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

Date: **05 August 2011**

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

SITUATION IN KENYA

THE PROSECUTOR

v.

**FRANCIS KIRIMI MUTHAURA
UHURU MUIGAI KENYATTA &
MOHAMMED HUSSEIN ALI**

Public Document

**with Confidential *Ex parte* Annex A available only to the VWU and Muthaura
Defence**

**Submission by Defence Team of Ambassador Francis K. Muthaura in Preparation
for the Commencement of the Confirmation Hearing**

Source: Counsel for Ambassador Francis Kirimi Muthaura

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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Legal Representatives of the Victims

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

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Detention Section

**Victims Participation and Reparations
Section**

Other

I. BACKGROUND

1. On 20 July 2011, the Single Judge issued the “Decision Requesting the Parties to Submit information for the Preparation of the Confirmation of Charges Hearing” in which, Her Honour ordered the parties to indicate by 5 August 2011, whether they intend to call live witnesses at the confirmation of charges hearing, and, if so, to submit information detailing the subject-matter and the scope of the proposed testimony of each witness.¹
2. In reaching the decision on the date of 5 August 2011 as the date for the submission of the requested information, the Single Judge reasoned that the rationale for the date is to assist the Chamber in organising the proceedings,² including the fact that the Victims and Witnesses Unit (“VWU”) would require a minimum period of six weeks to make the necessary arrangements to facilitate the testimony of a witness.³ The Single Judge considered the impact of the order on the parties and concluded that the Defence teams would have received the entirety of the Prosecution’s evidence by that date or in the near future and should therefore be in a position to comply with the order.⁴

II. SUBMISSIONS

3. In compliance with the Single Judge’s order, the Defence for Ambassador Muthaura notifies the Single Judge of its intention to present eight (8) viva voce witnesses at the upcoming confirmation of charges hearing. In reaching this position, the Defence has considered and applied the provisions of Article 69(4) of the Statute as a basis for its witness selection. Similar consideration was applied to the limited role and purpose of the confirmation hearings within the Court’s statutory framework.

¹ ICC-01/09-02/11-181, p. 8. See also, para. 12.

² *Ibid*, para. 12.

³ *Ibid*, para. 10.

⁴ *Ibid*, para. 13.

4. In order to enhance efficiency of proceedings and avoid duplicity of evidence, the Defence has divided its witnesses into thematic groups, reflecting the core evidentiary matters in debate at the upcoming confirmation hearing. This proposed division will enhance clarity in the presentation of the Defence's case, avoid repetition and assist the Chamber in its determinations. Such an approach will focus the Chamber's attention on the core matters in dispute, thus limiting the inflow of extraneous matters into the evidentiary debate with the objective of enhancing overall efficiency in the conduct of the confirmation hearing.

5. The Defence notifies the Single Judge that while it has endeavoured to comply with the order, it remains alive to the fact that it is yet to receive the most crucial documents; the Document Containing the Charges ("DCC") and the In-depth Analysis Chart setting out the alleged criminal responsibility of each suspect, both of which are due to be filed by 19 August 2011. The Defence notes with appreciation the Single Judge's analysis of the impact of the order on its preparation and the suggestion that the Defence would be able to comply because it would be in receipt of the entirety of the Prosecution's evidence by that date or in the near future.⁵ However, given the importance of the DCC to the confirmation process, and the level of specificity of the allegations contained therein, the present submission complying with the Single Judge's order is necessarily provisional based on its reading of generalised summaries advanced by the Prosecution in its various disclosures.

6. As noted above, complying with the Single Judge's order in the absence of the DCC impacts on the ability of the Defence to present its case fully at the confirmation hearing envisaged by Article 67(1) of the Statute. To strike a fair balance between organisation of the proceedings without limiting the Defence's ability to present its case and respond to the alleged charges, the Defence

⁵ ICC-01/09-02/11-181, para. 13.

provides its submissions contained in “Confidential *ex parte* **Annex A**”⁶ appended to this submission as provisional without prejudice to its right to revise, alter and expand the list of issues to be discussed by its proposed witnesses on receipt of the DCC and the in-depth analysis chart setting out the clear evidential basis of the alleged criminal responsibility of Mr. Muthaura. The Defence suggests that this proposal is reasonable and will enhance fairness in the proceedings. Given the circumstances presented above, the Defence respectfully urges the Single Judge to receive its submission without prejudice to further revision to enhance fairness and equality of arms in the proceedings, in the event the Defence considers such further submissions are required to ensure the fair trial rights of Ambassador Muthaura.

III. REQUEST FOR CONFIDENTIALITY

7. In compliance with the second part of the Single Judge’s order, the Defence appends as “Confidential *ex parte* **Annex A**”, its submission detailing the subject-matter and scope of the proposed testimony of each witness it intends to present at the confirmation hearing. Additionally, the Defence also sets out the proposed order of presentation of its witnesses as well as the estimated length of the testimony of each witness. The Defence files Annex A as *Confidential Ex parte VWU and Muthaura Defence Only* in compliance with the Single Judge’s Order to facilitate preparations for the witnesses’ testimony and assist the Chamber in its determinations. Consistent with Rule 121(6) of the Rules of Procedure and Evidence (“Rules”), the Defence submits that it has no obligation at this stage to disclose the evidence that it intends to rely upon at the confirmation hearing.⁷

⁶ Annex A is explained in greater detail in para. 7.

⁷ See Rule 121(6) of the Rules of Procedure and Evidence.

Respectfully Submitted,

A handwritten signature in black ink, consisting of a stylized 'K' followed by a horizontal line.

Karim A. A. Khan QC

Lead Counsel for Ambassador Francis K. Muthaura

Dated this 5th Day of August 2011

At Nairobi, Kenya