

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 4 April 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**

**Under seal, *ex parte*, Prosecution and Common Legal Representative of Victims
only**

**Corrected version of 'Decision on "Request for access to filings which may
relate to steps taken to identify, trace, freeze or seize assets of the accused"'**

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

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**

**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')¹ of the International Criminal Court ('Court') in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, pursuant to Article 64(6) of the Rome Statute ('Statute') and Regulation 23 *bis* of the Regulations of the Court ('Regulations'), renders the following 'Decision on "Request for access to filings which may relate to steps taken to identify, trace, freeze or seize assets of the accused"'.

I. Procedural background and submissions

1. On 7 October 2013, the Common Legal Representative of Victims ('LRV') emailed the Office of the Prosecutor ('Prosecution') to 'inquire about efforts by the Prosecution and orders by the Pre-Trial Chamber or by the Trial Chamber to identify, trace, freeze or seize the assets of Mr Kenyatta' in order to assess whether the LRV should pursue the matter before the Pre-Trial or Trial Chamber.²
2. On 22 October 2013, the Prosecution filed, under seal and *ex parte*, Prosecution only, the 'Prosecution request for reclassification' ('Prosecution Request'),³ requesting that the Chamber grant access to the LRV to records relating to the identification, freezing, tracing or seizing assets of Mr Kenyatta.⁴
3. On 5 November 2013, the Chamber invited the Registry to submit its views on the Prosecution's proposed reclassification, since the Records also contained Registry reports and external Registry communications stamped 'secret'.⁵ On 15 November

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 See Annex A to Prosecution request for reclassification, 22 October 2013, ICC-01/09-02/11-831-US-Exp-AnxA.

³ ICC-01/09-02/11-831-US-Exp.

⁴ Prosecution Request, ICC-01/09-02/11-831-US-Exp, para. 6. The records for which the Prosecution requested the LRV to have access were: ICC-01/09-02/11-11-US-Exp; ICC-01/09-02/11-16-US-Exp; ICC-01/09-02/11-42-US-Exp; ICC-01/09-02/11-43-US-Exp; ICC-01/09-02/11-58-US-Exp and annexes; ICC-01/09-02/11-84-US-Exp; ICC-01/09-02/11-107-US-Exp and annexes; ICC-01/09-02/11-419-US-Exp and annexes; and ICC-01/09-02/11-654-US-Exp and annexes (collectively, 'Records').

⁵ Email communications from a Legal Officer of the Chamber to the Registry on 5 November 2013 at 13:36 and 14 November 2013 at 14:30.

2013, the Registry responded that, should the Chamber consider it appropriate to disclose the Registry reports to the LRV, the Chamber may consider whether to allow the Registry to file redacted versions of ICC-01/09-02/11-58-US-Exp-Anx3 and ICC-01/09-02/11-654-US-Exp-Anx2, in order for the Registry to redact any references in those documents to under seal information unrelated to this case. Additionally, regarding ICC-01/09-02/11-654-US-Exp-Anx3, the Registry informed the Chamber that the document contained a list of alleged property and assets belonging to Mr Kenyatta and that its disclosure to any party other than the Prosecution may jeopardise the then on-going investigation.⁶

4. On 23 January 2014, in its decision on the Prosecution Request, the Chamber invited the LRV to request access to any relevant records directly with the Chamber.⁷
5. Thus, on 29 January 2014, the LRV filed, under seal and *ex parte*, Prosecution and LRV only, a request for access to any filings which may relate to steps taken to identify, trace, freeze or seize assets of the accused ('LRV Request').⁸ The LRV averred that the purpose of the inquiry was to certify that all relevant steps have been taken to ensure that assets will be available to victims in the event of the conviction of Mr Kenyatta and an order for reparations. The Prosecution did not respond to the LRV Request.

II. Analysis by the Chamber

6. The Chamber observes that the request made by the LRV is essentially a request to reclassify the Records, and any subsequently received related reports, from '*ex parte* Prosecution only', to '*ex parte* Prosecution and LRV only'. Reclassification would

⁶ Email communication from the Registry to the Chamber's Communications inbox on 15 November 2013 at 18:44.

⁷ Decision regarding request for access to information concerning steps taken to identify, trace, freeze or seize assets, 23 January 2014, ICC-01/04-02/11-885-US-Exp.

⁸ Request for access to filings which may relate to steps taken to identify, trace, freeze or seize assets of the accused, 29 January 2014, ICC-01/09-02/11-889-US-Exp.

allow the LRV to access such records to verify that appropriate measures have been taken to ensure that Mr Kenyatta's assets are available in the event of conviction and an order for reparations. The Chamber notes that the LRV Request is also apparently supported by the Prosecution which itself previously requested the reclassification,⁹ submitting that the LRV has 'a legitimate forensic purpose justifying the [Records request], which does not appear to be outweighed by any countervailing interest'.¹⁰

7. The Chamber finds that the LRV has a legitimate interest in being informed of any steps which have been taken in the case relating to the identification, freezing, tracing or seizing assets of the accused, in particular to avoid any duplication of efforts in making such an application in the future under Rule 99(1) of the Rules of Procedure and Evidence. The Chamber also notes that the LRV is bound by the Code of Professional Conduct for counsel to respect the secrecy and confidentiality of such information,¹¹ and previous decisions of the Chamber in respect of victims' representation and participation.¹² However, in light of the Chamber's communications with the Registry,¹³ the Registry is instructed to redact under seal information not relevant to this case contained in documents ICC-01/09-02/11-58-US-Exp-Anx3 and ICC-01/09-02/11-107-US-Exp-Anx2.

⁹ Prosecution Request, ICC-01/09-02/11-831-US-Exp, paras 1 and 8.

¹⁰ Prosecution Request, ICC-01/09-02/11-831-US-Exp, para. 5.

¹¹ Code of Professional Conduct for counsel, Article 8.

¹² Decision on victims' representation and participation, 3 October 2012, ICC-01/09-02/11-498, para. 67.

¹³ Email communication from the Registry to the Chamber's Communications inbox on 15 November 2013 at 18:44.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

PARTIALLY GRANTS the LRV Request;

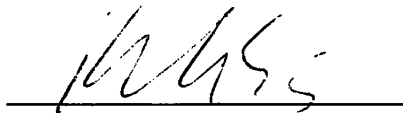
ORDERS the Registrar to reclassify as 'under seal, *ex parte*, Prosecution and LRV only' the following documents:

- a. ICC-01/09-02/11-11-US-Exp;
- b. ICC-01/09-02/11-16-US-Exp;
- c. ICC-01/09-02/11-42-US-Exp;
- d. ICC-01/09-02/11-58-US-Exp and annexes (subject to the redactions ordered below);
- e. ICC-01/09-02/11-84-US-Exp;
- f. ICC-01/09-02/11-107-US-Exp and annexes (subject to the redactions ordered below);
- g. ICC-01/09-02/11-419-US-Exp and annexes;
- h. ICC-01/09-02/11-654-US-Exp and annexes; and
- i. ICC-01/09-02/11-905-US-Exp and annexes;

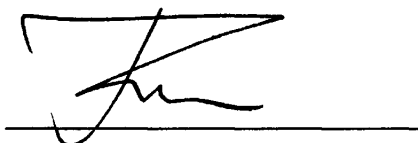
ORDERS the Registrar to file, as an annex to the present decision, a redacted version of ICC-01/09-02/11-43-US-Exp;

ORDERS the Registrar to file an 'under seal, *ex parte*, Prosecution and LRV only', version of ICC-01/09-02/11-58-US-Exp-Anx3 and ICC-01/09-02/11-107-US-Exp-Anx2, redacting any under seal information not relevant to the LRV Request.

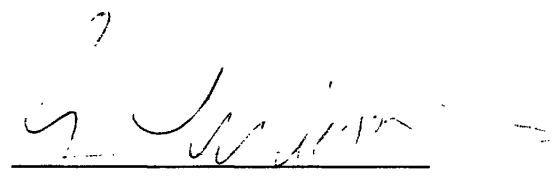
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Robert Fremr



Judge Geoffrey Henderson

Dated this 4 April 2014

At The Hague, The Netherlands