

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/09-02/11  
Date: 14 November 2013

**TRIAL CHAMBER V(B)**

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

**SITUATION IN THE REPUBLIC OF KENYA**

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

**PUBLIC REDACTED VERSION**

**Defence Observations on the Prosecution's Further Investigations  
Resulting from the Defence Application for a Permanent Stay of Proceedings Due  
to Abuse of Process**

**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

**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 the Victims**

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

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Herman Von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

Patrick Craig

**Detention Section**

**Victims Participation and Reparations Other  
Section**

## I. INTRODUCTION

1. The Defence for Uhuru Kenyatta ('Defence') observes that the 'Prosecution opposition to the Defence application for a permanent stay of proceedings' ('Abuse of Process Response')<sup>1</sup> states that the Prosecution is undertaking further investigations as a result of information disclosed in the 'Defence Application for a Permanent Stay of the Proceedings due to Abuse of Process' ('Abuse of Process Application').<sup>2</sup>
2. The Defence requests Trial Chamber V(B) ('Chamber') to await the outcome of those investigations and the submission of further arguments by the parties before rendering its decision on the Abuse of Process Application. The Defence undertakes to provide submissions promptly upon the completion of both parties' further investigations and within a reasonable time before the commencement of trial.
3. This document is filed confidentially as it pertains to confidential filings and includes information about protected witnesses and ongoing Defence and Prosecution investigations. A public redacted version is filed concurrently.

## II. PROCEDURAL HISTORY

4. On 10 October 2013, the Defence filed the Abuse of Process Application.<sup>3</sup>
5. On 29 October 2013, the Common Legal Representative of the Victims ('Legal Representative') submitted the 'Victims' Response to "Defence Application for

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<sup>1</sup> ICC-01/09-02/11-848-Conf.

<sup>2</sup> ICC-01/09-02/11-822-Conf.

<sup>3</sup> ICC-01/09-02/11-822-Conf.

a Permanent Stay of the Proceedings due to Abuse of Process''' ('Victims' Response').<sup>4</sup>

6. On 1 November 2013, the Prosecution submitted its Abuse of Process Response.<sup>5</sup>

### III. SUBMISSIONS

7. The Defence requests the Chamber to permit the Defence to provide further submissions at a date to be determined in the future, following completion of investigations by both parties into the matters raised in the Defence's Abuse of Process Application and the Prosecution's Abuse of Process Response.
8. In the Abuse of Process Response, the Prosecution informed the Court that 'the Prosecutor has initiated an investigation – undertaken by an investigative team separate from that responsible for the current case – to determine whether there is sufficient objective information to suggest that P-0118 has been involved in offences against the administration of justice under Article 70.'<sup>6</sup>
9. Notwithstanding the Prosecution's opposition to a permanent stay of proceedings due to abuse of process and the holding of an evidentiary hearing to determine the matters raised by the Defence,<sup>7</sup> the Prosecution has stated that it 'views all serious allegations of witness interference with the utmost concern' and that '[b]oth parties must take steps to investigate allegations of evidence tampering and to remedy the situation should tampering be established.'<sup>8</sup>

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<sup>4</sup> ICC-01/09-02/11-840-Conf.

<sup>5</sup> ICC-01/09-02/11-848-Conf.

<sup>6</sup> ICC-01/09-02/11-848-Conf, para. 77.

<sup>7</sup> ICC-01/09-02/11-848-Conf, paras 71 to 75.

<sup>8</sup> ICC-01/09-02/11-848-Conf, para. 76.

10. The Prosecution has also acknowledged that its investigations into the allegations against Witness 118 'may shed light' on the Defence's allegation that intermediary [REDACTED] was also engaged in misconduct.<sup>9</sup>
  
11. At the present time, the Defence's investigations into the extent of the abuse of process are ongoing. The Defence is currently taking further statements from witnesses now within VWU protection concerning the full extent of the interference with justice by Witness 118, [REDACTED], Witnesses 11 and 12 and other alleged Mungiki 'insiders.' This evidence adds further substance to the facts relating to the abuse of process and will need to be considered by the Chamber and disclosed to the Prosecution in order to ensure a proper assessment of the matters in issue. Contrary to the Prosecution's assertion that the abuse of process argument is insufficient to warrant a stay of the proceedings, the Defence submits that the extent of the abuse is such that it is now 'impossible to piece together the constituent elements of a fair trial.'<sup>10</sup> The further evidence being collated by the Defence supports this submission.
  
12. The Defence is also in the process of investigating the information contained in the Abuse of Process Response, and in particular, the nature of the evidence revealed by the investigations of [REDACTED],<sup>11</sup> the Prosecution investigator and their impact upon the issues. By way of example:
  - (a) At paragraph 68 of [REDACTED] witness statement, it is apparent that [REDACTED] did not disclose to the Prosecution [REDACTED];<sup>12</sup>

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<sup>9</sup> ICC-01/09-02/11-848-Conf, para. 95.

<sup>10</sup> *The Prosecutor v. Lubanga*, ICC-01/04-01/06-2582, para. 55.

<sup>11</sup> ICC-01/09-02/11-848-Conf-AnxA.

<sup>12</sup> ICC-01/09-02/11-822-Conf, paras 43; ICC-01/09-02/11-822-Conf-AnxA.1.

(b) In paragraph 70 of [REDACTED] witness statement, the acts and conduct of [REDACTED]. However, no explanation is given for the passages in which Witness 12 and [REDACTED]:

- (i) [REDACTED]<sup>13</sup>
- (ii) [REDACTED].<sup>14</sup> [REDACTED].<sup>15</sup>
- (iii) [REDACTED].<sup>16</sup>
- (iv) [REDACTED].<sup>17</sup>

13. Furthermore, no explanation is given by the Prosecution for the failure to make independent checks necessary to fulfil the Prosecutor's duties under Article 54 of the Statute in order to verify the hearsay reports of the assertions by Witnesses 11 and 12. Evidence that was subsequently obtained by the Prosecution contradicted key parts of the allegations, but is not referred to by [REDACTED] in his statement.<sup>18</sup>

## **V. RELIEF**

14. The Defence respectfully requests the Chamber to:

- (i) Permit the Defence to provide further submissions at a date to be determined in the future, following the conclusion of investigations relevant to this matter by both parties and within a reasonable time before the commencement of trial; and

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<sup>13</sup> KEN-OTP-0089-0087 from 00:15:45 to 00:15:47; Defence translation at KEN-D13-0014-0014, p. 14.

<sup>14</sup> KEN-OTP-0089-0033 from 00:04:53 to 00:04:55; Defence translation at KEN-D13-0014-0358, p. 5.

<sup>15</sup> KEN-OTP-0089-0033 from 00:05:01 to 00:05:20; Defence translation at KEN-D13-0014-0358, p. 5.

<sup>16</sup> KEN-OTP-0089-0034 from 00:07:34 to 00:07:45; Defence translation at KEN-D13-0014-0369, p. 7.

<sup>17</sup> KEN-OTP-0089-0104 from 00:10:36 to 00:13:47; Defence translation at KEN-D13-0014-0037, p. 10.

<sup>18</sup> KEN-OTP-0092-0737.

- (ii) Await the outcome of those investigations and the submission of further observations by the parties before ruling on the Abuse of Process Application.

Respectfully submitted,



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Steven Kay QC and Gillian Higgins

On behalf of Uhuru Muigai Kenyatta

Dated this 14<sup>th</sup> day of November 2013

At London, England