

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 23 April 2013

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.* UHURU MUIGAI KENYATTA**

Public

**Public Redacted Version of the Defence 'Request for Leave to Reply to the
"Prosecution's *omnibus* response to Defence Submissions ICC-01/09-02-11-706 and
ICC-01/09-02-11-707"' (ICC-01/09-02-11-717-Conf, 15-04-2013)**

Source: Defence for Uhuru Muigai Kenyatta

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor

Adesola Adeboyejo, Trial Attorney

Counsel for the Defence

Steven Kay QC

Gillian Higgins

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented

(Participation/Reparation)

Applicants

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman Von Hebel

Counsel Support Section

Deputy Registrar

Didier Daniel Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Defence for Uhuru Muigai Kenyatta hereby submits its request for leave to reply to the "Prosecution's *omnibus* response to Defence Submissions ICC-01/09-02-11-706 and ICC-01/09-02-11-707" ("Omnibus Response").¹ The Defence submits the current application in light of new evidence disclosed by the Prosecution on 11 April 2013 that is directly relevant to the subject matter and relief sought in the evidential² and legal³ submissions filed on 28 March 2013.
2. The new evidence giving rise to the present application was brought to the attention of the Defence only on 11 April 2013, after the parties had made their filings on the matter in question. The Defence respectfully requests that, if leave to reply is granted, Trial Chamber V ("Chamber") extend the time-limit specified in Regulation 34(c) of the Regulations of the Court ("Regulations"), and order that the Defence's reply be filed within seven days of notification of the Chamber's decision to grant leave. For the same reason, this application is filed 'urgent'.
3. This application is filed confidentially as it contains information relating to protected witnesses. A public redacted version will be filed in due course.

II. PROCEDURAL HISTORY

4. The hearing on the confirmation of charges ("Confirmation Hearing") took place between 21 September and 5 October 2011.

¹ ICC-01/09-02/11-714-Conf.

² ICC-01/09-02/11-707-Conf.

³ ICC-01/09-02/11-706.

5. On 23 January 2012, the Pre-Trial Chamber ("PTC") issued the "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute" ("Confirmation Decision"), confirming the charges against Mr Muthaura and Mr Kenyatta, and refusing to confirm the charges against General Ali.⁴
6. On 5 February 2013, the Defence submitted its "Application to the Trial Chamber Pursuant to Article 64(4) of the Rome Statute to Refer the Preliminary Issue of the Confirmation Decision to the Pre-Trial Chamber for Reconsideration" ("Article 64(4) Application").⁵
7. On 25 February 2013, the Prosecution submitted the "Confidential Redacted Version of the 25 February 2013 Consolidated Prosecution Response to the Defence Applications Under Article 64 of the Statute to Refer the Confirmation Decision back to the Trial Chamber" ("Prosecution Response").⁶
8. On 1 March 2013, the Defence submitted an application for leave to reply to the Prosecution Response.⁷ The same day, via email, the Chamber granted the Defence's request.⁸
9. On 8 March 2013, the Defence submitted its reply to the Prosecution's Response.⁹
10. On 11 March 2013, the Chamber convened a Status Conference to address the Article 64(4) Applications.¹⁰ At this Status Conference, the Prosecution

⁴ ICC-01/09-02/11-382-Conf.

⁵ ICC-01/09-02/11-622.

⁶ ICC-01/09-02/11-664-Conf-Red.

⁷ ICC-01/09-02/11-669.

⁸ ICC-01/09-02/11-679, para. 6.

⁹ ICC-01/09-02/11-681-Conf.

announced its intention to withdraw the charges against Mr Muthaura.¹¹ On the same day, the “Prosecution notification of the withdrawal of charges” was filed.¹²

11. On 18 March 2013, the Chamber held a Status Conference to consider the impact of the withdrawal of the charges against Mr Muthaura on the case against Mr Kenyatta.¹³ During the Status Conference, the Chamber requested that the Defence file written submissions regarding the consequences of the withdrawal of the charges against Mr Muthaura on the case against Mr Kenyatta.¹⁴ On the same day, the Chamber, Her Honour Judge Osaki partially dissenting, issued its “Decision on the withdrawal of charges against Mr Muthaura,” terminating the proceedings against Mr Muthaura.¹⁵
12. On 20 March 2013, the Chamber issued its “Order requesting written submissions following 18 March 2013 status conference” (“20 March Order”).¹⁶
13. On 28 March 2013, pursuant to the 20 March Order, the Defence submitted both its “Observations Regarding the Impact of the Withdrawal of the Charges Against Mr Muthaura on the Case Against Mr Kenyatta”¹⁷ and its “Written Submissions Following the 18 March 2013 Status Conference”¹⁸ (collectively, “28 March Submissions”).

¹⁰ ICC-01/09-02/11-673.

¹¹ ICC-01/09-02/11-T-23-ENG, page 3, lines 10 – 11.

¹² ICC-01/09-02/11-687.

¹³ ICC-01/09-02/11-695.

¹⁴ ICC-01/09-02/11-T-24-ENG, page 12, lines 4 – 12.

¹⁵ ICC-01/09-02/11-696.

¹⁶ ICC-01/09-02/11-699.

¹⁷ ICC-01/09-02/11-707-Conf-Corr.

¹⁸ ICC-01/09-02/11-706.

14. On the same day, the Prosecution submitted its "Additional observations on Mr Kenyatta's Article 64(4) Application"¹⁹ and the Common Legal Representative for Victims filed the "Victims' observations relating to the 'Order requesting written submissions following 18 March 2013 status conference.'"²⁰
15. On 9 April 2013, the Prosecution filed the Omnibus Response.²¹
16. On 11 April 2013, the Prosecution disclosed four items²² and an accompanying letter²³ relating to the Prosecution's initial contact with OTP-4 in 2010. The four items are:
 - a. A file note of the Prosecution's [REDACTED] 2010 preliminary telephone screening of OTP-4;²⁴
 - b. An audio recording of the Prosecution's [REDACTED] 2010 screening of OTP-4;²⁵
 - c. A transcription of the Prosecution's [REDACTED] 2010 telephone screening of OTP-4;²⁶ and
 - d. A file note of the Prosecution's [REDACTED] 2010 screening of OTP-4.²⁷

¹⁹ ICC-01/09-02/11-708-Conf.

²⁰ ICC-01/09-02/11-709.

²¹ ICC-01/09-02/11-714-Conf.

²² The documents were disclosed to the Defence in a meeting commencing at 17.30 on Thursday 11 April 2013. However, due to a fault in the Ringtail system and the non-availability of IT assistance after 18:00, the Defence was not able to access the documents until 12 April 2013.

²³ KEN-OTP-0096-0279; see Annex A.

²⁴ KEN-OTP-0096-0285; see Annex B.

²⁵ KEN-OTP-0028-0152; see Annex C.

²⁶ KEN-OTP-0097-0003; see Annex D.

²⁷ KEN-OTP-0096-0279; see Annex E.

III. APPLICABLE LAW

17. Regulation 24(5) of the Regulations states that a participant “may only reply to a response with the leave of the Chamber.” Regulation 34(c) of the Regulations provides that “[s]ubject to leave being granted by a Chamber in accordance with regulation 24, sub-regulation 5, a reply shall be filed within ten days of notification in accordance with regulation 31 of the response.”
18. A party must show “good cause” in order for a Chamber to grant leave to reply.²⁸ This Court has held that “good cause” exists where the applying party shows that new and distinct issues of law and fact are raised in the response, and where the importance and potential effect of the issues contained in the original application and response necessitate additional submissions.²⁹

IV. GROUNDS JUSTIFYING APPLICATION FOR LEAVE

19. The Defence submits that the disclosure of the four documents referred to in paragraph 16 above,³⁰ and as revealed by the Prosecution’s 11 April 2013 letter,³¹ raises two new and distinct issues.
20. The first issue concerns the impact of further evidence relating to OTP-4 previously undisclosed to the Defence and the PTC, which was in the possession of the Prosecution prior to the Confirmation Hearing. The four documents go to a central issue addressed within the Omnibus Response, namely whether or not the PTC would have confirmed the charges against Mr Kenyatta had exculpatory evidence been disclosed before the Confirmation

²⁸ For example, ICC-01/05-01/08-294, para. 3.

²⁹ For example, ICC- 01/04-01/10-61; ICC-01/04-01/07- 1004tENG.

³⁰ See Annexes B-E.

³¹ See Annex A.

Hearing, as was required under the Rome Statute.³² The existence of these documents was not even referred to in the Omnibus Response.

21. Crucially, the evidence contained within the four documents, which the Prosecution has had in its possession since 2010, and which were accessible by the Defence only on 12 April 2013, reveals further fundamental contradictions in respect of the other accounts the witness provided both before and after 2010.³³ The non-disclosure of these documents has unfairly prevented the Defence from providing submissions as to their impact upon the determination to be made by the Chamber on the future conduct of this case. The Defence submits that the granting of leave to reply on this issue would further assist the Trial Chamber.
22. The second new and distinct issue of fact relates to the impact of the further failure by the Prosecution to disclose exculpatory material, directly relevant to the relief requested in the Defence's 28 March Submissions, addressed in the Prosecution's Omnibus Response.
23. In Annex A, Ms Adeboyejo concedes that the four documents "may constitute Rule 77 material with respect to the Defence's Article 64 Application" and that "some information Witness 4 provided during the [REDACTED] 2010 screening (KEN-OTP-0096-0378) appears to be inconsistent with the account he provided in his first ICC statement (KEN-OTP-0043-0002)." In fact, the inconsistencies and fundamental contradictions within the documents disclosed, when compared with OTP-4's other accounts are wide-ranging and impact centrally upon the credibility and reliability of his evidence. Ms Adeboyejo conceded, however, that the documents "should have been disclosed" and regretted that

³² ICC-01/09-02/11-714-Conf, para. 3.

³³ Document KEN-OTP-0096-0285 is dated 26 May 2010 and documents KEN-OTP-0028-0152_R01; KEN-OTP-0096-0279_R01; and KEN-OTP-0097-0003_R01 are dated 1 June 2010.

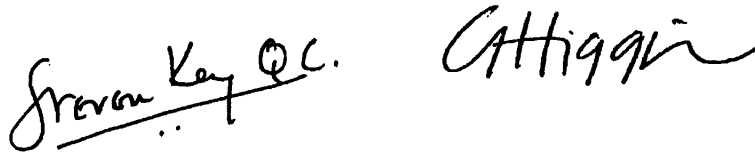
this "had not been done."³⁴ The Prosecution has provided the Defence with no explanation for its failure to disclose this crucial exculpatory evidence.

V. RELIEF

24. For the reasons set out above, the Defence respectfully requests that the Chamber:

- a. Grant the Defence leave to reply to the Omnibus Response; and
- b. Order that the Defence's reply be filed within seven days of notification of the Chamber's decision to grant leave.

Respectfully submitted,



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Steven Kay QC and Gillian Higgins

On behalf of Uhuru Muigai Kenyatta

Dated this 23rd day of April 2013

At London, England

³⁴ See Annex A.