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Date: **21 May 2013**

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

**Prosecution certification of review of its case file pursuant to Trial
Chamber V's 26 April 2013 order (ICC-01/09-02/11-728)**

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

Fatou Bensouda
James Stewart
Adesola Adeboyejo

Counsel for Uhuru Muigai Kenyatta

Steven Kay QC and Gillian Higgins

Legal Representatives of Victims

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

Herman von Hebel
Didier Preira

Defence Support Section

Victims and Witnesses Unit

Mr Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. Pursuant to the Chamber's 26 April "Decision on defence application pursuant to Article 64(4) and related requests" ("Decision"),¹ the Prosecution hereby certifies that it has reviewed all the case-relevant materials in its possession to ensure that "no other materials in its possession that ought to have been disclosed to the defence, are left undisclosed."² Additionally, members of the Office of the Prosecutor who have worked on the case have checked all materials in their possession to ensure that all relevant items have been registered in the official databases and reviewed.

2. As a result of the review, the Prosecution has identified a limited number of items that will be disclosed to the Defence on or before 28 May 2013, together with disclosable materials that have come into its possession after the Chamber's Decision. These items are being disclosed on the basis of the broadest possible interpretation of the statutory provisions and ICC case law governing the scope of the Prosecution's disclosure.³

3. The Prosecution notes that it still awaits completion of certain transcription of audio files currently in its possession. It will disclose these transcripts as soon as they become available. As the Chamber is aware, the Prosecution has also not yet lifted the redactions to the identities of delayed disclosure witnesses 334, 430, 494, 506, and 510. The Prosecution will disclose the outstanding materials related to these witnesses, with limited redactions lifted, as soon as the Victims and Witnesses Unit informs that it is safe to disclose the witnesses' identities.

¹ ICC-01/09-02/11-728.

² ICC-01/09-02/11-728, para. 97.

³ ICC-01/04-01/06-1433 OA11, paras.77-78, 81, ICC-01/04-01/06-3017 A5 A6, para. 10,16.

4. Below, the Prosecution provides the Chamber with an explanation of the steps it has taken to (i) ensure that it has identified and located all the material that needs to be reviewed for disclosure, (ii) ensure that all of these items were reviewed, and (iii) maintain quality control over the review. The Prosecution has also implemented changes to its internal review procedure to address the concerns that the Chamber expressed in its Decision.⁴

Submissions

I. Review of the case file in the case *Prosecutor v Uhuru Muigai Kenyatta*

5. The review that the Prosecution has undertaken to comply with the Chamber's Decision ("21 May 2013 review") is not the first review of its case file. Many materials in the Prosecution's possession have already been reviewed several times for identification and disclosure of incriminatory, Article 67(2) or Rule 77 information. Due to the multi-layered nature of such reviews, which encompass thousands of documents and involve many staff members, the review process was subject to human error. To account for this, the Prosecution undertook the 21 May 2013 review not only to supplement its prior reviews, but also to minimise the scope for human error inherent in such reviews, and to verify that previous reviews of the items in its possession were executed thoroughly and with consistent application of the relevant criteria for information that is disclosable under Article 67(2) and Rule 77. The Prosecution undertook to individually review every relevant item in its possession regardless of the level of review each item had received in the past. To reach this goal, the Prosecution developed and implemented a new, comprehensive plan of review, which subjected all

⁴ Ibid.

the materials in its possession to another round of review, notwithstanding the fact that the vast majority of those materials had been reviewed on several occasions prior to the issuance of the Decision. All available investigative and prosecutorial staff – including the most senior members of the investigative and prosecutorial teams – were involved in the review. The plan consisted of the following stages: a. Identification of relevant materials to be reviewed; b. Review; and c. Quality control.

a. Identification of relevant materials to be reviewed

6. First, the Prosecution identified all the electronic databases and physical files that had to be reviewed. The databases included Ringtail - the main database that is used to store information about the case and for disclosure - and other secondary databases that either contain a mixture of work product and case-related information or are not normally used for storing evidence, but may potentially contain some case-relevant information.
7. The Prosecution also identified personal computers, hard drives and any other electronic data carriers such as email accounts that could contain case-related information, as well as physical working spaces, notes and other hard copies of files in possession of staff members who have worked on the case since its inception.

b. Review

- i. Review of secondary databases and physical spaces and registration in Ringtail of any outstanding materials
8. The Prosecution first conducted a comprehensive and methodical review of its secondary information storage databases, and electronic and physical

data in possession of individual staff members who have worked on the Kenyatta case, to identify items that may contain potentially disclosable information.

9. The Prosecution ensured that all materials that contained potentially disclosable case information were registered in Ringtail so they could be centrally reviewed for Article 67(2) and Rule 77 material. To ensure that all potentially disclosable material in secondary databases and storage spaces was identified and registered for review, team members with detailed case knowledge reviewed internal work product and cross-checked items of evidence mentioned therein against the Ringtail database to ensure that they had been registered. In addition, Prosecution staff involved in the collection of evidence reviewed their email accounts – in some cases back several years – to ensure that materials obtained or circulated via email were identified and registered in Ringtail for disclosure review. In the Prosecution’s view, the above steps provided a robust quality control mechanism to minimize the chances of disclosable items being overlooked.

ii. Disclosure review

10. After ensuring registration of any outstanding materials in Ringtail, the Prosecution conducted a review of all potentially relevant materials contained in the database. Out of 20,000 Kenya-specific documents, audio/video material and physical items currently contained in Ringtail⁵ the Prosecution reviewed the approximately 16,000 previously undisclosed items. These items were re-reviewed out of an abundance of caution, even though the great majority of these items had been reviewed on multiple

⁵ On 21 May 2013 at 12h the Ringtail Kenya collection numbered 20,540 items. This number is constantly increasing.

occasions prior to the Decision being issued⁶ and were found to be irrelevant.

11. The records were divided among the staff members taking part in the review and reviewed item by item. Special attention was paid to newly registered documents that had never been reviewed before and documents that were assessed to contain information of relevance to the Kenyatta case. Most of the documents were found to be irrelevant to the Kenyatta case or had information only relevant to the Ruto and Sang case or contained only generic Kenya-related information.
12. Even though the Prosecution reviewed all individual items, the review was further enhanced and facilitated by using search terms to highlight case-relevant terms and names in the documents that were being reviewed. The search terms served only to facilitate the review and not to avoid full document review. During the review, the Prosecution also verified that the items in Ringtail were what they purported to be and that they did not include any other types of records that would require separate attention.

c. Quality control

13. Due to the volume of materials to be reviewed and the limited amount of time available before the 21 May 2013 deadline established in the Decision, all available members of the Prosecution team, including investigators and analysts assigned to the case, participated in the review.
14. Experienced trial lawyers and investigators with detailed case knowledge played a central part in the review process and were tasked with reviewing

⁶ The Prosecution did not review items emanating from the Kenyatta or Muthaura Defence that were already available to the Kenyatta Defence.

materials most likely to be disclosable and quality controlling the review of less experienced members of the team. Experienced members of the Prosecution team also participated in the identification of the materials outside Ringtail, including databases, physical work spaces, hard drives and email accounts. Less experienced members were assigned less difficult or sensitive categories that did not require the same degree of case-specific knowledge to review.

15. The more senior members, including the trial lawyers, were assigned to review the most sensitive and difficult categories of information. The senior staff members also (i) re-reviewed all items pointed out by others as potentially disclosable, (ii) reviewed all items that less experienced reviewers could not review for lack of experience or case knowledge, (iii) reviewed all the materials related to Prosecution trial witnesses, and (iv) conducted quality checks of items reviewed by less experienced members.

16. All Prosecution staff participating in the review were instructed to take the broadest possible approach as to what could - in accordance with the Court's current jurisprudence - be regarded as Article 67(2) or Rule 77 information, including information potentially undermining the credibility of Prosecution witnesses. All the staff members were briefed and reminded of the significance of such information and reminded of the importance of timely disclosure. In case of doubt, the less experienced members of the reviewing team were instructed to seek guidance from the trial lawyers, to ensure that no potentially disclosable material is left undisclosed.

II. Disclosure of materials

17. As a result of the 21 May 2013 review, the Prosecution identified additional items for disclosure pursuant to a very broad reading of Article 67(2) and Rule 77. This disclosure will be served on the Defence as soon as practicable,

and in any event no later than 28 May 2013, once the technical elements of formatting the items for disclosure are finalised.

18. In addition to the process described above, the Prosecution continues to review its collection to identify items that may have become subject to disclosure in relation to issues recently raised by the Defence with respect to cellular telephone data and recordings of conversations of Witness 12 with intermediaries purportedly acting on behalf of the Accused. The Prosecution will disclose any relevant materials thus identified.

19. The Prosecution hereby also informs the Chamber of other materials that will still be pending for disclosure after that time:⁷

- Records of the recent limited follow-up interviews with certain trial witnesses, which are currently being transcribed. The Prosecution anticipates disclosing the interview transcripts on a rolling basis, as they are completed and at any rate by 3 June 2013.
- Information received from certain trial witnesses regarding possible leads, in the limited situations where the information provided may assist the preparation of the Defence. The information in question is contained in audio recordings and is currently being transcribed. The Prosecution will disclose the relevant parts of these recordings as soon as possible when the transcripts are completed and at the latest by 3 June 2013.
- Certain witness material related to the four out of the five delayed disclosure witnesses whose identities have not been disclosed yet (506, 510, 494, and 430), which will be disclosed when the identities of these witnesses are disclosed.

⁷ While not constituting Rule 77 information, the Prosecution will seek to disclose, as courtesy, outstanding transcripts of video material on its List of Evidence as soon as they are completed and depending on other case exigencies.

Conclusion

20. In light of the above information, the Prosecution submits that it has fully complied with the Chamber's Decision. It has engaged in a thorough and broad review of all electronic and hard-copy material in all the relevant databases and physical work spaces related to all current staff members. As in all complex cases before this Court and indeed before the *ad hoc* tribunals, there may be material that "falls through the cracks",⁸ despite the meticulousness of the review process. That said, the Prosecution submits that the review process it has undertaken is one that has been specifically designed to maximise relevant disclosure and minimise the potential for error.

21. In sum, the Prosecution certifies that it has reviewed its case file as ordered.



Fatou Bensouda,
Prosecutor

Dated this 21st day of May 2013
At The Hague, The Netherlands

⁸ See ICC-01/04-01/06-T-329-Red2-ENG WT, p. 9, lines 7-24.