

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 12 February 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 on reclassification of ICC-01/09-02/11-866-Conf-Exp

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

Mr Githu Muigai, SC, Attorney General
of the Republic of Kenya

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Mr Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Others

Trial Chamber V(B) ('Chamber')¹ of the International Criminal Court in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, pursuant to Regulation 23 *bis* of the Regulations of the Court, issues the following 'Order on reclassification of ICC-01/09-02/11-866-Conf-Exp'.

1. On 29 November 2013, the Office of the Prosecutor ('Prosecution') filed the confidential *ex parte*, Prosecution and Government of the Republic of Kenya ('Kenyan Government') only, 'Prosecution application for a finding of non-compliance pursuant to Article 87(7) of the Statute against the Government of Kenya' ('Application').² In the Application, the Prosecution states that it sent to the Kenyan Government a request for assistance³ containing, *inter alia*, a request for financial and other information specifically identified in paragraphs 9 to 11 thereof ('Records Request').
2. The Prosecution avers that it designated the Application as confidential *ex parte* on the basis that it contains information about confidential communications between the Kenyan Government and the Prosecution.⁴ It submits, however, that as the Records Request has previously been referred to by the Kenyan Government in a public filing, the Kenyan Government has similarly 'waived confidentiality for the communications related to the Records Request'.⁵ The Prosecution requests that the Application therefore be reclassified as public because 'maintaining the confidentiality of this information would serve no identifiable purpose'.⁶

¹ Where 'Chamber' is used in this decision it refers to both Trial Chamber V(b) in its composition as until 31 January 2014 and to Trial Chamber V(b) as composed by the Presidency's 'Decision replacing a Judge in Trial Chamber V(b)', 30 January 2014, ICC-01/09-02/11-890.

² Application, ICC-01/09-02/11-866-Conf-Exp. A public redacted version was filed on 2 December 2013 as ICC-01/09-02/11-866-Red.

³ OTP/KEN/KEN-45/TL-JCCD-sm, attached as Annex A to the Application.

⁴ Application, ICC-01/09-02/11-866-Conf-Exp, para. 4.

⁵ Application, ICC-01/09-02/11-866-Conf-Exp, para. 5.

⁶ Application, ICC-01/09-02/11-866-Conf-Exp, para. 5.

3. Having been invited to do so by the Chamber,⁷ the Kenyan Government submitted its observations on the Application ('Observations'), which were conveyed to the Chamber by the Registry on 9 January 2014.⁸ The Observations address the Records Request and concomitant communications. The Kenyan Government designated the Observations as public; however, the Observations were reclassified as confidential by the Registry because the 'names of Registry staff' appear therein.⁹ Pursuant to an order of the Chamber,¹⁰ a public redacted version was subsequently filed.¹¹
4. On 3 February 2014, following leave to reply having been granted by the Chamber,¹² the Prosecution filed, designated as public, a reply to the Observations ('Prosecution Reply').¹³
5. The Chamber notes that the Kenyan Government sought to file its Observations publicly and made no submissions therein on the appropriate designation of the Application. The Chamber finds that the Kenyan Government thereby evinced a lack of objection to the Records Request, and concomitant communications, being made public. The Chamber further notes that the Prosecution Reply to the Observations was filed publicly. In light of these circumstances, the Chamber reclassifies the Application as public (excluding confidential Annexes A to M).

⁷ Decision requesting observations from the Government of Kenya, 9 December 2013, ICC-01/09-02/11-870.

⁸ Registry's report pursuant to the "Decision requesting observations from the Government of Kenya" dated 9 December 2013, ICC-01/09-02/11-877. The Observations are contained in Annex 2 of this filing (ICC-01/09-02/11-877-Conf-Anx2).

⁹ Registry's report pursuant to the "Decision requesting observations from the Government of Kenya" dated 9 December 2013, ICC-01/09-02/11-877, page 3.

¹⁰ Decision on the Prosecution request for leave to reply to the Government of Kenya's observations, 30 January 2014, ICC-01/09-02/11-891.

¹¹ Public redacted version filed by the Registry on 5 February 2014 as ICC-01/09-02/11-877-Anx2-Red.

¹² ICC-01/09-02/11-891.

¹³ Prosecution reply to the Government of Kenya's 20 December 2013 observations, ICC-01/09-02/11-894.

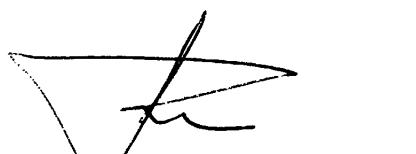
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ORDERS the Registry to reclassify as public the Application (ICC-01/09-02/11-866-Conf-Exp), excluding confidential Annexes A to M.

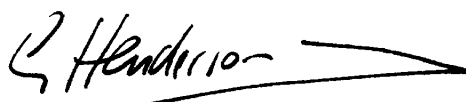
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Robert Fremr



Judge Geoffrey Henderson

Dated 12 February 2014

At The Hague, The Netherlands