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International Criminal Court

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Date: **13 August 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 13 August 2013 Prosecution's observations on the Chamber's "Order for further observations on where the Court shall sit for trial" (ICC-01/09-02/11-781)

Source: **The Office of the Prosecutor**

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

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Introduction

1. The Prosecution hereby provides observations in accordance with the Chamber's 29 July 2013 "Order for further observations on where the Court shall sit for trial" ("Order").[1] The Prosecution submits that in the present circumstances the statutory framework of the Court precludes the Chamber from "issu[ing] a recommendation to the Presidency"[2] to change the place where the Court shall sit for trial.

Confidentiality

2. This application is designated "confidential" because it refers to the Prosecution's records of security related incidents involving its witnesses. A public redacted version is being filed.

Submissions

I. Rule 100(2) of the Rules of Procedure precludes the Chamber from issuing a recommendation to the Presidency in the present circumstances.

3. Articles 3 and 62 of the Rome Statute establish that the "place of the trial" shall be "The Hague in the Netherlands", "[u]nless otherwise decided". Rule 100 sets out the procedure by which the trial venue may be moved outside the Netherlands. For present purposes, Rule 100(2) is the operative provision. It provides that "[a]n application or recommendation changing the place where the Court sits may be filed . . . either by the Prosecutor, the defence or by a majority of the judges of the Court".[3] This is

[1] ICC-01/09-02/11-781.
[2] ICC-01/09-02/11-781, para. 7.
[3] S*ee also Prosecutor v. Lubanga*, ICC-01/04-01/06-T-75-ENG ET WT, p. 30, lines 11-17 ("the Office of the Prosecutor may wish to bear in mind the provisions of Rule 100(2) which provides you with the opportunity of making an application or a recommendation as regards changing the place where the Court sits"); Otto Triffterer, 'Place of trial', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the*

the only provision in the Statute or Rules that specifies the actors that can initiate the procedure for determining whether to change the place where the Court sits for trial.

4. Rule 100(2) answers the Chamber's question of whether it "may consider the [possibility of a venue change] on its own and issue a recommendation to the Presidency".[4] The answer, in the Prosecution's respectful view, is "no". Rule 100(2) is an unambiguous provision that lists all actors that are permitted to make an application or recommendation to the Presidency for a change of venue: (i) the Prosecution; (ii) the Defence; and (iii) a majority of the judges of the Court. The wording of the provision demonstrates that the three-actor list is intended to be exhaustive. The use of "or" shows the drafters' intention to limit applications or recommendation to only three actors. The use of "either" in the provision emphasises the closed nature of the list. A review of the *travaux preparatoires* of Articles 3 and 62 and Rule 100 reveals no contrary interpretation.

5. The three-actor list in Rule 100(2) does not include the Trial Chamber and, in the Prosecution's view, the closed list prevents a *proprio motu* power of the Trial Chamber being read into the rule. In the *Ntaganda* case, the Appeals Chamber refused to accept the invocation of an "additional substantive prerequisite", when the Statute already "list[ed] the substantive prerequisites . . . exhaustively".[5] The same analysis applies here, since Rule 100(2) contains an "exhaustive[]" list of the actors with standing to make an application or recommendation to the Presidency. Had the drafters of the Statute and Rules wanted to provide the Chamber with the authority to

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International Criminal Court (2nd ed., C.H.Beck, Hart, Nomos, 2008), p. 1188, margin no. 13; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP, 2010), p. 748.

[4] ICC-01/09-02/11-781, para 7.

[5] *Situation in the DRC*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", ICC-01/04-169, 13 July 2006, paras 42, 44.

make a recommendation *proprio motu*, or leave the possibility open, they would have included words to that effect. Instead, they chose to include a closed list, which forecloses any such possibility.

6. Likewise, the phrase "judges of the Court" in Rule 100(2) refers to the plenary of judges of the International Criminal Court, rather than those sitting in a particular Trial Chamber. This interpretation is supported by the language used in Article 36, which stipulates that "there shall be 18 *judges of the Court*". In contrast, where the Statute and Rules deal with the judges of a specific Chamber, this is made explicit in the text, *e.g.*, in Articles 39, 57(2)(a) and 74(1) and Rules 34(3), 159(2) and 223.

7. Finally, no other provisions of the Statute or Rules enable the Trial Chamber to set aside Rule 100(2) and make a recommendation to the Presidency "on its own".[6] This includes Article 64(6)(f), a "catch all" provision that gives the Chamber residual power to rule on matters not otherwise regulated in the Statute or Rules. Article 64(6)(f) must be read with Article 64(1), which explains that the "functions and powers . . . set out in this article shall be exercised *in accordance with this Statute and the Rules*".[7] Thus, when a matter is regulated elsewhere in the Statute or Rules, those statutory or regulatory provisions are controlling and Article 64(6)(f) does not provide the Chamber with authority to depart from them.[8]

8. The Appeals Chamber has confirmed this interpretation. In the *Lubanga* case, the Appeals Chamber overturned Trial Chamber I's decision to grant leave to appeal to The Netherlands and the Democratic Republic of the Congo on the basis that the Trial Chamber acted *ultra vires* by invoking

[6] ICC-01/09-02/11-781, para 7.
[7] Emphasis added.
[8] For the same reason, other provisions of general application like Articles 64(2) and (3)(a) and 64(8)(b), and Rules 134 and 140(1) cannot be used to supplant the application of Rule 100(2).

Article 64(6)(f) as its authority to grant leave to appeal.[9] The Appeals Chamber noted that decisions subject to appeal are exhaustively regulated in Articles 81 and 82 and held that the Trial Chamber's view that granting the appeal may have been "desirable or even necessary" did not justify a departure from the "clearly enumerated" terms of the Statute.[10] The same is true here. The actors that have standing to make a recommendation to the Presidency are "clearly enumerated" in Rule 100(2), and since the Chamber is not one of the enumerated actors, it is unable to make a recommendation on its own.

9. Similarly, the procedure followed in the *Ruto and Sang* case, whereby the Trial Chamber V(A) issued a "[r]ecommendation to the Presidency on where the Court shall sit for trial",[11] is inapposite. In that case, proceedings were initiated pursuant to Rule 100(2) by a joint Defence application to the Presidency,[12] which then requested the Trial Chamber to "receive observations" and make a "recommend[ation]".[13] In this case there is no such application.

10. In sum, in this procedural context the Chamber is unable to make an application or recommendation to the Presidency.

[9] *Prosecutor v. Lubanga*, Decision on the "Urgent Request for Directions" of the Kingdom of the Netherlands of 17 August 2011, ICC-01/04-01/06-2799 OA19, 26 August 2011.
[10] ICC-01/04-01/06-2799 OA19, paras 7-8.
[11] *Prosecutor v. Ruto and Sang*, Order for further observations on where the Court shall sit for trial, ICC-01/09-02/11-781, 29 July 2013, p. 1 (introduction).
[12] *Prosecutor v. Ruto and Sang*, Joint Defence Application for a Change of Place where the Court Shall Sit for Trial, ICC-01/09-01/11-567, 24 January 2013.
[13] *Prosecutor v. Ruto and Sang*, Decision on "Joint Defence Application for a Change of Place where the Court Shall Sit for Trial", ICC-01/09-01/11-568, 24 January 2013, p. 3 (disposition).

II. Changing the place where the Court shall sit for (portions of) the trial is not in the interests of justice.

11. As the Order notes, the Chamber has denied the Muthaura application as moot.[14] Since there are no outstanding applications by any of the three actors enumerated in Rule 100(2), the Prosecution respectfully submits that it is not required to submit observations on "whether the opening of trial and/or another appropriate portion of trial shall be held in Kenya or Tanzania".[15] In the event the Chamber disagrees, the Prosecution presents its observations, updated from those it submitted on 7 February 2013[16] and in line with those made to the Presidency in the *Ruto and Sang* case.[17]

a. Public attitudes toward the ICC process in Kenya

12. Since its original submissions to the Chamber, the Prosecution now believes that circumstances have changed such that holding any part of the trial in Kenya would not be in the interests of justice. Recent events reveal the existence of a high level of hostility towards the ICC in Kenya.[18]

b. The Government of Kenya's position on ICC trials

13. The Prosecution is concerned by the ongoing campaign by elements of the Government of Kenya to discredit the Court and derail the present case. In particular, on 2 May 2013 the Permanent Mission of the Republic of Kenya to the United Nations requested that the United Nations Security Council bring the present case against Mr Kenyatta "to a halt".[19] Information

[14] ICC-01/09-02/11-781, para. 7.
[15] ICC-01/09-02/11-781, para. 9.
[16] ICC-01/09-02/11-631.
[17] ICC-01/09-01/11-809.
[18] *See*, *e.g.*, a recent poll that shows support for the ICC trials at 7% in Central Province and 39% across Kenya: Ipsos Synovate Kenya, *Political Barometer Survey*, 10 July 2013, http://www.ipsos.co.ke/home/index.php/downloads; Nation Reporter, *Daily Nation*, 'Less Kenyans want trials to continue at The Hague', 10 July 2013, http://www.nation.co.ke/News/Less-Kenyans-want-Hague-trials/-/1056/1911408/-/fkxqk/-/index.html.
[19] Confidential Annex B, p. 12, para. 4.

regarding this confidential request was later leaked and published in the Kenyan media.[20]

14. Similarly, members of the Kenyan government have continued to speak out against the ICC trial and this has also been widely publicised in the Kenyan media.[21] The Prosecution believes that this type of message is being purposefully disseminated in an effort to cast the Court in a negative light and rally Kenyan public opinion against the Court.

15. In the same vein, the African Union ("AU") adopted a resolution in May 2013,[22] widely publicised in the Kenyan media, in which it "deeply regret[ted] the Decisions of the Pre-Trial Chamber II and the appeals Chamber of the ICC on the admissibility of the cases . . . which denied the right of Kenya to prosecute" these cases.[23] The AU also "support[ed] and endorse[d] . . . a National Mechanism to investigate and prosecute the cases".[24] The Prosecution believes that the combined effect of this resolution and related media reports in the Kenyan press[25] have served to further rally Kenyans against the Court by fostering the perception that the Court is a foreign entity that was imposed on Kenya by illegitimate, western, interests.

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[20] Peter Ng'etich, *AllAfrica*, 'Kenya: UN Security Council Bid Not Linked to ICC – Kenya', 3 June 2013, http://allafrica.com/stories/201306030956.html; Wainaina Ndungu, *The Star*, 'Letter To Security Council Reeks Of Official Impunity', 14 May 2013, http://www.the-star.co.ke/news/article-120319/letter-security-council-reeks-official-impunity; Nzau Musua, *AllAfrica*, 'Kenya: Macharia Justifies His ICC Letter to UN', 22 May 2013, http://allafrica.com/stories/201305230154.html.

[21] Felix Olick, *Standard Digital*, 'Attorney General Githu Muigai differs with International Criminal Court Prosecution over court co-operation', 24 May 2013, http://www.standardmedia.co.ke/?articleID=2000084399&story_title=ag-differs-with-icc-prosecution-over-court-co-operation; Benjamin Muindi, *Daily Nation*, 'ICC suspects be tried in Kenya, says Ngilu', 3 November 2012, http://www.nation.co.ke/News/politics/ICC-suspects-be-tried-in-Kenya-says-Ngilu/-/1064/1610732/-/4hjy9g/-/index.html.

[22] *See* confidential Annex C.

[23] Confidential Annex C, p. 1, para. v (emphasis omitted).

[24] Confidential Annex C, p. 2, para. vi (emphasis omitted).

[25] Standard Digital Reporter, *Standard Digital*, 'AU leaders urge International Criminal Court to return cases against Uhuru Kenyatta, William Ruto back to Kenya', 27 May 2013, http://www.standardmedia.co.ke/?articleID=2000084600&story_title=au-leaders-urge-icc-to-return-trials-to-kenya; *AllAfrica*, 'African Union Wants ICC to Drop Kenya Cases', 28 May 2013, http://allafrica.com/stories/201305281262.html; Wachira Maina, *The East African*, 'ICC: Kenya's is a lose-lose strategy even if the African Union has its way', 7 June 2013, http://www.theeastafrican.co.ke/OpEd/comment/Kenya-s-is-a-lose-lose-strategy-even-if-the-AU-has-its-way--/-/434750/1875658/-/wp9sr1/-/index.html.

16. These circumstances have created a context in which elements of the Kenyan population may not welcome the ICC or its staff should any portions of the trial be held in Kenya. Indeed, the Prosecution is concerned that Kenyans who harbour hostility toward the Court may pose a risk to the safety of its staff. The Prosecution also does not discount the risk that demonstrations could interrupt or intentionally delay the proceedings.

c. Monitoring and security of confidential information

17. A recent report from the OTP's Operational Support Unit ("OSU")[26] indicates that, given the present circumstances, holding any part of the trial in Kenya would carry a high risk of surveillance of OTP staff and its general activities by the Kenyan authorities. In its report, the OSU describes a "very high risk of monitoring of OTP, staff, documents, information and general activities . . . during any trial in the country".[27] The OSU indicates the existence of actors with "extensive capabilities" and notes that "[m]onitoring would likely take place in the form of covert electronic surveillance of OTP's staff members' hotel rooms, office spaces and the premises" of the Court.[28] The Prosecution believes that this type of monitoring may also extend to the members of the judiciary and their assistants.

18. The Prosecution's potential inability to maintain the confidentiality of its information may interfere with prosecutorial and judicial activities. Further, confidential information falling into the hands of the wrong people may put the lives of witnesses or people who have cooperated with the Court in jeopardy.

[26] *See* confidential, *ex parte*, Annex A.
[27] Confidential, *ex parte*, Annex A, p. 1 (emphasis omitted).
[28] Confidential, *ex parte*, Annex A, p. 2.

d. Witness interference and witness security concerns

19. As the Prosecution has previously submitted,[29] this case is taking place in a background context of witness interference, and incidents involving Prosecution witnesses have continued unabated since Mr Kenyatta's election in March 2013. [REDACTED]. One cannot also ignore that the Prosecution encountered similar problems in the companion case of *Ruto and Sang*. The Prosecution believes that the number and gravity of these incidents will only intensify as the trial date approaches.

20. The high levels and broad scope of witness interference, and the capacity and intent of supporters of the Accused, indicate that risks to witnesses during a trial in Kenya may be high and would be difficult to mitigate. For example:

- Kenyan immigration authorities will have access to witness details as they come into Kenya to testify;
- Individuals who will be employed locally to support the trial may be vulnerable to bribery and pressure;
- Witnesses are likely to make contact via telephone or email with family and friends in Kenya, which may be subject to monitoring by Kenyan officials;
- As a corollary of their increased exposure, witness' identities may be illicitly disclosed in social and news media.

21. The Prosecution believes that the same risks apply to a trial in Arusha, Tanzania. Given the close nature of the relationship between Kenya and Tanzania through the East African Community,[30] the OTP cannot rule out attempts to access national intelligence assets in Arusha. Further, the short

[29] *See* ICC-01/09-02/11-633-Conf-Exp-AnxA and ICC-01/09-02/11-633-Conf-AnxA-Red, paras 5-7.
[30] East African Community Treaty, entered into force 7 July 2000, http://www.eac.int/treaty.

geographic distance between Nairobi and Arusha may allow any potential disruption to the trial in Nairobi to take place just as easily in Arusha, and the Prosecution is concerned about ability of the ICTR or Tanzanian security services to contain any hostile manifestations.

22. Given its heavy reliance on other Court divisions and the Host State to provide security at the trial stage, the OTP's capacity to mitigate risks in Kenya or Tanzania would be limited. It is unlikely that the planning and execution of measures to address these concerns will be able to be carried out before the commencement of trial.

23. Given the short period of time in which to file this submission, the Prosecution has not been able to contact its witnesses to hear their views directly on this matter. However, from interviews with Mungiki insider witnesses over the course of the investigation it is reasonable to assume that, given the history of their relationship with the Kenyan authorities, in their view it would not be safe for them to give evidence in Kenya or Tanzania.

24. The Prosecution re-iterates its willingness to contact its witnesses directly on this matter in order to place their views and concerns before the Court, should the Chamber so order.[31] It is the Prosecution's wish to ensure that the proceedings in the trial take place in an atmosphere of serenity and fairness, as befits so important a case.

Conclusion

25. For the foregoing reasons, the Prosecution respectfully submits that, in the current procedural context, the Chamber lacks the authority to submit a recommendation to the Presidency to change the place where the Court shall sit for trial. If the Chamber disagrees, the Prosecution opposes

[31] *See* ICC-01/09-02/11-631, para. 4.

changing the place where the Court sits for the trial, or any part thereof, as being against the interests of justice and its witnesses.

Fatou Bensouda,
Prosecutor

Dated this 13th day of August, 2013
At The Hague, The Netherlands