

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 7 February 2013

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 document

**Registry observations in relation to the "Defence Application for change of place
where the Court shall sit for Trial" (ICC-01/09-02/11-602)**

Source: The Registry

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

The Office of the Prosecutor
Ms Fatou Bensouda

Counsel for Francis Kirimi Muthaura
Mr Karim Khan QC
Mr Essa Faal

Counsel for Uhuru Muigai Kenyatta
Mr Steven Kay QC
Ms Gillian Higgins

Legal Representatives of the Victims
Mr Fergal Gaynor

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants
(Participation/Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Counsel Support Section

Deputy Registrar
Mr Didier Preira

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

The Registry of the International Criminal Court (the "Court");

NOTING the "Decision on the defence request to change the place of the proceedings" issued by Trial Chamber V on 7 November 2012;¹

NOTING the "Defence application for a change of place where the Court shall sit for Trial" submitted by the Defence for Francis Kirimi Muthaura on 3 December 2012²

NOTING the "Decision on "Defence Application for a change of place where the Court shall sit for Trial" issued by the Presidency on 21 December 2012³

NOTING the "order requesting observations in relation to the "Defence application for change of place where the Court shall sit for Trial" issued by Trial Chamber V on 17 January 2013⁴

CONSIDERING that "[...] the Registry is requested to submit observations "on the possibility of the trial being held in Kenya, or alternatively in Arusha, Tanzania, including on questions of logistics and security by no later than 7 February 2013"⁵;

TRANSMITS, respectfully, to the Chamber, the following observations;

¹ ICC-01/09-02/11-522

² ICC-01/09-02/11-551

³ ICC-01/09-02/11-581

⁴ ICC-01/09-02/11-602

⁵ ICC-01/09-02/11-602, page 5.

A. OBSERVATIONS

1. The Registry has touched on several aspects which were considered relevant in relation to the possibility of holding an *in situ* trial and has subsequently divided its observations in various categories.

Legal issues

2. The Registry wishes to draw the Chamber's attention to the Privileges and Immunities of personnel of the Court. The Republic of Kenya has not signed nor ratified the Agreement of Privileges and Immunities (hereinafter "APIC") with the Court. However, The Republic of Kenya has entered in 2010 into a specific Exchange of Letters with the Court. This Exchange of Letters covers the issue of the Privileges and Immunities.

3. As for the Republic of Tanzania, the APIC was signed but has not yet been ratified. In principle, Court officials are protected by Article 48 of the Statute but this article does not go into specifics and is subject to interpretation. Therefore, a written confirmation would need to be obtained from the authorities indicating that privileges and immunities of the Court officials, as provided under the APIC, will be fully respected. However, such confirmation may take time and, in order to succeed, contacts will need to be made at a high level.

4. Considering that, in the case of the Prosecutor v. William Samoei Ruto and Joshua Arap Sang, the observations of both the Republic of Kenya and Tanzania are expected by 8 March 2013⁶ and that the Registry is to equally provide its observations by 22 February 2013⁷, the Registry suggests to wait for the final answer of the Kenyan and Tanzanian authorities and then apply it *mutatis mutandis* to the case of *the*

⁶ ICC-01/09-01/11-580, page 4.

⁷ *Ibidem*.

Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta as their observations were not expressively requested in this case.

Security

5. Based on the assessment received from the relevant Registry Section, it is suggested, in the event of *in situ* proceedings, organising such proceedings in the Republic of Tanzania and preferably at the International Criminal Tribunal for Rwanda (hereinafter "ICTR"). Organising the proceedings at the premises of the International Criminal Tribunal for Rwanda – where ICTR would provide support and infrastructure - would be more conducive in terms of security and support instead of organising the proceedings somewhere in Kenya.

6. With regards to possible *in situ* proceedings in Kenya, it has to be taken into consideration that the post-election period will coincide with the scheduled commencement of the trial which also may affect the Court proceedings. In any event, a specific Security Assessment needs to be conducted before any decision on the feasibility of trials in Kenya is rendered.

Location and period for in situ trials

7. Further to the security assessment whereby the preferred location to hold the *in situ* proceedings at the premises of the ICTR, it is to be noted that the use of the ICTR premises is depending on the agreement of both the Republic of Tanzania and the ICTR itself. At this stage, the ICTR has agreed, in principle, to facilitate *in situ* ICC proceedings.

8. Pending final figures on the costs involved with *in situ* proceedings, the Registry suggests limiting the proceedings away from the Court to two relatively

short periods of 3-4 weeks maximum during which the opening statements and specific witnesses could be called to testify respectively.

Composition of ICC presence

9. Several scenarios are possible with regards to possible *in situ* proceedings. Either a fully-fledged courtroom is set up away from the Court with the complete teams of Judges, parties and participants and Registry courtroom support staff being dispatched or a rather limited presence is taking care of the *in situ* proceedings. Pending the final cooperation of the Tanzanian Authorities and the ICTR, if any, certain services, such as security support could be delivered by the latter.

Languages

10. In the event of proceedings *in situ* booths for English, French and Swahili would be required. Depending on the "mode" of proceedings (simultaneous or consecutive) 15 free-lance interpreters (in addition to 2 staff interpreters) and 6 free-lance interpreters and 2 staff interpreters would be needed respectively. There would be no field interpretation required for the opening statement as no witnesses are expected to testify at this stage.

11. The reason why freelance interpreters need to be recruited is that the Bemba trial will still be taking place at the seat of the Court and staff interpreters would be required to interpret there. However, if there is a requirement for a Lingala booth, which is comprised of the same interpreters working with Swahili, at the Bemba trial at the same time as the proceedings *in situ*, it cannot be guaranteed that enough freelance Swahili interpreters can be found for the trials *in situ*. Therefore, these interpreters would need to be brought from HQ. However, since staff interpreters are working with both Swahili and Lingala, there is a potential clash that would have to be resolved.

12. In addition to the above, 3 field interpreters for Luo (situational language) would be needed for the purpose of interpreting at hearing in consecutive mode and for trial-related familiarisation of witnesses, and 1 Swahili field interpreter for familiarisation. . If there are parallel trials, the total number of field interpreters required would be 6.

Court Management Services

13. In case of complete, limited trial or only opening statements *in situ* in Tanzania, it would be advisable, due to the incompatibility of Court Reporting systems, to ask the services of the ICTR French and English court reporters and to deliver transcripts either from Arusha (real-time possible) or from the ICC using audio or video links systems and the ICC Court Reporting teams. (Transcript then produced in remote in The Hague and in a delayed fashion, no real-time possible in Arusha)

14. Regarding the audio visual services and in all case scenarios, it would be preferable to use ICTR technological infrastructure and operation due to the difference and/or incompatibility of systems used at the ICTR and ICC. There is no technical limitation in having a normal video conference for witness testimony from ICTR and to send live signals to the ICC courtroom.

15. Concerning any other location, an individual assessment needs to be conducted in order to assess the feasibility of having audio visual services and delivering French and English transcripts.

Financial

16. Pending the final decision on both the exact location and duration of the *in situ* proceedings, the composition of the ICC presence and the services, if any, to be provided by possible partners, the final calculations cannot be made at this stage.

17. Also, a request for access to the Contingency Fund will depend on the scenario the Court will adopt (mainly consecutive or simultaneous proceedings) taking into account the Bemba and other on-going proceedings.

Public information

18. When deciding on the possibility of holding *in situ* trials, the management of public information is to be taken into account in order to prevent and reduce, if need be, the trial being heavily politicised.

19. It is expected, according to the Registry's Public Information and Documentation Section (hereinafter "PIDS"), that the *in situ* hearings will increase the interest of international media and the local and regional coverage. All case scenarios will be treated by PIDS as a high profile event.

20. The PIDS will be in a position to provide any technical and logistical support required in Arusha for any scenarios. Regarding the *in situ* in Kenya, and in the absence of the identification of a specific location, it is assumed that solution for technical support can be found as Kenya is a hub for media and a key country for the United Nations.

Logistics

21. In the event of *in situ* proceedings, there will be a need for *inter alia* office spaces and workstations. However, pending a final decision on location, exact duration and composition in the event of *in situ* proceedings the exact logistical requirements cannot be identified at this stage.

Information technology

22. For any case scenario in Tanzania, the Information and Communications Technologies Section (hereinafter "ICTS") would suggest making use of the ICTR facilities with the assistance of the ICTY, as the ICTR is connected to the ICTY with a permanent and direct satellite-to-satellite link. A direct communication between the ICTR and the ICC may be further established via ICTY.

23. The ICTR internet connection may be used to establish a Citrix connection allowing for access to ICC Ecourt applications. Several direct phone lines can be put in place to enable privileged communications between participants. However, the risk that calls can be intercepted has been assessed to be very small but still exists.

24. The facilities in ICTR courtroom do not provide the possibility to have voice and facial distortion for protected witnesses. The only possibility would then to go to closed session.

25. As a conclusion it should be taken into account that due to the many variables and technical challenges, the unreliability of the link to Africa, the use of the internet, the constrained timescales and the pioneering nature of the solution, the risk of failure identified has been assessed to be very high. In addition, the possibility of

using the different facilities has not been formally discussed with the providers in this specific case.

26. For any case scenario in Kenya, the short time notice and the absence of any confirmed location did not permit the ICTS to make any assessment on the feasibility.

B. CONCLUSION

Feasibility

27. With regards to the observations provided above, the Registry respectfully submits that there are no technical obstacles (for the ICTS and the CMS) to put in place the necessary requirements for any *in situ* case scenario in Arusha, as the existing facilities allow for a similar level of provision as provided by the ICC, except for having protected witnesses testifying in public session with voice and facial distortion.

28. However, the possibilities envisaged by the units consulted were given on the understanding that the ICTR was not approached with concrete information on specific date and defined scenario. The provision of the required technical support is still subject to the availability of the ICTR technical facilities and supporting staff.

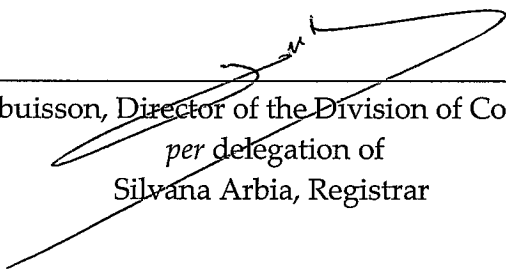
29. The possibilities of having similar level of provision provided in case of *in situ* in Kenya could not be assessed due to the absence of any identified place and availability of necessary technical support.

Location

30. Based on the observations made above, the Registry respectfully suggests that, in the event it is decided that the trial in the case of the *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* is to take place away from the seat of the Court, the proceedings are held in Arusha and preferably at the ICTR.

Duration

31. With regards to the duration of the *in situ* proceedings, the Registry respectfully suggests, in the event it is decided to organize *in situ* proceedings, limiting the proceedings away from the Court to two relatively short periods of 3-4 weeks maximum during which the opening statements and specific witnesses could be called to testify respectively.



Marc Dubuisson, Director of the Division of Court Services
per delegation of
Silvana Arbia, Registrar

Dated this 7 February 2013

At The Hague in The Netherlands