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

Date: **09 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 and *ex parte* Annex A available only to the VWU and Muthaura
Defence**

**Defence Request for Permission to Add an additional Witness to its List of *vive
voce* witnesses at the Confirmation Hearing Pursuant to Regulation 35 of the
Regulations of the Court**

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**

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**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"¹ wherein the parties were ordered 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.²
2. In setting this date, the Single Judge reasoned 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 thus enhancing the timely organisation of the proceedings.³ The Single Judge further stated that the Chamber would not permit *viva voce* evidence in the event that a party fails to comply with the established deadline.⁴
3. In compliance with the Single Judge's order, the Defence filed its "Submission by the Defence Team of Ambassador Francis K. Muthaura in preparation for the commencement of the Confirmation Hearing",⁵ on 5 August 2011. In its submissions, the Defence advised that it was still awaiting service of the Document Containing the Charges ("DCC") and the In-Depth Analysis Chart setting out the evidential basis of the alleged criminal responsibility of Mr. Muthaura.⁶ In these circumstances, the Defence reserved its right to seek leave to revise its list of *viva voce* witnesses in the event such a measure was required for the effective presentation of its case.

¹ ICC-01/09-02/11-181.

² *Ibid*, p. 8. See also, para. 12.

³ *Ibid*, para. 10.

⁴ *Ibid*, para. 11.

⁵ ICC-01/09-02/11-215.

⁶ *Ibid*.

II. DEFENCE REQUEST

4. Pursuant to Regulation 35(2) of the Regulations of the Court (“Regulations”),⁷ the Defence respectfully seeks permission from the Single Judge to add to its list of witnesses and issues contained in Annex A appended to its submission, ICC-01/09-02/11-215, filed with the Chamber on 5 August 2011. For the reasons set out below, the Defence submits that exceptional circumstances exist justifying the requested extension.

III. EXCEPTIONAL CIRCUMSTANCES JUSTIFYING EXTENSION OF TIME

5. The Single Judge is aware that the Defence is undertaking investigations in preparation for the upcoming confirmation hearing.⁸ In the process, the Defence has uncovered evidence which was previously unavailable and unknown to the Defence. This evidence is sufficiently relevant and probative to the issues to be determined at the confirmation hearing to warrant presentation before the Pre-Trial Chamber. This evidence was identified by the Defence while conducting investigations on the 6th August 2011.
6. The evidence in question satisfies all the criteria for admissibility set out in Article 69(4) of the Statute. It is directly relevant to the events in Naivasha, which is an incident underlying and informing the charges in this case. For this reason, it is probative to determining the circumstances surrounding the alleged attack in Naivasha. As such, admitting *viva voce* evidence from the proposed witness will assist the Chamber to not only assess evidence of alleged crimes committed during the Naivasha attack but also the entire circumstances based on the elaboration to be provided by the witness. The Defence submit that the *viva voce* evidence of the identified witness, capable of being tested by all parties constitutes vastly superior evidence compared to the same evidence being

⁷ Regulation 1(1) of the Regulations of the Court states that Regulations have been adopted pursuant to Article 52 of the Statute and shall be read subject to the Statute and the Rules.

⁸ ICC-01/09-02/11-215.

presented solely on paper or in a public report. The Defence respectfully submit that, in the circumstances of the present case, the Single Judge should exercise her discretion so as to allow the requested *viva voce* witness to be presented at the confirmation of charges hearing so as to allow the Defence to challenge core Prosecution allegations in the most effective and compelling manner.

7. Chambers of this Court have granted similar requests. In this context, Trial Chamber II reasoned that it would grant such requests if: “the new material is either significantly more compelling than other items of evidence previously disclosed to the defence, or brings to light a previously unknown fact which has a significant bearing upon the case and late addition will not cause undue prejudice to the defence in relation to the latter’s right to have adequate time and facilities to prepare in accordance with Article 67(1)(b) of the Statute.”⁹
8. The present request meets all the criteria enunciated by Trial Chamber II. The newly discovered evidence was previously unknown to the defence and brings to light facts which bear directly upon the issues to be determined at the confirmation hearing. None of the parties and participants would be prejudiced by the reception of the proposed *viva voce* evidence. The Prosecution would not be prejudiced because pursuant to Rule 121(6) of the Rules, the Defence’s disclosure obligation has not been triggered. Similarly, the VWU would not be prejudiced because this request has been filed only three days after the deadline set by the Chamber. Two of those three days were non-working weekend days, thus not impacting on VWU’s ability to discharge its burden.
9. The Defence respectfully submit that the factual circumstances detailed above constitute exceptional circumstances within the meaning of Regulation 37(2) of the Regulations and provide a sufficient basis to merit the Single Judge exercising her discretion so as to grant the present request. In short, no unfairness would be caused by granting the request. Rather, granting the same

⁹ ICC-01/04-01/07-1552, para. 14.

will significantly enhance the Defence's ability to present its case, thus furthering the aims and objectives of the Statute.¹⁰

IV. REQUEST FOR CONFIDENTIALITY

10. The Defence appends as Annex A to this request, a summary of the themes to which the witness proposes to testify, its relevance and scope. This Annex is filed as Confidential *Ex parte* available only to the VWU and the Muthaura Defence. The Defence has no obligation at this stage to disclose same to the Prosecution. This classification should be maintained until 5 September 2011, in the event that leave to call the witness is granted, at which time the Defence obligations to disclose evidence it intends to rely upon is triggered pursuant to Rule 121 (6) of the Rules.

V. CONCLUSION

11. For the reasons stated above, the Defence requests that the Chamber grants the requested extension and allow the Defence to rely on and present *viva voce* evidence as detailed in Annex A appended to this request.

Respectfully Submitted,



Karim A. A. Khan QC

Lead Counsel for Ambassador Francis K. Muthaura

Dated this 9th Day of August 2011

At Nairobi, Kenya

¹⁰ Regulation 1(1) of the Regulations of the Court states that Regulations have been adopted pursuant to Article 52 of the Statute and shall be read subject to the Statute and the Rules. As such, any interpretation of Regulation 37(2) which restricts the ability of the Defence to present its case would not be furthering the objectives of the Statute.