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

Date: 8 March 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

**Prosecution's application pursuant to Regulation 35 for a variation of the time
limit to submit agreed facts**

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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Other

1. Since the joint Prosecution/Defence submission on agreements as to evidence pursuant to Rule 69 of the Rules of Procedure, presented to the Chamber on 5 September 2012, the parties have not reached further agreement. In light of this, the Prosecution requests, pursuant to Regulation 35 of the Regulations of the Court, an extension of the 8 March 2013 deadline set by the Chamber, to permit the Defence teams to further consider their position on the Prosecution's most recent transmission of proposed agreed facts.

Procedural history

2. In its 9 July 2012 "Decision on the schedule leading up to trial" the Chamber instructed the parties to "liaise with a view to reaching agreement about non-contentious issues" and file a first joint submission on agreed facts by 3 September 2012,¹ followed by a second joint submission on agreed facts by 8 March 2013.²
3. On 5 September 2012, after an extension of deadline granted by the Chamber,³ the parties jointly filed a submission on agreements as to evidence, attaching the facts on which the parties were able to reach agreement.⁴
4. On 28 February 2013, the Prosecution sent to the Defence a further proposal on agreements as to evidence pursuant to Rule 69. It proposed that the parties agree to particular facts contained in the updated Document Containing the Charges and the Prosecution's pre-trial brief, and requested the Defence to respond by 4 March 2013. The Prosecution also indicated to the Defence that in instances where a fact had been

¹ ICC-01/09-02/11-451, para 15.

² ICC-01/09-02/11-451, para 23.

³ ICC-01/09-02/11-474.

⁴ ICC-01/09-02/11-479 and ICC-01/09-02/11-479-AnxA.

agreed to by only one accused, the Prosecution would only use that agreed fact with respect to the relevant accused.

5. The Prosecution received no response to this proposal. Instead, on 4 March 2013, the Muthaura Defence submitted a notification to the Chamber, asserting that the Chamber's 8 March 2013 deadline "cannot reasonably be complied with due to the dilatory actions of the Prosecution".⁵ The Defence invited the Prosecution to "take the action it deems necessary as a minister of justice to provide the Defence with adequate time to review, respond to and liaise with the Prosecution on the Updated Rule 69 Proposal, and thereafter jointly submit the results of this process to the Chamber in the manner required by the Trial Schedule Decision".⁶ On the same day, the Kenyatta Defence informed the Prosecution that "it is still considering the proposal and will provide you with further information shortly as to how we intend to proceed".⁷
6. On 5 March 2013, the Kenyatta Defence submitted its own notification regarding the 8 March 2013 deadline,⁸ echoing the Muthaura Defence's 4 March 2013 notification. On the same day, the Prosecution sent a further proposal to the Defence, inviting it to consider stipulations as to the authenticity of certain documents, maps and photographs on the Prosecution's list of evidence. The Prosecution also asked when it could expect to receive a substantive response to its 28 February and 5 March 2013 proposals.

⁵ ICC-01/09-02/11-672, para 1.

⁶ *Ibid.*, para 8.

⁷ Email *inter partes* from Benjamin Joyes of the Kenyatta Defence to Adesola Adeboyejo on 4 March 2013 at 4:40 PM.

⁸ ICC-01/09-02/11-675.

7. On 6 March 2013, the Defence teams informed the Prosecution that they could review the Prosecution's proposals on agreed facts by 22 March 2013.⁹

Submissions

I. There is good cause to extend the time limit.

8. The Prosecution submits that there is good cause for the Chamber to vary the limit to allow the submission of further agreed facts. The Appeals Chamber in *Lubanga* assessed "good cause" to mean "for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations".¹⁰ The jurisprudence of the Court provides numerous examples of what constitutes "good cause" under Regulation 35(2). Chambers have granted requests on the basis of, *inter alia*, illness, the late notification of a Chamber's order, the complexity of investigations required to respond to an application, technical problems and difficulties in obtaining documents to complete an application.¹¹
9. In this case, there exists good cause. Providing additional time to consult may allow agreements as to facts or the authenticity of documents, which if successful, will be in the interest of the parties and the Chamber. In addition, since the date of trial has been postponed until 9 July 2013, there exists additional time for the parties to reach agreement.

⁹ Email *inter partes* from Benjamin Joyes of the Kenyatta Defence to Adesola Adeboyejo on 6 March 2013 at 12:28 PM.

¹⁰ ICC-01/04-01/06-834, para 7.

¹¹ See ICC-01/04-01/06-177 (late notification of a Chamber's order); ICC-01/04-01/06-190 (complex investigations); ICC-01/04-01/06-562 (technical problems); ICC-01/04-01/06-834, para 7 (illness); ICC-02/05-03/09-314, paras 9-10 (difficulty in obtaining documents to complete an application); ICC-01/05-01/08-715, paras 2, 4 (complex filings).

II. The Prosecution has genuinely sought common ground with the Defence.

10. The Prosecution's first proposal to the Defence included 110 proposed agreed facts. In its second proposal the Prosecution included 112 facts. Its proposal on the authenticity of potential items of evidence contained 291 proposed items. The Prosecution has submitted, to date, a total number of 513 proposed agreed facts and items, to which both Defence teams agreed to 34. Additionally, the Kenyatta Defence has agreed to 17 facts, mostly related to the personal background of Mr Kenyatta. In the nine months since the Chamber issued its July 2012 scheduling order, the Prosecution has received no proposals for agreed facts from either Defence team.

11. The Prosecution acknowledges, however, that its updated submissions on agreed facts to the Defence left them with only one week to review the underlying sources. In this light, and given that agreed facts assist the Chamber to expedite proceedings and that both Defence applications support the need for additional time,¹² the Prosecution requests an extension of the deadline until 25 March 2013 to allow the Defence to respond to the Prosecution's proposals and to prepare the submissions to the Chamber.

Relief Requested

12. The Prosecution requests, pursuant to Regulation 35 of the Regulations of the Court, a variation of the deadline to submit its second submission on agreed facts until 25 March 2013.

¹² ICC-01/09-02/11-672, para 8; ICC-01/09-02/11-675, para 8.



Fatou Bensouda,
Prosecutor

Dated this 8th of March 2013
At The Hague, The Netherlands