

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **2 August 2013**

TRIAL CHAMBER V(B)

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public

**Public Redacted Version of “Corrigendum to ‘Former Defence’s
Submissions further to Trial Chamber’s ‘Order for submissions regarding
the Legal Representative’s request for access to confidential filings and
evidence’ ”**

Sources: Former Defence for Francis Kirimi Muthaura

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

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I. Introduction

1. The defence team of the former accused Ambassador Francis Kirimi Muthaura ("Former Defence") hereby files its submissions on the access of the Common Legal Representative ("CLR") and Office of Public Counsel for Victims ("OPCV") to certain un-redacted or less-redacted versions of filings in the record of this case, further to the invitation of Trial Chamber V(B) ("Chamber").¹
2. The Former Defence opposes the Chamber granting access to the CLR and OPCV of the un-redacted versions of the following filings listed in the CLR's request ("Request")² and Prosecution's response thereto ("Response"):³ ICC-01/09-02/11-617-Red; ICC-01/09-02/11-621-Conf-Exp; ICC-01/09-02/11-621-Red2; ICC-01/09-02/11-628-Red; ICC-01/09-02/11-664-Conf-Exp; ICC-01/09-02/11-664-Red2; ICC-01/09-02/11-678-Red.
3. With respect to filings ICC-01/09-02/11-628-Red, ICC-01/09-02/11-664-Conf-Exp, ICC-01/09-02/11-664-Red2 and ICC-01/09-02/11-678-Red, the Defence only objects to limited confidential information within these filings being disclosed to the CLR and OPCV.
4. With respect to filings ICC-01/09-02/11-617-Red, ICC-01/09-02/11-621-Conf-Exp and ICC-01/09-02/11-621-Red2, the Former Defence submits that the nature and content of the un-redacted filings is such that no lesser redacted version can be provided to the CLR and OPCV.

¹ Order for submissions regarding the Legal Representative's request for access to confidential filings and evidence, 24 July 2013, ICC-01/09-02/11-777 (hereafter "Order").

² Victims' request for access to confidential filings and evidence, 23 May 2013, ICC-01/09-02/11-742.

³ Prosecution response to the "Victims' request for access to confidential filings and evidence", 14 June 2013, ICC-01/09-02/11-761.

5. With respect to the remainder of the filings listed at paragraphs 12 and 13 of the Request and paragraph 4 of the Response, the Former Defence has no objection to the CLR and OPCV being provided access to the un-redacted versions of these filings.
6. The Former Defence takes this opportunity to state its objection to any items in the record of the case originating from the Former Defence and classified as “confidential” being provided to the CLR and OPCV. These items include sensitive documents originating from the Government of Kenya (“GoK”) that were provided to the Former Defence on a confidential and restricted basis, such as the minutes of meetings of the National Security Advisory Committee (“NSAC”), GoK communications,⁴ GoK Reports,⁵ Lists/Tables of information,⁶ and the confidential statements of Former Defence witnesses and annexes thereto.
7. The Former Defence submits that the CLR and OPCV are not entitled to the confidential information in these filings and evidence. The information originally submitted as “confidential” pertains to sensitive defence investigations and in some instances reveals the details of potential witnesses of a former accused.
8. This filing is submitted as confidential and only available to the Prosecution and Defence of Mr. Kenyatta as it refers to and discusses confidential information originating from the Former Defence, which, if provided to the CLR and OPCV, would obviate the relief sought by the

⁴ See, e.g., KEN-D12-0006-0001 and KEN-D12-0006-0002.

⁵ See, e.g., KEN-D12-0001-0005 and KEN-D12-0008-0003.

⁶ See, e.g., KEN-D12-011-0024.

Former Defence. A public redacted version of this filing shall also be submitted.

II. Background

9. On 11 March 2013, the Prosecutor submitted the “Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura”.⁷
10. On 18 March 2013, Trial Chamber V issued the “Decision on the withdrawal of charges against Mr Muthaura”,⁸ with the Majority of the Chamber (Presiding Judge Ozaki partially dissenting) granting the Prosecutor permission to withdraw the charges against Mr. Muthaura and terminating the proceedings against Mr. Muthaura.
11. On 23 May 2013, the CLR submitted the Request, requesting, *inter alia*, access to the filings listed at paragraphs 12 and 13 of the Request.
12. On 14 June 2013, the Prosecution filed the Response, submitting that with respect to the ten filings listed by the CLR originating from the Prosecution, the Prosecution had no objection to these filings being notified to the CLR.⁹ The Prosecution also submitted that it had identified additional filings originating from the Prosecution, listed at paragraph 4 of the Response, that the Prosecution did not object being notified to the CLR.
13. On 24 July 2013, the Chamber issued the Order, in which it invited the Former Defence to file submissions “as to reclassifying the filings

⁷ ICC-01/09-02/11-687.

⁸ ICC-01/09-02/11-696.

⁹ Response, para. 3.

referenced in the Request and Response”¹⁰ within 7 days of notification of the Order.¹¹

III. Applicable Law

14. Rule 78 of the Rules of Procedure and Evidence (“Rules”) states:

The defence shall permit the Prosecutor to inspect any books, documents, photographs and other tangible objects in the possession or control of the defence, which are intended for use by the defence as evidence for the purposes of the confirmation hearing or at trial (emphasis added).

15. In the “Decision on victims’ representation and participation” (“Decision”),¹² the Chamber stated its “view that the Common Legal Representative may have access to confidential filings, to the extent that their content is relevant to the personal interests of the victims he or she represents”¹³ and that “[i]n relation to evidence,...the Common Legal Representative will have access to the public and confidential documents in Ringtail”, with the submitting party to “indicate whether or not the Common Legal Representative shall have access to the” item.¹⁴

IV. Submissions on access of CLR and OPCV to specified filings and to evidence submitted by the Former Defence at the confirmation stage

16. At the outset, the Former Defence notes that the personal interests of the victims in this case with respect to confidential information originating from the Former Defence are, in principle, of limited relevance, if any, to

¹⁰ Order, para. 3.

¹¹ Pursuant to Regulation 33(1)(d) of the Regulations of the Court: “Documents shall be filed with the Registry, at the latest, on the first working day of the Court following expiry of the time limit.”

¹² 3 October 2012, ICC-01/09-02/11-498.

¹³ *Ibid.*, para. 66.

¹⁴ *Ibid.*, para. 68.

the victims given the withdrawal of the charges and termination of the case against Mr. Muthaura.

17. Further, as set out by Rule 78 of the Rules, any obligation on the defence to disclose information or evidence to the Prosecution comes into effect only when the defence has made the decision that it intends to rely upon a particular item of evidence for the purposes of the confirmation hearing or at trial. In most circumstances, at the trial stage, the defence will not make any such 'final' decisions as to the evidence it intends to rely upon until the conclusion of the Prosecution presentation of evidence.
18. In the present instance, the charges against Ambassador Muthaura were withdrawn and the proceedings against him terminated prior to the commencement of the Prosecution trial case. The Former Defence certainly had not made any 'final' decisions regarding the evidence it intended to rely upon at the trial stage, at least with respect to the confidential evidence submitted by the Former Defence for the purposes of the confirmation hearing, and to which the CLR and OPCV were not given access. The Former Defence submits that a former suspect or former accused must retain primary control over the access granted to information pertaining to confidential defence investigations and confidential defence witnesses.
19. The filings listed at paragraph 2 above contain references to confidential Defence investigative activities and/or confidential witnesses of the Former Defence which the Former Defence had not provided to the CLR and OPCV, and which the Former Defence placed before the Chamber solely as a means of obtaining specific procedural and substantive relief.

20. With respect to the following filings, the Former Defence does not object to the CLR and OPCV being granted access to less redacted versions of these filings so long as the following redactions are maintained:
- i. **ICC-01/09-02/11-628-Red**: the redactions [REDACTED] at paragraphs 22, 23 and 24, and footnote 24;
 - ii. **ICC-01/09-02/11-664-Conf-Exp** and **ICC-01/09-02/11-664-Red2**: the redactions to the names and reference to two Former Defence witnesses at footnote 16;
 - iii. **ICC-01/09-02/11-678-Red**: the redactions at paragraph 21, [REDACTED].
21. With respect to the un-redacted versions of filings **ICC-01/09-02/11-617-Red**, **ICC-01/09-02/11-621-Conf-Exp** and **ICC-01/09-02/11-621-Red2**, given that these filings concern and discuss in detail two witnesses of the Former Defence, the Former Defence submits that it is not possible to provide the CLR and OPCV with lesser redacted versions of these filings.
22. The Former Defence note that the above identified confidential information is of a very limited nature and concerns the limited issues of the Former Defence's Application pursuant to Article 64 of the Statute and a request for sanctions against a member of the Office of the Prosecutor. Both of which have been disposed of by the Chamber with respect to Ambassador Mutharua, and have limited, if any relevance to the personal interests of the victims in this case, where Ambassador Muthaura is no longer an accused.

23. With respect to the confidential items of evidence submitted by the Former Defence at the confirmation stage of this case, the Former Defence submits that given that none of these items had been submitted by the Former Defence as evidence it would rely upon at the trial stage of proceedings, the CLR and OPCV have no right to have access to this information.
24. The Prosecution's re-submission at the trial stage pursuant to Rule 77, Article 67(2) or as incriminatory materials any confidential items originating from the Former Defence does not supersede the right of a former suspect or accused to control access to these items of evidence. If this were not so this would vitiate the principle set out by the Chamber that it is the submitting party that shall "indicate whether or not the Common Legal Representative shall have access to" an item.¹⁵
25. This is critically important in this case, when certain classes of items (identified at paragraph 6 above) submitted by the Former Defence at the confirmation stage are extremely sensitive and confidential documents originating from Ambassador Muthaura and received in the course of his employment as a senior Government official. This information was provided on the basis that its circulation would be restricted to the Judges of the ICC and the OTP. The Former Defence and Ambassador Muthaura certainly would have had to consider whether or not they could rely upon these items at the trial stage – in full or perhaps redacted format – in the event the Chamber decided that the CLR and OPCV must be granted access to these items.

¹⁵ Decision, para. 68.

V. Conclusion and Relief Requested

26. The Former Defence is grateful for the Chamber having provided the Former Defence the opportunity to file submissions on this important matter.

27. For the reasons set out above, the Former Defence do not object to the CLR and OPCV being provided lesser redacted versions of the following filings so long as the below indicated redactions are maintained:
 - i. **ICC-01/09-02/11-628-Red**: redactions at paragraphs 22, 23 and 24, and footnote 24;
 - ii. **ICC-01/09-02/11-664-Conf-Exp** and **ICC-01/09-02/11-664-Red2**: redactions at footnote 16;
 - iii. **ICC-01/09-02/11-678-Red**: redactions at paragraph 21.

28. The Former Defence objects to the CLR and OPCV being granted access to un-redacted or lesser redacted versions of the following filings: **ICC-01/09-02/11-617-Red**, **ICC-01/09-02/11-621-Conf-Exp** and **ICC-01/09-02/11-621-Red2**.

29. The Former Defence has no objection to the CLR and OPCV being granted access to un-redacted versions of the remainder of the filings listed at paragraphs 12 and 13 of the Request and paragraph 4 of the Response.

30. For the reasons set out above, the Former Defence additionally objects to and respectfully requests that the CLR and OPCV not be provided access to any items classified as confidential that were submitted as evidence by the Former Defence for the purposes of the confirmation hearing, and of particular importance any confidential items originating from

Ambassador Muthaura or pertaining to the workings of government and matters that have clear and obvious national security implications to the Republic of Kenya.

Respectfully Submitted,



Karim A. A. Khan QC
Former Lead Counsel for Mr. Muthaura

Dated this 2nd Day of August 2013
At Nairobi, Kenya