

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 26 November 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***

Confidential

Decision on Defence request for lifting of redactions

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

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*, pursuant to Articles 64 and 68(1) of the Rome Statute ('Statute'), Rule 81 of the Rules of the Procedure and Evidence ('Rules') and having regard to Regulation 34 of the Regulations of the Court ('Regulations'), issues the following 'Decision on Defence request for lifting of redactions'.

I. Procedural Background and Submissions

1. On 23 October 2013, the Chamber issued a decision granting the request of the Office of the Prosecutor ('Prosecution') to add P-548 and P-66 as witnesses to its witness list ('Decision of 23 October 2013')¹ and in so doing, ordered the Prosecution to disclose the identities of both witnesses 'and all disclosable information relating to them forthwith'.²
2. On 1 November 2013, the Prosecution filed an application for delayed disclosure of the identity of Witness 66, inclusive of two annexes ('Application for Delayed Disclosure').³ The application and its two annexes were filed on a confidential *ex parte*, Prosecution and Victims and Witnesses Unit ('VWU') only, basis. On 5 November 2013, the Prosecution's confidential redacted version of the application for delayed disclosure was filed.⁴
3. In its Application for Delayed Disclosure, the Prosecution avers, *inter alia*, that Witness 66 has 'unique security concerns that require the adoption of special measures to safeguard [REDACTED] wellbeing', which were only brought to the

¹ Decision on Prosecution request to add P-548 and P-66 to its witness list, ICC-01/09-02/11-832.

² Decision of 23 October 2013, p. 9.

³ Prosecution application for delayed disclosure of witness identity, ICC-01/09-02/11-849-Conf-Exp, with corrigendum filed on 5 November 2013 as ICC-01/09-02/11-849-Conf-Exp-Corr.

⁴ Confidential redacted version of the Corrigendum of Prosecution's 1 November 2013 application for delayed disclosure of witness identity (ICC-01/09-02/11-849-Conf-Exp) with confidential redacted annexes A and B, ICC-01/09-02/11-849-Conf-Corr-Red.

attention of the Prosecution subsequent to the issuing of the Decision of 23 October 2013.⁵ The Prosecution submits that, in light of these concerns, delayed disclosure constitutes an 'appropriate measure' pursuant to Article 68(1) of the Statute.⁶

4. On 6 November 2013, the Prosecution disclosed, *inter alia*, redacted versions of the witness statement of Witness 66 and its annex, and another 'related item'.⁷
5. Prior to the time limit for responses to the Application for Delayed Disclosure elapsing, on 19 November 2013, the defence team for Mr Kenyatta ('Defence') submitted the 'Defence Request for Lifting of Redactions to ICC-01/09-02/11-849, KEN-OTP-0038-0865, KEN-OTP-0111-0484 and KEN-OTP-0111-0500' ('Defence Request'),⁸ requesting the Chamber to order the Prosecution to provide a lesser redacted version or written summaries of certain redacted material contained in the Application for Delayed Disclosure,⁹ and lesser redacted versions or written summaries of the redacted material contained in Witness 66's witness statement and its annex, and another 'related item'.¹⁰
6. The Defence requests further that the time limit for the filing of the Defence response to the Prosecution's Application for Delayed Disclosure be calculated from the 'the point of full disclosure' of the documents referred to in the Defence Request,¹¹ rather than from the point of notification of the confidential redacted version of the Application for Delayed Disclosure on 5 November 2013.

⁵ Application for delayed disclosure, para. 4.

⁶ Application for delayed disclosure, para. 4.

⁷ Prosecution communication of the disclosure of evidence, ICC-01/09-02/11-853; *See also* ICC-01/09-02/11-853-Conf-AnxA.

⁸ ICC-01/09-02/11-857-Conf.

⁹ Defence Request, paras 1, 10 and p. 8.

¹⁰ Defence Request, para. 1 and p. 8, referring to KEN-OTP-0038-0865, KEN-OTP-0111-0484 and KEN-OTP-0111-0500.

¹¹ Defence Request, para. 19. *See also* p. 8.

7. On 22 November 2013, the Prosecution filed a response ('Prosecution Response')¹² opposing the Defence Request.¹³ On the same day, in the interests of expediency, the Chamber informed parties of the outcome of this decision via email.¹⁴
8. The Defence argues in relation to the Application for Delayed Disclosure that, 'due to the level of redactions employed by the Prosecution, the Defence is currently prevented from submitting observations on the validity of the Prosecution's application'.¹⁵ The Defence argues further that the witness statement of Witness 66 and related items are heavily redacted and that 'the Prosecution has failed to provide any justification for such blanket redactions in this case'.¹⁶
9. In the Prosecution Response, it is argued that the redactions are 'limited to those strictly necessary to protect the identity of the witness pending the Chamber's ruling', and that '[l]ifting the redactions any further will lead to the identification of the witness' which would 'defeat the relief sought in the Application and render it moot'.¹⁷ Notwithstanding, the Prosecution annexed a written summary of the information redacted from the witness statement of Witness 66¹⁸ and of the incident referred to in paragraphs 4, 17 and 18 of the Application for Delayed Disclosure¹⁹ to facilitate the Defence response to the Application for Delayed Disclosure.

¹² Prosecution response to 'Defence Request for Lifting of Redactions to ICC-01/09-02/11-849, KEN-OTP-0038-0865, KEN-OTP-0111-0484 and KEN-OTP-0111-0500', ICC-01/09-02/11-861-Conf.

¹³ Prosecution Response, para. 3.

¹⁴ Email communication from Associate Legal Officer of Trial Chamber V(b) to the parties on 22 November 2013 at 16:51.

¹⁵ Defence Request, para. 2.

¹⁶ Defence Request, para. 12.

¹⁷ Prosecution Response, para. 1.

¹⁸ See ICC-01/09-02/11-861-Conf-AnxA.

¹⁹ See ICC-01/09-02/11-861-Conf-AnxB. See also Defence Request, paras 9-10.

II. Analysis by the Chamber

i. Redactions to Application for Delayed Disclosure

10. Having reviewed both the *ex parte* and redacted versions of the Application for Delayed Disclosure, the Chamber does not consider the latter to be so heavily redacted as to thwart the ability of the Defence to respond 'meaningfully' to the Application for Delayed Disclosure. Conversely, the Chamber is of the view that the current redactions are necessary to protect the identity of Witness 66 for the purposes of making the Application for Delayed Disclosure, and are neither disproportionate nor 'prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'.²⁰ The Chamber notes further that the Prosecution has now provided written summaries of the previously redacted information relating to the incident referred to in paragraphs 4, 17 and 18 of the Application for Delayed Disclosure.²¹

11. The Chamber therefore takes the view that, given these circumstances, the provision of a lesser redacted version of the Application for Delayed Disclosure is not required. The alternative request of the Defence for a written summary of the incident referred to at paragraphs 4, 17 and 18 of the Application for Delayed Disclosure has since been acceded to. This aspect of the Defence Request is therefore rejected.

²⁰ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81', 14 December 2006, ICC-01/04-01/06-773, para. 34.

²¹ See ICC-01/09-02/11-861-Conf-AnxB. See also Defence Request, paras 9-10.

ii. Witness 66's Statement and related items

12. While the Chamber finds some merit in the Defence submissions in relation to the extent of the redactions to the witness statement of Witness 66,²² it does not consider that the information redacted from the statement is necessary for the specific purpose of responding to the Application for Delayed Disclosure. Moreover, it notes the fact that the Prosecutor has since provided a written summary of the information redacted from the witness statement of Witness 66.²³ While the annex and related item remain fully redacted, the Chamber is of the view that the Defence may respond meaningfully to the Application for Delayed Disclosure on the basis of the information that it now has in its possession. This aspect of the Defence Request is therefore rejected.

iii. Time limit for filing of Defence response to Application for Delayed Disclosure

13. The Chamber recalls its finding above that the Application for Delayed Disclosure was not so heavily redacted as to prevent the Defence from meaningfully responding to it. Moreover, on 22 November 2013 the Prosecution provided, in summary form, further details of the specific incident upon which the request for delayed disclosure is largely predicated.²⁴ The Chamber considers that the incident in question is sufficiently self-contained and circumscribed to enable the Defence to factor it into their consideration and response within the existing time frame.

14. In rejecting this aspect of the Defence Request, the Chamber notes that the Defence was notified of the confidential redacted version of the Application for Delayed Disclosure on 5 November 2013. It did not elect to file the present request until

²² Defence request, paras 12-15.

²³ See ICC-01/09-02/11-861-Conf-AnxA.

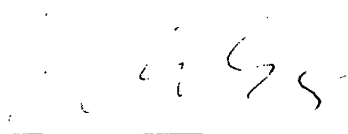
²⁴ See ICC-01/09-02/11-861-Conf-AnxB. See also Defence Request, paras 9-10.

some two weeks after this notification. The Chamber reminds parties that, in order to facilitate fair and expeditious proceedings, they should not wait until the relevant time limit is imminently due to expire before filing requests of this ilk.

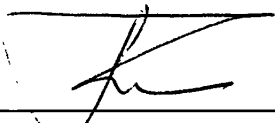
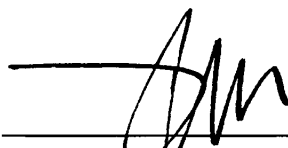
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Defence Request in its entirety.

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



Judge Kuniko Ozaki, Presiding


Judge Robert Fremr
Judge Chile Eboe-Osuji

Dated 26 November 2013

At The Hague, The Netherlands