

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 22 August 2013

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

**Decision on the Legal Representative's request for access to confidential filings
and evidence**

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

Ms Adesola Adeboyejo

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 Caroline Walter

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Others

Mr Karim Khan, Mr Essa Faal, Mr
Kennedy Ogetto, Ms Shyamala
Alagendra

Trial Chamber V(B) ('Chamber')¹ of the International Criminal Court ('Court'), in the case of *The Prosecutor v Uhuru Muigai Kenyatta*, having regard to Rule 131(2) of the Rules of Procedure and Evidence and Regulations 23 *bis* and 34 of the Regulations of the Court ('Regulations'), issues the following Decision on the Legal Representative's request for access to confidential filings and evidence.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 3 October 2012, the Chamber addressed the procedure and modalities for the participation of victims in the case of *The Prosecutor v Uhuru Muigai Kenyatta* in its 'Decision on victims' representation and participation' ('Victim Representation Decision').² This decision included the provision that the Common Legal Representative of Victims ('Legal Representative') and the Office of the Public Counsel for Victims ('OPCV') shall have access to public and confidential filings 'to the extent that their content is relevant to the personal interests of the victims [represented].'³
2. On 14 May 2013, the Legal Representative sent an email to the Chamber, copied to all parties, requesting that the Chamber remind the parties of their notification obligations to the victims' representation and that the Chamber authorise the provision of relevant confidential filings.⁴ On 15 May 2013, the Chamber directed the Legal Representative to submit a formal filing on the issue.⁵ On 23 May 2013, the

¹ Where 'Chamber' is used in this decision it refers to both Trial Chamber V in its composition as until 21 May 2013 and to Trial Chamber V(B) as composed by the Presidency's Decision constituting Trial Chamber V(a) and Trial Chamber V(b) and referring to them the cases of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang and The Prosecutor v. Uhuru Muigai Kenyatta*, 21 May 2013, ICC-01/09-01/11-745.

² ICC-01/09-02/11-498.

³ ICC-01/09-02/11-498, para 66.

⁴ Email from the Legal Representative to a Legal Officer of the Chamber, 14 May 2013 at 15:45.

⁵ Email from TC V Communications, 15 May 2013 at 10:37.

Legal Representative filed a written request pursuant to the Chamber's direction ('Request').⁶

3. In the Request, the Legal Representative alleges that both the Office of the Prosecutor ('Prosecution') and the defence teams for Mr Kenyatta and – prior to the withdrawal of charges against Mr Muthaura – for Mr Muthaura ('Kenyatta Defence' and 'Muthaura Defence', respectively) have repeatedly failed to comply with the notification requirements established by the Victim Representation Decision.⁷ The Legal Representative further submits that he contacted the Prosecution and Defence by email on 23 January 2013⁸ and 14 February 2013,⁹ respectively, reminding them of their disclosure and notification obligations to the victims.
4. The Legal Representative submits that the two Defence teams responded neither to a 14 February 2013 email reminding them of their notification obligations, nor to a follow-up email¹⁰ sent to the Kenyatta Defence on 9 April 2013.¹¹ It is alleged that filings continue to be submitted without notice to the Legal Representative, or to the OPCV, on 'issues which clearly and directly affect the interests of victims.'¹² The Legal Representative acknowledges that the Prosecution 'has provided considerable co-operation in respect of access to confidential evidence', but submits that the Prosecution, too, has submitted confidential filings 'on issues which affect the interests of the victims' without notice to the Legal Representative or OPCV.¹³
5. The Legal Representative submits that the parties have therefore not been complying with their notification obligations as outlined in the Victim

⁶ Victims' request for access to confidential filings and evidence, ICC-01/09-02/11-742.

⁷ Request, ICC-01/09-02/11-742, para. 8.

⁸ Email from the Legal Representative to the Prosecution on 23 January 2013 at 8:52.

⁹ Email from the Legal Representative to the Defence on 14 February 2013 at 16:21.

¹⁰ Email from the Legal Representative to the defence for Mr Kenyatta on 9 April 2013 at 17:15.

¹¹ Request, ICC-01/09-02/11-742, para. 9.

¹² Request, ICC-01/09-02/11-742, para. 9.

¹³ Request, ICC-01/09-02/11-742, para. 10.

Representation Decision.¹⁴ Specifically, he alleges that the un-redacted versions of a number of filings, where the redacted parts appear potentially ‘relevant to the personal interests of the victims’, have not been made available to the Legal Representative and/or OPCV.¹⁵ He further submits that there have been a number of confidential filings for which no public redacted versions exist.¹⁶ The Legal Representative submits that since he does not have access to a complete index of the case record, he is unable to ascertain which, if any, of those confidential filings are relevant to the personal interests of victims.¹⁷

6. The Legal Representative points to a recent status conference in *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, in which Trial Chamber V reminded the parties concerned of their notification obligations to the Common Legal Representative of Victims in that case.¹⁸ The Legal Representative requests that a similar reminder be given in this case.¹⁹ In addition, he requests that the Chamber orders the immediate notification to both the Legal Representative and OPCV of the confidential versions of ‘all filings which are relevant to the personal interests of victims’ that have not been previously provided to the Legal Representative in whole.
7. On 14 June 2013, the Prosecution filed its response to the Request (‘Prosecution Response’).²⁰ It indicates that it has no objection to the filings specifically mentioned in the Request being notified to the Legal Representative.²¹ In addition, the Prosecution submits that, as a result of the Request, it has reviewed its case file and

¹⁴ Request, ICC-01/09-02/11-742, para. 11.

¹⁵ Request, ICC-01/09-02/11-742, para. 12. The Legal Representative submits a list of 20 redacted filings, two filed before and 18 filed after the Victim Representation Decision, of which the Legal Representative and/or OPCV has not been notified of un-redacted versions.

¹⁶ Request, ICC-01/09-02/11-742, para. 14.

¹⁷ Request, ICC-01/09-02/11-742, para. 14.

¹⁸ Transcript of Status Conference on 14 May 2013, ICC-01/09-01/11-T-22-CONF-ENG ET, p. 3, lines 17- 22.

¹⁹ Request, ICC-01/09-02/11-742, para. 15.

²⁰ Prosecution response to the “Victims’ request for access to confidential filings and evidence”, ICC-01/09-02/11-761.

²¹ Prosecution Response, ICC-01/09-02/11-761, para. 3.

determined that 32 other filings and annexes may be notified to the Legal Representative.²² The Prosecution also requests the Chamber to order the reclassification of three filings that were referred to in the Request so that both the Legal Representative and the Defence may access them: ICC-01/09-02/11-664-Conf-Exp, ICC-01/09-02/11-621-Conf-Exp and ICC-01/09-02/11-571-Conf-Exp. It submits that these filings contained information that could identify witnesses whose identities at the time were not yet disclosed but subsequently have been disclosed.²³

8. On 19 June 2013, the Kenyatta Defence filed a response to the Request limiting its submissions to the documents covered in the Request.²⁴ As this filing was submitted five days after the deadline set out in Regulation 34(b) of the Regulations to respond to the Request, it will not be considered by the Chamber.
9. On 24 July 2013, the Chamber issued an order seeking submissions from the former Muthaura Defence as to the contemplated reclassifications.²⁵
10. On 2 August 2013, the former Muthaura Defence filed a public redacted version of the submissions sought by the Chamber ('Muthaura Defence Response').²⁶ Of the filings under consideration for reclassification in the Request and Prosecution Response, the former Muthaura Defence objects to notifying the Legal Representative and OPCV of two of them in full²⁷ and three of them in part.²⁸ The former Muthaura Defence argues that access should be restricted to these filings

²² Prosecution Response, ICC-01/09-02/11-761, para. 4.

²³ Prosecution Response, ICC-01/09-02/11-761, para. 6.

²⁴ Defence response to the "Victims' request for access to confidential filings and evidence", 19 June 2013, ICC-01/09-02/11-762.

²⁵ 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.

²⁶ 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'", 2 August 2013, ICC-01/09-02/11-783-Corr-Red (confidential version filed 1 August 2013, with a corrigendum on 2 August 2013).

²⁷ Muthaura Defence Response, ICC-01/09-02/11-783-Corr-Red, para. 28 (filings are ICC-01/09-02/11-617-Red and ICC-01/09-02/11-621-Red2. The objection regarding the latter filing extends to both the *ex parte* and confidential redacted versions).

²⁸ Muthaura Defence Response, ICC-01/09-02/11-783-Corr-Red, para. 27 (filings are ICC-01/09-02/11-628-Red, the confidential *ex parte* and confidential redacted versions of ICC-01/09-02/11-664-Red2 and ICC-01/09-02/11-678-Red).

because: (i) notification would reveal confidential details about former Muthaura Defence investigative activities and witnesses²⁹ and (ii) these filings address litigation which has been disposed of by the Chamber and have limited, if any, relevance to the personal interests of the victims in the case.³⁰ The former Muthaura Defence has no objection to notifying the Legal Representative and OPCV of the remaining filings addressed in the Request and Prosecution Response.³¹ Additionally, the former Muthaura Defence objects to the Legal Representative and OPCV being given 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'.³²

II. ANALYSIS AND CONCLUSIONS

11. With reference to its Victim Representation Decision, the Chamber hereby reminds the parties of their notification obligations pursuant to that decision.³³ Where an *ex parte* filing is deemed necessary and in addition to providing the relevant justification in accordance with Regulation 23 *bis* of the Regulations, the filing party is directed to file a redacted version concurrently. If the filing party is of the view that no confidential redacted version should be filed, it must make a specific submission to that effect to the Chamber. The parties are further reminded that the Legal Representative and OPCV are entitled to confidential documents that are

²⁹ Muthaura Defence Response, ICC-01/09-02/11-783-Corr-Red, paras 19-21.

³⁰ Muthaura Defence Response, ICC-01/09-02/11-783-Corr-Red, para. 22.

³¹ Muthaura Defence Response, ICC-01/09-02/11-783-Corr-Red, para. 29.

³² Muthaura Defence Response, ICC-01/09-02/11-783-Corr-Red, paras 6, 30.

³³ See ICC-01/09-02/11-498, para. 66 (further citations removed: 'In view of the specific circumstances of the present case, and in order to ensure that the participation by victims is meaningful, the Chamber is of the 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. It will be the responsibility of the filing party to indicate on the notification page whether the Common Legal Representative shall be notified'). See also ICC-01/09-02/11-498, para. 68.

relevant to the personal interests of victims.³⁴ In such cases, it is the responsibility of the filing party to indicate on the notification page that the Legal Representative and OPCV are to be notified of the filing.

12. With respect to the request to be granted access to relevant evidence, the Chamber also reminds the parties of their obligation to provide the Legal Representative access in Ringtail to all items which are relevant to the personal interests of the victims.³⁵ However, given the objections of the former Muthaura Defence to items which they labelled as confidential, the Chamber considers that if a party intends to use any of these items or tender one or more of them into evidence, the party concerned shall seek leave from the Chamber prior to notifying any of these items to the Legal Representative or OPCV.
13. The parties are primarily responsible for identifying when their filings are relevant to the victims' personal interests, and the Chamber expects the parties to notify all such filings to the Legal Representative and OPCV unless they can identify clear reasons not to do so. Accordingly, as a general rule, the Chamber considers it appropriate to grant the Legal Representative and OPCV access to filings when the parties do not object to this access being given. When objections are raised to notifying filings to the Legal Representative and OPCV, these objections will be assessed on a case by case basis.
14. With regards to notifying the specific filings indicated in the Request and Prosecution Response to the Legal Representative and OPCV,³⁶ as well as the request to reclassify the three *ex parte* filings, the Chamber notes that the Prosecution, Kenyatta Defence and former Muthaura Defence had opportunities to take positions on these matters and stated no objections to notifying the majority of

³⁴ Victim Representation Decision, ICC-01/09-02/11-498, para. 66.

³⁵ Victim Representation Decision, ICC-01/09-02/11-498, para. 68.

³⁶ Request, ICC-01/09-02/11-742, paras 12-13; Prosecution Response, ICC-01/09-02/11-761, para. 4.

these documents to the Legal Representative and OPCV. As such, and having regard to the nature of the information contained in these documents, the Chamber grants the relief sought with respect to all of the documents, with the exception of those addressed below.

15. The Chamber now will address the filings where the former Muthaura Defence objected to granting access to the Legal Representative and OPCV.
16. Filings ICC-01/09-02/11-617-Conf-Exp and ICC-01/09-02/11-621-Conf-Exp address an application for sanctions against a member of the Prosecution made by the former Muthaura Defence. This application was dismissed as moot on 18 March 2013,³⁷ meaning that observations from victims' counsel are no longer needed to resolve this matter. Further, both of these filings extensively discuss persons who at the time were expected to testify in Mr Muthaura's defence, and the Chamber considers that this information is no longer relevant to the personal interests of the victims after the charges against Mr Muthaura were withdrawn. Finally, the Legal Representative and OPCV have access to public redacted versions of these filings. For these reasons, the Chamber accepts the arguments of the former Muthaura Defence and rejects the request to notify these documents to the Legal Representative and OPCV. However, the Chamber notes that no objection has been made to notifying the Kenyatta Defence of filing ICC-01/09-02/11-621-Conf-Exp, and will grant the Prosecution's reclassification request in this respect.
17. Filings ICC-01/09-02/11-628-Conf, ICC-01/09-02/11-664-Conf-Exp and ICC-01/09-02/11-678-Conf also address completed litigation, relating to applications from both defence teams to, *inter alia*, refer the confirmation decision back to the Pre-Trial Chamber.³⁸ The former Muthaura Defence seeks limited redactions to these filings

³⁷ Decision on the withdrawal of charges against Mr Muthaura, 18 March 2013, ICC-01/09-02/11-696, para. 13.

³⁸ See Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-728.

so as to preserve the confidentiality of its investigative activities and witnesses. As indicated previously, the Chamber considers such information to no longer be relevant to the personal interests of the victims, and allows for the requested redactions to be made to filings ICC-01/09-02/11-628-Conf and ICC-01/09-02/11-678-Conf before these filings are notified to the Legal Representative and OPCV. Accordingly, the former Muthaura Defence are urged to re-file these two filings, notifying the Legal Representative and OPCV, with the redactions indicated at paragraph 20(i) and paragraph 20(iii) of the confidential version of the Muthaura Defence Response.

18. As regards filing ICC-01/09-02/11-664-Conf-Exp, the Chamber notes that the former Muthaura Defence requests redaction to 'the names and reference to two Former Defence witnesses' at footnote 16.³⁹ The Chamber notes that, on 6 March 2013, the Legal Representative and Muthaura Defence were notified of a lesser redacted version of this filing with the names of these witnesses revealed in footnote 16.⁴⁰ The Chamber therefore considers it unnecessary to allow for redaction of this information. Accordingly, the Chamber will grant the Prosecution's request to reclassify this document so that the Kenyatta Defence, Legal Representative and OPCV have access to it.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REMINDS the parties of their notification obligations as set out in paragraph 11 of the present decision;

GRANTS the relief sought in the Request and Prosecution Response in part;

³⁹ Muthaura Defence Response, ICC-01/09-02/11-783-Corr-Red, para. 20(ii).

⁴⁰ Lesser redacted version of the 25 February 2013 Consolidated Prosecution response to the Defence applications under Article 64 of the Statue to refer the confirmation decision back to the Pre-Trial Chamber, 6 March 2013, ICC-01/09-02/11-664-Conf-Red3.

ORDERS the Registry to reclassify ICC-01/09-02/11-571-Conf-Exp and ICC-01/09-02/11-664-Conf-Exp as 'Confidential', accessible to the Prosecution, Kenyatta Defence, Legal Representative and OPCV;

ORDERS the Registry to reclassify ICC-01/09-02/11-621-Conf-Exp as 'Confidential', accessible to the Prosecution and Kenyatta Defence;

ORDERS the Registry to notify the Legal Representative and OPCV of the following documents:

- ICC-01/09-02/11-468-Conf-AnxA; ICC-01/09-02/11-468-Conf-AnxB;
- ICC-01/09-02/11-481-Conf; ICC-01/09-02/11-481-Conf-AnxA; ICC-01/09-02/11-481-Conf-AnxB;
- ICC-01/09-02/11-500-Conf-Red;
- ICC-01/09-02/11-502-Conf;
- ICC-01/09-02/11-504-Conf;
- ICC-01/09-02/11-510-Conf-Red;
- ICC-01/09-02/11-515-Conf;
- ICC-01/09-02/11-519-Conf-Red2; ICC-01/09-02/11-519-Conf-AnxC-Corr-Red; ICC-01/09-02/11-519-Conf-AnxD-Corr-Red; ICC-01/09-02/11-519-Conf-AnxE-Corr-Red; ICC-01/09-02/11-519-Conf-AnxF-Corr-Red; ICC-01/09-02/11-519-Conf-AnxG-Corr-Red;
- ICC-01/09-02/11-525-Conf;
- ICC-01/09-02/11-539-Conf;
- ICC-01/09-02/11-547-Conf;
- ICC-01/09-02/11-562-Conf-Red; ICC-01/09-02/11-562-Conf-AnxC-Red; ICC-01/09-02/11-562-Conf-AnxD-Red; ICC-01/09-02/11-562-Conf-AnxE-Red; ICC-

01/09-02/11-562-Conf-AnxF-Red; ICC-01/09-02/11-562-Conf-AnxG-Red; ICC-01/09-02/11-562-Conf-AnxH-Red; ICC-01/09-02/11-562-Conf-AnxI-Red;

- ICC-01/09-02/11-570-Conf;
- ICC-01/09-02/11-571-Conf-AnxA-Red;
- ICC-01/09-02/11-592-Conf;
- ICC-01/09-02/11-599-Conf; ICC-01/09-02/11-599-Conf-AnxA-Red; ICC-01/09-02/11-599-Conf-AnxB-Red;
- ICC-01/09-02/11-607-Conf; ICC-01/09-02/11-607-Conf-AnxA; ICC-01/09-02/11-607-Conf-AnxB; ICC-01/09-02/11-607-Conf-AnxC; ICC-01/09-02/11-607-Conf-AnxD;
- ICC-01/09-02/11-649-Conf;
- ICC-01/09-02/11-656-Conf;
- ICC-01/09-02/11-681-Conf;
- ICC-01/09-02/11-707-Conf-Corr;
- ICC-01/09-02/11-708-Conf;
- ICC-01/09-02/11-717-Conf;
- ICC-01/09-02/11-719-Conf;
- ICC-01/09-02/11-721-Conf;
- ICC-01/09-02/11-722-Conf;
- ICC-01/09-02/11-723-Conf;
- ICC-01/09-02/11-726-Conf; ICC-01/09-02/11-726-Conf-AnxA.

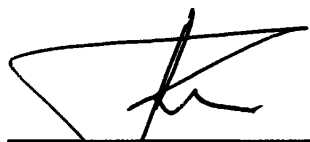
URGES the former Muthaura Defence within 5 days of notification of the present decision, to re-file ICC-01/09-02/11-628-Conf and ICC-01/09-02/11-678-Conf in accordance with paragraph 17 of the present decision; and

REJECTS the remainder of the relief sought in the Request and Prosecution Response.

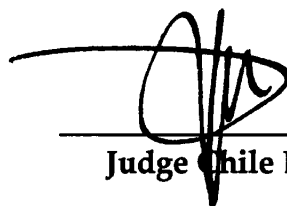
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding



Judge Robert Fremr



Judge Chile Eboe-Osuji

Dated 22 August 2013

At The Hague, The Netherlands