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No.: ICC-01/09-02/11  
Date: 05 August 2011

**PRE-TRIAL CHAMBER II**

**Before:** Judge Ekaterina Trendafilova, Presiding Judge  
Judge Hans-Peter Kaul, Judge  
Judge Cuno Tarfusser, Judge

**SITUATION IN THE REPUBLIC OF KENYA**

**IN THE CASE OF**  
***THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI***  
***KENYATTA AND MOHAMMED HUSSEIN ALI***

**PUBLIC**

**Defence Submission on Behalf of Uhuru Kenyatta on the Nature and Scope of the  
Confirmation Hearing and the Calling of Live Evidence, With Confidential *Ex-  
Parte* Annexes**

**Source:** Defence

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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Ms. Fatou Bensouda, Deputy Prosecutor

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**Legal Representatives of the Victims**

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**Unrepresented Victims**

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(Participation/Reparation)**

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

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Ms. Silvana Arbia, Registrar

**Deputy Registrar**

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**Counsel Support Section**

**Victims and Witnesses Unit**

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## I. PROCEDURAL BACKGROUND

1. On 6 April 2011, the Single Judge issued her “Decision Setting the Regime for Evidence Disclosure and Other Related Matters” (the “First Disclosure Decision”) which set out the principles governing disclosure and stated that a calendar containing the relevant deadlines was “to be issued in due course”.<sup>1</sup>
2. The initial appearance took place on 8 April 2011. At this hearing the Pre-Trial Chamber (the “PTC”) scheduled the confirmation hearing to take place on 21 September 2011.
3. On 20 April 2011, the Single Judge issued the “Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties” (the “Second Disclosure Decision”), in which she rejected the Prosecution’s application for deferral of disclosure and established the calendar for disclosure setting out the various time limits for service by the Defence and Prosecution.<sup>2</sup>
4. On 20 July 2011, the Single Judge issued her “Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing”,<sup>3</sup> in which she ordered “the Prosecutor and Defence teams to indicate by Friday 5 August 2011 whether they intended to call live witnesses at the confirmation of charges hearing and, if so, to submit information detailing the

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<sup>1</sup> Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 6 April 2011, ICC-01/09-02/11-48.

<sup>2</sup> Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of the Republic of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties, 20 April 2011, ICC-01/09-02/11-64.

<sup>3</sup> Pre-Trial Chamber II, The Prosecutor v Muthaura et al., “Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing”, 20 July 2011, ICC-01/09-02/11-181.

subject matter and the scope of the proposed testimony of each witness”.<sup>4</sup> In this Decision, HHJ Trendafilova addressed *inter alia*, the nature and purpose of the confirmation of charges hearing.<sup>5</sup>

5. The Defence awaits the service of further redacted evidence to be relied upon by the Prosecutor at the confirmation hearing and the charging document.

## II. SUBMISSIONS

6. The Defence provides the following submissions on (i) the nature and scope of the confirmation hearing and (ii) the calling of live evidence.

### (i) The Nature and Scope of the Confirmation Hearing

7. Article 61 of the Rome Statute requires the Prosecutor at the confirmation hearing to support each and every charge with sufficient evidence to establish substantial grounds to believe that the suspect committed the crimes alleged. In *Thomas Lubanga Dyilo*, Pre-Trial Chamber I relied on the jurisprudence of the European Court of Human Rights to define the standard required to confirm the charges against *Thomas Lubanga Dyilo*. According to Pre-Trial Chamber I, for the European Court of Human Rights, “substantial grounds to believe” means “serious reasons to believe” or “strong grounds for believing”.<sup>6</sup>
8. Article 61(6) provides that the suspect may object to the charges, challenge the evidence presented by the Prosecutor and present evidence. In *Ruto et al.*, HHJ

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<sup>4</sup> Pre-Trial Chamber II, *The Prosecutor v Muthaura et al.*, “Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing”, 20 July 2011, ICC-01/09-02/11-181, at page 8.

<sup>5</sup> Pre-Trial Chamber II, *The Prosecutor v Muthaura et al.*, “Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing”, 20 July 2011, ICC-01/09-02/11-181, at para. 8.

<sup>6</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Décision sur la confirmation des charges, ICC-01/04-01/06- 803, 29 January 2006, at para. 38–39. See: case *Soering v. United Kingdom*, judgment of 7 July 1989, Application no. 14038/88, at para. 82 and case *Mamatkulov and Aksarov v. Turkey*, Judgment of 4 February 2005, Applications nos. 46827/99 and 46951/99, joint partly dissenting opinion of Judges Bratza, Bonello and Hedigan at para. 6–7.

Trendafilova held that these rights “cannot be denied to the suspects and that the Single Judge has the responsibility to put the Defence in a position to meaningfully exercise them.”<sup>7</sup> Neither the right to challenge evidence presented by the Prosecutor, nor the right to present evidence is limited or circumscribed within the Rome Statute.

9. Article 61(7) requires that the PTC must make its determinations ‘on the basis of the hearing’. It is established case law that the Chamber must consider and rely on the evidence placed on the list of evidence for the purposes of the confirmation hearing – not only the evidence physically tendered during the confirmation hearing,<sup>8</sup> and will assess the probative value of each item of evidence.<sup>9</sup> Any item included in the Prosecution list of evidence shall be admitted into evidence for the purpose of the confirmation hearing, unless it is expressly ruled inadmissible by the Chamber upon a challenge by any of the participants at the hearing; and any item included in the Defence list of evidence shall be admitted into evidence, unless it is expressly ruled inadmissible by the Chamber upon a challenge by any of the participants at the hearing.<sup>10</sup>
10. The Defence acknowledges that the confirmation hearing is neither a ‘trial before the trial’ nor a ‘mini-trial’.<sup>11</sup> This mechanism is “designed to protect the rights of the Defence against wrongful and wholly unfounded charges.”<sup>12</sup> The

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<sup>7</sup> Pre-Trial Chamber II, The Prosecutor v Ruto et al., “Order to the Defence to Reduce the Number of Witnesses to be called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of *Viva Voce* Witnesses”, 25 July 2011, ICC-01/09-01/11-221, at para. 14

<sup>8</sup> Pre-Trial Chamber II, Prosecutor v. Bemba, Transcript, ICC-01/05-01/08-T-12-Red-ENG, 15 January 2009, p. 140-141.

<sup>9</sup> Pre-Trial Chamber I, Prosecutor v. Lubanga, Transcript, ICC-01/04-01/06-T-30-EN, 9 November 2006, p. 194.

<sup>10</sup> Pre-Trial Chamber I, Prosecutor v. Lubanga, Decision on the confirmation of charges, 29 January 2008, ICC-01/04-01/06-803, at para. 40.

<sup>11</sup> Pre-Trial Chamber I, The Prosecutor v Katanga and Ngudjolo, “Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased Witness 12”, 18 April 2008, ICC-01/04-01/07-412, at page 4.

<sup>12</sup> Pre-Trial Chamber I, Prosecutor v. Lubanga, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803, at para. 37.

suspect is to be presumed innocent<sup>13</sup> and the Defence must be given the final word.<sup>14</sup>

11. The Defence agrees with the Prosecution that one of the functions of the confirmation process is to act as a “screen to filter cases that are not sufficiently supported by evidence”<sup>15</sup> and to protect a suspect against abusive and unfounded accusations.<sup>16</sup> The charges must be “sufficiently compelling” and go beyond “mere theory or suspicion”.<sup>17</sup>
12. The Defence takes issue with HHJ Trendafilova’s position that it is for the parties to “select their best pieces of evidence in order to convince the Chamber that the charges brought against the suspects shall be confirmed or, conversely, that they shall not.”<sup>18</sup> Any interpretation of the burden of proof at the confirmation stage that suggests the Defence has to ‘convince’ the Chamber *not* to confirm the charges must be incorrect, as the evidentiary burden of proving substantial grounds with sufficient evidence lies firmly with the Prosecution.<sup>19</sup> In order for the Prosecution to meet this threshold, “it must offer concrete and

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<sup>13</sup> See, Pre-Trial Chamber I, The Prosecutor v Lubanga, Transcript of Confirmation Hearing, 9 November 2006, ICC-01-04-01-06-T-30-EN, at pp. 10-11; Pre-Trial Chamber I, The Prosecutor v Katanga and Ngudjolo, Transcript of Confirmation Hearing, 27 June 2008, ICC-01/04-01/07-T-38-ENG, at p. 15; and Pre-Trial Chamber III, The Prosecutor v Bemba, Transcript of the Confirmation Hearing, 12 January 2009, ICC-01/05-01/08-T-9-ENG, at p. 6.

<sup>14</sup> See, Pre-Trial Chamber I, The Prosecutor v Lubanga, Transcript of Confirmation Hearing, 9 November 2006, ICC-01-04-01-06-T-30-EN, at pp. 10-11; Pre-Trial Chamber I, The Prosecutor v Katanga and Ngudjolo, Transcript of Confirmation Hearing, 27 June 2008, ICC-01/04-01/07-T-38-ENG, at p. 15; and Pre-Trial Chamber III, The Prosecutor v Bemba, Transcript of the Confirmation Hearing, 12 January 2009, ICC-01/05-01/08-T-9-ENG, at p. 6.

<sup>15</sup> Pre-Trial Chamber I, The Prosecutor v Ruto et al., “Prosecution’s Response to the Defence Submissions in Preparation of the Confirmation of Charges Hearing and Request for Re-classification”, 21 July 2011, ICC-01/09-01/11-213, at para. 10.

<sup>16</sup> Pre-Trial Chamber I, The Prosecutor v Lubanga, “Decision on the Confirmation of Charges”, 29 January 2007 ICC-01/04-01/06-803-tEN, at para. 37; *see also* W. A. Schabas, *An introduction to the International Criminal Court*, (4<sup>th</sup> ed, Cambridge University Press) at p. 273.

<sup>17</sup> Pre-Trial Chamber I, Prosecutor v. Lubanga, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803, at para. 37; United Nations High Commission for Human Rights, Report of the Committee against Torture, United Nations Document, A/53/44, Annex IX, para. 6.

<sup>18</sup> Pre-Trial Chamber II, The Prosecutor v Muthaura et al., “Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing”, 20 July 2011, ICC-01/09-02/11-181, para 8.

<sup>19</sup> See, Pre-Trial Chamber I, The Prosecutor v Lubanga, Transcript of Confirmation Hearing, 9 November 2006, ICC-01-04-01-06-T-30-EN, at pp. 10-11; Pre-Trial Chamber I, The Prosecutor v Katanga and Ngudjolo, Transcript of Confirmation Hearing, 27 June 2008, ICC-01/04-01/07-T-38-ENG, at p. 15; and Pre-Trial Chamber III, The Prosecutor v Bemba, Transcript of the Confirmation Hearing, 12 January 2009, ICC-01/05-01/08-T-9-ENG, at p. 6.

tangible proof demonstrating a clear line of reasoning underpinning its specific allegations.”<sup>20</sup> The evidentiary threshold at confirmation is considerably higher than the threshold of the Article 15 *proprio motu* initiation of investigation stage and the Article 58 summons to appear stage.

13. Following an Article 15 request by the Prosecutor, the PTC need only consider that there “is a reasonable basis” for the Prosecutor to proceed with an investigation and that the case appears to fall within the jurisdiction of the Court. In deciding whether or not to grant the authorization to investigate, it is desirable for the PTC to deal with the *prima facie* evaluation on the legal issues of jurisdiction and admissibility and ensure that any evaluation on the merits, “i.e. on whether a reasonable basis for an investigation exists in the light of the ‘supporting material’, ... is not...extended beyond a certain limit, in order not to pervert the correct relationship between prosecutorial and judicial functions.”<sup>21</sup>
14. At the Article 58 stage, the evidentiary threshold requires a determination that there are ‘reasonable grounds’ to believe that the person has committed a crime within the jurisdiction of the Court. The ‘reasonable grounds’ standard is the least demanding evidentiary threshold before the International Criminal Court.<sup>22</sup>
15. The PTC does not address the higher evidential threshold of whether there are substantial grounds to believe that the suspect has committed the crime charged until the confirmation stage. The filter mechanism of the confirmation hearing is therefore crucial in terms of increased “control by the judiciary over

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<sup>20</sup> Pre-Trial Chamber I, Prosecutor v. Lubanga, Decision on the confirmation of charges, ICC-01/04-01/06-803, 29 January 2007, para. 39.

<sup>21</sup> A. Cassese, Gaeta and Jones, *The Rome Statute of the International Criminal Court*, at p. 1161.

<sup>22</sup> Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, page 707. The confirmation threshold is “sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged”. At trial, proof of guilt must be made beyond a reasonable doubt.

the Prosecution”,<sup>23</sup> particularly in Article 15 *proprio motu* cases and sets the International Criminal Court apart from other international criminal justice institutions. The proceedings before the PTC are the “forum in which the Prosecutor prepares his case for testing by the Pre-Trial Chamber.”<sup>24</sup> This is the first opportunity for the PTC to assess tangibly the nature of the evidence of the Prosecutor as to its sufficiency to allow the case to proceed to trial, as well as to hear from the Defence in respect of the substance of the evidence to be relied upon at confirmation. The confirmation hearing must not be a rubber-stamping of the Prosecution’s case. The PTC is limited to making its determination on the evidence disclosed to the Defence presented during the confirmation process. Any evidence disclosed to the PTC and *not* disclosed to the Defence is outside the province of this determination as the Defence will not have had an opportunity to scrutinize or challenge its probative value, relevance and provenance.

## (ii) Live Evidence at Confirmation

16. At the outset, the Defence submits that the expectation of HHJ Trendafilova that the parties will “rely on live witnesses only as far as their oral testimony at the hearing cannot be properly substituted by documentary evidence” is a limitation not forecast by the provisions of the Rome Statute. Such a limitation, if imposed strictly, may result in the PTC not receiving the best evidence at confirmation. For example, a witness with exonerating evidence may not be afforded the best platform to explain, elaborate or assist the PTC in determining whether or not the Prosecutor has brought sufficient evidence to establish substantial grounds. Similarly, the presentation of evidence in the form of merely a written witness summary will not afford the Defence the chance to expose misleading, false or contradictory evidence, a factor to be taken into account when assessing the real probative value of this type of evidence.

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<sup>23</sup> K. Shibahara/ W. A. Schabas, “Article 61 Confirmation of the charges before trial” in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observer’s Notes, Article by Article*, (2<sup>nd</sup> ed, June 2008, C.H. Beck.Hart.Nomos) at page 1172.

<sup>24</sup> “Fairness and expeditiousness in the International Criminal Court’s pre-trial proceedings”, Ekaterina Trendafilova, extracted from *The Emerging Practice of the International Criminal Court*, Carsten Stahn and Goran Sluiter at page 441.

17. The decision of the Prosecutor to date not to call live evidence, but to rely rather on a paper presentation of his case also denies the PTC the ability to scrutinize and probe the probative value of his witness evidence. It is noteworthy that the Prosecution cannot at the confirmation hearing rely on any information that does not appear in the summary evidence he has selected, such as the identity, position or any other identifying features of the relevant Prosecution witness.<sup>25</sup> Ultimately, summary evidence is drafted by the Prosecution, a factor which necessarily will have an impact on its probative value, if admitted by the PTC in due course.<sup>26</sup>
18. Contrary to the position taken by the Prosecution, the Defence welcomes the scrutiny of the Chamber and intends to present a factual matrix of live testimony, written witness statements and other documentary evidence that will not merely contradict the Prosecution's case,<sup>27</sup> but will constitute evidence exonerating Uhuru Kenyatta, and be capable of bearing on the sufficiency of evidence before the PTC.<sup>28</sup> The Defence case will also include evidence revealing the inconsistency and ambiguity of the Prosecution's case against Mr Kenyatta.
19. The Defence acknowledges the need for a fair and expeditious confirmation hearing, and understands the important role of the PTC in controlling the

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<sup>25</sup> Pre-Trial Chamber I, *The Prosecutor v Lubanga*, Decision concerning the Prosecution Proposed Summary Evidence, 4 October 2006, ICC-01/04-01/06-517, at p.4.

<sup>26</sup> Pre-Trial Chamber I, *The Prosecutor v Lubanga*, Decision concerning the Prosecution Proposed Summary Evidence, 4 October 2006, ICC-01/04-01/06-517, at p.4.

<sup>27</sup> In paragraph 11 of, Pre-Trial Chamber II, *The Prosecutor v Ruto et al.*, Prosecution's Response to the Defence Submissions in Preparation of the Confirmation of Charges Hearing and Request for Re-Classification, 21 June 2011, ICC-01/09-01/11-213, the Prosecution failed to consider the category of evidence set out by HHJ Pikis which is capable of bearing upon the determination of whether or not the standard for the confirmation of charges has been satisfied.

<sup>28</sup> HHJ Pikis has recently confirmed the capability of exonerating evidence to have a "bearing on the sufficiency of evidence before the PTC for the purpose of determining whether the standard for the confirmation of charges has been satisfied." Appeals Chamber, *The Prosecutor v Lubanga*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008",

proceedings.<sup>29</sup> However, in order for the Defence to be afforded a meaningful opportunity to challenge and present evidence, it must be permitted to determine the identity and appropriate number of witnesses to be called to give live evidence before the Pre-Trial Chamber. By virtue of its analysis of the Prosecution disclosure and its own investigations, the Defence submits that it is in the best position to determine the necessity for live testimony at confirmation.

20. Confidential and *ex parte* Annex A contains information in respect of the proposed *viva voce* witnesses each of whom addresses different relevant issues.
21. This Annex has been filed confidentially *ex-parte* PTC only. The Defence requests the maintenance of this classification until the deadline of 5 September 2011 as set out in the Second Disclosure Decision.<sup>30</sup> The Defence notes the PTC's observations that the request to the parties to indicate their intention to call *viva voce* witnesses is "by no means an anticipation of the deadline for the submission of their respective lists of evidence in accordance with Rule 121(3) and (6) of the Rules."<sup>31</sup>
22. The witnesses in Annex A have been selected after careful consideration of how their testimony might bear upon the determination that is required of the PTC at the confirmation stage. The witnesses will not only provide exonerating evidence of Uhuru Kenyatta's extensive efforts to bring peace to the region after the outbreak of the post-election violence, but will also address in detail the fundamental allegations of his alleged involvement in fundraising meetings and his alleged role as a facilitator of the mungiki.<sup>32</sup> The Defence has

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<sup>29</sup> Article 57, Rome Statute.

<sup>30</sup> Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision on the 'Prosecution's application requesting disclosure after a final resolution of the Government of the Republic of Kenya's admissibility challenge' and Establishing a Calendar for Disclosure Between the Parties, 20 April 2011, ICC-01/09-02/11-64 at p. 13.

<sup>31</sup> Pre-Trial Chamber II, The Prosecutor v Ruto et al., Order to the Defence to Reduce the Number of Witnesses to be Called to Testify at the Confirmation of Charges Hearing and to Submit an amended List of *Viva Voce* Witnesses, 25 July 2011, ICC-01/09-01/11-221, at para. 27.

<sup>32</sup> Pre-Trial Chamber II, The Prosecutor v Muthaura et al., Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 15 December

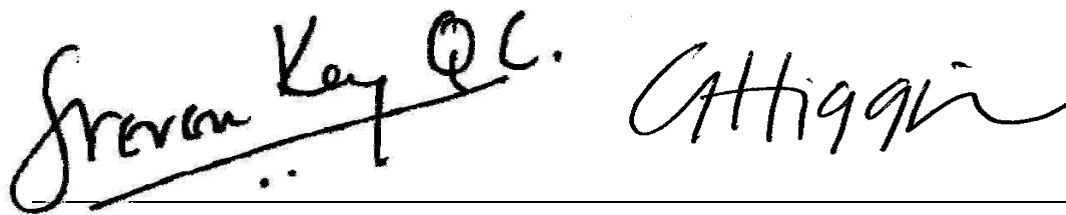
determined that the Prosecutor's paper case against Uhuru Kenyatta should be met with the best evidence available, which includes the hearing of the selected *viva voce* witnesses.

23. Given the expectation of further Prosecution disclosure as a result of the ongoing redaction process,<sup>33</sup> the Defence reserves the right to make further submissions on the number of *viva voce* witnesses and other evidence to be presented at the confirmation hearing, should the need arise.

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2010, ICC-01/09-31-Red2, at para.25: "Kenyatta was the focal point between the Mungiki and Muthaura in the implementation of the common plan. He used his connections with different Mungiki leaders to mobilize members of the organization and other pro PNU youth to launch retaliatory attacks against civilian supporters of the ODM. Kenyatta had a long and close association with the Mungiki from as early as March 2002 when the Mungiki officially endorsed him as their legitimate presidential candidate. "

<sup>33</sup> Pre-Trial Chamber II, The Prosecutor v Muthaura et al., Redacted Second Decision on the Prosecutor's Requests for Redactions, 22 July 2011, ICC-01/09-02/11-178-Conf-Red, at p. 15.



Handwritten signatures of Steven Kay QC and Gillian Higgins. The signature of Steven Kay QC is on the left, and the signature of Gillian Higgins is on the right. A horizontal line is drawn below the signatures.

Steven Kay QC and Gillian Higgins  
On behalf of Uhuru Muigai Kenyatta

Dated this Friday, 5 August 2011

At London, UK