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

Date: 08 July 2014

TRIAL CHAMBER V(B)

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Robert Fremr
Judge Geoffrey Henderson

SITUATION IN THE REPUBLIC OF KENYA

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

Public document

**With EX PARTE Annex A, available to the Prosecution and the Government of
Kenya only**

**Joint guide to oral submissions to be made by the Prosecution and the
Government of Kenya in response to the Chamber's scheduling order of 4 July
2014 concerning the status conference to take place on 9 July 2014**

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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Other

Introduction

1. This document is filed in response to the Scheduling Order issued by the Chamber on 4 July 2014.¹ The terms of this document have largely been agreed between the Prosecution ('OTP') and the Government of the Republic of Kenya ('GoK'). Where the OTP and the GoK take different views on matters this is clearly indicated.
2. This filing is marked public. It is accompanied by an *ex parte* Annex not to be disclosed to the Defence, but to the Chamber and the GoK alone. The reason is that certain details of the inquiries made by the OTP and of materials supplied by the GoK remain matters which the OTP is entitled to keep confidential during the course of its inquiries.
3. It is submitted that the status conference should start in *ex parte* closed session. The only persons present would be the Judges, their staff and the necessary courtroom staff. This will enable to OTP and the GoK to speak without restraint about the status of their negotiations, their concerns about the individual categories of material in the Revised Request and the further material which would amount to fulfilment of the Revised Request.
4. The *ex parte* closed session should then touch on each category within the Revised Request, as below. The OTP has provided the GoK with a detailed response (letter of 3 July 2014) in which the 'OTP commentary' remarks below are expanded upon.
5. At the conclusion of the *ex parte* submissions on each category, the parties will express their views on what may be dealt with in the presence of Mr

¹ OCC-01/09-02/11

Kenyatta's counsel and whether that can occur in open session. Those submissions and views are indicated in summary in this document.

6. At the conclusion of the *ex parte* hearing Mr Kenyatta's legal representatives and the general public will be invited to be present.
7. The principal issues to be discussed are the eight categories of documents for which requests were made by the OTP in the 'Revised Request' addressed to the GoK and dated 8 April 2014.
8. The OTP has asked for supplementary information to be provided under each of the eight categories of documents. The GoK has undertaken to do so, where the request meets the criteria of relevance and specificity. It has been agreed in principle that this material will be provided as soon as possible and no later than Friday 15 August 2014.
9. GOK is seeking the guidance of the Chamber to determine the issue of whether the request by the OTP adheres to the tripartite principles of: (i) specificity, (ii) relevance; and (iii) necessity. The GoK feels that in many respects some of the specific requests for assistance offend these principles, leading to both legal and practical hurdles which will adversely affect the ability of GoK to fully cooperate with the Court, as specifically set out in *ex parte* Annex A.
10. In respect of the bank statements provided, the OTP has asked for representatives of the banks in question to be made available for meetings with OTP investigators in order to identify and explain the underlying documents (cheques, transfer instructions, etc.) referred to in the bank statements. It has been agreed in principle that GoK will take full faith

measures to facilitate these meetings and that the meetings will take place as soon as possible and will be concluded no later than Friday 8 August 2014.

11. The Chamber requested that should the OTP or GoK wish to raise particular matters under the heading of 'Any other matters', these should be specified by 16:00 on 7 July. The OTP and GoK regret that this has not proved possible because of the timing of meetings between them.
12. The OTP and GoK are in agreement that where relevance and specificity is established, it would be of assistance, under this heading, to ask for the Chamber's guidance in respect of the period of time for which it is appropriate for the bank statements and telephone records provided in response to paragraphs 17(4) and 17(5) of the Revised Request. The OTP's arguments are set out in paragraphs 6 and 7(v) of *ex parte* Annex A to the OTP's filing of 23 May 2014.² The GoK's arguments, in brief, are that the period for which the request was made is unreasonably long and that the three months central to the charges against the Accused (December 2007 to February 2008 inclusive) should suffice.

This document is not signed by representative of either the OTP or the GoK since it is a joint production of both. It is designed, in any event, only to be a guide to the oral submissions to be made at the Status Conference. It is submitted by the OTP simply because that is administratively the easier course.

Dated this 08th day of July, 2014
At The Hague, The Netherlands

² ICC-01/09-02/11-922-Conf-Exp-AnxA.