

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 14 May 2013

TRIAL CHAMBER V

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

**Public Redacted Version of the 13 May 2013 “Defence Observations on Estimated Time Required to Prepare for Trial with Confidential Annex A, Public Annex B, Confidential *ex parte* Annexes C and C.1 and Confidential Annexes C.2 to G”
(ICC-01/09-02/11-735)**

Source: Defence for Uhuru Muigai Kenyatta

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

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**Victims Participation and Reparations
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Other

I. INTRODUCTION

1. The Defence for Uhuru Muigai Kenyatta hereby submits its written observations on the time required to prepare for trial. The Defence submits that for the reasons set out herein, the trial date should be set for January 2014.
2. This application and Annexes A and C.2 to G are filed confidentially, as they contain information relating to confidential defence investigations and trial proceedings. Annexes C and C.1 are filed confidentially and *ex parte* as they contain information regarding ongoing Defence investigations and strategy. The Defence will file a public redacted version of this application in due course.

II. PROCEDURAL HISTORY

3. On 23 January 2012, Pre-Trial Chamber II issued the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” (“Confirmation Decision”),¹ confirming the charges against President Kenyatta and his then co-accused Mr Muthaura. On 9 July 2012, Trial Chamber V (“Chamber”) scheduled the trial to commence on 11 April 2013.²
4. At a status conference on 14 February 2013, the Defence addressed the impact of the manner in which the Prosecution had exercised its investigations and disclosure duties and requested additional time to prepare for trial.³ The Chamber directed the Defence to file additional observations on these issues.⁴

¹ ICC-01/09-02/11-382-Conf.

² “Decision on the schedule leading up to trial”, ICC-01/09-02/11-451.

³ ICC-01/09-02/11-T-22-ENG, page 25, lines 1 – 14; and pages 31 - 32.

⁴ ICC-01/09-02/11-T-22-ENG, page 32, lines 10 – 12.

The Defence filed its observations on 20 February 2013, and requested the vacation of the 11 April 2013 trial date.⁵

5. On 7 March 2013, the Chamber vacated the trial commencement date of 11 April 2013, provisionally replacing it with the date of 9 July 2013.⁶
6. On 26 April 2013, the Chamber rejected the “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” and its associated requests (“Article 64(4) Application”).⁷ In its “Public Decision on defence application pursuant to Article 64(4) and related requests,” the Chamber noted that it “is concerned by the considerable volume of evidence collected by the Prosecution post-confirmation and the delays in disclosing all relevant evidence to the Defence.”⁸ In the circumstances, it considered that “the most appropriate remedy for the prejudice caused to the accused consists of providing the Defence with further time to conduct its investigations and to fully prepare for trial in light of the new evidence.”⁹ In light of these findings, the Chamber invited the Defence to submit its observations as to the estimated time needed to prepare adequately for trial.¹⁰

⁵ “Corrigendum to Observations on the Conduct, Extent and Impact of the Prosecution’s Investigation and Disclosure on the Defence’s Ability to Prepare for Trial with Confidential Annex A, Public Annex B, and Public Annex A1,” ICC-01/09-02/11-655-Corr.

⁶ ICC-01/09-02/11-677.

⁷ ICC-01/09-02/11-622; “Observations on the Conduct, Extent and Impact of the Prosecution’s Investigation and Disclosure on the Defence’s Ability to Prepare for Trial,” ICC-01/09-02/11-655; “Defence Reply to 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 Pre-Trial Chamber,” ICC-01/09-02/11-681-Conf; “Written Submissions Following 18 March Status Conference,” ICC-01/09-02/11-706; “Defence Observations Regarding the Impact of the Withdrawal of the Charges Against Mr Muthaura on the Case Against Mr Kenyatta Pursuant to the Order requesting written submissions following 18 March status conference,” ICC-01/09-02/11-707-Conf; “Submissions Regarding the Prosecution’s 11 April 2013 Disclosure of Material Relation to its Initial Contact with OTP-4 with Confidential Annexes A-E,” ICC-01/09-02/11-719-Conf; “Submissions Regarding the Prosecution’s 17 April 2013 Disclosure of Material Relating to its Initial Contact with OTP-11, with Confidential Annex A”, ICC-01/09-02/11-723-Conf.

⁸ ICC-01/09-02/11-728, para. 118.

⁹ ICC-01/09-02/11-728, para. 125.

¹⁰ ICC-01/09-02/11-728, para. 127.

III. GROUNDS FOR ADJOURNMENT OF TRIAL DATE

7. The Defence submits that it requires until January 2014 in order to prepare adequately for trial on the following grounds:

- (i) The scale of Prosecution disclosure served after the confirmation of the charges necessitates further substantial Defence investigations due to the high incidence of witnesses relied upon by the Prosecution with a criminal background and significant issues relating to their credibility. None of these investigations can be undertaken prior to the disclosure of the identities of the individuals concerned;
- (ii) The Defence requires time to investigate the credibility and substantive allegations made by five Prosecution witnesses whose identities and unredacted transcripts of interview have still not yet been disclosed;¹¹
- (iii) The transcripts of interview of further Prosecution witnesses remain substantially redacted. The Defence will require time to investigate the full extent of the allegations made upon disclosure of the unredacted transcripts;
- (iv) [REDACTED]. The Defence seeks to instruct a joint expert witness in this regard;
- (v) The Defence has not been provided with significant transcripts and/or translations of documents that the Prosecution seeks to rely upon at trial. By reason of the Prosecution's failures, it has been necessary for the

¹¹ The five Prosecution witnesses are P-334, P-430, P-494, P-506 and P-510.

Defence to undertake its own translations and transcriptions of audio files served by the Prosecution. These have produced highly significant exculpatory evidence at a late stage in these proceedings;

- (vi) The Prosecution's service of the document containing the charges ("Second Updated DCC") and the pre-trial brief ("Updated PTB"), on 6 May 2013,¹² requires the Defence to reassess the remit of the allegations made against President Kenyatta, given the withdrawal of charges against Mr Muthaura; and
- (vii) The Defence requires time to investigate: (i) the substantive allegations made by Witness P-0118, who was identified on 4 April 2013 as being [REDACTED]; (ii) the associations between P-0118 and [REDACTED], another person of great notoriety who was [REDACTED] whose identity was disclosed to the Defence on [REDACTED]. Both these men have the incentive for personal gain to concoct false evidence and provide false witnesses against the accused.

¹² "Public with confidential Annex A and confidential, ex parte Annex B Prosecution submission of the Second Updated Document Containing the Charges and the Updated pre-trial brief," ICC-01/09-02/11-732.

IV. SUBMISSIONS

(i) **The Impact of Post Confirmation Disclosure and the Redacted Sources of the Pre-Trial Brief on Defence Investigations and Preparation for Trial**

(a) *The Impact of Post Confirmation Disclosure*

8. In order to assist the Chamber in its evaluation of the Defence submissions on the impact of the Prosecution's delayed disclosure, the Defence has prepared two annexes to reflect the disclosure position to date.
9. Confidential Annex A is a table providing an overview of the witnesses relied upon by the Prosecution and the dates of disclosure to the Defence of transcripts of interview/statements.¹³
10. Public Annex B is a table outlining the disclosure dates and page counts in respect of all documents disclosed by the Prosecution in these proceedings to date.¹⁴ Annex B clearly shows that from 4 January 2013 until 10 May 2013, the Prosecution has disclosed 12,706 pages of evidence and 70 audio visual files with a total duration of 16 hours 51 minutes and 17 seconds. 57.3 *per cent* of all evidence categorised by the Prosecution as incriminatory was disclosed after 1 January 2013.¹⁵ Transcripts of evidence of 11 trial witnesses were disclosed to the Defence for the first time only in January 2013.¹⁶ The deadline for completion of all disclosure by the Prosecution was 9 January 2013.¹⁷

¹³ This Annex has been updated since its original transmission to the Chamber on 20 February 2013 as ICC-01/09-02/11-655-Conf-AnxA.

¹⁴ This Annex has been updated since its original transmission to the Chamber on 20 February 2013 as ICC-01/09-02/11-655-AnxB.

¹⁵ Calculated as 10,794 / 18,850, which equals 0.5726, or 57.3 *per cent*.

¹⁶ See Annex A.

¹⁷ ICC-01/09-02/11-451, para 19.

11. In order for the Defence to ensure that President Kenyatta's right to a fair trial is upheld, the Defence requires approximately six months from the date of final unredacted disclosure by the Prosecution in order to prepare fully for trial. Defence Investigation Counsel, [REDACTED], who has compiled an investigation report at Annex C, supports this assessment. The reason for this period of time is the Defence's knowledge that the witnesses in this case have been providing false statements to the Prosecution and making untrue claims. Thus far, the Defence has been able to prove the false claims of several key witnesses: See sections (iv) [REDACTED], and (v) Outstanding Disclosure of Translations and Transcripts. The Defence requires additional time in order to conduct the same rigorous investigations in respect of all Prosecution witnesses.

(b) The Redacted Sources of the Pre-Trial Brief

12. On 7 May 2013, the Prosecution filed an Updated PTB.¹⁸ This version of the PTB retains a significant number of redacted sources.¹⁹ The effect of these redactions is that the Defence remains unable to penetrate the reliability or credibility of the source, or the veracity of the allegation. The Defence remains in a position, as previously submitted, where it is unable properly to investigate critical allegations, or prepare for the cross-examination of trial witnesses.²⁰ The Chamber must ensure that the Defence is granted adequate time to prepare in accordance with Article 67 of the Statute, taking into account the date on which all redactions are lifted from the Updated PTB. Once these redactions are lifted,

¹⁸ On 6 May 2013, the Prosecution filed ICC-01/09-02/11-732, including Confidential Annex A, containing an unredacted version of the Second Updated DCC, and Confidential *ex parte* Annex B, containing an unredacted version of the Updated PTB. The redacted PTB, ICC-01/09-02/11-732-Conf-AnxB-Red, was notified on 7 May 2013.

¹⁹ The redacted sources in the Updated PTB can be found at the following references: At page II (Contents) at section III(g); footnotes 32, 33, 34, 51, 91-94, 96, 98, 100-102, 124-128, 133, 153, 160-164, 169, 173, 175, 176-179, 181, 183, 187, 188, 190, 193, 195, 197, 199, 203, 210-213, 219-222, 224-226, 305-309, 328-330, 336, 337, 339-341, 346-349, 351, 352, 353, 355, 356, 357, 358, 359, 360-363, 364-370, 372-3.

²⁰ "Corrigendum to Observations on the Conduct, Extent and Impact of the Prosecution's Investigation and Disclosure on the Defence's Ability to Prepare for Trial with Confidential Annex A, Public Annex B, and Public Annex A1", ICC-01/09-02/11-655-Corr, para. 35.

the Defence will be required to undertake further time-consuming analysis of the underlying source material of the relevant allegations and commence appropriate Defence investigations.

(ii) The Impact of the Non-Disclosure of the Identities of Five Prosecution Witnesses on Defence Investigations and Preparation for Trial

13. To date, the Prosecution has not completed the disclosure of its evidence to the Defence. The Defence notes the Chamber's recent observations that three months after the date of full disclosure should be taken as *guidance* as to the time needed by the Defence to prepare for trial.²¹
14. In the present case, the outstanding disclosure concerns transcripts of interview of five Prosecution witnesses, all of whom were interviewed for the first time after the confirmation of charges hearing.²² The Defence believes that these witnesses are persons of great notoriety as they are [REDACTED] whose claims in relation to the allegations in this case will require careful and thorough investigation. The experience of the Defence thus far has been that such witnesses are of a mercenary nature and are willing to provide statements to a party if they believe there is the possibility of personal gain (see section (iv) [REDACTED]; and section (v) Outstanding Disclosure of Translations and Transcripts).
15. To date, the Defence has been provided with only highly redacted transcripts of interviews conducted by the Prosecution ("R01s").²³ In respect of Witness P-

²¹ ICC-01/09-02/11-728, para. 127, emphasis added.

²² The Defence awaits the identities of P-0334, P-0430, P-0494, P-0506 and P-0510. Annex A contains further information in respect of the dates of disclosure of relevant materials.

²³ 'R01' denotes the first disclosed and therefore most redacted version of a document.

0334, 51 *per cent* of the statement is redacted; Witness P-0430 has 20 *per cent* redactions remaining; Witness P-0494 has 27 *per cent* redactions remaining; Witness P-0506 has 38.5 *per cent* redactions remaining and Witness P-0510 has 28 *per cent* redactions remaining. An example of this type of disclosure is attached in Confidential Annex D.²⁴ The extent of the remaining redactions renders any meaningful analysis of the key allegations impossible. Redactions in respect of witness identification have also rendered it impossible to assess the credibility of these witnesses. Such assessment is an essential component of trial preparation, particularly where the nature of a significant number of witnesses relied upon includes [REDACTED]. Defence investigations to date have established serious credibility issues with such witnesses. By way of example, the Defence has served on the Prosecution exculpatory interviews in respect of five of their protected witnesses, which contradict the Prosecution statements.²⁵

16. The potential significance of this evidence is demonstrated by the Prosecution's allocation of 46 hours for examination-in-chief in respect of the five undisclosed witnesses. In recent correspondence between the Defence and the Prosecution, the Prosecution has stated that disclosure of the identities of the five witnesses is dependent upon the VWU and the conclusion of its implementation of security measures.²⁶

17. The Defence notes that on 5 February 2013, the Chamber authorised the Prosecution to withhold temporarily the "identity of Witness P-334 until local

²⁴ KEN-OTP-0091-1616, (Annex D), is a 'final' transcript, relating to Witness P-494, disclosed on 25 January 2013.

²⁵ The Defence has served upon the Prosecution exculpatory transcripts of interviews or witness statements from [REDACTED] (Witness 11), [REDACTED] (Witness 12), [REDACTED] (Witness 152), [REDACTED] (Witness 219) and [REDACTED] (Witness 428). Whilst the Defence has not included all of this material in the current filing and its associated annexes, it is willing to disclose this evidence to the Chamber if it so requests.

²⁶ On 3 May 2013, Manoj Sachdeva of the Prosecution replied, via email, to the Defence request for an indication as to when the Prosecution expected to complete service of all disclosure to the Defence: "Concerning the disclosure of the identities of witnesses that remain outstanding, the Prosecution is in daily contact with the VWU and as soon as the VWU informs us that all necessary measures are in place and finalised we will be in a position to disclose."

protective measures have been implemented and in any event no later than 30 days before the commencement of trial.”²⁷ In the same decision, the Chamber also authorised, *inter alia*, the Prosecution to withhold temporarily the identities of Witnesses P-430, P-494, P-506 and P-510 “until such time as the VWU assessment is complete and protection measures have been implemented.”²⁸ At the time the Chamber issued these directions, the trial date was set for 11 April 2013. It is reasonable therefore to assume that the VWU was, or ought to have been, striving to implement all necessary measures by 12 March 2013. In the circumstances, the Defence submits that the VWU should have completed its assessment of witness security issues by mid-March and that disclosure of the identities of these witnesses is therefore overdue.

18. In order to facilitate the Chamber’s determination as to the amount of time necessary to ensure that the Defence can prepare adequately for trial, the Defence requests the Chamber to order the VWU to identify the date by which protective measures will be implemented in respect of each of the five undisclosed witnesses.
19. The conduct of investigations into the credibility and substance of Prosecution witnesses is a complex and time-consuming process. The Defence submits that once VWU security measures are in place, the Chamber must ensure the disclosure of the identities of these witnesses to the Defence as soon as possible, and that the transcripts of their interviews are served forthwith in unredacted form.

²⁷ ICC-01/09-02/11-619-Conf-Red, p. 8.

²⁸ ICC-01/09-02/11-619-Conf-Red, p. 8.

(iii) The Impact of Additional Remaining Redactions on Defence Investigations and Preparation for Trial

20. Substantial redactions in relation to other key Prosecution witnesses currently prevent the Defence from conducting meaningful investigations into the credibility and substance of these individuals and their accounts.
21. The transcripts of interview of Witness P-217, [REDACTED], remain substantially redacted. These were first disclosed to the Defence, along with Witness P-217's identity, on [REDACTED]. The Defence is able to glean from the transcripts in their current form that the redacted passages include those pertaining to: the discussion of documents shown to Witness P-217 by the Prosecution;²⁹ unspecified "multiple meetings";³⁰ Witness P-217's involvement with [REDACTED];³¹ the role of [REDACTED];³² [REDACTED];³³ allegations of a [REDACTED];³⁴ and allegations regarding the information [REDACTED] provided to the Defence.³⁵ The extent of the redactions renders any meaningful analysis of these key allegations impossible. Witness P-217 is [REDACTED], which further complicates investigations into his credibility.
22. The transcripts of interview of Witness P-152, [REDACTED], also remain partially redacted. The salient redacted passages concern Witness P-152's relationship with [REDACTED] and his movements before, during, and after

²⁹ See, for example: KEN-OTP-0074-0718_R01 at 0726.

³⁰ See, for example: KEN-OTP-0074-0718_R01 at 0727; KEN-OTP-0074-0769_R01 at 0772, 0781, 0784, 0787; KEN-OTP-0074-0792_R01 at 0794, 0795, 0796, 0800, 0803; KEN-OTP-0074-0839_R01 at 0851.

³¹ See, for example: KEN-OTP-0074-0718_R01 at 0731.

³² See, for example: KEN-OTP-0074-0792_R01 at 0803, 0804; KEN-OTP-0074-0809_R01 at 0821, KEN-OTP-0074-0839_R01 at 0843, 0845; KEN-OTP-0074-0903_R01 at 0908, 0909; KEN-OTP-0074-1024_R01 at 1038-1046.

³³ See, for example: KEN-OTP-0074-0809_R01 at 0810.

³⁴ See, for example: KEN-OTP-0074-1024_R01 at 1028.

³⁵ See, for example: KEN-OTP-0074-1057_R01 at 1066-1067.

the post-election violence. Meaningful Defence investigation requires the lifting of these redactions.

23. In order to facilitate the Chamber's determination as to the amount of time necessary to ensure that the Defence can prepare adequately for trial, the Defence requests the Chamber to order the Prosecution to identify the date by which the Defence can expect the disclosure of the unredacted versions of the transcripts of interview. If the lifting of these redactions similarly relies on the implementation of protective measures for other witnesses, the Defence repeats its request that the Chamber orders the VWU to indicate when such measures will be in place.

(iv) [REDACTED]

24. [REDACTED].

25. [REDACTED].

26. [REDACTED].³⁶

(v) Outstanding Disclosure of Transcripts and Translations of Prosecution Evidence

27. The Prosecution disclosed to the Defence 11 audio files on 4 January 2013, and a further 38 audio files on 11 February 2013 in relation to [REDACTED]. The Prosecution failed to disclose transcripts of these files as required by Regulation

³⁶ [REDACTED].

39(1) of the Regulations of the Court.³⁷ In order to satisfy itself as to the content of these audio files, and in accordance with the requirement of due diligence, the Defence dedicated approximately 120 hours to translating and transcribing these files over a period of three and half months, an exercise which concluded on 4 May 2013. This evidence proved to be highly significant and revealed [REDACTED].

(vi) Necessity of a Further Defence Review of the Second Updated DCC and Updated PTB

28. The Prosecution's service of the Second Updated DCC and Updated PTB on 6 May 2013,³⁸ requires the Defence to reassess the remit of the allegations made against Uhuru Kenyatta, given the withdrawal of charges against Mr Muthaura. This review is essential in order to ensure that additional lines of enquiry are identified and incorporated into the Defence investigation plan. This analysis is time-consuming as all unredacted source references must be located and considered in respect of their probative value and impact on Defence investigations.

(vii) The [REDACTED] (Witness OTP-118) and [REDACTED] Investigation

29. On [REDACTED], the Prosecution disclosed the identities of two individuals named [REDACTED] and [REDACTED] as having acted as intermediaries by supplying a large number of now protected witnesses to the Prosecution. This important information was previously unknown to the Defence. The individuals concerned are highly public figures in Kenya with known motives

³⁷ Regulation 39(1) of the Regulations of the Court: "All documents and materials filed with the Registry shall be in English or French, unless otherwise provided in the Statute, Rules, these Regulations or authorized by the Chamber or the Presidency. If the original document or material is not in one of these languages, a participant shall attach a translation thereof."

³⁸ ICC-01/09-02/11-732.

to provide false evidence against Uhuru Kenyatta. Examination of their roles in this case to get to the truth is essential in order to ensure a fair trial. By reason of the conduct and character of these witnesses and the fact that they have been acting in concert, the Defence submits that it is entitled to a reasonable amount of time as requested to investigate and bring fully into the trial those facts and matters of relevance to the issues in this case.

(a) [REDACTED] (*Witness OTP-118*)

28. The delayed disclosure of the identity of [REDACTED] as a Prosecution witness in these proceedings has impacted unfairly on the Defence and the conduct of its investigations. This late disclosure has reduced significantly the amount of time available to the Defence to prepare the substantial materials necessary to cross-examine this witness in order properly to inform the Chamber as to his unreliability as a witness for the following reasons:

- (i) [REDACTED];³⁹
- (ii) The witness is [REDACTED].⁴⁰ His alleged role in these matters must be examined fully by the Defence;
- (iii) By producing [REDACTED] as a Prosecution witness, the Defence must be availed of the opportunity not only to counter what he may say, but also to deal with fundamental issues [REDACTED];
- (iv) The motivations and ambitions of [REDACTED] and to become [REDACTED] are a matter of public record. An extensive dossier relating to these activities will need to be prepared by the Defence;

³⁹ UDCC, ICC-01/09-02/11-732-Conf-AnxA, para. 21; and PTB, ICC-01/09-02/11-732-Conf-AnxB-Red, paras 22, 29, 32, 113.

⁴⁰ UDCC, ICC-01/09-02/11-732-Conf-AnxA, para. 36; and PTB, ICC-01/09-02/11-732-Conf-AnxB-Red, para. 7.

(v) The criminal behaviour of the witness and his bad character are important matters of evidence that the Defence are entitled to bring to the attention of the Trial Chamber.

(b) [REDACTED]

29. [REDACTED] was supplying witnesses to the Prosecution at the same time that he was a [REDACTED]. He has been motivated to influence the outcome of the Presidential election by his conduct [REDACTED]. Initial Defence investigations have discovered that certain witnesses presented by him to the Prosecution.⁴¹

30. The Defence has also discovered that certain witnesses referred by [REDACTED] to the Prosecution who provided incriminatory statements have also provided [REDACTED] exculpatory statements. The Defence has disclosed this information to the Prosecution and exhibit hereto in Confidential Annex G the statements of these witnesses.⁴² As the Prosecution witnesses yet to be identified also derive from this source, the Defence has good grounds to believe that further evidential revelations will emerge. It is important that the Defence is given adequate time as requested to investigate and prepare its case so that the Chamber has a complete understanding of the issues at stake.

V. CONCLUSION

31. The Defence submits that the Prosecution's case against President Kenyatta is riddled with corrupt and false Prosecution witnesses. The matters produced in support of this filing support this submission. The history of this case as

⁴¹ [REDACTED].

⁴² [REDACTED].

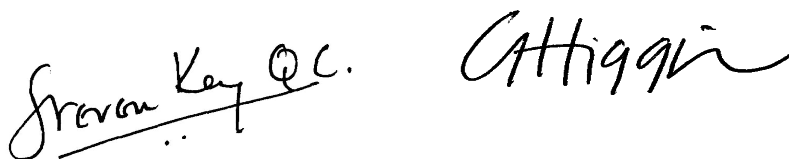
revealed by the recent Article 64(4) Application, supports the Defence's contention that there has been false evidence tendered upon which the Court has based its decisions. In the interests of justice, it is essential that the Defence is given the adequate time it seeks to ensure that it is properly equipped to contest the serious allegations made against President Kenyatta.

VI. RELIEF

32. For the reasons set out above, the Defence respectfully requests the Chamber to:

- (i) Order the VWU to identify the date by which protective measures will be implemented in respect of each of five witnesses;
- (ii) Order the Prosecution to identify the date by which it will disclose the unredacted versions of the transcripts of interview of P-217 and P-152; and
- (iii) Adjourn the commencement of trial until January 2014.

Respectfully submitted,



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Steven Kay QC and Gillian Higgins

On behalf of Uhuru Muigai Kenyatta

Dated this 14th day of May 2013

At London, England