the apology and assurance provided by the Kenyan Government, the Prosecution’s request for a caution can be considered moot and need not be ruled upon by the Chamber.’⁹

6. On 7 April 2014, the Chamber issued an ‘Order for submissions on the implementation of the request to freeze assets’¹⁰ requesting submissions from the parties, participants and Kenyan Government on an apparent violation of the confidentiality of the Pre-Trial Chamber’s Order.¹¹ Therein, the Chamber observed that a news article cited by the Prosecution and available on the internet contained information about a request to identify or freeze the assets of the accused, in apparent contravention of the instruction of the Single Judge to keep the matter confidential.¹²

⁵ Prosecution’s Request for a Caution, ICC-01/09-02/11-733-Red, para. 7.

⁶ Registry Transmission of a document received from the Government of the Republic of Kenya, represented by the Attorney General of Kenya, ICC-01/09-02/11-743.

⁷ Annex 1 to Registry Transmission of a document received from the Government of the Republic of Kenya, represented by the Attorney General of Kenya, ICC-01/09-02/11-743-Anx1, para. 3.

⁸ Decision concerning the Government of Kenya’s Submissions on its cooperation with the Court, ICC-01/09-02/11-770 (‘Decision of 3 July 2013’).

⁹ Decision of 3 July 2013, ICC-01/09-02/11-770, para. 17.

¹⁰ ICC-01/09-02/11-910-Conf (‘7 April Order for Submissions’).

¹¹ 7 April Order for Submissions, ICC-01/09-02/11-910-Conf, page 6.

¹² Pre-Trial Chamber’s Order, ICC-01/09-02/11-42-Conf, para. 10.

7. On 8 July 2014, the Chamber issued a decision ('Decision of 8 July 2014')¹³ which, *inter alia*, addressed the apparent breach of confidentiality of the Pre-Trial Chamber's Order. The Chamber noted with concern that, based on the content of the news article as reported, there had been a clear contravention of the statutory obligation of confidentiality required of the parties, participants, or persons appearing before the Court in relation to the Pre-Trial Chamber's Order.¹⁴ The Chamber observed, however, that, on this occasion, no evidence had been presented which would allow the Chamber to make any findings concerning the person or persons responsible for the apparent breach.¹⁵

8. On 29 July 2014, the Chamber invited¹⁶ the Kenyan Government to propose a public redacted version of 'The Government of the Republic of Kenya's Submissions pursuant to the Order for Submissions given by the Trial Chamber at the Status Conference of 9 July 2014' (Kenya's Submissions'), dated 16 July 2014.¹⁷ However, rather than proposing its redactions to the Chamber in a confidential filing as had been done previously¹⁸, on 18 August 2014, the Kenyan Government directly filed a public redacted version.¹⁹ In its public filing, the Kenyan Government left unredacted references to the Pre-Trial Chamber's Order and to the Decision of 8 July 2014, both of

¹³ Decision on the implementation of the request to freeze assets, ICC-01/09-02/11-931-Conf ('Decision of 8 July 2014').

¹⁴ Pre-Trial Chamber's Order, ICC-01/09-02/11-42-Conf, para. 10.

¹⁵ Decision of 8 July 2014, ICC-01/09-02/11-931-Conf, para. 34.

¹⁶ Decision on the Prosecution's revised cooperation request, 29 July 2014, ICC-01/09-02/11-937.

¹⁷ ICC-01/09-02/11-934-Conf-Exp.

¹⁸ Public redacted version of the 'The Government of the Republic of Kenya's Update to the Trial Chamber Pursuant to the "Decision on the Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date" of 31 March 2014 (ICC-01/09-02/11-928-Conf-Exp dated 30 June 2014', 22 July 2014, ICC-01/09-02/11-936-Conf-Exp-Anx. Pursuant to an order of the Chamber, this public redacted version of ICC-01/09-02/11-928-Conf-Exp was notified to parties and participants as ICC-01/09-02/11-928-Red on 19 September 2014; Public redacted version of the 'Corrigendum of The Government of the Republic of Kenya's First Update to the Trial Chamber Pursuant to the "Order further extending deadline for filing of first update due on 30 April 2014"(ICC-01/09-02/11-921-conf-Exp-Corr) dated 29 May 2014, 11 June 2014, ICC-01/09-02/11-925-Conf-Exp-Anx. Pursuant to an order of the Chamber, dated 19 June 2014, the document was reclassified as Public, ICC-01/09-02/11-925-Anx.

¹⁹ Public Redacted Version of 'The Government of the Republic of Kenya's Submissions pursuant to the Order for Submissions given by the Trial Chamber at the Status Conference of 9 July 2014' ICC-01/09-02/11-934-Conf-Exp dated 16 July 2014, 18 August 2014, ICC-01/09-02/11-934-Red ('18 August 2014 Submissions').

which were confidential.²⁰ Pursuant to an instruction by the Chamber, the document was reclassified as confidential on 26 August 2014.²¹

9. On 11 and 17 September 2014, the Kenya media reported again on information contained in confidential, *ex parte* filings made by the Kenyan Government,²² quoting directly from those filings.²³

10. On 7 October 2014, the Chamber held a public hearing²⁴ in which the representatives of the Kenyan Government referred, in open session, to the Prosecutor's confidential 'application to freeze assets'²⁵ of the accused. On the same day, the Chamber ordered the Registry to redact the transcript and audio visual broadcast of the hearing.²⁶

II. Disclosure to the public of confidential information

11. The Chamber has previously underlined the importance of the parties, participants and other persons appearing before the Court respecting their obligations under the Statute concerning the confidentiality of the proceedings and taking appropriate measures to ensure that confidentiality is respected.²⁷ The Chamber has

²⁰ ICC-01/09-02/11-934-Conf-Red, para. 43.

²¹ Email from a Legal Officer in the Chamber to the Registry on 26 August 2014, directing that filing ICC-01/09-02/11-934-Red be reclassified as confidential. *See* ICC-01/09-02/11-934-Conf-Red.

²² 'AG Githu Muigai accuses Bensouda of dishonesty on Uhuru data', published 11 September 2014 (<http://www.the-star.co.ke/news/article-189625/ag-githu-muigai-accuses-bensouda-dishonesty-uhuru-data>). This statement was reported in the Kenyan press on 11 September 2014, even before the filing was notified to the Chamber and the Prosecution on 12 September 2014. 'I'm blameless in Uhuru case, Githu tells ICC', published 17 September 2014 (<http://www.the-star.co.ke/news/article-190709/im-blameless-uhuru-case-githu-tells-icc>).

²³ Annex 1 of the Registry's Transmission of a document received from the Attorney-General of the Republic of Kenya, 11 September 2014, ICC-01/09-02/11-948-Anx1, para. 18. Pursuant to an order of the Chamber, on 19 September 2014, this document was reclassified as public. The Government of the Republic of Kenya's Observations on the "Prosecution update on the status of cooperation between the Office of the Prosecutor and the Government of Kenya", 15 September 2014, ICC-01/09-02/11-951-Conf-Exp, para. 19.

²⁴ ICC-01/09-02/11-T-31-CONF-ENG.

²⁵ ICC-01/09-02/11-T-31-CONF-ENG ET, page 25, lines 7-9.

²⁶ Order to redact the transcript and audio visual broadcast of a public hearing, 7 October 2014, ICC-01/09-02/11-963-Conf.

²⁷ Decision of 8 July 2014, ICC-01/09-02/11-931-Conf, para. 35.

also indicated that it regards seriously any allegation that confidential or under seal information has been provided or leaked to the press.²⁸

12. Thus, the Chamber notes with concern the Kenyan Government's cumulative inattention to the taking of appropriate measures to ensure the confidentiality of the proceedings, including by leaving confidential information unredacted in its proposed public-redacted version, by exercising insufficient care in how this proposed version was filed, and by its reference to confidential information during a public status conference.²⁹ The Chamber underlines that this occurred despite having been recently warned of the seriousness of such a breach³⁰ and despite the Kenyan Government's assurance that it would 'proceed with the appropriate and necessary caution' to avoid such occurrences happening in the future.³¹ Separately, the Chamber notes with concern what appears to be a pattern of information contained in confidential filings being leaked to the media, in some cases even before the filings have been notified to the Chamber, parties or participants.³²

13. Under the Statute, an essential function of the Trial Chamber is its authority to provide for the protection of confidential information.³³ In this respect, it is within the inherent authority of a Chamber to take measures to protect the integrity of its proceedings.³⁴ Thus, the Chamber has specifically recalled its authority to sanction breaches of its orders and of statutory obligations of confidentiality, should it be presented with evidence making it necessary to do so.³⁵ For the foregoing reasons, the

²⁸ Decision of 8 July 2014, ICC-01/09-02/11-931-Conf, para. 35; ICC-01/09-02/11-T-31-CONF-ENG ET, page 25, lines 7-9.

²⁹ ICC-01/09-02/11-T-31-CONF-ENG ET, page 25, lines 7-9 ; *see also* Order to redact the transcript and audio visual broadcast of a public hearing, 7 October 2014, ICC-01/09-02/11-963-Conf.

³⁰ Decision of 8 July 2014, ICC-01/09-02/11-931-Conf, para. 35.

³¹ ICC-01/09-02/11-743-Anx1, para. 3.

³² Decision of 8 July 2014, ICC-01/09-02/11-931-Conf, para. 34; *see also* the incidents referred to in paragraph 9, above.

³³ Article 64 (6) (c) of the Statute.

³⁴ Regulation 29 of the Regulations.

³⁵ Decision of 8 July 2014, ICC-01/09-02/11-931-Conf, para. 35; Decision on the Defence application concerning professional ethics applicable to prosecution lawyers, 31 May 2013, ICC-01/09-02/11-747, paras 13-15.

Chamber formally cautions the Kenyan Government in respect of the matters outlined above.³⁶

III. Reclassification of related documents

14. Pursuant to Regulation 23 *bis* (3) of the Regulations, where the basis for a classification no longer exists, a Chamber may re-classify a document either at the request of a party or participant or on its own motion. The underlying rationale for issuing an order to freeze or seize assets of an accused person under seal is to ensure that steps are not taken to frustrate the implementation of the order prior to its execution. However, in light of the fact that the existence of the Pre-Trial Chamber's Order has been disclosed to the accused, the Chamber considers that its obligation in respect of the public nature of the proceedings now outweighs any remaining basis to keep the Pre-Trial Chamber's Order and related documents confidential.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ORDERS the Registry to reclassify as public the following documents:

- ICC-01/09-02/11-42-Conf
- ICC-01/09-02/11-910-Conf
- ICC-01/09-02/11-931-Conf
- ICC-01/09-02/11-931-Conf-Anx
- ICC-01/09-02/11-934-Conf-Red
- ICC-01/09-02/11-963-Conf

³⁶ 18 August 2014 Submissions of the Kenyan Government, ICC-01/09-02/11-934-Conf-Red, para. 43.


- ICC-01/09-02/11-T-31-CONF and,

ORDERS the parties, participants, and the Registry, pursuant to Regulation 23 *bis* (3) of the Regulations, to request reclassification of any related documents as necessary.


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



Judge Kuniko Ozaki, Presiding Judge



Judge Robert Fremr



Judge Geoffrey Henderson

Dated this 21 October 2014

At The Hague, The Netherlands