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No.: ICC-01/09-02/11
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TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA
AND
*UHURU MUIGAI KENYATTA***

Public

Joint Defence Response to the “Prosecution’s application to vary the ‘Decision on the protocol establishing a redaction regime, ICC-01/09-02/11-495’ to allow redaction of investigators’ names from relevant material and to allow consideration of this Application without requiring provision of redacted copies of that material to the Defence

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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Unrepresented Victims

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(Participation/Reparation)

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Victims**

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

States' Representatives

Amicus Curiae

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
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Other

I. INTRODUCTION

1. The Defence for Francis Kirimi Muthaura and the Defence for Uhuru Muigai Kenyatta (collectively “Defence”) hereby submit their response to the “Prosecution’s application to vary the ‘Decision on the protocol establishing a redaction regime, ICC-01/09-02/11-495’ to allow redaction of investigators’ names from relevant material and to allow consideration of this Application without requiring provision of redacted copies of that material to the Defence”¹ (“Variance and Investigator ID Application”).
2. The Defence note with grave concern the Prosecution’s inability to comply, at this late stage of the proceedings, with the Trial Chamber’s (“Chamber”) Protocol establishing a redaction regime, issued on 5 October 2012.² The Prosecution’s failure to undertake a thorough, diligent and complete investigation prior to the start of the confirmation hearing, or at least prior to the issuance of the confirmation decision, has resulted in the filing of its Variance and Investigator ID Application now, to the detriment of the fair trial rights of the Defence.
3. The Defence are concerned by the Prosecution’s submission that a mere month prior to the final disclosure deadline of 9 January 2013,³ “thousands of pages”⁴ of information, including statements and transcripts of interviews of core Prosecution witnesses remain to be disclosed to the Defence, and that protective measures for all witnesses “cannot be completed” prior to the final disclosure deadline.⁵ The Prosecution’s dilatory actions undermine the Accused’s right to

¹ ICC-01/09-02/11-558.

² ICC-01/09-02/11-495-AnxA-Corr.

³ Decision on the schedule leading up to trial, 9 July 2012, ICC-01/09-02/11-451.

⁴ Variance and Investigator ID Application, para. 8.

⁵ *Ibid.*

adequate time to prepare their defence, including undertaking complex and intensive investigations,⁶ and puts at risk the scheduled start date for trial.

4. While the Defence reaffirm in this response their consistent position⁷ that the names of all Prosecution investigators must be disclosed and that pending such disclosure pseudonyms should be applied to the identifying information of the investigators, the Defence reject the Prosecution's submission that "[t]he Defence does not need to review the documents themselves to formulate a position on the issue of redacting the names of investigators".⁸ Accordingly, the Defence respectfully request the Chamber to reject the Variance and Investigator ID Application *in toto*.

II. PROCEDURAL BACKGROUND

5. On 27 September 2012, the Chamber issued the "Decision on the protocol establishing a redaction regime" ("Decision on the Redactions Protocol"),⁹ instructing the parties to apply the annexed "Protocol establishing a redaction regime" ("Redactions Protocol").¹⁰ Paragraph 7 of the Redactions Protocol provides that for any applications for "non-standard" redactions, such as redactions to the identifying information of Prosecution investigators, the underlying material for which redactions are requested must be disclosed to the Defence with the redactions in question applied.

⁶ See further Defence Response to the Public Redacted Version of the 5 November 2012 "Prosecution Application for delayed disclosure of witness identities" (ICC-01/09-02/11-519-Conf-Exp), 7 December 2012, ICC-01/09-02/11-561.

⁷ See ICC-01/09-02/11-521-Conf, paras. 36-47; ICC-01/09-02/11-528-Conf, paras. 30-31; ICC-01/09-02/11-545-Conf, paras. 8-9; ICC-01/09-02/11-564.

⁸ ICC-01/09-02/11-544, para. 7; ICC-01/09-02/11-558, para. 6.

⁹ ICC-01/09-02/11-495.

¹⁰ ICC-01/09-02/11-495-AnxA-Corr.

6. On 28 November 2012, the Prosecution submitted its “Fifth Prosecution application for the authorisation of non-standard redactions pursuant to Decision ICC-01/09-02/11-495” (“Fifth Redaction Application”).¹¹ In the Fifth Redaction Application, the Prosecution requested authorisation to apply redactions to the identifying information of Prosecution witnesses in any items to be disclosed to the Defence moving forward.¹² The Prosecution further submitted that “it is unnecessary to disclose to the Defence, simultaneously with this application, all materials affected by the proposed nonstandard redaction”.¹³
7. On 3 December 2012, the Chamber issued its “Decision on fifth prosecution application for authorisation of non-standard redactions” (“Decision on Fifth Redaction Application”),¹⁴ dismissing the Fifth Redaction Application and holding that “[t]o the extent that the prosecution believed that the procedure established in paragraphs 7 and 8 of the Redaction Protocol is ‘unnecessary’ or poses difficulties in implementation, the appropriate course would have been to seek a modification to the procedure or an additional extension of time beyond the one-day extension that was already requested and granted”.¹⁵
8. On 6 December 2012, the Prosecution filed the Variance and Investigator ID Application, and also requested “an expedited consideration of the Application in view of the disclosure deadlines”.¹⁶
9. On 7 December 2012, the Chamber, acting pursuant to Regulation 34 of the Regulations of the Court, instructed the Defence to file any response to the Variance and Investigator ID Application by 12 December 2012.¹⁷

¹¹ ICC-01/09-02/11-544.

¹² Fifth Redaction Application, para. 2

¹³ *Ibid.*, para. 5.

¹⁴ ICC-01/09-02/11-552.

¹⁵ *Ibid.*, para. 7.

¹⁶ Variance and Investigator ID Application, para. 12.

10. The Defence hereby file their response to the Variance and Investigator ID Application.

III. SUBMISSIONS

11. The Defence submit that the reasoning of the Chamber in the Decision on Fifth Redaction Application can be equally applied to the current Prosecution application, namely that the Variance and Investigator ID Application must be rejected by reason of procedural irregularity.¹⁸ First, it is manifestly unfair for the Prosecution to resile from its obligations under a system of disclosure reached through an *inter partes* process, the Redactions Protocol, and to then seek variance of the same to avoid further its duty of disclosure to the Defence.¹⁹ Second, “it is not for the prosecution to determine, on the expiry of the deadline, that disclosure to the defence of redacted versions of documents, prior to the final deadline of 9 January 2013, would be ‘inefficient’.”²⁰ Finally, if the Prosecution foresaw difficulties in meeting its obligations under the Redactions Protocol, it should have raised such an issue sufficiently in advance – and certainly not after – the expiry of the deadline for the filing of an application for non-standard redactions,²¹ or at least requested another extension of the relevant deadline.
12. As set out by the Chamber in its Decision on Fifth Redaction Application, “[t]he purpose of the Redaction Protocol is to facilitate disclosure of relevant materials to the defence *at the earliest opportunity*, even if those documents are disclosed with redactions in place that will be lifted at a later date. The Redaction Protocol

¹⁷ Email from the Legal Office of Trial Chamber V to Defence counsel, 7 December 2012 at 15:51.

¹⁸ Fifth Redaction Application, para. 8.

¹⁹ Fifth Redaction Application, para.5.

²⁰ Fifth Redaction Application, para.6.

²¹ Fifth Redaction Application, para.7.

should not be interpreted as requiring disclosure of entire documents to the defence only at the expiry of the latest deadline set out for disclosure for certain information contained in those documents.”²²

13. Accordingly, if the Prosecution is in a position to undertake disclosure of the items in question at this stage, it is under an obligation to do so. Given the “thousands of pages”²³ of outstanding disclosure, it is imperative that the Defence receive all disclosure as soon as possible, with less redacted and ‘final’ versions of the disclosed items provided in due course and in line with the deadlines established by the Chamber. Even heavily reacted versions of the items in question will allow the Defence to make preliminary analyses of these items and conduct or plan investigative activities based upon them.
14. With respect to the Prosecution’s specific submission that “[t]he Defence does not need to review the documents themselves to formulate a position on the issue of redacting the names of investigators”, the critical factor is not the name of the investigator *per se*, but the Defence’s ability to evaluate and identify – among these “thousands of pages” of outstanding disclosure – when *a particular* investigator has put a question to an interviewee. The Defence must also be afforded an opportunity to evaluate the content of the question and the context and manner of the questioning in respect of *particular* investigators. The Defence’s ability to respond to any application for redactions will be severely prejudiced if the Prosecution is permitted not to disclose simultaneously the specific documents in respect of which it seeks redactions. The Defence must be permitted to review the documents themselves in order to identify whether the manner of questioning is relevant to the credibility of the evidence provided by the witness. For example, where one witness provides an answer in an identical

²² Decision on Fifth Redaction Application, para. 6 (emphasis added).

²³ Variance and Investigator ID Application, para. 8.

or unusually similar form to that of another witness interviewed by the same investigator, the Defence may have a possible challenge to the credibility of the evidence on the basis that the witnesses have been led by the investigator.

15. As previously submitted, the Defence have fundamental concerns regarding the conduct of the Prosecution's investigations and the truthfulness of its witnesses,²⁴ and it is essential that the identities of Prosecution investigators are provided to the Defence given their relevance to both of these issues. Further, given the Defence's assertion of the Prosecution's failure to fulfil its obligations under Article 54(1)(a) of the Statute, as well as other unique circumstances pertaining to this case, the Defence foresee the possibility of needing to call and/or cross-examine Prosecution investigators involved in this case.
16. Therefore, even if the name of the investigator is redacted and withheld from the Defence, it is vital – *both for the purposes of evaluating an application to redact the name of an investigator from a particular document, and generally* – that the Defence are able to identify, at least in a transcript, when a *particular* investigator has put a question to an interviewee, the content of the question, and the context and manner of questioning.
17. Should the Chamber determine that it is not appropriate for the Defence to be provided immediately with the identities of Prosecution investigators, it is submitted that the Prosecution must be ordered to assign suitable pseudonyms to the investigators during the interim period leading up to the deadline for final disclosure.²⁵

²⁴ ICC-01/09-02/11-521-Conf, para. 39.

²⁵ See ICC-01/09-02/11-521-Conf, paras 36-47.

IV. RELIEF REQUESTED

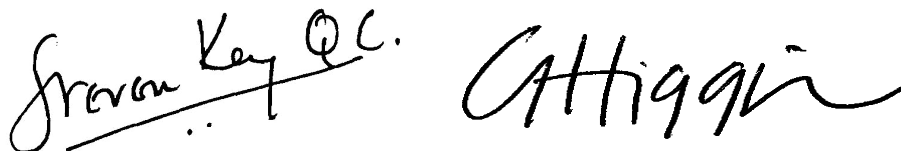
18. Based on the above submissions, the Defence respectfully request that the Chamber:

- a. Deny the Variance and Investigator ID Application; and
- b. Order the Prosecution to disclose immediately to the Defence all materials affected by the Fifth Redaction Application, including the identities of the investigators or suitable pseudonyms which can be used by the Defence in the interim period leading up to the deadline for final disclosure.

Respectfully Submitted,



Karim A. A. Khan QC
On behalf of Francis K. Muthaura
At The Hague, the Netherlands



Steven Kay QC and Gillian Higgins
On behalf of Uhuru Muigai Kenyatta
At London, England

Dated this 12th Day of December 2012