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

Date: **22 February 2013**

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
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
with Confidential Annex A and Public Annex B**

**Muthaura Defence's Additional Submissions on the Viability of the
Commencement Date of Trial**

Sources: Defence for Francis Kirimi Muthaura

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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**Unrepresented Applicants
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I. Introduction

1. On 21 February 2013, the Defence for Francis Kirimi Muthaura (“Defence”) submitted its “Application for Leave to Submit Discrete Additional Submissions on the Viability of the Commencement Date of Trial” (“Application”),¹ in which it sought the Chamber’s permission to make additional submissions, to those submitted at the 14 February 2013 status conference,² on the issue of the viability of the commencement date of trial, limited to the subject “of outstanding translations and transcripts of audio recordings disclosed by the Prosecution on 11 February 2013”.³
2. By way of electronic communication on 21 February 2013, the Trial Chamber (“Chamber”) granted the Application, ordering that the Defence file its additional submissions by 22 February 2013.⁴
3. The Defence hereby submits its discrete additional submissions on the viability of the commencement date of trial.

II. Background

4. On 11 February 2013, the Prosecution disclosed to the Defence 39 audio files related to Prosecution Witness KEN-OTP-P-0151.⁵ A chart listing the audio files is attached as Confidential Annex “A”, including relevant metadata fields (which include confidential information), the length of each audio file and basic comments on the language or languages

¹ ICC-01/09-02/11-658.

² See ICC-01/09-02/11-T-22-ENG ET, p. 11, line 20 to p. 18, line 23.

³ Application, para. 3.

⁴ Email dated 21 February 2013 at 17h05 from the Legal Officer of Trial Chamber V to the parties.

⁵ Most of these audio files were disclosed as “Trial INCR package 34”. Two of the audio files were previously disclosed in January 2013 in a more redacted version. The Witness is referred to as “KEN-OTP-P-0012” in the Prosecution’s list of fact witnesses (see ICC-01/09-02/11-596-Conf-AnxA-Red).

contained in each audio file (English and/or non-English) based on a preliminary analysis by the Defence.

5. On 17 February 2013, Defence counsel Ms. Alagendra contacted the Prosecution trial attorney with carriage of the case, Ms. Adeboyejo, requesting that the Prosecution inform the Defence when the Prosecution would “be providing [] the translations and transcriptions of the recordings that” were “disclosed on 11 February 2013”, given that “most, if not all, the recordings are not fully in English”.⁶
6. On 21 February 2013, Ms. Adeboyejo responded that “the transcription and translation of the relevant parts of the recordings in the working language of the Court” have been requested and that the estimated time for completion of these materials was at least “the next 15-16 weeks”.⁷ Ms. Adeboyejo then went on to note “that the parts of the recordings for which you seek transcription and translation are in a language understandable by your client”.⁸
7. Ms. Alagendra replied on behalf of the Defence, on 21 February, querying whether any translations would have already been completed for some of these materials given that the date indicated for the recording of some of the materials was in September, October and through 6 November 2012, which would therefore fall within the minimum 15-week period for translation provided by the Prosecution.⁹

⁶ A record of the email communications between the Defence and Prosecution on this topic between 17 February 2013 through today, 22 February 2013, are attached as Public Annex B, with email addresses and the names of some Prosecution personnel redacted.

⁷ See Public Annex B (emphasis added).

⁸ *Ibid* (emphasis added).

⁹ *Ibid*.

8. On 22 February 22 2013, at 10h07, Ms. Adeboyejo wrote back to the Defence, repeating that “these audio files have been submitted for translation and transcription and will be ready in 15 - 16 weeks”.¹⁰
9. The Defence responded at 13h53 requesting that prosecution clarify when the recordings were submitted for translation.¹¹

III. Submissions

10. It is incumbent on the Prosecution to provide translations of materials that the Prosecution will seek to rely upon for trial to the Defence which are not in one of the working languages of the Court.
11. As is clear from the Prosecution’s communications, the Defence should not expect to receive the translations any earlier than 15 weeks hence – i.e. not earlier than the first week of June 2013, almost two months after the 11 April commencement date of the trial, and potentially even later than this.
12. The Prosecution was of course aware of this situation at the 14 February 2013 status conference. The Defence invited the Prosecution, at the status conference, to make submissions on whether the Prosecution believed the present commencement date of trial is viable in light of the current state of disclosure, and in view of the Office of the Prosecutor’s role as a minister of justice.¹² The Prosecution demurred, merely noting that it “recognise[d] the Defence's submissions [] and we'll leave the matter of the start date in your Honours' hands”.¹³

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² ICC-01/09-02/11-T-22-ENG ET, p. 10, line 22 to p. 11, line 18.

¹³ *Ibid.*, p. 33, lines 8-9.

13. As the Defence submitted at the status conference, this pattern of Prosecution disclosure and its official stance on the viability of trial date is a *de facto* policy that is certainly not limited to the present case.¹⁴ It is neither practically viable nor in line with the fundamental rights of an Accused for disclosure to take place long after the commencement of trial, let alone the Prosecution's delayed disclosure of a substantial amount of critical material with significant redactions to material information. Disclosure must be meaningful. This of course is exacerbated by the fundamentally altered theory of the case that the Prosecution has now put forward in its Pre-Trial Brief.¹⁵
14. Additionally, and perhaps as best clarified by Ms. Alagendra's communication to the Prosecution of today at 13h53 (*Annex B*), it is unclear to the Defence when the Prosecution submitted these 39 audio files for translation as well as the language content of the majority of these files. As is shown in the chart attached as Confidential Annex A, the earliest of these recordings date to September 2012. Furthermore, beginning at item '3' on the list, the date of the recording and the chain of custody of the recording do not correspond. For example, the recording at number 3 on the list is dated 20 September 2012, but for this recording and all those following on the list, the chain of custody metadata begins on 3 December 2012. This is especially strange given that, as best as the Defence can tell from the conversation in English that takes place in the first few seconds or minutes of each recording, it is the Prosecution that is creating these recordings- the prosecution is initiating the phone calls

¹⁴ *Ibid.*, p. 13, lines 7 to 14 (noting the similar disclosure situation and Prosecution position in the Banda and Jerbo case before Trial Chamber IV of the Court).

¹⁵ As the Defence submitted at the 14 February status conference (ICC-01/09-02/11-T-22-ENG ET, p. 11, line 20 to p. 18, line 23).

that it then records and which it apparently seeks to use as evidence in this case.

15. Further, for 31 of the 39 items on the list, in the metadata field for 'Language', the Prosecution has entered the code "NC", meaning "Not Clear". Despite this, the Prosecution deems such disclosure to be proper, and in line with its obligations. .
16. Finally, and as an aside, the Defence has identified at least five items cited by the Prosecution in its Pre-Trial Brief that have yet to be disclosed to the Defence.¹⁶

Relief Requested

17. For the reasons submitted above and at the 14 February 2013 status conference, the Defence reiterates its submission that the current trial commencement date of 11 April 2013 is simply not viable, and respectfully requests that the Chamber vacate this date.¹⁷

Respectfully Submitted,



Karim A. A. Khan QC

Dated this 22nd Day of February 2013
At Nairobi, Kenya

¹⁶ These items are: KEN-OTP-0046-0188 (footnote 20 of the Pre-Trial Brief ("PTB")); KEN-OTP-0087-0397 (PTB, footnote 40); KEN-OTP-0087-0426 (PTB, footnote 71); KEN-OTP-0091-0587 (PTB, footnotes 226, 228 and 229); KEN-OTP-0091-0611 (PTB, footnote 347).

¹⁷ The Defence's submission and the relief requested are of course without prejudice to the Defence's pending application pursuant to Article 64(4) of the Statute to have certain matters referred back to the Pre-Trial Chamber over an available Judge of the Pre-Trial Division.