

**Cour
Pénale
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**International
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Court**

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Date: **29 October 2014**

TRIAL CHAMBER V (B)

Before: Judge Kuniko Ozaki, Presiding
Judge Robert Fremr
Judge Geoffrey Henderson

SITUATION IN THE REPUBLIC OF KENYA

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

Public redacted version with a confidential annex

Victims' request for reclassification

Source: Common Legal Representative of Victims

Document 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 the Defence

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
Ms Caroline Walter

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

States Representative

Government of the Republic of Kenya

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

I. Introduction

1. In accordance with the Trial Chamber's order of 21 October 2014,¹ and Regulation 23 *bis* (3) of the Regulations of the Court ('RoC'), and on behalf of the victims of this case, the Legal Representative of Victims ('LRV') respectfully requests the Trial Chamber to order the reclassification of certain documents relating to requests to the Government of the Republic of Kenya ('Kenyan Government') to identify, trace and freeze assets in accordance with Part 9 of the Rome Statute.
2. Further, the LRV requests the Chamber to order the Prosecution to file a public redacted version of its pre-trial brief.²
3. This request is classified 'confidential' in accordance to Regulation 23 *bis* (2) of the RoC as it refers to confidential submissions. The LRV files concurrently a public redacted version of this request.

II. Relevant legal provisions

4. Regulations 8(c) and 23 *bis* (3) of the RoC, articles 64(7) and 67(1) of the Rome Statute, and rule 15 of the Rule of Procedure and Evidence ('RPE'), read together, reflect the principle that proceedings before the Court, to the greatest extent possible, should be accessible to the public. This principle has been repeatedly emphasised by Chambers of the Court.³

¹ Order concerning the public disclosure of confidential information, 21 October 2014, ICC-01/09-02/11-967.

² Prosecution's submission of the second updated pre-trial brief, 26 August 2013, ICC-01/09-02/11-796 and ICC-01/09-02/11-796-Conf-AnxA.

³ Decision on the application for registration in the record of decisions and motions transmitted solely by e-mail, 8 February 2012, ICC-01/04-01/07-3237-tENG, para. 3: 'The Chamber nonetheless shares the Legal Representative's concern with respect to safeguarding the fundamental principle of public hearings and ensuring that the record of the case is as complete as possible'; Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008, ICC-01/05-01/08-55, par. 63: 'In view of the principle of publicity of proceedings, the evidence submitted shall in principle be registered as public unless there is a need to classify it otherwise.'; *Décision relative à la levée des scellés et à la reclassification de certains documents dans les dossiers de la situation et de l'affaire et annexes*, 2 February 2007, ICC-02/04-01/05-135, p. 5: 'Attendu que l'article 67, paragraphe 1 du Statut consacre le principe de la publicité des procédures engagées devant la Cour'; Decision on issues relating to the publicity of proceedings in the case, 11 October 2010, ICC-01/04/01/10-7, par. 7: 'Noting article 67(1) of the Statute, enshrining the fundamental principle of the publicity of proceedings before the Court'; Decision setting the date for the first appearance of Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba and Fidèle Babala, and on issues relating to the publicity of the proceedings, 25

5. In addition to its duty to uphold the public character of the proceedings, the Trial Chamber is contemporaneously entrusted with the responsibility to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses in accordance with articles 57(3)(c) and 68(1) of the Rome Statute and with rule 43 of the RPE. These duties can be simultaneously achieved through ordering the submission of public redacted versions of filings.⁴ Redactions must comply with the principles of proportionality and necessity.⁵
3. Victims have the right to know the truth of the crimes committed against them and to receive just reparation for the harm they have suffered.⁶ Victims have an interest in the swift and effective freezing of assets. This is reflected in article 75(2) of the Rome Statute, which empowers the Court to ‘make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims’. It is also reflected in article 57(3)(e) of the Rome Statute, which provides that the Pre-Trial Chamber may seek the cooperation of States pursuant to article 93(1)(k), ‘to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims’.⁷

November 2013, ICC-01/05-01/13-11, p. 4: ‘(...) in light of the paramount principle of the publicity of the proceedings (...)’; Decision on issues relating to the publicity of proceedings in the Case, 15 May 2009, ICC-02/05-02/09-15, p. 4: ‘Noting article 67(1) of the Statute, enshrining the principle that proceedings before the Court shall be public, as well as regulation 20(1) of the Regulations of the Court (the ‘Regulations’), providing that all hearings shall be held in public unless otherwise provided in the statutory texts or ordered by the Chamber’; Decision on Re-classification and Unsealing of Certain Documents and Decisions, 18 September 2009, ICC-01/05-01/08-528, par. 9: ‘At the outset, the Single Judge notes the principle of publicity of the proceedings prescribed in article 67(1) of the Statute.’

⁴ Decision reclassifying certain documents and ordering redacted versions, 9 October 2009, ICC-02/05-02/09-155, pp. 3-4; Decision on Reclassification of Certain Documents, 1 April 2011, ICC-01/09-02/11-30, par. 6.

⁵ 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, ICC-01/04-01/06-773, 14 December 2006, at para 22. See also Decision on the Procedure to be Adopted for Ex Parte Procedures, ICC-01/04-01/06-1058, 6 December 2007, at para 12.

⁶ See ICC-01/04-01/06-1119, 18 January 2008, para. 98; ICC-01/04-01/07-474, 13 May 2008, para. 32; ICC-01/04-503 OA4 OA5 OA6, 30 June 2008, para. 97.

⁷ This reading was recently confirmed by the Trial Chamber in its Decision on the implementation of the request to freeze assets, 8 July 2014, ICC-01/09-02/11-931, reclassified as public on 22 October 2014 in accordance with the Chamber’s Decision ICC-01/09-02/11-967.

III. Request for reclassification in accordance with the Order of 21 October

6. On 21 October 2014, the Chamber ordered the Registry to reclassify as public certain documents related to the identification, tracing, freezing or seizure of the accused's assets by the Kenyan Government.⁸ The Chamber further ordered the parties, the participants and the Registry to request reclassification of any related documents as necessary pursuant to regulation 23 *bis* (3) of the RoC.⁹
7. The LRV supports the requests already filed by the Prosecution¹⁰ and the Defence¹¹ on this matter.
8. The LRV submits that following the Chamber's Order of 21 October 2014,¹² there is no reason to maintain confidential the LRV's submissions filed on 29 January 2014 (ICC-01/09-02/11-889-US-Exp) and on 2 May 2014 (ICC-01/09-02/11-916-Conf).¹³ The LRV therefore requests the Trial Chamber to reclassify those filings as public.
9. Furthermore, the LRV has reviewed other filings of which he is aware relating to efforts to secure the Kenyan Government's co-operation with the Court in respect of asset-freezing; to the Kenyan Government's failure to freeze any assets of the accused; to the Kenyan Government's failure to bring its purported legal objections before the Chamber in a timely manner; and to the LRV's access to these filings.
10. Those filings are relevant to the question of the extent to which the Kenyan Government has complied in good faith with its obligations under Part 9 of the Rome Statute, and, in particular, the extent to which it has fulfilled its obligations to identify, trace and freeze assets. The victims (whose interests

⁸ ICC-01/09-02/11-967.

⁹ *Ibid.*

¹⁰ ICC-01/09-02/11-968.

¹¹ ICC-01/09-02/11-969.

¹² Order concerning the public disclosure of confidential information, 21 October 2014, ICC-01/09-02/11-967.

¹³ The basis for the classification of this filing as confidential no longer exists: the Chamber ordered on 21 October 2014 (ICC-01/09-02/11-967) the reclassification as public of its Order dated 5 April 2011 (ICC-01/09-02/11-910-Conf).

are directly impacted by any failure to freeze assets for use in eventual reparation proceedings), the States Parties, and the general public are now entitled to have access to this information to the greatest extent possible.

11. In accordance with the principle that filings should be made public where the basis for their previous classification no longer exists, pursuant to regulation 23*bis*(3) of the RoC, and with the principle of publicity of the proceedings of the Court, the LRV therefore requests the Trial Chamber to reclassify the following documents as public, redacted to the extent that the Trial Chamber considers necessary:

- a. ICC-01/09-02/11-11-US-Exp;
- b. ICC-01/09-02/11-58-US-Exp (redacted as appropriate) and annexes 1 and 3 ;
- c. ICC-01/09-02/11-84-US-Exp;
- d. ICC-01/09-02/11-107-US-Exp (redacted as appropriate), and annex 3;
- e. ICC-01/09-02/11-419-US-Exp (redacted as appropriate) and annex 1;
- f. ICC-01/09-02/11-654-US-Exp (redacted as appropriate) and annexes 1, 2 and 3 ;
- g. ICC-01/04-02/11-885-US-Exp;
- h. ICC-01/09-02/11-905-Conf, and annexes I, II and III; and
- i. ICC-01/09-02/11-909-US-Exp-Corr (redacted as appropriate).

IV. Request for submission of a public redacted version of the Prosecution's second updated pre-trial brief

12. The LRV notes the criteria upheld in a previous decision issued in the current case requiring a sufficient articulation of the 'factual and legal basis' for a request for reclassification pursuant to regulation 23*bis*(3) of the RoC.¹⁴ In this

¹⁴ Decision on the 'Request for Reclassification in Respect of the 'Prosecution's Submission of the Updated Document Containing the Charges pursuant to Order ICC-01/09-02/11-450, Annex D', 12 September 2012, ICC-01/09-02/11-482, par. 5: 'Although Regulation 23*bis*(3) does not specify what information must be provided by a participant in support of a request for reclassification, guidance may be sought from Regulation 23*bis*(1). This provision governs initial classification requests and states that a participant filing a document as

regard, the LRV submits the following legal and factual basis for his request to the Trial Chamber to order the Prosecution to file a public redacted version of its second updated pre-trial brief ('pre-trial brief').

13. On 26 August 2013, the Prosecution submitted its pre-trial brief and indicated that it 'will file a public redacted version of the pre-trial brief as soon as practicable, pending the implementation of protective measures for some of its witnesses who are in VWU care.'¹⁵
14. The Prosecution has not yet filed a public version of the pre-trial brief. The principal reason for this appears to be opposition by the Defence. On 9 July 2014, the Prosecution said: 'The reason why the pre-trial brief is confidential is because the Defence asked that it should be so. We'd be perfectly happy for it to be a public document tomorrow.'¹⁶
15. [REDACTED]
16. The pre-trial brief is directly relevant to the victims' interests in this case, in particular their right to know the truth about the crimes committed against them and the identities of those most responsible.¹⁷ [REDACTED]
17. The crimes alleged in this case took place almost seven years ago. The victims have so far not heard a single day of trial; the likelihood that they will hear in the near future any evidence at trial is not high. They have so far received almost nothing in the way of truth or accountability for the brutal crimes committed against them in Naivasha and Nakuru from this Court, nor from the Kenyan criminal justice system. Nine of the victims formally accepted by the Pre-Trial Chamber to participate in this case have already died. Many others are elderly and infirm, and have frankly communicated to the LRV their expectation that they too might pass away before long.

confidential shall 'state the factual and legal basis for the chosen classification'. The Chamber considers it appropriate to apply this standard equally to requests for reclassification pursuant to Regulation 23bis(3).'

¹⁵ Prosecution's submission of the second updated pre-trial brief, 26 August 2013, ICC-01/09-02/11-796, par. 3.

¹⁶ ICC-01/09-02/11-T-30-ENG ET WT, p. 9, lines 21-22.

¹⁷ Decision on victims' representation and participation, 3 October 2012, ICC-01/09-02/11-498.

18. Many Kenyans will have heard the Prosecution's recent summary of the likely evidence of significant witnesses in this case.¹⁸ The Prosecution has also referred publicly to interference with witnesses, including witnesses 4, 11 and 12, and to 'the fact that Mungiki members said to have interacted with the Accused in person during the PEV were killed or forcibly disappeared in an apparent clean-up operation after the violence'.¹⁹ It is respectfully submitted that the surviving victims are entitled to the dignity of access to the Prosecution's more detailed assertions relating to these issues, as set out in its pre-trial brief.
19. This Chamber is aware of the extensive coverage of this case in Kenya and of the public debate of the case on Kenyan radio (in Kiswahili, Kikuyu, Luo, English and other languages), on television, and in the print media. As a consequence, during meetings held by the LRV with victims in Kenya, victims regularly ask questions relating to various issues, including interference with witnesses. Many of those issues are addressed in the pre-trial brief. The LRV is not permitted to discuss the content of confidential filings with the victims of this case. This makes the LRV's discharge of his duty to engage in a 'candid exchange'²⁰ with his clients in respect of questions that they raise more difficult than it otherwise might be. The existence of a public redacted version of the pre-trial brief would facilitate a more candid exchange on many issues and would therefore ensure a more efficient legal representation of the victims.
20. Furthermore, this case concerns many thousands of victims. Those thousands of victims whom the LRV has not yet met are themselves entitled to the greatest level of access possible to the truth regarding the evidentiary

¹⁸ Status conference, 8 October 2014, ICC-01/09-02/11-T-32-ENG ET WT 08-10-2014, pages 35-37.

¹⁹ ICC-01/09-02/11-892-AnxA-Red, pp. 2-3.

²⁰ Code of Professional Conduct for counsel, Article 14(1): 'The relationship of client and counsel is one of candid exchange and trust, binding counsel to act in good faith when dealing with the client.'

support for the Prosecution's case, and the serious problem of interference with witnesses in this case, as set out in the pre-trial brief.

21. The LRV also notes that the Prosecution in the *Ruto & Sang* case filed a public redacted version of its updated pre-trial brief on 9 September 2013.²¹
22. Should the Trial Chamber decide to grant the Prosecution's pending article 87(7) request, and refer the matter to the Assembly of States Parties, it is imperative that the States Parties have a full and informed understanding of the allegations at the heart of this case, and the question of interference with witnesses. This will assist them in making an informed decision as to what action, if any, they decide to take in an effort to secure the Kenyan Government's full compliance with its obligations under Part 9 of the Statute.
23. This case has received enormous publicity in Kenya and in many parts of the world: the general public also has an interest in having access to a redacted version of the pre-trial brief, in accordance with the principle of maintaining the public character of the proceedings, as repeatedly upheld by this Court. This would in turn contribute to ensuring that public debate about this case is informed and accurate, which too often is not the case.
24. In summary, the interests of the victims of the crimes alleged in this case, of the public as a whole, and of the States Parties merits the publication, in redacted form, of the pre-trial brief. The Chamber should balance its obligation to ensure the public nature of the proceedings and its obligation regarding the protection of victims and witnesses by ordering the Prosecution to file without delay a redacted version of its pre-trial brief.
25. The LRV has reviewed the pre-trial brief and requests the Chamber to order one redaction suggested in the annex to this request.²² [REDACTED]

²¹ ICC-01/09-01/11-625-AnxB-Red submitted on 9 September 2013. The original version of the PTB was filed on 25 February 2013.

26. The Prosecution might wish to redact further information from the brief in order to protect the identities of other witnesses.

27. The Defence might be invited to submit without delay its proposals for any other redactions; any redactions should accord with the principles of proportionality and necessity.²³

V. Relief requested

28. For the foregoing reasons, the LRV respectfully requests the Chamber to:

- a. reclassify as public the following:
 - i. ICC-01/09-02/11-11-US-Exp;
 - ii. ICC-01/09-02/11-58-US-Exp (redacted as appropriate) and annexes 1 and 3;
 - iii. ICC-01/09-02/11-84-US-Exp;
 - iv. ICC-01/09-02/11-107-US-Exp (redacted as appropriate), and annex 3;
 - v. ICC-01/09-02/11-419-US-Exp (redacted as appropriate) and annex 1;
 - vi. ICC-01/09-02/11-654-US-Exp (redacted as appropriate) and annexes 1, 2 and 3;
 - vii. ICC-01/04-02/11-885-US-Exp;
 - viii. ICC-01/09-02/11-889-US-Exp;

²² In accordance with the Court's practice of requiring parties and participants to attach a complete copy of the filing for which a redaction is sought, the LRV attaches a copy of the entire pre-trial brief, highlighting the single redaction requested. See the redaction requested at par. 79 of the pre-trial brief.

²³ See in this respect: Decision on the 'Request for Reclassification in Respect of the 'Prosecution's Submission of the Updated Document Containing the Charges pursuant to Order ICC-01/09-02/11-450, Annex D'', 12 September 2012, ICC-01/09-02/11-482, par. 8: 'Should the defence have any particular concerns about specific assertions or information contained in Annex D being misused, the appropriate course would be to submit a reasoned request for additional redactions of Annex D. In this way, the protection of witnesses and integrity of the proceedings can be safeguarded whilst at the same time respecting the basic principle of public proceedings.' See also Decision on Reclassification of Certain Documents, 1 April 2011, ICC-01/09-02/11-30, par. 8: 'Indeed, the Single Judge remains alert to the need to balance interests in order to ascertain the continued necessity and proportionality of any classifications.'

- ix. ICC-01/09-02/11-905-Conf, and annexes I, II and III;
 - x. ICC-01/09-02/11-909-US-Exp-Corr (redacted as appropriate);
 - xi. ICC-01/09-02/11-916-Conf; and
- b. order the Prosecution to submit without delay a public redacted version of the Prosecution's second updated pre-trial brief.

Respectfully submitted,



Fergal Gaynor

Common Legal Representative of Victims

Dated this 29th day of October 2014

At Barcelona, Spain