

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Decision on the reclassification of documents

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

Government of the Republic of Kenya

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(B) ('Chamber') of the International Criminal Court in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, pursuant to Article 64(7) of the Rome Statute ('Statute') and Regulation 23bis(3) of the Regulations of the Court ('Regulations'), renders the following 'Decision on the reclassification of documents'.

I. Procedural background and submissions

1. On 21 October 2014, the Chamber ordered, *inter alia*, reclassification of a decision of Pre-Trial Chamber II¹ and simultaneously ordered the parties, participants and the Registry, pursuant to Regulation 23bis(3) of the Regulations, 'to request reclassification of any related documents as necessary' ('Order Concerning Confidential Information').²
2. On 27 October 2014, the Office of the Prosecutor ('Prosecution') filed its 'Prosecution request for reclassification' ('Prosecution Submission') in which it submitted that filing ICC-01/09-02/11-16-US-Exp could be reclassified as public in its entirety³ and requested that the Chamber accept the public redacted versions of two documents: ICC-01/09-02/11-906-Conf and ICC-01/09-02/11-914-Conf attached as Annexes A and B to the Prosecution Submission.⁴ The Prosecution also submitted that, should another document referred to in Annex A be reclassified as public, its submissions might change.⁵

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 of property or assets of Francis Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 5 April 2011, ICC-01/09-02/11-42-US-Exp ('Pre-Trial Chamber's Order'). The Pre-Trial Chamber's Order was filed as under seal, *ex parte*, the Prosecutor only, but was reclassified as under seal, *ex parte*, the Prosecutor and Legal Representative of Victims ('LRV') only, on 4 April 2014 (*see* Chamber decision ICC-01/09-02/11-909-US-Exp-Corr), and was subsequently reclassified as confidential on 7 April 2014 (*see* Chamber decision ICC-01/09-02/11-910-Conf).

² Order Concerning Confidential Information, ICC-01/09-02/11-967, page 9.

³ Prosecution Submission, ICC-01/09-02/11-968, paras 4 and 7.

⁴ Prosecution Submission, ICC-01/09-02/11-968, paras 1 and 7.

⁵ Prosecution Submission, ICC-01/09-02/11-968, para 5. Specifically, the Prosecution submits that if document ICC-01/09-02/11-905-US-Exp-AnxIII is reclassified as public then Annex A to its submission can be reclassified as public in its entirety.

3. On 27 October 2014, the defence team for Mr Kenyatta ('Defence') filed its 'Defence Request for Reclassification of ICC-01/09-02/11-915-Conf and ICC-01/09-02/11-915-Conf-AnxA' ('Defence Submission') in which it sought the reclassification as public of one filing and its annex.⁶ The Defence averred, *inter alia*, that ICC-01/09-02/11-915-Conf and its annex were filed confidentially because they related to documents also designated confidential; however, since the Chamber's Order Concerning Confidential Information the reasoning underlying the classification had been 'nullified'.⁷
4. On 29 October 2014, the LRV filed his 'Victims' request for reclassification' ('LRV Submission').⁸ The LRV submitted that he supported the reclassifications proposed by the Prosecution and the Defence.⁹ Additionally, the LRV submitted that his filings ICC-01/09-02/11-889-US-Exp and ICC-01/09-02/11-916-Conf could be reclassified as public.¹⁰ The LRV also sought the reclassification of nine other documents, with redactions as the Chamber saw fit, for the purpose of providing the victims, public and States Parties the greatest amount of information possible.¹¹ The LRV additionally requested that the Prosecution file a public redacted version of its second updated pre-trial brief.¹²
5. On 10 November 2014, the Registry filed the 'Registry's submission pursuant to the "Order concerning the public disclosure of confidential information" (ICC-01/09-02/11-967) dated 21 October 2014' ('Registry Submission').¹³ The

⁶ Defence Submission, ICC-01/09-02/11-969, paras 1 and 4.

⁷ Defence Submission, ICC-01/09-02/11-969, para. 2.

⁸ LRV Submission. ICC-01/09-02/11-970-Conf. A public redacted version was filed on the same day.

⁹ LRV Submission, ICC-01/09-02/11-970-Red, para. 7.

¹⁰ LRV Submission, ICC-01/09-02/11-970-Red, paras 8 and 28(a).

¹¹ LRV Submission, ICC-01/09-02/11-970-Red, paras 10-11 and 28(a).

¹² LRV Submission, ICC-01/09-02/11-970-Red, paras 12-27 and 28(b).

¹³ ICC-01/09-02/11-972-US-Exp. A public redacted version was filed on 2 December 2014 (ICC-01/09-02/11-972-Red).

Registry submitted that it could provide public redacted versions of four of the five relevant Registry reports which had been filed in the case record.¹⁴

6. On 11 November 2014, the Prosecution submitted the 'Prosecution response to the Defence's and Common Legal Representative's request for reclassification' ('Prosecution Response') wherein which the Prosecution stated that it did not oppose the requests of either.¹⁵
7. Also on 11 November 2014, the Registry transmitted to the Chamber a letter received from the Government of the Republic of Kenya ('Kenyan Government').¹⁶ In the letter, the Kenyan Government requests access to all documents named in the LRV Submission ('Kenyan Government Request').¹⁷
8. On 14 November 2014, the Defence filed the 'Defence Response to Victims' Request for Reclassification dated 29 October 2014' ('Defence Response') wherein it objected to the LRV's request for the Prosecution to file a public redacted version of the second updated pre-trial brief.¹⁸ The Defence did not comment on the other requests for reclassification made by the LRV, or those put forth by the Prosecution.
9. On 19 November 2014, the Registry transmitted the 'Observations of the Government of Kenya, Pursuant to Decision ICC-01/09-02/11-967' ('Kenyan

¹⁴ Registry Submission, ICC-01/09-02/11-972-Red, paras 2 and 3.

¹⁵ Prosecution Response, ICC-01/09-02/11-973, paras 3-4 and 6. The Prosecution also noted, in para. 3, that some of the documents which the LRV sought reclassification for were produced by other entities and therefore those other entities should determine whether they believe reclassification to be appropriate.

¹⁶ Registry transmission of the letter received from the Attorney General of the Republic of Kenya, *ex parte* only available to the Government of the Republic of Kenya and the Registry, ICC-01/09-02/11-974-Conf-Exp and confidential Annex 1, *ex parte* only available to the Government of the Republic of Kenya and the Registry, ICC-01/09-02/11-974-Conf-Exp-Anx1.

¹⁷ ICC-01/09-02/11-974-Conf-Exp-Anx1.

¹⁸ Defence Response, ICC-01/09-02/11-975.

Government Observations').¹⁹ Therein the Kenyan Government notes its regret for having left confidential information unredacted in a proposed public filing and seeks to explain the circumstances surrounding the making of the filing in question.²⁰

II. Analysis of the Chamber

10. As a preliminary matter, the Chamber notes that the request for the Prosecution file a public redacted version of its second updated pre-trial brief will be addressed by way of a separate decision.
11. As a further preliminary matter, in respect of the Kenyan Government Request, the Chamber considers that it is only necessary for the Kenyan Government to be notified of filings containing copies of its own correspondence for the purposes of raising any objections to reclassification.
12. The Chamber recalls its general obligation under Article 64(7) of the Statute to ensure that trial proceedings are held in public. However, pursuant to the Statute, information may be withheld and classified as confidential or under seal to ensure, *inter alia*, 'appropriate measures to protect the safety, [...] dignity and privacy of victims and witnesses' and 'to protect confidential or sensitive information'.²¹ These exceptions to the principle of public proceedings are also subject to the requirement that where the basis for the original classification no longer exists, parties and participants must seek reclassification from the Chamber, or the Chamber may reclassify a document *proprio motu*.²²

¹⁹ Kenyan Government Observations, ICC-01/09-02/11-977-Conf-Exp-Anx.

²⁰ Kenyan Government Observations, ICC-01/09-02/11-977-Conf-Exp-Anx, pages 11-12.

²¹ Article 64(7) of the Statute. *See also* Articles 57(3)(c) and 68(1) of the Statute.

²² Regulation 23*bis* of the Regulations.

13. For these reasons, the Chamber invited the parties and participants to request reclassification of documents, as necessary, following the Chamber's own reclassification as public of its Order Concerning Confidential Information.²³
14. Having received these requests, the Chamber observes that there is express agreement between the Prosecution, Defence and LRV as to one filing the Defence requested to be reclassified as public: ICC-01/09-02/11-915-Conf and its annex ICC-01/09-02/11-915-Conf-AnxA.²⁴ The Chamber further notes that no objection has been indicated in respect of the documents proposed to be reclassified as public by the Prosecution and LRV (with the exception of the pre-trial brief which will, as noted above, be addressed separately).²⁵
15. The Chamber does not consider that the underlying basis for the confidential classification of filing ICC-01/09-02/11-16-US-Exp has ceased to exist and therefore rejects the request for its reclassification. However, noting that the original basis for the confidential classification of the remaining documents no longer exists, the Chamber considers that the documents filed by the Defence, Prosecution and LRV as referred to in their respective submissions may be reclassified as public. The Chamber also accepts the public redacted versions of ICC-01/09-02/11-906-Conf and ICC-01/09-02/11-914-Conf as proposed by the Prosecution. Should a public redacted version of ICC-01/09-02/11-905-Conf plus Annexes I-III be filed by the Registry in accordance with the directions below, the Chamber considers that document ICC-01/09-02/11-906-Conf may be reclassified as public in its entirety.

²³ Order Concerning Confidential Information, ICC-01/09-02/11-967, page 9.

²⁴ Defence Submission, ICC-01/09-02/11-969, paras 1 and 4. Prosecution Response, ICC-01/09-02/11-973, para. 3. LRV Submission, ICC-01/09-02/11-970-Red, para. 7.

²⁵ See LRV Submission, ICC-01/09-02/11-970-Red, para 28(a); Prosecution Submission, ICC-01/09-02/11-968, paras 1 and 7. See also Defence Submission, ICC-01/09-02/11-969, paras 1 and 4. In the Defence Submission, the Chamber noted no opposition to the reclassification of any document mentioned by the LRV or Prosecution (with the exception of the pre-trial brief). In addition, the Registry made no comment on the proposals for reclassification of filings made by the LRV, Defence and Prosecution.

16. In respect of the LRV's request for the reclassification of other documents filed by a Chamber, the Registry and the Kenyan Government, the Chamber notes the submissions of the Registry that, in respect of the Registry filings, these should remain confidential since the underlying basis for their designation as confidential has not been altered. However, the Chamber also accepts the Registry's proposal that – based on the suggested redaction categories contained in the Registry's submission – public redacted versions of four of the five of these documents may be filed by the Registry as proposed, with the exception of ICC-01/09-02/11-107-US-Exp.

17. Further, in respect of the annexes to those five aforementioned documents, the Chamber directs the Registry to file, by 9 January 2015, public redacted versions of ICC-01/09-02/11-58-US-Exp annexes 1 and 3; ICC-01/09-02/11-419-US-Exp annex 1; ICC-01/09-02/11-654-US-Exp annexes 1 and 2; and ICC-01/09-02/11-905-Conf annexes I, II and III – redacting any information in these annexes relating to the staff of the Registry and officials of the Kenyan Government – unless the Kenyan Government files any objections to such reclassification by 7 January 2015. The Chamber considers it appropriate that references, if any, to proceedings unrelated to this case should also be redacted.²⁶

18. In respect of ICC-01/09-02/11-84-US-Exp, the Chamber notes that, on 4 July 2014, it directed the Registry to request the Kenyan Government to propose a public redacted version of this filing.²⁷ The Registry subsequently transmitted to the Chamber the Kenyan Government's response that it would not be filing a public redacted version of this filing.²⁸ No reasons were provided by the Kenyan Government and no specific concerns in relation to the content of the

²⁶ See e.g. ICC-01/09-02/11-58-US-Exp-Anx3.

²⁷ E-mail from Legal Officer of the Chamber to the Registry dated 4 July 2014 at 14:50.

²⁸ E-mail from Registry to Legal Officer of the Chamber dated 10 July 2014 at 16:16.

document were expressed. Consequently, the Chamber considers it appropriate to reclassify this filing *proprio motu*.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ORDERS the Registry to reclassify as public the following documents:

- a. ICC-01/09-02/11-11-US-Exp;
- b. ICC-01/09-02/11-84-US-Exp;
- c. ICC-01/09-02/11-885-US-Exp;
- d. ICC-01/09-02/11-889-US-Exp;
- e. ICC-01/09-02/11-909-US-Exp-Corr and ICC-01/09-02/11-909-US-Exp-Corr-AnxA;
- f. ICC-01/09-02/11-915-Conf and ICC-01/09-02/11-915-Conf-AnxA; and
- g. ICC-01/09-02/11-916-Conf;

ORDERS the Registry to notify the Government of Kenya of the following annexes:

- a. ICC-01/09-02/11-58-US-Exp annexes 1 and 3;
- b. ICC-01/09-02/11-419-US-Exp annex 1;
- c. ICC-01/09-02/11-654-US-Exp annexes 1, 2 and 3; and
- d. ICC-01/09-02/11-905-Conf annexes I, II and III;

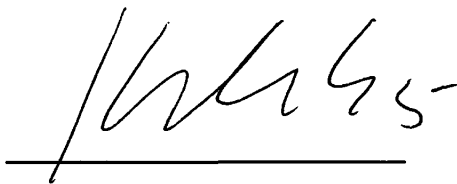
DIRECTS the Kenyan Government to notify the Chamber of any objection to the reclassification as public - subject to redaction of identifying information of Registry staff, Kenyan Government officials and references, if any, to other proceedings - of those immediately aforementioned annexes not later than 7 January 2015, (this

excludes annex ICC-01/09-02/11-654-US-Exp-Anx3, which the Chamber does not in any event consider it appropriate to reclassify); and

ORDERS the parties, participants and the Registry, as applicable, in accordance with the directions provided in paragraphs 15-17 of this decision, to file by 9 January 2015, public redacted versions of the following documents (in respect of the annexes, reclassification is subject to no objection having been notified by the Kenyan Government in accordance with the foregoing direction):

- a. ICC-01/09-02/11-58-US-Exp and annexes 1 and 3;
- b. ICC-01/09-02/11-419-US-Exp and annex 1;
- c. ICC-01/09-02/11-654-US-Exp and annexes 1 and 2;
- d. ICC-01/09-02/11-905-Conf and annexes I, II and III;
- e. ICC-01/09-02/11-906-Conf (as redacted by the Prosecution); and
- f. ICC-01/09-02/11-914-Conf (as redacted by the Prosecution).

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



Judge Kuniko Ozaki, Presiding Judge



Judge Robert Fremr



Judge Geoffrey Henderson

Dated 11 December 2014

At The Hague, The Netherlands