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No.: ICC-01/09-02/11
Date: 30 October 2013

TRIAL CHAMBER V(B)

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public

**Public redacted version of the Prosecution response to the Defence application
to vacate the 12 November 2013 date for the commencement of trial**

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

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Introduction

1. The Defence has applied to vacate the trial date of 12 November 2013 in this matter (the “Defence Application”). The Prosecution acknowledges that there are some grounds for such a change and does not oppose the Defence Application.

Confidentiality

2. This Defence Application was filed confidentially. This filing is similarly marked.¹ A public redacted version is filed concurrently.

Submissions

3. The Prosecution does not accept that grounds (ii)-(v) as set out in paragraph 2 of the Defence Application amount to grounds which would justify the vacation of the current trial date.
4. The Prosecution does not accept the need to hold an evidential hearing to determine the Defence Application for a Permanent Stay of Proceedings (“the Stay Application”).²
5. The Prosecution does not accept that the Chamber will be unable to determine the Stay Application before the commencement of the trial.
6. The Prosecution does not accept that [REDACTED] or other [REDACTED] investigations are a matter which should delay the start of the trial. [REDACTED] is not a scientific activity: it is an evidential inference to be drawn from other evidential material. The Prosecution has previously sought the help of the [REDACTED] who may have material relevant to this case and been rebuffed. Once the Defence made it known in mid-2013 that

¹ See Regulation 23bis(2) of the Regulations of the Court

² ICC-01/09-02/11-822

this material might be relevant or helpful to the Defence case those same [REDACTED] appear to have offered immediate and unconditional help. The Defence has had years to gather such evidence and draw such inferences, should it seek to rely on them.

7. The Prosecution does not accept that the Accused's presidential duties are a reason to delay the trial. He assumed those duties in the full knowledge that he was facing trial at the International Criminal Court.
8. In the interests of judicial economy, given that the Prosecution does not oppose the Defence Application, the Prosecution will not further develop the issues to which grounds (ii)-(v) give rise.
9. The Prosecution does accept that the factual proposition set out in ground (i) in paragraph 2 of the Defence Application is, in part, correct. While not all of the "facts and matters raised by Stay Application require further investigation by the Prosecution" (the majority of them are matters which have been exhaustively rehearsed previously), the allegations which are summarised at paragraphs 4-7 of the Stay Application are fresh material, raised for the first time by the Defence. While these allegations – even if they are ultimately established on the facts – do not constitute grounds for a stay of proceedings, the Prosecution accepts that they merit further investigation. Those investigations are ongoing and the date on which they may be concluded is uncertain. When they are concluded the Prosecution will need time to consider what, if any, impact the results of those investigations may have on the Prosecution case.
10. The Chamber, the Defence and the Legal Representative of the Victims will be aware that the Prosecution's witness presentation plans have had to be significantly revised in the light of the Chamber's 23 October Decision on Prosecution request to add P-548 and P-66 to its witness list, requiring the

Prosecution not to call any [REDACTED] witnesses “until at least the end of January 2014”.³ Six of the first ten originally proposed witnesses fall into that category.

11. The Prosecution now faces the prospect of being unable to call the witnesses who are at the heart of the dispute in this case (the [REDACTED] witnesses) in the three months following the commencement of the trial if that occurs on 12 November 2013. The Chamber will spend until the end of January 2014 hearing evidence from a succession of witnesses whose evidence, while important, does not relate directly to the acts and conduct of the accused.
12. Furthermore the Prosecution faces genuine difficulties in terms of securing the attendance of replacement witnesses at relatively short notice. This matter has been explored in the Prosecution’s notification of its amended order of witnesses.⁴
13. Rather than presenting a case of which the chronology is dictated by the availability of witnesses, and where there may be significant delays caused by the unavailability of witnesses whose travel arrangements have been made at short notice, the Prosecution position is that the presentation of evidence should take place in a logical and coherent sequence.

Conclusion

14. For the foregoing reasons, the Prosecution does not oppose the Defence Application, save in that the new date for the commencement of the trial should be fixed as Monday 3 February 2014, the first working day after the

³ ICC-01/09-02/11-832

⁴ ICC-01/09-02/11-839

expiry of the time bar imposed by the Chamber's decision of 23 October 2013.⁵



Fatou Bensouda,
Prosecutor

Dated this 30th day of October, 2013
At The Hague, The Netherlands

⁵ ICC-01/09-02/11-832, para. 14