

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 12 June 2013

TRIAL CHAMBER V(b)

Before: Judge Kuniko Ozaki, Presiding
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. UHURU MUIGAI KENYATTA***

Public

Defence Response to the “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: 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

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Adesola Adeboyejo, Trial Attorney

Counsel for the Defence

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Legal Representatives of the Victims

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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for the Victims

The Office of Public Counsel for the Defence

States' Representatives

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Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. INTRODUCTION

1. The Defence hereby submits its response to the “Prosecution certification of review of its case file pursuant to Trial Chamber V’s 26 April 2013 order (ICC-01/09-02/11-728)” (“Review Filing”).¹
2. The Defence submits that the remaining redactions to the Prosecution’s list of evidence, list of witnesses, Pre-Trial Brief and Prosecution witness transcripts prevent the Defence from preparing adequately for trial. The retention of these redactions at this stage in the proceedings deny the Defence the right to be informed of the nature of the case against the Accused and thereby the right to a fair trial.

II. PROCEDURAL HISTORY

3. On 9 July 2012, Trial Chamber V (“Chamber”) issued its “Decision on the schedule leading up to trial” (“Trial Schedule Decision”) in which it stated that “[t]he prosecution is to provide its witness list...[and] is also to file its list of evidence to be relied on at trial. Both the witness list and the list of evidence are to be submitted by 9 January 2013.”² In the Trial Schedule Decision, the Chamber also stated that with the exception of witnesses subject to the delayed disclosure regime, by 9 January 2013 the Prosecution must to disclose to the Defence “all incriminatory material in the form of witness statements and any other material to be relied on at trial, as well as disclosure of all Article 67(2)” and Rule 77 material.³
4. On 9 January 2013, the Prosecution submitted a filing entitled “Prosecution’s provision of materials pursuant to Decision ICC-01/09-02/11-451.”⁴ On 10 January 2013, the Defence was notified of the annexes to this filing, which included the Prosecution’s list of evidence,⁵ list of witnesses⁶ and Pre-Trial Brief.⁷

¹ ICC-01/09-02/11-740.

² ICC-01/09-02/11-451, para. 18.

³ ICC-01/09-02/11-451, para. 19.

⁴ ICC-01/09-02/11-596.

⁵ ICC-01/09-02/11-596-Conf-AnxC-Red.

⁶ ICC-01/09-02/11-596-Conf-AnxA-Red.

⁷ ICC-01/09-02/11-596-Conf-AnxD-Red.

5. On 26 April 2013, the Chamber issued its “Decision on defence application pursuant to Article 64(4) and related requests” (“Article 64(4) Decision”).⁸ In the Article 64(4) Decision, the Chamber directed the Prosecution “to conduct a complete review of its case file and certify before this Chamber that it has done so in order to ensure that no other materials in its possession that ought to have been disclosed to the Defence, are left undisclosed.”⁹ In the same decision, the Chamber ordered the Prosecution “to submit an updated version of the Updated DCC by 6 May 2013”, and invited it “to submit an updated Pre-Trial Brief by 6 May 2013”.¹⁰
6. On 21 May 2013, the Prosecution submitted the Review Filing.
7. On 28 May 2013, the Prosecution disclosed: (i) 8 items in Potentially Exculpatory Evidence package 25; (ii) 132 items in Rule 77 package 36; (iii) 12 items in Rule 77 package 37; (iv) 13 items in Incriminatory Evidence package 48; and (v) 1 item in Rule 77 package 38.
8. On 3 June 2013, the Prosecution disclosed: (i) 10 items in Incriminatory Evidence package 49; (ii) 16 items in Incriminatory Evidence package 50; (iii) 8 items in Incriminatory Evidence package 51; and (iv) 23 items in Rule 77 package 39.
9. On 7 June 2013, the Prosecution disclosed: (i) 9 items in Incriminatory Evidence package 52; and (ii) 4 items in Rule 77 package 40. The Prosecution also reissued metadata fields "Source Identity" and "Chain of custody notes" for 12 documents that had been previously disclosed.
10. Since the submission of the Review Filing, the Prosecution has disclosed the remaining identities of the witnesses it proposes to call for trial.¹¹

⁸ ICC-01/09-02/11-728.

⁹ ICC-01/09-02/11-728, para. 97.

¹⁰ ICC-01/09-02/11-728, p. 56.

¹¹ Witness 334's name and lesser redacted statement were disclosed on 3 June 2013. The names of Witness 430, 494, 506 and 510 were disclosed on 7 June 2013 via email.

III. SUBMISSIONS

(A) Unredacted List of Evidence and List of Witnesses

11. The Prosecution's list of evidence to be relied upon at trial was notified to the Defence on 10 January 2013.¹² In accordance with the Trial Schedule Decision, the deadline for service of the list of evidence was 9 January 2013.¹³ Following a request by the Defence on 24 May 2013,¹⁴ Mr Sam Lowery of the Prosecution stated on 31 May that the Prosecution was "considering whether and to what extent the list of evidence requires updating",¹⁵ and that a further list would not be provided to the Defence on 3 June 2013.
12. In order to assist the Defence to prepare adequately for trial and ensure that the Accused is informed promptly and in detail of the nature of the case under Article 67 of the Rome Statute, the Defence requests the Chamber to order the Prosecution to provide an unredacted list of evidence.¹⁶
13. Similarly, the Defence requests the Chamber to order the Prosecution to provide an unredacted list of witnesses. Despite undertaking to do so, the Prosecution has not provided an unredacted list to the Defence.¹⁷ In addition, the Defence requests that the Prosecution specifies, in respect of each witness, the ERN relating to the latest version of every transcript or statement attributable to that witness, organized in chronological order, identifying clearly the transcripts and/or statements to be relied upon at trial. This information will enable the Defence to identify readily the evidence to be relied upon in respect of each Prosecution witness.¹⁸

¹² ICC-01/09-02/11-596-Conf-AnxC-Red.

¹³ ICC-01/09-02/11-451, para. 18.

¹⁴ Email from Ben Joyes to Adesola Adeboyejo on 24 May, 2013 at 11:33 AM.

¹⁵ Email from Sam Lowery to Thomas Obhof and Ben Joyes on 31 May, 2013 at 5.29 PM.

¹⁶ ICC-01/09-02/11-596-Conf-AnxC-Red.

¹⁷ Email from Sam Lowery to Thomas Obhof and Ben Joyes on 31 May, 2013 at 5.29 PM: "With respect to the request for an updated witness list, we will provide the Defence with an updated witness list on 3 June, which will include the witnesses whose identities have been disclosed since the initial list was filed on 9 January."

¹⁸ By way of example, in relation to Witness OTP-219, the Prosecution has disclosed the transcripts of his interview in lesser redacted form on three separate dates: 30 November 2012, 11 February 2013 and 10 May 2013. On 10 June 2013, the Prosecution disclosed a new set of transcripts relating to this individual, a total of 128 pages.

(B) Pre-Trial Brief

14. The Defence was provided with the Prosecution's updated Pre-Trial Brief on 7 May 2013.¹⁹
15. In its "Observations on Estimated Time Required to Prepare for Trial", the Defence set out the extent to which its ability to investigate and prepare is negatively impacted by the remaining substantial redactions in the Prosecution's updated Pre-Trial Brief.²⁰ In order for the Defence to undertake a meaningful analysis of the Pre-Trial Brief, the Defence requests the Chamber to order the Prosecution to file an unredacted version of this document in preparation for trial.

(C) Remaining Redactions in Transcripts to be Lifted

16. The Defence submits that in order to investigate the allegations made by Prosecution witnesses, the Defence requires at least six months from the lifting of all redactions from the transcripts of interview.
17. In relation to four Prosecution witnesses, the identities of whom were released to the Defence on 7 June 2013, substantial redactions remain in place:
 - a. Witness 430 - 20% redacted, totalling 32 redacted pages;
 - b. Witness 494 - 27% redacted, totalling 60 redacted pages;
 - c. Witness 506 - 38.5% redacted, totalling 89 redacted pages; and
 - d. Witness 510 - 28% redacted, totalling 73 redacted pages.
18. In addition, the Prosecution has not disclosed unredacted transcripts in respect of Witness 217.²¹ At this stage, the Defence requires unredacted transcripts of evidence in respect of each Prosecution witness.

¹⁹ ICC-01/09-02/11-732-Conf-AnxB-Red.

²⁰ The extent of the remaining redactions are set out in ICC-01/09-02/11-735-Conf, para. 12, footnote 19.

²¹ Defence submissions on the impact on trial preparation of significant redactions are set out in ICC-01/09-02/11-735-Conf, para. 21.

19. The Defence requests that the Chamber refrains from setting the trial date until all redactions have been lifted from the evidence to be relied upon by the Prosecution at trial.

(D) Prosecution Post-9 January 2013 Interview of Trial Witnesses

20. Since 9 January 2013, the Defence has received new transcripts of follow-up interviews conducted by the Prosecution in respect of nine trial witnesses,²² in addition to the transcript of one non-trial witness, who was interviewed on 25 February 2013 and whose interview was disclosed to the Defence under Rule 77 on 15 March 2013.²³ The disclosure of substantial further evidence in relation to a significant number of trial witnesses requires the provision of additional time for the Defence to review the remit of the allegations made and conduct additional investigations in preparation for trial.

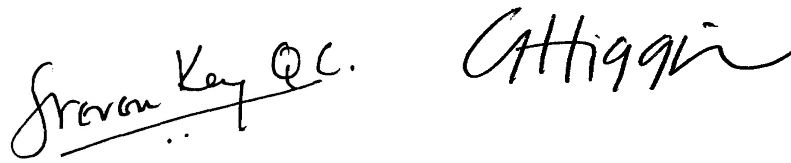
IV. RELIEF

21. For the reasons set out above, the Defence respectfully requests that the Chamber orders the Prosecution to:
 - a. Provide the Defence with an unredacted list of evidence;
 - b. Provide the Defence with an unredacted list of witnesses, clearly identifying the transcripts to be relied upon at trial;
 - c. Provide the Defence with an unredacted version of the Pre-Trial Brief; and
 - d. Disclose unredacted interview transcripts of all Prosecution witnesses.
22. Further, the Defence requests that the Chamber refrains from setting the trial date until all redactions have been lifted from the evidence to be relied upon by the Prosecution at trial.

²² These witnesses are OTP-12; OTP-118; OTP-217; OTP-219; OTP-428; OTP-493; OTP-494; OTP-505; and OTP-506. The interviews were conducted after 9 January 2013 and the transcripts total 306 pages.

²³ KEN-OTP-0095-0110.

Respectfully submitted,

The image shows two handwritten signatures in black ink. The signature on the left is 'Steven Kay QC.' with a horizontal line under 'Steven'. The signature on the right is 'G Higgins' in a cursive style.

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Steven Kay QC and Gillian Higgins
On behalf of Uhuru Muigai Kenyatta

Dated this 12th day of June 2013
At London, England