

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 22 August 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***

**Confidential, with Confidential, *Ex parte*, Prosecution and Trial Chamber Only,
Annexes A-F**

**Public Redacted Version of the 20 August 2013 'Defence Response to the "Victims'
application relating to possible disclosure of confidential information"' (ICC-01/09-
02/11-793-Conf)**

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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Legal Representatives of the Victims

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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for the 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 Section

I. INTRODUCTION

1. The Defence for President Uhuru Kenyatta hereby provides its response to the Common Legal Representative for Victims' ("Legal Representative") "Victims' application relating to possible disclosure of confidential information" ("Victims' Application").¹
2. This filing is classified as "Confidential" as it contains information related to [REDACTED]. Annexes A-F are classified as "Confidential, *Ex parte*, Prosecution and Trial Chamber Only" as they contain information related to [REDACTED], and do not contain information that concerns or in any way impacts upon the interests of the victims. The Defence will issue a public redacted version of this filing in due course.

II. FACTUAL BACKGROUND

3. On 9 July 2012, Trial Chamber V(b) ("Chamber") issued its "Decision on the schedule leading up to trial," in which it instructed the Prosecution to liaise with the Defence to discuss the joint instruction of experts.²
4. On 15 February 2013, the Prosecution submitted its "third report on joint instruction of experts."³ In this filing, the Prosecution reported that "the parties have continued discussions with respect to the Defence's proposal to call an expert in communications to testify regarding email and telephone communications of certain witnesses."⁴

¹ ICC-01/09-02/11-789.

² ICC-01/09-02/11-451, para. 17.

³ ICC-01/09-02/11-646. The Prosecution previously submitted reports on the joint instruction of experts on 31 October (ICC-01/09-02/11-515-Conf) and 30 November 2012 (ICC-01/09-02/11-549).

⁴ ICC-01/09-02/11-646, para. 2; see also paras 21-23.

5. On 13 May 2013, in its “Observations on Estimated Time Required to Prepare for Trial,” the Defence informed the Chamber that it had “carried out investigations [REDACTED] of significant witnesses or persons cited in evidence.”⁵ The Defence further explained that [REDACTED]⁶ and [REDACTED].⁷ None of these investigations related to individuals represented by the Legal Representative.
6. On 5 July 2013, the Defence communicated [REDACTED].
7. [REDACTED].
8. On 26 July 2013, Lead Counsel submitted a confidential application to the High Court of Kenya at Nairobi (“High Court”), [REDACTED] (“26 July Application”), [REDACTED].⁸ The Prosecution expressed its support for the “relief requested [REDACTED]” and this official letter was submitted to the High Court as an annex to the 26 July Application.⁹ [REDACTED].¹⁰
9. On 29 July 2013, Lead Counsel submitted a further confidential application to the High Court, [REDACTED]. [REDACTED].¹¹
10. On 30 July 2013, the High Court joined the 26 and 29 July Applications (“Court Application”), attached at Annex E. On the same day, the High Court granted the Defence’s request [REDACTED], attached at Annex F.
11. [REDACTED].

⁵ ICC-01/09-02/11-789, para. 24.

⁶ ICC-01/09-02/11-789, para. 25.

⁷ ICC-01/09-02/11-789, para. 26 and Confidential Annexes C.3.1 to C.3.4.

⁸ Annex B, p. 3/57, para. 5. [REDACTED].

⁹ Annex B, p. 20/57.

¹⁰ Annex B, pp. 56/57 and 57/57.

¹¹ Annex C, page 3/57, para. 5. [REDACTED].

12. On 13 August 2013, the Legal Representative submitted the Victims' Application, in which he requested the Chamber to order the Defence to provide clarifying information to assist the Chamber to determine whether in fact there has been a breach of the Protocol of 24 August 2012 and the Code of Professional Conduct for Counsel, and requested the following relief:
 - a. "To inform the Trial Chamber, the Legal Representative and the Prosecution without delay whether it has communicated information which might lead to the identification of any victim of the crimes charged in the present case, or any protected witness, to any member of "the public", as defined in the Protocol (including to the High Court of Kenya or to any mobile telephone company in Kenya)"; and
 - b. "To provide to the Trial Chamber the record required by paragraph 22 of the Protocol in relation to any such disclosure."¹²
13. On 14 August 2013, Lead Counsel informed the Legal Representative that "[t]he victims whom you represent do not form any part of this matter at all and it is a pity you have caused alarm and distress by not speaking to a member of the Defence or the Prosecution before launching your public proceedings." In the letter, Lead Counsel suggested that the Legal Representative withdraw the Victims' Application. By email on 14 August 2013, the Legal Representative declined to withdraw the Victims' Application.

III. SUBMISSIONS

Victims

¹² ICC-01/09-02/11-789, para. 23.

14. The Defence restates categorically that it has not communicated to the High Court, [REDACTED] or any other person any information which might lead to the identification of any victims of the crimes charged in the proceedings. Contrary to the suggestion of the Legal Representative, the Defence has breached neither the Protocol of 24 August 2012 nor the Code of Professional Conduct for Counsel.¹³
15. The Defence has [REDACTED]. [REDACTED].¹⁴ The victims represented by the Legal Representative, therefore, are not affected by the [REDACTED] investigations in any respect.

Prosecution Witnesses, Defence Witnesses and Other Individuals

16. Where information related to Prosecution witnesses has been disclosed, such disclosure has taken place only upon the instruction and with the consent of the Prosecution.¹⁵ [REDACTED].¹⁶

Observations on the Conduct of the Legal Representative

17. Great care and careful planning has been taken by the Defence [REDACTED] to ensure that the [REDACTED]. The proceedings and hearings before the High Court were confidential as they related to highly important and sensitive investigations. The media reports of these proceedings were unauthorised, inaccurate and can only have been derived from leaks by a person or persons not party to the proceedings.

¹³ ICC-01/09-02/11-469-Anx.

¹⁴ Annex B, p. 7/57, para. 20 and Annex C, p. 7/54, para. 20.

¹⁵ Annex B, p. 20/57; Annex C, p. 19/57.

¹⁶ Annex B, pp. 15/57 and 16/57; Annex C, pp. 15/54 and 16/54.

18. The Defence regrets that the Legal Representative did not seek to contact the Defence by means other than email during the Court recess prior to filing publicly the Victims' Application. The public filing of the Victims' Application on the sole basis of unverified, partial and misleading news reports can only have led to increased tensions regarding the nature of the investigations being conducted in the present case. Given the fact that the Legal Representative's communications were labelled "Urgent" and were sent during the Court's recess, the Defence submits that it would have been reasonable for the Legal Representative to contact Counsel, the Prosecution or another member of the Defence directly as regards "[t]he victims [...] deep concern and anxiety about these reports, which they believe might be directed at undermining the participation of victims and protected witnesses in this case."¹⁷
19. The Defence submits that the conduct of the Legal Representative in publicly filing the substantive allegations contained in the Victims' Application and challenging the professional conduct of Counsel on the basis of unverified reports falls below the expected standard of professionalism in circumstances where Counsel was not afforded a proper opportunity to address the matter before it was put into the public domain. The agencies reproducing the filing of the Legal Representative have shown themselves to be very ready to be critical of the Defence.¹⁸ [REDACTED]. Such conduct is capable of creating unwarranted alarm, distress and also wrongful damage to Counsel's professional reputation.

¹⁷ ICC-01/09-02/11-789.

¹⁸ The Coalition for the International Criminal Court's 14 August 2013 "Case Update...Kenya: Concerns for Witnesses and Victims" contained a link to the Victims' Application, and also stated that "a Coalition member in Kenya has indicated that it will take legal action to challenge [the Court Application]", citing *The International Center for Policy and Conflict*, 'Constitutional Petition at the High Court on ICC Criminal Proceedings', 30 July 2013, available at <http://coalitionfortheicc.us2.list-manage1.com/track/click?u=8758bcde31bc78a5c32ceee50&id=bb2f7e9086&e=4b4c11fc3f> (accessed 20 August 2013).

IV. RELIEF

28. For the reasons set out above, and given the information provided in Annexes A - F, the Defence respectfully requests the Chamber to dismiss the Victims' Application.

Respectfully submitted,



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Steven Kay QC and Gillian Higgins

On behalf of Uhuru Muigai Kenyatta

Dated this 22nd day of August 2013

At London, England