

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 20 March 2013

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

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

Public

**Order requesting written submissions following 18 March 2013 status
conference**

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

The Office of the Prosecutor

Ms Fatou Bensouda

Legal Representatives of Victims

Mr Fergal Gaynor

Unrepresented Victims

Counsel for the Defence

Mr Steven Kay

Ms Gillian Higgins

Legal Representatives of Applicants

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, pursuant to Rule 132(2) of the Rules of Procedure and Evidence and Regulation 37(2) of the Regulations of the Court issues the following Order requesting written submissions following 18 March 2013 status conference .

1. On 18 March 2013 the Chamber held a status conference to discuss the application filed by the defence for Mr Kenyatta ("Defence") pursuant to Article 64(4) of the Statute ("Application")¹ and the consequences of the withdrawal of the charges against Mr Muthaura for the case against Mr Kenyatta.²
2. During the conference the Defence made oral submissions regarding the evidence underlying the charges as confirmed.³ In the interests of time, the Chamber requested the Defence to submit any further submissions on this issue in writing.⁴
3. At the start of the status conference, the Chamber announced that the Office of the Prosecutor ("Prosecution") would be given the opportunity to respond to allegations made by the Defence about misconduct by the Prosecution.⁵ However, due to time constraints, the Prosecution was not able to respond and will be allowed to respond in writing.
4. As indicated during the status conference, the Chamber also had questions on factual and legal issues arising from the Application and related written submissions of the parties. In view of the fact the legal issues have never been

¹ Defence 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, 5 February 2013, ICC-01/09-02/11-622.

² See Order scheduling a status conference, 14 March 2013, ICC-01/09-02/11-695.

³ ICC-01/09-02/11-T-24-ENG ET, pages 6-13.

⁴ ICC-01/09-02/11-T-24-ENG ET, page 12, lines 11-12.

⁵ ICC-01/09-02/11-T-24-ENG ET, page 3, lines 13-16.

litigated before the Court, the Chamber considered it appropriate to give the parties the opportunity to make observations on these issues. Since not all issues could be addressed during the status conference, the Chamber will allow the parties to give their observations in writing. Therefore, the Chamber hereby orders the Defence, the Prosecution and the Legal Representative to file written submissions on the following questions, as appropriate, by 28 March 2013:

- 1) Is a Trial Chamber competent to decide retroactively whether the non-disclosure (either as a result of i) bad faith, ii) negligence, or iii) an innocent oversight) affected the fairness, integrity, or validity of the confirmation proceedings? If so, what factors should the Trial Chamber take into account when assessing the impact of the non-disclosure?

- 2) Is a Trial Chamber competent to order the Prosecution to seek amendment of, or withdraw, charges or to stay or terminate trial proceedings in case of a finding of deficiencies in the confirmation process?

- 3) (For the Prosecution only) Did the Prosecution, in addition to the evidence presented to the Pre-Trial Chamber, have other evidence to support the charges against Mr Kenyatta at the time of the confirmation hearing? What proportion of the prosecution evidence relating to Mr Kenyatta's criminal responsibility contemplated for use at trial was obtained post-confirmation?

- 4) What, if any, criteria or pre-conditions need to be met for the Prosecution to investigate post-confirmation? Were the post-confirmation investigations in the present case proportional to the reasons given by the Prosecution?

6) (For the Prosecution only) With reference to para. 28 of the Prosecution's written submissions of 8 March 2013, could the Prosecution clarify how many witnesses retracted their willingness to testify after confirmation, and at what moment the Prosecution learned that this was the case? What gave the Prosecution reason to believe, prior to confirmation, that these witnesses were in fact willing to testify?

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ORDERS the parties and Legal Representative to file their observations on the questions as indicated in paragraph 4 by 28 March 2013. Any responses to the answers filed on 28 March 2013 are to be filed by 9 April 2013;

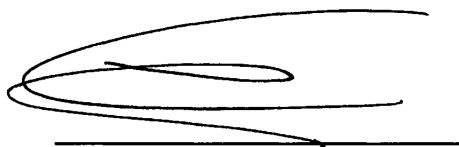
ORDERS the Defence to also file the submissions referred to in paragraph 2 by 28 March 2013, such filing not to exceed 40 pages;

ORDERS the Prosecution to also file its response referred to in paragraph 3 by 28 March 2013.

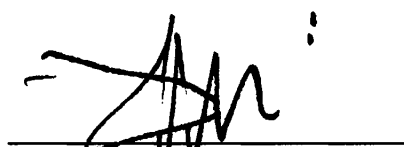
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding



Judge Christine Van den Wyngaert



Judge Chie Eboe-Osuji

Dated this 20 March 2013

At The Hague, The Netherlands