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

Date: 16 May 2012

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's Response to the Joint Defence Request to Postpone Setting Trial Date
Pending Appeals Chamber's Determination of Jurisdiction Appeal**

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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**Victims Participation and Reparations
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Other

1. The Prosecution hereby responds to the joint defence Request to Postpone Setting Trial Date Pending Appeals Chamber's Determination of Jurisdiction Appeal ("Defence Request").¹
2. The Defence Request presents a tension between two competing imperatives: the desire to conduct expeditious trials on the one hand, and the desire for judicial economy, and the resolution of a potentially dispositive appeal, on the other. The first consideration would normally counsel in favor of proceeding to trial notwithstanding the pendency of the jurisdictional appeal; the second counsels in favor of postponing trial until the appeal is resolved.
3. Through the Defence Request the accused have waived their right, under Article 67(1)(c) of the Statute, to be tried without undue delay. This being the case, the Prosecution submits that the key question is how the proposed postponement would affect the victims and witnesses on the ground and their communities.

¹ Request to Postpone Setting Trial Date Pending Appeals Chamber's Determination of Jurisdiction Appeal, 25 April 2012, ICC-01/09-02/11-417.

4. Certain elements of Kenyan society have publicly advocated for the commencement of the trials in the Kenya cases as soon as possible to enable the charges to be adjudicated before Kenya's next presidential and parliamentary elections, currently scheduled for March 2013. It is argued that this would ensure judicial finality for those accused, who are expected to stand for office. However, it is clear that even if the trial were to commence today, it could not be concluded before March 2013. In any event, the Court's processes must not be influenced by Kenyan domestic politics. This is the exclusive domain of the Kenyan people. The court decision on the confirmation of charges found substantial grounds to believe the alleged responsibility of some Kenyan leaders for the crimes committed during the post-electoral violence in 2007-2008. The court will continue its work in accordance with the judicial rules, and it should not be expected that it will define the coming electoral process. It is up to Kenyans to define who are the candidates and who will be elected.

5. It is also necessary to consider the impact that the trial date will have on witnesses. Recently, the Prosecution has had to investigate several cases of witness tampering and purported witness exposure, including media reports, videos and internet posts, which claim to have exposed the

identities of protected witnesses. Whilst the investigation of this activity, and any links to the accused, continue, what is clear is that the effect of such actions has been to put Prosecution witnesses under further pressure.

6. Against this backdrop, the Prosecution has serious concerns about the security of witnesses and their families, and submits that their identities should be disclosed to the defence only after the jurisdictional appeal is resolved and it is certain that the case will proceed to trial.
7. In light of the above considerations the Prosecution does not oppose the Defence Request, provided that the accused submit written undertakings to appear for trial, whenever scheduled.

Respectfully submitted,



Luis Moreno-Ocampo,
Prosecutor

Dated this 16th day of May, 2012
At The Hague, The Netherlands