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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 4 June 2013 Prosecution response to the
“Defence Observations on Estimated Time Required to Prepare for Trial”
(ICC-01/09-02/11-735)**

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
James Stewart
Adesola Adeboyejo

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**

Paolina Massidda
Caroline Walter

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel
Didier Preira

Defence Support Section

Victims and Witnesses Unit

Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Fiona McKay

Other

Introduction

1. The Prosecution hereby responds to the “Defence Observations on Estimated Time Required to Prepare for Trial” (“Adjournment Submission”).¹
2. The Adjournment Submission fails to demonstrate that the requested delay – until January 2014 – is warranted. The proposed adjournment would have the trial begin two full years after the Pre-Trial Chamber confirmed the charges against Mr Kenyatta, six years after the commission of the crimes charged, and nine months after the original April 2013 trial date set by this Chamber. The Defence fails to provide a justification for such a lengthy postponement. At most, the Adjournment Submission provides a basis for an incremental delay in the trial schedule – weeks, not months.
3. In the Prosecution’s view, the trial should begin as soon as possible. To this end, the Prosecution is prepared for opening statements and the testimony of the first witnesses to commence on the 9 July 2013 provisional start date currently in place.
4. If the Chamber decides to grant the Defence additional time, the Prosecution submits that the trial should start promptly after the Court’s summer recess. Such a schedule would provide the Defence with adequate time to finalise its preparations, while at the same time balancing the interests of victims, witnesses, and the broader public for the trial to start without further delay. Witnesses in this case have made significant sacrifices to provide evidence regarding the crimes committed during the 2008 post-election violence (“PEV”) and they, like the victims of the crimes, wish this trial to commence without delay. Against this backdrop, any grant of additional time should not exceed that which is strictly necessary to safeguard Mr Kenyatta’s fair

¹ ICC-01/09-02/11-735-Conf; ICC-01/09-02/11-735-Red.

trial rights. The January 2014 start date proposed by the Defence exceeds that threshold and should be rejected.

Confidentiality

5. This document is filed confidentially as a response to a filing so designated.²
A public redacted version will be filed.

Submissions

A. The Defence has already had additional time to prepare.

6. The trial was initially scheduled to begin on 11 April 2013.³ On 7 March 2013, the Chamber vacated the April start date and provisionally set 9 July 2013 as the start date.⁴ This interim adjournment provided three additional months for the Defence to prepare. In the Prosecution's submission, the Chamber should consider this three month block of extra preparation time when evaluating the Defence's current request for an additional lengthy delay.⁵

B. The Adjournment Submission fails to justify the requested adjournment.

7. In its 9 July 2012 scheduling order, the Chamber ruled that "three months between the full disclosure of the prosecution case and the commencement of trial will afford the defence teams sufficient time to carry out all necessary preparations".⁶ The Chamber reiterated this position in its decision denying the Defence's Article 64(4) application, stating that the three month period should "be taken as guidance as to the time needed".⁷
The three month period established by the Chamber thus constitutes the

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

³ ICC-01/09-02/11-451, para 25.

⁴ ICC-01/09-02/11-677, para 10.

⁵ While the stated reason for vacating the April trial date was "the time needed to address and decide the pending applications before [the Chamber]", ICC-01/09-02/11-728, para 126 (citing ICC-01/09-02/11-677), the effect is the same: the Defence has been afforded three additional months to prepare for trial.

⁶ ICC-01/09-02/11-451, para 12.

⁷ ICC-01/09-02/11-728, para 127.

baseline against which the adjournment request should be evaluated. The Defence bears the burden of justifying any additional time over and above that period. As explained below, the seven points raised in the Adjournment Submission fail to satisfy that burden.

(i) Post-confirmation disclosure and redactions in the pre-trial brief.

8. The disclosure statistics relied upon by the Defence are artificially inflated by double counting. The Defence asserts that “from 4 January 2013 until 10 May 2013, the Prosecution has disclosed 12,706 pages of evidence”, and that 57.3% of all incriminatory evidence “was disclosed after 1 January 2013”.⁸ The Defence calculations of the number of pages disclosed after 4 January 2013 fail to acknowledge that multiple versions of the same documents have been disclosed since January in lesser redacted form, in accordance with the Chamber’s rulings on the delayed disclosure of witness identities and the lifting of category B.3 redactions.⁹ The Defence counts each lesser redacted version disclosed since January as a unique document.¹⁰ This approach significantly inflates the figures because many of the re-disclosed materials are interview transcripts that run into hundreds of pages. Annex A lists the affected materials and demonstrates that the figures presented by the Defence are inflated by at least 5,328 pages.¹¹

⁸ ICC-01/09-02/11-735-Red, para 10.

⁹ Some of the documents were disclosed for the first time before January 2013 and re-disclosed after January 2013, whereas some others were disclosed for the first time since January 2013 and later re-disclosed with lesser redactions.

¹⁰ ICC-01/09-02/11-735-AnxB.

¹¹ In Annex A, the Prosecution lists all the documents that were a) disclosed between 4 January 2013 and 10 May 2013 and b) were disclosed more than once either prior to or during the aforementioned dates. By adding up the numbers of pages of these documents, the Prosecution obtained the number of 5,328 pages that the Defence “double-counted”. As explained in the Annex, this is a conservative estimate, as the Prosecution did not include in this count, *inter alia*, the numbers of pages emanating from their third and/or fourth disclosures, or take into account that final versions of interview transcripts of several witnesses were disclosed during the aforementioned dates with different ERNs to the ERNs of their draft transcripts, in effect duplicating the count.

9. With respect to the updated pre-trial brief (“PTB”),¹² any interim disadvantage caused by the remaining redactions should be viewed in context. The Prosecution drafted the PTB in such a way that the need for temporary redactions was minimised to the greatest extent possible. As a result, only five out of 128 paragraphs in the 77-page PTB contain redacted text. This ensures that the Defence has nearly complete visibility into the Prosecution’s factual allegations. The limited redactions in the footnotes relate to the witnesses whose identities have not yet been disclosed in accordance with the Chamber’s rulings. All redactions will be lifted as soon as the Victims and Witnesses Unit (“VWU”) advises that the identities of the remaining witnesses can be disclosed.

(ii) Disclosure of identities of the remaining witnesses for whom delayed disclosure has been authorised.

10. Since the Adjournment Submission was filed, the identity of Witness 334 has been disclosed, along with a version of his statement in which identity-related redactions have been lifted.¹³ Thus, the identities of four trial witnesses (430, 494, 506 and 510) are yet to be disclosed. The Prosecution is ready to disclose their identities as soon as the VWU advises that adequate protective measures are in place.

11. The Prosecution acknowledges that the Defence’s ability to evaluate the evidence of the four witnesses is temporarily limited by the redactions applied to their interview transcripts. However, any interim disadvantage can be cured by measures other than delaying the trial until January 2014. If the trial commences promptly after the summer recess, the Prosecution will undertake not to call Witnesses 494, 506 and 510 within the first ten

¹² ICC-01/09-02/11-732-Conf-AnxB-Red.

¹³ The disclosure of Witness 334’s identity and his related materials in lesser redacted form took place on 3 June 2013.

witnesses. This would afford the Defence additional time to prepare for their testimony, which largely relates to the [REDACTED] and is relatively self-contained. While the Prosecution would prefer to call Witness 430 earlier in its case, it is willing to revisit this preference if the implementation of protective measures prevents his identity being disclosed in the next month. In sum, it is possible for the trial to begin with the testimony of witnesses whose identities already have been disclosed to the Defence, and for whom the Defence has had adequate time to prepare.

12. The above is consistent with the Chamber's guidance that the Defence requires "three months after the date of full disclosure" to prepare.¹⁴ The Prosecution understands from the Chamber's rulings that "full disclosure of the prosecution case" refers to the disclosure of the Prosecution's PTB, evidence and witness lists, and all incriminatory evidence other than that for which delayed disclosure has been authorised.¹⁵ Indeed, the July 2012 scheduling order envisaged the identities of certain witnesses being disclosed after the "[c]ompletion of all disclosure by the prosecution" and inside the final three months before trial.¹⁶

(iii) Redactions to the interview transcripts of Witnesses 217 and 152.

13. The redactions to Witness 217's interview transcripts relate to one of the four witnesses for whom the Chamber has granted delayed disclosure and whose identity has not yet been disclosed. Lifting the redactions would reveal the identity of this witness. The redactions to Witness 217's transcript will be lifted as soon as the VWU advises that the identity of the second witness can be disclosed.

¹⁴ ICC-01/09-02/11-728, para 127.

¹⁵ ICC-01/09-02/11-451, para 12.

¹⁶ ICC-01/09-02/11-451, para 19; *see also* paras 21 and 24 (setting deadlines 60 and 30 days before trial for the identities of witnesses for whom delayed disclosure was authorized).

14. The Defence submissions regarding the redactions to Witness 152's transcripts are moot. The Prosecution has, in line with its obligation to review redactions on an ongoing basis, lifted almost all of the redactions to Witness 152's transcripts and disclosed lesser redacted versions.¹⁷

(iv) [REDACTED].

15. The [REDACTED] should not prevent the commencement of trial. [REDACTED].

16. Moreover, the [REDACTED] cannot constitute a basis for the lengthy adjournment sought.

(v) Transcripts and translations.

17. The transcription/translation of audio files related to [REDACTED] cannot possibly form a basis for the Defence's adjournment request.¹⁸

18. It is wrong for the Defence to suggest that the audio files reveal [REDACTED].¹⁹ What the files actually reveal is [REDACTED].²⁰ As the Chamber is aware, [REDACTED].²¹ [REDACTED].²² [REDACTED] cannot possibly be used as a basis to request more time.²³

(vi) Review of the Second Updated DCC and Updated PTB.

¹⁷ The Defence is incorrect in its assertion that the redactions to Witness 152's transcripts concern his "relationship with [REDACTED]". ICC-01/09-02/11-735-Conf, para 22. The redactions related in large measure to information that tends to identify the location of relatives unconnected to these proceedings. These redactions were retained under the rubric of contact information of family members, as provided in paragraph 58 of the redactions protocol (ICC-01/09-02/11-495-AnxA-Corr).

¹⁸ ICC-01/09-02/11-735-Conf, para 27.

¹⁹ ICC-01/09-02/11-735-Conf, para 27.

²⁰ ICC-01/09-02/11-732-Conf-AnxB-Red, para 95.

²¹ ICC-01/09-02/11-492-Conf-Red, paras 13-21.

²² [REDACTED].

²³ The Defence's arguments regarding the strength of Prosecution evidence (*see, e.g.*, ICC-01/09-02/11-735-Conf, paras [REDACTED], [REDACTED], 28) do not provide a basis for an adjournment. Such merits-based challenges will be dealt with at trial in the usual manner – through the questioning of witnesses and arguments of counsel.

19. The changes made to these documents after the withdrawal of Mr Muthaura's charges were incremental. The work required to review the changes requires a matter of hours and does not constitute a basis for a meaningful adjournment.

(vii) Witness 118 and [REDACTED].

20. The Defence has failed to demonstrate that it needs until January 2014 to examine the role of [REDACTED] and [REDACTED]. The Prosecution informed the Defence on [REDACTED] that [REDACTED] and [REDACTED] had connected the Prosecution with certain witnesses. By the end of the Court's summer recess, the Defence will have had four months to conduct its inquiries regarding [REDACTED] and [REDACTED]. In the Prosecution's submission, this is an adequate period to examine their role. The Adjournment Submission fails to demonstrate in specific and concrete terms why the Defence requires nine months (April 2013-January 2014) to conduct its inquiries.

C. The public interest favors the prompt commencement of this trial.

21. At the first status conference before this Chamber, the former Legal Representative of Victims emphasised that the victims wish the trial to start as soon as possible, and requested that the Chamber set a start date "within one year of the denial of leave to appeal the confirmation decision", *i.e.*, 9 March 2012.²⁴ Similarly, the Common Legal Representative appointed by this Chamber has explained that the prospect of delay is "one of the issues of greatest concern to the victims", and has urged the Chamber to be "very vigilant to any submissions by any party, the intention or effect of which

²⁴ ICC-01/09-02/11-T-18-ENG CT WT, pages 24-25.

would be to delay the commencement of this trial”.²⁵ It is clear that the victims want the case to be resolved on the merits without delay.

22. Witnesses have conveyed the same desire. They have taken significant risks to provide the Court with the evidence it needs to determine the truth in this case. As a result of their decision to cooperate with the Court, many witnesses have required invasive measures to protect their security – in several instances being uprooted from their communities and relocated to unfamiliar surroundings. The witnesses have agreed to such measures because they want the Court to hear the truth about the PEV, but the impact on them and their families is significant. They are eager for the trial to commence (and conclude) so that they can get on with their lives.

23. The Prosecution shares this sentiment. Enormous resources have been dedicated to witness protection in this case – a particularly onerous task given the security challenges inherent in the Kenya situation. The longer the trial is delayed, the greater the exposure of witnesses and the greater the chance that they will be tampered with, resulting in the Chamber being deprived of their evidence at trial. The history of this case shows this concern to be well-founded.²⁶

24. While considerations of victim and witness welfare are not dispositive,²⁷ they are important factors to be considered when evaluating the adjournment request. In the Prosecution’s submission, they require the Chamber to take particular care when balancing its dual duties under Article 64(2) to ensure that the trial is both “fair and expeditious”. The Prosecution acknowledges that the Defence is entitled to an adequate period

²⁵ ICC-01/09-02/11-T-22-ENG ET WT, pages 35-37.

²⁶ *See, e.g.*, ICC-01/09-02/11-732-Conf-AnxB-Red, paras 93, 95.

²⁷ Article 68(1) of the Statute (“These measures [to protect the physical and psychological well-being of victims and witnesses] shall not be prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial”).

to prepare. The Defence is not, however, entitled to superfluous amounts of time. As explained above, the Adjournment Submission fails to demonstrate that the Defence requires an additional seven months (over and above the adjournment of the April 2013 start date already granted) to prepare.

25. There is only one substantive issue to be resolved – the finalisation of protective measures for the remaining four witnesses for whom delayed disclosure has been authorised. This issue need not delay the start of the trial until 2014. As stated above, the Prosecution is willing to call these witnesses later in its case to ensure that the Defence has adequate time to prepare for their testimony. Should additional time be needed, the Defence may request the Chamber to grant a short adjournment before those witnesses testify. In the circumstances, it is possible for the trial to commence with opening statements and with the witnesses for whom all materials have been disclosed to the Defence. In the Prosecution's submission, this course of action would appropriately balance the Chamber's duty to ensure that the trial is both "fair" and "expeditious".

26. Finally, to the extent that there are logistical issues that may prevent the trial from commencing on whatever start date the Chamber sets, the Prosecution respectfully requests that the parties and participants be alerted so that they can undertake the necessary contingency planning.

Conclusion

27. The Prosecution respectfully requests the Chamber to (i) deny the Defence request for an adjournment until January 2014; and (ii) if the Chamber decides to grant the Defence additional time, set the start date of trial promptly after the Court's summer recess.



Fatou Bensouda,
Prosecutor

Dated this 5th day of June 2013
At The Hague, The Netherlands