

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 7 October 2014

TRIAL CHAMBER V(B)

Before:

**Judge Kuniko Ozaki, Presiding
Judge Robert Fremr
Judge Geoffrey Henderson**

SITUATION IN THE REPUBLIC OF KENYA

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

**URGENT
PUBLIC WITH CONFIDENTIAL ANNEXES A-D**

Defence Submission of Documents Concerning Consents to Disclosure

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
James Stewart
Benjamin Gumpert QC
Adesola Adeboyejo

Counsel for the Defence

Steven Kay QC
Gillian Higgins

Legal Representatives of the Victims

Fergal Gaynor

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**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

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section Other**

1. On 7 October 2014, Trial Chamber V(B) ('Chamber') held a Status Conference "to discuss the status of cooperation between the Prosecution and the Kenyan Government."¹
2. This request is submitted urgently due to the imminence of tomorrow's scheduled Status Conference and the need for the Chamber to see the documents attached to this filing as soon as practicable. Annexes A-D are submitted confidentially due to the nature of the information disclosed therein.
3. At the Status Conference, the Chamber requested that the Defence for Uhuru Muigai Kenyatta ('Defence') file copies of all consents issued on behalf of Mr Kenyatta. Accordingly, the Defence attaches a number of annexes to this filing.
4. Annex A is comprised of documents sent to both the Attorney General of Kenya and Njuguna Ndungu of the Central Bank of Kenya on 18 June 2013, namely: a letter from the Defence consenting to the disclosure (and onward transmission to the Prosecution) of Mr Kenyatta's relevant bank account records for the period 1 December 2007 to 28 February 2008; a copy of Mr Kenyatta's power of attorney appointing Steven Kay QC and Gillian Higgins as Counsel; and a schedule of all relevant bank accounts held by Mr Kenyatta.
5. Annex B contains a 16 December 2013 email from Prosecution lawyer Manoj Sachdeva to Safaricom and the Defence's Lead Investigator, Gary Summers, requesting the extraction of call data for a selection of telephone numbers, one of which concerns a number ending in -891 allegedly used by Mr Kenyatta during the post-election violence. The

¹ ICC-01/09-02/11-954, para. 11.

Prosecution was able to request this information only after the Defence initiated domestic proceedings on behalf of both parties, and which resulted in the issuance of an order of the High Court of Kenya on 30 July 2013 consenting to the extraction of relevant call data by the single joint expert from Safaricom and Airtel.

6. Importantly, it was known by both parties that call data could be obtained only in respect of identified numbers. Annexes C1-5 contain the documents concerning the domestic litigation before the High Court of Kenya referred to above.
7. Similarly, Annex D is a 9 July 2013 note compiled by Mr Summers concerning a meeting between the Defence, Prosecution and Safaricom and the single joint expert, in which it is recorded that a senior Safaricom representative and an OTP analyst “moved on to discuss the ICC’s previous request through the AG of Kenya for telephone data. [The Safaricom representative] said that [Safaricom] could not help as the request was not specific to actual telephone numbers.”
8. With respect to vehicle registrations, the Defence was willing to provide consent on behalf of Mr Kenyatta, but considered it unnecessary in light of the Attorney General of Kenya’s submission that a court order was not needed to access the information and that it was “a matter of common and public knowledge”.²

² ICC-01/09-02/11-T-28-ENG, p. 35, line .3

Respectfully submitted,

 

.....
Steven Kay QC and Gillian Higgins

On behalf of Uhuru Muigai Kenyatta

Dated this 7th day of October 2014

At London, England