

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 20 June 2013

**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 'Decision on commencement date of trial'**

**Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:**

**The Office of the Prosecutor**

Ms Fatou Bensouda

Mr James Stewart

Ms Adesola Adeboyejo

**Counsel for the Defence**

Mr Steven Kay

Ms Gillian Higgins

**Legal Representatives of Victims**

Mr Fergal Gaynor

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda

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

**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Deputy Registrar**

**Victims and Witnesses Unit**

Mr Patrick Craig

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**Trial Chamber V(B)** (“Chamber”)<sup>1</sup> of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, having regard to Articles 64 and 67 of the Rome Statute (“Statute”) and Rule 132 of the Rules of Procedure and Evidence (“Rules”) issues this Decision on the commencement date of trial.

## **I. Procedural history**

1. On 7 March 2013, the Chamber vacated the previously scheduled trial commencement date of 11 April 2013<sup>2</sup> and provisionally set 9 July 2013 as the new commencement date, pending resolution of a request filed by the defence for Mr Kenyatta (“Defence”) pursuant to Article 64(4) of the Statute and other related requests.<sup>3</sup>
2. On 26 April 2013, the Chamber issued its decision on the Defence’s requests,<sup>4</sup> in which it determined, *inter alia*, that the Defence would be provided with further time, beyond 9 July 2013, to conduct its investigations and fully prepare for trial.<sup>5</sup> The Chamber invited the Defence to submit observations as to the estimated time it needed to adequately prepare for trial.<sup>6</sup> The Chamber further ordered the Office of the Prosecutor (“Prosecution”) to conduct a review of its case file, and to certify that it had done so, in order to ensure that all relevant materials had been disclosed to the Defence.<sup>7</sup>
3. On 13 May 2013, the Defence filed its observations on the estimated time required to prepare for trial (“Observations”),<sup>8</sup> in which it requested the Chamber to postpone the commencement of trial until January 2014.<sup>9</sup>

<sup>1</sup> Where “Chamber” is used in this decision it refers to both the Trial Chamber V in its composition as until 21 May 2013 and to Trial Chamber V(B) as composed by the Presidency’s Decision constituting Trial Chamber V(a) and Trial Chamber V(b) and referring to them the cases of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* and *The Prosecutor v. Uhuru Muigai Kenyatta*, 21 May 2013, ICC-01/09-02/11-739.

<sup>2</sup> The 11 April 2013 trial commencement date was set in the Chamber’s Decision on the schedule leading up to trial, 9 July 2012, ICC-01/09-02/11-451, para. 25.

<sup>3</sup> Order concerning the start date of trial, ICC-01/09-02/11-677.

<sup>4</sup> Decision on defence application pursuant to Article 64(4) and related requests, ICC-01/09-02/11-728.

<sup>5</sup> ICC-01/09-02/11-728, para. 125.

<sup>6</sup> ICC-01/09-02/11-728, para. 127.

<sup>7</sup> ICC-01/09-02/11-728, para. 97.

<sup>8</sup> Defence Observations on Estimated Time Required to Prepare for Trial with Confidential Annex A, Public Annex B, Confidential ex parte Annexes C and C.1 and Confidential Annexes C.2 to G, ICC-01/09-02/11-735-Conf. A public redacted version was filed on 14 May 2013.

4. On 21 May 2013, the Prosecution filed its certification of review of its case file in accordance with the Chamber's order.<sup>10</sup> The Prosecution informed the Chamber that additional items for disclosure had been identified and would be disclosed to the Defence, together with other recently acquired documents, by no later than 28 May 2013.<sup>11</sup> It also informed the Chamber that certain transcriptions of audio files and unredacted versions of witness materials would be disclosed to the Defence as soon as they became available (in the case of transcription) or witness protective measures had been implemented (in the case of unredacted witness materials).<sup>12</sup> The Prosecution subsequently confirmed that it disclosed 166 items, comprising items identified during the review of its case file and other materials previously identified for disclosure, to the Defence on 28 May 2013.<sup>13</sup>
5. On 4 June 2013, the Prosecution filed its response to the Observations.<sup>14</sup> The response from the Common Legal Representative for Victims ("Legal Representative") was filed on 7 June 2013.<sup>15</sup>
6. On 3 June 2013 and 7 June 2013, the Victims and Witnesses Unit ("VWU") informed the Chamber that outstanding security measures had been implemented for the five remaining witnesses (334, 430, 494, 506 and 510) whose identities had not yet been disclosed to the Defence.<sup>16</sup> The Prosecution

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<sup>9</sup> ICC-01/09-02/11-735-Red, para. 32.

<sup>10</sup> Prosecution certification of review of its case file pursuant to Trial Chamber V's 26 April 2013 order (ICC-01/09-02/11-728), ICC-01/09-02/11-740.

<sup>11</sup> ICC-01/09-02/11-740, paras 2, 17.

<sup>12</sup> ICC-01/09-02/11-740, paras 3, 19.

<sup>13</sup> Prosecution's Communication of the Disclosure of Evidence, 3 June 2013, ICC-01/09-02/11-748.

<sup>14</sup> Prosecution Response to the "Defence Observations on Estimated Time Required to Prepare for Trial" (ICC-01/09-02/11-735), ICC-01/09-02/11-749-Conf. A public redacted version of the response was filed on 5 June 2013.

<sup>15</sup> Victims' Response to the Defence Observations on Estimated Time Required to Prepare for Trial, ICC-01/09-02/11-752.

<sup>16</sup> Email to TC V Communications, 3 June 2013 at 9.49 (in respect of Witness 334); Email to TC V Communications, 7 June 2013 at 10.59 (in respect of Witnesses 430, 494, 506 and 510); Victims and Witnesses Unit's Second Updated Report on the Security Situation of Witness KEN-OTP-P-0334, 7 June 2013, ICC-01/09-02/11-751-Conf-Exp; Victims and Witnesses Unit's Updated Report on Witnesses KEN-OTP-P-0430, KEN-OTP-P-0494, KEN-OTP-P-0506 and KEN-OTP-P-0510, 12 June 2013, ICC-01/09-02/11-758-Conf-Exp.

subsequently confirmed that the identities and unredacted materials relating to these witnesses had been disclosed to the Defence.<sup>17</sup>

7. On 10 June 2013, the Prosecution filed a request for the unredacted versions of its witness list, list of evidence, witness summaries and pre-trial brief, initially classified as confidential *ex parte*, to be reclassified as confidential.<sup>18</sup> On 11 June 2013, the Chamber granted the Prosecution's request and ordered the documents in question to be reclassified as confidential, available to the Defence and the Legal Representative.<sup>19</sup>
8. On 12 June 2013, the Defence filed its response to the Prosecution's certification of its review of its case file ("Certification Response").<sup>20</sup>

## II. Submissions

### A. Defence

9. In its Observations, the Defence submits that it requires a postponement until January 2014 in order for it to be able to effectively prepare for trial. In support, the Defence points to: difficulties arising from the late disclosure of evidence and the withholding of witnesses' identities; on-going complex investigations [REDACTED] and Prosecution intermediaries; and the necessity of reassessing the case against Mr Kenyatta given the withdrawal of charges against Mr Muthaura.
10. With respect to late disclosure and the withholding of witness identities, the Defence argues that: i) 57.3% of all incriminatory evidence was disclosed after 1 January 2013;<sup>21</sup> ii) transcripts of 11 trial witnesses were disclosed to the Defence

<sup>17</sup> Prosecution's Communication of the Disclosure of Evidence, 5 June 2013, ICC-01/09-02/11-750, para. 3 (in respect of Witness 334); Prosecution request for reclassification, 10 June 2013, ICC-01/09-02/11-753, para. 4 and Prosecution's Communication of the Disclosure of Evidence, 13 June 2013, ICC-01/09-02/11-760 (in respect of Witnesses 430, 494, 506 and 510).

<sup>18</sup> Prosecution request for reclassification, ICC-01/09-02/11-753.

<sup>19</sup> Decision reclassifying five documents, ICC-01/09-02/11-757 (notified 12 June 2013).

<sup>20</sup> Defence Response to the "Prosecution certification of review of its case file pursuant to Trial Chamber V's 26 April 2013 order (ICC-01/09-02/11-728)", ICC-01/09-02/11-759.

<sup>21</sup> ICC-01/09-02/11-735-Red, para.10.

for the first time only in January 2013;<sup>22</sup> iii) the identities of five key Prosecution witnesses still have not been disclosed and that the transcripts of interviews with these witnesses were highly redacted;<sup>23</sup> iv) remaining redactions to the transcripts of two other key Prosecution witnesses, Witnesses 152 and 217, and to the sources of allegations in the Prosecution's updated pre-trial brief renders meaningful Defence investigations into the allegations impossible;<sup>24</sup> and v) that the Prosecution failed to disclose the transcripts and translations of 49 audio files requiring the Defence to dedicate approximately 120 hours to this exercise over a period of three and a half months.<sup>25</sup>

11. The Defence submits that it requires approximately six months from the date of final unredacted disclosure to conduct full and rigorous investigations in respect of the Prosecution's witnesses<sup>26</sup> and attaches a report by its *Investigation Counsel* in support of this assertion.<sup>27</sup> Further, the Defence requests the Chamber to order the VWU to identify the date by which protective measures will be implemented in respect of the five remaining delayed disclosure witnesses<sup>28</sup> and to order the Prosecution to identify the date by which it will disclose the unredacted transcripts of Witnesses 152 and 217.<sup>29</sup>

12. With respect to on-going investigations, the Defence submits that allegations of key Prosecution witnesses in respect of their alleged presence at certain events can be [REDACTED].<sup>30</sup> It argues that the [REDACTED]

[REDACTED].<sup>31</sup> Further, the Defence notes that on 4 April 2013 the Prosecution disclosed the identities of two individuals who acted as

<sup>22</sup> ICC-01/09-02/11-735-Red, para.10.

<sup>23</sup> ICC-01/09-02/11-735-Red, paras 14-15.

<sup>24</sup> ICC-01/09-02/11-735-Red, paras 12, 21-22.

<sup>25</sup> ICC-01/09-02/11-735-Red, para. 27.

<sup>26</sup> ICC-01/09-02/11-735-Red, para. 11.

<sup>27</sup> ICC-01/09-02/11-735-Conf-Exp-AnxC.

<sup>28</sup> ICC-01/09-02/11-735-Red, para. 18.

<sup>29</sup> ICC-01/09-02/11-735-Red, para. 23.

<sup>30</sup> ICC-01/09-02/11-735-Conf, paras 24-25.

<sup>31</sup> ICC-01/09-02/11-735-Conf, paras 24, 26.

intermediaries for the Prosecution. The Defence submits that the individuals have “known motives to provide false evidence against Uhuru Kenyatta” and that the Defence is entitled to a reasonable amount of time to investigate their roles in the case and the reliability of the witnesses presented by these individuals.<sup>32</sup>

13. Finally, with respect to the impact of the withdrawal of charges against Mr Muthaura, the Defence submits that it is required to undertake a time-consuming analysis of the Prosecution’s second updated document containing the charges (“Second Updated DCC”) and updated pre-trial brief (“Updated PTB”), both of which were served on 6 May 2013.<sup>33</sup>
14. In its Certification Response, the Defence notes that since its original filing the identities of all remaining Prosecution witnesses have been disclosed to it but that it has not yet received the unredacted transcripts of all witnesses, nor has it received unredacted versions of the Prosecution’s list of evidence, witness list or Updated PTB.<sup>34</sup> It requests the Chamber to order the Prosecution to provide these documents and to specify, in chronological order, every transcript or statement attributable to each witness and whether it is to be relied upon at trial.<sup>35</sup> The Defence further requests the Chamber to refrain from setting the trial commencement date until all redactions have been lifted from the evidence to be relied upon by the Prosecution at trial.<sup>36</sup>
15. In the Certification Response, the Defence also notes that since 9 January 2013 it has received disclosure of follow-up interviews conducted by the Prosecution in respect of nine trial witnesses and one other person. It submits that the disclosure of this new evidence requires the provision of additional time for the Defence.<sup>37</sup>

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<sup>32</sup> ICC-01/09-02/11-735-Red, paras 29, 28(*sic*), 29(*sic*), 30 (pages 14-16).

<sup>33</sup> ICC-01/09-02/11-735-Red, para. 28 (page 14).

<sup>34</sup> ICC-01/09-02/11-759, paras 10-13, 15, 17-18.

<sup>35</sup> ICC-01/09-02/11-759, para. 13.

<sup>36</sup> ICC-01/09-02/11-759, para. 19.

<sup>37</sup> ICC-01/09-02/11-759, para. 20.

## B. Prosecution

16. The Prosecution requests the Chamber to reject the Defence's request to adjourn the trial until January 2014. It submits that the trial should begin as soon as possible and, at the latest, shortly after the Court's summer recess.<sup>38</sup> The Prosecution notes that the Defence has already had additional time to prepare as the trial was initially scheduled to begin in April 2013 and argues that this time should be taken into account by the Chamber.<sup>39</sup>
17. The Prosecution recalls that the Chamber has previously ruled that three months between the time of full disclosure of the Prosecution's evidence and the commencement of trial is sufficient preparation time for the Defence and that this ruling contemplated the identities of certain witnesses being disclosed within the three month period.<sup>40</sup> It submits that that the Defence has not adequately justified why any additional time beyond that period should be granted.<sup>41</sup>
18. In response to the Defence's complaints as to late and incomplete disclosure, the Prosecution argues that: i) the Defence artificially inflated its statistics by double counting the multiple versions of documents that were disclosed in lesser redacted form;<sup>42</sup> ii) the redactions to the pre-trial brief are minimal and that the Defence has "nearly complete visibility into the Prosecution's factual allegations";<sup>43</sup> iii) the identity of Witness 334 had been disclosed since the filing of the Observations and thus the identities of only four witnesses remained undisclosed;<sup>44</sup> iv) any temporary disadvantage caused by this delayed disclosure could be cured by scheduling the witnesses to testify later in the trial;<sup>45</sup> v) the redactions to other Prosecution witnesses' transcripts had either

<sup>38</sup> ICC-01/09-02/11-749-Red, paras 1-4, 27.

<sup>39</sup> ICC-01/09-02/11-749-Red, para. 6.

<sup>40</sup> ICC-01/09-02/11-749-Red, paras 7, 12 (referring to ICC-01/09-02/11-451, paras 12, 19, 21, 24).

<sup>41</sup> ICC-01/09-02/11-749-Red, para. 7.

<sup>42</sup> ICC-01/09-02/11-749-Red, para. 8.

<sup>43</sup> ICC-01/09-02/11-749-Red, para. 9.

<sup>44</sup> ICC-01/09-02/11-749-Red, para. 10.

<sup>45</sup> ICC-01/09-02/11-749-Red, para. 11.



already been lifted or would be lifted as soon as protective measures were implemented;<sup>46</sup> and vi) that the Defence cannot rely on the non-disclosure of transcriptions and translations of the audio files as a basis for an adjournment given that the audio files reveal [REDACTED]

[REDACTED].<sup>47</sup>

19. With respect to on-going investigations into [REDACTED], the Prosecution argues that new lines of inquiry will inevitably arise during the case and that such inquiries in themselves cannot be the basis for an adjournment.<sup>48</sup> Further, it submits that the Defence itself is frustrating the pace of these investigations [REDACTED]

[REDACTED].<sup>49</sup> As to investigations into the two intermediaries, the Prosecution argues that by the end of the Court's summer recess the Defence will have had four months to conduct its inquiries which is an adequate period of time.<sup>50</sup>

20. With respect to the Second Updated DCC and Updated PTB, the Prosecution argues that the changes made arising from the withdrawal of the charges against Mr Muthaura were incremental and could be reviewed in a matter of hours.<sup>51</sup>

21. Finally, the Prosecution contends that considerations of victim and witness welfare should also be considered by the Chamber when balancing its duty to ensure that the trial is both "fair" and "expeditious" and that these considerations militate in favour of the trial commencing as soon as possible.<sup>52</sup>

## **B. Legal Representative**

<sup>46</sup> ICC-01/09-02/11-749-Red, paras 13-14.

<sup>47</sup> ICC-01/09-02/11-749-Red, para. 18.

<sup>48</sup> ICC-01/09-02/11-749-Conf, para. 15.

<sup>49</sup> ICC-01/09-02/11-749-Conf, para. 16.

<sup>50</sup> ICC-01/09-02/11-749-Red, para. 20.

<sup>51</sup> ICC-01/09-02/11-749-Red, para. 19.

<sup>52</sup> ICC-01/09-02/11-749-Red, paras 21-25.

22. The Legal Representative opposes the Defence request to adjourn the commencement of trial until January 2014 and requests the Chamber to commence the trial as soon as practicable.<sup>53</sup> He notes that when previously consulted on the trial commencement date, victims expressed strong opposition to a delay in commencing the trial and already considered April 2013 to be too late.<sup>54</sup> More recently, he notes, members of his field staff consulted with a sample of 51 victims on the potential adjournment of the trial until January 2014.<sup>55</sup> Of the 51 victims consulted, 94% opposed any further delay, expressing frustration at the slow pace of the proceedings, as well as scepticism regarding the Defence's strategy in seeking an adjournment, and concerns as to their own security and the security of witnesses now that Mr Kenyatta is in power.<sup>56</sup>
23. The Legal Representative submits that the Defence's request must be viewed in the context of political efforts by the Government of Kenya to have the Court's jurisdiction over this case terminated.<sup>57</sup>
24. He further submits that whilst it is desirable for the Defence to have access to the entirety of the Prosecution's case before the start of trial, this must be balanced with the need to protect witnesses against interference and that the critical issue is to afford the Defence sufficient time before its cross-examination of each witness rather than before the commencement of trial. He notes that the *ad hoc* tribunals have permitted the identities of particularly sensitive witnesses to be withheld until many months after the start date of trial.<sup>58</sup>
25. Finally, the Legal Representative argues that any prejudice to the Defence arising from the delayed disclosure of witness identities can be cured by other remedies during the trial, such as the scheduling of these witnesses later during

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<sup>53</sup> ICC-01/09-02/11-752, para. 2.

<sup>54</sup> ICC-01/09-02/11-752, para. 8.

<sup>55</sup> ICC-01/09-02/11-752, para. 10.

<sup>56</sup> ICC-01/09-02/11-752, paras 11-12.

<sup>57</sup> ICC-01/09-02/11-752, paras 13-19.

<sup>58</sup> ICC-01/09-02/11-752, paras 20-24.

the trial, or a short adjournment prior to the testimony of certain Prosecution witnesses or prior to the commencement of the Defence case.<sup>59</sup>

### III. Analysis and conclusions

26. As an initial matter, the Chamber notes that a number of the Defence requests in the Observations and Certification Response have been rendered moot due to intervening events. Specifically:

- a) the requests in the Observations to order the VWU to identify the date by which protective measures will be implemented in respect of the (then) five outstanding delayed disclosure witnesses<sup>60</sup> and to order the Prosecution to identify the date by which it will disclose the unredacted transcripts of Witnesses 217 and 152<sup>61</sup> have been rendered moot by the subsequent disclosure of the identities and unredacted transcripts of these witnesses;<sup>62</sup>
- b) the request in the Certification Response to order the Prosecution to provide unredacted versions of its list of evidence, witness list, and Updated PTB<sup>63</sup> has been rendered moot by the reclassification of the unredacted versions of these documents as confidential documents available to the Defence;<sup>64</sup>
- c) the request in the Certification Response for the disclosure of the unredacted transcripts of Witnesses 217, 430, 494, 506, and 510<sup>65</sup> has been rendered moot by the disclosure of these documents;<sup>66</sup>

<sup>59</sup> ICC-01/09-02/11-752, paras 27-31.

<sup>60</sup> ICC-01/09-02/11-735-Red, para. 18.

<sup>61</sup> ICC-01/09-02/11-735-Red, para. 23.

<sup>62</sup> The identity of Witness 334 and unredacted transcripts of interviews with Witnesses 334 and 152 were disclosed on 3 June 2013. See Prosecution Communication of the Disclosure of Evidence, 5 June 2013, ICC-01/09-02/11-750, paras 3, 5. The identities of Witnesses 430, 494, 506, 510 were disclosed on 7 June 2013. See Prosecution request for reclassification, 10 June 2013, ICC-01/09-02/11-753, para. 4. The unredacted transcripts of interviews with these witnesses and Witness 217 were disclosed on 12 June 2013. See Prosecution's Communication of the Disclosure of Evidence, 13 June 2013, ICC-01/09-02/11-760, paras 2-3.

<sup>63</sup> ICC-01/09-02/11-759, paras 12, 13, 15

<sup>64</sup> ICC-01/09-02/11-757.

<sup>65</sup> ICC-01/09-02/11-759, paras 17-18, 21.

- d) the request in the Certification Response for the Chamber to refrain from setting the trial commencement date until redactions have been lifted from the evidence to be relied upon at trial<sup>67</sup> has been rendered moot by the disclosure of all substantively unredacted documents.

27. The Defence request for the Chamber to order the Prosecution to specify, in chronological order, every transcript or statement attributable to each witness and whether it is to be relied upon at trial<sup>68</sup> will be ruled upon separately once the Prosecution has had the opportunity to submit a response.
28. Turning to the matter of the start date of trial, the Chamber recalls that in its decision of 26 April 2013 it already determined that the Defence would be granted additional time beyond 9 July 2013 to prepare for trial.<sup>69</sup> In that decision, the Chamber also stated that it would be guided by its previous finding that three months after the date of full disclosure provides adequate time to prepare.<sup>70</sup> As such, the question now before the Chamber is whether to grant the Defence additional time, beyond three months, for its preparations and when that period should start running.
29. The Chamber notes the submissions of the Prosecution that the Defence has already benefitted from additional preparation time as a result of the vacating of the initial start date of 11 April 2013 and that when setting the 9 January 2013 deadline for disclosure the Chamber contemplated that the identities of certain witnesses would be disclosed after that date and within the three-month preparation period granted to the Defence.
30. The Chamber emphasises, however, that the disclosure deadline of 9 January 2013 was a final deadline and disclosure was expected to take place on a rolling basis prior to then. It was not anticipated when setting that deadline and

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<sup>66</sup> The unredacted transcripts of interviews with Witnesses 217, 430, 494, 506, and 510 were disclosed on 12 June 2013. See Prosecution's Communication of the Disclosure of Evidence, 13 June 2013, ICC-01/09-02/11-760, paras 2-3.

<sup>67</sup> ICC-01/09-02/11-759, para. 19.

<sup>68</sup> ICC-01/09-02/11-759, para. 13.

<sup>69</sup> ICC-01/09-02/11-728, para. 125.

<sup>70</sup> ICC-01/09-02/11-728, para. 127.

allocating three months preparation time to the Defence that such a significant volume of newly collected evidence would only be disclosed in January 2013. The Chamber has already outlined its concerns in relation to this issue in its decision of 26 April 2013.<sup>71</sup>

31. Nor was it anticipated that the Prosecution would request delayed disclosure in respect of such a significant number of its witnesses. As it happened, the identities and unredacted transcripts of 12 of the Prosecution's 31 fact witnesses<sup>72</sup> were not disclosed until after 9 January 2013. Indeed, the identities of five of these witnesses, all of whom are [REDACTED], were only disclosed within the past two weeks.<sup>73</sup> It is a matter of particular concern to the Chamber that the need for delayed disclosure of many of these witnesses appears to have arisen from delays on the part of the Prosecution in referring their security situation to the VWU for assessment and implementation of protective measures as appropriate.

32. In these circumstances, the Chamber does not accept the arguments of the Prosecution or the Legal Representative that the Defence has already had sufficient time to prepare its case. As the Defence was only recently in a position to start investigating a significant part of the disclosed material, it must be afforded a reasonable amount of time to conduct those investigations before the commencement of trial.

33. On the other hand, having considered the Defence's arguments in support of its request to adjourn the commencement until January 2014, the Chamber is not persuaded that the Defence requires such an extensive additional amount of time (nearly nine months after the original commencement date of 11 April

<sup>71</sup> ICC-01/09-02/11-728, paras 118, 122.

<sup>72</sup> Witnesses 118, 219, 232, 334, 428, 429, 430, 493, 494, 505, 506, 510.

<sup>73</sup> The identity of and unredacted transcripts of interviews with Witness 334 were disclosed on 3 June 2013. See Prosecution Communication of the Disclosure of Evidence, 5 June 2013, ICC-01/09-02/11-750, para.3. The identities of witnesses 430, 494, 506, 510 were disclosed on 7 June 2013. Prosecution request for reclassification, 10 June 2013, ICC-01/09-02/11-753, para. 4. The unredacted transcripts of interviews with these witnesses and Witness 217 were disclosed on 12 June 2013. See Prosecution's Communication of the Disclosure of Evidence, 13 June 2013, ICC-01/09-02/11-760, paras 2-3.

2013) in order to carry out investigations and otherwise adequately prepare for trial.

34. In particular the Chamber does not accept that the Defence's on-going investigations into [REDACTED] and Prosecution intermediaries justifies an extension of time beyond the three months initially contemplated by the Chamber. Such investigations are part of the Defence's ordinary preparations and, apart from the matter of delayed disclosure of the relevant individuals' identities, have not been frustrated by conduct on the part of the Prosecution.
35. Nor is the Chamber convinced that any additional time should be allocated for the review of the Prosecution's Second Updated DCC and Updated PTB, which were modified to take account of the withdrawal of the charges against Mr Muthaura, given the minimal nature of the modifications.
36. The Chamber does, however, agree that the Defence is entitled to a limited amount of additional time to compensate for the time and resources it expended on the transcription and translation of the 49 audio files disclosed to it in January and February 2013.<sup>74</sup> The Chamber does not accept the Prosecution's argument that the Defence cannot rely on the incomplete disclosure of the audio files as a basis to request additional time as [REDACTED]  
[REDACTED].<sup>75</sup> The Prosecution was under an obligation to prepare translations of the content of the audio files into one of the working languages of the Court so that the Defence could fully understand their precise content. This obligation arises under Regulation 39(1) of the Regulations and applies regardless of the content of the disclosed materials.<sup>76</sup>

<sup>74</sup> ICC-01/09-02/11-735-Red, para. 27.

<sup>75</sup> ICC-01/09-02/11-749-Conf, para. 18.

<sup>76</sup> The Chamber notes the jurisprudence of Trial Chamber II on the matter of translations of audio-visual material whereby it held that "the transcripts and translations form an integral part of the video and must for that reason be considered as constituting one and the same piece of evidence – when one is missing, the evidence is not complete." See *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the "Prosecution's

37. Likewise, the Chamber agrees that the Defence is entitled to a limited amount of additional time for the review of transcripts of follow-up interviews the Prosecution conducted after 9 January 2013 with nine of its trial witnesses and one other individual. According to the Defence, these interviews were conducted, and the transcripts thereof disclosed to the Defence, after the disclosure deadline of 9 January 2013.
38. Accordingly, the Chamber considers that the Defence should be entitled to several additional weeks preparation time, on top of the three month period previously determined by the Chamber, to compensate for the time expended on completing the disclosure of the audio files and the review of the transcripts of the follow-up interviews conducted after 9 January 2013.
39. In light of the volume of new evidence disclosed to the Defence only in January 2013 and the delays in disclosing the identity of a significant proportion of the Prosecution's witnesses, the Chamber further considers that the additional preparation period should only begin running from 12 June 2013, being the date of disclosure of the unredacted transcripts of the outstanding delayed disclosure witnesses.
40. Based on the foregoing, the Chamber would in principle set the date of commencement of the trial for early October 2013. However, scheduling conflicts, logistical and other constraints, including availability of courtrooms, arising from the other ongoing cases before the Court prevent the Chamber from setting this date and necessitate a further delay of approximately one month before trial can commence.

**FOR THE FOREGOING REASONS, THE CHAMBER:**

**VACATES** the trial commencement date of 9 July 2013;

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Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP- 1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", 27 July 2009, ICC-01/04-01/07-1336, paras 10-13.

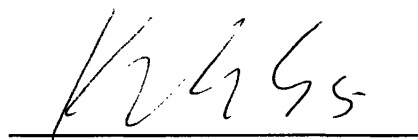
**SETS** the trial commencement date as 12 November 2013;

**DISMISSES**, as moot, the Defence requests for the Chamber to:

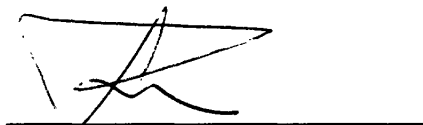
- order the VWU to identify the date by which protective measures will be implemented in respect outstanding delayed disclosure witnesses;
- order the Prosecution to identify the date by which it will disclose the unredacted transcripts of Witnesses 217 and 152;
- order the Prosecution to provide unredacted versions of its list of evidence, witness list, Pre-Trial Brief and the transcripts of Witnesses 217, 430, 494, 506, and 510; and
- refrain from setting the trial date until all redactions have been lifted from the evidence to be relied upon by the Prosecution at trial; and

**RESERVES** its decision on the Defence request in relation to the specification of statements and transcripts attributable to the Prosecution's witnesses until such time as the Prosecution has had the opportunity to submit a response.

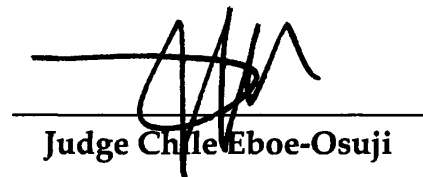
Done in both English and French, the English version being authoritative.



**Judge Kuniko Ozaki, Presiding**



**Judge Robert Fremr**



**Judge Chile Eboe-Osuji**

Dated 20 June 2013

At The Hague, The Netherlands