

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Original Date: 6 December 2013

Date of public version: 3 February 2017

**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 redacted version of  
Decision on Prosecution application for delayed disclosure of witness identity,  
6 December 2013, ICC-01/09-02/11-869-Conf**

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**

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**

Mr Patrick Craig

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**Trial Chamber V(B)** ('Chamber')<sup>1</sup> of the International Criminal Court ('Court') in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, having regard to Articles 64, 67, 68(1) and 68(5) of the Rome Statute ('Statute'), and Rules 76, 77 and 81 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Prosecution application for delayed disclosure of witness identity'.

## **I. Procedural Background**

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')<sup>2</sup> and in so doing, ordered the Prosecution to disclose the identities of both witnesses 'and all disclosable information relating to them forthwith'.<sup>3</sup>
2. On 1 November 2013, the Prosecution filed an application for delayed disclosure of the identity of Witness 66 ('Application for Delayed Disclosure').<sup>4</sup> 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.<sup>5</sup>

---

<sup>1</sup> Where "Chamber" is used in this decision it refers to both the 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.

<sup>2</sup> Decision on Prosecution request to add P-548 and P-66 to its witness list, ICC-01/09-02/11-832.

<sup>3</sup> Decision of 23 October 2013 ICC-01/09-02/11-832, p. 9.

<sup>4</sup> 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.

<sup>5</sup> 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.

3. On the same day, the Prosecution disclosed, *inter alia*, redacted versions of the witness statement of Witness 66, its annex, and another 'related item'.<sup>6</sup>
  
4. On 19 November 2013, prior to the time limit for responses to the Application for Delayed Disclosure elapsing, 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'),<sup>7</sup> requesting the Chamber to order the Prosecution to provide a lesser redacted version of the Application for Delayed Disclosure or written summaries of certain redacted material contained therein,<sup>8</sup> and lesser redacted versions or written summaries of the redacted material contained in Witness 66's witness statement, its annex, and the other 'related item'.<sup>9</sup> The Defence requested further that the time limit for the filing of the Defence response to the Application for Delayed Disclosure be calculated from the 'the point of full disclosure' of the documents referred to in the Defence Request.<sup>10</sup>
  
5. On 22 November 2013, the Prosecution filed a response ('Prosecution Response')<sup>11</sup> opposing the Defence Request.<sup>12</sup> However, in doing so, the Prosecution annexed a written summary of the previously redacted information relating to the incident referred to in paragraphs 4, 17 and 18 of the Application for Delayed Disclosure,<sup>13</sup> as well as a written summary of the information

---

<sup>6</sup> Prosecution communication of the disclosure of evidence, ICC-01/09-02/11-853. *See also* ICC-01/09-02/11-853-Conf-AnxA.

<sup>7</sup> ICC-01/09-02/11-857-Conf.

<sup>8</sup> Defence Request ICC-01/09-02/11-857-Conf, paras 1, 10 and p. 8.

<sup>9</sup> Defence Request ICC-01/09-02/11-857-Conf, para. 1 and p. 8, referring to KEN-OTP-0038-0865, KEN-OTP-0111-0484 and KEN-OTP-0111-0500.

<sup>10</sup> Defence Request ICC-01/09-02/11-857-Conf, para. 19. *See also* p. 8.

<sup>11</sup> 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.

<sup>12</sup> Prosecution Response ICC-01/09-02/11-861-Conf, para. 3.

<sup>13</sup> *See* Prosecution Response ICC-01/09-02/11-861-Conf-AnxB. *See also* Defence Request ICC-01/09-02/11-857-Conf, paras 9-10.

redacted from the witness statement of Witness 66<sup>14</sup> (together, 'written summaries') in order to facilitate the Defence response to the Application for Delayed Disclosure.

6. Having informed the parties via email of the Chamber's disposition in relation to the Defence Request,<sup>15</sup> the Chamber formally issued its 'Decision on Defence request for lifting of redactions' on 26 November 2013 ('Decision on Defence Request'),<sup>16</sup> rejecting it in its entirety. In so doing, the Chamber noted that written summaries had been filed by the Prosecution since the Defence Request was made,<sup>17</sup> and found that the Defence could respond 'meaningfully' to the Application for Delayed Disclosure on the basis of the information in its possession.<sup>18</sup>
7. Accordingly, on 27 November 2013, the Defence filed its response to the Application for Delayed Disclosure<sup>19</sup> ('Defence Response'), requesting that the Chamber deny the Application for Delayed Disclosure in its entirety and order the immediate disclosure of Witness 66's identity in accordance with its Decision of 23 October 2013.<sup>20</sup>

---

<sup>14</sup> See Prosecution Response ICC-01/09-02/11-861-Conf-AnxA.

<sup>15</sup> Email communication from Legal Officer of Trial Chamber V(B) to the parties on 22 November 2013 at 16:51.

<sup>16</sup> ICC-01/09-02/11-864-Conf.

<sup>17</sup> Decision on Defence Request ICC-01/09-02/11-864-Conf, paras 10 and 12.

<sup>18</sup> Decision on Defence Request ICC-01/09-02/11-864-Conf, para. 12.

<sup>19</sup> Defence Response to the Prosecution's 5 November 2013 '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), ICC-01/09-02/11-865-Conf, with corrigendum filed on 28 November 2013 as ICC-01/09-02/11-865-Conf-Corr.

<sup>20</sup> Defence Response ICC-01/09-02/11-865-Conf, paras 2 and 30.

## II. Submissions

### *Prosecution submissions*

8. In its Application for Delayed Disclosure, the Prosecution states that Witness 66's identity ought to be withheld from the Defence until after 14 December 2013 'to allow more time to assess the risk to the witness and for a referral to VWU for implementation of further protective measures, if deemed appropriate'.<sup>21</sup> The Prosecution submits that delayed disclosure constitutes an appropriate measure to protect the witness's security as required by Article 68(1) of the Statute,<sup>22</sup> given the jurisprudence of the Chamber which has found such orders appropriate where witnesses would otherwise 'be interfered with or intimidated once their identity is disclosed to the accused'.<sup>23</sup> The Prosecution submits that the relevant criteria justifying delayed disclosure are fulfilled in the following manner:

#### **(i) There is an 'objectively justifiable risk'**<sup>24</sup>

9. The Prosecution avers that there is an objectively justifiable risk to Witness 66's safety for three reasons. First, Witness 66's [REDACTED] vulnerable to the approaches of '[i]ndividuals purporting to act on behalf of the Accused [who] have demonstrated that they are willing and able to track down Prosecution witnesses'.<sup>25</sup> Second, social media has frequently been deployed by individuals in the past, attempting to expose Prosecution witnesses.<sup>26</sup> Third, on

<sup>21</sup> Application for Delayed Disclosure ICC-01/09-02/11-849-Conf-Corr-Red, para. 5.

<sup>22</sup> Application for Delayed Disclosure ICC-01/09-02/11-849-Conf-Corr-Red, para. 6.

<sup>23</sup> Application for Delayed Disclosure ICC-01/09-02/11-849-Conf-Corr-Red, para. 5.

<sup>24</sup> Application for Delayed Disclosure ICC-01/09-02/11-849-Conf-Corr-Red, paras 11-18.

<sup>25</sup> Application for Delayed Disclosure ICC-01/09-02/11-849-Conf-Corr-Red, para. 14.

<sup>26</sup> Application for Delayed Disclosure ICC-01/09-02/11-849-Conf-Corr-Red, para. 15.

[REDACTED],<sup>27</sup> and in light of the incident, if delayed disclosure is not granted, there is [REDACTED].<sup>28</sup>

**(ii) Less restrictive protective measures are infeasible and insufficient<sup>29</sup>**

10. The Prosecution submits that less restrictive protective measures would be inadequate in relation to Witness 66 because first, the security concerns of Witness 66 'stem from the Accused and his supporters', and second, the Defence takes the position that it 'cannot withhold from the client any materials provided to them', and that, because Mr Kenyatta is not in custody, 'contacts with supporters or potential witnesses cannot be limited and monitored'.<sup>30</sup>

**(iii) The measures requested will not unduly prejudice Mr Kenyatta's fair trial rights<sup>31</sup>**

11. The Prosecution submits that any potential disadvantage to the Defence resulting from delayed disclosure is outweighed, *inter alia*, by security considerations referred to in Article 68(1) of the Statute and 'can be mitigated'.<sup>32</sup> The Prosecution avers accordingly that although the identity and identifying information for Witness 66 is redacted, the redacted statement of Witness 66 provides the Defence 'with much of the substance of the witness's accounts', the proposed evidence is similar to that of former Witness 426, thus allowing the Defence to prepare for comparable evidence, and the Prosecution has undertaken not to call Witness 66 until later stages of the trial, so 'no undue

<sup>27</sup> Prosecution Response ICC-01/09-02/11-861-Conf-AnxB.

<sup>28</sup> Application for Delayed Disclosure ICC-01/09-02/11-849-Conf-Corr-Red, para. 18.

<sup>29</sup> Application for Delayed Disclosure ICC-01/09-02/11-849-Conf-Corr-Red, paras 19-21.

<sup>30</sup> Application for Delayed Disclosure ICC-01/09-02/11-849-Conf-Corr-Red, para. 19.

<sup>31</sup> Application for Delayed Disclosure ICC-01/09-02/11-849-Conf-Corr-Red, paras 22-26.

<sup>32</sup> Application for Delayed Disclosure ICC-01/09-02/11-849-Conf-Corr-Red, para. 22.

prejudice would result'.<sup>33</sup> The Prosecution further submits that any interim disadvantage to the Defence can be mitigated through the provision of a written summary of the redacted material, while still protecting the identity of Witness 66,<sup>34</sup> and that any disadvantage caused by delayed disclosure 'will be temporary in nature and limited in scope'.<sup>35</sup>

### *Defence submissions*

12. The Defence opposes the Application for Delayed Disclosure, arguing that 'the Prosecution has failed to demonstrate that an objectively justifiable risk renders it necessary to withhold Witness 66's identity from the Defence in order to protect Witness 66's safety'.<sup>36</sup> The Defence submits that the Prosecution has failed to fulfill the relevant criteria justifying delayed disclosure in the following manner:

#### **(i) There is no 'objectively justifiable risk'**<sup>37</sup>

13. The Defence argues that the Prosecution has failed to establish an 'objectively justifiable risk' to the safety of Witness 66 arising from the disclosure of the identity of Witness 66 to the Defence.<sup>38</sup> It argues first, in responding to the Prosecution allegation that 'individuals purporting to act on behalf of the Accused have demonstrated they are willing and able to track down Prosecution witnesses', that no evidence has been disclosed 'that evidentially substantiates a link between any individual and Uhuru Kenyatta engaging in the conduct alleged by the Prosecution'.<sup>39</sup> Second, the Defence denies any implication that

<sup>33</sup> Application for Delayed Disclosure ICC-01/09-02/11-849-Conf-Corr-Red, para. 23.

<sup>34</sup> Application for Delayed Disclosure ICC-01/09-02/11-849-Conf-Corr-Red, para. 25.

<sup>35</sup> Application for Delayed Disclosure ICC-01/09-02/11-849-Conf-Corr-Red, para. 26.

<sup>36</sup> Defence Response ICC-01/09-02/11-865-Conf, para. 1.

<sup>37</sup> Defence Response ICC-01/09-02/11-865-Conf, paras 18-24.

<sup>38</sup> Defence Response ICC-01/09-02/11-865-Conf, para. 24.

<sup>39</sup> Defence Response ICC-01/09-02/11-865-Conf, para. 19.

the leaking of confidential information into the public domain is related to Mr Kenyatta or to the Defence.<sup>40</sup> Third, the Defence avers that the alleged occurrence of [REDACTED] cannot be due to the disclosure of Witness 66's identity, as it remains unknown to the Defence.<sup>41</sup> Fourth, the Defence argues that Witness 66's unwillingness to continue as a Prosecution witness if delayed disclosure is not ordered is a subjective and therefore irrelevant consideration.<sup>42</sup> Fifth, the Defence submits that the proposed date until which disclosure is sought to be delayed, being the completion of [REDACTED], 'betrays an improper motive for seeking delayed disclosure'.<sup>43</sup>

**(ii) Less restrictive measures are feasible and sufficient<sup>44</sup>**

14. The Defence argues that lesser restrictive measures are feasible and sufficient in this case, insofar as 'the Chamber can order that Witness 66's identity remain confidential from the public for a further period'.<sup>45</sup> The Defence argues that the Prosecution has failed to bring credible evidence to show that 'there are factors indicating that Mr Kenyatta may pass on the information to others or otherwise put Witness 66 at risk by his actions'.<sup>46</sup> The Defence submits that the Codes of Conduct and ethical principles of the Court, the Bar of England and Wales, and the Bar of Kenya preclude the Defence from withholding material and evidence from Mr Kenyatta.<sup>47</sup> The Defence avers further that the existence of the Court's 'Code of Professional Conduct for counsel, internal protocols issued and implemented by the defence team and the Chamber's protocol governing the

---

<sup>40</sup> Defence Response ICC-01/09-02/11-865-Conf, para. 20.

<sup>41</sup> Defence Response ICC-01/09-02/11-865-Conf, para. 21.

<sup>42</sup> Defence Response ICC-01/09-02/11-865-Conf, para. 22.

<sup>43</sup> Defence Response ICC-01/09-02/11-865-Conf, para. 23.

<sup>44</sup> Defence Response ICC-01/09-02/11-865-Conf, paras 25-27.

<sup>45</sup> Defence Response ICC-01/09-02/11-865-Conf, para. 25.

<sup>46</sup> Defence Response ICC-01/09-02/11-865-Conf, para. 25.

<sup>47</sup> Defence Response ICC-01/09-02/11-865-Conf, para. 26.

handling of confidential information' secure against the alleged risks to Witness 66 in this regard.<sup>48</sup>

**(iii) Non-disclosure of Witness 66's identity to the Defence is prejudicial to or inconsistent with the right of Mr Kenyatta to a fair and impartial trial<sup>49</sup>**

15. The Defence submits that, even in light of the Prosecution's provision of the written summaries of certain redacted material, and attempts to narrow, as much as possible, the redactions to Witness 66's statement, 'the level of information not available to the Defence remains considerable.'<sup>50</sup> The Defence submits that, in the absence of the disclosure of the identity and related information pertaining to Witness 66, the Defence is unable adequately to carry out investigations into the credibility and reliability of Witness 66, and [REDACTED].<sup>51</sup> The Defence argues that its concomitant inability to prepare for the trial in this regard is 'clearly inconsistent with the right of Mr Kenyatta to a fair and impartial trial.'<sup>52</sup>

### **III. Analysis by the Chamber**

16. This Chamber has previously outlined in its jurisprudence a number of factors to be considered in deciding whether or not to grant an application for delayed disclosure.<sup>53</sup>

---

<sup>48</sup> Defence Response ICC-01/09-02/11-865-Conf, para. 27.

<sup>49</sup> Defence Response ICC-01/09-02/11-865-Conf, paras 28-29.

<sup>50</sup> Defence Response ICC-01/09-02/11-865-Conf, para. 28.

<sup>51</sup> Defence Response ICC-01/09-02/11-865-Conf, para. 29.

<sup>52</sup> Defence Response ICC-01/09-02/11-865-Conf, para. 29.

<sup>53</sup> *See, for example*, Decision on the prosecution's application to authorise redactions to a statement of Witness 4 and to withhold documents from disclosure, 16 August 2012 (notified 17 August 2012) ICC-01/09-02/11-464-Conf, para. 7 and jurisprudence cited therein, also cited in Decision on prosecution application for delayed disclosure of witnesses identities, 21 December 2012, ICC-01/09-02/11-580-Conf-Exp, para. 31.

17. In considering these factors in relation to the application before it, the Chamber notes that Witness 66 is an individual [REDACTED],<sup>54</sup> who works for [REDACTED].<sup>55</sup>
18. The Chamber is satisfied that there exists an ‘objectively justifiable risk’ to the safety of Witness 66 and the witness’s family such as to justify delayed disclosure in the instant case. In reaching this view, the Chamber has considered the submissions of the Prosecution, the fact that the witness has [REDACTED], and the fact that the Prosecution considers that further protective measures may yet be required. The Chamber has also taken note of the subjective concerns expressed by Witness 66. In light of the foregoing, the Chamber considers that the temporary non-disclosure of the identity of Witness 66 is necessary and that no lesser measures are feasible at this point in time.
19. With regard to this latter point, contrary to the Defence argument that a lesser restrictive measure available to the Chamber would be to order that Witness 66’s identity remain confidential from the public for a further period,<sup>56</sup> the Chamber notes that, unless otherwise ordered by the Chamber, the identity of all witnesses should be treated as confidential until they have given evidence. Therefore the Chamber does not consider that this proposal constitutes an alternative ‘lesser measure’, but rather reflects the *status quo* in relation to witnesses’ involvement with the Court.
20. Additionally, in determining whether authorising the Application for Delayed Disclosure would be ‘prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’, the Chamber notes that the date until which

---

<sup>54</sup> Application for Delayed Disclosure ICC-01/09-02/11-849-Conf-Corr-Red, para. 14.

<sup>55</sup> See ICC-01/09-02/11-861-Conf-AnxA.

<sup>56</sup> Defence Response ICC-01/09-02/11-865-Conf, para. 25.

delayed disclosure is requested (14 December 2013 inclusive) is imminent. The Chamber therefore finds that the rights of the accused are not prejudiced, given that the effect on the temporal requirement of the Prosecution under Rule 76(1) of the Rules to provide witness identities and concomitant statements 'sufficiently in advance to enable the adequate preparation of the defence' will be minimal.

21. The Chamber finds that the non-disclosure of the identity of Witness 66 until and inclusive of 14 December 2013 strikes an appropriate balance between the need for full disclosure to the Defence as early as possible, and the need to ensure the safety of Witness 66 and the witness's family. In accordance with this finding, the Chamber grants the Application for Delayed Disclosure.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**GRANTS** the Application for Delayed Disclosure; and

**DIRECTS** the Prosecution to disclose the identity of Witness 66 to the Defence no later than Monday, 16 December 2013, as the first working day after Saturday, 14 December 2013.

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



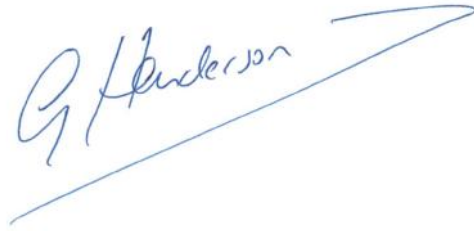
---

**Judge Kuniko Ozaki, Presiding Judge**

A handwritten signature in black ink, consisting of a large, stylized 'F' followed by a smaller, cursive 'r'.

---

**Judge Robert Fremr**

A handwritten signature in blue ink, consisting of the letters 'G' and 'H' followed by the name 'Henderson' in a cursive script.

---

**Judge Geoffrey Henderson**

Dated 3 February 2017

At The Hague, The Netherlands