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No.: ICC-01/09-02/11  
Date: 7 February 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. FRANCIS KIRIMI MUTHAURA AND UHURU  
MUIGAI KENYATTA***

**Public**

Prosecution observations on the possibility of the  
trial being held in Kenya or, alternatively, in Arusha, Tanzania

**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  
Adesola Adeboyejo

**Counsel for Francis Kirimi Muthaura**

Karim A. Khan QC, Essa Faal, Kennedy Ogetto and Shyamala Alagendra

**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**

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

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

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**Defence Support Section**

**Victims and Witnesses Unit**

Maria Luisa Martinod-Jacome

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

1. In accordance with the Trial Chamber's "Order requesting observations in relation to the "Defence Application for change of place where the Court shall sit for Trial""<sup>1</sup>, the Prosecution hereby submits its observations on the possibility of the trial being held in Kenya or, alternatively, in Arusha, Tanzania.
2. The Prosecution in principle favours bringing trials as close as possible to the victims and acknowledges that one way to do this is by holding them, or portions thereof, in the region where most victims reside and/or where the crimes occurred.<sup>2</sup> Holding the trial in either of these locations, however, raises a number of issues that require careful consideration.
3. *First*, the provision of adequate safety and security to witness, victims and ICC staff is a necessary pre-condition to determining that the trial take place either in Kenya or Arusha, Tanzania. This determination will need to take into account the unique security challenges and unprecedented level of witness interference in this case.<sup>3</sup> These security challenges and their impact on victims and witnesses have been canvassed in previous Prosecution filings.<sup>4</sup> They include the extra-judicial killings and forced disappearances of individuals with direct knowledge of the Accused's involvement in the post-election violence, perceived Prosecution witnesses being threatened not to testify against the Accused,<sup>5</sup> and the persistent and systematic attempts, including by individuals holding themselves out as associates of the Accused, to bribe and/or threaten witnesses not to testify at trial or to

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<sup>1</sup> ICC-01/09-02/11-602.

<sup>2</sup> In addition, the Office of the Prosecutor will support each and every effort to engage the victims and the Kenyan people through media – radio, live feed, television – and outreach.

<sup>3</sup> See ICC-01/09-02/11-427, ICC-01/09-02/11-429, ICC-01/09-02/11-522.

<sup>4</sup> See e.g. ICC-01/09-02/11-519-Red; ICC-01/09-02/11-562-Red2.

<sup>5</sup> See e.g. ICC-01/09-02/11-519-Red; ICC-01/09-02/11-562-Red2.

provide false exculpatory testimony.<sup>6</sup> The Prosecution's concern is that the attempts to interfere with trial witnesses would increase if the trial were held in Kenya and, to a lesser extent, in Arusha, Tanzania, where the Accused have significant influence, where the public interest in the trial is extremely high and where the Court has no infrastructure in place to ensure the security of trial witnesses.

4. *Second*, the views and concerns of the witnesses and victims should be taken into account. Some of the witnesses and victims may be unwilling to testify in the region; this would particularly apply to witnesses who are in the court's protection program or who have otherwise relocated from Kenya specifically for protection reasons. Changing the location of testimony at this late hour may therefore adversely impact their well-being and/or even change their attitude towards testifying. Should the Chamber so order, the Prosecution will contact the witnesses who are not under the care of the Victims and Witnesses Unit and place their views and concerns before the Court, and it suggests that the VWU contact the witnesses under its care to the same end. More generally, the Prosecution questions the assumption in the Defence application that the Kenyan public would welcome the conduct of part or all the proceedings in or near Kenya. Persons have expressed to OTP staff members an opposite view, reflecting distrust that a fair trial on these charges, free of outside influence and corruption of the evidence, can take place anywhere in the region. In canvassing the views of victims and witnesses, these concerns should also be explored.
5. *Third*, the logistical implications of a change of location should not delay the trial. The Prosecution wishes the trial to begin as expeditiously as possible and thus the logistics for any proceedings in Kenya or in Arusha, Tanzania should be organised between now and 11 April 2013, the scheduled start

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<sup>6</sup> See e.g ICC-01/09-02/11-519-Red; ICC-01/09-02/11-562-Red2.

date for trial. In this respect, it is important to note that some witnesses reside outside of Kenya and that, from a logistical point of view, it may be more or equally difficult to receive their testimony in Kenya or in Arusha, Tanzania than it would in The Hague.

6. As mentioned above, one suggestion may be to hold portions of the trial in Kenya or Arusha, Tanzania, such as the opening/closing statements, the unsworn oral statement pursuant to Article 67(1)(h), the testimonies of the two Accused (should they choose to proceed therewith), and/or the testimonies of international experts. Hearings of this nature could strike the right balance between bringing the trial as close as possible to the affected region and thus satisfy the public interest in the case, and the need to protect witnesses.<sup>7</sup> If so desired, the Chamber might also be able to use these opportunities to visit locations of relevance to the case in the presence of the parties ("site visits"). The Prosecution is prepared to make observations as to possible site visits should the Chamber require it to do so.



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Fatou Bensouda,  
Prosecutor

Dated this 7<sup>th</sup> of February 2013  
At The Hague, The Netherlands

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<sup>7</sup> In principle there will be less security concerns in respect of the international expert.