

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 18 December 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***

Confidential

**Prosecution observations on the Muthaura Defence's "Request to the Judges
of the Chamber to consider acting pursuant to Rule
33(1) of the Rules"**

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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**Unrepresented Applicants for
Participation/Reparation**

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**The Office of Public Counsel for the
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Other

1. The Prosecution hereby provides its observations on the Muthaura Defence's 11 December 2012 "Request to the Judges of the Chamber to consider acting pursuant to Rule 33(1) of the Rules" ("Request").¹
2. *First*, the Prosecution takes no position on the Defence's suggestion that the Judges of this Chamber should excuse themselves from one of the two Kenya cases.² As the Defence correctly notes, this matter "is wholly up to the discretion" of the Chamber.³
3. *Second*, there appears to be no reason for the Request to be classified as confidential, and none is provided in the document.⁴ For this reason, the Prosecution respectfully suggests that the Request and these observations should be reclassified as public, pursuant to Regulation 23bis(3) of the Regulations of the Court.
4. *Third*, the Prosecution shares the Defence's desire for the Kenya cases to commence expeditiously. In this regard, the Prosecution notes the 13 December 2012 decision in the *Bemba* case, in which Trial Chamber III temporarily suspended proceedings until 4 March 2013 due to case-specific developments.⁵ This suspension will presumably extend the duration of the *Bemba* case and thereby limit the ability of Presiding Judge Ozaki – a

¹ ICC-01/09-02/11-565-Conf.

² ICC-01/09-02/11-565-Conf, para 1.

³ ICC-01/09-02/11-565-Conf, para 11.

⁴ See Regulation 23bis(1) of the Regulations of the Court.

⁵ ICC-01/05-01/08-2480, para 22.

member of the *Bemba* Bench – to sit on one or both of the Kenya cases, if they are to commence in April 2013, as scheduled.⁶

5. The Prosecution appreciates that many variables go into trial scheduling, some of which may be outside the Chamber's control. It is, however, important at this juncture in the Kenya cases to have as much certainty as possible with respect to the trial date. With the final disclosure deadline approaching, the Prosecution is now implementing highly disruptive and invasive protective measures for certain witnesses. These protective measures have a significant impact on witnesses' lives and those of their family members. Due to the security situation in Kenya, these measures will be difficult, if not impossible, to reverse if trial is delayed.
6. In light of the requirements of Article 68(1) of the Statute, the Prosecution wishes to implement such intrusive measures as late as possible, so as to minimize the disruption to witnesses' lives as a result of their cooperation with the Court. The longer that witnesses are subject to intrusive protective measures, the more their well-being suffers. For this reason, and because the implementation of the most invasive protective measures is keyed off the date the witnesses' identities are disclosed, the Prosecution respectfully requests the Chamber to inform the parties if the April 2013 trial date is to be postponed for any reason. This will enable appropriate measures to be taken with respect to witness security and, in particular, the disclosure of their identities.⁷ As the identities of several witnesses are scheduled to be disclosed between now and 9 January 2013, the Prosecution respectfully

⁶ ICC-01/09-02/11-451, para 25.

⁷ The Prosecution notes the Chamber's ruling 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". ICC-01/09-02/11-451, para 12.

suggests that any such notification, if it is necessary, should be made as soon as possible.



Fatou Bensouda,
Prosecutor

Dated this 18th of December 2012
At The Hague, The Netherlands